

## Sampliner, Gary

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**From:** Christopulos, Greg  
**Sent:** Friday, November 30, 2001 12:23 PM  
**To:** Resnick, Bonnie; Epstein, Natan; Sampliner, Gary; Sills, Gay; Wallace, James  
**Subject:** FW: Request for Meeting re. Azurix Corp Dispute with the Province of BA in Argentina



AzurixBriefingPaperRevisedNov19.doc

Bonnie -- As they say in NY: da ball z in ur court.

Tanks.

-----Original Message-----

**From:** Miceli, Keith [mailto:Keith.Miceli@enron.com]  
**Sent:** Friday, November 30, 2001 12:02 PM  
**To:** greg.christopulos@do.treas.gov  
**Subject:** Request for Meeting re. Azurix Corp Dispute with the Province of BA in Argentina

November 30, 2001

Greg Christopulos  
International Economist  
International Affairs  
Treasury Department  
Washington, D.C.

Dear Greg:

Thanks for offering to arrange a meeting with John Garrison, President and CEO of the Azurix Corp. and myself. The purpose of the meeting to provide a briefing on the status of a half a billion dollar investment dispute that the Azurix Corp. has with the Province of Buenos Aires. Attached is a confidential briefing paper that provides a history of the dispute; our efforts to resolve it amicably; the lack of good will on the part of the Provincial authorities to find a resolution, and some suggestions to break the impasse to the benefit of all parties concerned.

I understand that you will be on travel for those dates, and that you will speak with Bonnie Resnick about meeting with us. I can be contacted at (713) 345-5956 or keith.miceli@enron.com to finalize arrangements. Many thanks,

Sincerely,

Keith L. Miceli  
Senior Director  
International Public Relations

<<AzurixBriefingPaperRevisedNov19.doc>>

.....  
This e-mail is the property of Enron Corp. and/or its relevant affiliate and may contain confidential and privileged material for the sole use of the intended recipient (s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender or reply to Enron Corp. at [enron.messaging.administration@enron.com](mailto:enron.messaging.administration@enron.com) and delete all copies of the message. This e-mail (and any attachments hereto) are not intended to be an offer (or an acceptance) and do not create or evidence a binding and enforceable contract between Enron Corp. (or any of its affiliates) and the intended recipient or any other party, and may not be relied on by anyone as the basis of a contract by estoppel or otherwise. Thank you.  
.....

Sampliner, Gary

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**From:** Christopoulos, Greg  
**Sent:** Thursday, November 29, 2001 12:56 PM  
**To:** Sampliner, Gary; Allmond, Gary  
**Subject:** FW: Enron nears final collapse

fyi

-----Original Message-----

**From:** Rao, Geetha  
**Sent:** Thursday, November 29, 2001 12:41 PM  
**To:** Kifayat, Adnan; McDonald, Larry; Mills, Marshall  
**Cc:** Christopoulos, Greg  
**Subject:** RE: Enron nears final collapse

Yup - down from \$80 a share in February...

-----Original Message-----

**From:** Kifayat, Adnan  
**Sent:** Thursday, November 29, 2001 12:35 PM  
**To:** Rao, Geetha; McDonald, Larry; Mills, Marshall  
**Cc:** Christopoulos, Greg  
**Subject:** RE: Enron nears final collapse

i heard their stock was "trading" at 65 cents a share yesterday!!!!

-----Original Message-----

**From:** Rao, Geetha  
**Sent:** Thursday, November 29, 2001 9:29 AM  
**To:** McDonald, Larry; Mills, Marshall; Kifayat, Adnan  
**Cc:** Christopoulos, Greg  
**Subject:** Enron nears final collapse

[(b)(5)]

## Enron nears final collapse

**End of merger talks, debt downgrade all but seal the company's fate, analysts say**

Nov. 28 - The collapse of Enron Corp. - which rose during the 1990s from a sleepy natural gas distribution company to become one of the largest U.S. corporations - picked up speed Wednesday as merger talks broke off with rival Dynegy Corp. and its debt was downgraded by another rating agency. As its energy trading customers fled and its cash problems mushroomed, analysts said the company's options were fast running out.

AS RECENTLY as February, Enron's energy trading business - and its stock price - were riding high as the company rapidly expanded, buoyed by the volatility in natural gas prices and the deregulation of the electricity industry. Encouraged by glowing Wall Street reports on the company's cutting-edge business

model, Enron's stock traded earlier this year above \$80 a share. It was recently ranked seventh on the Fortune 500 list of the biggest U.S. companies.

But in a stunning reversal, Enron's commanding share of U.S. energy trading has all but evaporated. Following the collapse Wednesday of merger talks with Dynegy, Enron's shares closed Wednesday at 61 cents, wiping out virtually all of the \$80 billion in value its stock investors held less than a year ago.

Though analysts say it is all but certain the company will seek bankruptcy protection, the company faces a huge mountain of debt - the size of which is not fully known. And many of Enron's most attractive assets have already been pledged as collateral for a series of loans the company sought to stay afloat. "All the debt is in question," said Jon Cartwright, a senior energy analyst at Raymond James & Associates Inc., after the downgrade by Standard & Poor's, one of the agencies. "It is inconceivable that Enron can continue as a going concern." In response to the credit rating downgrade and Dynegy's announcement that it was ending merger talks, Enron said it will temporarily suspend all payments other than those necessary to maintain its core operations.

Kenneth L. Lay, Enron's chairman and chief executive, said the company was evaluating and exploring other options to protect its core energy businesses.

But analysts said there was little in the way of a viable business left to protect.

"I don't think there's too much to break up anymore," according to A.G. Edward analyst Mike Heim. "What you're left with is people and outdated computers."

The company also faces a blizzard of lawsuits from those Enron workers, whose jobs are now at risk. Many have lost hundreds of thousands of dollars on Enron stock held in retirement accounts, wrecking dreams of a comfortable retirement for some. It's been a painful experience for people like Enron employee Roy Rinard, who was invested heavily in Enron stock.

"I'm basically wiped out," said the 54-year-old Rinard, who lost more than \$400,000 as a result of investing all of the funds in his 401(k) retirement account in Enron stock.

#### **SWIFT SLIDE**

Enron's collapse began earlier this year but picked up speed six weeks ago with the announcement of a \$638 million quarterly loss. Investor and customer confidence eroded further after the company admitted it had overstated earnings by almost \$600 million since 1997.

The disclosure of the company's so-called "off-balance sheet" debts - those not carried on its books nor disclosed to investors - heightened concerns about its financial health. Those debts were hidden in a series of partnerships which included top Enron executives, including its now-ousted chief financial officer Andrew Fastow. The deals, in which Fastow earned about \$30 million in management fees, are the subject of a Securities & Exchange Commission investigation.

The final blow came when Dynegy on Wednesday accused Enron of breaching a takeover agreement negotiated on Nov. 9, and invoked an escape clause that let it pull out of the all-stock deal valued at about \$9 billion at the time.

In a terse conference call with Wall Street analysts, investors and reporters, Dynegy Chairman and CEO Chuck Watson said early Wednesday afternoon that merger talks had broken down because Enron had breached the original merger agreement, "including the material adverse change provision."

Watson said the merger was off because the company didn't want to risk its "franchise, credit or credibility."

"We weren't going to do anything to jeopardize our stakeholders," he said. "Sometimes a company's best deals are the very ones they did not do."

#### **DEBT AVALANCHE**

In calling off the merger, Dynegy was fleeing an impending avalanche of debt. All three major credit rating agencies had downgraded Enron's bonds to junk status by the time Dynegy called off merger talks. That lit the fuse on a debt bomb that Enron is unlikely to be able to defuse. The loss of Enron's

investment-grade credit rating forces some \$3.9 billion in debts to come due immediately, a major problem for a company that has spent most of the \$5.5 billion it sought in recent weeks to stay afloat. Enron said in a recent regulatory filing that it was unlikely to "continue as a going concern" were its credit rating to be slashed to junk status.

Analysts say it's still not clear just how much debt is out there. Prudential Securities energy analyst Carol Coale estimates the total - both on and off the books - at about \$23 billion. How could the company hide so much debt from analysts and investors? Part of the reason stems from the company's insistence that its business model relied on proprietary trading strategies that it could not disclose to its competitors, Coale said. The lesson learned is that managements do lie," she said. "And analysts need to be less trusting of management when they have poor financial disclosure."

Enron's customers have been scrambling to find other energy companies to trade with. Dynegy CEO Watson said Wednesday there was a "a clear flight to quality" underway in the energy markets, and that Dynegy was in a position to pick up a piece of that business "with virtually no incremental cost to us." Dynegy has about \$75 million in exposure to possible trading losses with Enron, he said. Watson also said Wednesday that Dynegy has exercised an option to buy Northern Natural Gas - Enron's largest interstate distribution system with some 17,000 miles of pipeline that stretches from the Permian Basin of Texas to the Great Lakes. ChevronTexaco Corp., which owns 26 percent of Dynegy's stock, contributed \$1.5 billion to Dynegy as part of the transaction.

#### **INVESTOR PAIN**

Watson insisted the business model that Enron had pioneered remains sound, but stocks in other companies with energy trading operations moved lower. But whatever the long-term impact on the rest of the energy industry, Enron's legacy will almost surely be the wide swath it cut through its investors' portfolios.

"They [Enron] entrapped the sophisticates," said Robert Stovall, senior strategist at Prudential Securities, referring to what was once an almost fawning admiration for Enron by institutional investors. "I think this is going to become a classic case."

Stovall, with nearly 50 years of Wall Street experience, said he could not recall any previous corporate unraveling that matches that of Enron.

"You would have to go to pre-SEC days for that," he said, referring to the creation of the SEC in the aftermath of the stock market crash of 1929.

Enron has also left its financial backers with egg on their faces. J.P. Morgan Chase and Citigroup, who were advising the company in merger talks, have already contributed an estimated \$1 billion to the deal - much of it unsecured, according to analysts. Citigroup shares were off \$2.30, or 4.55 percent, at \$48.25 on the New York Stock Exchange, while J.P. Morgan shares were off \$2.37, or nearly 6 percent, at \$37.43.

Enron's collapse will be felt around the world, especially in Europe where the company had expanded into in most major cities. Until recently, Enron had accounted for about 30 percent of German wholesale power trading. It was also a major player in U.K. gas and electricity, and Nordic power, and was driving forward a fledgling French power market.

## McGivern, Tom

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**From:** Carleton, Norman  
**Sent:** Wednesday, December 19, 2001 3:43 PM  
**To:** Wiedman, Mark; Bair, Sheila; Bieger, Peter; Bitsberger, Timothy; DeMarco, Edward; Dorsey, Karen; Ellett, Martha; Ellis, Dina; Gabilondo, Jose; Gross, Jared; Huffman, Lucy; Hughes, Gerry; McGivern, Tom; McInerney, Roberta; Nickoloff, Peter; Roseboro, Brian; Salladin, Anne; Schultheiss, Heidilynne; Smith, Amy; Sutton, Gary; Tishuk, Brian  
**Subject:** Conervation with Frank Hampton and ABI Website: House Leaders Continue to Push Netting Provisions

According to Frank Hampton of TBMA, Dick Arney is also pushing the netting legislation. However, Sensenbrenner hopes to acheive a compromise on the larger bankruptcy legislation by February and is opposed to passing the netting legislation separately. In the Senate, Grassley is also opposed to a separate netting bill and is reportedly avoiding a meeting with Greenspan to discuss this.

Norman Carleton

ABI Website news:

December 19, 2001

### House Leaders Continue to Push Netting Provisions

House leaders are trying to nudge forward legislation that seeks to prevent systemic financial crises by allowing creditors to "net out" their derivatives losses with major counter parties that have filed for bankruptcy, The American Banker reported. It is still unclear, however, whether even they will be successful in overcoming the political obstacles that have stalled it for more than a year - especially considering that Congress is expected to adjourn for the year as early as this week. Majority Whip Tom DeLay (R-Texas) "believes that it's important to get the netting provisions done, either within the context of bankruptcy reform or elsewhere," a spokesman said.

Such highly technical bills rarely attract the attention of top House or Senate leaders, but the recent collapse of Enron Inc. has given the netting legislation newfound relevance. Federal Reserve Board Chairman Alan Greenspan and Treasury Secretary Paul O'Neill say markets are at risk until a law is enacted that allows contracts to be quickly and easily netted out without the approval of slow-moving bankruptcy courts. Holding it up, however, is House Judiciary Committee Chairman James Sensenbrenner (R-Wis.), who heads the House-Senate bankruptcy legislation conference committee. The netting legislation is a part of the bankruptcy reform legislation. Sensenbrenner and some Senate Judiciary Committee members, including bill sponsor Charles Grassley (R-Iowa), oppose passing the netting authority separately because they still hope that the relatively uncontroversial provisions will propel the bankruptcy package.

Though industry sources said they have received commitments from House leaders that netting will be enacted by year-end or soon thereafter, they are not expected to force a vote without the support of Sensenbrenner. Even after a meeting last week with Greenspan, Sensenbrenner maintained that he was "going to try to keep it in the bankruptcy package," his spokesman said.



## McGivern, Tom

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**From:** McGivern, Tom  
**Sent:** Friday, December 14, 2001 11:26 AM  
**To:** Smith, Amy  
**Cc:** Duncan, John; Sanders, Traci  
**Subject:** RE: Enron and Bankruptcy Bill -- ABI Website

[(b)(5)]

-----Original Message-----

**From:** Carleton, Norman  
**Sent:** Friday, December 14, 2001 10:02 AM  
**To:** Bair, Sheila; Bieger, Peter; Bitsberger, Timothy; DeMarco, Edward; Dorsey, Karen; Elliott, Martha; Ellis, Dina; Gabilondo, Jose; Gross, Jared; Huffman, Lucy; Hughes, Gerry; McGivern, Tom; McInerney, Roberta; Nickoloff, Peter; Roseboro, Brian; Salladin, Anne; Schultheiss, HeidiLynne; Smith, Amy; Sutton, Gary; Tishuk, Brian; Berardi, Steve; Eichner, Matthew; Hammer, Viva; Lori Sanatamarena (E-mail); Novey, Michael; Petrangeli, Fred; Whaley, Jean; Wiedman, Mark  
**Subject:** Enron and Bankruptcy Bill -- ABI Website

### ENRON UPDATE

#### *Greenspan, Oxley Meet; Netting Bill Gains Support Following Enron Debacle*

Federal Reserve Chairman Alan Greenspan met yesterday with key House lawmakers to discuss this year's prospects for passing legislation that clarifies corporate bankruptcy laws by allowing companies to quickly settle outstanding derivatives contracts in the event of an insolvency, Dow Jones reported. The once-obscure financial issue has gained new prominence and urgency on Capitol Hill as federal investigators sift through the mess left behind by Enron's chapter 11 bankruptcy filing. The measure allows institutions to quickly close outstanding derivatives contracts with bankrupt trading partners by netting all the losses and gains of individual contracts into one deal.

House Financial Services Chairman Michael Oxley (R-Ohio) invited Greenspan to meet with House Judiciary Chairman James Sensenbrenner (R-Wis.) after Oxley held a bruising hearing on Wednesday on financial improprieties leading to Enron's demise. Complicated, off-balance sheet transactions were the company's undoing. Its stock collapsed after a Nov. 8 announcement that the firm had overstated its net income over four years by \$569 million. Creditors are now lining up to collect on about \$40 billion in debt owed by Enron.

