

### **IC 27-9-3.1**

#### **Chapter 3.1. Treatment of Certain Agreements**

### **IC 27-9-3.1-1**

#### **Actual direct compensatory damages**

Sec. 1. (a) As used in this chapter, "actual direct compensatory damages" includes:

- (1) normal and reasonable costs of cover;
- (2) other reasonable measures of damages used in the derivatives market, the securities market, or another market for contract claims.

(b) The term does not include:

- (1) punitive or exemplary damages;
- (2) damages for lost profit or lost opportunity; or
- (3) damages for pain and suffering.

*As added by P.L.11-2011, SEC.36.*

### **IC 27-9-3.1-2**

#### **Business day**

Sec. 2. As used in this chapter, "business day" means a day other than:

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

*As added by P.L.11-2011, SEC.36.*

### **IC 27-9-3.1-3**

#### **Commodity contract**

Sec. 3. As used in this chapter, "commodity contract" means any of the following:

- (1) A contract for the purchase or sale of a commodity:
  - (A) for future delivery on; or
  - (B) subject to the rules of;  
a board of trade or contract market under the federal Commodity Exchange Act (7 U.S.C. 1 et seq.) or a board of trade outside the United States.
- (2) An agreement that is:
  - (A) subject to regulation under Section 19 of the federal Commodity Exchange Act (7 U.S.C. 1 et seq.); and
  - (B) commonly known to the commodities trade as a margin account, margin contract, leverage account, or leverage contract.
- (3) An agreement or transaction that is:
  - (A) subject to regulation under Section 4c(b) of the federal Commodity Exchange Act (7 U.S.C. 1 et seq.); and
  - (B) commonly known to the commodities trade as a commodity option.
- (4) A combination of the contracts, agreements, or transactions described in subdivisions (1) through (3).

- (5) An option to enter into:
  - (A) a contract;
  - (B) an agreement;
  - (C) a transaction; or
  - (D) a combination of contracts, agreements, or transactions; described in subdivisions (1) through (4).

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-4**

##### **Contractual right**

Sec. 4. As used in this chapter, "contractual right" includes the following:

- (1) A right set forth in a rule, bylaw, or resolution of the governing board of any of the following:
  - (A) A derivatives clearing organization (as defined in the federal Commodity Exchange Act (7 U.S.C. 1 et seq.)).
  - (B) A multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act (12 U.S.C. 1821)).
  - (C) A national securities exchange, national securities association, or securities clearing agency.
  - (D) A contract market designated under the federal Commodity Exchange Act (7 U.S.C. 1 et seq.).
  - (E) A derivatives transaction execution facility registered under the federal Commodity Exchange Act (7 U.S.C. 1 et seq.).
  - (F) A board of trade (as defined in the federal Commodity Exchange Act (7 U.S.C. 1 et seq.)).
- (2) A right, regardless of whether evidenced in writing, arising:
  - (A) under statutory or common law;
  - (B) under the law merchant; or
  - (C) by reason of normal business practice.

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-5**

##### **Forward contract**

Sec. 5. As used in this chapter, "forward contract" has the meaning set forth in the Federal Deposit Insurance Act (12 U.S.C. 1821).

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-6**

##### **Netting agreement**

Sec. 6. (a) As used in this chapter, "netting agreement" means a new agreement that:

- (1) allows the parties to a previous agreement to aggregate the amounts owing by each party under all transactions that are outstanding under the previous agreement; and
- (2) replaces the amounts owing under the previous agreement with a single net amount:

(A) resulting from the aggregation under subdivision (1);  
and

(B) owing:

(i) by one (1) party; and

(ii) to the other party;

to the previous agreement.

(b) The single net amount described in subsection (a)(2) may be determined as follows:

(1) In the event of a relevant default (including counterparty bankruptcy) as specified in the previous agreement, all transactions of a certain type are netted at:

(A) market value; or

(B) if:

(i) otherwise specified in the contract; or

(ii) market value is impossible to obtain;

an amount equal to the loss suffered by the nondefaulting party as a result of the default.

(2) Under the new agreement, the parties agree that legal obligations of the parties to make required payments under at least one (1) series of related transactions under the previous agreement are:

(A) canceled; and

(B) replaced by a new legal obligation to make payments on only the single net amount under the new agreement.

(3) In the event of a cash settled trade, the parties agree that legal obligations of:

(A) the parties; or

(B) a party and parents or affiliates of a party;

under related or unrelated transactions are canceled and replaced by the cash settled trade.

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-7**

##### **Qualified financial contract**

Sec. 7. As used in this chapter, "qualified financial contract" means a commodity contract, forward contract, repurchase agreement, securities contract, swap agreement, or a similar agreement, as determined by the commissioner.

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-8**

##### **Repurchase agreement**

Sec. 8. As used in this chapter, "repurchase agreement" has the meaning set forth in the Federal Deposit Insurance Act (12 U.S.C. 1821).

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-9**

##### **Securities contract**

Sec. 9. As used in this chapter, "securities contract" has the

meaning set forth in the Federal Deposit Insurance Act (12 U.S.C. 1821).

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-10**

##### **Swap agreement**

Sec. 10. As used in this chapter, "swap agreement" has the meaning set forth in the Federal Deposit Insurance Act (12 U.S.C. 1821).

