112TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPT. 112–477
Part 1

SWAP JURISDICTION CERTAINTY ACT

MAY 11, 2012.—Ordered to be printed

Mr. BACHUS, from the Committee on Financial Services, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3283]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 3283) to amend the Commodity Exchange Act and the Securities Exchange Act of 1934 to provide an exemption for certain swaps and security-based swaps involving non-U.S. persons, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Swap Jurisdiction Certainty Act".

SEC. 2. COMMODITY EXCHANGE ACT.

Section 4s(a) of the Commodity Exchange Act (7 U.S.C. 6s(a)) is amended by adding at the end the following:

"(3) EXTRA-TERRITORIAL SWAP TRANSACTION APPLICATION OF TITLE VII.—

"(A) IN GENERAL.—A swap entered into between—

"(i) a swap dealer that is registered with the Commission who is either—

"(I) a U.S. person, or

"(II) a person that has a parent company that is a U.S. person, and

"(ii) a person who is—

"(I) a U.S. or non-U.S. subsidiary, branch, or affiliate of such swap dealer, or

"(II) any other non-U.S. person that is not registered as a swap dealer with the Commission,

shall not be subject to the provisions of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and of amendments added by such title, so long as each swap dealer described under clause (i) reports such swap to a swap data repository registered with the Commission.

"(B) SWAPS ENTERED INTO BY REGISTERED NON-U.S. PERSONS.—

"(i) IN GENERAL.—A non-U.S. person that registers as a swap dealer with the Commission shall only be subject to the requirements of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and of amendments added by such title, with respect to swaps that such person enters into with a U.S. person who is not a U.S. subsidiary, branch, or affiliate of such non-U.S. person.

"(ii) CAPITAL REQUIREMENTS.—A non-U.S. person that registers as a swap dealer with the Commission shall be permitted by the Commission to comply with the capital requirements under subsection (e) by complying with comparable requirements established by the appropriate governmental authorities in the home country of the non-U.S. person, so long as such home country is a signatory to the Basel Accords.

"(C) NON-U.S. PERSON.—For purposes of this paragraph, the term 'non-U.S. person' includes—

"(i) any person that is not a U.S. person;

"(ii) any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;

"(iii) any agency or branch of a U.S. person located outside the United States if—

"(I) the agency or branch operates for valid business reasons; and

"(II) the agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where it is located;

"(iv) any trust of which any professional fiduciary acting as trustee is a U.S. person, if—

"(I) a trustee who is a non-U.S. person has sole or shared investment discretion with respect to the trust assets; and

"(II) no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person;

"(v) an employee benefit plan established and administered in accordance with the law, customary practices, and documentation of a country other than the United States; and

"(vi) the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, a central bank or its functional equivalent which is located in a non-U.S. jurisdiction and that is a signatory to the Basel Accords, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

"(D) U.S. PERSON.—For purposes of this paragraph, the term 'U.S. person' includes—

"(i) any natural person resident in the United States;

"(ii) any partnership or corporation organized or incorporated under the laws of the United States;

"(iii) any estate of which any executor or administrator is a U.S. person;

"(iv) any trust of which any trustee is a U.S. person;

"(v) any agency or branch of a foreign entity located in the United States;

"(vi) any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a United States person;

"(vii) any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

"(viii) any partnership or corporation—

"(I) organized or incorporated under the laws of any foreign jurisdiction; and

"(II) formed by a U.S. person principally for the purpose of investing in securities not registered under the Securities Act of

1933, unless it is organized or incorporated, and owned, by accredited investors (as such term is defined under section 230.501 of title 17, Code of Federal Regulations) that are not natural persons, estates, or trusts.

"(E) ANTI-EVASION.—Notwithstanding any other provision of this paragraph, each registered swap dealer shall be subject to the provision under section 2(i)(2).".

SEC. 3. SECURITIES EXCHANGE ACT OF 1934.

Section 15F(a) of the Securities Exchange Act of 1934 (78o–10(a)) is amended by adding at the end the following:

"(3) EXTRA-TERRITORIAL SWAP TRANSACTION APPLICATION OF TITLE VII.—

"(A) IN GENERAL.—A security-based swap entered into between—

"(i) a security-based swap dealer that is registered with the Commission who is either—

"(I) a U.S. person, or

"(II) a person that has a parent company that is a U.S. person, and

"(ii) a person who is a U.S. or non-U.S. subsidiary, branch, affiliate, or parent company of such security-based swap dealer,

shall not be subject to the provisions of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and of amendments added by such title, so long as each security-based swap dealer described under clause (i) reports such security-based swap to a security-based swap data repository registered with the Commission.

