

31A-27a-611 Qualified financial contracts.

(1) As used in this section:

(a)

(i) "Actual direct compensatory damages" does not include:

- (A) punitive or exemplary damages;
- (B) damages for lost profit or lost opportunity; or
- (C) damages for pain and suffering.

(ii) "Actual direct compensatory damages" includes:

- (A) normal and reasonable costs of cover; or
- (B) other reasonable measures of damages used in the derivatives, securities, or other market for the contract or agreement claim.

(b) "Business day" means a day other than:

- (i) a Saturday;
- (ii) a Sunday; or
- (iii) day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(c) "Contractual right" includes:

(i) a right set forth:

(A) in a rule or bylaw of:

- (I) a derivatives clearing organization, as defined in the Commodity Exchange Act, 7 U.S.C. Sec. 1 et seq.;
 - (II) a multilateral clearing organization, as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. Sec. 4421;
 - (III) a national securities exchange;
 - (IV) a national securities association;
 - (V) a securities clearing agency;
 - (VI) a contract market designated under the Commodity Exchange Act, 7 U.S.C. Sec. 1 et seq.;
 - (VII) a derivatives transaction execution facility registered under the Commodity Exchange Act, 7 U.S.C. Sec. 1 et seq.; or
 - (VIII) a board of trade, as defined in the Commodity Exchange Act, 7 U.S.C. Sec. 1 et seq.;
- or

(B) in a resolution of the governing board of an entity described in Subsection (1)(c)(i)(A); and

(ii) a right, whether or not evidenced in writing, arising:

- (A) under statutory or common law;
- (B) under law merchant; or
- (C) by reason of normal business practice.

(d) For purposes of Subsection (3), "walkaway clause" means a provision in a qualified financial contract that suspends, conditions, or extinguishes a payment obligation of a party, in whole or in part, or does not create a payment obligation of a party that would otherwise exist:

(i) solely because of:

- (A) the party's status as a nondefaulting party in connection with the insolvency of an insurer that is subject to this chapter and a party to the contract; or
- (B) the appointment of or the exercise of rights or powers by a receiver of an insurer that is subject to this chapter and a party to the contract; and

(ii) not as a result of a party's exercise of any right to offset, setoff, or net obligations that exist under:

- (A) the contract;

- (B) any other contract between those parties; or
 - (C) applicable law.
- (2) Notwithstanding any other provision of this chapter, including any provision of this chapter permitting the modification of a contract, or other law of a state:
- (a) a person may not be stayed or prohibited from exercising:
 - (i) a contractual right to cause the termination, liquidation, acceleration, or close out of an obligation under or in connection with a netting agreement or qualified financial contract with an insurer because of:
 - (A) 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
 - (B) the commencement of a formal delinquency proceeding under this chapter;
 - (ii) a right under any of the following relating to one or more netting agreements or qualified financial contracts:
 - (A) a pledge agreement or arrangement;
 - (B) a security agreement or arrangement;
 - (C) a collateral agreement or arrangement;
 - (D) a reimbursement agreement or arrangement;
 - (E) a guarantee agreement or arrangement;
 - (F) any other similar security agreement or arrangement; or
 - (G) other credit enhancement; or
 - (iii) subject to Subsection 31A-27a-510(2), a 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 qualified financial contracts where the counterparty or its guarantor is organized under the laws of:
 - (A) the United States;
 - (B) a state; or
 - (C) a foreign jurisdiction approved by the Securities Valuation Office of the National Association of Insurance Commissioners as eligible for netting; or
 - (b) 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 master netting agreement or qualified financial contract:
 - (i) damages shall be measured as of the date or dates of termination, liquidation, close out, or acceleration; and
 - (ii) the amount of a claim for damages shall be actual direct compensatory damages calculated in accordance with Subsection (7).
- (3)
- (a) 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 or petition is filed under this chapter shall be transferred to or on the order of the receiver for the insurer:
 - (i) even if the insurer is the defaulting party; and
 - (ii) notwithstanding any walkaway clause in the netting agreement or qualified financial contract.
 - (b)
 - (i) A limited two-way payment or first method provision in a netting agreement or qualified financial contract with an insurer that defaults is considered to be a full two-way payment or second method provision as against the defaulting insurer.

- (ii) Property or an amount described in this Subsection (3)(b) 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.
- (4) In making a 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 proceeding under this chapter, all netting agreements and qualified financial contracts between a counterparty or an affiliate of the counterparty and the insurer that is the subject of the proceeding, including:
 - (i) all rights and obligations of each party under each netting agreement and qualified financial contract; and
 - (ii) 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 Subsection (4)(a) with respect to the counterparty and an affiliate of the counterparty.
- (5) If a receiver for an insurer makes a transfer of one or more netting agreements or qualified financial contracts, the receiver shall use its best efforts to notify any person who is party to the netting agreements or qualified financial contracts of the transfer by 12 noon, the receiver's local time, on the business day following the transfer.
- (6)
 - (a) Notwithstanding any other provision of this chapter and except for Subsection (6)(b), a receiver may not avoid a transfer of money or other property arising under or in connection with any of the following that is made before the commencement of a formal delinquency proceeding under this chapter:
 - (i) a netting agreement;
 - (ii) a qualified financial contract; or
 - (iii) one of the following relating to a netting agreement or qualified financial contract:
 - (A) a pledge agreement;
 - (B) a security agreement;
 - (C) a collateral agreement;
 - (D) a guarantee agreement;
 - (E) any other similar security arrangement; or
 - (F) a credit support document.
 - (b) A transfer may be avoided under Subsection 31A-27a-507(1) if the transfer is made with actual intent to hinder, delay, or defraud:
 - (i) the insurer;
 - (ii) a receiver appointed for the insurer; or
 - (iii) an existing or future creditor.
- (7)
 - (a) In exercising the rights of disaffirmance or repudiation of a receiver with respect to a netting agreement or qualified financial contract to which an insurer is a party, the receiver for the insurer shall either:
 - (i) disaffirm or repudiate all netting agreements and qualified financial contracts between a counterparty or an affiliate of the counterparty and the insurer that is the subject of the proceeding; or
 - (ii) disaffirm or repudiate none of the netting agreements and qualified financial contracts referred to in Subsection (7)(a)(i) with respect to the person or an affiliate of the person.

- (b) Notwithstanding any other provision of this chapter, a 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 case shall be determined and shall be allowed or disallowed:
 - (i) as if the claim arose before the day on which the petition for liquidation is filed; or
 - (ii) if a rehabilitation proceeding is converted to a liquidation proceeding, as if the claim had arisen before the day on which the petition for rehabilitation is filed.
- (c) The amount of a 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.
- (8) This section does not apply to a person who is an affiliate of the insurer that is the subject of the proceeding.
- (9) All rights of a counterparty under this chapter apply to a netting agreement or qualified financial contract 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.
- (10)
 - (a) The definition of "qualified financial contract" in Section 31A-27a-102 shall be interpreted to be consistent with the definitions applicable under federal law in instances of insolvency of other types of financial institutions.
 - (b) The definition of "qualified financial contract" and this section do not:
 - (i) affect the scope of permissible investments of insurers or the valuation of those investments;
or
 - (ii) modify any other regulatory framework applicable to investments or investment practices of insurers.

Enacted by Chapter 309, 2007 General Session