S T A T E  O F  N E W  Y O R K

2713

2011-2012 Regular Sessions

I N  S E N A T E

January 31, 2011

Introduced by Sen. SEWARD -- read twice and ordered printed, and when printed to be committed to the Committee on Insurance

AN ACT to amend the insurance law, in relation to the treatment of qualified financial contracts in an insurance insolvency proceeding affecting a domestic, foreign or alien insurer

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The insurance law is amended by adding a new section 7437 to read as follows:

S 7437. QUALIFIED FINANCIAL CONTRACTS. (A) AS USED IN THIS SECTION:

(1) "ACTUAL DIRECT COMPENSATORY DAMAGES" MEANS AND INCLUDES NORMAL AND REASONABLE COSTS OF COVER OR OTHER REASONABLE MEASURES OF DAMAGES UTILIZED IN THE DERIVATIVES, SECURITIES OR OTHER MARKET FOR THE CONTRACT AND AGREEMENT CLAIMS BUT DOES NOT INCLUDE PUNITIVE OR EXEMPLARY DAMAGES, DAMAGES FOR LOST PROFIT OR LOST OPPORTUNITY OR DAMAGES FOR PAIN AND SUFFERING.

(2) "BUSINESS DAY" MEANS A DAY OTHER THAN A SATURDAY, A SUNDAY OR ANY DAY ON WHICH EITHER THE NEW YORK STOCK EXCHANGE OR THE FEDERAL RESERVE BANK OF NEW YORK IS CLOSED.

(3) "COMMODITY CONTRACT" MEANS: (A) A CONTRACT FOR THE PURCHASE OR SALE OF A COMMODITY FOR FUTURE DELIVERY ON, OR SUBJECT TO THE RULES OF, A BOARD OF TRADE OR CONTRACT MARKET UNDER THE COMMODITY EXCHANGE ACT (7 U.S.C. S 1, ET SEQ.) OR A BOARD OF TRADE OUTSIDE THE UNITED STATES; (B) AN AGREEMENT THAT IS SUBJECT TO REGULATION UNDER SECTION 19 OF THE COMMODITY EXCHANGE ACT (7 U.S.C. S 1, ET SEQ.) AND THAT IS COMMONLY KNOWN TO THE COMMODITIES TRADE AS A MARGIN ACCOUNT, MARGIN CONTRACT, LEVERAGE ACCOUNT OR LEVERAGE CONTRACT; (C) AN AGREEMENT OR TRANSACTION THAT IS SUBJECT TO REGULATION UNDER SECTION 4C(B) OF THE COMMODITY EXCHANGE ACT (7 U.S.C. S 1, ET SEQ.) AND THAT IS COMMONLY KNOWN TO THE COMMODITIES TRADE AS A COMMODITY OPTION; (D) ANY COMBINATION OF THE AGREEMENTS OR TRANSACTIONS REFERRED TO IN THIS PARAGRAPH; (E) ANY OPTION

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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TO ENTER INTO AN AGREEMENT OR TRANSACTION REFERRED TO IN THIS PARAGRAPH; OR (F) ANY OTHER CONTRACT THAT IS INCLUDED FROM TIME TO TIME AS A COMMODITY CONTRACT AS DEFINED IN THE FEDERAL DEPOSIT INSURANCE ACT, 12 U.S.C. S 1821(E)(8)(D).

(4) "CONTRACTUAL RIGHT" MEANS AND INCLUDES ANY RIGHT SET FORTH IN A RULE OR BYLAW OF A DERIVATIVES CLEARING ORGANIZATION (AS DEFINED IN THE COMMODITY EXCHANGE ACT), A MULTILATERAL CLEARING ORGANIZATION (AS DEFINED IN THE FEDERAL DEPOSIT INSURANCE CORPORATION IMPROVEMENT ACT OF 1991), A NATIONAL SECURITIES EXCHANGE, A NATIONAL SECURITIES ASSOCIATION, A SECURITIES CLEARING AGENCY, A CONTRACT MARKET DESIGNATED UNDER THE COMMODITY EXCHANGE ACT, A DERIVATIVES TRANSACTION EXECUTION FACILITY REGISTERED UNDER THE COMMODITY EXCHANGE ACT, OR A BOARD OF TRADE (AS DEFINED IN THE COMMODITY EXCHANGE ACT) OR IN A RESOLUTION OF THE GOVERNING BOARD THEREOF AND ANY RIGHT, WHETHER OR NOT EVIDENCED IN WRITING, ARISING UNDER STATUTORY OR COMMON LAW, OR UNDER LAW MERCHANT, OR BY REASON OF NORMAL BUSINESS PRACTICE.

