

2713--A

Cal. No. 239

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 -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

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:

1 Section 1. The insurance law is amended by adding a new section 7437
2 to read as follows:
3 S 7437. QUALIFIED FINANCIAL CONTRACTS. (A) AS USED IN THIS SECTION:
4 (1) "ACTUAL DIRECT COMPENSATORY DAMAGES" MEANS AND INCLUDES NORMAL AND
5 REASONABLE COSTS OF COVER OR OTHER REASONABLE MEASURES OF DAMAGES
6 UTILIZED IN THE DERIVATIVES, SECURITIES OR OTHER MARKET FOR THE CONTRACT
7 AND AGREEMENT CLAIMS BUT DOES NOT INCLUDE PUNITIVE OR EXEMPLARY DAMAGES,
8 DAMAGES FOR LOST PROFIT OR LOST OPPORTUNITY OR DAMAGES FOR PAIN AND
9 SUFFERING.
10 (2) "BUSINESS DAY" MEANS A DAY OTHER THAN A SATURDAY, A SUNDAY OR ANY
11 DAY ON WHICH EITHER THE NEW YORK STOCK EXCHANGE OR THE FEDERAL RESERVE
12 BANK OF NEW YORK IS CLOSED.
13 (3) "COMMODITY CONTRACT" MEANS: (A) A CONTRACT FOR THE PURCHASE OR
14 SALE OF A COMMODITY FOR FUTURE DELIVERY ON, OR SUBJECT TO THE RULES OF,
15 A BOARD OF TRADE OR CONTRACT MARKET UNDER THE COMMODITY EXCHANGE ACT (7
16 U.S.C. S 1, ET SEQ.) OR A BOARD OF TRADE OUTSIDE THE UNITED STATES; (B)
17 AN AGREEMENT THAT IS SUBJECT TO REGULATION UNDER SECTION 19 OF THE
18 COMMODITY EXCHANGE ACT (7 U.S.C. S 1, ET SEQ.) AND THAT IS COMMONLY
19 KNOWN TO THE COMMODITIES TRADE AS A MARGIN ACCOUNT, MARGIN CONTRACT,
20 LEVERAGE ACCOUNT OR LEVERAGE CONTRACT; (C) AN AGREEMENT OR TRANSACTION
21 THAT IS SUBJECT TO REGULATION UNDER SECTION 4C(B) OF THE COMMODITY

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

LBD05498-03-1

1 EXCHANGE ACT (7 U.S.C. S 1, ET SEQ.) AND THAT IS COMMONLY KNOWN TO THE
2 COMMODITIES TRADE AS A COMMODITY OPTION; (D) ANY COMBINATION OF THE
3 AGREEMENTS OR TRANSACTIONS REFERRED TO IN THIS PARAGRAPH; (E) ANY OPTION
4 TO ENTER INTO AN AGREEMENT OR TRANSACTION REFERRED TO IN THIS PARAGRAPH;
5 OR (F) ANY OTHER CONTRACT THAT IS INCLUDED FROM TIME TO TIME AS A
6 COMMODITY CONTRACT AS DEFINED IN THE FEDERAL DEPOSIT INSURANCE ACT, 12
7 U.S.C. S 1821(E)(8)(D).

8 (4) "CONTRACTUAL RIGHT" MEANS AND INCLUDES ANY RIGHT SET FORTH IN A
9 RULE OR BYLAW OF A DERIVATIVES CLEARING ORGANIZATION (AS DEFINED IN THE
10 COMMODITY EXCHANGE ACT), A MULTILATERAL CLEARING ORGANIZATION (AS
11 DEFINED IN THE FEDERAL DEPOSIT INSURANCE CORPORATION IMPROVEMENT ACT OF
12 1991), A NATIONAL SECURITIES EXCHANGE, A NATIONAL SECURITIES ASSOCI-
13 ATION, A SECURITIES CLEARING AGENCY, A CONTRACT MARKET DESIGNATED UNDER
14 THE COMMODITY EXCHANGE ACT, A DERIVATIVES TRANSACTION EXECUTION FACILITY
15 REGISTERED UNDER THE COMMODITY EXCHANGE ACT, OR A BOARD OF TRADE (AS
16 DEFINED IN THE COMMODITY EXCHANGE ACT) OR IN A RESOLUTION OF THE GOVERN-
17 ING BOARD THEREOF AND ANY RIGHT, WHETHER OR NOT EVIDENCED IN WRITING,
18 ARISING UNDER STATUTORY OR COMMON LAW, OR UNDER LAW MERCHANT, OR BY
19 REASON OF NORMAL BUSINESS PRACTICE.