"Congress should not fail to enact netting legislation this year," Greenspan and Treasury Secretary Paul O'Neill wrote House lawmakers a few weeks after the attacks. "Further delays would unnecessarily place the financial system at greater risk." Lawmakers are

now questioning whether the legislation, which is also attached to a broader bankruptcy bill in both chambers, could be applied to Enron's bankruptcy case if the bill passes this year. Federal securities officials said it was unclear whether they could apply new contract netting laws retroactively. Oxley hopes to get the bill passed by next week, before Congress finishes its work for 2001.

#### ***House Probe Seeks Andersen's Records On Enron Audits***

The House Energy and Commerce Committee yesterday asked Arthur Andersen to provide records relating to its audits of Enron Corp., Dow Jones reported. At the same time, the committee sent a letter to former Enron Chief Executive Jeffrey Skilling, requesting an interview with committee investigators within the next two weeks. The committee also formally sought interviews with David Duncan, Andersen's partner in charge of the company's Enron account, and Andersen employees involved in the company's audits. The requests came after Joseph Berardino, Andersen's chief executive, told the House Financial Services Committee on Wednesday that the auditing and consulting firm didn't receive critical information from its client concerning the special-purpose entities that brought about Enron's financial downfall.

#### ***Enron Seeks Supplier to Take Over California University System Powers Contract***

Enron Corp is looking for another electricity supplier to complete its contract with California's two public university systems, a spokeswoman for California State University said yesterday, reported Dow Jones. Enron Energy Services Inc.'s current contract with California State and the University of California Systems expires on March 31, 2004, said spokeswoman Clara Potes-Fellow. The Enron subsidiary filed for chapter 11 bankruptcy protection Dec. 2.

#### ***Enron Contract Hearing Moved To Dec. 18***

A bankruptcy court hearing regarding embattled Enron Corp.'s motion to negotiate, end or sell certain contracts has been postponed to next Tuesday, Dec. 18, Dow Jones reported. The meeting was originally scheduled for today. Earlier this week, Enron filed a motion with the court asking to be allowed to terminate with other parties certain contracts with safe-harbor provisions. The company doesn't want to ask for court approval every time it seeks to end an agreement.

In its filing, Enron had asked for authority to end some of these safe-harbor contracts and negotiate payments for each termination. Creditors, including Cinergy Corp.'s Cinergy Services Inc. and Wiser Oil Co., have filed objections. The motions and objections will be addressed at Tuesday's bankruptcy court hearing.



From: Tom McGivern  
To: DOM3.DOPO6(CARLETONN, NICKOLOFFP), YETTERJ  
Date: 3/17/00 3:25pm  
Subject: Financial Netting provisions of H.R. 833 - bankruptcy bill -Reply -Reply -Reply -Reply -Reply  
-Rep

I'll forward to them.

>>> John Yetter 03/17/00 03:20pm >>>  
No, I don't know.

>>> Peter Nickoloff 03/17/00 03:17pm >>>  
I have no comments or edits on the letters except to ask if they've yet been circulated to the other WG agencies.  
[(b)(6)] , so I can't say whether he had  
a chance to forward the letters on before he left. John, would you know?

>>> John Yetter 03/17/00 02:50pm >>>  
[(b)(6)] I have attached your original e-mail and copied  
Norman's staff to see if they have any comments.

>>> Tom McGivern 03/17/00 02:46pm >>>  
Norman, do you have comments/edits?

>>> John Yetter 03/10/00 10:18am >>>  
I agree with all of Tom's comments on the Enron proposals and don't have any comments on the letter.

>>> Tom McGivern 03/09/00 06:38pm >>>  
Attached for your review and edits is a draft letter from the Secretary on behalf of the Working Group regarding the  
financial netting provisions of the bankruptcy legislation. [(b)(6)] , if you  
would send a version with your edits to other Working Group staff for their review that would be great. My thought is  
that this letter shouldn't get too much in the weeds on technical matters unless it's really necessary.

On the Enron proposals Norman received:

[(b)(5)]

Thanks.

CC: DOM3.DOPO5(TooheyF), DOM3.DOPO6(schultheissh),

0100000001211

**From:** Tom McGivern  
**To:** CARLETONN  
**Date:** 3/17/00 2:46pm  
**Subject:** Financial Netting provisions of H.R. 833 - bankruptcy bill -Reply -Reply

Norman, do you have comments/edits?

>>> John Yetter 03/10/00 10:18am >>>

I agree with all of Tom's comments on the Enron proposals and don't have any comments on the letter.

>>> Tom McGivern 03/09/00 06:36pm >>>

Attached for your review and edits is a draft letter from the Secretary on behalf of the Working Group regarding the financial netting provisions of the bankruptcy legislation. [(b)(6)], if you would send a version with your edits to other Working Group staff for their review that would be great. My thought is that this letter shouldn't get too much in the weeds on technical matters unless it's really necessary.

On the Enron proposals Norman received:

[(b)(5)]

Thanks.

CC: DOPO5.ToohyF, YETTERJ

0100000001212

**From:** Tom McGivern  
**To:** CARLETONN, YETTERJ, DOPO5,TooheyF  
**Date:** 3/9/00 6:38pm  
**Subject:** Financial Netting provisions of H.R. 833 - bankruptcy bill

Attached for your review and edits is a draft letter from the Secretary on behalf of the Working Group regarding the financial netting provisions of the bankruptcy legislation. [(b)(6)], if you would send a version with your edits to other Working Group staff for their review that would be great. My thought is that this letter shouldn't get too much in the weeds on technical matters unless it's really necessary.

On the Enron proposals Norman received:

[(b)(5)]

Thanks.

**CC:** DORSEYK, CARROR

0100000001213

**3/9/2000 draft letter to bankruptcy conferees**

The Honorable Orrin G. Hatch  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Patrick J. Leahy  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Chairman Hatch and Senator Leahy:

[(b)(5)]

Sincerely,

Lawrence H. Summers

cc: The Honorable Charles E. Grassley  
The Honorable Robert Torricelli

**3/9/2000 draft letter to bankruptcy conferees**

The Honorable Henry Hyde  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
Washington, D.C.

The Honorable John Conyers, Jr.  
Committee on the Judiciary  
United States House of Representatives  
Washington, D.C.

Dear Chairman Hyde and Representative Conyers:

[(b)(5)]

0100000001216



Sincerely,

Lawrence H. Summers

cc: The Honorable George W. Gekas  
The Honorable Jerrold Nadler

0100000001217

**From:** Tom McGivern  
**To:** CARLETONN  
**Date:** 11/10/99 4:32pm  
**Subject:** enron letter

Norman, attached is the e-version of the letter I left with Lee Sachs.

0100000001218

November 10, 1999

The Honorable Senator Charles Grassley  
The Honorable Robert G. Torricelli  
Subcommittee on Administrative Oversight and the Courts  
Committee on the Judiciary  
United States Senate  
Washington, D.C.

Dear Chairman Grassley and Senator Torricelli:

[(b)(5)]

0100000001219

[(b)(5)]

Sincerely,

Lee Sachs  
Assistant Secretary for Financial Markets

0100000001220

**Mail Envelope Info:** (3829E48A.D26 : 5 : 53861)

**Subject:** enron letter  
**Creation Date:** 11/10/99 4:32pm  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6:MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
Post Office DOM3.DOPO6	Delivered	11/10/99 04:32pm
CARLETONN	Opened	11/10/99 05:05pm

<b>Domain.Post Office</b>	<b>Delivered</b>	<b>Route</b>
DOM3.DOPO6	11/10/99 04:32pm	DOM3.DOPO6

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MESSAGE	71	11/10/99 04:32pm

**Options**

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<b>Expiration Date:</b>	None
<b>Notify Recipients:</b>	Yes
<b>Priority:</b>	Normal
<b>Reply Requested:</b>	No
<b>Return Notification::</b>	None

<b>Concealed Subject:</b>	No
<b>Security:</b>	Normal

<b>To Be Delivered:</b>	Immediate
<b>Status Tracking:</b>	Delivered & Opened

0100000001221

**From:** Tom McGivern  
**To:** BARBOURG  
**Date:** 11/10/99 6:37pm  
**Subject:** bankruptcy letter

Gaylen, attached is the letter that Lee signed and that he is running by Gary. Just in case they decide they need a change, here it is.

0100000001222



November 10, 1999

The Honorable Senator Charles Grassley  
The Honorable Robert G. Torricelli  
Subcommittee on Administrative Oversight and the Courts  
Committee on the Judiciary  
United States Senate  
Washington, D.C.

Dear Chairman Grassley and Senator Torricelli:

[(b)(5)]

0100000001223

[(b)(5)]

Sincerely,

0100000001224

Lee Sachs  
Assistant Secretary for Financial Markets

**Mail Envelope Info:** (382A01C9.D26 : 5 : 53861)

**Subject:** bankruptcy letter  
**Creation Date:** 11/10/99 6:37pm  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6.MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
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BARBOURG	Opened	11/15/99 09:07am

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**Options**

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<b>Return Notification::</b>	None

<b>Concealed Subject:</b>	No
<b>Security:</b>	Normal

<b>To Be Delivered:</b>	Immediate
<b>Status Tracking:</b>	Delivered & Opened

**From:** Tom McGivern  
**To:** WOLINN, SCHMALZBACHK, EDSALLA, CohenD, MCINERNEYR,...  
**Date:** 11/10/99 3:20pm  
**Subject:** letter on Enron-proposed financial netting amendments

Neal:

[(b)(5)]

Let me know if you have questions or comments.

Tom

0100000001227

November 10, 1999

The Honorable Senator Charles Grassley  
The Honorable Robert G. Torricelli  
Subcommittee on Administrative Oversight and the Courts  
Committee on the Judiciary  
United States Senate  
Washington, D.C.

Dear Chairman Grassley and Senator Torricelli:

[(b)(5)]

0100000001228



[(b)(5)]

Sincerely,

Lee Sachs  
Assistant Secretary for Financial Markets

0100000001229

**Mail Envelope Info:** (382903A9.D26 : 5 : 53861)  
**Subject:** letter on Enron-proposed financial netting amendments  
**Creation Date:** 11/10/99 3:20pm  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6:MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
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CohenD	Opened	11/10/99 03:22pm
CONSTANTINEE	Opened	11/10/99 04:00pm
EDSALLA	Opened	11/10/99 04:19pm
MCINERNEYR	Opened	11/10/99 04:21pm
SCHMALZBACHK	Opened	11/12/99 05:48pm
WOLINN	Opened	11/10/99 03:21pm

<b>Domain.Post Office</b>	<b>Delivered</b>	<b>Route</b>
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MESSAGE	1218	11/10/99 03:20pm

**Options**  
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**Expiration Date:** None  
**Notify Recipients:** Yes  
**Priority:** High  
**Reply Requested:** No  
**Return Notification::** None

**Concealed Subject:** No  
**Security:** Normal

**To Be Delivered:** Immediate  
**Status Tracking:** Delivered & Opened

**From:** Tom McGivern  
**To:** ex.mail."Ronald\_E.\_Jones@omb.eop.gov"  
**Date:** 11/10/99 10:31am  
**Subject:** bankruptcy amendments

Ron:

Enron Corp. contacted Treasury about potential amendments they are seeking to the financial contract netting provisions (title IX) of S. 625. The netting provisions were the product of over two years of work by the agencies in the Working Group on Financial Markets that are designed to reduce systemic risk in the event of a failure of a financial concern with large holdings that might cause a ripple effect and spread to other firms.

After discussions between Working Group staff and Enron, the latter dropped a number of their proposals but still may be pushing the ones we address in the attached letter, which they also submitted to staff of the Senate Judiciary Committee. [(b)(5)]

proposed by Enron. Thanks.

I'll fax to you the amendments

Tom  
622-2317

**CC:** Dom13.DOPO7.ELMENDORFD, ex.mail."Sarah\_Rosen\_Warte...

0100000001231

The Honorable Senator Charles Grassley  
The Honorable Robert G. Torricelli  
Subcommittee on Administrative Oversight and the Courts  
Committee on the Judiciary  
United States Senate  
Washington, D.C.

Dear Chairman Grassley and Senator Torricelli:

[(b)(5)]

[(b)(5)]

Sincerely,

Lee Sachs  
Assistant Secretary for Financial Markets

01000000001233

**Mail Envelope Info:** (38298FB4.D26 : 5 : 53861)

**Subject:** bankruptcy amendments  
**Creation Date:** 11/10/99 10:31am  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6.MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
Post Office Dom13.DOPO7 ELMENDORFD CC	Delivered Opened	11/10/99 10:31am 11/10/99 11:36am
Post Office DOM3.DOPO5 TooheyF CC	Delivered Opened	11/10/99 10:31am 11/10/99 10:37am
Post Office ex.mail "Ronald_E_Jones@omb.eop.gov" "Sarah_Rosen_Wartell@opd.eop.gov" CC	Transferred	11/10/99 10:31am

<b>Domain.Post Office</b>	<b>Delivered</b>	<b>Route</b>
Dom13.DOPO7	11/10/99 10:31am	Dom13.DOPO7
DOM3.DOPO5	11/10/99 10:31am	DOM3.DOPO5
ex.mail		ex.mail

<b>Files</b>	<b>Size</b>	<b>Date &amp; Time</b>
ENRON.3	10229	11/10/99 05:04am
MESSAGE	1562	11/10/99 10:31am

**Options**  
**Auto Delete:** No  
**Expiration Date:** None  
**Notify Recipients:** Yes  
**Priority:** High  
**Reply Requested:** No  
**Return Notification::** None

**Concealed Subject:** No  
**Security:** Normal

**To Be Delivered:** Immediate  
**Status Tracking:** Delivered & Opened



**From:** Norman Carleton  
**To:** SachsL, MCGIVERNT, GREENEMI, STEWARTLAW, NICKOLOFF...  
**Date:** 9/15/99 11:18am  
**Subject:** Enron's Bankruptcy Proposals

Representatives of Enron have given their proposed amendments to the bankruptcy netting provisions to staff of the Senate Agriculture Committee. They hope that it will be included in a managers' amendment.

The concerns we have about the Enron proposal are:

[(b)(5)]

Comments, suggestions?

