

1. Definition of swaps and how they will apply to future instruments.

- The current bankruptcy definition of swaps (11 U.S.C. 101(53B)) contains a catch-all for “similar agreements” to swaps.
- The proposed revision in section 1007(a) of the House passed bill (starting on p. 298, line 23) to expands the list of instruments encompassed by the definition of swaps to clarify that new types of financial derivatives and transactions that have been introduced in the market are covered.
- The proposed revision also retains that catch-all language (starting on p. 299, line 19) for “any agreement or transaction similar to” the swap agreements or transactions described in the paragraph to accommodate the development new products that would fit within the definition of swaps.
- The same definitional change is made in the Federal Deposit Insurance Act.
- Page 184 of the House report on H.R. 833 discusses this.
- In addition, the material that accompanied the Working Group’s proposal on this topic explained that expanding the list of instruments encompassed by the definition of swaps was meant to clarify that these instruments would be considered swaps for purposes of bankruptcy and that continued use of the “similar agreements” language was intended to continue to allow for the development of new instruments that were within the definition of swaps.

2. Amendments to section 362(b) of the Bankruptcy Code regarding set-off rights for forwards and repos.

- The proposed revision in section 1007(d) of the House passed bill (starting on p. 308, line 19) adds a new paragraph (17) to section 362(b) of the Bankruptcy Code.
- This revision is designed to protect, free from the automatic stay of bankruptcy, the enforcement of setoff or netting provisions in swap agreements and in master netting agreements and security agreements or arrangements related to one or more swap agreements or master netting agreements.
- This provision parallels other provisions of the Code that protect netting provisions of (1) securities, commodities and forward contracts (section 362(b)(6)) and (2) repurchase agreements (section 362(b)(7)).
- See the discussion starting at page 185 of the House report starting with the sentence at the bottom of the page that begins “Because the relevant definitions include related security agreements, the reference to “setoff” in this provisions, as well as in section 362(b)(6) and (7), . . .”

3. Proposed section 561, question regarding rights arising “by reason of normal business practice.”

- The proposed revision in section 1007(k) of the House passed bill (starting on p. 315, line 3) adds a new section 561 to the Bankruptcy Code that is designed to protect the contractual right of a master netting agreement participant to enforce any rights of

termination, liquidation, acceleration, offset or netting under a master netting agreement.

- These rights include rights arising “by reason of normal business practice.”
- For purposes of proposed section 561 (and sections 555, 556, 559 and 560), it is intended that the normal business practice in the event of a default of a party based on bankruptcy or insolvency is to terminate, liquidate or accelerate securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements with the bankrupt or insolvent party.
- See page 186 of the House report.

... cross-product netting will be protected from the automatic stay under section 561 even in the absence of a master netting agreement.