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

22 (6) "NETTING AGREEMENT" MEANS: (A) A CONTRACT OR AGREEMENT (INCLUDING
23 THE TERMS AND CONDITIONS INCORPORATED BY REFERENCE IN SUCH AGREEMENT),
24 INCLUDING A MASTER AGREEMENT (WHICH MASTER AGREEMENT, TOGETHER WITH ALL
25 SCHEDULES, CONFIRMATIONS, DEFINITIONS AND ADDENDA THERETO AND TRANS-
26 ACTIONS UNDER ANY THEREOF, SHALL BE TREATED AS ONE NETTING AGREEMENT),
27 THAT DOCUMENTS ONE OR MORE TRANSACTIONS BETWEEN THE PARTIES TO THE
28 AGREEMENT FOR OR INVOLVING ONE OR MORE QUALIFIED FINANCIAL CONTRACTS AND
29 THAT PROVIDES FOR THE NETTING, OFFSET, LIQUIDATION, TERMINATION, ACCEL-
30 ERATION OR CLOSE OUT, UNDER OR IN CONNECTION WITH ONE OR MORE QUALIFIED
31 FINANCIAL CONTRACTS OR PRESENT OR FUTURE PAYMENT OR DELIVERY OBLIGATIONS
32 OR PAYMENT OR DELIVERY ENTITLEMENTS THEREUNDER (INCLUDING LIQUIDATION OR
33 CLOSE-OUT VALUES RELATING TO SUCH OBLIGATIONS OR ENTITLEMENTS) AMONG THE
34 PARTIES TO THE NETTING AGREEMENT; (B) ANY MASTER AGREEMENT OR BRIDGE
35 AGREEMENT FOR ONE OR MORE MASTER AGREEMENTS DESCRIBED IN SUBPARAGRAPH
36 (A) OF THIS PARAGRAPH; OR (C) ANY SECURITY ARRANGEMENT RELATED TO ONE OR
37 MORE CONTRACTS OR AGREEMENTS DESCRIBED IN SUBPARAGRAPH (A) OR (B) OF
38 THIS PARAGRAPH; PROVIDED THAT ANY CONTRACT OR AGREEMENT DESCRIBED IN
39 SUBPARAGRAPH (A) OR (B) OF THIS PARAGRAPH RELATING TO AGREEMENTS OR
40 TRANSACTIONS THAT ARE NOT QUALIFIED FINANCIAL CONTRACTS SHALL BE DEEMED
41 TO BE A NETTING AGREEMENT ONLY WITH RESPECT TO THOSE AGREEMENTS OR TRAN-
42 SACTIONS THAT ARE QUALIFIED FINANCIAL CONTRACTS.

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

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

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

52 (10) "SECURITY ARRANGEMENT" MEANS ANY SECURITY AGREEMENT OR ARRANGE-
53 MENT OR OTHER CREDIT ENHANCEMENT OR GUARANTEE OR REIMBURSEMENT OBLI-
54 GATION, INCLUDING A PLEDGE, SECURITY, COLLATERAL OR GUARANTEE AGREEMENT
55 OR CREDIT SUPPORT DOCUMENT.

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

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

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

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

33 (2) IF A COUNTERPARTY TO A MASTER NETTING AGREEMENT OR A QUALIFIED
34 FINANCIAL CONTRACT WITH AN INSURER, OTHER THAN AN INSURER LICENSED TO
35 WRITE FINANCIAL GUARANTY INSURANCE, SUBJECT TO A PROCEEDING UNDER THIS
36 ARTICLE TERMINATES, LIQUIDATES, CLOSES OUT OR ACCELERATES THE AGREEMENT
37 OR CONTRACT, DAMAGES SHALL BE MEASURED AS OF THE DATE OR DATES OF TERMI-
38 NATION, LIQUIDATION, CLOSE OUT OR ACCELERATION. THE AMOUNT OF A CLAIM
39 FOR DAMAGES SHALL BE ACTUAL DIRECT COMPENSATORY DAMAGES.

