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HOUSE BILL NO. 1504

House Amendments in [] - January 21, 2011

A BILL to amend and reenact §§ 38.2-1401, 38.2-1407, 38.2-1428, and 38.2-1501 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 15 of Title 38.2 a section numbered 38.2-1522, relating to derivative transactions and qualified financial contracts made by insurance companies.

Patron Prior to Engrossment—Delegate Ware, R.L.

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 38.2-1401, 38.2-1407, 38.2-1428, and 38.2-1501 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 15 of Title 38.2 a section numbered 38.2-1522 as follows:

§ 38.2-1401. Definitions.

As used in this chapter:

"Admitted assets" means, for purposes of the limitations and standards imposed by Articles 1 and 2 of this chapter, the amount thereof as permitted to be reported on the statutory financial statement of the insurer most recently required to be filed with the Commission pursuant to §§ 38.2-1300 and 38.2-1301 or other similar provisions within this title, but excluding the assets allocated to separate accounts pursuant to Article 3 (§ 38.2-1443 et seq.) of this chapter.

"Business entity" means a corporation, association, partnership, joint venture, trust, church, or religious body.

"Cap" means an agreement obligating the seller to make payments to the buyer, with each payment based on the amount by which a reference price or level or the performance or value of one or more underlying interests exceeds a predetermined number, sometimes called the strike rate or strike price.

["~~Cash equivalents~~" means ~~short-term, highly rated, and highly liquid investments or securities readily convertible to known amounts of cash without penalty and so near maturity that they present insignificant risk of change in value. Cash equivalents include government money market mutual funds and class one money market mutual funds. For purposes of this definition, an investment is:~~

1. "~~Short-term~~" if its remaining term to maturity is 90 days or less; and

2. "~~Highly rated~~" if it is rated one or two by the Securities Valuation Office of the National Association of Insurance Commissioners or, if not rated by the Securities Valuation Office, is rated in an equivalent grade by a national rating agency recognized by the Commission.]

"Category 1 investment" means any investment complying with Article 1 (§ 38.2-1400 et seq.) and either Article 2 (§ 38.2-1412 et seq.) or 3 (§ 38.2-1443 et seq.), or both Articles 2 and 3, of this chapter.

"Category 2 investment" means any investment complying with Article 1, but with neither Article 2 nor Article 3, of this chapter.

"Claimants" means any owners, beneficiaries, assignees, certificate holders, or third-party beneficiaries of any insurance benefit or right arising out of and within the coverage of an insurance policy, annuity contract, benefit contract, or subscription contract.

"Collar" means an agreement to receive payments as the buyer of an option, cap, or floor and to make payments as the seller of a different option, cap, or floor.

"Counterparty exposure amount" means the amount of credit risk attributable to an over-the-counter derivative instrument, which amount of credit risk is equal to (i) the market value of the over-the-counter derivative instrument if the liquidation of the derivative instrument would result in a final cash payment to the insurer or (ii) zero if the liquidation of the derivative instrument would not result in a final cash payment to the insurer. However, if an over-the-counter derivative instrument is entered into under a written master agreement that provides for netting of payments owed by the respective parties, and the domicile of the counterparty is either within the United States or, if not within the United States, within a foreign jurisdiction listed in the Purposes and Procedures Manual of the Securities Valuation Office as eligible for netting, the amount of credit risk attributable to the over-the-counter derivative instrument shall be the greater of zero or the net sum of (a) the market value of the over-the-counter derivative instruments entered into under the agreement, the liquidation of which would result in a final cash payment to the insurer, and (b) the market value of the over-the-counter derivative instruments entered into under the agreement, the liquidation of which would result in a final cash payment by the insurer to the business entity. With respect to open transactions, the market value of the over-the-counter derivative instrument shall be determined at the end of the most

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59 *recent quarter of the insurer's fiscal year and shall be reduced by the market value of acceptable*
60 *collateral held by the insurer or placed in escrow by one or both parties.*

61 *"Date of investment" means the date on which funds are disbursed for an investment.*

