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Assigned to: Economic Matters

A BILL ENTITLED

1 AN ACT concerning

2 **Insurance - Delinquency Proceedings Against Insolvent Insurers - Financial**
3 **Contracts**

4 FOR the purpose of providing that a person may not be stayed or otherwise prohibited
5 from exercising certain rights under certain circumstances in certain
6 delinquency proceedings against certain insurers; requiring certain net or
7 settlement amounts due to an insurer subject to a certain delinquency
8 proceeding to be transferred to or on the order of the receiver for the insurer;
9 specifying the manner in which a receiver in a certain delinquency proceeding
10 must transfer certain netting agreements and qualified financial contracts;
11 requiring a receiver for an insurer to give notice to parties to certain netting
12 agreements and qualified financial contracts under certain circumstances;
13 prohibiting a receiver for an insurer from avoiding a transfer of certain money
14 or other property under certain circumstances; requiring a receiver to exercise
15 certain powers to disaffirm or repudiate certain netting agreements and
16 qualified financial contracts in a certain manner; providing that the rights of
17 counterparties under certain provisions of law apply to certain netting
18 agreements and qualified financial contracts; providing for the application of
19 this Act; defining certain terms; and generally relating to delinquency
20 proceedings against insolvent insurers.

21 BY adding to
22 Article - Insurance
23 Section 9-229.1
24 Annotated Code of Maryland
25 (2003 Replacement Volume and 2004 Supplement)

26 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
27 MARYLAND, That the Laws of Maryland read as follows:

1

Article - Insurance

2 9-229.1.

3 (A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS
4 INDICATED.

5 (2) "COMMODITY CONTRACT" MEANS:

6 (I) A CONTRACT FOR THE PURCHASE OR SALE OF A COMMODITY
7 FOR FUTURE DELIVERY ON, OR SUBJECT TO THE RULES OF, A BOARD OF TRADE
8 DESIGNATED AS A CONTRACT MARKET BY THE COMMODITY FUTURES TRADING
9 COMMISSION UNDER THE FEDERAL COMMODITY EXCHANGE ACT OR BOARD OF
10 TRADE OUTSIDE THE UNITED STATES;

11 (II) AN AGREEMENT THAT IS:

12 1. SUBJECT TO REGULATION UNDER § 19 OF THE FEDERAL
13 COMMODITY EXCHANGE ACT; AND

14 2. COMMONLY KNOWN TO THE COMMODITIES TRADE AS A
15 MARGIN ACCOUNT, MARGIN CONTRACT, LEVERAGE ACCOUNT, OR LEVERAGE
16 CONTRACT; OR

17 (III) AN AGREEMENT OR TRANSACTION THAT IS:

18 1. SUBJECT TO REGULATION UNDER § 4C(B) OF THE
19 FEDERAL COMMODITY EXCHANGE ACT; AND

20 2. COMMONLY KNOWN TO THE COMMODITIES TRADE AS A
21 COMMODITY OPTION.

22 (3) "CONTRACTUAL RIGHT" MEANS ANY RIGHT, WHETHER OR NOT
23 EVIDENCED IN WRITING, ARISING UNDER:

24 (I) STATUTORY LAW, COMMON LAW, OR LAW MERCHANT;

25 (II) A RULE OR BYLAW OF A NATIONAL SECURITIES EXCHANGE,
26 NATIONAL SECURITIES CLEARING ORGANIZATION, OR SECURITIES CLEARING
27 AGENCY; OR

28 (III) A RULE, BYLAW, OR RESOLUTION OF THE GOVERNING BODY OF
29 A CONTRACT MARKET OR ITS CLEARING ORGANIZATION.

30 (4) "FORWARD CONTRACT" MEANS A CONTRACT, OTHER THAN A
31 COMMODITY CONTRACT, FOR THE PURCHASE, SALE, OR TRANSFER OF:

32 (I) A COMMODITY, AS DEFINED IN § 1 OF THE FEDERAL
33 COMMODITY EXCHANGE ACT; OR

1 (II) ANY SIMILAR GOOD, ARTICLE, SERVICE, RIGHT, OR INTEREST
2 THAT PRESENTLY IS OR IN THE FUTURE BECOMES THE SUBJECT OF DEALING IN THE
3 FORWARD CONTRACT TRADE, OR A PRODUCT OR BY-PRODUCT THEREOF, WITH A
4 MATURITY DATE MORE THAN 2 DAYS AFTER THE DATE THE CONTRACT IS ENTERED
5 INTO, INCLUDING, BUT NOT LIMITED TO, A REPURCHASE TRANSACTION, REVERSE
6 REPURCHASE TRANSACTION, CONSIGNMENT, LEASE, SWAP, HEDGE TRANSACTION,
7 DEPOSIT, LOAN, OPTION, ALLOCATED TRANSACTION, UNALLOCATED TRANSACTION,
8 OR A COMBINATION OF THESE OR AN OPTION ON ANY OF THEM.