"(B) SECURITY-BASED SWAPS ENTERED INTO BY REGISTERED NON-U.S. PERSONS.—

"(i) IN GENERAL.—A non-U.S. person that registers as a security-based swap dealer with the Commission shall only be subject to the requirements of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and of amendments added by such title, with respect to security-based swaps that such person enters into with a U.S. person who is not a U.S. subsidiary, branch, or affiliate of such non-U.S. person.

"(ii) CAPITAL REQUIREMENTS.—A non-U.S. person that registers as a security-based swap dealer with the Commission shall be permitted by the Commission to comply with the capital requirements under subsection (e) by complying with comparable requirements established by the appropriate governmental authorities in the home country of the non-U.S. person, so long as such home country is a signatory to the Basel Accords.

"(C) NON-U.S. PERSON.—For purposes of this paragraph, the term 'non-U.S. person' includes—

"(i) any person that is not a U.S. person;

"(ii) any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;

"(iii) any agency or branch of a U.S. person located outside the United States if—

"(I) the agency or branch operates for valid business reasons; and

"(II) the agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where it is located;

"(iv) any trust of which any professional fiduciary acting as trustee is a U.S. person, if—

"(I) a trustee who is a non-U.S. person has sole or shared investment discretion with respect to the trust assets; and

"(II) no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person;

"(v) an employee benefit plan established and administered in accordance with the law, customary practices, and documentation of a country other than the United States; and

"(vi) the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, a central bank or its functional equivalent which is located in a non-U.S. jurisdiction and that is a signatory to the Basel Accords, and their agencies, affiliates and pension plans, and any other

similar international organizations, their agencies, affiliates and pension plans.

"(D) U.S. PERSON.—For purposes of this paragraph, the term 'U.S. person' includes—

"(i) any natural person resident in the United States;

"(ii) any partnership or corporation organized or incorporated under the laws of the United States;

"(iii) any estate of which any executor or administrator is a U.S. person;

"(iv) any trust of which any trustee is a U.S. person;

"(v) any agency or branch of a foreign entity located in the United States;

"(vi) any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a United States person;

"(vii) any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

"(viii) any partnership or corporation—

"(I) organized or incorporated under the laws of any foreign jurisdiction; and

"(II) formed by a U.S. person principally for the purpose of investing in securities not registered under the Securities Act of 1933, unless it is organized or incorporated, and owned, by accredited investors (as such term is defined under section 230.501 of title 17, Code of Federal Regulations) that are not natural persons, estates, or trusts.

"(E) ANTI-EVASION.—Notwithstanding any other provision of this paragraph, a registered security-based swap dealer shall not conduct any activities that are designed to evade any provision of this Act that was enacted by the Wall Street Transparency and Accountability Act of 2010.

"(F) PRESERVATION OF AUTHORITY.—Nothing in this paragraph shall—

"(i) exempt a transaction described in this paragraph from section 23A or 23B of the Federal Reserve Act, or implementing regulations thereunder; or

"(ii) affect the authorities of the prudential regulators over the institutions described under subparagraphs (A) through (E) of section 1a(39) of the Commodity Exchange Act (7 U.S.C. 1a(39)) as those authorities are established in law, other than under title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act and amendments made by such title.".

PURPOSE AND SUMMARY

H.R. 3283, the "Swap Jurisdiction Certainty Act," clarifies Congress's intent in limiting the extraterritorial application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111–203). H.R. 3283 makes clear that (1) Title VII's capital requirements do not apply to non-U.S. swap dealers as long as the non-U.S. swap dealer's home country is a signatory to the Basel Capital Accords; (2) swap transactions between swap dealers and their affiliates are subject only to Title VII's reporting requirements; and (3) swap transactions between non-U.S. swap dealers and non-U.S. persons are outside the scope of Title VII's transaction-level requirements. H.R. 3283 also strengthens the anti-evasion authority of the U.S. Securities and Exchange Commission (SEC) and preserves the prudential regulators' non-Title VII authority over security-based swap dealers. A broad application of Title VII's requirements to transactions that take place outside the United States and to non-U.S. entities could weaken the U.S. financial system and place U.S. financial institutions at a competitive disadvantage against their foreign counterparts. The clarifications set forth in H.R. 3283 will mitigate these potential negative effects.

BACKGROUND AND NEED FOR LEGISLATION

Title VII of the Dodd-Frank Act seeks to regulate the over-the-counter derivatives (OTC) market in the same way that equities and futures exchanges are regulated. Because the OTC market is global, Title VII gives rise to questions about the extent to which U.S. regulations will apply to swap and security-based swap transactions that take place outside of the United States. Title VII's plain language makes clear that Congress intended it to apply outside the United States only in certain limited circumstances. Section 722 provides that provisions relating to swaps will not apply to activities outside the United States unless those activities (1) have a direct and significant connection with activities in, or effect on, commerce of the United States or (2) contravene anti-evasion rules promulgated by the Commodity Futures Trading Commission (CFTC). Section 772 provides that the provisions related to security-based swaps will not apply to a financial institution transacting business outside of the United States unless that institution transacts business in security-based swaps in contravention of the SEC's anti-evasion rules or regulations.

