

110TH CONGRESS
2D SESSION

S. 3739

To address the regulation of derivatives and unregistered hedge funds, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 11 (legislative day, DECEMBER 10), 2008

Mr. DORGAN (for himself and Mr. FEINGOLD) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To address the regulation of derivatives and unregistered hedge funds, and for other purposes.

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 “Derivatives and Hedge
5 Fund Regulatory Improvement Act of 2008”.

6 **SEC. 2. COORDINATED RULEMAKING.**

7 (a) INITIATION OF PROCEEDINGS.—Not later than
8 90 days after the date of enactment of this Act, the appro-
9 priate Federal banking agencies, in coordination with the
10 Commission, after consultation with the Secretary of the

1 Treasury and the Commodity Futures Trading Commis-
2 sion, shall initiate a coordinated rulemaking with respect
3 to the entities under their respective jurisdictions that en-
4 gage in transactions involving unregistered hedge funds or
5 over-the-counter derivatives—

6 (1) to extend the requirements of regulations
7 relating to the safety and soundness of the financial
8 system applicable to mutual funds under the Invest-
9 ment Company Act of 1940 (15 U.S.C. 80a–1 et
10 seq.) to unregistered hedge funds, including—

11 (A) requiring the fund to disclose its poli-
12 cies on borrowing money and requiring a share-
13 holder vote to change such policy, as in section
14 5 of that Act (15 U.S.C. 80a–5);

15 (B) strict record keeping and reporting
16 rules, as in section 30 of that Act (15 U.S.C.
17 80a–29); and

18 (C) capital structure requirements, as in
19 section 18 of that Act (15 U.S.C. 80a–18);

20 (2) to provide for the regulation of over-the-
21 counter derivatives, including credit default swaps,
22 interest rate swaps, currency swaps, mortgage-
23 backed securities, asset-backed securities,
24 collateralized debt obligations, and other derivatives
25 that are not traded on a national securities exchange

1 or by a registered securities association, in the pub-
2 lic interest and for the protection of investors, the
3 stability of the financial markets, and the well-being
4 of the economy; and

5 (3) to prohibit insured depository institutions
6 from trading derivatives for their own accounts.

7 (b) COORDINATION, CONSISTENCY, AND COM-
8 PARABILITY.—Each of the agencies and authorities re-
9 ferred to in subsection (a) shall consult and coordinate
10 with the other such agencies and authorities for the pur-
11 pose of assuring, to the extent possible, that the regula-
12 tions by each such agency and authority are consistent
13 and comparable with those prescribed by the other such
14 agencies and authorities.

15 **SEC. 3. SCOPE AND DEADLINE.**

16 The appropriate Federal banking agencies and the
17 Commission shall, not later than 12 months after the date
18 of enactment of this Act, issue the rules required by this
19 Act in final form that are designed—

20 (1) to avoid systemic risks to the financial mar-
21 kets;

22 (2) to ensure safe and sound operation of
23 banks, including by requiring the maintenance of
24 sufficient capital levels and limits on aggregate le-
25 verage and establishing appropriate restrictions on

1 the buying, selling, or entering into derivatives by an
2 insured depository institution for its own account;
3 and

4 (3) to provide means to prevent fraudulent, de-
5 ceptive, or manipulative practices.

6 **SEC. 4. AUTHORITY TO GRANT EXCEPTIONS.**

7 The regulations prescribed under this Act may allow
8 an insured depository institution to purchase, sell, or en-
9 gage in traditional hedging transactions or to purchase,
10 sell, or engage in transactions involving de minimus inter-
11 ests in derivatives for the account of that institution, but
12 only to the extent that such exceptions are consistent with
13 the safety and soundness of such institution.

14 **SEC. 5. AGENCY AUTHORITY.**

15 The rules issued under this Act shall be enforced by
16 the appropriate Federal banking agencies with respect to
17 entities under their respective jurisdictions, and by the
18 Commission with respect to any other entity that engages
19 in transactions involving unregistered hedge funds or over-
20 the-counter derivatives.

21 **SEC. 6. DEFINITIONS.**

22 As used in this Act—

23 (1) the terms “appropriate Federal banking
24 agency”, “Federal banking agencies”, and “insured
25 depository institution” have the same meanings as

1 in section 3 of the Federal Deposit Insurance Act
2 (12 U.S.C. 1813);

3 (2) the term “Commission” means the Securi-
4 ties and Exchange Commission; and

5 (3) the term “derivative”—

6 (A) means any financial contract or other
7 instrument that derives its value from the value
8 or performance of any security or other finan-
9 cial instrument, or of any excluded commodity
10 (as that term is defined in section 1a of the
11 Commodity Exchange Act (7 U.S.C. 1a)); and

12 (B) does not include—

13 (i) any security that is traded on a
14 national securities exchange or on an auto-
15 mated interdealer quotation system spon-
16 sored by a securities association registered
17 under section 15A of the Securities Ex-
18 change Act of 1934 (15 U.S.C. 78o-3); or

19 (ii) any forward contract which has a
20 maturity at a time of issuance of not
21 longer than 270 days;

22 (4) the term “unregistered hedge fund”—

23 (A) means any pooled investment vehicle,
24 or group or family of pooled investment vehi-
25 cles, that—

1 (i) has total assets under management
2 of not less than \$1,000,000,000 or such
3 other amount as is determined to be ap-
4 propriate by the appropriate Federal bank-
5 ing agency and the Commission with re-
6 spect to the entities under their respective
7 jurisdictions; and

8 (ii) is excepted from the definition of
9 an investment company by paragraph (1)
10 or (7) of section 3(c) of the Investment
11 Company Act of 1940, or is a foreign com-
12 pany that would be required to obtain an
13 order from the Commission under section
14 7(d) of that Act if it made a public offer-
15 ing of its securities by use of the mails and
16 means or instrumentalities of interstate
17 commerce; and

18 (B) does not include a commodity pool op-
19 erator or futures commission merchant (as such
20 terms are defined in section 1a of the Com-
21 modity Exchange Act (7 U.S.C. 1a)).

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