62 *"Derivative instrument" means an agreement, instrument, or a series or combination thereof (i) to*
63 *make or take delivery of, or assume or relinquish, a specified amount of one or more underlying*
64 *interests or to make a cash settlement in lieu thereof or (ii) that has a price, performance, value, or*
65 *cash flow based primarily upon the actual or expected price, level, performance, value, or cash flow of*
66 *one or more underlying interests. Derivative instruments include options, warrants used in a hedging*
67 *transaction and not attached to another financial instrument, caps, floors, collars, swaps, forwards,*
68 *futures, and any other agreements, options, or instruments substantially similar thereto or any series or*
69 *combination thereof and any agreements or instruments permitted under rules adopted under*
70 *§ 38.2-1428.*

71 *"Derivative transaction" means a transaction involving the use of one or more derivative instruments.*

72 *"Domestic governmental entity" means the United States, any state, or any municipality or district in*
73 *any such state, or any political subdivision, civil division, agency or instrumentality of one or more of*
74 *the foregoing.*

75 *"Fair market value" means the price that property will bring when (i) offered for sale by one who*
76 *desires, but who is not obligated, to sell it; (ii) bought by one who is under no necessity of having it;*
77 *and (iii) sufficient time has elapsed to allow interested buyers the opportunity to become informed of the*
78 *offer for sale.*

79 *"Fixed charges" means actual interest incurred in each year on funded and unfunded debt, excluding*
80 *interest on bank deposit accounts, and annual apportionment of debt discount or premium. Where*
81 *interest is partially or entirely contingent upon earnings, "fixed charges" includes contingent interest*
82 *payments.*

83 *"Floor" means an agreement obligating the seller to make payments to the buyer in which each*
84 *payment is based on the amount by which a predetermined number, sometimes called the floor rate or*
85 *price, exceeds a reference price, a level, or the performance or value of one or more underlying*
86 *interests.*

87 *"Forward" means an agreement, other than a future, to make or take delivery of, or effect a cash*
88 *settlement based on the actual or expected price, level, performance or value of, one or more underlying*
89 *interests.*

90 *"Future" means an agreement, traded on a qualified exchange or qualified foreign exchange, to*
91 *make or take delivery of, or effect a cash settlement based on the actual or expected price, level,*
92 *performance or value of, one or more underlying interests and includes an insurance future.*

93 *"Hedging transaction" means:*

94 *1. A derivative transaction that is entered into and maintained to reduce:*

95 *a. The risk of a change in the value, yield, price, cash flow, or quantity of assets or liabilities that*
96 *the insurer has acquired or incurred or anticipates acquiring or incurring; or*

97 *b. The currency exchange rate risk or the degree of exposure as to assets or liabilities that the*
98 *insurer has acquired or incurred or anticipates acquiring or incurring; or*

99 *2. Any other derivative transaction specified as constituting a hedging transaction in rules adopted*
100 *pursuant to § 38.2-1428.*

101 *"High grade obligations" means obligations which (i) are rated one or two by the Securities*
102 *Valuation Office of the National Association of Insurance Commissioners or (ii) if not rated by the*
103 *Securities Valuation Office, are rated in an equivalent grade by a national rating agency recognized by*
104 *the Commission.*

105 *"Insurance future" means a future relating to an index or pool that is based on insurance-related*
106 *items.*

107 *"Insurance futures option" means an option on an insurance future.*

108 *"Insurer" means a company licensed pursuant to Chapter 10 (§ 38.2-1000 et seq.), 11 (§ 38.2-1100 et*
109 *seq.), 12 (§ 38.2-1200 et seq.), 25 (§ 38.2-2500 et seq.), 26 (§ 38.2-2600 et seq.), 38 (§ 38.2-3800 et*
110 *seq.), 39 (§ 38.2-3900 et seq.), 40 (§ 38.2-4000 et seq.), 41 (§ 38.2-4100 et seq.), 42 (§ 38.2-4200 et*
111 *seq.), 43 (§ 38.2-4300 et seq.), 45 (§ 38.2-4500 et seq.), 46 (§ 38.2-4600 et seq.), 51 (§ 38.2-5100 et*
112 *seq.), or 61 (§ 38.2-6100 et seq.) of this title.*

113 *"Life insurer" means any insurer authorized to transact life insurance or to grant annuities as defined*
114 *in §§ 38.2-102 through 38.2-107 or authorized pursuant to the provisions of Chapter 38, 39, 40 or 41, or*
115 *any other chapter of this title, to provide any one of the following contractual benefits in any form:*
116 *death benefits, endowment benefits, annuity benefits or monument or tombstone benefits.*

117 *"Lower grade obligations" means obligations which (i) are rated four, five, or six by the Securities*
118 *Valuation Office of the National Association of Insurance Commissioners or (ii) if not rated by the*
119 *Securities Valuation Office, are rated in an equivalent grade by a national rating agency recognized by*
120 *the Commission.*

"Medium grade obligations" means obligations which (i) are rated three by the Securities Valuation Office of the National Association of Insurance Commissioners or (ii) if not rated by the Securities Valuation office, are rated in an equivalent grade by a national rating agency recognized by the Commission.

