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An Act Relating to Qualified Financial Contracts by Domestic Insurers

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 24-A MRSA §4353, sub-§20 is enacted to read:

20. Netting agreement. "Netting agreement" means:

A. A contract or agreement, including terms and conditions incorporated by reference into a contract or agreement, including a master 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 closeout under or in connection with one or more qualified financial contracts or present or future payment or delivery obligations or payment or delivery entitlements under one or more qualified financial contracts, 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 paragraph A; or

C. Any security agreement or arrangement or other credit enhancement or guarantee or reimbursement obligation related to any contract or agreement described in paragraph A or B.

A contract or agreement described in paragraph A or B relating to agreements or transactions that are not qualified financial contracts is considered to be a netting agreement only with respect to those agreements or transactions that are qualified financial contracts. For the purposes of this subsection, a master agreement together with all schedules, confirmations, definitions and addenda to the master agreement and transactions under any master agreement, is treated as one netting agreement.

Sec. 2. 24-A MRSA §4353, sub-§21 is enacted to read:

21. Qualified financial contract. "Qualified financial contract" means a commodity contract, forward contract, repurchase agreement, securities contract, swap agreement and any similar agreement that the superintendent determines to be a qualified financial contract.

A. "Commodity contract" means:

(1) 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 federal Commodity Exchange Act or a board of trade outside the United States;

(2) An agreement that is subject to regulation under Section 19 of the federal Commodity Exchange Act and that is commonly known to the commodities trade as a margin account, margin contract, leverage account or leverage contract;

(3) An agreement or transaction that is subject to regulation under Section 4c(b) of the federal Commodity Exchange Act and that is commonly known to the commodities trade as a commodity option;

(4) Any combination of the agreements or transactions referred to in this paragraph; or

(5) Any option to enter into an agreement or transaction referred to in this paragraph.

B. "Forward contract," "repurchase agreement," "securities contract" and "swap agreement" have the meanings set forth in the Federal Deposit Insurance Act, 12 United States Code, Section 1821(e) (8)(D), as amended from time to time.

Sec. 3. 24-A MRSA §4387 is enacted to read:

§ 4387. Qualified financial contracts

1. Qualified financial contracts. Notwithstanding any other provision of this chapter, including any other provision of this chapter permitting the modification of contracts, or other provision of law to the contrary, a person may not be stayed or prohibited from exercising:

A. A contractual right to cause the termination, liquidation, acceleration or closeout of obligations under or in connection with any netting agreement or qualified financial contract with an insurer because of:

(1) The insolvency, financial condition or default of the insurer at any time, if the right is enforceable under applicable law other than this chapter; or

(2) The commencement of a formal delinquency proceeding under this chapter;

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

C. Subject to section 4381, subsection 2, any right to offset, set off or net out any termination value, payment amount or other transfer obligation arising under or in connection with one or more qualified financial contracts when 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; or

D. If a counterparty to a master netting agreement or a qualified financial contract with an insurer subject to a proceeding under this chapter terminates, liquidates, closes out or accelerates the agreement or contract, damages must be measured as of the date or dates of termination, liquidation, closeout or acceleration. The amount of a claim for damages is the actual direct compensatory damages calculated in accordance with subsection 6.

2. Termination of contract. 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 that is the subject of a delinquency proceeding under this chapter must 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, "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 nondefaulting party. Any limited 2-way payment or first method provision in a netting agreement or qualified financial contract with an insurer that has defaulted is considered to be a full 2-way payment or 2nd method provision as against the defaulting insurer. Any such property or amount, except to the extent it is subject to one or more secondary liens or encumbrances or rights of netting, offset or setoff, must be a general asset of the insurer.

3. Transfer of contract. In making any transfer of a netting agreement or qualified financial contract of an insurer subject to a proceeding under this chapter, the receiver shall either:

A. Transfer to one party, other than an insurer subject to a delinquency proceeding under this chapter, 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, including:

(1) All rights and obligations of each party under each netting agreement and qualified financial contract; and

(2) All property, including any guarantees or other credit enhancement, securing any claims of each party under each netting agreement and qualified financial contract; or

B. Transfer none of the netting agreements, qualified financial contracts, rights, obligations or property referred to in paragraph A with respect to the counterparty and any affiliate of the counterparty.

4. Notice. If a receiver for an insurer makes a transfer of one or more netting agreements or qualified financial contracts, then the receiver must use its best efforts to notify any person who is a party to the netting agreements or qualified financial contracts of the transfer by 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 the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

5. Transfer prior to delinquency. Notwithstanding any other provision of this chapter and except as provided in this subsection, a receiver 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 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 delinquency proceeding under this chapter. A transfer may be avoided 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.

6. Rights of disaffirmance or repudiation. Disaffirmance or repudiation is governed by this subsection.

A. 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:

(1) 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

(2) Disaffirm or repudiate none of the netting agreements and qualified financial contracts referred to in subparagraph (1) with respect to the person or any affiliate of the person.

B. 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 rehabilitation proceeding must be determined and either allowed or disallowed:

(1) As if the claim had arisen before the date of the filing of the petition for liquidation;

(2) If a rehabilitation proceeding is converted to a liquidation proceeding, as if the claim had arisen before the date of the filing of the petition for rehabilitation; or

(3) As if the claim had arisen before the issuance of any order or the commencement of any summary proceeding under this chapter.

The amount of the claim is the actual direct compensatory damages determined as of the date of the disaffirmance or repudiation of the netting agreement or qualified financial contract. "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 used in the derivatives, securities or other market for the contract and agreement claims.

7. Contractual right defined. "Contractual right," as used in this section, includes any right set forth in a rule or bylaw of a derivatives clearing organization as defined in the federal 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 or a contract market designated under the federal Commodity Exchange Act, a derivatives transaction execution facility registered under the federal Commodity Exchange Act, or a board of trade as defined in the federal 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.

8. Affiliates. This section does not apply to any persons who are affiliates of the insurer that is the subject of the proceeding.

9. Rights of counterparties. All rights of counterparties under this chapter 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.

SUMMARY

This bill conforms the chapter in the Maine Insurance Code regarding delinquent insurers to Section 711 of the National Association of Insurance Commissioners Insurer Receivership Model Act regarding netting of qualified financial contracts by insurers who have been placed in rehabilitation or liquidation. This bill also adds 2 related definitions from the model act to that chapter.