Despite Congress's intent that the extraterritorial application of Title VII be limited, the comments and actions of U.S. regulators indicate that they are considering regulations that would result in Title VII's being applied far more broadly than Congress intended. For example, U.S. regulators have proposed margin rules that would apply to the foreign subsidiaries of U.S. swap dealers that enter into swaps with foreign counterparties, notwithstanding that these transactions have no connection to the United States. These proposed margin rules prompted a letter from Ranking Member Barney Frank and Senate Banking Committee Chairman Tim Johnson to Federal regulators, in which they wrote that "Congress generally limited the territorial scope of Title VII to activities within the United States." Ranking Member Frank and Senator Johnson noted that they were "concerned that the proposed imposition of margin requirements, in addition to provisions related to clearing, trading, registration, and the treatment of foreign subsidiaries of U.S. institutions, all raise questions about consistency with Congressional intent regarding Title VII." [1]

The broad extraterritorial application of Title VII contemplated by U.S. regulators would have significant negative effects. Requiring non-U.S. entities to comply with Title VII solely because they are affiliates or subsidiaries of U.S. companies would result in dual—and potentially inconsistent—regulation because the country in which the subsidiary is located would also have jurisdiction over the non-U.S. entity and its transactions. Avoiding conflicting U.S. and foreign regulations is particularly important when both the U.S. and the foreign jurisdiction require that swaps and security-based swaps by cleared. If both the U.S. and the foreign regulator require that swaps be cleared at locally regulated clearinghouses, but there is no clearinghouse registered in both jurisdictions that can clear the swap, it will be impossible for the non-U.S. entity to comply with both the U.S. and the foreign regulation. Applying

[1] Letter from Sen. Tim Johnson and Rep. Barney Frank to CFTC Chairman Gary Gensler, Federal Reserve Chairman Ben S. Bernanke, SEC Chairman Mary L. Schapiro, and Federal Deposit Insurance Corporation Acting Chairman Martin J. Gruenberg (Oct. 4, 2011).

Title VII's regulations to a non-U.S. entity solely because it is affiliated with a U.S. company will disadvantage U.S. companies and their non-U.S. operations, particularly if the foreign jurisdiction in which the non-U.S. entity is operating does not have similar rules or if it is still developing its OTC swaps rules, which is currently the case in most foreign jurisdictions.

The application of Title VII's capital requirements to foreign institutions that operate in the United States has also raised concerns about the negative effects that broadly applying Title VII would have on financial markets. When a financial institution is incorporated in one country (the home country) but does business in another (the host country), the home country regulator is charged with setting prudential standards and regulating that institution. If the host country regulator also seeks to regulate the institution, the institution may be subject to overlapping and inconsistent regulation. Under Title VII, a financial institution incorporated abroad but doing business in the U.S. that registers in the U.S. as a swap dealer will be subject to Title VII's capital requirements, even though that institution is already subject to the capital requirements established by its home country regulator.

Dual regulation resulting from a broad application of Title VII to foreign financial institutions may prompt them to spin off their U.S. affiliates as separate U.S. legal entities to avoid conflicting regulatory requirements. But the creation of separate U.S. institutions to comply with Title VII's requirements could have negative and costly consequences for foreign firms and their customers. For example, a foreign institution that finds itself compelled to maintain a separate U.S. institution could lose the benefits of netting, collateral management, and centralized risk management across that institution's global operations. In turn, the fragmentation of foreign global institutions into a foreign institution and a separately-maintained U.S. subsidiary could increase the exposure of U.S. customers and the U.S. financial system to systemic risk: U.S. customers would find themselves transacting business with a thinly-capitalized U.S. subsidiary rather than a well-capitalized global financial institution with a large balance sheet and centralized risk management. Alternatively, foreign institutions could cease their U.S. swap operations altogether, which would reduce liquidity in U.S. financial markets, increase transaction costs for U.S. end-users, and impede U.S. economic growth. Apart from these effects in U.S. markets, a broad application of Title VII's capital requirements to foreign institutions may cause foreign regulators to retaliate against the foreign subsidiaries of U.S. financial institutions by imposing their own regulations.