0100000001235

**Working Group Staff View of Proposed Enron/Cadwalader Changes**

**1. Amendments to the definition of "swap agreement"**

[(b)(5)]

**2. Exceptions to operation of the automatic stay**

[(b)(5)]

## Statutory changes proposed by Cadwalader/Enron

### 1. Amendments to the definition of "swap agreement"

#### a. Definition in S. 625:

"(53B) 'swap agreement'—

"(A) means—

"(i) an agreement, including the terms and conditions incorporated by reference in such agreement, that is—

"(I) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap;

"(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement;

"(III) a currency swap, option, future, or forward agreement;

"(IV) an equity index or an equity swap, option, future, or forward agreement;

"(V) a debt index or a debt swap, option, future, or forward agreement;

"(VI) a credit spread or a credit swap, option, future, or forward agreement; or

"(VII) a commodity index or a commodity swap, option, future, or forward agreement;

"(ii) an agreement or transaction that is similar to an agreement or transaction referred to in clause (i) that—

"(I) is currently, or in the future becomes, regularly entered into in the swap market (including terms and conditions incorporated by reference therein); and

"(II) is a forward, swap, future, or option on a rate, currency, commodity, equity security, or other equity instrument, on a debt security or other debt instrument, or on an economic index or measure of economic risk or value;

#### b. Proposed change:

"(53B) 'swap agreement'—

"(A) means—

"(i) an agreement, including the terms and conditions incorporated by reference in such agreement, that is—

"(I) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap;

"(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement;

"(III) a currency swap, option, future, or forward agreement;

"(IV) an equity index or an equity swap, option, future, or forward agreement;

"(V) a debt index or a debt swap, option, future, or forward agreement;

"(VI) a credit spread or a credit swap, option, future, or forward agreement; or

"(VII) a commodity index or a commodity swap, option, future, or forward agreement; or

- “(VIII) a weather swap, weather derivative, or weather option;
- “(ii) an agreement or transaction that is similar to an agreement or transaction referred to in clause (i) that—
- “(I) is currently, or in the future becomes, ~~regularly~~ entered into ~~in the~~ by swap market participants (including terms and conditions incorporated by reference therein); and
- “(II) is a forward, swap, future, or option on a rate, currency, commodity, equity security, or other equity instrument, on a debt security or other debt instrument, or on an economic or other index or measure of economic risk or value;

## 2. Exceptions to operation of the automatic stay

### a. Changes in S. 625:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [USCS § 78eee(a)(3)], does not operate as a stay—

\* \* \* \* \*

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by, pledged to, and under the control of, or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by, pledged to, and under the control of, or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

### b. Proposed change:

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in

section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for ~~a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of any payment or transfer due from the debtor under or in connection with commodity contracts, forward contracts, or securities contracts against any payment due to the debtor from a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency under or in connection with commodity contracts, forward contracts or securities contracts or against cash, securities, or other property held by, pledged to, and under the control of, or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;~~

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for ~~a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of any payment or transfer due from the debtor under or in connection with repurchase agreements against any payment due to the debtor from such repo participant under or in connection with repurchase agreements or against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;~~

**From:** Tom McGivern  
**To:** BELLEWS  
**Date:** 7/27/99 12:39pm  
**Subject:** 2 questions -Reply

Hi, here's the answers:

[OUTSIDE SCOPE , (b)(5)]

[(b)(5)]

>>> Sandra Bellew 07/27/99 12:02pm >>>  
Hello. Neal asked me to touch base with you on

[OUTSIDE SCOPE , (b)(5)]

[(b)(5)]

Thanks.

0100000001241

**Mail Envelope Info:** (379DE0B3.D26 : 5 : 53861)

**Subject:** 2 questions -Reply  
**Creation Date:** 7/27/99 12:39pm  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6:MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
Post Office DOM3.DOPO6	Delivered	07/27/99 12:39pm
BELLEWS	Opened	07/27/99 12:40pm

<b>Domain.Post Office</b>	<b>Delivered</b>	<b>Route</b>
DOM3.DOPO6	07/27/99 12:39pm	DOM3.DOPO6

<b>Files</b>	<b>Size</b>	<b>Date &amp; Time</b>
MESSAGE	1518	07/27/99 12:39pm

**Options**  
**Auto Delete:** No  
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**Priority:** Normal  
**Reply Requested:** No  
**Return Notification::** None

**Concealed Subject:** No  
**Security:** Normal

**To Be Delivered:** Immediate  
**Status Tracking:** Delivered & Opened



**From:** Tom McGivern  
**To:** CARLETONN  
**Date:** 6/17/99 3:19pm  
**Subject:** Conference Call with Cadwalader/Enron -Reply -Reply -Reply -Reply -Reply -Reply -Reply

I did not, since I didn't know who to invite. Do you want to call them?

>>> Norman Carleton 06/17/99 01:57pm >>>  
Tom,

Did you invite the FRBNY to participate in the call? If not, I think we should give Joyce Hansen or someone on her staff (Michael Nelson or Eric Foster) the opportunity to participate.

Thanks.

Norman

0100000001243

**Mail Envelope Info:** (37694A3B.D26 : 5 : 53861)

**Subject:** Conference Call with Cadwalader/Enron -Reply -Reply -Reply -Reply -Reply -Reply -Rep  
**Creation Date:** 6/17/99 3:19pm  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6:MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
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CARLETONN	Opened	06/17/99 03:22pm

<b>Domain.Post Office</b>	<b>Delivered</b>	<b>Route</b>
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<b>Files</b>	<b>Size</b>	<b>Date &amp; Time</b>
MESSAGE	324	06/17/99 03:19pm

**Options**

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<b>Notify Recipients:</b>	Yes
<b>Priority:</b>	Normal
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<b>Return Notification:::</b>	None

<b>Concealed Subject:</b>	No
<b>Security:</b>	Normal

<b>To Be Delivered:</b>	Immediate
<b>Status Tracking:</b>	Delivered & Opened

**From:** Tom McGivern  
**To:** DOM3.DOPO5(TooheyF), DOM3.DOPO6(CARTERJ, NICKOLOFF...  
**Date:** 6/17/99 10:28am  
**Subject:** Conference Call with Cadwalader/Enron -Reply -Reply -Reply -Reply -Reply

Enron has asked to change the time to 10:00 a.m., and the Fed and FDIC are okay with that.

>>> Norman Carleton 06/16/99 03:56pm >>>

We can do it in my office.

0100000001245

**Mail Envelope Info:** (3769060B.D26 : 5 : 53861)

**Subject:** Conference Call with Cadwalader/Enron -Reply -Reply -Reply -Reply -Reply  
**Creation Date:** 6/17/99 10:28am  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6:MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
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TooheyF	Opened	06/17/99 10:36am
Post Office DOM3.DOPO6	Delivered	06/17/99 10:28am
CARLETONN	Opened	06/17/99 10:36am
CARTERJ	Opened	06/17/99 10:39am
NICKOLOFFP	Opened	06/17/99 11:03am
SHELTONA (Alison Shelton)	Opened	06/17/99 12:37pm

<b>Domain.Post Office</b>	<b>Delivered</b>	<b>Route</b>
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DOM3.DOPO6	06/17/99 10:28am	DOM3.DOPO6

<b>Files</b>	<b>Size</b>	<b>Date &amp; Time</b>
MESSAGE	161	06/17/99 10:28am

**Options**

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<b>Priority:</b>	Normal
<b>Reply Requested:</b>	No
<b>Return Notification::</b>	None

<b>Concealed Subject:</b>	No
<b>Security:</b>	Normal

<b>To Be Delivered:</b>	Immediate
<b>Status Tracking:</b>	Delivered & Opened

0100000001246

From: Tom McGivern  
To: CARLETONN, SHELTONA, CARTERJ, NICKOLOFFP, DOPO5.To...  
Date: 6/16/99 3:54pm  
Subject: Conference Call with Cadwalader/Enron -Reply -Reply -Reply

The conference call with Enron/Cadwalader will be Friday morning at 10:30. They will initiate the call, so if we could be in one room here at Treasury that would make it slightly easier for them. The GC and Leg. Affairs conference rooms are booked, so maybe we should aim for someone's office. Norman?

I'll contact the other agencies to give them the time of the call and get the phone numbers to Cadwalader.

They plan to send us some additional explanatory material (probably what they're using to market this on the Hill, etc.). I will send that around as soon as it arrives. They would like to have a discussion and to find out if the agencies are opposed or supportive of their proposals. I committed only to listening, but said there likely would be some questions.

>>> Norman Carleton 06/16/99 03:12pm >>>

There's a steering group meeting tomorrow morning, so maybe Friday is better.

**Mail Envelope Info:** (3768010C.D26 : 5 : 53861)

**Subject:** Conference Call with Cadwalader/Enron -Reply -Reply -Reply  
**Creation Date:** 6/16/99 3:54pm  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6:MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
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TooheyF	Opened	06/16/99 04:08pm

Post Office DOM3.DOPO6	Delivered	06/16/99 03:54pm
CARLETONN	Opened	06/16/99 03:56pm
CARTERJ	Opened	06/16/99 04:11pm
NICKLOFFP	Opened	06/16/99 03:55pm
SHELTONA (Alison Shelton)	Opened	06/16/99 03:57pm

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MESSAGE	902	06/16/99 03:54pm

**Options**

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<b>Reply Requested:</b>	No
<b>Return Notification::</b>	None

<b>Concealed Subject:</b>	No
<b>Security:</b>	Normal

<b>To Be Delivered:</b>	Immediate
<b>Status Tracking:</b>	Delivered & Opened

0100000001248

**From:** Tom McGivern  
**To:** CARTERJ  
**Date:** 6/16/99 10:45am  
**Subject:** bankruptcy legislation -Forwarded -Reply -Reply -Reply

thanks Jana. We likely will do a teleconference. I'll let you know when it's going to happen so you can sit in if you want.

>>> Jana Carter 06/16/99 10:35am >>>

[(b)(5)]

thanks--Jana

>>> Tom McGivern 06/15/99 05:32pm >>>

[(b)(5)]

>>> Norman Carleton 06/15/99 04:48pm >>>

Alison,

[(b)(5)]

Tom and Lucy: Do you know anything more about this? Alison's question is attached.



**DEPARTMENT OF THE TREASURY**

WASHINGTON, D.C. 20220

(3767B875.D26 : 5 : 53861)

**Envelope Info:**

**Subject:** bankruptcy legislation -Forwarded -Reply -Reply -Reply  
**Creation Date:** 6/16/99 10:45am  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6:MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
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CARTERJ	Opened	06/16/99 10:45am

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MESSAGE	3082	06/16/99 10:45am

**Options**

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<b>Reply Requested:</b>	No
<b>Return Notification::</b>	None

<b>Concealed Subject:</b>	No
<b>Security:</b>	Normal

<b>To Be Delivered:</b>	Immediate
<b>Status Tracking:</b>	Delivered & Opened



**From:** Tom McGivern  
**To:** SHELTONA, CARTERJ  
**Date:** 6/15/99 5:32pm  
**Subject:** bankruptcy legislation -Forwarded -Reply

[(b)(5)]

>>> Norman Carleton 06/15/99 04:48pm >>>  
Alison,

[(b)(5)]

Tom and Lucy: Do you know anything more about this? Alison's question is attached.

**CC:** NICKOLOFFP, Dom13.DOPO7.HUFFMANL, CARLETONN, DOPO5...

0100000001251

**Mail Envelope Info:** (3766C65B.D26 : 5 : 53861)

**Subject:** bankruptcy legislation -Forwarded -Reply  
**Creation Date:** 6/15/99 5:32pm  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6:MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
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Post Office DOM3.DOPO5 TooheyF CC	Delivered Opened	06/15/99 05:32pm 06/16/99 08:23am
Post Office DOM3.DOPO6 CARLETONN CC CARTERJ NICKOLOFFP CC SHELTONA (Alison Shelton)	Delivered Opened Opened Opened	06/15/99 05:32pm 06/15/99 05:33pm 06/16/99 08:50am 06/16/99 09:29am

<b>Domain.Post Office</b>	<b>Delivered</b>	<b>Route</b>
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DOM3.DOPO5	06/15/99 05:32pm	DOM3.DOPO5
DOM3.DOPO6	06/15/99 05:32pm	DOM3.DOPO6

<b>Files</b>	<b>Size</b>	<b>Date &amp; Time</b>
MESSAGE	2448	06/15/99 05:32pm

**Options**  
**Auto Delete:** No  
**Expiration Date:** None  
**Notify Recipients:** Yes  
**Priority:** Normal  
**Reply Requested:** No  
**Return Notification::** None

**Concealed Subject:** No  
**Security:** Normal

**To Be Delivered:** Immediate  
**Status Tracking:** Delivered & Opened

**From:** Tom McGivern  
**To:** GENSLERG, SachsL, CARLETONN  
**Date:** 6/3/99 3:48pm  
**Subject:** Working Group Comments on Enron/Cadwalader Proposals -Reply -Reply

[(b)(5)]

This afternoon Cadwalader called to see what the Working Group reaction was to their proposed changes. I told them that the Working Group still was considering them but that the early reaction was not altogether in favor of all of the changes. They would like to come in and discuss the proposals with some subset of Working Group staff.

[(b)(5)]

**CC:** DOPO5.ToohyF, CARTERJ, SHELTONA

0100000001253

**Mail Envelope Info:** (3756DC0A.D26 : 5 : 53861)

**Subject:** Working Group Comments on Enron/Cadwalader Proposals -Reply -Reply  
**Creation Date:** 6/3/99 3:48pm  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6:MCGIVERNT

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TooheyF CC	Opened	06/03/99 03:51pm
Post Office DOM3.DOPO6	Delivered	06/03/99 03:48pm
CARLETONN	Opened	06/03/99 03:53pm
CARTERJ CC	Opened	06/04/99 08:57am
GENSLERG (Gary Gensler)		
SachsL		
SHELTONA CC (Alison Shelton)	Opened	06/03/99 04:24pm
Domain.Post Office	Delivered	Route
DOM3.DOPO5	06/03/99 03:48pm	DOM3.DOPO5
DOM3.DOPO6	06/03/99 03:48pm	DOM3.DOPO6

Files	Size	Date & Time
MESSAGE	922	06/03/99 03:48pm

**Options**

Auto Delete:	No
Expiration Date:	None
Notify Recipients:	Yes
Priority:	Normal
Reply Requested:	No
Return Notification::	None

Concealed Subject:	No
Security:	Normal

To Be Delivered:	Immediate
Status Tracking:	Delivered & Opened

0100000001254

**From:** Tom McGivern  
**To:** WOLINN  
**Date:** 6/3/99 3:28pm  
**Subject:** Working Group Comments on Enron/Cadwalader Proposals -Reply -Forwarded -Reply

[(b)(5)]

Let me know if you want more or less info.

>>> Neal Wolin 06/03/99 01:42pm >>>

I have not understood this series of emails. Is there anything here I need to know?

0100000001255

**Mail Envelope Info:** (3756D74D.D26 : 5 : 53861)

**Subject:** Working Group Comments on Enron/Cadwalader Proposals -Reply -Forwarded -Reply  
**Creation Date:** 6/3/99 3:28pm  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6:MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
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WOLINN	Opened	06/08/99 02:56pm

<b>Domain,Post Office</b>	<b>Delivered</b>	<b>Route</b>
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<b>Files</b>	<b>Size</b>	<b>Date &amp; Time</b>
MESSAGE	3433	06/03/99 03:28pm

**Options**

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<b>Notify Recipients:</b>	Yes
<b>Priority:</b>	Normal
<b>Reply Requested:</b>	No
<b>Return Notification::</b>	None

<b>Concealed Subject:</b>	No
<b>Security:</b>	Normal

<b>To Be Delivered:</b>	Immediate
<b>Status Tracking:</b>	Delivered & Opened

**From:** Tom McGivern  
**To:** DOPO5.ToohyF  
**Date:** 6/3/99 10:53am  
**Subject:** Working Group Comments on Enron/Cadwalader Proposals -Forwarded

[(b)(5)]

Thanks.

0100000001257

**From:** Tom McGivern  
**To:** GENSLERG, SachsL, CARLETONN  
**Date:** 5/27/99 12:06pm  
**Subject:** Working Group Comments on Enron/Cadwalader Proposals

I plan to send these along as I receive them.