(5) "FORWARD CONTRACT" SHALL HAVE THE MEANING SET FORTH IN THE FEDERAL DEPOSIT INSURANCE ACT, 12 U.S.C. S 1821(E)(8)(D).

(6) "NETTING AGREEMENT" MEANS: (A) A CONTRACT OR AGREEMENT (INCLUDING THE TERMS AND CONDITIONS INCORPORATED BY REFERENCE IN SUCH AGREEMENT), INCLUDING A MASTER AGREEMENT (WHICH MASTER AGREEMENT, TOGETHER WITH ALL SCHEDULES, CONFIRMATIONS, DEFINITIONS AND ADDENDA THERETO AND TRANSACTIONS UNDER ANY THEREOF, SHALL BE TREATED AS ONE NETTING AGREEMENT), THAT DOCUMENTS ONE OR MORE TRANSACTIONS BETWEEN THE PARTIES TO THE AGREEMENT FOR OR INVOLVING ONE OR MORE QUALIFIED FINANCIAL CONTRACTS AND THAT PROVIDES FOR THE NETTING, OFFSET, LIQUIDATION, TERMINATION, ACCELERATION OR CLOSE OUT, UNDER OR IN CONNECTION WITH ONE OR MORE QUALIFIED FINANCIAL CONTRACTS OR PRESENT OR FUTURE PAYMENT OR DELIVERY OBLIGATIONS OR PAYMENT OR DELIVERY ENTITLEMENTS THEREUNDER (INCLUDING LIQUIDATION OR CLOSE-OUT VALUES RELATING TO SUCH OBLIGATIONS OR ENTITLEMENTS) AMONG THE PARTIES TO THE NETTING AGREEMENT; (B) ANY MASTER AGREEMENT OR BRIDGE AGREEMENT FOR ONE OR MORE MASTER AGREEMENTS DESCRIBED IN SUBPARAGRAPH (A) OF THIS PARAGRAPH; OR (C) ANY SECURITY ARRANGEMENT RELATED TO ONE OR MORE CONTRACTS OR AGREEMENTS DESCRIBED IN SUBPARAGRAPH (A) OR (B) OF THIS PARAGRAPH; PROVIDED THAT ANY CONTRACT OR AGREEMENT DESCRIBED IN SUBPARAGRAPH (A) OR (B) OF THIS PARAGRAPH RELATING TO AGREEMENTS OR TRANSACTIONS THAT ARE NOT QUALIFIED FINANCIAL CONTRACTS SHALL BE DEEMED TO BE A NETTING AGREEMENT ONLY WITH RESPECT TO THOSE AGREEMENTS OR TRANSACTIONS THAT ARE QUALIFIED FINANCIAL CONTRACTS.

(7) "QUALIFIED FINANCIAL CONTRACT" MEANS ANY COMMODITY CONTRACT, FORWARD CONTRACT, REPURCHASE AGREEMENT, SECURITIES CONTRACT, SWAP AGREEMENT AND ANY SIMILAR AGREEMENT THAT THE SUPERINTENDENT DETERMINES BY REGULATION TO BE A QUALIFIED FINANCIAL CONTRACT FOR THE PURPOSES OF THIS ARTICLE.

(8) "REPURCHASE AGREEMENT" SHALL HAVE THE MEANING SET FORTH IN THE FEDERAL DEPOSIT INSURANCE ACT, 12 U.S.C. S 1821(E)(8)(D).

(9) "SECURITIES CONTRACT" SHALL HAVE THE MEANING SET FORTH IN THE FEDERAL DEPOSIT INSURANCE ACT, 12 U.S.C. S 1821(E)(8)(D).

