

**\*\* Senate Counteroffer \*\***

**June 24, 2010**

**Title: Title VII**

**Matter: Derivatives Regulation**

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**The Senate accepts the following House proposals for amendments to the Base text:**

1. House #1: Amend base text to specifically reference CFTC authority to interpret definitions (Base text § 711, Page 599, line 3).
2. House #2: Strike base text provision on regulatory consultation and replace with House provision (with minor revisions) and appropriate conforming changes (Base text §712, page 599, line 5-18; House bill §3002, page 558 through 559 line 18).
3. House #4: Strike base text provision allowing futures associations and national securities associations to enforce rules on advertising (Base text §712, page 604 lines 1 and 15).
4. House #5: Strike base text provision that is duplicated on pages 736 and 950 (Base text §712, page 606, line 22 through page 607, line 17).
5. House #6: Add House provision that requires maintenance of records and information sharing with the CFTC and SEC for all uncleared security based swap agreements. The provision names the Financial Services Oversight Council as the resolver of disputes between the CFTC and SEC in joint rulemaking for security based swap agreements. (Base text § 712, page 607 and House bill § 3002, page 563-564).
6. House #7: Replace base text provision regarding portfolio margining for certain brokers, dealers and futures commission merchants, and appropriate conforming changes (new §713, page 608 line 17 through page 609 line 2).
7. House #8: Add provision that allows the CFTC and SEC to prepare in advance of the effective date in regards to rules, regulations, studies, etc. (Base text §712 , page 608, line 16).
8. With modifications, House #9: Add House studies on (1) the effects of position limits on trading exchanges, (2) the feasibility of requiring the use of standardized algorithmic descriptions for financial derivatives, (3) international swaps regulation, and (4) the application of swaps definition to stable value funds. The provision also adds a memorandum of understanding between the CFTC and the Federal Energy Regulatory Commission. (House bill §3005, page 566, line 7 through page 569 line 24 and § 3009).

9. House #10: Strike base text provision and replace with House provision for associated person of a swap dealer or major participant (Base text §721, page 622, line 24 through page 623 line 13).
10. House #11: Strike base text provision that excludes employee pension plans from the definition of major swap participant (Base text §721, page 636).
11. With modifications, House #12: Strikes base text provision and replaces with new provision that qualifies “highly leveraged financial entities” as those that are not subject to capital requirements set by a federal banking regulator in definition of major swap participant. (Base text §721, page 637, line 8).
12. House #13: Add House provision requiring CFTC to consider a person’s relative position in uncleared as opposed to cleared swaps in determining “substantial position.” Gives the regulator the authority to consider collateral position of major swap participants. (Base text §721, page 637, line 20; House bill §3101, page 585 line 10-11).
13. House #15: Add provision that includes Federal Housing Finance Agency in the definition of “prudential regulator” (Base text §721, page 639, line 21).
14. House #18: Amend base text provision for definition of swap data repository (Base text §721, page 651, line 14-17)
15. House #19: Amend base text provision for definition of swap dealer (Base text §721, page 652, line 1)
16. House #20: Amend base text provision definition of “swap dealer”, providing for a *de minimis* exception, and appropriate conforming changes (Base text §721, page 652, line 18).
17. With modifications, House #21: Add language to adjust swap execution facility definition (Base text §721, page 652, line 21 and lines 23-24)
18. With modifications, House #23: Strike base text provision relating to clearing requirements and replace with House provision with modifications (including treatment for end users, affiliates, and small institutions) (Base text §721, page 663, line 25 through page 681, line 8; House bill §3103, page 595 line 15 through page 604, line 24).
19. House #24: Amend base text provision to recognize that not all issuers will have audit committees and may rely on the appropriate committee of the issuer’s board or governing body with appropriate conforming changes (Base text §723, page 681, lines 20-21).
20. House #25: Strike base text provision requiring CFTC registration of depository institutions and clearing agencies (Base text §725, page 693, lines 3-12).