5/27/99 phone conversation with Mike Kremminger, FDIC

[(b)(5)]

**CC:** SHELTONA, CARTERJ, WOLINN, MCINERNEYR, Dom13.DOPO7...

0100000001258



**Mail Envelope Info:** (374D6D2C.D26 : 5 : 53861)  
**Subject:** Working Group Comments on Enron/Cadwalader Proposals  
**Creation Date:** 5/27/99 12:05pm  
**From:** Tom McGivern  
**Created By:** DOM3.DOPO6.MCGIVERNT

**Recipients**

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MCCLELLANM CC

Post Office DOM3.DOPO5  
TocheyF CC

Post Office DOM3.DOPO6  
CARLETONN  
CARTERJ CC  
GENSLERG (Gary Gensler)  
MCINERNEYR CC  
Sachsl  
SHELTONA CC (Alison Shelton)  
WOLINN CC

**Domain.Post Office**

Dom13.DOPO7  
DOM3.DOPO5  
DOM3.DOPO6

**Route**

Dom13.DOPO7  
DOM3.DOPO5  
DOM3.DOPO6

**Files**

MESSAGE

**Size**

1913

**Date & Time**

05/27/99 12:05pm

**Options**

**Expiration Date:** None  
**Priority:** Normal  
**Reply Requested:** No  
**Return Notification::** None

**Concealed Subject:** No  
**Security:** Normal

**Mail Envelope Info:** (375696FD.D26 : 5 : 53861)

**Subject:** Working Group Comments on Enron/Cadwalader Proposals -Forwarded  
**Creation Date:** 6/3/99 10:53am  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6:MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
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TocheyF	Opened	06/03/99 01:02pm

<b>Domain.Post Office</b>	<b>Delivered</b>	<b>Route</b>
DOM3.DOPO5	06/03/99 10:54am	DOM3.DOPO5

<b>Files</b>	<b>Size</b>	<b>Date &amp; Time</b>
Mail MESSAGE	896	06/03/99 10:53am

**Options**

<b>Auto Delete:</b>	No
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<b>Priority:</b>	Normal
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<b>Return Notification::</b>	None

<b>Concealed Subject:</b>	No
<b>Security:</b>	Normal

<b>To Be Delivered:</b>	Immediate
<b>Status Tracking:</b>	Delivered & Opened

0100000001260

**From:** Tom McGivern  
**To:** GENSLERG, SachsL, CARLETONN  
**Date:** 5/27/99 12:05pm  
**Subject:** Working Group Comments on Enron/Cadwalader Proposals

I plan to send these along as I receive them.

5/27/99 phone conversation with Mike Kremminger, FDIC

[(b)(5)]

**CC:** SHELTONA, CARTERJ, WOLINN, MCINERNEYR, Dom13.DOPO7...

0100000001261

**Mail Envelope Info:** (374D6D2C.D26 : 5 : 53861)

**Subject:** Working Group Comments on Enron/Cadwalader Proposals  
**Creation Date:** 5/27/99 12:05pm  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6:MCGIVERNT

Recipients	Action	Date & Time
Post Office Dom13.DOPO7	Delivered	05/27/99 12:05pm
MCCLELLANM CC	Opened	05/27/99 12:14pm
Post Office DOM3.DOPO5	Delivered	05/27/99 12:05pm
ToohyF CC	Opened	05/27/99 01:01pm
Post Office DOM3.DOPO6	Delivered	05/27/99 12:04pm
CARLETONN	Opened	05/27/99 12:07pm
CARTERJ CC	Opened	05/27/99 12:41pm
GENSLERG (Gary Gensler)	Opened	06/01/99 09:12am
MCINERNEYR CC	Opened	05/27/99 05:44pm
SachsL	Opened	05/28/99 08:28am
SHELTONA CC (Alison Shelton)	Opened	05/27/99 12:41pm
WOLINN CC	Opened	05/27/99 08:34pm
Domain.Post Office	Delivered	Route
Dom13.DOPO7	05/27/99 12:05pm	Dom13.DOPO7
DOM3.DOPO5	05/27/99 12:05pm	DOM3.DOPO5
DOM3.DOPO6	05/27/99 12:04pm	DOM3.DOPO6

Files	Size	Date & Time
MESSAGE	1913	05/27/99 12:05pm

**Options**

**Auto Delete:** No  
**Expiration Date:** None  
**Notify Recipients:** Yes  
**Priority:** Normal  
**Reply Requested:** No  
**Return Notification::** None

**Concealed Subject:** No  
**Security:** Normal

**To Be Delivered:** Immediate  
**Status Tracking:** Delivered & Opened

**From:** Tom McGivern  
**To:** Ron Jones - OMB  
**Date:** 5/3/99 1:35pm  
**Subject:** Interior proposed amendment on H.R. 833

A few technical edits. [(b)(5)]

Letter

[(b)(5)]

Comments document

[(b)(5)]

Draft Bill

[(b)(5)]

**Mail Envelope Info:** (372DDE71.D26 : 5 : 53861)  
**Subject:** Interior proposed amendment on H.R. 833  
**Creation Date:** 5/3/99 1:35pm  
**From:** Tom McGivern

**Created By:** DOM3.DOPO6.MCGIVERNT

<b>Recipients</b>	<b>Action</b>	<b>Date &amp; Time</b>
Post Office EX.MAIL "Ronald_E._Jones@omb.eop.gov"	Transferred	05/03/99 01:36pm

<b>Domain.Post Office</b>	<b>Delivered</b>	<b>Route</b>
EX.MAIL		EX.MAIL

<b>Files</b>	<b>Size</b>	<b>Date &amp; Time</b>
MESSAGE	964	05/03/99 01:35pm

**Options**  
**Auto Delete:** No  
**Expiration Date:** None  
**Notify Recipients:** Yes  
**Priority:** High  
**Reply Requested:** No  
**Return Notification::** None

**Concealed Subject:** No  
**Security:** Normal

**To Be Delivered:** Immediate  
**Status Tracking:** Delivered & Opened

**From:** Kenneth Schmalzbach  
**To:** DOPOS (ROBERTSONL)  
**Date:** 1/18/00 8:47am  
**Subject:** Conflicts -Reply

[(b)(5)]

>>> Linda Robertson 01/14/00 05:53pm >>>

[(b)(5)]

Thanks for your assistance.

0100000001271

From: Linda Robertson  
To: DOPO6.SCHMALZBACHK  
Date: 5/4/00 8:38am  
Subject: Decision making

[(b)(5)]

Is that ok?

0100000001272



**From:** Kenneth Schmalzbach  
**To:** DOPOS (ROBERTSONL)  
**Date:** 5/4/00 11:33am  
**Subject:** Employment -Reply

Linda: [(b)(5)]

Please call me if you have any questions  
regarding the scope of [(b)(5)]

>>> Linda Robertson 05/04/00 08:34am >>>

[(b)(5)]

Rahilly, Lyn

---

**From:** Kenneth Schmalzbach [DOM3.DOPO6.gwSCHMALZBACHK] on behalf of  
DOM3.DOPO6.gwSCHMALZBACHK  
**Sent:** Wednesday, October 03, 2001 3:49 PM  
**To:** Rahilly, Lyn  
**Subject:** Conflict -Forwarded

—Original Message—

**Date:** 06/16/2000 11:04 am -0400 (Friday)  
**From:** Linda Robertson  
**To:** DOPO6.SCHMALZBACHK  
**Subject:** Conflict

[(b)(5)]

6/19/00

**From:** Kenneth Schmalzbach  
**To:** DOPOS (ROBERTSONL)  
**Date:** 6/16/00 5:50pm  
**Subject:** Conflict -Reply

Linda: [(b)(5)]

>>> Linda Robertson 06/16/00 11:04am >>>

[(b)(5)]

Rahilly, Lyn

---

**From:** Kenneth Schmalzbach [DOM3.DOPO6.gwSCHMALZBACHK] on behalf of  
DOM3.DOPO6.gwSCHMALZBACHK  
**Sent:** Wednesday, October 03, 2001 3:58 PM  
**To:** Rahilly, Lyn  
**Subject:** Conflict -Reply -Forwarded

—Original Message—

**Date:** 06/16/2000 05:50 pm -0400 (Friday)  
**From:** Kenneth Schmalzbach  
**To:** DOPO5(ROBERTSONL)  
**Subject:** Conflict -Reply

Linda: [(b)(5)]

> > > Linda Robertson 06/16/00 11:04am > > >  
[(b)(5)]

Rahilly, Lyn

---

**From:** Kenneth Schmalzbach [DOM3.DOPO6.gwSCHMALZBACHK] on behalf of  
DOM3.DOPO6.gwSCHMALZBACHK  
**Sent:** Wednesday, October 03, 2001 4:01 PM  
**To:** Rahilly, Lyn  
**Subject:** Conflict -Reply -Reply -Forwarded

—Original Message—

Date: 06/18/2000 12:00 pm -0400 (Sunday)  
From: Linda Robertson  
To: DOPO6(SCHMALZBACHK)  
Subject: Conflict -Reply -Reply

[(b)(5)]

> > > Kenneth Schmalzbach 06/16/00 05:50pm > > >  
Linda: [(b)(5)]

> > > Linda Robertson 06/16/00 11:04am > > >  
[(b)(5)]

**Rahilly, Lyn**

---

**From:** Kenneth Schmalzbach [DOM3.DOPO6.gwSCHMALZBACHK] on behalf of  
DOM3.DOPO6.gwSCHMALZBACHK  
**Sent:** Wednesday, October 03, 2001 3:59 PM  
**To:** Rahilly, Lyn  
**Subject:** Conflict -Reply -Reply -Reply -Forwarded

—Original Message—

**Date:** 06/19/2000 11:30 am -0400 (Monday)  
**From:** Kenneth Schmalzbach  
**To:** DOPO5(ROBERTSONL)  
**Subject:** Conflict -Reply -Reply -Reply

[(b)(5)]

> > > Linda Robertson 06/18/00 12:00pm > > >

[(b)(5)]

> > > Kenneth Schmalzbach 06/16/00 05:50pm > > >  
Linda: [(b)(5)]

> > > Linda Robertson 06/16/00 11:04am > > >  
[(b)(5)]

Rahilly, Lyn

---

**From:** Kenneth Schmalzbach [DOM3.DOPO6.gwSCHMALZBACHK] on behalf of  
DOM3.DOPO6.gwSCHMALZBACHK  
**Sent:** Wednesday, October 03, 2001 4:01 PM  
**To:** Rahilly, Lyn  
**Subject:** Conflict -Reply -Reply -Reply -Reply -Forwarded

—Original Message—

**Date:** 06/19/2000 11:51 am -0400 (Monday)  
**From:** Linda Robertson  
**To:** DOPO6(SCHMALZBACHK)  
**Subject:** Conflict -Reply -Reply -Reply -Reply

[(b)(5)]

> > > Kenneth Schmalzbach 06/19/00 11:30am > > >  
What's the Portman Cardin pension legislation?

> > > Linda Robertson 06/18/00 12:00pm > > >  
[(b)(5)]

> > > Kenneth Schmalzbach 06/16/00 05:50pm > > >  
Linda: [(b)(5)]

> > > Linda Robertson 06/16/00 11:04am > > >  
[(b)(5)]

**Rahilly, Lyn**

---

**From:** Kenneth Schmalzbach [DOM3.DOPO6.gwSCHMALZBACHK] on behalf of  
DOM3.DOPO6.gwSCHMALZBACHK  
**Sent:** Wednesday, October 03, 2001 3:59 PM  
**To:** Rahilly, Lyn  
**Subject:** Conflict -Reply -Reply -Reply -Reply -Reply -Forwarded

—Original Message—

Date: 06/26/2000 09:14 am -0400 (Monday)  
From: Kenneth Schmalzbach  
To: DOPO5(ROBERTSONL)  
Subject: Conflict -Reply -Reply -Reply -Reply -Reply

[(b)(5)]

> > > Linda Robertson 06/19/00 11:51am > > >

[(b)(5)]

> > > Kenneth Schmalzbach 06/19/00 11:30am > > >

[(b)(5)]

> > > Linda Robertson 06/18/00 12:00pm > > >

[(b)(5)]

> > > Kenneth Schmalzbach 06/16/00 05:50pm > > >

Linda: [(b)(5)]

> > > Linda Robertson 06/16/00 11:04am > > >

[(b)(5)]



Rahilly, Lyn

---

**From:** Kenneth Schmalzbach [DOM3.DOPO6.gwSCHMALZBACHK] on behalf of  
DOM3.DOPO6.gwSCHMALZBACHK  
**Sent:** Wednesday, October 03, 2001 4:02 PM  
**To:** Rahilly, Lyn  
**Subject:** Me -Forwarded

—Original Message—

**Date:** 10/11/2000 10:49 am -0400 (Wednesday)  
**From:** Linda Robertson  
**To:** SandbergS, SMITHM, DOPO6.WOLINN, THOMASM, DOPO6.SCHMALZBACHK  
**Subject:** Me

As you know, I have accepted a position with Enron. They want to put out a press release today announcing this (Yes, Michelle, you know how thrilled I am about that). I have a copy of it. [(b)(5)]

Thanks

much.

**From:** Tom McGivern  
**To:** CARLETONN, YETTERJ, DOPO5.ToohyF  
**Date:** 3/9/00 6:36pm  
**Subject:** Financial Netting provisions of H.R. 833 - bankruptcy bill

Attached for your review and edits is a draft letter from the Secretary on behalf of the Working Group regarding the financial netting provisions of the bankruptcy legislation. [(b)(6)]  
if you would send a version with your edits to other Working Group staff for their review that would be great. My thought is that this letter shouldn't get too much in the weeds on technical matters unless it's really necessary.

On the Enron proposals Norman received:

[(b)(5)]

Thanks.

**CC:** DORSEYK, CARROR

0100000001371

November 10, 1999

The Honorable Senator Charles Grassley  
The Honorable Robert G. Torricelli  
Subcommittee on Administrative Oversight and the Courts  
Committee on the Judiciary  
United States Senate  
Washington, D.C.

Dear Chairman Grassley and Senator Torricelli:

[(b)(5)]

0100000001372

[(b)(5)]

Sincerely,

Lee Sachs  
Assistant Secretary for Financial Markets

## Statutory changes proposed by Cadwalader/Enron

### 1. Amendments to the definition of “swap agreement”

#### a. Definition in S. 625:

“(53B) ‘swap agreement’—

“(A) means—

“(i) an agreement, including the terms and conditions incorporated by reference in such agreement, that is—

“(I) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap;

“(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement;

“(III) a currency swap, option, future, or forward agreement;

“(IV) an equity index or an equity swap, option, future, or forward agreement;

“(V) a debt index or a debt swap, option, future, or forward agreement;

“(VI) a credit spread or a credit swap, option, future, or forward agreement; or

“(VII) a commodity index or a commodity swap, option, future, or forward agreement;

“(ii) an agreement or transaction that is similar to an agreement or transaction referred to in clause (i) that—

“(I) is currently, or in the future becomes, regularly entered into in the swap market (including terms and conditions incorporated by reference therein); and

“(II) is a forward, swap, future, or option on a rate, currency, commodity, equity security, or other equity instrument, on a debt security or other debt instrument, or on an economic index or measure of economic risk or value;

#### b. Proposed change:

“(53B) ‘swap agreement’—

“(A) means—

“(i) an agreement, including the terms and conditions incorporated by reference in such agreement, that is—

“(I) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap;

“(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement;

“(III) a currency swap, option, future, or forward agreement;

“(IV) an equity index or an equity swap, option, future, or forward agreement;

“(V) a debt index or a debt swap, option, future, or forward agreement;

“(VI) a credit spread or a credit swap, option, future, or forward agreement; or

“(VII) a commodity index or a commodity swap, option, future, or forward agreement; or

“(VIII) a weather swap, weather derivative, or weather option;

“(ii) an agreement or transaction that is similar to an agreement or transaction

referred to in clause (i) that—

“(I) is currently, or in the future becomes, ~~regularly~~ entered into ~~in the~~ by swap market participants (including terms and conditions incorporated by reference therein); and

“(II) is a forward, swap, future, or option on a rate, currency, commodity, equity security, or other equity instrument, on a debt security or other debt instrument, or on an economic or other index or measure of economic risk or value;

## 2. Exceptions to operation of the automatic stay

### a. Changes in S. 625:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [USCS § 78eeee(a)(3)], does not operate as a stay—

\* \* \* \* \*

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by, pledged to, and under the control of, or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by, pledged to, and under the control of, or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

### b. Proposed change:

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section

~~†01 or 741 of this title, arising out of~~ any payment or transfer due from the debtor under or in connection with commodity contracts, forward contracts, or securities contracts against any payment due to the debtor from a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency under or in connection with commodity contracts, forward contracts or securities contracts or against cash, securities, or other property held by, pledged to, and under the control of, or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for ~~a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title,~~ arising out of any payment or transfer due from the debtor under or in connection with repurchase agreements against any payment due to the debtor from such repo participant under or in connection with repurchase agreements or against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

**Working Group Staff View of Proposed Enron/Cadwalader Changes**

[(b)(5)]



[(b)(5)]

**Working Group Comments on Enron/Cadwalader Proposals**

**5/27/99 phone conversation with Mike Kremminger, FDIC**

[(b)(5)]

**From:** Norman Carleton  
**To:** GENSLERG, SachsL, MCGIVERNT  
**Date:** 6/1/99 5:36pm  
**Subject:** Working Group Comments on Enron/Cadwalader Proposals -Reply

[(b)(5)]

[(b)(5)]

**CC:** Dom13.DOPO7.MCCLELLANM, DOPO5.ToohyF, CARTERJ, MC...

**From:** Norman Carleton  
**To:** GENSLERG, SachsL, MCGIVERNT  
**Date:** 6/2/99 9:52am  
**Subject:** Working Group Comments on Enron/Cadwalader Proposals -Reply

Attached are Eric Foster's comments on the Enron proposals. I sent a message about this yesterday.