9 (5) (I) "NETTING AGREEMENT" MEANS A CONTRACT OR AGREEMENT,
10 INCLUDING TERMS AND CONDITIONS INCORPORATED BY REFERENCE IN THE
11 CONTRACT OR AGREEMENT, THAT:

12 1. DOCUMENTS ONE OR MORE TRANSACTIONS BETWEEN
13 THE PARTIES TO THE CONTRACT OR AGREEMENT FOR OR INVOLVING ONE OR MORE
14 QUALIFIED FINANCIAL CONTRACTS; AND

15 2. PROVIDES FOR THE NETTING OR LIQUIDATION OF
16 QUALIFIED FINANCIAL CONTRACTS OR THE PRESENT OR FUTURE PAYMENT
17 OBLIGATIONS OR PAYMENT ENTITLEMENTS UNDER QUALIFIED FINANCIAL
18 CONTRACTS, INCLUDING LIQUIDATION OR CLOSE-OUT VALUES RELATING TO THE
19 OBLIGATIONS OR ENTITLEMENTS, AMONG THE PARTIES TO THE NETTING
20 AGREEMENT.

21 (II) "NETTING AGREEMENT" INCLUDES A MASTER AGREEMENT
22 THAT, TOGETHER WITH ALL SCHEDULES, CONFIRMATIONS, DEFINITIONS, AND
23 ADDENDA TO AND TRANSACTIONS UNDER ANY THEREOF, SHALL BE TREATED AS
24 ONE NETTING AGREEMENT.

25 (6) "QUALIFIED FINANCIAL CONTRACT" MEANS A COMMODITY
26 CONTRACT, FORWARD CONTRACT, REPURCHASE AGREEMENT, REVERSE
27 REPURCHASE AGREEMENT, SECURITIES CONTRACT, SWAP AGREEMENT, OR ANY
28 SIMILAR AGREEMENT THAT THE COMMISSIONER DETERMINES BY REGULATION OR
29 ORDER TO BE A QUALIFIED FINANCIAL CONTRACT FOR PURPOSES OF THIS
30 SUBTITLE.

31 (7) (I) "REPURCHASE AGREEMENT" OR "REVERSE REPURCHASE
32 AGREEMENT" MEANS AN AGREEMENT, INCLUDING RELATED TERMS, THAT PROVIDES
33 FOR THE TRANSFER OF CERTIFICATES OF DEPOSIT, ELIGIBLE BANKERS'
34 ACCEPTANCES, OR SECURITIES THAT ARE DIRECT OBLIGATIONS OF, OR THAT ARE
35 FULLY GUARANTEED AS TO PRINCIPAL AND INTEREST BY, THE UNITED STATES OR
36 AN AGENCY OF THE UNITED STATES AGAINST THE TRANSFER OF FUNDS BY THE
37 TRANSFEREE OF THE CERTIFICATES OF DEPOSIT, ELIGIBLE BANKERS'
38 ACCEPTANCES, OR SECURITIES WITH A SIMULTANEOUS AGREEMENT BY THE
39 TRANSFEREE TO TRANSFER TO THE TRANSFEROR CERTIFICATES OF DEPOSIT,
40 ELIGIBLE BANKERS' ACCEPTANCES, OR SECURITIES AS DESCRIBED ABOVE IN THIS
41 SUBPARAGRAPH (I) AT A CERTAIN DATE NOT LATER THAN 1 YEAR AFTER THE
42 TRANSFERS OR ON DEMAND, AGAINST THE TRANSFER OF FUNDS.

1 (II) FOR PURPOSES OF THE DEFINITIONS OF "REPURCHASE
2 AGREEMENT" AND "REVERSE REPURCHASE AGREEMENT" IN SUBPARAGRAPH (I) OF
3 THIS PARAGRAPH, THE ITEMS THAT MAY BE SUBJECT TO A REPURCHASE
4 AGREEMENT OR A REVERSE REPURCHASE AGREEMENT INCLUDE
5 MORTGAGE-RELATED SECURITIES, A MORTGAGE LOAN, AND AN INTEREST IN A
6 MORTGAGE LOAN, AND DO NOT INCLUDE ANY PARTICIPATION IN A COMMERCIAL
7 MORTGAGE LOAN UNLESS THE COMMISSIONER DETERMINES BY REGULATION OR
8 ORDER TO INCLUDE THE COMMERCIAL MORTGAGE LOAN PARTICIPATION.