21. House #26: Add provision to require the SEC to share information with the CFTC regarding clearing agencies that are deemed to be registered with the CFTC (Base text §725, page 694, line 9).
22. House #27: Amend base text provision regarding derivatives clearing organizations' governance arrangements to permit the consideration of the views of owners and participants (Base text §725, page 710, line 23).
23. House #28: Strike base text provision giving CFTC ability to modify core principles (Base text §725 page 712, lines 12-16).
24. House #29: Amend base text to conform statutory references in the Commodity Exchange Act (Base text §725, page 714, lines 1-2, etc.)
25. House #30: Amend base text to make derivatives clearing organization reports on security-based swap agreements open to inspection and examination by the SEC. (Base text §725, page 714, line 3)
26. House #31: Add provision to clarify that a derivatives clearing organization will not be compelled to accept the counterparty credit risk of another clearing organization (Base text §725, page 719, line 9).
27. House #33: Amend base text provision to ensure books and records of large swap reporters are open to inspection and examination by the SEC for swaps (Base text §730, page 739, line 13)
28. With modifications, House #36: Amend base text provisions on capital and margin requirements for swap dealers and major swap participants to delete references to "depository institution" and replace with references to whether or not there is a Prudential Regulator and appropriate conforming changes (Base text §731, page 744, lines 2-5 and lines 15-18).
29. House #37: Amend base text provisions referring to "appropriate Federal banking agency" to refer to "Prudential Regulator" (Base text §731, page 744, lines 7-8; page 750, lines 7, 9-10 and 18-19).
30. House #38: Strike base text provision that states that capital and margin requirements will be set to help ensure the safety and soundness of the swap dealer or major participant (Base text §731, page 744, line 9-10 and line 23-24)
31. House #39: Strike base text provision which names the SEC (along with the CFTC) to set margin and capital for swap dealers and major swap participants that a not depository institutions in the Commodities and Exchange Act (Base text §731, page 744, line 20-21)
32. With modifications, House #40: Strike base text and replace with revised House provision regarding risk-based capital and margin standards with appropriate conforming

changes (Base text §731, page 745, line 1 through page 747, line 16; House bill § 3107, page 634, line 19 through page 637, line 2).

33. House #41: Strike base text provision for margin to eliminate redundancy (Base text §731, page 748, line 25 through page 750, line 2)
34. House #42: Amend base text provision to require regulators to permit the use of non-cash collateral to meet margin requirements (§731, page 750, line 9).
35. House #43: Strikes base text provision for requested margin (Base text §731, page 751, line 10 through page 752, line 4)
36. House #44: Add provision that each swap dealer and major swap participant shall keep books and records related to open to inspection and examination by the SEC (Base text §731, page 753, line 4)
37. House #45: Amend Base text provision to establish a standard of conduct for swap dealers and major swap participants when providing advice to state entities and pension funds. The provision also establishes business conduct and disclosure standards for counterparties. (Base text §731 page 754, line 8)
38. House #46: Add provision requiring the Commission to prescribe rules governing the duties of swap dealers and major swap participants (Base text § 731, page 761, line 11).
39. House #47: Amend base text provision Requiring futures commission merchants to have a Chief Compliance Officer responsible for performing duties and responsibilities set forth in regulation to be adopted by the CFTC or a futures association registered under 17 (Base text §732, page 765, line 1 through page 767, line 19).
40. House #48: Add provision preventing swap execution facilities from listing agricultural swaps outside the current regulatory structure with appropriate conforming changes (Base text §733, page 768, line 16).
41. With modifications, House #49: Add provision clarifying that a swap execution facility is responsible for enforcing position limits on the swap execution facility only (not across all swap execution facilities), whether self- or Commission-imposed, with appropriate conforming changes (§733, page 773, line 6).
42. House #50: Strike base text provision regarding position enforcement for swap execution facilities. (Base text §733, page 773, line 7-16)
43. House #51: Add provision that each swap execution facility shall keep books and records open to inspection and examination by the SEC (Base text §733, page 775, line 6)

