**This is an unofficial transcription of a 1990 amendment of the Bankruptcy Code,
prepared by Robert J. Pfister for ease of reading and copying/pasting.
The authoritative text is the United States Statutes at Large.**

One Hundred First Congress, Session II
Public Law 101-311 — 104 Stat. 267 (H.R. 4612)
June 25, 1990

AN ACT *To amend title 11 of the United States Code regarding swap agreements and forward contracts.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—SWAP AGREEMENTS

SEC. 101. DEFINITION OF SWAP AGREEMENT AND SWAP PARTICIPANT.

Section 101 of title 11, United States Code, is amended by—

(1) redesignating paragraphs (49), (50), (51), (52), and (53) as paragraphs (51), (52), (53), (54), and (55), respectively; and

(2) inserting after paragraph (48) the following:

"(49) 'swap agreement' means—

"(A) an agreement (including terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option, any other similar agreement (including any option to enter into any of the foregoing);

"(B) any combination of the foregoing; or

"(C) a master agreement for any of the foregoing together with all supplements;

"(50) 'swap participant' means an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor;".

SEC. 102. AUTOMATIC STAY.

Section 362(b) of title 11, United States Code, is amended—

(1) in paragraph (12) by striking "or" at the end;

(2) in paragraph (13) by striking the period and inserting "; or"; and

(3) by adding at the end the following:

"(14) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement.".

SEC. 103. LIMITATION ON AVOIDING POWERS.

Section 546 of title 11, United States Code, is amended by adding at the end the following:

"(g) Notwithstanding sections 544, 545, 547, 548(a)(2) and 548(b) of this title, the trustee may not avoid a transfer under a swap agreement, made by or to a swap

participant, in connection with a swap agreement and that is made before the commencement of the case, except under section 548(a)(1) of this title.".

SEC. 104. FRAUDULENT TRANSFERS AND OBLIGATIONS.

Section 548(d)(2) of title 11, United States Code, is amended—

(1) in subparagraph (B) by striking "and" at the end;

(2) in subparagraph (C) by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer.".

SEC. 105. SETOFF.

Section 553(b)(1) of title 11, United States Code, is amended by striking "362(b)(7)," and inserting "362(b)(7), 362(b)(14),".

SEC. 106. CONTRACTUAL RIGHT TO TERMINATE SWAP AGREEMENTS.

(a) TERMINATION OF SWAP AGREEMENTS.—Subchapter III of chapter 5 of title 11, United States Code, is amended by adding at the end the following:

"§ 560. Contractual right to terminate a swap agreement

"The exercise of any contractual right of any swap participant to cause the termination of a swap agreement because of a condition of the kind specified in section 365(e)(1) of this title or to offset or net out any termination values or payment amounts arising under or in connection with any swap agreement shall not be stayed,

avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title. As used in this section, the term 'contractual right' includes a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice.".

(b) TECHNICAL AMENDMENT.—The table of sections of chapter 5 of title 11, United States Code, is amended by adding at the end the following item:

"560. Contractual right to terminate a swap agreement.".

TITLE II—FORWARD CONTRACTS

SEC. 201. DEFINITION OF COMMODITY.

Section 101 of title 11, United States Code (as amended by section 101), is amended—

(1) in paragraph (24)—

(A) by inserting "as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade," after "transfer of a commodity,", and

(B) by inserting ", including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any combination thereof or option thereon" after "entered into";

(2) in paragraph (25) by striking out "commodities" and inserting "a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right,

or interest which is presently or in the future becomes the subject of dealing in the forward contract trade";

(3) by redesignating paragraphs (34) through (55), as paragraphs (36) through (57), respectively; and

(4) by inserting after paragraph (33) the following:

"(34) 'margin payment' means, for purposes of the forward contract provisions of this title, payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, or variation payments; and

"(35) 'settlement payment' means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade;".

SEC. 202. AUTOMATIC STAY.

Section 362(b)(6) of title 11, United States Code, is amended—

(1) by striking "section 741(5) or 761(15)" and inserting "section 101(34), 741(5), or 761(15)"; and

(2) by striking "section 741(8)" and inserting "section 101(35) or 741(8)".

SEC. 203. LIMITATIONS ON AVOIDING POWERS.

Section 546(e) of title 11, United States Code, is amended—

(1) by striking "section 741(5) or 761(15)" and inserting "section 101(34), 741(5), or 761(15)"; and

(2) by striking "section 741(8)" and inserting "section 101(35) or 741(8)".

SEC. 204. FRAUDULENT TRANSFERS AND OBLIGATIONS.

Section 548(d)(2)(B) of title 11, United States Code, is amended—

(1) by striking "section 741(5) or 761(15)" and inserting "section 101(34), 741(5) or 761(15)"; and

(2) by striking "section 741(8)" and inserting "section 101(35) or 741(8)".

SEC. 205. CONTRACTUAL RIGHT TO LIQUIDATE A COMMODITY CONTRACT OR FORWARD CONTRACT.

Section 556 of title 11, United States Code, is amended by striking the period at the end of the last sentence of the section and inserting "and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.".

APPROVED June 25, 1990.