(O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and

(P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

11 U.S.C. § 1112(b)(4) (as amended).

A party opposing a conversion or dismissal must show that either there is a reasonable likelihood that a plan will be confirmed within the timeframes established in section 1121(e) and 1129(e), or if those sections do not apply, within a reasonable period of time. In addition, the party opposing conversion or dismissal must show that even if there are grounds to convert or dismiss the case, there is reasonable justification for the debtor's act or omission (other than under paragraph (4)(A)) that will be cured within a reasonable period of time fixed by the court. See 11 U.S.C. § 1112(b)(2)(B) (as amended).

The Act contains a requirement that the court hear any motion to convert or dismiss within 30 days after the motion is filed and decide the motion no later than 15 days thereafter. The movant can consent to a continuance of the hearing on the motion. See 11 U.S.C. § 1112(b)(3) (as amended).

The Act also amends section 1104(a) to allow the court to order the UST to appoint a trustee or examiner if grounds for conversion or dismissal exist. See 11 U.S.C. § 1104(a)(3) (added).

Dismissal or conversion appears to be mandatory under revised section 1112 unless cure is possible, even if the best interests of creditors are not served by dismissal or conversion. This unfortunate result may be forestalled by the court's discretionary appointment of a trustee or an examiner under revised section 1104(a)(3).

XI. Financial Contracts

The Financial Contract Provisions in Title IX amend the Federal Deposit Insurance Act ("FDIA"), the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), the Securities Investor Protection Act of 1970 ("SIPA") and the Bankruptcy Code. During the 107th Congress, then Senator Gramm stated during the Senate Debate on March 15, 2001, that the financial contract provisions have four principal purposes:

1. To strengthen the provisions of the Bankruptcy Code and the FDIA that protect the enforceability of acceleration, termination, liquidation, close-out netting, collateral foreclosure and related provisions of certain financial agreements and transactions.

2. To harmonize the treatment of these financial agreements and transactions under the Bankruptcy Code and the FDIA.

3. To amend the FDIA and FDICIA to clarify that certain rights of the FDIC acting as conservator or receiver for a failed insured depository institution (and in some situations, rights of SIPC and receivers of certain uninsured institutions) cannot be defeated by operation of the terms of FDICIA.

4. To make other substantive and technical amendments to clarify the enforceability of financial agreements and transactions in bankruptcy or insolvency.

Cong. Rec. S 2366 (daily ed. March 15, 2001) (statement of Sen. Gramm).

The Financial Contract provisions concern various types of financial contracts, including forward contracts, repurchase agreements, swap agreements, commodities contracts and securities contracts. The amendments create definitions for the various agreements that fall under the financial contract provisions, some portions of which are controversial. The definitions of financial contracts, including the definitions of "forward contract," "repurchase agreement," "swap agreement" and "securities contract," include guarantees and reimbursement obligations. Thus, a debtor-guarantor that has provided collateral under a financial contract will be subject to the netting protections that are afforded to financial institutions under the revised law.

The Act amends various provisions of the Bankruptcy Code to reflect the intent of Congress "[t]hat normal business practice in the event of a default of a party based on bankruptcy or insolvency is to terminate, liquidate or accelerate securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements with the bankrupt or insolvent party." Cong. Rec. S 2372 (daily ed. March 15, 2001) (statement of Sen. Gramm).

The Act makes the following amendments to the Bankruptcy Code:

- The Act amends Bankruptcy Code section 362(b)(17) to protect netting provisions in swap agreements, security agreements and master netting agreements. Act, § 907(d). A corresponding amendment is made to SIPA to provide that a SIPC stay does not operate as a stay against netting provisions.

- The Act amends Bankruptcy Code sections 546(g) and 548(d)(2)(E) to clarify that the trustee cannot avoid transfers that are made in connection with a master netting agreement, unless the transfer was made to hinder, delay or defraud creditors.

- The Act amends Bankruptcy Code sections 555, 556, 559 and 560 to expand the contractual right to liquidate securities contracts, commodities contracts, forward contracts, repurchase agreements and swap agreements to the right to liquidate, terminate or accelerate those contracts.

- The Act adds to chapter 5 of the Bankruptcy Code a new section 561 to protect the "[c]ontractual right to terminate liquidate, accelerate, or offset under a master netting agreement[.]"

- The Act adds to chapter 5 a new section 562 to govern the measure of damages in connection with the rejection of a financial contract. Section 562 provides that if the trustee rejects a financial contract or a financial institution liquidates, terminates or accelerates a financial contract the damages are measured as of the date of the rejection, liquidation, termination, or acceleration and treated as though the claim arose prepetition.

The principal substantive change in this area is to allow broad "cross-product" netting pursuant to "master netting agreements" for the first time. Thus a net credit for the debtor on a series of swaps can in effect collateralize the debtor's obligation on otherwise unrelated repurchase obligations with the same financial counterparty under a master netting agreement.

XII. Conflicts and Compensation

A. Disinterestedness--§ 414

The Act amends the definition of "disinterested person." All references to investment bankers in section 101(14)(B), (C), & (E) were deleted:

(14) 'disinterested person' means a person that—

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason[.]

11 U.S.C. § 101(14) (as amended).

Although this section removes investment bankers and their employees and attorneys from *per se* disqualification, it might cause courts to scrutinize more closely investment banker retentions. The former law drew a three-year line on *per se* disqualification for investment bankers of securities that are not outstanding. See 11 U.S.C. § 101(14)(C) (former). To the extent some courts might have viewed the three-year line as a safe harbor for older transactions, the amendment could open the door to more serious scrutiny.