44. House #52: Add provision to provide a transition period for exempt boards of trade to permit them to continue operating subject to 5d of the Commodity Exchange Act for up to 1 year after the effective date of the subtitle (Base text §734, page 781, line 12).
45. House #53: Add provision to core principles for designated contract markets to require publicly traded boards of trade to endeavor to recruit diverse boards of directors (Base text §735, page 791, line 17).
46. With modifications, House #54: Add House provision, with modifications, setting position limits (Base text §737, page 793, line 15 through page 796, line 13; House bill §3113, page 664, line 15 through 671, line 9).
47. House #56: Add House provision that states that a person can not be liable under the Act for a transaction with a Foreign Board of Trade if the person has reason to believe a number of factors, including the FBOT is legally organized under the laws of a foreign country. (House Bill § 742 page 679, line 20 through page 680, line 7)
48. With modifications, House #57: Amend base text enforcement authority provision to grant exclusive authority to the CFTC and Prudential regulator, respectively. (Base text §741, page 806, line 12-25)
49. House #58: Amend Base text provision by replacing “shall” with “may” in regards to the prudential regulators’ role in notifying the Commission that a swap dealer or major swap participant may have violated a nonprudential requirement of the Act (Base text § 741, page 807, line 11)
50. House #60: Amend Base text provision to provide for a 90-day transition period for the CFTC to complete its rulemaking in regard to retail foreign exchange. (House Bill §742, page 819, line 17)
51. House #61: Amend Base text provision to require registered entities to provide notice of certification to its members regarding a new contract or instrument listed for clearing or accepted for trading (Base text § 745, page 822, line 21)
52. House #62: Add Base text provision to add a public comment period during a stay of certification for rules. (Base text §745, page 823, line 25)
53. House #68: Replace Base text provision on confidentiality to provide that only information revealing a whistleblower’s identity is subject to confidentiality restrictions, not all information a whistleblower provides. (Base text bill § 748, page 846, line 10, through page 847, line 8)
54. House #69: Amend Base text provision to remove an unnecessary reference to ‘privileged’ (Base text bill § 748, page 848, line 24)

55. House #71: Amend Base text provision to add swaps to private rights of action under the Commodities Exchange Act (Base text § 749, page 854 lines 1-3)
56. House #72: Strike Base text provision and add House provision for international harmonization which requires consultation and cooperation among the CFTC, SEC and Prudential regulators. The CFTC is required to consult and coordinate with foreign regulatory authorities for standards on futures. (Base text bill § 752, page 858, lines 5-19 and House bill § 3004, page 565)
57. With modifications, House #73: Add provision that states that in prohibiting manipulation no rule shall restrict the ability of a person to hedge or require the disclosure of non-public information. (Base text § 753, page 859, after line 14)
58. With modifications, House #74: Add provision to clarify that mistakenly transmitting false, misleading or inaccurate information about a swap to a price reporting service does not constitute "manipulation" (Base text §753, page 861, line 2)
59. House #76: Strike Base text provision stating that findings of the Commission shall be conclusive (Base text §753, page 868, lines 11-12)
60. House #77: Amend Base text provision to insert "knowingly" before fail to clarify mens rea standard. (Base text bill § 753, pages 868 and 869)
61. House #78: Strike Base text provision automatically making a person guilty of a misdemeanor for failure to obey or comply with an order of the Commission (Base text §753, page 869, line 1)
62. House # 79: Strike Base text provision of "less than 6 months" to remove the mandatory prison sentence for failing to or refusing to obey or comply with a cease and desist order. (Base text bill § 753, page 869)
63. House #82: Amend base text provision to revise the definition of major security-based swap participant to delete exclusion for pension funds (§761 page 873, line 21 through page 874, line 8)
64. House #83: Strikes base text provision and replaces with new provision that qualifies "highly leveraged financial entities" as those that are not subject to capital requirements set by a federal banking regulator in definition of major swap participant. (Base text §761, page 874, line 18).
65. House #84: Add House provision requiring CFTC to consider a person's relative position in uncleared as opposed to cleared swaps in determining "substantial position." Gives the regulator the authority to consider collateral position of major swap participants. (Base text §721, page 637, line 20; House bill §3101, page 585 line 10-11).

