

110TH CONGRESS
2D SESSION

S. _____

To amend the Commodity Exchange Act to clarify the treatment of purchases of certain commodity futures contracts and financial instruments with respect to limits established by the Commodity Futures Trading Commission relating to excessive speculation.

IN THE SENATE OF THE UNITED STATES

_____ introduced the following bill; which was read twice
and referred to the Committee on _____

A BILL

To amend the Commodity Exchange Act to clarify the treatment of purchases of certain commodity futures contracts and financial instruments with respect to limits established by the Commodity Futures Trading Commission relating to excessive speculation.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Swaps Loophole Clo-

5 sure Act of 2008”.

1 **SEC. 2. TREATMENT OF PURCHASES OF CERTAIN COM-**
2 **MODITY FUTURES CONTRACTS AND FINAN-**
3 **CIAL INSTRUMENTS.**

4 Section 4a of the Commodity Exchange Act (7 U.S.C.
5 6a) is amended—

6 (1) by striking “SEC. 4a. (a) Excessive specula-
7 tion” and inserting the following:

8 **“SEC. 4a. EXCESSIVE SPECULATION.**

9 “(a) BURDEN ON INTERSTATE COMMERCE; TRADING
10 OR POSITION LIMITS.—

11 “(1) IN GENERAL.—Excessive speculation and”;
12 and

13 (2) in subsection (a) (as amended by paragraph
14 (1)), by adding at the end the following:

15 “(2) TREATMENT OF PURCHASES OF CERTAIN
16 COMMODITY FUTURES CONTRACTS AND FINANCIAL
17 INSTRUMENTS.—

18 “(A) DEFINITIONS.—In this paragraph:

19 “(i) BONA FIDE HEDGING TRANS-
20 ACTION.—The term ‘bona fide hedging
21 transaction’ means a transaction that—

22 “(I) represents a substitute for a
23 transaction to be made or a position
24 to be taken at a later time in a phys-
25 ical marketing channel;

1 “(II) is economically appropriate
2 for the reduction of risks in the con-
3 duct and management of a commer-
4 cial enterprise; and

5 “(III) arises from the potential
6 change in the value of—

7 “(aa) assets that a person
8 owns, produces, manufactures,
9 possesses, or merchandises (or
10 anticipates owning, producing,
11 manufacturing, possessing, or
12 merchandising);

13 “(bb) liabilities that a per-
14 son incurs or anticipates incur-
15 ring; or

16 “(cc) services that a person
17 provides or purchases (or antici-
18 pates providing or purchasing).

19 “(ii) OVER-THE-COUNTER COMMODITY
20 DERIVATIVE.—The term ‘over-the-counter
21 commodity derivative’ means any agree-
22 ment, contract, or transaction that—

23 “(I)(aa) is traded or executed in
24 the United States; or

1 “(bb) is held by a person located
2 in the United States;

3 “(II) is not traded on a des-
4 ignated contract market or derivatives
5 transaction execution facility; and

6 “(III)(aa) is a put, call, cap,
7 floor, collar, or similar option of any
8 kind for the purchase or sale of, or
9 substantially based on the value of, 1
10 or more qualifying commodities or an
11 economic or financial index or meas-
12 ure of economic or financial risk pri-
13 marily associated with 1 or more
14 qualifying commodities;

15 “(bb) provides on an executory
16 basis for the applicable transaction,
17 on a fixed or contingent basis, of 1 or
18 more payments substantially based on
19 the value of 1 or more qualifying com-
20 modities or an economic or financial
21 index or measure of economic or fi-
22 nancial risk primarily associated with
23 1 or more qualifying commodities, and
24 that transfers between the parties to
25 the transaction, in whole or in part,

1 the economic or financial risk associ-
2 ated with a future change in any such
3 value without also conveying a current
4 or future direct or indirect ownership
5 interest in an asset or liability that in-
6 corporates the financial risk that is
7 transferred; or

8 “(cc) is any combination or per-
9 mutation of, or option on, any agree-
10 ment, contract, or transaction de-
11 scribed in item (aa) or (bb).

