

Excluded Commodity Contracts
Outline of Key Provisions

New definition of “excluded commodity contract”.

An “excluded commodity contract” would be any “forward contract” or “commodity contract” (or similar term, such as “forward agreement”) for the purchase or sale of a commodity actually used or sold by the debtor in the ordinary course of its business, including a hedging contract for actual business operations, if the debtor is not a “financial participant”.

Replacement protections applicable to excluded commodity contracts.

Except as to all excluded commodity contracts with a single counterparty listed by the debtor or trustee in a statement filed with the court within 48 hours after the order for relief, the Bankruptcy Code’s exemptions for financial contracts would not apply to an excluded commodity contract. The exemptions that would not apply would include exemptions from avoidance relating to the excluded commodity contract itself or any guaranty of, security interest securing, or other credit enhancement of the excluded financial contract.

Instead, the following protections would apply:

Interim post-petition performance. Pending assumption or rejection of each excluded commodity contract, the trustee would be required to perform all terms of the contract (other than provisions described in section 365(b)(2)) that are required to be performed by the debtor post-petition. During this period the trustee would not be required to pay any unpaid amounts on an excluded commodity contract that were required to have been paid by the debtor pre-petition.

No cherry picking. The trustee would not be permitted to cherry pick among excluded commodity contracts with a single counterparty. All such contracts with the counterparty would have to be either assumed or rejected.

Administrative expense claim for “in the money” claims including post-petition changes in value. If, on the date on which excluded commodity contracts with a particular counterparty are assumed or rejected, the net market value to the counterparty of the excluded commodity contracts (measured across all such contracts) is positive, then the counterparty would have an administrative expense claim for any amount by which the net market value to the counterparty on that date is greater than the net market value (by the same measure) of all those contracts on the earlier of the date of the order for relief and the post-petition date on which the net market value (by the same measure) to the counterparty is first positive.

Cash collateral to be posted to secure the administrative expense claim. The trustee would be required to post cash collateral, starting no later than X (~5) days after

the date of the order for relief, to secure payment of the administrative expense claim (determined, as to each counterparty, as if all of such excluded commodity contracts were being assumed or rejected as of the date of determination) in an amount equal to 105% of the allowable administrative expense claim, and the counterparty would be required to return any excess cash collateral. Cash collateral would be posted or returned each business day based on the closing price at the end of the prior business day. The amount of cash collateral to be posted under this provision would not be subject to modification by any agreement between the debtor and the counterparty, except a post-petition agreement approved by the court.

Period in which to assume or reject. The trustee would have up to Y (~30) days after the order for relief to move for court approval to assume or reject the contract. Cash collateral would continue to be posted or returned as required pending court approval. If the contract is not assumed within that time period, it is considered rejected.

Effect of rejection. If a counterparty's excluded commodity contracts are rejected, the counterparty's netting rights would be preserved, and the contracts would no longer be "excluded", i.e., all financial contract exemptions would apply (including with respect to collateral posted post-petition for any administrative expense claim). The counterparty would then have a period of up to 30 days following the rejection date to exercise the counterparty's right under the financial contract exemptions to terminate the contracts and exercise liquidation and netting rights without leave from the bankruptcy court. In addition, on rejection, the counterparty's damage claim under section 365(g) would be measured as of the rejection date (subject to sections 562(b) and (c)), rather than as of the petition date.

Stay relief. If the trustee fails to post cash collateral, otherwise perform the excluded commodity contract or timely assume the excluded commodity contract, then stay relief would be automatic for the counterparty, all excluded commodity contracts of that counterparty would cease to be excluded commodity contracts, and the general financial contract exemptions would be available to the counterparty.

Transition provisions

The foregoing treatment of excluded commodity contracts would apply to a contract entered into on or after the date of enactment. If a confirmation is entered into on or after the date of enactment under a master agreement entered before the date of enactment, the foregoing treatment would apply to the confirmation.

The foregoing treatment would not otherwise apply to a contract, or to a confirmation under a master agreement, entered into before the date of enactment unless the contract or confirmation were amended on or after the date of enactment to add a commodity or to increase the amount of a commodity, the price for a commodity or margin or collateral or to provide a guaranty or other credit enhancement of the debtor's performance.