To mitigate the potential negative effects that would result from a broad extraterritorial application of Title VII, Representatives Jim Himes and Scott Garrett introduced H.R. 3283, the "Swap Jurisdiction Certainty Act," on October 31, 2011. The Subcommittee on Capital Markets and Government Sponsored Enterprises held a legislative hearing on H.R. 3283 on February 8, 2012. During that hearing, the Subcommittee received testimony from a variety of financial market participants, many of whom expressed concerns about the potential negative effects that a broad extraterritorial application of Title VII would have. For example, Don Thompson, Managing Director & Associate General Counsel, JPMorgan Chase

& Co., testified that "[a]n overreaching application of Dodd-Frank would severely impact U.S. competitiveness and actually increase risk when a robust regulatory framework already exists and there are other safeguards that could be adopted without creating an unlevel playing field for our banks." Chris Allen, Managing Director, Barclays Capital, testified on behalf of the Institute of International Bankers, and stated that broad extraterritorial application of Title VII "would lead to the very duplicative and conflicting regulation that the G–20 intended to avoid . . . [which] would place foreign firms with ties to the U.S.—both those firms headquartered abroad that choose to do business in the U.S. and the foreign affiliates of U.S. firms—at a competitive disadvantage as they conduct business around the globe." Luke Zubrod, Director, Chatham Financial, testified on behalf of the Coalition of Derivatives End-Users about the effects on end-users, and concluded that "expansive extraterritorial application of Title VII could undermine end users' ability to manage risk efficiently, both when they transact domestically and abroad."

HEARING

On February 8, 2012, the Subcommittee on Capital Markets and Government Sponsored Enterprises held a hearing titled "Limiting the Extraterritorial Impact of Title VII of the Dodd-Frank Act" to consider the merits of H.R. 3283. This was a one-panel hearing with the following witnesses:

- Mr. Chris Allen, Managing Director, Barclays Capital
- Dr. Chris Brummer, Professor of Law, Georgetown University
- Mr. Don Thompson, Managing Director and Associate General Counsel, JPMorgan Chase & Co.
- Mr. Luke Zubrod, Director, Chatham Financial

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on March 27, 2012, and ordered H.R. 3283, as amended, favorably reported to the House by a record vote of 41 yeas and 18 nays (Record vote no. FC–68).

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. A motion by Chairman Bachus to report the bill, as amended, to the House with a favorable recommendation was agreed to by a record vote of 41 yeas and 18 nays (Record vote no. FC–68). The names of Members voting for and against follow:

Record vote no. FC–68

Representative	Aye	Nay	Present	Representative	Aye	Nay	Present
Mr. Bachus	X			Mr. Frank (MA)		X	
Mr. Hensarling	X			Ms. Waters		X	
Mr. King (NY)	X			Mrs. Maloney		X	
Mr. Royce	X			Mr. Gutierrez		X	
Mr. Lucas	X			Ms. Velázquez		X	
Mr. Paul				Mr. Watt		X	

Record vote no. FC–68—Continued

Representative	Aye	Nay	Present	Representative	Aye	Nay	Present
Mr. Manzullo	X			Mr. Ackerman		X	
Mr. Jones				Mr. Sherman		X	
Mrs. Biggert	X			Mr. Meeks	X		
Mr. Gary G. Miller (CA)	X			Mr. Capuano		X	
Mrs. Capito	X			Mr. Hinojosa		X	
Mr. Garrett	X			Mr. Clay	X		
Mr. Neugebauer	X			Mrs. McCarthy (NY)	X		
Mr. McHenry	X			Mr. Baca	X		
Mr. Campbell	X			Mr. Lynch		X	
Mrs. Bachmann	X			Mr. Miller (NC)		X	
Mr. McCotter	X			Mr. David Scott (GA)	X		
Mr. McCarthy (CA)	X			Mr. Al Green (TX)		X	
Mr. Pearce	X			Mr. Cleaver		X	
Mr. Posey	X			Ms. Moore		X	
Mr. Fitzpatrick	X			Mr. Ellison		X	
Mr. Westmoreland	X			Mr. Perlmutter	X		
Mr. Luetkemeyer	X			Mr. Donnelly		X	
Mr. Huizenga	X			Mr. Carson		X	
Mr. Duffy	X			Mr. Himes	X		
Ms. Hayworth	X			Mr. Peters	X		
Mr. Renacci	X			Mr. Carney	X		
Mr. Hurt	X						
Mr. Dold	X						
Mr. Schweikert	X						
Mr. Grimm	X						
Mr. Canseco	X						
Mr. Stivers	X						
Mr. Fincher	X						

During consideration of H.R. 3283 by the Committee, the following amendment was considered:

1. An amendment offered by Mr. Frank, no. 4, to preserve the prudential regulators' authority to subject securities-based swap dealers to prudential and other rules besides those issued under Title VII of the Dodd-Frank Act, and to give the SEC and CFTC the authority to regulate offshore swaps if they jointly determine that such regulation is needed to prevent the importation of systemic risk into the United States; to avoid threats to the financial stability of the United States; or to prevent evasion of U.S. laws or regulations, was not agreed to by a record vote of 26 yeas and 32 nays (Record vote no. FC–67).

