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Sens. Blevins, Bonini, Sokola, Reps. Carson, Hocker, Hudson

DELAWARE STATE SENATE

146th GENERAL ASSEMBLY

SENATE BILL NO. 46  
AS AMENDED BY  
SENATE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 18 OF THE DELAWARE CODE RELATING TO QUALIFIED FINANCIAL CONTRACTS, DERIVATIVE INSTRUMENTS AND REHABILITATION AND LIQUIDATION.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Title 18 of the Delaware Code by inserting a new Section 1333 thereof reading as follows:

“§ 1333. Rules and Regulations.

The Commissioner may issue such reasonable rules, regulations and orders as the Commissioner may deem necessary or desirable to effectuate the purposes of this chapter, including setting standards for the prudent use by domestic insurers of derivative instruments and other qualified financial contracts (as defined in section 5901 of this title).”

Section 2. Amend § 5901 of Title 18 to add new subsections (14)-(24) to read as follows:

“(14) ‘Affiliate’ shall have the same meaning as set forth in § 5001(1) of this title.

(15) ‘Commodity contract’ means any of the following:

- 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 designated as a contract market by the commodity futures trading commission under the federal Commodity Exchange Act, 7 U.S.C. § 1 et seq., or a board of trade outside the United States.
- b. An agreement that is subject to regulation under section 23 of the federal Commodity Exchange Act, 7 U.S.C. § 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 6c(b) of the federal Commodity Exchange Act, 7 U.S.C. § 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 to enter into an agreement or transaction referred to in this paragraph.

(16) 'Creditor' or 'claimant' is a person having any claim against an insurer, whether the claim is matured or not, liquidated or unliquidated, secured or unsecured, absolute, fixed or contingent.

(17) 'Formal delinquency proceeding' means any conservation, rehabilitation or liquidation proceeding; provided, however, that the term "formal delinquency proceeding" shall not include a supervision under § 5942 of this title.

(18) 'Forward contract' shall have the meaning set forth in the Federal Deposit Insurance Act, 12 U.S.C. § 1821(e)(8)(D), as amended from time to time.

(19) 'Netting agreement' means (1) a contract or agreement (including terms and conditions incorporated by reference therein), 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, liquidation, setoff, 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; (2) any master agreement or bridge agreement for one or more master agreements described in paragraph (1) of this subsection; or (3) any security agreement or arrangement or other credit enhancement or guarantee or reimbursement obligation related to any contract or agreement described in paragraph (1) or (2) of this subsection; provided that any contract or agreement described in paragraph (1) or (2) of this subsection 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.

(20) 'Qualified financial contract' means any commodity contract, forward contract, repurchase agreement, securities contract, swap agreement and any similar agreement that the commissioner determines by regulation, rule or order to be a qualified financial contract for the purposes of this chapter.

(21) 'Repurchase agreement' shall have the meaning set forth in the Federal Deposit Insurance Act, 12 U.S.C. § 1821(e)(8)(D), as amended from time to time. The term repurchase agreement also applies to a reverse repurchase agreement.

(22) ‘Securities contract’ shall have the meaning set forth in the Federal Deposit Insurance Act, 12 U.S.C. § 1821(e)(8)(D), as amended from time to time.

(23) ‘Swap agreement’ shall have the meaning set forth in the Federal Deposit Insurance Act, 12 U.S.C. § 1821(e)(8)(D), as amended from time to time.

(24) ‘Transfer’ shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein, including a setoff, or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings. The retention of a security title in property delivered to an insurer and foreclosure of the insurer’s equity of redemption shall be deemed a transfer suffered by the insurer.”

Section 3. Amend Title 18 of the Delaware Code by inserting a new Section 5933 thereof reading as follows:

“§ 5933. Qualified financial contracts.

(a) Notwithstanding any other provision of this chapter to the contrary, including any other provision of this chapter permitting the modification of contracts, or other law of a state, no person shall be stayed, enjoined or prohibited from exercising any of the following:

(1) A contractual right to terminate, liquidate, accelerate or close out, or cause the termination, liquidation, acceleration or close out of obligations, under or in connection with any netting agreement or qualified financial contract with an insurer because of any of the following:

- a. The insolvency, financial condition or default of the insurer at any time, provided that the right is enforceable under applicable law other than this chapter; or
- b. The commencement of a formal delinquency proceeding under this chapter;

(2) Any right under a pledge, security, collateral, reimbursement or guarantee agreement or arrangement or any other similar security arrangement or other credit enhancement relating to one or more netting agreements or qualified financial contracts; or

(3) Subject to any provision of § 5927(b) of this title, any right to set off or net out any termination value, payment amount or other transfer obligation arising under or in connection with one or more netting agreements or qualified financial contracts where the counterparty or its guarantor is organized under the laws of the United States or a state or a foreign jurisdiction approved by the Securities Valuation Office of the National Association of Insurance Commissioners as eligible for netting.