66. House #87: Amend base text provision for definition of swap dealer (Base text §761, page 880, lines 5-7)
67. House #88: Amend base text provision definition of “swap dealer”, providing for a *de minimis* exception, and appropriate conforming changes (Base text §761, page 880, lines 5-7)
68. House #90: Amend base text provision that defines of security-based swap data repository to clarify it applies to entities that are providing a centralized recordkeeping facility (§ page 881, lines 19-23)
69. With modifications, House #91: Add language to adjust swap execution facility definition (Base text §761, page 882, line 6 and 8-9)
70. House #92: Add provision to permit the SEC to define the term “commercial risk” and other terms under the Securities Exchange Act (Base text §761, page 883, line 6)
71. With modifications, House #94: Strike base text provision relating to clearing requirements and replace with House provision with modifications (including treatment for end users, affiliates, and small institutions) (Base text §763, page 890, line 18 through page 908, line 3)
72. House #95: Amend base text provision to recognize that not all issuers will have audit committees and may rely on the appropriate committee of the issuer’s board or governing body with appropriate conforming changes (Base text §763 page 908, lines 10-11)
73. House #96: Strike base text provision requiring automatic registration exemption for derivatives clearing organizations (Base text §763, page 918, lines 9-24)
74. House #97: Add provision to deem as registered with the SEC existing depository institutions and derivatives clearing organizations already registered under the CFTC (Base text §763 page 918, line 25)
75. House #98: Strike Base text provision which removes the security-based swap Swap Execution Facility (SEF) position limit core principle (Base text §763, page 923, line 22 through page 924, line 25)
76. House #99: Add provision regarding the segregation requirements for uncleared swaps to confirm the Commodity Exchange Act and Securities Exchange Act in the bill. (Base text §763, page 936)
77. With modifications, House #101: Amend base text provisions on capital and margin requirements for swap dealers and major swap participants to delete references to “depository institution” and replace with references to whether or not there is a Prudential Regulator and appropriate conforming changes (Base text §764, page 960, lines 8-11 and lines 8-10).

78. House #102: Amend base text provisions referring to “appropriate Federal banking agency” to refer to “Prudential Regulator” (Base text §764, page 967, lines 5-6, 12, and 21-22).
79. With modifications, House #103: Strike base text and replace with revised House provision regarding risk-based capital and margin standards with appropriate conforming changes (Base text §764, page 962, line 2 through page 964, line 22)
80. House #104: Strike base text provision for margin to eliminate redundancy (Base text §764, page 966, line 4 through page 967, line 3)
81. House #105: Amend base text provision to require regulators to permit the use of non-cash collateral to meet margin requirements (Base text §764, page 967, line 11)
82. House #106: Strikes base text provision for requested margin (Base text §764, page 968, line 13 through page 969, line 8)
83. House #108: Add provision requiring the Commission to prescribe rules governing the duties of swap dealers and major swap participants (Base text § 764, page 979, line 17)
84. House #109: Add provision establishing parameters for exemptive authority (Base text §772, page 1001 lines 8-12 and page 1002, lines 7-10)
85. House #110: Amend provision to revise effective dates for the Title to be 360 days (Page 871, lines 2-4 and page 1002, lines 7-10).

