

S. 1682

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

SECTION 1. SHORT TITLE.

This Act may be cited as the ``Derivatives Market Manipulation Prevention Act of 2009''.

SEC. 2. CIVIL PENALTIES FOR MARKET MANIPULATION.

Subsection (c) of section 6 of the Commodity Exchange Act (7 U.S.C. 9, 15) is amended to read as follows:

``(c) Prohibition Regarding Market Manipulation and False Information.--

``(1) PROHIBITION REGARDING MARKET MANIPULATION.--It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after the date of enactment of the Derivatives Market Manipulation Prevention Act of 2009.

``(2) PROHIBITION REGARDING FALSE INFORMATION.--It shall be unlawful for any person to report information relating to any registration application, any report filed with the Commission, or any other information relating to a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to omit any material fact that is required to be stated in any application or report if the person knew, or reasonably should have known, the information to be false or misleading.

``(3) ENFORCEMENT.--

``(A) AUTHORITY OF COMMISSION.--If the Commission has reason to believe that any person is violating or has violated this subsection, or any other provision of this Act (including any rule, regulation, or order promulgated in accordance with this subsection or any other provision of this Act), the Commission may serve upon the person a complaint.

``(B) CONTENTS OF COMPLAINT.--A complaint under subparagraph (A) shall--

``(i) contain a description of the charges against the person that is the subject of the complaint; and

“(ii) have attached or contain a notice of hearing that specifies the date and location of the hearing regarding the complaint.

“(C) HEARING.--A hearing described in subparagraph (B)(ii)--

“(i) shall be held not later than 3 days after the date on which the person described in subparagraph (A) receives the complaint;

“(ii) shall require the person to show cause regarding why--

“(I) an order should not be made--

“(aa) to prohibit the person from trading on, or subject to the rules of, any registered entity; and

“(bb) to direct all registered entities to refuse all privileges to the person until further notice of the Commission; and

“(II) the registration of the person, if registered with the Commission in any capacity, should not be suspended or revoked; and

“(iii) may be held before--

“(I) the Commission; or

“(II) an administrative law judge designated by the Commission, under which the administrative law judge shall ensure that all evidence is recorded in written form and submitted to the Commission.

“(4) SUBPOENA.--For the purpose of securing effective enforcement of the provisions of this chapter, for the purpose of any investigation or proceeding under this chapter, and for the purpose of any action taken under section 12(f) of this title, any member of the Commission or any Administrative Law Judge or other officer designated by the Commission (except as provided in paragraph (6)) may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry.

“(5) WITNESSES.--The attendance of witnesses and the production of any such records may be required from any place in the United States, any State, or any foreign country or jurisdiction at any designated place of hearing.

“(6) SERVICE.--A subpoena issued under this section may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service of process in

a foreign country, except that a subpoena to be served on a person who is not to be found within the territorial jurisdiction of any court of the United States may be issued only on the prior approval of the Commission.

“(7) REFUSAL TO OBEY.--In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Such court may issue an order requiring such person to appear before the Commission or member or Administrative Law Judge or other officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question.

“(8) FAILURE TO OBEY.--Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district wherein such person is an inhabitant or transacts business or wherever such person may be found.

“(9) EVIDENCE.--On the receipt of evidence under paragraph (3)(C)(iii)(II), the Commission may--

“(A) prohibit the person that is the subject of the hearing from trading on, or subject to the rules of, any registered entity and require all registered entities to refuse the person all privileges on the registered entities for such period as the Commission may require in the order;

“(B) if the person is registered with the Commission in any capacity, suspend, for a period not to exceed 180 days, or revoke, the registration of the person;

“(C) assess such person--

“(i) a civil penalty of not more than an amount equal to the greater of--

“(I) \$140,000; or

“(II) triple the monetary gain to such person for each such violation; or

“(ii) in any case of manipulation or attempted manipulation in violation of this subsection, subsection (d), or section 9(a)(2), a civil penalty of not more than an amount equal to the greater of--

“(I) \$1,000,000; or

“(II) triple the monetary gain to the person for each such violation; and

“(D) through an order of the Commission, require restitution to customers of damages proximately caused by violations of the person.

“(10) ORDERS.--

“(A) NOTICE.--The Commission shall provide to a person described in paragraph (9)(A) and the appropriate governing board of the registered entity notice of the order described in paragraph (9)(A) by--

“(i) registered mail;

“(ii) certified mail; or

“(iii) personal delivery.

“(B) REVIEW.--

“(i) IN GENERAL.--A person that has received notice of an order by the Commission may obtain a review of the order or such other equitable relief as determined to be appropriate by a court described in clause (ii).

“(ii) PETITION.--To obtain a review or other relief under clause (i), a person may, not later than 15 days after the date of receipt of a notice under clause (i), file a written petition to set aside the order with the United States Court of Appeals--

“(I) for the circuit in which the petitioner carries out the business of the petitioner; or

“(II) in the case of an order denying registration, the circuit in which the principal place of business of the petitioner is located, as listed on the application of the petitioner.

“(C) PROCEDURE.--

“(i) DUTY OF CLERK OF APPROPRIATE COURT.--The clerk of the appropriate court under subparagraph (B)(ii) shall transmit to the Commission a copy of a petition filed under subparagraph (B)(ii).

“(ii) DUTY OF COMMISSION.--In accordance with section 2112 of title 28, United States Code, the Commission shall file in the appropriate court described in subparagraph (B)(ii) the record theretofore made.