40 (C) UPON TERMINATION OF A NETTING AGREEMENT OR QUALIFIED FINANCIAL
41 CONTRACT, THE NET OR SETTLEMENT AMOUNT, IF ANY, OWED BY A NONDEFAULTING
42 PARTY TO AN INSURER AGAINST WHICH AN APPLICATION HAS BEEN FILED UNDER
43 THIS ARTICLE, OTHER THAN AN INSURER LICENSED TO WRITE FINANCIAL GUARANTY
44 INSURANCE, SHALL BE TRANSFERRED TO OR ON THE ORDER OF THE SUPERINTEN-
45 DENT, AS LIQUIDATOR, REHABILITATOR OR CONSERVATOR FOR THE INSURER, EVEN
46 IF THE INSURER IS THE DEFAULTING PARTY, NOTWITHSTANDING ANY WALKAWAY
47 CLAUSE IN THE NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT. ANY
48 LIMITED TWO-WAY PAYMENT OR FIRST METHOD PROVISION IN A NETTING AGREEMENT
49 OR QUALIFIED FINANCIAL CONTRACT WITH AN INSURER THAT HAS DEFAULTED SHALL
50 BE DEEMED TO BE A FULL TWO-WAY PAYMENT OR SECOND METHOD PROVISION AS
51 AGAINST THE DEFAULTING INSURER. ANY SUCH PROPERTY OR AMOUNT SHALL,
52 EXCEPT TO THE EXTENT IT IS SUBJECT TO ONE OR MORE SECONDARY LIENS OR
53 ENCUMBRANCES OR RIGHTS OF NETTING OR SETOFF, BE AN ASSET OF THE INSURER.

54 (D) IN MAKING ANY TRANSFER OF A NETTING AGREEMENT OR QUALIFIED FINAN-
55 CIAL CONTRACT OF AN INSURER SUBJECT TO A PROCEEDING UNDER THIS ARTICLE,
56 OTHER THAN AN INSURER LICENSED TO WRITE FINANCIAL GUARANTY INSURANCE,

1 THE SUPERINTENDENT, AS LIQUIDATOR, REHABILITATOR OR CONSERVATOR FOR THE
2 INSURER, SHALL EITHER:

3 (1) TRANSFER TO ONE PARTY (OTHER THAN AN INSURER SUBJECT TO A PROCEED-
4 ING UNDER THIS ARTICLE) ALL NETTING AGREEMENTS AND QUALIFIED FINANCIAL
5 CONTRACTS BETWEEN A COUNTERPARTY OR ANY AFFILIATE OF SUCH COUNTERPARTY
6 AND THE INSURER THAT IS THE SUBJECT OF THE PROCEEDING, INCLUDING: (A)
7 ALL RIGHTS AND OBLIGATIONS OF EACH PARTY UNDER EACH SUCH NETTING AGREE-
8 MENT AND QUALIFIED FINANCIAL CONTRACT; AND (B) ALL PROPERTY, INCLUDING
9 ANY GUARANTEES OR OTHER CREDIT ENHANCEMENT, SECURING ANY CLAIMS OF EACH
10 PARTY UNDER EACH SUCH NETTING AGREEMENT AND QUALIFIED FINANCIAL
11 CONTRACT; OR

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

16 (E) IF THE SUPERINTENDENT, AS LIQUIDATOR, REHABILITATOR OR CONSERVATOR
17 FOR AN INSURER, OTHER THAN AN INSURER LICENSED TO WRITE FINANCIAL GUAR-
18 ANTY INSURANCE, MAKES A TRANSFER OF ONE OR MORE NETTING AGREEMENTS OR
19 QUALIFIED FINANCIAL CONTRACTS, THEN THE SUPERINTENDENT SHALL USE HIS OR
20 HER BEST EFFORTS TO NOTIFY ANY PERSON WHO IS PARTY TO THE NETTING AGREE-
21 MENTS OR QUALIFIED FINANCIAL CONTRACTS OF THE TRANSFER BY 12:00 NOON,
22 NEW YORK TIME, ON THE BUSINESS DAY FOLLOWING THE TRANSFER.