(4) If a counterparty to a master netting agreement or a qualified financial contract with an insurer subject to a formal delinquency proceeding under this chapter 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 calculated in accordance with subsection (f) of this section.

(b) Upon termination of a netting agreement or qualified financial contract, the net or settlement amount, if any, owed by a non-defaulting party to an insurer against which an application or petition has been filed under this chapter shall be transferred to or on the order of the receiver for the insurer, even if the insurer is the defaulting party, notwithstanding any walkaway clause in the netting agreement or qualified financial contract. For purposes of this subsection, the term “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. 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 net or settlement amount shall, except to the extent it is subject to one or more secondary liens or encumbrances or rights of netting or setoff, be a general asset of the insurer.

(c) In making any transfer of a netting agreement or qualified financial contract of an insurer subject to a formal delinquency proceeding under this chapter, the receiver shall do either of the following:

(1) Transfer to one party (other than an insurer subject to a proceeding under this chapter) 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 formal delinquency proceeding, including all of the following:

- 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 (1) of this subsection (with respect to the counterparty and any affiliate of such counterparty).

(d) If a receiver for an insurer makes a transfer of one or more netting agreements or qualified financial contracts, then the receiver shall use its best efforts to notify any person who is a party to the netting agreements or qualified financial contracts of the transfer by 12:00 noon (the receiver’s local time) on the business day following the transfer. For purposes of

this subsection, “business day” means a day other than a Saturday, Sunday or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(e) Notwithstanding any other provision of this chapter to the contrary, a receiver shall not avoid a transfer of money or other property arising under or in connection with a netting agreement or qualified financial contract (or any pledge, security, collateral or guarantee agreement or any other similar security arrangement or credit support document relating to a netting agreement or qualified financial contract) that is made before the commencement of a formal delinquency proceeding under this chapter. However, a transfer may be avoided under § 5925(c) of this title if the transfer was made with actual intent to hinder, delay or defraud the insurer, a receiver appointed for the insurer or existing or future creditors.

(f) (1) In exercising the rights of disaffirmance or repudiation of a receiver with respect to any netting agreement or qualified financial contract to which an insurer is a party, the receiver for the insurer shall either:

- a. Disaffirm or repudiate all netting agreements and qualified financial contracts between a counterparty or any affiliate of the 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 (1) (with respect to the person or any affiliate of the person).

(2) Notwithstanding any other provision of this chapter, any claim of a counterparty against the estate arising from the receiver’s disaffirmance or repudiation of a netting agreement or qualified financial contract that has not been previously affirmed in the liquidation or immediately preceding conservation or rehabilitation case shall be determined and shall be allowed or disallowed as if the claim had arisen before the date of the filing of the petition for liquidation or, if a conservation or rehabilitation proceeding is converted to a liquidation proceeding, as if the claim had arisen before the date of the filing of the petition for conservation or rehabilitation. The amount of the claim 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. The term “actual direct compensatory damages” does not include punitive or exemplary damages, damages for lost profit or lost opportunity or damages for pain and suffering, but does include 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.

(g) The term “contractual right” as used in this section includes any right, whether or not evidenced in writing, arising under statutory or common law, a rule or bylaw of a national securities exchange, national securities clearing

organization or securities clearing agency, a rule or bylaw or a resolution of the governing body of a contract market or its clearing organization, or under law merchant.

(h) The provisions of this section shall not apply to persons who are affiliates of the insurer that is the subject of the formal delinquency proceeding, unless the Commissioner has previously approved the application of this section to a particular affiliate, which approval may not be unreasonably or arbitrarily withheld.

(i) All rights of counterparties under this chapter shall apply to netting agreements and qualified financial contracts entered into on behalf of the general account or separate accounts if the assets of each separate account are available only to counterparties to netting agreements and qualified financial contracts entered into on behalf of that separate account.”

Section 4. This bill will take effect immediately upon enactment, except that it will only apply to a liquidation, rehabilitation or conservation proceeding that commences under Chapter 59 of the Delaware Insurance Code on or after the enactment of this bill.