"Minimum capital and surplus" means the minimum surplus to policyholders, or minimum net worth, a particular insurer must have to obtain and maintain its license to transact business in this Commonwealth pursuant to the applicable provisions of this title. In no case shall an insurer's minimum capital and surplus be less than zero.

"Net earnings available for fixed charges" means income minus operating expenses, maintenance expenses, taxes other than income taxes, depreciation, and depletion. Extraordinary nonrecurring income and expense items are excluded from the calculation of "net earnings available for fixed charges."

"Obligation" means a bond, debenture, note or other evidence of indebtedness.

"Option" means an agreement giving the buyer the right to buy or receive, sell or deliver, enter into, extend, terminate, or effect a cash settlement based on the actual or expected price, level, performance, or value of one or more underlying interests. "Option" includes an insurance futures option.

"Over-the-counter derivative instrument" means a derivative instrument that is entered into with a business entity other than through a qualified exchange or qualified foreign exchange or that is cleared other than through a qualified clearinghouse.

"Potential exposure" means the amount determined in accordance with the National Association of Insurance Commissioners Annual Statement Instructions.

"Prohibited investment" means any investment prohibited by § 38.2-1407.

"Qualified clearinghouse" means a clearinghouse for, and that is subject to the rules of, a qualified exchange or a qualified foreign exchange, which clearinghouse provides clearing services, including acting as a counterparty to each of the parties to a transaction such that the parties no longer have credit risk as to each other.

"Qualified exchange" means:

1. A securities exchange registered as a national securities exchange, or a securities market regulated under the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.), as amended;

2. A board of trade or commodities exchange designated as a contract market by the Commodity Futures Trading Commission or any successor thereof;

3. Private Offerings, Resales and Trading through Automated Linkages (PORTAL);

4. A designated offshore securities market as defined in Securities Exchange Commission Regulation S, 17 C.F.R. Part 230, as amended; or

5. A qualified foreign exchange.

"Qualified foreign exchange" means a foreign exchange, board of trade, or contract market located outside the United States:

1. That has received regulatory comparability relief under Commodity Futures Trading Commission (CFTC) Rule 30.10 (as set forth in Appendix C to Part 30 of the CFTC's regulations at 17 C.F.R. Part 30);

2. That is, or whose members are, subject to the jurisdiction of a foreign futures authority that has received regulatory comparability relief under CFTC Rule 30.10 (as set forth in Appendix C to Part 30 of the CFTC's regulations at 17 C.F.R. Part 30) as to futures transactions in the jurisdiction where the exchange, board of trade, or contract market is located; or

3. Upon which foreign stock index futures contracts are listed that are the subject of no-action relief issued by the CFTC's Office of General Counsel, provided that an exchange, board of trade, or contract market that qualifies as a "qualified foreign exchange" only under this subsection shall only be a "qualified foreign exchange" as to foreign stock index futures contracts that are the subject of no-action relief.

"Replication transaction" means a derivative transaction that is intended to replicate the performance of one or more assets that an insurer is authorized to acquire under this chapter. A derivative transaction that is entered into as a hedging transaction shall not be considered a replication transaction.

"Reserve liabilities" means those liabilities which are required to be established by an insurer for all of its outstanding insurance policies, annuity contracts, benefit contracts and subscription contracts, in accordance with this title, as amended or as hereafter amended.

"Statement value" means the amount determined in accordance with the National Association of Insurance Commissioners Annual Statement Instructions.

"Swap" means an agreement to exchange or to net payments at one or more times based on the actual or expected price, level, performance, or value of one or more underlying interests.

"Underlying interest" means the assets, liabilities, or other interests, or a combination thereof, underlying a derivative instrument, such as any one or more securities, currencies, rates, indices,

182 commodities, or derivative instruments.