**CC:** Dom13.DOPO7.MCCLELLANM, DOPO5.ToohyF, CARTERJ, MC...

**From:** ex.mail."Eric.Foster@ny.frb.org"  
**To:** ex.mail("Norman.Carleton"),DOM3.DOPO6(CARLETONN)  
**Date:** 6/2/99 8:38am  
**Subject:** Fwd: comments

see attached comments

Norm, having reviewed Enron's proposed changes to the pending bankruptcy bill, I have the following comments. [(b)(5)]

[(b)(5)]

Norm, feel free to call me to discuss further any of these comments.

0100000001381

## Statutory changes proposed by Cadwalader/Enron

### 1. Definition of "forward contract merchant"

#### a. Definition in S. 625:

(3) by striking paragraph (26) and inserting the following:

"(26) 'forward contract merchant' means a Federal reserve bank, or an entity, the business of which consists in whole or in part of entering into forward contracts as or with merchants or in a commodity, as defined or in section 761, or any similar good, article, service, right, or interest that is presently or in the future becomes the subject of dealing or in the forward contract trade;"

#### b. Proposed change:

(3) by striking paragraph (26) and inserting the following:

"(26) 'forward contract merchant' means an entity that, at any time before the filing of the petition, has an outstanding forward contract with the debtor;"

### 2. Exceptions to operation of the automatic stay

#### a. Changes in S. 625:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [USCS § 78eee(a)(3)], does not operate as a stay—

• • • • •

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by, pledged to, and under the control of, or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by, pledged to,

and under the control of, or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

b. Proposed change:

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of any payment or transfer due from the debtor under or in connection with commodity contracts, forward contracts, or securities contracts against any payment due to the debtor from a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency under or in connection with commodity contracts, forward contracts or securities contracts or against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of any payment or transfer due from the debtor under or in connection with repurchase agreements against any payment due to the debtor from such repo participant under or in connection with repurchase agreements or against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

### 3. Amendments to the definition of “swap agreement”

a. Definition in S. 625:

“(53B) ‘swap agreement’—

“(A) means—

“(i) an agreement, including the terms and conditions incorporated by reference in such agreement, that is—

\* \* \* \* \*

“(ii) an agreement or transaction that is similar to an agreement or transaction referred to in clause (i) that—

“(I) is currently, or in the future becomes, regularly entered into in the swap market (including terms and conditions incorporated by reference therein); and

“(II) is a forward, swap, future, or option on a rate,

currency, commodity, equity security, or other equity instrument, on a debt security or other debt instrument, or on an economic index or measure of economic risk or value;

b. Proposed change:

“(53B) ‘swap agreement’—

“(A) means—

“(i) an agreement, including the terms and conditions incorporated by reference in such agreement, that is—

\* \* \* \* \*

“(ii) an agreement or transaction that is similar to an agreement or transaction referred to in clause (i) that—

“(I) is currently, or in the future becomes, **regularly** entered into in the swap market (including terms and conditions incorporated by reference therein); and

“(II) is a forward, swap, future, or option on a rate, currency, commodity, equity security, or other equity instrument, on a debt security or other debt instrument, or on an economic or other index or measure of economic risk or value;

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.

1           “(v) a security agreement or arrange-  
2           ment or other credit enhancement related  
3           to any agreement or transaction referred  
4           to in clause (i), (ii), (iii), or (iv), but not  
5           to exceed the actual value of such contract  
6           on the date of the filing of the petition;  
7           and

8           “(B) does not include a repurchase obliga-  
9           tion under a participation in a commercial  
10          mortgage loan,

11          and, for purposes of this paragraph, the term ‘quali-  
12          fied foreign government security’ means a security  
13          that is a direct obligation of, or that is fully guaran-  
14          teed by, the central government of a member of the  
15          Organization for Economic Cooperation and Devel-  
16          opment.”;

17          (D) in paragraph (48) by inserting “or ex-  
18          empt from such registration under such section  
19          pursuant to an order of the Securities and Ex-  
20          change Commission” after “1934”; and

21          (E) by amending paragraph (53B) to read  
22          as follows:

23          “(53B) ‘swap agreement’—

24          “(A) means—

1           “(i) any agreement, including the  
2           terms and conditions incorporated by ref-  
3           erence in such agreement, which is an in-  
4           terest rate swap, option, future, or forward  
5           agreement, including a rate floor, rate cap,  
6           rate collar, cross-currency rate swap, and  
7           basis swap; a spot, same day-tomorrow, to-  
8           morrow-next, forward, or other foreign ex-  
9           change or precious metals agreement; a  
10          currency swap, option, future, or forward  
11          agreement; an equity index or an equity  
12          swap, option, future, or forward agree-  
13          ment; a debt index or a debt swap, option,  
14          future, or forward agreement; a credit  
15          spread or a credit swap, option, future, or  
[(b)(5)]

1 conditions incorporated by reference  
2 therein); and

3 “(II) is a forward, swap, future,  
4 or option on one or more rates, cur-  
5 rences commodities, equity securities,  
6 or other equity instruments, debt se-  
7 curities or other debt instruments, or

[(b)(5)]

10 “(iii) any combination of agreements  
11 or transactions referred to in this para-  
12 graph;

13 “(iv) any option to enter into an  
14 agreement or transaction referred to in  
15 this paragraph;

16 “(v) a master agreement that provides  
17 for an agreement or transaction referred to  
18 in clause (i), (ii), (iii), or (iv), together  
19 with all supplements to any such master  
20 agreement, and without regard to whether  
21 the master agreement contains an agree-  
22 ment or transaction that is not a swap  
23 agreement under this paragraph, except  
24 that the master agreement shall be consid-  
25 ered to be a swap agreement under this

1 paragraph only with respect to each agree-  
2 ment or transaction under the master  
3 agreement that is referred to in clause (i),  
4 (ii), (iii), or (iv); or

5 “(B) any security agreement or arrange-  
6 ment or other credit enhancement related to  
7 any agreements or transactions referred to in  
8 subparagraph (A); and

9 “(C) is applicable for purposes of this title  
10 only and shall not be construed or applied so as  
11 to challenge or affect the characterization, defi-  
12 nition, or treatment of any swap agreement  
13 under any other statute, regulation, or rule, in-  
14 cluding the Securities Act of 1933, the Securi-  
15 ties Exchange Act of 1934, the Public Utility  
16 Holding Company Act of 1935, the Trust In-  
17 denture Act of 1939, the Investment Company  
18 Act of 1940, the Investment Advisers Act of  
19 1940, the Securities Investor Protection Act of  
20 1970, the Commodity Exchange Act, and the  
21 regulations prescribed by the Securities and Ex-  
22 change Commission or the Commodity Futures  
23 Trading Commission.”;

24 (2) by amending section 741(7) to read as fol-  
25 lows:

1 (F) by inserting after paragraph (31) the  
2 following new paragraph:

3 “(32) under subsection (a), of the setoff by a  
4 master netting agreement participant of a mutual  
5 debt and claim under or in connection with one or  
6 more master netting agreements or any contract or  
7 agreement subject to such agreements that con-  
8 stitutes the setoff of a claim against the debtor for  
9 any payment or other transfer of property due from  
10 the debtor under or in connection with such agree-  
11 ments or any contract or agreement subject to such  
12 agreements against any payment due to the debtor  
13 from such master netting agreement participant  
14 under or in connection with such agreements or any  
15 contract or agreement subject to such agreements or  
16 against cash, securities, or other property held by,  
17 pledged or and under the control of, or due from  
18 such master netting agreement participant to mar-  
19 gin, guarantee, secure, or settle such agreements or  
20 any contract or agreement subject to such agree-  
21 ments, to the extent such participant is eligible to  
22 exercise such offset rights under paragraph (6), (7),  
23 or (17) for each individual contract covered by the  
24 master netting agreement in issue.”.

1 termination, liquidation, or acceleration of one or  
2 more swap agreements”.

3 (k) LIQUIDATION, TERMINATION, ACCELERATION, OR  
4 OFFSET UNDER A MASTER NETTING AGREEMENT AND  
5 ACROSS CONTRACTS.—(1) Title 11, United States Code,  
6 is amended by inserting after section 560 the following:  
7 **“§ 561. Contractual right to terminate, liquidate, ac-**  
8 **celerate, or offset under a master netting**  
9 **agreement and across contracts**

10 “(a) IN GENERAL.—Subject to subsection (b), the ex-  
11 ercise of any contractual right, because of a condition of  
12 the kind specified in section 365(e)(1), to cause the termi-  
13 nation, liquidation, or acceleration of or to offset or net  
14 termination values, payment amounts or other transfer ob-  
15 ligations arising under or in connection with one or more  
16 (or the termination, liquidation, or acceleration of one or  
17 more)—

18 “(1) securities contracts, as defined in section  
19 741(7);

20 “(2) commodity contracts, as defined in section  
21 761(4);

22 “(3) forward contracts;

23 “(4) repurchase agreements;

24 “(5) swap agreements; or

25 “(6) master netting agreements,

1 shall not be stayed, avoided, or otherwise limited by oper-  
2 ation of any provision of this title or by any order of a  
3 court or administrative agency in any proceeding under  
4 this title.

5       “(b) EXCEPTION.—

6               “(1) A party may exercise a contractual right  
7 described in subsection (a) to terminate, liquidate, or  
8 accelerate only to the extent that such party could  
9 exercise such a right under section 555, 556, 559,  
10 or 560 for each individual contract covered by the  
11 master netting agreement in issue.

12               “(2) If a debtor is a commodity broker subject  
13 to subchapter IV of chapter 7 of this title—

14                       “(A) a party may not net or offset an obli-  
15 gation to the debtor arising under, or in con-  
16 nection with, a commodity contract against any  
17 claim arising under, or in connection with,  
18 other instruments, contracts, or agreements  
19 listed in subsection (a) except to the extent the  
20 party has positive net equity in the commodity  
21 accounts at the debtor, as calculated under sub-  
22 chapter IV; and

23                       “(B) another commodity broker may not  
24 net or offset an obligation to the debtor arising  
25 under, or in connection with, a commodity con-



1           tract entered into or held on behalf of a cus-  
2           tomer of the debtor against any claim arising  
3           under, or in connection with, other instruments,  
4           contracts, or agreements listed in subsection  
5           (a).

6           “(c) DEFINITION.—As used in this section, the term  
7 ‘contractual right’ includes a right set forth in a rule or  
8 bylaw of a national securities exchange, a national securi-  
9 ties association, or a securities clearing agency, a right  
10 set forth in a bylaw of a clearing organization or contract  
11 market or in a resolution of the governing board thereof,  
12 and a right, whether or not evidenced in writing, arising  
13 under common law, under law merchant, or by reason of  
14 normal business practice.”.

15           (2) CONFORMING AMENDMENT.—The table of sec-  
16 tions of chapter 9 of title 11, United States Code, is  
17 amended by inserting after the item relating to section  
18 560 the following:

“561. Contractual right to terminate, liquidate, accelerate, or offset under a  
master netting agreement and across contracts.

19           (1) ANCILLARY PROCEEDINGS.—Section 304 of title  
20 11, United States Code, is amended by adding at the end  
21 the following:

22           “(d) Any provisions of this title relating to securities  
23 contracts, commodity contracts, forward contracts, repur-  
24 chase agreements, swap agreements, or master netting



## DEPARTMENT OF THE TREASURY

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TELEPHONE: 202-622-2317  
FAX: 202-622-1188  
E-MAIL: tom.mcgivern@do.treas.gov

DATE: JUNE 18, 1999

NUMBER OF PAGES TO FOLLOW: 2

---

TO: OLIVER IRELAND  
MIKE KRIMMINGER  
DAN WALDMAN

FROM: TOM MCGIVERN  
DEPUTY ASSOCIATE GENERAL COUNSEL

SUBJECT: Participants for 6/18/99 conference call at 10:00 a.m.

---

COMMENTS: The Enron/Cadwalader participants are on the accompanying pages, along with their brief explanation of the proposed changes.

<u>Treasury:</u>	Norman Carleton Tom McGivern	202-622-1855
<u>FRB:</u>	Oliver Ireland	202-452-3625
<u>FDIC:</u>	Mike Krimminger	202-898-8950
<u>CFTC:</u>	Dan Waldman	202-418-5115

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0100000001401

**CADWALADER, WICKERSHAM & TAFT**

1333 New Hampshire Avenue, NW

Washington, DC 20036

(202) 862-2200

Fax number: (202) 862-2400

From: ELLEN LEVINSON	No. of pages including cover: 2	Date: June 17, 1999
----------------------	---------------------------------	---------------------

**FOR IMMEDIATE DELIVERY TO:**

1) Name: Tom McGivern, Esq. Deputy Associate General Counsel	Fax No.: 622-1188
Firm: Department of the Treasury	Confirmation No.: 622-2317

Dear Tom:

I received your fax with the names and phone numbers for the conference call at 10:00 am on June 18, 1999. Thank you for organizing the meeting and making the change in the time.

I have attached a very brief summary of the intent of each provision, but I think the explanation by Carol and Lech will be much more useful.

Jeff Keeler, Enron's Washington Representative, will not be able to join us for the call. Thus, it will include:

Carol St. Clair, Esq. of Enron

Lech Kalembka, Esq., David Mitchell, Esq. and Ellen Levinson of CWT

With best regards,

Ellen

This communication is confidential and intended only for the addressee. Any distribution or duplicating of this communication is strictly prohibited. If you received this telecopy in error, please call us immediately.

200 JUN 18 1999  
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16469.001

## ABSTRACT OF PROPOSED AMENDMENTS TO THE BANKRUPTCY CODE

- The change to the definition of "forward contract merchant" in Section 101(26) is designed to remove the ambiguities that exist regarding the current definition by replacing it with a simplified, streamlined definition patterned after the definitions of "repo participant" (U.S.C. § 101(46)) and "swap participant" (11 U.S.C. § 101(53C)).

- The change to the safe harbor regarding the application of the "automatic stay" to commodity contracts, securities contracts and forward contracts in Section 362(b)(6) is designed to eliminate the uncertainty regarding the enforceability of netting rights thereunder occasioned by the limitation on the exercise of such rights to "margin payments" and "settlement payments". The approach suggested, *i.e.*, protecting netting rights in connection with "any payment or transfer" arising in connection with the specified types of transactions, replicates the approach taken in the automatic stay safe harbor governing swap agreements (11 U.S.C. § 362(b)(17)).