Record vote no. FC–67

Representative	Aye	Nay	Present	Representative	Aye	Nay	Present
Mr. Bachus		X		Mr. Frank (MA)	X		
Mr. Hensarling		X		Ms. Waters	X		
Mr. King (NY)		X		Mrs. Maloney	X		
Mr. Royce		X		Mr. Gutierrez	X		
Mr. Lucas		X		Ms. Velázquez	X		
Mr. Paul				Mr. Watt	X		
Mr. Manzullo		X		Mr. Ackerman	X		
Mr. Jones				Mr. Sherman	X		
Mrs. Biggert		X		Mr. Meeks	X		
Mr. Gary G. Miller (CA)		X		Mr. Capuano	X		
Mrs. Capito		X		Mr. Hinojosa	X		
Mr. Garrett		X		Mr. Clay	X		
Mr. Neugebauer		X		Mrs. McCarthy (NY)	X		
Mr. McHenry		X		Mr. Baca	X		
Mr. Campbell		X		Mr. Lynch	X		
Mrs. Bachmann		X		Mr. Miller (NC)	X		

Record vote no. FC–67—Continued

Representative	Aye	Nay	Present	Representative	Aye	Nay	Present
Mr. McCotter		X		Mr. David Scott (GA)	X		
Mr. McCarthy (CA)		X		Mr. Al Green (TX)			
Mr. Pearce		X		Mr. Cleaver	X		
Mr. Posey		X		Ms. Moore	X		
Mr. Fitzpatrick		X		Mr. Ellison	X		
Mr. Westmoreland		X		Mr. Perlmutter	X		
Mr. Luetkemeyer		X		Mr. Donnelly	X		
Mr. Huizenga		X		Mr. Carson	X		
Mr. Duffy		X		Mr. Himes	X		
Ms. Hayworth		X		Mr. Peters	X		
Mr. Renacci		X		Mr. Carney	X		
Mr. Hurt		X					
Mr. Dold		X					
Mr. Schweikert		X					
Mr. Grimm		X					
Mr. Canseco		X					
Mr. Stivers		X					
Mr. Fincher		X					

The following amendments and motion were also considered by the Committee:

1. An amendment offered by Mr. Miller of N.C., no. 1, to require security-based swap dealers registered with the SEC to maintain margin and capital equal to the difference between the U.S. requirements for margin and capital and the requirements of the foreign jurisdiction where the counterparty is located, was offered and withdrawn.

2. An amendment offered by Mr. Himes, no. 2, as amended by unanimous consent, to preserve the SEC's authority to regulate security-based swaps between U.S. security-based swap dealers and foreign counterparties, was agreed to by voice vote.

3. An amendment offered by Messrs. Garrett and Frank, no. 3, to preserve the prudential regulators' authority to subject securities-based swap dealers to prudential and other rules besides those issued under Title VII of the Dodd-Frank Act, was agreed to by voice vote.

4. A motion offered by Mr. Garrett to move the previous question on H.R. 3283 was agreed to by voice vote.

Committee Oversight Findings

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee has held hearings and made findings that are reflected in this report.

Performance Goals and Objectives

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee establishes the following performance related goals and objectives for this legislation:

The objective of H.R. 3283, the "Swap Jurisdiction Certainty Act" is to clarify Congress's intent in limiting the extraterritorial application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111–203). H.R. 3283 clarifies that (1) Title VII's capital requirements do not apply to non-U.S. swap dealers as long as the non-U.S. swap dealer's home country is a signatory to the Basel Capital Accord; (2) swap transactions between

swap dealers and their affiliates are subject only to Title VII's reporting requirements; and (3) swap transactions between non-U.S. swap dealers and non-U.S. persons are outside the scope of Title VII's transaction-level requirements.

H.R. 3283 will strengthen the SEC's anti-evasion authority and preserve the prudential regulators' non-Title VII authority over security-based swap dealers. H.R. 3283 will mitigate the potential negative effects that would result from a broad extraterritorial application of Title VII, which could weaken the U.S. financial system and place U.S. financial institutions at a competitive disadvantage against their foreign counterparts.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

APRIL 27, 2012.