9 (8) (I) "SECURITIES CONTRACT" MEANS A CONTRACT FOR THE
10 PURCHASE, SALE, OR LOAN OF A SECURITY, INCLUDING:

11 1. AN OPTION FOR THE REPURCHASE OR SALE OF A
12 SECURITY, CERTIFICATE OF DEPOSIT, OR GROUP OR INDEX OF SECURITIES,
13 INCLUDING AN INTEREST THEREIN OR BASED ON THE VALUE THEREOF;

14 2. AN OPTION ENTERED INTO ON A NATIONAL SECURITIES
15 EXCHANGE RELATING TO FOREIGN CURRENCIES; OR

16 3. THE GUARANTEE OF A SETTLEMENT OF CASH OR
17 SECURITIES BY OR TO A SECURITIES CLEARING AGENCY.

18 (II) IN SUBPARAGRAPH (I) OF THIS PARAGRAPH, "SECURITY"
19 INCLUDES A MORTGAGE LOAN, MORTGAGE-RELATED SECURITIES, AND AN
20 INTEREST IN ANY MORTGAGE LOAN OR MORTGAGE-RELATED SECURITY.

21 (9) "SWAP AGREEMENT" MEANS AN AGREEMENT, INCLUDING THE
22 TERMS AND CONDITIONS INCORPORATED BY REFERENCE IN THE AGREEMENT, THAT
23 IS A RATE SWAP AGREEMENT, BASIS SWAP, COMMODITY SWAP, FORWARD RATE
24 AGREEMENT, INTEREST RATE FUTURE, INTEREST RATE OPTION, FORWARD FOREIGN
25 EXCHANGE AGREEMENT, SPOT FOREIGN EXCHANGE AGREEMENT, RATE CAP
26 AGREEMENT, RATE FLOOR AGREEMENT, RATE COLLAR AGREEMENT, CURRENCY
27 SWAP AGREEMENT, CROSS-CURRENCY RATE SWAP AGREEMENT, CURRENCY
28 FUTURE, CURRENCY OPTION, OR ANY OTHER SIMILAR AGREEMENT, AND INCLUDES
29 ANY COMBINATION OF AGREEMENTS AND AN OPTION TO ENTER INTO AN
30 AGREEMENT.

31 (B) NOTWITHSTANDING ANY OTHER PROVISION OF STATE LAW, A PERSON
32 MAY NOT BE STAYED OR OTHERWISE PROHIBITED FROM EXERCISING:

33 (1) A CONTRACTUAL RIGHT TO TERMINATE, LIQUIDATE, OR CLOSE OUT
34 ANY NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT WITH AN INSURER
35 BECAUSE OF:

36 (I) THE INSOLVENCY, FINANCIAL CONDITION, OR DEFAULT OF
37 THE INSURER AT ANY TIME, PROVIDED THAT THE RIGHT IS ENFORCEABLE UNDER
38 APPLICABLE LAW OTHER THAN THIS SUBTITLE; OR

39 (II) THE COMMENCEMENT OF A DELINQUENCY PROCEEDING
40 UNDER THIS SUBTITLE;

1 (2) ANY RIGHT UNDER A PLEDGE, SECURITY, COLLATERAL, OR
2 GUARANTEE AGREEMENT OR ANY OTHER SIMILAR SECURITY ARRANGEMENT OR
3 CREDIT SUPPORT DOCUMENT RELATING TO A NETTING AGREEMENT OR QUALIFIED
4 FINANCIAL CONTRACT; OR

5 (3) SUBJECT TO ANY PROVISION OF § 9-229(B) OF THIS SUBTITLE, ANY
6 RIGHT TO OFFSET OR NET OUT ANY TERMINATION VALUE, PAYMENT AMOUNT, OR
7 OTHER TRANSFER OBLIGATION ARISING UNDER OR IN CONNECTION WITH A
8 NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT IF THE COUNTERPARTY
9 OR ITS GUARANTOR IS ORGANIZED UNDER THE LAWS OF THE UNITED STATES, A
10 STATE, OR A FOREIGN JURISDICTION APPROVED BY THE SECURITIES VALUATION
11 OFFICE OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS
12 ELIGIBLE FOR NETTING.