“(iii) JURISDICTION OF APPROPRIATE COURT.--Upon the filing of a petition under subparagraph (B)(ii), the appropriate court described in subparagraph (B)(ii) shall have jurisdiction to affirm, set aside, or modify the order of the Commission, and the findings of the Commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive.”.

SEC. 3. CEASE AND DESIST ORDERS, FINES.

Section 6(d) of the Commodity Exchange Act (7 U.S.C. 13b) is amended to read as follows:

“(d) If any person (other than a registered entity), directly or indirectly, is using or employing, or attempting to use or employ, in connection with a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after the date of enactment of the Derivatives Market Manipulation Prevention Act of 2009, the Commission may, upon notice and hearing, and subject to appeal as in other cases provided for in sections 9 and 15 of this title, make and enter an order directing that such person shall cease and desist therefrom and, if such person thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such person shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than the higher of \$140,000 or triple the monetary gain to such person, or imprisoned for not less than six months nor more than one year, or both, except that if such failure or refusal to obey or comply with such order involves any offense within subsection (a) or (b) of section 13 of this title, such person shall be guilty of a felony and, upon conviction thereof, shall be subject to the penalties of said subsection (a) or (b): Provided, That any such cease and desist order against any respondent in any case of under this subsection shall be issued only in conjunction with an order issued against such respondent under sections 9 and 15 of this title. Each day during which such failure or refusal to obey or comply with such order continues shall be deemed a separate offense.”.

SEC. 4. MANIPULATIONS; PRIVATE RIGHTS OF ACTION.

Section 22(a)(1) of the Commodity Exchange Act (7 U.S.C. 25(a)(1)) is amended by striking subparagraph (D) and inserting the following:

“(D) who purchased or sold a contract referred to in subparagraph (B) hereof if the violation constitutes the use or employment of, or an attempt to use or employ, in connection with a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative device or contrivance in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after the date of enactment of the Derivatives Market Manipulation Prevention Act of 2009.”.

SEC. 5. DEFINITION OF SWAP.

Section 1a of the Commodity Exchange Act (7 U.S.C. 1a) is amended by adding at the end the following:

“(35) SWAP.--

“(A) IN GENERAL.--Except as provided in subparagraph (B), the term `swap' means any agreement, contract, or transaction that--

“(i) is a put, call, cap, floor, collar, or similar option of any kind for the purchase or sale of, or based on the value of, one or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind;

“(ii) provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence;

“(iii) provides on an executory basis for the exchange, on a fixed or contingent basis, of one or more payments based on the value or level of one or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred, including any agreement, contract, or transaction commonly known as an interest rate swap, a rate floor, rate cap, rate collar, cross-currency rate swap, basis swap, currency swap, foreign exchange swap, total return swap, equity index swap, equity swap, debt index swap, debt swap, credit spread, credit default swap, credit swap, weather swap, energy swap, metal swap, agricultural swap, emissions swap, or commodity swap;

“(iv) is an agreement, contract, or transaction that is, or in the future becomes, commonly known to the trade as a swap; or

“(v) is any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through (iv);

“(B) EXCLUSIONS.--The term `swap' does not include:

“(i) any contract of sale of a commodity for future delivery or security futures product traded on or subject to the rules of any board of trade designated as a contract market under section 5 or 5f;

“(ii) any sale of a nonfinancial commodity for deferred shipment or delivery, so long as such transaction is physically settled;

“(iii) any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof, that is subject to the Securities Act of 1933 (15 U.S.C. 77a et seq.) and the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

“(iv) any put, call, straddle, option, or privilege relating to foreign currency entered into on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a));

“(v) any agreement, contract, or transaction providing for the purchase or sale of one or more securities on a fixed basis that is subject to the Securities Act of 1933 (15 U.S.C. 77a et seq.) and the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

“(vi) any agreement, contract, or transaction providing for the purchase or sale of one or more securities on a contingent basis that is subject to the Securities Act of 1933 (15 U.S.C. 77a et seq.) and the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), unless such agreement, contract, or transaction predicates such purchase or sale on the occurrence of a bona fide contingency that might reasonably be expected to affect or be affected by the creditworthiness of a party other than a party to the agreement, contract, or transaction;

“(vii) any note, bond, or evidence of indebtedness that is a security as defined in section 2(a) of the Securities Act of 1933 (15 U.S.C. 77b(a));

“(viii) any agreement, contract, or transaction that is--

“(I) based on a security; and

“(II) entered into directly or through an underwriter (as defined in section 2(a) of the Securities Act of 1933) (15 U.S.C. 77b(a)) by the issuer of such security for the purposes of raising capital, unless such agreement, contract, or transaction is entered into to manage a risk associated with capital raising; or

“(ix) any agreement, contract, or transaction a counterparty of which is a Federal Reserve bank, the United States government or an agency of the United States government that is expressly backed by the full faith and credit of the United States.

“(C) RULE OF CONSTRUCTION REGARDING MASTER AGREEMENTS.--The term ‘swap’ shall be construed to include a master agreement that provides for an agreement, contract, or transaction that is a swap pursuant to subparagraph (A), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement, contract, or transaction that is not a swap pursuant to subparagraph (A), except that the master agreement shall be considered to be a swap only with respect to each agreement, contract, or transaction under the master agreement that is a swap pursuant to subparagraph (A).”.

SEC. 6. EFFECTIVE DATE.

(a) In General.--The amendments made by sections 2, 3, and 4 shall take effect on the date on which the final rule promulgated by the Commodity Futures Trading Commission pursuant to the Derivatives Market Manipulation Prevention Act of 2009 takes effect.

(b) Definition of Swap.--The amendment made by section 5 shall take effect on the date of enactment of this Act.