Hon. SPENCER BACHUS,
Chairman, Committee on Financial Services,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3283, the Swap Jurisdiction Certainty Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Swan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 3283—Swap Jurisdiction Certainty Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111–203) requires that participants in swap transactions meet certain clearing, reporting, and margin requirements as well as certain standards of business conduct. (A swap is a contract that calls for an exchange of cash between two participants based on an underlying rate or index, or the performance of an asset.)

H.R. 3283 would exempt from those requirements swap transactions entered into between a registered swap dealer that is a U.S. company or the affiliate of a U.S. company and:

- The dealer's U.S. or foreign affiliate or a foreign company that is not registered with the Commodity Futures Trading Commission (CFTC), in the case of commodity-based transactions; or
- The dealer's U.S. or foreign affiliate, in the case of securities-based transactions.

Further, H.R. 3283 would specify that capital, reporting, and margin requirements apply to swap transactions between foreign swap dealers that are registered with the CFTC (or the Securities and Exchange Commission (SEC) in the case of securities-based swap transactions) and a U.S. company that is not an affiliate of the dealer. H.R. 3283 also would allow foreign swap dealers to meet the capital requirements of their home country so long as the country is a signatory to certain international banking regulations (known as the Basel Accords).

Both the CFTC and the SEC are developing regulations relating to swap transactions including margin, clearing, and reporting requirements as well as standards of conduct for swap dealers. Some of these rules have been adopted while many more are in earlier stages of the regulatory process. Based on information from the two agencies, CBO estimates that incorporating the provisions of H.R. 3283 at this point would not require a significant increase in the workload of either agency. Therefore, CB0 estimates that any change in discretionary spending to implement the legislation, which would be subject to the availability of appropriated funds, would not be significant (less than $500,000). Further, the SEC is authorized to collect fees sufficient to offset its annual appropriation; therefore, CBO estimates that the net cost to the SEC to implement H.R. 3283 would be negligible, assuming appropriation actions consistent with the agency's authorities. Enacting H.R. 3283 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 3283 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Susan Willie. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or

accommodations within the meaning of the section 102(b)(3) of the Congressional Accountability Act.

EARMARK IDENTIFICATION

H.R. 3283 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

The short title of the Act is the "Swap Jurisdiction Certainty Act."

Section 2. Commodity Exchange Act

This section clarifies that swap transactions between U.S. swap dealers and their affiliates as well as swap transactions between U.S. swap dealers and non-U.S. institutions are subject to Title VII's reporting requirements, but not to Title VII's other transaction-level requirements.

This section also provides that a non-U.S. person that registers as a swap dealer is subject to Title VII's requirements only for swaps that person enters into with a U.S. person who is not a U.S. subsidiary, branch, or affiliate of such non-U.S. person.

This section also clarifies that Title VII's capital requirements do not apply to a non-U.S. person registered as a swap dealer as long as the non-U.S. person's home country is a signatory to the Basel Capital Accord.

This section also defines "U.S. Person" and "non-U.S. person" by adopting the definitions set forth in SEC Regulation S (17 CFR 230.901 et seq.), which provides an exclusion from the registration requirements of the Securities Act of 1933 for offerings made outside the United States by U.S. and foreign issuers, and by adding "a central bank or its functional equivalent which is located in a non-U.S. jurisdiction and that is a signatory to the Basel Accords" to the definition of a "non-U.S. person."

Section 3. Securities Exchange Act of 1934

This section clarifies that security-based swap transactions between U.S. security-based swap dealers and their affiliates are subject to Title VII's reporting requirements, but are not subject to Title VII's other transaction-level requirements.

This section also provides that a non-U.S. person that registers as a security-based swap dealer is subject to Title VII's requirements only for security-based swaps that the non-U.S. person enters into with a U.S. person

This section also clarifies that Title VII's capital requirements do not apply to non-U.S. persons registered as security-based swap dealers as long as the non-U.S. person's home country is a signatory to the Basel Capital Accord.

This section also defines "U.S. Person" and "non-U.S. person" by adopting the definitions set forth in SEC Regulation S and adding "a central bank or its functional equivalent which is located in a non-U.S. jurisdiction and that is a signatory to the Basel Accords" to the definition of a "non-U.S. person."

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

COMMODITY EXCHANGE ACT

* * * * * * *

SEC. 4s. REGISTRATION AND REGULATION OF SWAP DEALERS AND MAJOR SWAP PARTICIPANTS.

(a) REGISTRATION.—

(1) * * *

* * * * * * *

(3) EXTRA-TERRITORIAL SWAP TRANSACTION APPLICATION OF TITLE VII.—

(A) IN GENERAL.—A swap entered into between—

(i) a swap dealer that is registered with the Commission who is either—

(I) a U.S. person, or

(II) a person that has a parent company that is a U.S. person, and

(ii) a person who is—

(I) a U.S. or non-U.S. subsidiary, branch, or affiliate of such swap dealer, or

(II) any other non-U.S. person that is not registered as a swap dealer with the Commission,

shall not be subject to the provisions of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and of amendments added by such title, so long as each swap dealer described under clause (i) reports such swap to a swap data repository registered with the Commission.