13 (C) (1) NOTWITHSTANDING A PROVISION IN A NETTING AGREEMENT THAT
14 THE NONDEFAULTING PARTY IS NOT REQUIRED TO PAY ANY NET OR SETTLEMENT
15 AMOUNT DUE TO THE DEFAULTING PARTY, ON TERMINATION OF THE NETTING
16 AGREEMENT, THE NET OR SETTLEMENT AMOUNT, IF ANY, OWED BY A
17 NONDEFAULTING PARTY TO AN INSURER AGAINST WHICH AN APPLICATION OR
18 PETITION HAS BEEN FILED UNDER THIS SUBTITLE, SHALL BE TRANSFERRED TO OR
19 ON THE ORDER OF THE RECEIVER FOR THE INSURER, EVEN IF THE INSURER IS THE
20 DEFAULTING PARTY.

21 (2) ANY LIMITED TWO-WAY PAYMENT PROVISION IN A NETTING
22 AGREEMENT WITH AN INSURER THAT HAS DEFAULTED SHALL BE DEEMED TO BE A
23 FULL TWO-WAY PAYMENT PROVISION AS AGAINST THE DEFAULTING INSURER.

24 (3) ANY SUCH NET OR SETTLEMENT AMOUNT SHALL BE A GENERAL
25 ASSET OF THE INSURER, EXCEPT TO THE EXTENT SUCH NET OR SETTLEMENT
26 AMOUNT IS SUBJECT TO ONE OR MORE SECONDARY LIENS OR ENCUMBRANCES.

27 (D) IN MAKING A TRANSFER OF A NETTING AGREEMENT OR QUALIFIED
28 FINANCIAL CONTRACT OF AN INSURER SUBJECT TO A DELINQUENCY PROCEEDING
29 UNDER THIS SUBTITLE, THE RECEIVER SHALL:

30 (1) TRANSFER TO ONE PARTY, OTHER THAN AN INSURER SUBJECT TO A
31 DELINQUENCY PROCEEDING UNDER THIS SUBTITLE, ALL NETTING AGREEMENTS
32 AND QUALIFIED FINANCIAL CONTRACTS BETWEEN A COUNTERPARTY OR AN
33 AFFILIATE OF A COUNTERPARTY AND THE INSURER THAT IS THE SUBJECT OF THE
34 DELINQUENCY PROCEEDING, INCLUDING:

35 (I) ALL RIGHTS AND OBLIGATIONS OF EACH PARTY UNDER EACH
36 NETTING AGREEMENT AND QUALIFIED FINANCIAL CONTRACT; AND

37 (II) ALL PROPERTY, INCLUDING ANY GUARANTEES OR CREDIT
38 SUPPORT DOCUMENTS, SECURING ANY CLAIMS OF EACH PARTY UNDER EACH
39 NETTING AGREEMENT AND QUALIFIED FINANCIAL CONTRACT; OR

40 (2) TRANSFER NONE OF THE NETTING AGREEMENTS, QUALIFIED
41 FINANCIAL CONTRACTS, RIGHTS, OBLIGATIONS, OR PROPERTY REFERRED TO IN

1 ITEM (1) OF THIS SUBSECTION, WITH RESPECT TO THE COUNTERPARTY AND ANY
2 AFFILIATE OF THE COUNTERPARTY.

3 (E) (1) IF A RECEIVER FOR AN INSURER MAKES A TRANSFER OF ONE OR
4 MORE NETTING AGREEMENTS OR QUALIFIED FINANCIAL CONTRACTS, THE
5 RECEIVER SHALL USE ITS BEST EFFORTS TO NOTIFY ANY PERSON WHO IS PARTY TO
6 THE NETTING AGREEMENTS OR QUALIFIED FINANCIAL CONTRACTS OF THE
7 TRANSFER BY 12:00 P.M., THE RECEIVER'S LOCAL TIME, ON THE BUSINESS DAY
8 FOLLOWING THE TRANSFER.

9 (2) IN THIS SUBSECTION, "BUSINESS DAY" MEANS A DAY OTHER THAN A
10 SATURDAY, A SUNDAY, OR ANY DAY ON WHICH EITHER THE NEW YORK STOCK
11 EXCHANGE OR THE FEDERAL RESERVE BANK OF NEW YORK IS CLOSED.