183 "Warrant" means an instrument that gives the holder the right to purchase an underlying financial
184 instrument at a given price and time or at a series of prices and times outlined in the warrant
185 agreement. Warrants may be issued alone or in connection with the sale of other securities.

186 "Wrap-around mortgage" means a loan made by an insurer to a borrower, secured by a mortgage or
187 deed of trust on real property encumbered by a first mortgage or first deed of trust, where the total
188 amount of the obligation of the borrower to the insurer under the loan is not less than the sum of (i) the
189 principal amount initially disbursed by the insurer on account of the loan and (ii) the unpaid principal
190 balance of the obligation secured by the preexisting mortgage or deed of trust.

191 § 38.2-1407. Prohibited investments.

192 A. No domestic insurer shall invest in or loan funds secured by:

193 1. Issued shares of its own capital stock without the Commission's approval. This approval shall be
194 based on an evaluation that indicates the investment does not adversely affect the insurer or its
195 policyholders. The insurer shall not invest in or own more than ~~twenty~~ 20 percent of its outstanding
196 issued stock, except for the purpose of mutualization;

197 2. Securities of an insolvent entity;

198 3. Securities that, by their terms, will subject the insurer to any assessment other than for taxes or for
199 wages; however, the term "assessment" shall not include ordinary contractual payments or the transfer
200 of collateral or margin made under derivative instruments invested in or owned under § 38.2-1428;

201 4. Investments that, as determined by the Commission, are designed to evade any prohibition of this
202 title; or

203 5. Any obligation or investment prohibited by § 38.2-1411.2.

204 B. Notwithstanding the provisions of this chapter, the Commission may order a domestic insurer to
205 limit or withdraw from certain investments, or discontinue certain investment practices, to the extent the
206 Commission finds that such investment or investment practice endangers the solvency of the insurer or
207 is otherwise hazardous to policyholders, creditors or the public in this Commonwealth.

208 § 38.2-1428. Derivative instruments.

209 A. A domestic insurer may ~~effect or maintain~~ bona fide engage in derivative transactions under this
210 section subject to the following general conditions:

211 1. A domestic insurer may use derivative instruments under this section to engage in hedging
212 transactions and replication transactions.

213 2. Each domestic insurer utilizing derivative instruments shall establish written guidelines with
214 respect to derivative transactions stating the insurer's objectives for engaging in derivative transactions
215 and derivative strategies, permissible derivative strategies and the relationship of those strategies to the
216 insurer's operations, and such other details as the Commission may from time to time require. The
217 insurer's board of directors or committee thereof charged with the responsibility of overseeing
218 investments shall approve the written guidelines and any amendment thereto and shall establish a
219 procedure to determine, at least annually, that all derivative transactions were made in accordance with
220 such guidelines. The guidelines established pursuant to this section, and any amendment thereto, shall
221 be submitted to the Commission for prior approval. The Commission shall, in writing, either approve the
222 guidelines or amendment, request any additional information needed to approve the guidelines or
223 amendment, or deny the guidelines or amendment within (i) 90 days of receipt of the guidelines or (ii)
224 60 days of receipt of any amendment; otherwise the guidelines or amendment shall be deemed approved.

225 3. The Commission may adopt reasonable rules and regulations for derivative transactions including,
226 but not limited to, rules and regulations that impose financial solvency standards, valuation standards,
227 and reporting requirements.

228 B. A domestic insurer may enter into hedging transactions pertaining to securities otherwise eligible
229 for investment under §§ 38.2-1415 through 38.2-1427 and 38.2-1433, including, but not limited to: (i)
230 financial futures contracts, warrants, options, calls and other rights to purchase, and (ii) puts and other
231 rights to require another person to purchase such securities. The contracts, options, calls, puts, and rights
232 shall be traded on a commodity exchange regulated under the Commodity Exchange Act, as amended,
233 or on a securities exchange or on an over-the-counter market regulated under the Securities Exchange
234 Act of 1934, as amended. For purposes of this section, a "bona fide hedging transaction" means a
235 purchase or sale of a contract, warrant, option, call, put or right entered into for the purpose of (a)
236 minimizing interest rate or foreign currency risks in respect of obligations on insurance policies or
237 contracts supported by securities held by the insurer or (b) offsetting changes in the market values or
238 yield rates of securities held by the insurer, currency risks or other items that qualify for hedge
239 accounting if:

240 1. The domestic insurer is able to demonstrate to the Commission the intended hedging
241 characteristics and the ongoing effectiveness of the derivative transaction or combination of the
242 transactions through cash flow testing or other appropriate analyses; and

243 2. As a result of and after giving effect to the hedging transaction:

a. The aggregate statement value of options, caps, floors, and warrants not attached to another financial instrument purchased and used in hedging transactions then engaged in by the domestic insurer does not exceed 7.5 percent of its admitted assets;

b. The aggregate statement value of options, caps, and floors written in hedging transactions then engaged in by the domestic insurer does not exceed 3 percent of its admitted assets; and

c. The aggregate potential exposure of collars, swaps, forwards, and futures used in hedging transactions then engaged in by the domestic insurer does not exceed 6.5 percent of its admitted assets.

C. A domestic insurer may enter into replication transactions if the asset being replicated shall comply with all of the provisions and limitations specified in this article with respect to investments by the insurer, as if such replicated asset constituted a direct investment by the insurer in the asset being replicated. The aggregate statement value of all assets being replicated shall not exceed 10 percent of the insurer's admitted assets.

D. The counterparty exposure amount under a derivative instrument entered into pursuant to this section shall be deemed an obligation of a business entity to which the insurer is exposed to credit risk for the purpose of determining compliance with the limitations of §§ 38.2-1411.2 and 38.2-1413.

E. Pursuant to rules promulgated under § 38.2-223, the Commission may approve additional transactions involving the use of derivative instruments in excess of the limits set forth in this section or for other risk management purposes.

§ 38.2-1501. Definitions.

As used in this chapter:

"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.

"Association" means the Virginia Property and Casualty Insurance Guaranty Association created by Chapter 16 of this title or the Virginia Life, Accident and Sickness Insurance Guaranty Association created by Chapter 17 of this title or any person performing a similar function in another state.

"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 Commodity Exchange Act (7 U.S.C. § 1 et seq.) or a board of trade outside the United States;

2. An agreement that is subject to regulation under § 19 of the 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;

3. An agreement or transaction that is subject to regulation under § 4c(b) of the Commodity Exchange Act (7 U.S.C. § 1 et seq.) 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 definition; or

5. Any option to enter into an agreement or transaction referred to in this definition.

"Contractual right" as used in § 38.2-1522 includes any right set forth in a rule or bylaw of a derivatives clearing organization as defined in the 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, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodities Exchange Act, or a board of trade as defined in the 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, under law merchant, or by reason of normal business practice.

"Delinquency proceeding" means any proceeding commenced against an insurance company for the purpose of liquidating, rehabilitating, reorganizing, or conserving an insurer.

"Forward contract," "repurchase agreement," "securities contract," and "swap agreement" have the meanings set forth with respect thereto in 12 U.S.C. § 1821(e)(8)(D), as amended.

"Insolvent" means (i) the condition of an insurer that has liabilities in excess of assets or (ii) the inability of an insurer to pay its obligations as they become due in the usual course of business.

"Netting agreement" means:

1. A contract or agreement, including terms and conditions incorporated by reference in it, including a master agreement, which master agreement, together with all schedules, confirmations, definitions, and addenda to it and transactions under any of them, 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

305 present or future payment or delivery obligations or payment or delivery entitlements under it, including
306 liquidation or close-out values relating to those obligations or entitlements, among the parties to the
307 netting agreement;

308 2. Any master agreement or bridge agreement for one or more master agreements described in
309 subdivision 1 of this definition; or

310 3. Any security agreement or arrangement or other credit enhancement or guarantee or
311 reimbursement obligation related to any contract or agreement described in subdivision 1 or 2 of this
312 definition, provided that any contract or agreement described in subdivision 1 or 2 of this definition
313 relating to agreements or transactions that are not qualified financial contracts shall be deemed to be a
314 netting agreement only with respect to those agreements or transactions that are qualified financial
315 contracts.

316 "Qualified financial contract" means any commodity contract, forward contract, repurchase
317 agreement, securities contract, swap agreement, or any similar agreement that the Commission
318 determines to be a qualified financial contract for the purposes of this chapter.

319 "Receiver" means the Commission or any person appointed to manage delinquency proceedings.

320 § 38.2-1522. Qualified financial contracts.