(B) SWAPS ENTERED INTO BY REGISTERED NON-U.S. PERSONS.—

(i) IN GENERAL.—A non-U.S. person that registers as a swap dealer with the Commission shall only be subject to the requirements of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and of amendments added by such title, with respect to swaps that such person enters into with a U.S. person who is not a U.S. subsidiary, branch, or affiliate of such non-U.S. person.

(ii) CAPITAL REQUIREMENTS.—A non-U.S. person that registers as a swap dealer with the Commission shall be permitted by the Commission to comply with the capital requirements under subsection (e) by complying with comparable requirements established by the appropriate governmental authorities in the home country of the non-U.S. person, so long as such home country is a signatory to the Basel Accords.

(C) NON-U.S. PERSON.—For purposes of this paragraph, the term "non-U.S. person" includes—

(i) any person that is not a U.S. person;

(ii) any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;

(iii) any agency or branch of a U.S. person located outside the United States if—

(I) the agency or branch operates for valid business reasons; and

(II) the agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where it is located;

(iv) any trust of which any professional fiduciary acting as trustee is a U.S. person, if—

(I) a trustee who is a non-U.S. person has sole or shared investment discretion with respect to the trust assets; and

(II) no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person;

(v) an employee benefit plan established and administered in accordance with the law, customary practices, and documentation of a country other than the United States; and

(vi) the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, a central bank or its functional equivalent which is located in a non-U.S. jurisdiction and that is a signatory to the Basel Accords, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

(D) U.S. PERSON.—For purposes of this paragraph, the term "U.S. person" includes—

(i) any natural person resident in the United States;

(ii) any partnership or corporation organized or incorporated under the laws of the United States;

(iii) any estate of which any executor or administrator is a U.S. person;

(iv) any trust of which any trustee is a U.S. person;

(v) any agency or branch of a foreign entity located in the United States;

(vi) any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a United States person;

(vii) any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

(viii) any partnership or corporation—

(I) organized or incorporated under the laws of any foreign jurisdiction; and

(II) formed by a U.S. person principally for the purpose of investing in securities not registered under the Securities Act of 1933, unless it is organized or incorporated, and owned, by accredited investors (as such term is defined under section 230.501 of title 17, Code of Federal Regulations) that are not natural persons, estates, or trusts.

(E) ANTI-EVASION.—Notwithstanding any other provision of this paragraph, each registered swap dealer shall be subject to the provision under section 2(i)(2).

* * * * * * *

SECURITIES EXCHANGE ACT OF 1934

TITLE I—REGULATION OF SECURITIES EXCHANGES

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SEC. 15F. REGISTRATION AND REGULATION OF SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS.

(a) REGISTRATION.—

(1) * * *

* * * * * * *

(3) EXTRA-TERRITORIAL SWAP TRANSACTION APPLICATION OF TITLE VII.—

(A) IN GENERAL.—A security-based swap entered into between—

(i) a security-based swap dealer that is registered with the Commission who is either—

(I) a U.S. person, or

(II) a person that has a parent company that is a U.S. person, and

(ii) a person who is a U.S. or non-U.S. subsidiary, branch, affiliate, or parent company of such security-based swap dealer,

shall not be subject to the provisions of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and of amendments added by such title, so long as each security-based swap dealer described under clause (i) reports such security-based swap to a security-based swap data repository registered with the Commission.

(B) SECURITY-BASED SWAPS ENTERED INTO BY REGISTERED NON-U.S. PERSONS.—

(i) IN GENERAL.—A non-U.S. person that registers as a security-based swap dealer with the Commission shall only be subject to the requirements of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and of amendments added by such title, with respect to security-based swaps that such person enters into with a U.S. person who is not a U.S. subsidiary, branch, or affiliate of such non-U.S. person.

(ii) CAPITAL REQUIREMENTS.—A non-U.S. person that registers as a security-based swap dealer with the Commission shall be permitted by the Commission to comply with the capital requirements under subsection (e) by complying with comparable requirements established by the appropriate governmental authorities in the home country of the non-U.S. person, so long as such home country is a signatory to the Basel Accords.