**The Senate does not accept the following House proposals for amendments to the Base text:**

1. House #3: Strike base text provision regarding mixed swaps regulation (Base text §712, page 601, lines 12-20; §721, page 648, line 1-16)
2. House #14: Amend base text provision defining “prudential regulator” with modified House provision (Base text §721, page 638, line 7 through page 639, line 15; House bill §3101 page 585, line 24 through page 586, line 21 and page 703, line 14 through page 704, line 11)
3. House #16: Strike base text provision defining mixed swap (Base text §721, page 648, lines 1-16)
4. House #17: Strike base text provision that treats foreign exchange as swaps and forwards (Base text text §721, page 648 line 17 through page 651, line 11)
5. House #22: Strike base text provision and replace with House provision regarding CFTC and FERC jurisdiction and replace with House provision regarding same (Base text §722,



page 659, line 16 through page 661, line 13; House bill §3102, page 591, line 11 through page 592 line 2).

6. House #32: Strike base text provision that is duplicative with paragraph (7) on page 728 relating to information sharing by swap data repositories (Base text §728, page 726, line 17 through page 727, line 3).
7. House #34: Amend base text provision to give the Commission authority to write rules for swap dealers and major swap participants except for rule making and capital and margin (Base text §731, page 741, line 21-24)
8. House #35: Amend base text provision to clarify CFTC authority to prescribe rules relating to registration and regulation of swap dealers and major swap participants (§731, page 743, lines 19-21).
9. House #55: Add House provision that requires the Commission to define a bona fide hedge for exemption from trading positions when determining when excessive speculation is a burden (Base text §737, page 796, line 24; House Bill § 3113, page 671, line 20 through page 673, line 8)
10. House #59: Amend Base text provision and strike a provision to limit the CFTC's ability to make shorter delivery requirements and remove a limitation on the term 'actual delivery' (Base text § 742, page 815, line 22 and page 817, line 11-16)
11. House #63: Amend Base text provision to include 'civil' actions in the definition of 'covered judicial or administrative action.' (Base text § 748, page 834, line 13, etc.)
12. House #64: Amend Base text provision to make clear that 'monetary sanctions' relate only to 'covered' judicial or administrative proceedings. (Base text § 748, page 834, line 20)
13. House #65: Amend base text provision to clarify appellate review of determination of whistleblower awards (Base text §748, page 840, line 9)
14. House #66: Amend Base text provision to provide that appeals of whistleblower awards are made to the U.S. district court, not to the court of appeals. (Base text § 748, page 840, line 16)
15. House #67: Amend Base text provision to remove an unnecessary reference to the Administrative Procedure Act (Base text bill § 748, page 840, lines 19-21)
16. House #70: Amend Base text provision to remove reference to the United States criminal code. (Base text § 748, page 850, line 16-17)
17. House #75: Amend Base text provision to clarify jurisdiction of federal district courts (Base text §753, page 867, lines 6-7, 11)

18. House #80: Strike Base text provision automatically making a person guilty of a felony for failure to obey or comply with an order of the Commission (Base text §753, page 869, line 8)
19. House #81: Add provision regarding conflicts of interest and beneficial ownership of derivatives clearing organizations (Base text §753, page 870, line 23)
20. House #85: Amend base text provision to clarify the definition of security-based swap (Base text §761, page 875, line 23)
21. House #86: Strikes base text provision defining mixed swap (Base text §761, page 877, line 23 through page 878, line 12)
22. House #89: Amend Base text provision defining “prudential regulator” with modified House provision (Base text §761, page 881, line 13-16)
23. House #93: Strike Base text provision incorporating additional terms by reference (Base text §761, page 883, line 14 through page 884, line 2)
24. House #100: Amend base text provision to clarify Commission authority to write rules for swap dealers and major swap participants (Base text §731, page 741, line 21-24)
25. House #107: Amend Base text provision to establish a standard of conduct for swap dealers and major swap participants when providing advice to state entities and pension funds. The provision also establishes business conduct and disclosure standards for counterparties. (Base text §764 page 971, line 19 through page 976, line 6)