- The changes suggested to the proposed revised definition of "swap agreement" are intended to ensure that the revised definition does not inadvertently narrow the current definition (11 U.S.C. § 101(53B)) and, accordingly, that the definition is flexible enough to accommodate inevitable developments in the marketplace.

L.K.



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

May 26, 1999

**MEMORANDUM FOR WORKING GROUP STAFF**

**FROM:**

Norman Carleton *NC*  
Tom McGivern *TM*

**SUBJECT:**

**Proposed Changes to Financial Contract Netting Legislation**

Enron and their outside counsel, Cadwalader, Wickersham & Taft, have contacted us with concerns regarding a few of the financial contract netting provisions of the pending bankruptcy reform legislation. They are suggesting changes to the legislation and the conference report language that will accompany that legislation. The House already has passed its bankruptcy reform bill and the Senate bill (S. 625) has been reported out of the Judiciary Committee and awaits Senate floor action, which could occur any time after the Memorial Day recess.

The Cadwalader/Enron proposals ("Proposals Regarding Amendments to the Bankruptcy Code and legislative History") are attached, as well as a more thorough illustration of the statutory changes they are seeking ("Statutory changes proposed by Cadwalader/Enron"). Please review these changes and get back to us with your thoughts as soon as possible (phone: 202-622-1855 or 202-622-2317; fax: 202-622-0974 or 202-622-1188). Thanks.

Attachments

0100000001404

PROPOSALS REGARDING AMENDMENTS TO THE BANKRUPTCY CODE AND  
LEGISLATIVE HISTORY

I. Amendments to the Text of the Bankruptcy Code and H. 833 and S. 625

- Amend Section 101(26) by replacing the entire text after the word "means" with "an entity that, at any time before the filing of the petition, has an outstanding forward contract with the debtor".
- Amend Section 362(b)(6) by (i) replacing "a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of" in the sixth through eighth lines thereof with "any payment or transfer due from the debtor under or in connection with" and (ii) inserting between the words "against" and "cash" in the eighth line thereof: "against any payment due to the debtor from a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency under or in connection with commodity contracts, forward contracts or securities contracts or against".
- Amend 362(b)(7) by (i) replacing "a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of" in the fourth and fifth lines thereof with "any payment or transfer due from the debtor under or in connection with" and (ii) inserting between the words "against" and "cash" in the sixth line thereof "against any payment due to the debtor from such repo participant under or in connection with repurchase agreements or against".
- Amend the proposed text of the definition of "swap agreement" in H.R. 833 and S. 625 by deleting the word "regularly" in Section 101(53B)(ii)(I) (line 2 of page 208 of S. 625 and

line 22 of page 257 of H. 833) and adding the words "or other" immediately after the word "economic" in Section 101(53B)(ii)(II) (lines 10 and 11 of page 208 of S. 625 and lines 5 and 6 of page 258 of H. 833).

## II. Proposed Language for Senate and House Reports

- (Definition of "swap agreement") The definition of "swap agreement" in Section 101(53B) includes "any similar agreement". This language was included to ensure that the definition would be broad enough to encompass future types of swaps that the financial marketplace would develop.

The proposed revised definition also adopts this approach. The drafters believe that a definition limited to specifically enumerated transactions would soon be rendered obsolete by the ingenuity of financial engineers. The drafters have taken the approach used in the 1990 Amendments a step further, however. Specifically, the revised definition in Section 101(53B) of H. 833 and S. 625 refers to "any agreement or transaction that is similar" to one of the enumerated types of transaction that, *inter alia*, "is currently, or in the future becomes, [regularly] entered into in the swap market ... and "is a ... swap ... on a ... measure of [economic] risk or value".

The additional language is for purpose of clarification only. It is not designed to limit the circumstances in which a transaction may qualify as a "swap agreement", and no inference is intended that a transaction that qualifies as a swap agreement under the version of the definition adopted in 1990 should be excluded under the new definition because of the addition of the clarifying language paraphrased above.

- ("Cross-product" netting; Sections 561(a), (c) of H. 833 and S. 625, Section 362(b)(28) of H. 833 and Section 362(b)(29) of S. 625.) Section 561(a) will protect the exercise

of any "contractual right" to "offset or net termination values, payment amounts or other transfer obligations" in connection with certain enumerated types of transactions free from any stay or any order of a court or administrative agency. Under subsection (c), "the term contractual right includes ... a right, whether or not evidenced in writing, arising by reason of normal business practice".

Section 561(a), therefore, will protect netting and setoff rights between, *e.g.*, repurchase agreements and swap agreements, swap agreements and forward contracts, and cash-settled and physically-settled forward contracts, even without implementation of an umbrella "master master" agreement tying the agreements together, as long as such netting and setoff is consistent with "normal business practice". The determination of what constitutes "normal business practice" in any particular case will, of course, depend on the facts and circumstances. Nevertheless, the drafters anticipate that where the normal practice in an industry is not to implement master master agreements, but the participants in the industry nevertheless rely on the enforceability of their "cross product" netting rights when entering into transactions and making attendant credit determinations, such participants will be protected under Section 561.

Section 362(b)(28) of S. 625 and Section 362(b)(29) of H. 833 will complement Section 561 by protecting netting and setoff and collateral foreclosure rights in connection with master netting agreements. The protections afforded by Section 362(b)(28) and Section 362(b)(29), on the one hand, and Section 561, on the other, are cumulative. Accordingly, the absence in Section 362(d)(28) and 362(b)(29) of explicit protection for rights arising by virtue of "normal business practice" is not in derogation of such rights arising under Section 561.

L.K.



## Statutory changes proposed by Cadwalader/Enron

### 1. Definition of "forward contract merchant"

#### a. Definition in S. 625:

(3) by striking paragraph (26) and inserting the following:

"(26) 'forward contract merchant' means a Federal reserve bank, or an entity, the business of which consists in whole or in part of entering into forward contracts as or with merchants or in a commodity, as defined or in section 761, or any similar good, article, service, right, or interest that is presently or in the future becomes the subject of dealing or in the forward contract trade;"

#### b. Proposed change:

(3) by striking paragraph (26) and inserting the following:

"(26) 'forward contract merchant' means an entity that, at any time before the filing of the petition, has an outstanding forward contract with the debtor;"

### 2. Exceptions to operation of the automatic stay

#### a. Changes in S. 625:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [USCS § 78eee(a)(3)], does not operate as a stay—

\* \* \* \* \*

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by, pledged to, and under the control of, or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or

15

761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by, pledged to, and under the control of, or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

b. Proposed change:

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a ~~margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of~~ any payment or transfer due from the debtor under or in connection with commodity contracts, forward contracts, or securities contracts against any payment due to the debtor from a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency under or in connection with commodity contracts, forward contracts or securities contracts or against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a ~~margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of~~ any payment or transfer due from the debtor under or in connection with repurchase agreements against any payment due to the debtor from such repo participant under or in connection with repurchase agreements or against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

### 3. Amendments to the definition of "swap agreement"

a. Definition in S. 625:

“(53B) ‘swap agreement’—

“(A) means—

“(i) an agreement, including the terms and conditions incorporated by reference in such agreement, that is—

\* \* \* \* \*

“(ii) an agreement or transaction that is similar to an agreement or transaction referred to in clause (i) that—

“(I) is currently, or in the future becomes, regularly entered

into in the swap market (including terms and conditions incorporated by reference therein); and

“(II) is a forward, swap, future, or option on a rate, currency, commodity, equity security, or other equity instrument, on a debt security or other debt instrument, or on an economic index or measure of economic risk or value;

b. Proposed change:

“(53B) ‘swap agreement’—

“(A) means—

“(i) an agreement, including the terms and conditions incorporated by reference in such agreement, that is—

\* \* \* \* \*

“(ii) an agreement or transaction that is similar to an agreement or transaction referred to in clause (i) that—

“(I) is ~~only, or in the future, or~~ regularly entered into in the swap market (including terms and conditions incorporated by reference therein); and

“(II) is a forward, swap, future, or option on a rate, currency, commodity, equity security, or other equity instrument, on a debt security or other debt instrument, or on an economic or other index or measure of economic risk or value;

or other

May 26, 1999

**MEMORANDUM FOR WORKING GROUP STAFF**

**FROM:** Norman Carleton  
Tom McGivern

**SUBJECT:** Proposed Changes to Financial Contract Netting Legislation

Enron and their outside counsel, Cadwalader, Wickersham & Taft, have contacted us with concerns regarding a few of the financial contract netting provisions of the pending bankruptcy reform legislation. They are suggesting changes to the legislation and the conference report language that will accompany that legislation. The House already has passed its bankruptcy reform bill and the Senate bill (S. 625) has been reported out of the Judiciary Committee and awaits Senate floor action, which could occur any time after the Memorial Day recess.

The Cadwalader/Enron proposals ("Proposals Regarding Amendments to the Bankruptcy Code and legislative History") are attached, as well as a more thorough illustration of the statutory changes they are seeking ("Statutory changes proposed by Cadwalader/Enron"). Please review these changes and get back to us with your thoughts as soon as possible (phone: 202-622-1855 or 202-622-2317; fax: 202-622- or 202-622-1188).

Attachments

Fed Ireland 452-3101  
 Parkinson 736-5615  
 CFTE - Dan Waldman 418-5524  
 Brashem 874-5339  
 Mike Krimminger 6857  
 Joyce Hanson 898-6916  
 NY Fed FDIC 898-8950  
 Don Lawson 212-720-1756  
 Bob Colby 874-5277  
 Sarah Rosen 456-2223  
 OCC  
 SEC  
 OTS  
 Ken Ryder 906-6735



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E-MAIL: tom.mcgivern@do.treas.gov

DATE: MAY 26, 1999

NUMBER OF PAGES TO FOLLOW: 7

---

TO: OLIVER IRELAND, FED ✓  
JOYCE HANSON, NY FED ✓  
MIKE KRIMMINGER, FDIC ✓  
BOB COLBY, SEC ✓  
DAN WALDMAN, CFTC ✓  
DON LAMSON, OCC ✓  
KEN RYDER, OTS ✓  
MICHAEL BROSNAN, OCC ✓

FROM: TOM McGIVERN  
DEPUTY ASSOCIATE GENERAL COUNSEL

SUBJECT: Proposed Changes to Financial Contract Netting Legislation

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COMMENTS:

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DATE: MAY 26, 1999

NUMBER OF PAGES TO FOLLOW: 7

---

TO: SARAH ROSEN WARTELL, NEC ✓

FROM: TOM McGIVERN  
DEPUTY ASSOCIATE GENERAL COUNSEL

SUBJECT: Proposed Changes to Financial Contract Netting Legislation

---

COMMENTS:

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TO: OLIVER IRELAND, FED  
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DON LAMSON, OCC  
KEN RYDER, OTS  
MICHAEL BROSNAN, OCC

FROM: TOM MCGIVERN  
DEPUTY ASSOCIATE GENERAL COUNSEL

SUBJECT: Proposed Changes to Financial Contract Netting Legislation

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COMMENTS:

0100000001414

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\*\*\* ACTIVITY REPORT \*\*\*  
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CONNECTION ID

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\*\*\* TX REPORT \*\*\*  
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CONNECTION ID  
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FROM: TOM MCGIVERN  
DEPUTY ASSOCIATE GENERAL COUNSEL

SUBJECT: Proposed Changes to Financial Contract Netting Legislation

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COMMENTS:

0100000001416

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\*\*\* TX REPORT \*\*\*  
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TRANSMISSION OK

TX/RX NO 0743  
CONNECTION TEL 94562223  
SUBADDRESS  
CONNECTION ID  
ST. TIME 05/26 12:30  
USAGE T 01'23  
PGS. SENT 8  
RESULT OK



## DEPARTMENT OF THE TREASURY

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DATE: MAY 26, 1999

NUMBER OF PAGES TO FOLLOW: 7

---

TO: SARAH ROSEN WARTELL, NEC  
FROM: TOM McGIVERN  
DEPUTY ASSOCIATE GENERAL COUNSEL  
SUBJECT: Proposed Changes to Financial Contract Netting Legislation

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COMMENTS:

0100000001420

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\*\*\* TX REPORT \*\*\*  
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TRANSMISSION OK

TX/RX NO 0749  
CONNECTION TEL 98745339  
SUBADDRESS  
CONNECTION ID  
ST. TIME 05/26 12:54  
USAGE T 03'23  
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DATE: MAY 26, 1999

NUMBER OF PAGES TO FOLLOW: 7

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TO: OLIVER IRELAND, FED  
JOYCE HANSON, NY FED  
MIKE KRIMMINGER, FDIC  
BOB COLBY, SEC  
DAN WALDMAN, CFTC  
DON LAMSON, OCC  
KEN RYDER, OTS  
MICHAEL BROSINAN, OCC

FROM: TOM MCGIVERN  
DEPUTY ASSOCIATE GENERAL COUNSEL

SUBJECT: Proposed Changes to Financial Contract Netting Legislation

---

COMMENTS:

0100000001422



## DEPARTMENT OF THE TREASURY

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TO: OLIVER IRELAND, FED  
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DON LAMSON, OCC  
KEN RYDER, OTS  
MICHAEL BROSNAN, OCC

FROM: TOM MCGIVERN  
DEPUTY ASSOCIATE GENERAL COUNSEL

SUBJECT: Proposed Changes to Financial Contract Netting Legislation

---

COMMENTS:

---

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0100000001423

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.**

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

- The current bankruptcy definition of swaps contains a catch-all for "similar agreements." The proposed revision 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, and it also retains the catch-all for "similar agreements."
- The same definition change is made in the Federal Deposit Insurance Act.

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

- The amendment that adds a new paragraph (17) to section 362(b) of the Bankruptcy Code is designed to protect, free from the automatic stay of bankruptcy, 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))

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

- Section 561 is a proposed addition to the Bankruptcy Code 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.

[(b)(5)]



**CADWALADER, WICKERSHAM & TAFT**100 MAIDEN LANE  
NEW YORK, NEW YORK 10038  
(212) 504-6000For assistance or confirmation, call (212) 504-6739  
Fax number: (212) 504-6666No. of pages  
following cover 3

Date: 05/19/99

From: Lech Kalembka

**FOR IMMEDIATE DELIVERY TO:**

1)	Name: Tom McGivern	Fax No.: (202) 622-1188
	Firm:	Firm No.:
	City:	Country:
2)	Name: Carol St. Clair	Fax No.: (713) 646-3393
	Firm:	Firm No.:
	City: State:	Country:

*Special Instructions:* I have attached our proposals regarding the Bankruptcy Code amendments that we discussed last Friday. Thank you for your assistance.

cc: David Mitchell

1999 MAY 19 P 5:50

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RECEIVED  
GENERAL COUNSEL  
MAY 19 1999

CWT DRAFT  
5/19/99

## PROPOSALS REGARDING AMENDMENTS TO THE BANKRUPTCY CODE AND LEGISLATIVE HISTORY

### I. Amendments to the Text of the Bankruptcy Code and H. 833 and S. 625

- Amend Section 101(26) by replacing the entire text after the word "means" with "an entity that, at any time before the filing of the petition, has an outstanding forward contract with the debtor".
- Amend Section 362(b)(6) by (i) replacing "a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of" in the sixth through eighth lines thereof with "any payment or transfer due from the debtor under or in connection with" and (ii) inserting between the words "against" and "cash" in the eighth line thereof: "against any payment due to the debtor from a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency under or in connection with commodity contracts, forward contracts or securities contracts or against".
- Amend 362(b)(7) by (i) replacing "a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of" in the fourth and fifth lines thereof with "any payment or transfer due from the debtor under or in connection with" and (ii) inserting between the words "against" and "cash" in the sixth line thereof "against any payment due to the debtor from such repo participant under or in connection with repurchase agreements or against".
- Amend the proposed text of the definition of "swap agreement" in H.R. 833 and S. 625 by deleting the word "regularly" in Section 101(53B)(ii)(I) (line 2 of page 208 of S. 625 and

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line 22 of page 257 of H. 833) and adding the words "or other" immediately after the word "economic" in Section 101(53B)(ii)(II) (lines 10 and 11 of page 208 of S. 625 and lines 5 and 6 of page 258 of H. 833).