321 A. Notwithstanding any other provision of this chapter, including any other provision of this chapter
322 permitting the modification of contracts, or other state law, no person shall be stayed or prohibited from
323 exercising:

324 1. A contractual right to cause the termination, liquidation, acceleration, or close-out of obligations
325 under or in connection with any netting agreement or qualified financial contract with an insurer
326 because of:

327 a. The insolvency, financial condition, or default of the insurer at any time, provided that the right is
328 enforceable under applicable law other than this chapter; or

329 b. The commencement of a delinquency proceeding under this chapter;

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

333 3. Subject to subdivision B 2 of § 38.2-1515, any right to set off or net out any termination value,
334 payment amount, or other transfer obligation arising under or in connection with one or more qualified
335 financial contracts where the counterparty or its guarantor is organized under the laws of the United
336 States or a state or a foreign jurisdiction approved by the Securities Valuation Office of the National
337 Association of Insurance Commissioners as eligible for netting; or

338 4. A right to claim damages if a counterparty to a master netting agreement or a qualified financial
339 contract with an insurer subject to a proceeding under this chapter terminates, liquidates, closes out, or
340 accelerates the agreement or contract, which damages shall be measured as of the date or dates of
341 termination, liquidation, close-out, or acceleration. The amount of a claim for damages shall be actual
342 direct compensatory damages calculated in accordance with subsection F.

343 B. Upon termination of a netting agreement or qualified financial contract, the net or settlement
344 amount, if any, owed by a nondefaulting party to an insurer against which an application has been filed
345 under this chapter shall be transferred to or on the order of the receiver for the insurer, even if the
346 insurer is the defaulting party, notwithstanding any walkaway clause in the netting agreement or
347 qualified financial contract. For purposes of this subsection, "walkaway clause" means a provision in a
348 netting agreement or a qualified financial contract that, after calculation of a value of a party's position
349 or an amount due to or from one of the parties in accordance with its terms upon termination,
350 liquidation, or acceleration of the netting agreement or qualified financial contract, either does not
351 create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in
352 part solely because of the party's status as a nondefaulting party. Any limited two-way payment or first
353 method provision in a netting agreement or qualified financial contract with an insurer that has
354 defaulted shall be deemed to be a full two-way payment or second method provision as against the
355 defaulting insurer. Any such property or amount shall, except to the extent it is subject to one or more
356 secondary liens or encumbrances, or rights of netting or setoff, be a general asset of the insurer.

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

359 1. Transfer to one party, other than an insurer subject to a delinquency proceeding under this
360 chapter, all netting agreements and qualified financial contracts between a counterparty or any affiliate
361 of the counterparty and the insurer that is the subject of the proceeding, including:

362 a. All rights and obligations of each party under each netting agreement and qualified financial
363 contract; and

364 b. All property, including any guarantees or other credit enhancement, securing any claims of each
365 party under each netting agreement and qualified financial contract; or

366 2. Transfer none of the netting agreements, qualified financial contracts, rights, obligations, or

property referred to in subdivision 1, with respect to the counterparty and any affiliate of the counterparty.

D. If a receiver of an insurer subject to a delinquency proceeding 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 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 section, "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, including § 38.2-1513, 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. However, a transfer may be avoided under § 38.2-1513 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. In exercising the receiver's rights of disaffirmance or repudiation 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 subdivision 1, with respect to the person or any affiliate of the person.

G. Notwithstanding any other provision of this chapter, provided the receiver disaffirms or repudiates a netting agreement or qualified financial contract within a reasonable period after the commencement of a delinquency proceeding, 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 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 rehabilitation is converted to a delinquency proceeding, as if the claim had arisen before the date of the filing of the petition for 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.

H. The provisions of this section shall not apply to persons who are affiliates of the insurer that is the subject of the proceeding.

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 and any separate account if the assets of such separate account are available only to counterparties to netting agreements and qualified financial contracts and entered into on behalf of such separate account.

2. That a domestic insurer utilizing derivative instruments prior to the effective date of this act shall be permitted to continue to utilize such derivative instruments during the period from the effective date of this act until completion of the State Corporation Commission's review of guidelines as described in subdivision A 2 of § 38.2-1428 of the Code of Virginia, provided that (i) the domestic insurer reasonably believes that its continued usage of derivative instruments is consistent with § 38.2-1428 and (ii) the insurer submitted the guidelines to the State Corporation Commission for review by April 1, 2011.