(10) "SECURITY ARRANGEMENT" MEANS ANY SECURITY AGREEMENT OR ARRANGEMENT OR OTHER CREDIT ENHANCEMENT OR GUARANTEE OR REIMBURSEMENT OBLIGATION, INCLUDING A PLEDGE, SECURITY, COLLATERAL OR GUARANTEE AGREEMENT OR CREDIT SUPPORT DOCUMENT.

(11) "SEPARATE ACCOUNT" MEANS AN ACCOUNT ESTABLISHED PURSUANT TO SECTION FOUR THOUSAND TWO HUNDRED FORTY OF THIS CHAPTER.

(12) "SWAP AGREEMENT" SHALL HAVE THE MEANING SET FORTH IN THE FEDERAL DEPOSIT INSURANCE ACT, 12 U.S.C. S 1821(E)(8)(D).

(13) "WALKAWAY CLAUSE" MEANS A PROVISION IN A NETTING AGREEMENT OR A QUALIFIED FINANCIAL CONTRACT THAT, AFTER CALCULATION OF A VALUE OF A PARTY'S POSITION OR AN AMOUNT DUE TO OR FROM ONE OF THE PARTIES IN ACCORDANCE WITH ITS TERMS UPON TERMINATION, LIQUIDATION OR ACCELERATION OF THE NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT, EITHER DOES NOT CREATE A PAYMENT OBLIGATION OF A PARTY OR EXTINGUISHES A PAYMENT OBLIGATION OF A PARTY IN WHOLE OR IN PART SOLELY BECAUSE OF THE PARTY'S STATUS AS A NON-DEFAULTING PARTY.

(B)(1) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE, INCLUDING ANY OTHER PROVISION OF THIS ARTICLE PERMITTING THE MODIFICATION OF CONTRACTS, OR OTHER LAW OF THIS STATE, NO PERSON SHALL BE STAYED OR PROHIBITED FROM EXERCISING: (A) A CONTRACTUAL RIGHT TO CAUSE THE TERMINATION, LIQUIDATION, ACCELERATION OR CLOSE OUT OF ANY OBLIGATION UNDER OR IN CONNECTION WITH A NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT WITH AN INSURER BECAUSE OF: (I) THE INSOLVENCY, FINANCIAL CONDITION OR DEFAULT OF THE INSURER AT ANY TIME, PROVIDED THAT THE RIGHT IS ENFORCEABLE UNDER APPLICABLE LAW OTHER THAN THIS ARTICLE; OR (II) THE COMMENCEMENT OF ANY PROCEEDING UNDER THIS ARTICLE; (B) ANY RIGHT UNDER A SECURITY ARRANGEMENT RELATING TO ONE OR MORE NETTING AGREEMENTS OR QUALIFIED FINANCIAL CONTRACTS; OR (C) SUBJECT TO ANY PROVISION OF SUBSECTION (B) OF SECTION SEVEN THOUSAND FOUR HUNDRED TWENTY-SEVEN OF THIS CHAPTER, ANY RIGHT TO OFFSET OR NET OUT ANY TERMINATION VALUE, PAYMENT AMOUNT, OR OTHER TRANSFER OBLIGATION ARISING UNDER OR IN CONNECTION WITH ONE OR MORE QUALIFIED FINANCIAL CONTRACTS WHERE THE COUNTERPARTY OR ITS GUARANTOR IS ORGANIZED UNDER THE LAWS OF THE UNITED STATES, A STATE, OR A FOREIGN JURISDICTION APPROVED BY THE SECURITIES VALUATION OFFICE OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS ELIGIBLE FOR NETTING.

(2) IF A COUNTERPARTY TO A MASTER NETTING AGREEMENT OR A QUALIFIED FINANCIAL CONTRACT WITH AN INSURER SUBJECT TO A PROCEEDING UNDER THIS ARTICLE TERMINATES, LIQUIDATES, CLOSES OUT OR ACCELERATES THE AGREEMENT OR CONTRACT, DAMAGES SHALL BE MEASURED AS OF THE DATE OR DATES OF TERMINATION, LIQUIDATION, CLOSE OUT OR ACCELERATION. THE AMOUNT OF A CLAIM FOR DAMAGES SHALL BE ACTUAL DIRECT COMPENSATORY DAMAGES.