## II. Proposed Language for Senate and House Reports

- (Definition of "swap agreement") The definition of "swap agreement" in Section 101(53B) includes "any similar agreement". This language was included to ensure that the definition would be broad enough to encompass future types of swaps that the financial marketplace would develop.

The proposed revised definition also adopts this approach. The drafters believe that a definition limited to specifically enumerated transactions would soon be rendered obsolete by the ingenuity of financial engineers. The drafters have taken the approach used in the 1990 Amendments a step further, however. Specifically, the revised definition in Section 101(53B) of H. 833 and S. 625 refers to "any agreement or transaction that is similar" to one of the enumerated types of transaction that, *inter alia*, "is currently, or in the future becomes, [regularly] entered into in the swap market ... and "is a ... swap ... on a ... measure of [economic] risk or value".

The additional language is for purpose of clarification only. It is not designed to limit the circumstances in which a transaction may qualify as a "swap agreement", and no inference is intended that a transaction that qualifies as a swap agreement under the version of the definition adopted in 1990 should be excluded under the new definition because of the addition of the clarifying language paraphrased above.

- ("Cross-product" netting; Sections 561(a), (c) of H. 833 and S. 625, Section 362(b)(28) of H. 833 and Section 362(b)(29) of S. 625.) Section 561(a) will protect the exercise

of any "contractual right" to "offset or net termination values, payment amounts or other transfer obligations" in connection with certain enumerated types of transactions free from any stay or any order of a court or administrative agency. Under subsection (c), "the term contractual right includes ... a right, whether or not evidenced in writing, arising by reason of normal business practice".

Section 561(a), therefore, will protect netting and setoff rights between, e.g., repurchase agreements and swap agreements, swap agreements and forward contracts, and cash-settled and physically-settled forward contracts, even without implementation of an umbrella "master master" agreement tying the agreements together, as long as such netting and setoff is consistent with "normal business practice". The determination of what constitutes "normal business practice" in any particular case will, of course, depend on the facts and circumstances. Nevertheless, the drafters anticipate that where the normal practice in an industry is not to implement master master agreements, but the participants in the industry nevertheless rely on the enforceability of their "cross product" netting rights when entering into transactions and making attendant credit determinations, such participants will be protected under Section 561.

Section 362(b)(28) of S. 625 and Section 362(b)(29) of H. 833 will complement Section 561 by protecting netting and setoff and collateral foreclosure rights in connection with master netting agreements. The protections afforded by Section 362(b)(28) and Section 362(b)(29), on the one hand, and Section 561, on the other, are cumulative. Accordingly, the absence in Section 362(d)(28) and 362(b)(29) of explicit protection for rights arising by virtue of "normal business practice" is not in derogation of such rights arising under Section 561.

L.K.



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DATE: NOVEMBER 16, 1999

NUMBER OF PAGES TO FOLLOW: 2

---

TO: RON JONES  
OMB-LRD

FROM: TOM McGIVERN

SUBJECT: Final letter in response to proposed Enron amendments to financial netting contract legislation

---

COMMENTS: Attached. Thanks for the help in getting this cleared quickly last week.

Tom

---

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0100000001432

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DATE: NOVEMBER 16, 1999

NUMBER OF PAGES TO FOLLOW: 2

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TO: RON JONES  
OMB-LRD

FROM: TOM MCGIVERN

SUBJECT: Final letter in response to proposed Enron amendments to financial  
netting contract legislation

---

COMMENTS: Attached. Thanks for the help in getting this cleared quickly last week.

Tom

0100000001433

\*\*\*\*\*  
 \*\*\* TX REPORT \*\*\*  
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TX/RX NO 2140  
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DATE: NOVEMBER 16, 1999

NUMBER OF PAGES TO FOLLOW: 2

---

TO: OLIVER IRELAND MIKE KRIMMINGER  
 FRB FDIC

NANCY YANOFSKY  
 CFTC

FROM: TOM MCGIVERN  
 DEPUTY ASSOCIATE GENERAL COUNSEL

SUBJECT: Final letter in response to proposed Enron amendments to financial  
 netting contract legislation

---

COMMENTS: Attached.

Tom

0100000001434

\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
\*\*\*\*\*

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TX/RX NO 2141  
CONNECTION TEL 94185524  
SUBADDRESS  
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ST. TIME 11/16 15:42  
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DATE: NOVEMBER 16, 1999

NUMBER OF PAGES TO FOLLOW: 2

---

TO: OLIVER IRELAND MIKE KRIMMINGER  
FRB FDIC  
  
NANCY YANOFSKY  
CFTC

FROM: TOM MCGIVERN  
DEPUTY ASSOCIATE GENERAL COUNSEL

SUBJECT: Final letter in response to proposed Enron amendments to financial  
netting contract legislation

---

COMMENTS: Attached.

Tom

0100000001435







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DATE: NOVEMBER 10, 1999

NUMBER OF PAGES TO FOLLOW: 5

---

TO: RON JONES  
OMB-LRD

FROM: TOM McGIVERN

SUBJECT: Draft letter in response to proposed Enron amendments to financial netting contract legislation

---

COMMENTS: Attached is a draft response to the last known Enron proposal for amendments to the financial netting contract legislation (also attached). That legislation is being considered in the Senate and it is uncertain when it will be voted on, so a quick clearance of this letter would be much appreciated. Thanks.

Tom

---

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0100000001437

The Honorable Senator Charles Grassley  
The Honorable Robert G. Torricelli  
Subcommittee on Administrative Oversight and the Courts  
Committee on the Judiciary  
United States Senate  
Washington, D.C.

Dear Chairman Grassley and Senator Torricelli:

[(b)(5)]

[(b)(5)]

Sincerely,

Lee Sachs  
Assistant Secretary for Financial Markets

**EXPLANATION OF AMENDMENTS TO S. 625  
TO UPDATE SWAPS DEFINITION AND TO CLARIFY NETTING RIGHTS FOR  
CERTAIN FINANCIAL AGREEMENTS**

***Section 901(a)(1) – Definition of “Swap Agreement”***

As reported by Committee, the definition of “swap agreement” in current law is updated by (i) adding to the existing list of swap products, types of transactions that have been introduced since the last time the definition was amended, and (ii) including a “catchall” phrase to cover the potential for development of new swap products. Since this is a rapidly evolving industry, the catchall phrase is intended to provide flexibility to avoid the need to amend the definition as the nature and uses of swap agreements matures.

As reported, the definition of swap agreement inadvertently did not cover some legitimate transactions, and this amendment remedies this problem. First, the list of swaps is amended to include “weather derivatives,” an important type of transaction that allows end-users, such as energy companies, agricultural producers and agribusinesses, to manage their weather-related business risks. Second, the “catchall” clause is revised to ensure that the new definition (a) is not limited to products that address “economic” risk, which could inadvertently narrow the current definition, and (b) is flexible enough to accommodate swaps that are not traded “regularly” because they are new or innovative developments. The phrase “entered into in the swap market” is changed to “entered into by swap participants” since swap transactions do not take place on federally-regulated markets; swaps are entered into by agreements between parties “over-the-counter.”

***Section 901(d) – Netting Rights in Bankruptcy***

Under current law, a safe harbor from the application of the automatic stay in bankruptcy proceedings is provided for several types of financial transactions. This safe harbor is intended to provide legal certainty to the enforceability of netting rights in the case of bankruptcy. This amendment rectifies an inconsistency between the safe harbor for swaps and the safe harbor for several other types of financial transactions which, if not addressed, could undermine legal certainty for commodities, securities and forward contracts and repurchase agreements.

For swap agreements, netting rights in connection with “any payment or transfer” arising in connection with the transactions are protected in current law. However, for commodity, securities and forward contracts and for repurchase agreements, under current law the protection is more limited -- it only applies to netting rights related to “margin payments” and “settlement payments.” This inconsistency in statutory language can create some confusion about the exercise of netting rights in bankruptcy. To remedy this problem, the amendment would apply the same protection for commodity, securities and forward contracts and repurchase agreements that is already provided for swap agreements.

**AMENDMENTS TO S. 625 TO UPDATE SWAPS DEFINITION AND TO CLARIFY  
NETTING RIGHTS FOR CERTAIN FINANCIAL AGREEMENTS**

Update to the Definition of Swap Agreement:

Section 901(a)(1) of S. 625 is amended –

- a) on page 239, line 8, by deleting “or” after “agreement.”;
- b) on page 239, line 11, by inserting “or (VIII) a weather swap, weather derivative, or weather option;” after “agreement.”;
- c) on page 239, line 16, by striking the words “regularly entered into in the swap market” and inserting “entered into by swap participants”;
- d) on page 240, line 1, by inserting “or other” after “economic”;

Clarifying Netting Rights for Certain Financial Agreements:

Section 901(d) of S. 625 is amended –

- a) on page 248, line 17, by inserting “(i)” after the comma;
- b) on page 248, line 19, by inserting before the semicolon, “(ii) by striking the words ‘a margin payment’ through ‘arising out of’ and inserting ‘any payment or transfer due from the debtor under or in connection with’, and (iii) by inserting ‘any payment due to the debtor from a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency under or in connection with commodity contracts, forward contracts or securities contracts or against’ after ‘contracts against’”;
- c) on page 248, line 20, by inserting “(i)” after the comma; and
- d) on page 248, line 22, by inserting before the semicolon “(ii) by striking the words ‘a margin payment’ through ‘arising out of’ and inserting ‘any payment or transfer due from the debtor under or in connection with’, and (iii) by inserting ‘any payment due

to the debtor from such repo participant under or in connection with repurchase agreements or against' after 'contracts against'.

\*\* TOTAL PAGE.004 \*\*

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DATE: NOVEMBER 5, 1999

NUMBER OF PAGES TO FOLLOW: 6

---

TO: OLIVER IRELAND                      MIKE KRIMINGER  
FEDERAL RESERVE BOARD              FDIC

NANCY YANOFSKY                      ROBERT COLBY  
CFTC    SEC

FROM: TOM MCGIVERN

SUBJECT: Draft letter in response to proposed Enron amendments to financial  
netting contract legislation

---

COMMENTS: Attached is a draft response to the last known Enron proposal for amendments to the financial netting contract legislation (also attached). That legislation is being considered in the Senate and it is uncertain when it will be voted on, so your quick review of this draft and recommendations for edits and proposed changes would be much appreciated. Thanks.

Tom

---

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0100000001447



The Honorable Senator Charles Grassley  
The Honorable Robert G. Torricelli  
Subcommittee on Administrative Oversight and the Courts  
Committee on the Judiciary  
United States Senate  
Washington, D.C.

Dear Chairman Grassley and Senator Torricelli:

[(b)(5)]

[(b)(5)]

Sincerely,

Lee Sachs  
Assistant Secretary for Financial Markets

\*\*\*\*\*  
 \*\*\* TX REPORT \*\*\*  
 \*\*\*\*\*

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TX/RX NO 1992  
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 SUBADDRESS  
 CONNECTION ID  
 ST. TIME 11/05 15:49  
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DATE: NOVEMBER 5, 1999

NUMBER OF PAGES TO FOLLOW: 6

---

TO: OLIVER IRELAND  
 FEDERAL RESERVE BOARD

MIKE KRIMINGER  
 FDIC

NANCY YANOFSKY  
 CFTC

ROBERT COLBY  
 SEC

FROM: TOM McGIVERN

SUBJECT: Draft letter in response to proposed Enron amendments to financial netting contract legislation

---

COMMENTS: Attached is a draft response to the last known Enron proposal for amendments to the financial netting contract legislation (also attached). That legislation is being considered in the Senate and it is uncertain when it will be voted on, so your quick review of this draft and recommendations for edits and proposed changes would be much appreciated. Thanks.

0100000001456



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DATE: SEPTEMBER 13, 1999

NUMBER OF PAGES TO FOLLOW: 7

---

TO: MIKE KRIMMINGER  
FDIC

NANCY YANOFSKY  
CFTC

FROM: TOM McGIVERN  
DEPUTY ASSOCIATE GENERAL COUNSEL

SUBJECT: Cadwalader fax on proposed bankruptcy netting provision changes

---

COMMENTS: This morning Norman Carleton provided me a copy of this document. I would be interested in your comments ASAP so we can assess how to respond. Thanks much.

Mike  
898-6776

Nancy  
418-8114

---

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0100000001459

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CONNECTION TEL 98986746  
SUBADDRESS  
CONNECTION ID  
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USAGE T 01'29  
PGS. SENT 5  
RESULT OK



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DATE: SEPTEMBER 13, 1999

NUMBER OF PAGES TO FOLLOW: 7

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TO: MIKE KRIMMINGER  
FDIC

NANCY YANOFSKY  
CFTC

FROM: TOM McGIVERN  
DEPUTY ASSOCIATE GENERAL COUNSEL

SUBJECT: Cadwalader fax on proposed bankruptcy netting provision changes

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COMMENTS: This morning Norman Carleton provided me a copy of this document. I would be interested in your comments ASAP so we can assess how to respond. Thanks much.

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\*\*\* ACTIVITY REPORT \*\*\*  
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**To: Gary Gensler  
Lee Sachs**

**Department  
of the Treasury**

**Room:**

**Date: 5/26/99**

**Office of the  
General Counsel**

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Enron and their outside counsel, Cadwalader, Wickersham & Taft, have contacted us with concerns regarding a few of the financial contract netting provisions of the pending bankruptcy reform legislation. They are suggesting changes to the legislation and the conference report language that will accompany that legislation. The House already has passed its bankruptcy reform bill and the Senate bill (S. 625) has been reported out of the Judiciary Committee and awaits Senate floor action, which could occur any time after the Memorial Day recess.

Norman Carleton and I are sending the Cadwalader/Enron proposals to key staff on the Working Group for Financial Markets for their review. Those proposals ("Proposals Regarding Amendments to the Bankruptcy Code and legislative History") are attached, as well as a more thorough illustration of the statutory changes they are seeking ("Statutory changes proposed by Cadwalader/Enron").