23 (F) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE, THE SUPER-
24 INTENDENT, AS LIQUIDATOR, REHABILITATOR OR CONSERVATOR FOR AN INSURER,
25 OTHER THAN AN INSURER LICENSED TO WRITE FINANCIAL GUARANTY INSURANCE,
26 MAY NOT AVOID A TRANSFER OF MONEY OR OTHER PROPERTY ARISING UNDER OR IN
27 CONNECTION WITH A NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT, OR
28 ANY SECURITY ARRANGEMENT RELATING TO A NETTING AGREEMENT OR QUALIFIED
29 FINANCIAL CONTRACT, THAT IS MADE BEFORE THE COMMENCEMENT OF A LIQUI-
30 DATION, REHABILITATION OR CONSERVATION PROCEEDING UNDER THIS ARTICLE,
31 EXCEPT THAT A TRANSFER MAY BE AVOIDED UNDER SECTION SEVEN THOUSAND FOUR
32 HUNDRED TWENTY-FIVE OF THIS ARTICLE IF THE TRANSFER WAS MADE WITH ACTUAL
33 INTENT TO HINDER, DELAY OR DEFRAUD THE INSURER, THE SUPERINTENDENT, AS
34 LIQUIDATOR, REHABILITATOR OR CONSERVATOR OF THE INSURER, ANY OTHER
35 RECEIVER APPOINTED FOR THE INSURER, OR EXISTING OR FUTURE CREDITORS.

36 (G)(1) IN EXERCISING ANY RIGHTS OF DISAFFIRMANCE OR REPUDIATION OF A
37 LIQUIDATOR, REHABILITATOR OR CONSERVATOR WITH RESPECT TO ANY NETTING
38 AGREEMENT OR QUALIFIED FINANCIAL CONTRACT TO WHICH AN INSURER IS A
39 PARTY, OTHER THAN AN INSURER LICENSED TO WRITE FINANCIAL GUARANTY INSUR-
40 ANCE, THE SUPERINTENDENT, AS LIQUIDATOR, REHABILITATOR OR CONSERVATOR
41 FOR THE INSURER SHALL EITHER: (A) DISAFFIRM OR REPUDIATE ALL NETTING
42 AGREEMENTS AND QUALIFIED FINANCIAL CONTRACTS BETWEEN A COUNTERPARTY OR
43 ANY AFFILIATE OF SUCH COUNTERPARTY AND THE INSURER THAT IS THE SUBJECT
44 OF THE PROCEEDING; OR (B) DISAFFIRM OR REPUDIATE NONE OF THE NETTING
45 AGREEMENTS AND QUALIFIED FINANCIAL CONTRACTS REFERRED TO IN SUBPARAGRAPH
46 (A) OF THIS PARAGRAPH (WITH RESPECT TO SUCH PERSON OR ANY AFFILIATE OF
47 SUCH PERSON).

48 (2) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE, ANY CLAIM OF
49 A COUNTERPARTY AGAINST THE ESTATE, OTHER THAN THE ESTATE OF AN INSURER
50 LICENSED TO WRITE FINANCIAL GUARANTY INSURANCE, ARISING FROM THE SUPER-
51 INTENDENT'S DISAFFIRMANCE OR REPUDIATION OF A NETTING AGREEMENT OR QUAL-
52 IFIED FINANCIAL CONTRACT THAT HAS NOT BEEN PREVIOUSLY AFFIRMED IN THE
53 LIQUIDATION PROCEEDING OR IN THE IMMEDIATELY PRECEDING REHABILITATION
54 PROCEEDING SHALL BE DETERMINED AND SHALL BE ALLOWED OR DISALLOWED: (A)
55 AS IF THE CLAIM HAD ARISEN BEFORE THE DATE OF THE FILING OF THE APPLICA-
56 TION FOR LIQUIDATION; OR (B) IF A REHABILITATION PROCEEDING IS CONVERTED

1 TO A LIQUIDATION PROCEEDING, AS IF THE CLAIM HAD ARISEN BEFORE THE DATE
2 OF THE FILING OF THE APPLICATION FOR REHABILITATION.

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

7 (H) ALL RIGHTS OF A COUNTERPARTY UNDER THIS ARTICLE SHALL APPLY TO A
8 NETTING AGREEMENT AND A QUALIFIED FINANCIAL CONTRACT ENTERED INTO ON
9 BEHALF OF OR ALLOCATED TO: (1) THE GENERAL ACCOUNT OF THE INSURER; OR
10 (2) A SEPARATE ACCOUNT OF THE INSURER, OTHER THAN AN INSURER LICENSED TO
11 WRITE FINANCIAL GUARANTY INSURANCE, IF THE ASSETS OF THE SEPARATE
12 ACCOUNT ARE AVAILABLE ONLY TO A COUNTERPARTY TO A NETTING AGREEMENT AND
13 A QUALIFIED FINANCIAL CONTRACT ENTERED INTO ON BEHALF OF, OR ALLOCATED
14 TO, THAT SEPARATE ACCOUNT.

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