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-11**

##### **Walkaway clause**

Sec. 11. As used in this chapter, "walkaway clause" means a provision in a netting agreement or qualified financial contract that, after calculation of the value of a party's position or an amount due to or from a party under the netting agreement or qualified financial contract upon termination, liquidation, or acceleration of the netting agreement or qualified financial contract, either:

- (1) does not create a payment obligation of a party; or
- (2) voids any part of a payment obligation of a party; solely because of the party's status as a nondefaulting party.

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-12**

##### **Rights**

Sec. 12. Notwithstanding a provision of IC 27-9-3 or this chapter to the contrary, a person may exercise any of the following:

- (1) A contractual right to cause the termination, liquidation, acceleration, or close-out of obligations in connection with a netting agreement or qualified financial contract with an insurer due to:

(A) the insolvency, financial condition, or default of the insurer if the right is enforceable under applicable law other than this chapter; or

(B) the commencement of a formal delinquency proceeding under IC 27-9-3.

- (2) A right under:

(A) a pledge, security, collateral, reimbursement, guarantee agreement, or similar security agreement; or

(B) an arrangement or credit enhancement relating to at least one (1) netting agreement or qualified financial contract.

- (3) A right to set off or net out a termination value, payment amount, or other transfer obligation arising in connection with at least one (1) qualified financial contract in which the counterparty or the counterparty's guarantor is organized under the laws of:

(A) the United States; or

(B) a state or foreign jurisdiction approved as eligible for netting by the Securities Valuation Office of the NAIC.

*As added by P.L.11-2011, SEC.36.*

### **IC 27-9-3.1-13**

#### **Damages**

Sec. 13. (a) If a counterparty to a netting agreement or qualified financial contract with an insurer that is subject to a proceeding under IC 27-9-3 terminates, liquidates, closes out, or accelerates the netting agreement or qualified financial contract, damages must be measured as of the date of termination, liquidation, close-out, or acceleration.

(b) The amount of a claim for damages under subsection (a) is equal to the actual direct compensatory damages calculated in accordance with section 19 of this chapter.

*As added by P.L.11-2011, SEC.36.*

### **IC 27-9-3.1-14**

#### **Transfer of amounts with receiver**

Sec. 14. (a) Notwithstanding a walkaway clause in a netting agreement or qualified financial contract, upon termination of the netting agreement or qualified financial contract, any net or settlement amount owed by a nondefaulting party to an insurer against which an application or petition has been filed under IC 27-9-3 must be transferred:

- (1) to; or
- (2) according to the order of;

the receiver for the insurer, regardless of whether the insurer is the defaulting party.

(b) For purposes of subsection (a), a limited two-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 two-way payment or second method provision as against the defaulting insurer.

*As added by P.L.11-2011, SEC.36.*

### **IC 27-9-3.1-15**

#### **Transfers by receiver**

Sec. 15. In making a transfer of a netting agreement or qualified financial contract of an insurer that is subject to a proceeding under IC 27-9-3, the receiver shall either:

- (1) transfer to one (1) party, other than an insurer subject to a proceeding under IC 27-9-3, all netting agreements and qualified financial contracts between a counterparty or an affiliate of a counterparty and the insurer that is the subject of the proceeding, including:

(A) all rights and obligations of each party; and

(B) all property, including guarantees or credit enhancements, that secures claims of each party;

under each netting agreement and qualified financial contract;  
or

- (2) transfer none of the netting agreements, qualified financial

contracts, rights, obligations, or property referred to in subdivision (1) with respect to a counterparty or an affiliate of a counterparty.

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-16**

##### **Notice to parties of transfer**

Sec. 16. If an insurer's receiver makes a transfer of at least one (1) netting agreement or qualified financial contract under section 14 of this chapter, the receiver shall use the receiver's best efforts to notify any person that is a party to the netting agreement or qualified financial contract before noon, local time of the receiver, on the business day following the transfer.

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-17**

##### **Avoidance of transfer by receiver**

Sec. 17. Notwithstanding IC 27-9-3 and this chapter, a receiver may not avoid a transfer of money or other property arising in connection with:

- (1) a netting agreement or qualified financial contract;
- (2) a pledge, security, collateral, reimbursement, guarantee agreement, or similar security agreement; or
- (3) an arrangement or credit enhancement relating to a netting agreement or qualified financial contract;

made before the commencement of a formal delinquency proceeding under IC 27-9-3. However, a receiver may avoid a transfer made with actual intent to hinder, delay, or defraud the insurer, the insurer's receiver, or creditors.

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-18**

##### **Receiver's right of disaffirmance or repudiation**

Sec. 18. In exercising a receiver's right of disaffirmance or repudiation with respect to a 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 an affiliate of a 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 a counterparty or an affiliate of a counterparty.

*As added by P.L.11-2011, SEC.36.*

#### **IC 27-9-3.1-19**

##### **Claim arising from disaffirmance or repudiation**

Sec. 19. (a) Notwithstanding IC 27-9-3 and this chapter, a claim of a counterparty against an estate arising from an insurer's 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 conservation or rehabilitation case must be determined and allowed or disallowed:

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

(b) The amount of a claim described in subsection (a) is the actual direct compensatory damages determined as of the date of the disaffirmance or repudiation of the netting agreement or qualified financial contract.

*As added by P.L.11-2011, SEC.36.*

### **IC 27-9-3.1-20**

#### **Application of counterparty rights**

Sec. 20. 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:

- (1) available only to counterparties to netting agreements and qualified financial contracts; and
- (2) entered into on behalf of the separate account.

*As added by P.L.11-2011, SEC.36.*