

SUBCHAPTER I—BILATERAL AND
CLEARING ORGANIZATION NETTING

§ 4401. Findings and purpose

The Congress finds that—

(1) many financial institutions engage daily in thousands of transactions with other financial institutions directly and through clearing organizations;

(2) the efficient processing of such transactions is essential to a smoothly functioning economy;

(3) such transactions can be processed most efficiently if, consistent with applicable contractual terms, obligations among financial institutions are netted;

(4) such netting procedures would reduce the systemic risk within the banking system and financial markets; and

(5) the effectiveness of such netting procedures can be assured only if they are recognized as valid and legally binding in the event of the closing of a financial institution participating in the netting procedures.

(Pub. L. 102-242, title IV, §401, Dec. 19, 1991, 105 Stat. 2371.)

SEPARABILITY

If any provision of Pub. L. 102-242 or any application of any provision thereof to any person or circumstance is held invalid, the remainder of Pub. L. 102-242 and the application of any remaining provision of such Act to any other person or circumstance not to be affected by such holding, see section 481 of Pub. L. 102-242, set out as a note under section 1811 of this title.

§ 4402. Definitions

For purposes of this subchapter—

(1) Broker or dealer

The term “broker or dealer” means—

(A) any company that is registered or licensed under Federal or State law to engage in the business of brokering, underwriting, or dealing in securities in the United States; and

(B) to the extent consistent with this title,¹ as determined by the Board of Governors of the Federal Reserve System, any company that is an affiliate of a company described in subparagraph (A) and that is engaged in the business of entering into netting contracts.

(2) Clearing organization

The term “clearing organization” means a clearinghouse, clearing association, clearing corporation, or similar organization—

(A) that provides clearing, netting, or settlement services for its members and—

(i) in which all members other than the clearing organization itself are financial institutions or other clearing organizations; or

(ii) which is registered as a clearing agency under the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], or is exempt from such registration by order of the Securities and Exchange Commission; or

(B) that is registered as a derivatives clearing organization under section 7a-1 of title 7, that has been granted an exemption under section 6(c)(1) of title 7, or that is a multilateral clearing organization (as defined in section 4421¹ of this title).

(3) Covered clearing obligation

The term “covered clearing obligation” means an obligation of a member of a clearing organization to make payment to another member of a clearing organization, subject to a netting contract.

(4) Covered contractual payment entitlement

The term “covered contractual payment entitlement” means—

(A) an entitlement of a financial institution to receive a payment, subject to a netting contract from another financial institution; and

(B) an entitlement of a member of a clearing organization to receive payment, subject to a netting contract, from another member of a clearing organization of a covered clearing obligation.

(5) Covered contractual payment obligation

The term “covered contractual payment obligation” means—

(A) an obligation of a financial institution to make payment, subject to a netting contract to another financial institution; and

(B) a covered clearing obligation.

(6) Depository institution

The term “depository institution” means—

(A) a depository institution as defined in section 19(b)(1)(A) of the Federal Reserve Act [12 U.S.C. 461(b)(1)(A)] (other than clause (vii));

(B) an uninsured national bank or an uninsured State bank that is a member of the Federal Reserve System, if the national bank or State member bank is not eligible to make application to become an insured bank under section 1815 of this title;

(C) a branch or agency of a foreign bank, a foreign bank and any branch or agency of the foreign bank, or the foreign bank that established the branch or agency, as those terms are defined in section 1(b) of the International Banking Act of 1978 [12 U.S.C. 3101];

(D) a corporation chartered under section 25(a)¹ of the Federal Reserve Act [12 U.S.C. 611 et seq.]; or

(E) a corporation having an agreement or undertaking with the Board of Governors of the Federal Reserve System under section 25 of the Federal Reserve Act [12 U.S.C. 601 et seq.].

(7) Failed financial institution

The term “failed financial institution” means a financial institution that—

(A) fails to satisfy a covered contractual payment obligation when due;

(B) has commenced or had commenced against it insolvency, liquidation, reorganization, receivership (including the appointment of a receiver), conservatorship, or similar proceedings; or

(C) has generally ceased to meet its obligations when due.

¹ See References in Text note below.

(8) Failed member

The term “failed member” means any member that—

(A) fails to satisfy a covered clearing obligation when due,

(B) has commenced or had commenced against it insolvency, liquidation, reorganization, receivership (including the appointment of a receiver), conservatorship, or similar proceedings, or

(C) has generally ceased to meet its obligations when due.

(9) Financial institution

The term “financial institution” means a broker or dealer, a depository institution, a futures commission merchant, or any other institution as determined by the Board of Governors of the Federal Reserve System.

(10) Futures commission merchant

The term “futures commission merchant” means a company that is registered or licensed under Federal law to engage in the business of selling futures and options in commodities.