**The Senate proposes the following amendments to the Base text:**

1. **FOIA Study**: Requires the Inspector General of the Commission to conduct a study about the disclosure of information by whistleblowers to the Commission.
2. **Reporting/Repositories Requirement**: This amendment would require all swaps/security-based swaps, cleared and uncleared, to be subject to be reported to a repository. The conference base text only requires uncleared swaps to be subject to the reporting requirements.
3. **Transition for Captive Finance Companies**: This amendment would provide a transition period of up to 2 years for captive finance companies to meet the clearing and margin requirements in Title VII. Captive finance companies are affiliates wholly owned by a parent company, whose purpose is to provide financing to dealers and customers buying the parent company’s product.

4. Conflicts of Interest: This amendment would strengthen the Conference base text language on conflicts of interest by requiring (rather than permitting) the CFTC and SEC to adopt rules to mitigate conflicts of interest at clearinghouses, clearing agencies, exchanges, and swap/security-based swap execution facilities. The rules adopted may include numerical limits on the control of, or the voting rights with respect to, these entities.
5. Additional modification to House #33 regarding clearing: This amendment would increase the penalties for violations of the clearing requirement and require (rather than permit) the CFTC and SEC to prescribe anti-evasion rules.
6. Foreign Boards of Trade: This amendment would authorize the CFTC to require foreign boards of trade to register with the CFTC.
7. Further modification to House #33 regarding election of counterparties: This amendment would provide certain counterparties the ability to select the clearinghouse at which a swap will be cleared. For swaps not subject to the clearing requirement, certain counterparties may choose to require clearing of the swap.
8. Business Conduct Standards: This provision would impose business conduct standards on Swap Dealers when they solicit transactions with or offer to enter into swaps with Governmental Entities, Pension Plans, Endowments, and Retirement Plans. The section distinguishes between Special Entity solicited transactions and those where the Swap Dealer solicits the Special Entity. The Swap Dealers must meet certain higher disclosure standards, client portfolio confidentiality and recordkeeping requirements when dealing with Special Entities. The Swap Dealers would be required to meet other disclosure and recordkeeping standards with respect to other swap transactions with all other entities.
9. Bona Fide Hedging: This amendment provides clarifications related to situations involving bona fide hedging. The provision addresses netting long and short positions in similar but different instruments.
10. 716 Amendment: This amendment clarifies several aspects of the Prohibition on Federal Assistance to Swap Entities. The new language clarifies that (1) that swap entities are not prohibited from using the new 13(3) Federal Reserve broad-based lending facility program for liquidity problems in the financial system; (2) that bank major swap participants are not subject to the restrictions on federal assistance such as FDIC insurance of accounts and access to the Federal Reserve Discount Window; (3) Transition period for banks to push out swap entities of up to 24 months at the discretion of the appropriate Federal Banking Agency after considering certain factors such as the effect on mortgage lending, small business lending, jobs and capital formation; (4) FDIC conservatorships, receiverships and bridge banks are exempt from prohibition; and (5) swap entities may not be in the bank, but may be "affiliates" under the Bank Holding Company.

11. **Considerations for Regulation of FX Swaps and Forwards:** This amendment requires the Treasury Secretary to consider certain criteria when determining whether to exempt foreign exchange swaps and foreign exchange forwards from the definition of the term “swap.”
12. **Technical Change:** This amendment adds provisions to conform the real-time reporting requirements in the base text to the clearing requirements in the House offer.
13. **CFTC Whistleblower Program:** These changes will harmonize the CFTC Whistleblower program with the SEC Whistleblower program created in Sec. 922 of Wall Street Reform Act. The changes clarify the process through which deposits are made into the Fund that supports the Whistleblower program. It would also add a clause that waives pre-dispute arbitration agreements, or employment contracts that would force whistleblowers to go through mandatory arbitration, as opposed to coming straight to the Commission with their information.