12 (F) (1) NOTWITHSTANDING ANY PROVISION OF THIS SUBTITLE OTHER
13 THAN PARAGRAPH (2) OF THIS SUBSECTION, A RECEIVER MAY NOT AVOID A
14 TRANSFER OF MONEY OR OTHER PROPERTY ARISING UNDER OR IN CONNECTION
15 WITH A NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT, OR ANY
16 PLEDGE, SECURITY, COLLATERAL, OR GUARANTEE AGREEMENT OR ANY OTHER
17 SIMILAR SECURITY ARRANGEMENT OR CREDIT SUPPORT DOCUMENT RELATING TO A
18 NETTING AGREEMENT OR QUALIFIED FINANCIAL CONTRACT, THAT IS MADE BEFORE
19 THE COMMENCEMENT OF A DELINQUENCY PROCEEDING UNDER THIS SUBTITLE.

20 (2) A TRANSFER MAY BE AVOIDED UNDER § 9-221 OF THIS SUBTITLE IF
21 THE TRANSFER WAS MADE WITH ACTUAL INTENT TO HINDER, DELAY, OR DEFRAUD
22 THE INSURER, A RECEIVER APPOINTED FOR THE INSURER, OR EXISTING OR FUTURE
23 CREDITORS.

24 (G) (1) IN EXERCISING ANY OF ITS POWER UNDER THIS SUBTITLE TO
25 DISAFFIRM OR REPUDIATE A NETTING AGREEMENT OR QUALIFIED FINANCIAL
26 CONTRACT, A RECEIVER SHALL TAKE ACTION WITH RESPECT TO EACH NETTING
27 AGREEMENT OR QUALIFIED FINANCIAL CONTRACT AND ALL TRANSACTIONS
28 ENTERED INTO IN CONNECTION WITH EACH NETTING AGREEMENT OR QUALIFIED
29 FINANCIAL CONTRACT, IN ITS ENTIRETY.

30 (2) NOTWITHSTANDING ANY OTHER PROVISION OF THIS SUBTITLE, ANY
31 CLAIM OF A COUNTERPARTY AGAINST THE ESTATE ARISING FROM A RECEIVER'S
32 DISAFFIRMANCE OR REPUDIATION OF A NETTING AGREEMENT OR QUALIFIED
33 FINANCIAL CONTRACT THAT HAS NOT BEEN PREVIOUSLY AFFIRMED IN THE
34 LIQUIDATION OR IMMEDIATELY PRECEDING REHABILITATION PROCEEDING SHALL
35 BE DETERMINED AND SHALL BE ALLOWED OR DISALLOWED:

36 (I) AS IF THE CLAIM HAD ARISEN BEFORE THE DATE OF THE
37 FILING OF THE PETITION FOR LIQUIDATION; OR

38 (II) IF A REHABILITATION PROCEEDING IS CONVERTED TO A
39 LIQUIDATION PROCEEDING, AS IF THE CLAIM HAD ARISEN BEFORE THE DATE OF
40 THE FILING OF THE PETITION FOR REHABILITATION.

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

5 (II) IN SUBPARAGRAPH (I) OF THIS PARAGRAPH, "ACTUAL DIRECT
6 COMPENSATORY DAMAGES" DOES NOT INCLUDE PUNITIVE OR EXEMPLARY
7 DAMAGES, DAMAGES FOR LOST PROFITS OR LOST OPPORTUNITY, OR DAMAGES FOR
8 PAIN AND SUFFERING, BUT DOES INCLUDE NORMAL AND REASONABLE COSTS OF
9 COVER OR OTHER REASONABLE MEASURES OF DAMAGES USED IN THE DERIVATIVES
10 MARKET FOR THE CONTRACT AND AGREEMENT CLAIMS.

11 (H) ALL RIGHTS OF COUNTERPARTIES UNDER THIS SUBTITLE SHALL APPLY
12 TO NETTING AGREEMENTS AND QUALIFIED FINANCIAL CONTRACTS ENTERED INTO
13 ON BEHALF OF:

14 (1) THE GENERAL ACCOUNT; OR

15 (2) SEPARATE ACCOUNTS IF THE ASSETS OF EACH SEPARATE ACCOUNT
16 ARE AVAILABLE ONLY TO COUNTERPARTIES TO NETTING AGREEMENTS AND
17 QUALIFIED FINANCIAL CONTRACTS ENTERED INTO ON BEHALF OF THAT SEPARATE
18 ACCOUNT.

19 (I) THIS SECTION DOES NOT APPLY TO A PERSON THAT IS AN AFFILIATE OF
20 THE INSURER THAT IS THE SUBJECT OF A DELINQUENCY PROCEEDING UNDER THIS
21 SUBTITLE.

22 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
23 October 1, 2005.