(11) Member

The term “member” means a member of or participant in a clearing organization, and includes the clearing organization and any other clearing organization with which such clearing organization has a netting contract.

(12) Net entitlement

The term “net entitlement” means the amount by which the covered contractual payment entitlements of a financial institution or member exceed the covered contractual payment obligations of the institution or member after netting under a netting contract.

(13) Net obligation

The term “net obligation” means the amount by which the covered contractual payment obligations of a financial institution or member exceed the covered contractual payment entitlements of the institution or member after netting under a netting contract.

(14) Netting contract**(A) In general**

The term “netting contract”—

(i) means a contract or agreement between 2 or more financial institutions, clearing organizations, or members that provides for netting present or future payment obligations or payment entitlements (including liquidation or close out values relating to such obligations or entitlements) among the parties to the agreement; and

(ii) includes the rules of a clearing organization.

(B) Invalid contracts not included

The term “netting contract” does not include any contract or agreement that is invalid under or precluded by Federal law.

(15) Payment

The term “payment” means a payment of United States dollars, another currency, or a

composite currency, and a noncash delivery, including a payment or delivery to liquidate an unmatured obligation.

(Pub. L. 102-242, title IV, § 402, Dec. 19, 1991, 105 Stat. 2372; Pub. L. 102-550, title XVI, § 1606(a), Oct. 28, 1992, 106 Stat. 4087; Pub. L. 106-554, § 1(a)(5) [title I, §§ 112(a)(2), 123(b)], Dec. 21, 2000, 114 Stat. 2763, 2763A-391, 2763A-411; Pub. L. 109-8, title IX, § 906(a), Apr. 20, 2005, 119 Stat. 167.)

REFERENCES IN TEXT

This title, referred to in par. (1)(B), means title IV of Pub. L. 102-242, Dec. 19, 1991, 105 Stat. 2371. For complete classification of title IV to the Code, see Tables.

The Securities Exchange Act of 1934, referred to in par. (2)(A)(ii), is act June 6, 1934, ch. 404, 48 Stat. 881, which is classified principally to chapter 2B (§ 78a et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 78a of Title 15 and Tables.

Section 4421 of this title, referred to in par. (2)(B), was repealed by Pub. L. 111-203, title VII, § 740, July 21, 2010, 124 Stat. 1729.

Section 25(a) of the Federal Reserve Act, referred to in par. (6), which is classified to subchapter II (§ 611 et seq.) of chapter 6 of this title, was renumbered section 25A of that act by Pub. L. 102-242, title I, § 142(e)(2), Dec. 19, 1991, 105 Stat. 2281. Section 25 of the Federal Reserve Act is classified to subchapter I (§ 601 et seq.) of chapter 6 of this title.

AMENDMENTS

2005—Par. (2)(A)(ii). Pub. L. 109-8, § 906(a)(1)(A), inserted before semicolon “, or is exempt from such registration by order of the Securities and Exchange Commission”.

Par. (2)(B). Pub. L. 109-8, § 906(a)(1)(B), inserted before period at end “, that has been granted an exemption under section 6(c)(1) of title 7, or that is a multilateral clearing organization (as defined in section 4421 of this title)”.

Par. (6)(B). Pub. L. 109-8, § 906(a)(2)(B), added subpar. (B). Former subpar. (B) redesignated (C).

Par. (6)(C). Pub. L. 109-8, § 906(a)(2)(A), (C), redesignated subpar. (B) as (C) and amended it generally. Prior to amendment, subpar. (C) read as follows: “a branch or agency as defined in section 1(b) of the International Banking Act of 1978;”. Former subpar. (C) redesignated (D).

Par. (6)(D), (E). Pub. L. 109-8, § 906(a)(2)(A), redesignated subpars. (C) and (D) as (D) and (E), respectively.

Par. (11). Pub. L. 109-8, § 906(a)(3), inserted before period at end “and any other clearing organization with which such clearing organization has a netting contract”.

Par. (14)(A)(i). Pub. L. 109-8, § 906(a)(4), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: “means a contract or agreement between 2 or more financial institutions or members, that—

“(I) is governed by the laws of the United States, any State, or any political subdivision of any State, and

“(II) provides for netting present or future payment obligations or payment entitlements (including liquidation or close-out values relating to the obligations or entitlements) among the parties to the agreement; and”.

Par. (15). Pub. L. 109-8, § 906(a)(5), added par. (15).

2000—Pub. L. 106-554, § 1(a)(5) [title I, § 112(a)(2)], substituted “this subchapter” for “this chapter” in introductory provisions.

Par. (2)(B). Pub. L. 106-554, § 1(a)(5) [title I, § 123(b)], added subpar. (B) and struck out former subpar. (B) which read as follows: “that performs clearing functions for a contract market designated pursuant to the Commodity Exchange Act.”