(C) UPON TERMINATION OF A NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT, THE NET OR SETTLEMENT AMOUNT, IF ANY, OWED BY A NONDEFAULTING PARTY TO AN INSURER AGAINST WHICH AN APPLICATION HAS BEEN FILED UNDER THIS ARTICLE SHALL BE TRANSFERRED TO OR ON THE ORDER OF THE SUPERINTENDENT, AS LIQUIDATOR, REHABILITATOR OR CONSERVATOR FOR THE INSURER, EVEN IF THE INSURER IS THE DEFAULTING PARTY, NOTWITHSTANDING ANY WALKAWAY CLAUSE IN THE NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT. ANY LIMITED TWO-WAY PAYMENT OR FIRST METHOD PROVISION IN A NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT WITH AN INSURER THAT HAS DEFAULTED SHALL BE DEEMED TO BE A FULL TWO-WAY PAYMENT OR SECOND METHOD PROVISION AS AGAINST THE DEFAULTING INSURER. ANY SUCH PROPERTY OR AMOUNT SHALL, EXCEPT TO THE EXTENT IT IS SUBJECT TO ONE OR MORE SECONDARY LIENS OR ENCUMBRANCES OR RIGHTS OF NETTING OR SETOFF, BE AN ASSET OF THE INSURER.

(D) IN MAKING ANY TRANSFER OF A NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT OF AN INSURER SUBJECT TO A PROCEEDING UNDER THIS ARTICLE, THE SUPERINTENDENT, AS LIQUIDATOR, REHABILITATOR OR CONSERVATOR FOR THE INSURER, SHALL EITHER:

(1) TRANSFER TO ONE PARTY (OTHER THAN AN INSURER SUBJECT TO A PROCEEDING UNDER THIS ARTICLE) ALL NETTING AGREEMENTS AND QUALIFIED FINANCIAL CONTRACTS BETWEEN A COUNTERPARTY OR ANY AFFILIATE OF SUCH COUNTERPARTY AND THE INSURER THAT IS THE SUBJECT OF THE PROCEEDING, INCLUDING: (A) ALL RIGHTS AND OBLIGATIONS OF EACH PARTY UNDER EACH SUCH NETTING AGREEMENT AND QUALIFIED FINANCIAL CONTRACT; AND (B) ALL PROPERTY, INCLUDING

ANY GUARANTEES OR OTHER CREDIT ENHANCEMENT, SECURING ANY CLAIMS OF EACH PARTY UNDER EACH SUCH NETTING AGREEMENT AND QUALIFIED FINANCIAL CONTRACT; OR

(2) TRANSFER NONE OF THE NETTING AGREEMENTS, QUALIFIED FINANCIAL CONTRACTS, RIGHTS, OBLIGATIONS OR PROPERTY REFERRED TO IN PARAGRAPH ONE OF THIS SUBSECTION (WITH RESPECT TO SUCH COUNTERPARTY AND ANY AFFILIATE OF SUCH COUNTERPARTY).

(E) IF THE SUPERINTENDENT, AS LIQUIDATOR, REHABILITATOR OR CONSERVATOR FOR AN INSURER, MAKES A TRANSFER OF ONE OR MORE NETTING AGREEMENTS OR QUALIFIED FINANCIAL CONTRACTS, THEN THE SUPERINTENDENT SHALL USE HIS OR HER BEST EFFORTS TO NOTIFY ANY PERSON WHO IS PARTY TO THE NETTING AGREEMENTS OR QUALIFIED FINANCIAL CONTRACTS OF THE TRANSFER BY 12:00 NOON, NEW YORK TIME, ON THE BUSINESS DAY FOLLOWING THE TRANSFER.