12 “(iii) OVER-THE-COUNTER COM-
13 MODITY DERIVATIVE DEALER.—The term
14 ‘over-the-counter commodity derivative
15 dealer’ means a person that regularly of-
16 fers to enter into, assume, offset, assign,
17 or otherwise terminate positions in over-
18 the-counter commodity derivatives with
19 customers in the ordinary course of a trade
20 or business of the person.

21 “(iv) QUALIFYING COMMODITY.—The
22 term ‘qualifying commodity’ means—

23 “(I) an agricultural commodity;

24 and

25 “(II) an energy commodity.

1 “(B) REGULATIONS.—

2 “(i) IN GENERAL.—Not later than 90
3 days after the date of enactment of this
4 paragraph, in accordance with clauses (ii)
5 and (iii), the Commission shall promulgate
6 regulations to establish and enforce—

7 “(I) speculative position limits
8 for qualifying commodities;

9 “(II) a methodology—

10 “(aa) to enable persons to
11 aggregate the positions held or
12 controlled by the persons on des-
13 ignated contract markets, on de-
14 rivatives transaction execution fa-
15 cilities, and in over-the-counter
16 commodity derivatives; and

17 “(bb) to ensure, to the max-
18 imum extent practicable, that the
19 determinations made by the
20 Commission with respect to each
21 person examined under subpara-
22 graph (C) accurately reflect the
23 net long and net short positions
24 held or controlled by the person

1 in the underlying qualifying com-
2 modity; and

3 “(III) information reporting rules
4 to facilitate the monitoring and en-
5 forcement by the Commission of the
6 speculative position limits established
7 under subclause (I), including the
8 monitoring of positions held in over-
9 the-counter commodity derivatives.

10 “(ii) APPLICABILITY.—

11 “(I) POSITION LIMITS.—The
12 speculative position limits established
13 under clause (i)(I) shall apply to posi-
14 tion limits that, with respect to each
15 applicable position limit, expire dur-
16 ing—

17 “(aa) the spot month;

18 “(bb) each separate futures
19 trading month (other than the
20 spot month); or

21 “(cc) the sum of each trad-
22 ing month (including the spot
23 month).

24 “(II) SUM OF POSITIONS.—The
25 speculative position limits established

1 under clause (i)(I) shall apply to the
2 sum of the positions held by a per-
3 son—

4 “(aa) on designated contract
5 markets;

6 “(bb) on derivatives trans-
7 action execution facilities; and

8 “(cc) in over-the-counter
9 commodity derivatives.

10 “(iii) MAXIMUM LEVEL OF POSITION
11 LIMITS.—In establishing the speculative
12 position limits under clause (i)(I), the
13 Commission shall set the speculative posi-
14 tion limits at the minimum level prac-
15 ticable to ensure sufficient market liquidity
16 for the conduct of bona fide hedging activi-
17 ties.

18 “(C) PROHIBITION RELATING TO CERTAIN
19 POSITIONS.—

20 “(i) IN GENERAL.—Notwithstanding
21 any other provision of this Act, no person
22 may hold or control a position, separately
23 or in combination, net long or net short,
24 for the purchase or sale of a commodity for
25 future delivery or, on a futures-equivalent

1 basis, any option, or an over-the-counter
2 commodity derivative that exceeds a specu-
3 lative position limit established by the
4 Commission under subparagraph (B)(i)(I).

5 “(ii) BONA FIDE HEDGING TRANS-
6 ACTIONS.—In determining whether the
7 sum of a position held or controlled by a
8 person has exceeded the applicable specula-
9 tive position limit established by the Com-
10 mission under subparagraph (B)(i)(I), the
11 Commission shall not consider positions at-
12 tributable to a bona fide hedging trans-
13 action.

14 “(iii) DETERMINATION OF POSITION
15 LIMITS FOR OVER-THE-COUNTER COM-
16 MODITY DERIVATIVE DEALERS.—To deter-
17 mine the position of an over-the-counter
18 commodity derivative dealer, the sum of
19 the positions held or controlled by the over-
20 the-counter commodity derivative dealer
21 shall be—

22 “(I) calculated on the last day of
23 each month; and

24 “(II) considered, for the monthly
25 period covered by the determination,

1 to be the average daily net position
2 held or controlled by the over-the-
3 counter commodity derivative dealer
4 for the period beginning on the first
5 day of the month and ending on the
6 last day of the month.”.