We will get back to you with the recommendations of Working Group staff.  
[(b)(5)]

**Attachment**

cc: Norman Carleton  
Neal Wolin  
Roberta McInerney  
Mark McClellan  
Frank Toohey  
Sarah Rosen Wartell

**Thomas M. McGivern  
Deputy Associate General Counsel  
(Legislation, Litigation & Regulation)**

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PROPOSALS REGARDING AMENDMENTS TO THE BANKRUPTCY CODE AND  
LEGISLATIVE HISTORY

I. Amendments to the Text of the Bankruptcy Code and H. 833 and S. 625

- Amend Section 101(26) by replacing the entire text after the word "means" with "an entity that, at any time before the filing of the petition, has an outstanding forward contract with the debtor".
- Amend Section 362(b)(6) by (i) replacing "a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of" in the sixth through eighth lines thereof with "any payment or transfer due from the debtor under or in connection with" and (ii) inserting between the words "against" and "cash" in the eighth line thereof: "against any payment due to the debtor from a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency under or in connection with commodity contracts, forward contracts or securities contracts or against".
- Amend 362(b)(7) by (i) replacing "a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of" in the fourth and fifth lines thereof with "any payment or transfer due from the debtor under or in connection with" and (ii) inserting between the words "against" and "cash" in the sixth line thereof "against any payment due to the debtor from such repo participant under or in connection with repurchase agreements or against".
- Amend the proposed text of the definition of "swap agreement" in H.R. 833 and S. 625 by deleting the word "regularly" in Section 101(53B)(ii)(I) (line 2 of page 208 of S. 625 and



line 22 of page 257 of H. 833) and adding the words "or other" immediately after the word "economic" in Section 101(53B)(ii)(II) (lines 10 and 11 of page 208 of S. 625 and lines 5 and 6 of page 258 of H. 833).

## II. Proposed Language for Senate and House Reports

- (Definition of "swap agreement") The definition of "swap agreement" in Section 101(53B) includes "any similar agreement". This language was included to ensure that the definition would be broad enough to encompass future types of swaps that the financial marketplace would develop.

The proposed revised definition also adopts this approach. The drafters believe that a definition limited to specifically enumerated transactions would soon be rendered obsolete by the ingenuity of financial engineers. The drafters have taken the approach used in the 1990 Amendments a step further, however. Specifically, the revised definition in Section 101(53B) of H. 833 and S. 625 refers to "any agreement or transaction that is similar" to one of the enumerated types of transaction that, *inter alia*, "is currently, or in the future becomes, [regularly] entered into in the swap market ... and "is a ... swap ... on a ... measure of [economic] risk or value".

The additional language is for purpose of clarification only. It is not designed to limit the circumstances in which a transaction may qualify as a "swap agreement", and no inference is intended that a transaction that qualifies as a swap agreement under the version of the definition adopted in 1990 should be excluded under the new definition because of the addition of the clarifying language paraphrased above.

- ("Cross-product" netting; Sections 561(a), (c) of H. 833 and S. 625, Section 362(b)(28) of H. 833 and Section 362(b)(29) of S. 625.) Section 561(a) will protect the exercise

of any "contractual right" to "offset or net termination values, payment amounts or other transfer obligations" in connection with certain enumerated types of transactions free from any stay or any order of a court or administrative agency. Under subsection (c), "the term contractual right includes ... a right, whether or not evidenced in writing, arising by reason of normal business practice".

Section 561(a), therefore, will protect netting and setoff rights between, e.g., repurchase agreements and swap agreements, swap agreements and forward contracts, and cash-settled and physically-settled forward contracts, even without implementation of an umbrella "master master" agreement tying the agreements together, as long as such netting and setoff is consistent with "normal business practice". The determination of what constitutes "normal business practice" in any particular case will, of course, depend on the facts and circumstances. Nevertheless, the drafters anticipate that where the normal practice in an industry is not to implement master master agreements, but the participants in the industry nevertheless rely on the enforceability of their "cross product" netting rights when entering into transactions and making attendant credit determinations, such participants will be protected under Section 561.

Section 362(b)(28) of S. 625 and Section 362(b)(29) of H. 833 will complement Section 561 by protecting netting and setoff and collateral foreclosure rights in connection with master netting agreements. The protections afforded by Section 362(b)(28) and Section 362(b)(29), on the one hand, and Section 561, on the other, are cumulative. Accordingly, the absence in Section 362(d)(28) and 362(b)(29) of explicit protection for rights arising by virtue of "normal business practice" is not in derogation of such rights arising under Section 561.

L.K.

## Statutory changes proposed by Cadwalader/Enron

### 1. Definition of "forward contract merchant"

#### a. Definition in S. 625:

(3) by striking paragraph (26) and inserting the following:

"(26) 'forward contract merchant' means a Federal reserve bank, or an entity, the business of which consists in whole or in part of entering into forward contracts as or with merchants or in a commodity, as defined or in section 761, or any similar good, article, service, right, or interest that is presently or in the future becomes the subject of dealing or in the forward contract trade;"

#### b. Proposed change:

(3) by striking paragraph (26) and inserting the following:

"(26) 'forward contract merchant' means an entity that, at any time before the filing of the petition, has an outstanding forward contract with the debtor;"

### 2. Exceptions to operation of the automatic stay

#### a. Changes in S. 625:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [USCS § 78eee(a)(3)], does not operate as a stay—

\* \* \* \* \*

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by, pledged to, and under the control of, or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or

761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by, ~~pledged to, and under the control of,~~ or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

b. Proposed change:

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a ~~margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of any payment or transfer due from the debtor under or in connection with commodity contracts, forward contracts, or securities contracts against any payment due to the debtor from a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency under or in connection with commodity contracts, forward contracts or securities contracts or against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;~~

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a ~~margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of any payment or transfer due from the debtor under or in connection with repurchase agreements against any payment due to the debtor from such repo participant under or in connection with repurchase agreements or against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;~~

**3. Amendments to the definition of “swap agreement”**

a. Definition in S. 625:

“(53B) ‘swap agreement’—

“(A) means—

“(i) an agreement, including the terms and conditions incorporated by reference in such agreement, that is—

\* \* \* \* \*

“(ii) an agreement or transaction that is similar to an agreement or transaction referred to in clause (i) that—

“(I) is currently, or in the future becomes, regularly entered

into in the swap market (including terms and conditions incorporated by reference therein); and

“(II) is a forward, swap, future, or option on a rate, currency, commodity, equity security, or other equity instrument, on a debt security or other debt instrument, or on an economic index or measure of economic risk or value;

b. Proposed change:

“(53B) ‘swap agreement’—

“(A) means—

“(i) an agreement, including the terms and conditions incorporated by reference in such agreement, that is—

\* \* \* \* \*

“(ii) an agreement or transaction that is similar to an agreement or transaction referred to in clause (i) that—

“(I) is currently, or in the future becomes, regularly entered into in the swap market (including terms and conditions incorporated by reference therein); and

“(II) is a forward, swap, future, or option on a rate, currency, commodity, equity security, or other equity instrument, on a debt security or other debt instrument, or on an economic or other index or measure of economic risk or value;

Cadwalader, Wickersham & Taft

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FROM: Ellen Levinson

No. of Pages: 5

Date: March 1, 2000

FOR IMMEDIATE DELIVERY

TO:	Name: Norman Carleton Department of the Treasury	Fax No.: 202-622-0974 Phn No.: 202-622-1855
cc)	Name: Carol St. Clair ENRON	Fax No.: 713-646-3393 Phn No.: 713-853-3989
cc)	Name: Jeff Keeler ENRON	Fax No.: 202-828-3372 Phn No.: 202-466-9157

Dear Norm:

As we previously discussed, Enron has revised its proposed amendments and report language to the Bankruptcy Reform Act. I have attached the current version for review and consideration by the Financial Products Working Group. We expect ISDA and the Bond Market Association to agree to these provisions, as they had approved the earlier draft.

We would appreciate discussing these amendments with you early next week. Please let me know a time that would be most convenient.

Sincerely,

  
Ellen S. Levinson

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**AMENDMENTS TO THE FINANCIAL CONTRACT PROVISIONS  
of the  
BANKRUPTCY REFORM BILL, H.R. 833**

**Background and Summary**

In 1990, amendments were made to the Bankruptcy Code to give legal certainty to the treatment of certain financial transactions in the case of bankruptcy. The amendments particularly addressed transactions, such as swaps and other over-the-counter derivatives, that are subject to fluctuations because they derive their values from an underlying commodity, rate, index or other item. The insolvency of a party to such a transaction could pose systemic risks.

Both the House and Senate Bankruptcy Reform Bills update the financial contract provisions of the Code. Among other things, the purposes are to catch up with new developments in the market, to anticipate continued innovation and growth of derivatives and to provide greater legal certainty that financial transactions can be closed out, netted and settled in a timely manner in case of bankruptcy.

The following amendments and report language to H.R. 833 are needed (1) to revise the definition of "swap agreements" to accommodate the introduction of new swap products, (2) to avoid any confusion regarding the netting rights for different types of transactions by providing consistency in the statutory language, and (3) to clarify how the "cross-product" netting provisions should be applied.

**The Amendments, Report Language and Explanations**

The amendments and report language below refer to Section 1007 of the House-passed bill.

- 1) **Revise the definition of "swap agreements" in the bills to accommodate the introduction of new swap products.**
  - a) *Amend the definition of "swap agreement" in Section 1007(a)(1)(E) by:*
    - OK i) on page 299, line 16, deleting "or" after "agreement;" ;
    - OK ii) on page 299, line 18, inserting after "agreement;" the following: "or a weather swap, weather derivative, or weather option;" ;
    - AD iii) on page 299, lines 23 and 24, deleting the words "in the swap market" and inserting instead "by swap participants";
    - OK iv) on page 300, line 8, inserting "or other" after the word "economic"; and
    - OK v) on page 300, line 9, inserting "or other" after the word "economic".



**b) Conference Report Statement of Managers:**

The current statutory definition of "swap agreement" in Section 101(53B) includes an enumerated list of products and a catch-all phrase for "any similar agreement." The catch-all phrase was included in the 1990 Amendments to ensure that the definition would be broad enough to encompass future types of swaps that the financial marketplace would develop. The revised definition in H.R. 833 also adopts this approach.

- i) The conferees believe that a swap definition limited to specifically enumerated transactions would soon be rendered obsolete by the ingenuity of financial engineers. The conferees have taken the approach used in the 1990 Amendments a step further, however. Specifically, the revised catch-all phrase in Section 1007(a)(1)(E) of H.R. 833 refers to "any agreement or transaction similar" to one of the enumerated types of transaction that, "is presently, or in the future becomes, regularly entered into by swap participants ... and ... is a forward, swap, future or option on one or more rates, currencies, commodities, equity securities, or other equity instruments, or on an economic or other index or measure of economic or other risk or value".
- ii) The additional language in the catch-all phrase is for purpose of clarification only. It is not designed to limit the circumstances in which a transaction may qualify as a "swap agreement." The conferees in no way intend to exclude from this revised definition any transaction or agreement that is considered a swap agreement under the version of the definition adopted in 1990.
- iii) The use of the phrase "regularly entered into" in clause A(ii)(I) of the definition of "swap agreement" is not intended to preclude from the scope of sections 362(b), 560, 561(a)(5), and other provisions relating to swap agreements, transactions that have as their underlying items novel or unusual rights, services, interests or other measures of value, whether or not such rights, services, interests or other measures of value have previously been used or are thereafter used in any other transaction or by any other parties. The conferees believe and intend that so long as the transaction or the underlying item is vulnerable to market fluctuations, the same systemic risks sought to be avoided by permitting non-debtor counterparties to liquidate, terminate and accelerate swap agreements pursuant to contractual rights apply to such transactions.

**c) Explanation:**

In both the House and Senate bills the statutory definition of "swap agreement," which was established in 1990, is updated by (i) adding to the existing list of swap products, types of transactions that have been introduced since 1990, and (ii) modifying the "catch-all" phrase to provide flexibility to avoid the need to amend the definition as the nature and uses of swap agreements matures.

The updated definition of swap agreements in H.R. 833 inadvertently did not cover some legitimate transactions, and this amendment remedies this problem. First, the list of swaps is amended to include "weather derivatives," an important type of transaction that allows end-users, such as energy companies, agricultural producers and agribusinesses, to



manage their weather-related business risks. Second, the catch-all clause is revised to ensure that the new definition (a) is not limited to products that address "economic" risk, which could inadvertently narrow the current definition, and (b) refers to transactions entered into "by swap participants" rather than "in the swaps market" since swap transactions do not take place on federally-regulated markets; swaps are entered into by agreements between parties "over-the-counter."

To ensure that the intent of the amendments to the swap definition is clear, report language in the Statement of Managers is necessary.

**2) Protection of netting rights for commodity, securities and forward contracts and repurchase agreements.**

*a) At the appropriate place in each bill add the following amendments to the Bankruptcy Code:*

Amend 11 U.S.C. § 362(b)(6) by (i) replacing "a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of" in the sixth through eighth lines thereof with "any payment or transfer due from the debtor under or in connection with" and (ii) inserting between the words "against" and "cash" in the eighth line thereof: "against any payment due to the debtor from a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency under or in connection with commodity contracts, forward contracts or securities contracts or against".

Amend 11 U.S.C. § 362(b)(7) by (i) replacing "a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of" in the third through fifth lines thereof with "any payment or transfer due from the debtor under or in connection with" and (ii) inserting between the words "against" and "cash" in the fifth line thereof "against any payment due to the debtor from such repo participant under or in connection with repurchase agreements or against".

*b) Explanation:*

Under current law, a safe harbor from the application of the automatic stay in bankruptcy proceedings is provided for several types of financial transactions. This safe harbor is intended to provide legal certainty to the enforceability of netting rights in the case of bankruptcy of a counterparty to one of these types of transactions. For swap agreements, netting rights in connection with "any payment or transfer" arising in connection with the transactions are protected in current law. However, for commodity, securities and forward contracts and for repurchase agreements, under current law the protection is more limited -- it only applies to netting rights related to "margin payments" and "settlement payments." This inconsistency in statutory language can create legal uncertainty about the exercise of netting rights in bankruptcy.

To remedy this problem, the amendment would apply the same protection for commodity, securities and forward contracts and repurchase agreements that is already provided for swap agreements.

**3) Conference Report Statement of Managers ("cross-product" netting).**

**a) Language:**

Sections 561(a) and (c) of the Code; Section 1007(k) of H.R. 833  
Section 362(b)(32) of the Code; Section 1007(d)(1)(F) of H.R. 833

Section 561(a) will protect the exercise of any "contractual right" to "offset or net termination values, payment amounts or other transfer obligations" in connection with certain enumerated types of transactions free from any stay or any order of a court or administrative agency. Under subsection (c), "the term contractual right includes ... a right, whether or not evidenced in writing, arising by reason of normal business practice".

- i) Section 561(a), therefore, will protect netting and setoff rights between, e.g., repurchase agreements and swap agreements, swap agreements and forward contracts, and cash-settled and physically-settled forward contracts, even without implementation of an umbrella "master master" agreement tying the agreements together, as long as such netting and setoff is consistent with "normal business practice". The determination of what constitutes "normal business practice" in any particular case will, of course, depend on the facts and circumstances. Nevertheless, the drafters anticipate that where the normal practice in an industry is not to implement master master agreements, but the participants in the industry nevertheless rely on the enforceability of their "cross product" netting rights when entering into transactions and making attendant credit determinations, such participants will be protected under Section 561.
- ii) The new Section 362(b)(32) established under Section 1007(d)(1)(F) will complement Section 561 by protecting netting and setoff and collateral foreclosure rights in connection with master netting agreements. The protections afforded by Section 362(b)(32), on the one hand, and Section 561, on the other, are cumulative. Accordingly, the absence in Section 362(b)(32) of explicit protection for rights arising by virtue of "normal business practice" is not in derogation of such rights arising under Section 561.

**b) Explanation:**

Both bills have provisions to protect netting and setoff rights between different types of agreements, such as repurchase agreements and swap agreements, swap agreements and forward contracts, and cash-settled and physically-settled forward contracts, even without implementation of an umbrella agreement tying the agreements together, as long as such netting and setoff is consistent with "normal business practice." To clarify the intent of these provisions the report language states that where the normal practice is not to implement umbrella agreements, but the participants in the industry nevertheless rely on the enforceability of their "cross-product" netting rights when entering into transactions and making attendant credit determinations, such participants will be protected.