(C) NON-U.S. PERSON.—For purposes of this paragraph, the term "non-U.S. person" includes—

(i) any person that is not a U.S. person;

(ii) any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;

(iii) any agency or branch of a U.S. person located outside the United States if—

(I) the agency or branch operates for valid business reasons; and

(II) the agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where it is located;

(iv) any trust of which any professional fiduciary acting as trustee is a U.S. person, if—

(I) a trustee who is a non-U.S. person has sole or shared investment discretion with respect to the trust assets; and

(II) no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person;

(v) an employee benefit plan established and administered in accordance with the law, customary practices, and documentation of a country other than the United States; and

(vi) the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, a central bank or its functional equivalent which is located in a non-U.S. jurisdiction and that is a signatory to the Basel Accords, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

(D) U.S. PERSON.—For purposes of this paragraph, the term "U.S. person" includes—

(i) any natural person resident in the United States;

(ii) any partnership or corporation organized or incorporated under the laws of the United States;

(iii) any estate of which any executor or administrator is a U.S. person;

(iv) any trust of which any trustee is a U.S. person;

(v) any agency or branch of a foreign entity located in the United States;

(vi) any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a United States person;

(vii) any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

(viii) any partnership or corporation—

(I) organized or incorporated under the laws of any foreign jurisdiction; and

(II) formed by a U.S. person principally for the purpose of investing in securities not registered under the Securities Act of 1933, unless it is organized or incorporated, and owned, by accredited investors (as such term is defined under section 230.501 of title 17, Code of Federal Regulations) that are not natural persons, estates, or trusts.

(E) ANTI-EVASION.—Notwithstanding any other provision of this paragraph, a registered security-based swap dealer shall not conduct any activities that are designed to evade any provision of this Act that was enacted by the Wall Street Transparency and Accountability Act of 2010.

(F) PRESERVATION OF AUTHORITY.—Nothing in this paragraph shall—

(i) exempt a transaction described in this paragraph from section 23A or 23B of the Federal Reserve Act, or implementing regulations thereunder; or

(ii) affect the authorities of the prudential regulators over the institutions described under subparagraphs (A) through (E) of section 1a(39) of the Commodity Exchange Act (7 U.S.C. 1a(39)) as those authorities are established in law, other than under title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act and amendments made by such title.

* * * * * * *

DISSENTING VIEWS

Democratic Members of the Financial Services Committee agreed that we should not be subjecting the foreign branches and subsidiaries of American financial institutions to derivative regulation that is duplicative, or that would put our institutions at a significant disadvantage in seeking business—as a general rule. That is, we believe that that should be the normal way in which the branches and subsidiaries operate. But we unanimously supported an amendment to the legislation, and most of us opposed the bill's adoption when the amendment was defeated, because we think it is a great mistake to take what should be a general operating principle and make it an unchallengeable, invariant rule, no matter what the circumstances and no matter what experience shows about dangers that might result from abuses here.

Our amendment would provide that the SEC and CFTC acting jointly could exercise their regulatory authority over the foreign branches and subsidiaries of American firms in case of any of the following conditions:

1. Prevent the importation of systemic risk to the US economy;
2. Avoid threats to US financial stability; and,
3. Avoid evasion of US rules.

We note that our Republican colleagues assert that they have dealt with the evasion issue, but they have done so in a wholly inadequate way, simply by the declarative statement that there should be no evasion. Absent enforcement powers in the SEC and CFTC, this would mean very little.

We are surprised that our colleagues believe, after all that happened with derivatives in the past, that it would be prudent to establish a regime in which the SEC and the CFTC could under no circumstances engage in imposing margin requirements or other regulatory safeguards should a pattern develop in which abusive practices threatened our stability. And while it is true that we are talking about things that happened outside of the U.S., it is also the case that none of this would have any application to financial institutions that have no American affiliation. That is, we are talking here about the foreign-based branches and subsidiaries of American institutions.

We will be offering this amendment again on the floor, and we hope that our Republican colleagues will agree to it so that we can go forward with a situation in which American companies' foreign branches and subsidiaries can operate in general in the appropriate way, but with our regulatory agencies equipped to step in if problems arise. We do not understand how any of our colleagues could believe that no such safety net provision is required, given the experience we have had with underregulated derivatives.

Finally, we note that if we do not effectively block transactions that are put in a place under the Republican version of this bill, for the purpose of evading regulation of derivatives, American economic interests will be harmed directly. That is, absent strong enforcement powers in an anti- evasion section, there will be some American institutions who will be strongly tempted to send some of their business out of the U.S. to be transacted by a foreign branch or subsidiary precisely because it will be either unregulated or inadequately regulated.

BARNEY FRANK.
MELVIN L. WATT.
LUIS V. GUTIERREZ.
ANDRÉ CARSON.
GWEN MOORE.
MAXINE WATERS.
MICHAEL E. CAPUANO.
RUBÉN HINOJOSA.
CAROLYN B. MALONEY.
GARY L. ACKERMAN.

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