

## CHAPTER 160

AN ACT concerning certain financial agreements and supplementing P.L.1992, c.65 (C.17B:32-31 et seq.).

**BE IT ENACTED** by the Senate and General Assembly of the State of New Jersey:

C.17B:32-92 Rights relative to certain financial agreements; terms defined.

1. a. (1) Notwithstanding any other provision of the “Life and Health Insurers Rehabilitation and Liquidation Act,” P.L.1992, c.65 (C.17B:32-31 et seq.) to the contrary, a person shall not be stayed or prohibited from exercising:

(a) A contractual right to cause the termination, liquidation, acceleration or close out of any obligation under or in connection with a netting agreement or qualified financial contract with an insurer because of: (i) the insolvency, financial condition or default of the insurer at any time, provided that the right is enforceable under applicable law other than the provisions of P.L.1992, c.65 (C.17B:32-31 et seq.); or (ii) the commencement of a formal delinquency proceeding under P.L.1992, c.65 (C.17B:32-31 et seq.);

(b) Any right under a security arrangement relating to one or more netting agreements or qualified financial contracts; or

(c) Subject to subsection b. of section 29 of P.L.1992, c.65 (C.17B:32-59), any right to setoff 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, a state, or a foreign jurisdiction approved by the Securities Valuation Office of the National Association of Insurance Commissioners as eligible for netting.

(2) If a counterparty to a master netting agreement or a qualified financial contract with an insurer subject to a proceeding under P.L.1992, c.65 (C.17B:32-31 et seq.) 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.

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 a petition has been filed pursuant to P.L.1992, c.65 (C.17B:32-31 et seq.) shall be transferred to the receiver for the insurer or as directed by 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. 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 an asset of the insurer.

c. In making any transfer of a netting agreement or qualified financial contract of an insurer subject to a proceeding under P.L.1992, c.65 (C.17B:32-31 et seq.), the receiver shall either:

(1) Transfer to one party, other than an insurer subject to a proceeding under P.L.1992, c.65 (C.17B:32-31 et seq.), 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 proceeding, including: (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

credit support documents, 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 subparagraph (b) of paragraph (1) of this subsection with respect to such 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 his or her best efforts to notify any person who is party to the netting agreements or qualified financial contracts of the transfer by 12 o'clock 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, a 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 P.L.1992, c.65 (C.17B:32-31 et seq.), 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 security arrangement relating to a netting agreement or qualified financial contract that is made before the commencement of a formal delinquency proceeding under P.L.1992, c.65 (C.17B:32-31 et seq.), except that a transfer may be avoided under section 25 of P.L.1992, c.65 (C.17B:32-55) 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 any 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 that 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 with respect to that person or any affiliate of that person.

(2) Notwithstanding any other provision of P.L.1992, c.65 (C.17B:32-31 et seq.), 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 proceeding or in the immediately preceding rehabilitation proceeding shall be determined and shall be allowed or disallowed: (a) as if the claim had arisen before the date of the filing of the petition for liquidation; or (b) 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.

(3) The amount of the claim identified in paragraph (2) of this subsection 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.

g. All rights of a counterparty under this section shall apply to a netting agreement and a qualified financial contract entered into on behalf of, or allocated to:

(1) the general account of the insurer; or

(2) a separate account of the insurer if the assets of the separate account are available only to a counterparty to a netting agreement and a qualified financial contract entered into on behalf of, or allocated to, that separate account.

h. As used in this section:

(1) "Actual direct compensatory damages" includes normal and reasonable costs of cover or other reasonable measures of damages utilized in the derivatives market for the contract

and agreement claims, but does not include punitive and exemplary damages, damages for lost profit or lost opportunity, or damages for pain and suffering.

(2) “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 “Commodity Exchange Act,” 7 U.S.C. s.1 et seq., or board of trade outside the United States;

(b) An agreement that is subject to regulation under section 19 of the “Commodity Exchange Act,” 7 U.S.C. s.23, 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 subsection 4c(b) of the “Commodity Exchange Act,” 7 U.S.C. s.6c(b), 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; or

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

(3) “Contractual right” includes any right set forth in a rule or bylaw of a derivatives clearing organization as defined in the “Commodity Exchange Act,” 7 U.S.C. s.1a(9), a multilateral clearing organization as defined in the “Federal Deposit Insurance Corporation Improvement Act of 1991,” 12 U.S.C. s.4421(1), a national securities exchange, a national securities association, a securities clearing agency, or a contract market designated under the “Commodity Exchange Act,” 7 U.S.C. s.1 et seq., a swap execution facility registered under the “Commodity Exchange Act,” 7 U.S.C. s.1 et seq., or a board of trade as defined in the “Commodity Exchange Act,” 7 U.S.C. s.1a(2), 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.

(4) “Forward contract” means the same as the term is defined in the “Federal Deposit Insurance Act,” 12 U.S.C. s.1821(e)(8)(D).

(5) “Netting agreement” means:

(a) A contract or agreement, including the terms and conditions incorporated by reference in such contract or agreement, 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, setoff, liquidation, 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;

(b) Any master agreement or bridge agreement for one or more master agreements described in subparagraph (a) of this paragraph; or

(c) Any security arrangement related to one or more contracts or agreements described in subparagraph (a) or (b) of this paragraph, provided that any contract or agreement described in subparagraph (a) or (b) of this paragraph 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.

(6) “Qualified financial contract” means a commodity contract, forward contract, repurchase agreement, securities contract, swap agreement, and any similar agreement that

the commissioner determines by regulation to be a qualified financial contract for the purposes of this section.

(7) "Repurchase agreement" means the same as that term is defined in the "Federal Deposit Insurance Act," 12 U.S.C. s.1821(e)(8)(D). The term "repurchase agreement" shall include a reverse repurchase agreement.

(8) "Security arrangement" means any security agreement or arrangement or other credit enhancement or guarantee or reimbursement obligation, including a pledge, security, collateral or guarantee agreement or credit support document.

(9) "Securities contract" means the same as that term is defined in the "Federal Deposit Insurance Act," 12 U.S.C. s.1821(e)(8)(D).

(10) "Separate account" means the same as that term is defined in N.J.S.17B:28-1.

(11) "Swap agreement" means the same as that term is defined in the "Federal Deposit Insurance Act," 12 U.S.C. s.1821(e)(8)(D).

(12) "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.

2. This act shall take effect immediately.

Approved January 5, 2012.