1992—Par. (14)(B). Pub. L. 102-550 substituted “Federal law” for “Federal commodities law”.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109-8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under Title 11, Bankruptcy, before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109-8, set out as a note under section 101 of Title 11.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-550 effective as if included in the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102-242, as of Dec. 19, 1991, see section 1609(a) of Pub. L. 102-550, set out as a note under section 191 of this title.

§ 4403. Bilateral netting**(a) General rule**

Notwithstanding any other provision of State or Federal law (other than section 1821(e) of this title, section 5390(c) of this title, section 4617 of this title, section 1787(c) of this title, or any order authorized under section 78eee(b)(2) of title 15), the covered contractual payment obligations and the covered contractual payment entitlements between any 2 financial institutions shall be terminated, liquidated, accelerated, and netted in accordance with, and subject to the conditions of, the terms of any applicable netting contract (except as provided in section 561(b)(2) of title 11).

(b) Limitation on obligation to make payment

The only obligation, if any, of a financial institution to make payment with respect to covered contractual payment obligations to another financial institution shall be equal to its net obligation to such other financial institution, and no such obligation shall exist if there is no net obligation.

(c) Limitation on right to receive payment

The only right, if any, of a financial institution to receive payments with respect to covered contractual payment entitlements from another financial institution shall be equal to its net entitlement with respect to such other financial institution, and no such right shall exist if there is no net entitlement.

(d) Payment of net entitlement of failed financial institution

The net entitlement of any failed financial institution, if any, shall be paid to the failed financial institution in accordance with, and subject to the conditions of, the applicable netting contract.

(e) Effectiveness notwithstanding status as financial institution

This section shall be given effect notwithstanding that a financial institution is a failed financial institution.

(f) Enforceability of security agreements

The provisions of any security agreement or arrangement or other credit enhancement related to one or more netting contracts between any 2 financial institutions shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of title 11), and shall not be stayed, avoided, or otherwise limited by any State or Federal law (other than section 1821(e) of this title, section 1787(c) of this title, and section 78eee(b)(2) of title 15).

(Pub. L. 102-242, title IV, § 403, Dec. 19, 1991, 105 Stat. 2374; Pub. L. 109-8, title IX, § 906(b), Apr. 20, 2005, 119 Stat. 168; Pub. L. 109-390, § 4(a), Dec. 12, 2006, 120 Stat. 2695; Pub. L. 111-203, title II, § 211(c), July 21, 2010, 124 Stat. 1514.)

AMENDMENTS

2010—Subsec. (a). Pub. L. 111-203 inserted “section 5390(c) of this title, section 4617 of this title,” after “section 1821(e) of this title.”

2006—Subsec. (a). Pub. L. 109-390 struck out “paragraphs (8)(E), (8)(F), and (10)(B) of” before “section 1821(e)” and “section 1787(c)” and inserted “terminated, liquidated, accelerated, and” after “institutions shall be”.

Subsec. (f). Pub. L. 109-390, § 4(a)(1), struck out “paragraphs (8)(E), (8)(F), and (10)(B) of” before “section 1821(e)” and “section 1787(c)”.

2005—Subsec. (a). Pub. L. 109-8, § 906(b)(1), added subsec. (a) and struck out heading and text of former subsec. (a). Text read as follows: “Notwithstanding any other provision of law, the covered contractual payment obligations and the covered contractual payment entitlements between any 2 financial institutions shall be netted in accordance with, and subject to the conditions of, the terms of any applicable netting contract.”

Subsec. (f). Pub. L. 109-8, § 906(b)(2), added subsec. (f).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111-203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111-203, set out as an Effective Date note under section 5301 of this title.

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109-390 not applicable to any cases commenced under Title 11, Bankruptcy, or to appointments made under any Federal or State law, before Dec. 12, 2006, see section 7 of Pub. L. 109-390, set out as a note under section 101 of Title 11.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109-8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under Title 11, Bankruptcy, before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109-8, set out as a note under section 101 of Title 11.

§ 4404. Clearing organization netting**(a) General rule**

Notwithstanding any other provision of State or Federal law (other than section 1821(e) of this title, section 1787(c) of this title, and any order authorized under section 78eee(b)(2) of title 15), the covered contractual payment obligations and the covered contractual payment entitlements of a member of a clearing organization to and from all other members of a clearing organization shall be terminated, liquidated, accelerated, and netted in accordance with and subject to the conditions of any applicable netting contract (except as provided in section 561(b)(2) of title 11).

(b) Limitation of obligation to make payment

The only obligation, if any, of a member of a clearing organization to make payment with respect to covered contractual payment obligations arising under a single netting contract to any other member of a clearing organization shall be equal to its net obligation arising under that netting contract, and no such obligation shall exist if there is no net obligation.