(F) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE, THE SUPERINTENDENT, AS LIQUIDATOR, REHABILITATOR OR CONSERVATOR FOR AN INSURER, MAY NOT AVOID A TRANSFER OF MONEY OR OTHER PROPERTY ARISING UNDER OR IN CONNECTION WITH A NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT, OR ANY SECURITY ARRANGEMENT RELATING TO A NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT, THAT IS MADE BEFORE THE COMMENCEMENT OF A LIQUIDATION, REHABILITATION OR CONSERVATION PROCEEDING UNDER THIS ARTICLE, EXCEPT THAT A TRANSFER MAY BE AVOIDED UNDER SECTION SEVEN THOUSAND FOUR HUNDRED TWENTY-FIVE OF THIS CHAPTER IF THE TRANSFER WAS MADE WITH ACTUAL INTENT TO HINDER, DELAY OR DEFRAUD THE INSURER, THE SUPERINTENDENT, AS LIQUIDATOR, REHABILITATOR OR CONSERVATOR OF THE INSURER, ANY OTHER RECEIVER APPOINTED FOR THE INSURER, OR EXISTING OR FUTURE CREDITORS.

(G)(1) IN EXERCISING ANY RIGHTS OF DISAFFIRMANCE OR REPUDIATION OF A LIQUIDATOR, REHABILITATOR OR CONSERVATOR WITH RESPECT TO ANY NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT TO WHICH AN INSURER IS A PARTY, THE SUPERINTENDENT, AS LIQUIDATOR, REHABILITATOR OR CONSERVATOR FOR THE INSURER SHALL EITHER: (A) DISAFFIRM OR REPUDIATE ALL NETTING AGREEMENTS AND QUALIFIED FINANCIAL CONTRACTS BETWEEN A COUNTERPARTY OR ANY AFFILIATE OF SUCH COUNTERPARTY AND THE INSURER THAT IS THE SUBJECT OF THE PROCEEDING; OR (B) DISAFFIRM OR REPUDIATE NONE OF THE NETTING AGREEMENTS AND QUALIFIED FINANCIAL CONTRACTS REFERRED TO IN SUBPARAGRAPH (A) OF THIS PARAGRAPH (WITH RESPECT TO SUCH PERSON OR ANY AFFILIATE OF SUCH PERSON).

(2) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE, ANY CLAIM OF A COUNTERPARTY AGAINST THE ESTATE ARISING FROM THE SUPERINTENDENT'S DISAFFIRMANCE OR REPUDIATION OF A NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT THAT HAS NOT BEEN PREVIOUSLY AFFIRMED IN THE LIQUIDATION PROCEEDING OR IN THE IMMEDIATELY PRECEDING REHABILITATION PROCEEDING SHALL BE DETERMINED AND SHALL BE ALLOWED OR DISALLOWED: (A) AS IF THE CLAIM HAD ARISEN BEFORE THE DATE OF THE FILING OF THE APPLICATION FOR LIQUIDATION; OR (B) IF A REHABILITATION PROCEEDING IS CONVERTED TO A LIQUIDATION PROCEEDING, AS IF THE CLAIM HAD ARISEN BEFORE THE DATE OF THE FILING OF THE APPLICATION FOR REHABILITATION.

(3) THE AMOUNT OF THE CLAIM IDENTIFIED IN PARAGRAPH TWO OF THIS SUBSECTION SHALL BE THE ACTUAL DIRECT COMPENSATORY DAMAGES DETERMINED AS OF THE DATE OF THE DISAFFIRMANCE OR REPUDIATION OF THE NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT.

(H) ALL RIGHTS OF A COUNTERPARTY UNDER THIS ARTICLE SHALL APPLY TO A NETTING AGREEMENT AND A QUALIFIED FINANCIAL CONTRACT ENTERED INTO ON BEHALF OF OR ALLOCATED TO: (1) THE GENERAL ACCOUNT OF THE INSURER; OR (2) A SEPARATE ACCOUNT OF THE INSURER IF THE ASSETS OF THE SEPARATE ACCOUNT ARE AVAILABLE ONLY TO A COUNTERPARTY TO A NETTING AGREEMENT AND

A QUALIFIED FINANCIAL CONTRACT ENTERED INTO ON BEHALF OF, OR ALLOCATED TO, THAT SEPARATE ACCOUNT.

S 2. This act shall take effect immediately; provided, however, the provisions of section 7437 of the insurance law, as added by section one of this act shall only apply to a liquidation, rehabilitation or conservation proceeding that commences under article 74 of the insurance law on or after such effective date.