

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

6603--A

2011-2012 Regular Sessions

I N A S S E M B L Y

March 23, 2011

Introduced by M. of A. MORELLE -- read once and referred to the Committee on Insurance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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
22 EXCHANGE ACT (7 U.S.C. S 1, ET SEQ.) AND THAT IS COMMONLY KNOWN TO THE
23 COMMODITIES TRADE AS A COMMODITY OPTION; (D) ANY COMBINATION OF THE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

52 (D) IN MAKING ANY TRANSFER OF A NETTING AGREEMENT OR QUALIFIED FINAN-
53 CIAL CONTRACT OF AN INSURER SUBJECT TO A PROCEEDING UNDER THIS ARTICLE,
54 OTHER THAN AN INSURER LICENSED TO WRITE FINANCIAL GUARANTY INSURANCE,
55 THE SUPERINTENDENT, AS LIQUIDATOR, REHABILITATOR OR CONSERVATOR FOR THE
56 INSURER, SHALL EITHER:

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

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

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

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

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

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

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

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

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