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SENATE BILL 5007

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State of Washington

63rd Legislature

2013 Regular Session

By Senators Mullet and Benton

Read first time 01/14/13. Referred to Committee on Financial Institutions & Insurance .

1 AN ACT Relating to the settling of certain insurer transactions;  
2 amending RCW 48.31.020; and adding a new section to chapter 48.31 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 48.31.020 and 2005 c 432 s 1 are each amended to read  
5 as follows:

6 (1) For the purposes of this chapter, other than as to RCW  
7 48.31.010, and in addition to persons included under RCW 48.99.010, the  
8 term "insurer" shall be deemed to include an insurer authorized under  
9 chapter 48.05 RCW, an insurer or institution holding a certificate of  
10 exemption under RCW 48.38.010, a health care service contractor  
11 registered under chapter 48.44 RCW, and a health maintenance  
12 organization registered under chapter 48.46 RCW, as well as all persons  
13 engaged as, or purporting to be engaged as insurers, institutions  
14 issuing charitable gift annuities, health care service contractors, or  
15 health maintenance organizations in this state, and to persons in  
16 process of organization to become insurers, institutions issuing  
17 charitable gift annuities, health care service contractors, or health  
18 maintenance organizations.

1 (2) The definitions in this subsection apply throughout this  
2 chapter unless the context clearly requires otherwise.

3 (a) "Exceeded its powers" means the following conditions:

4 (i) The insurer has refused to permit examination of its books,  
5 papers, accounts, records, or affairs by the commissioner, his or her  
6 deputies, employees, or duly commissioned examiners as required by this  
7 title or any rules adopted by the commissioner;

8 (ii) A domestic insurer has unlawfully removed from this state  
9 books, papers, accounts, or records necessary for an examination of the  
10 insurer;

11 (iii) The insurer has failed to promptly comply with the filing of  
12 any applicable financial reports as required by this title or any rules  
13 adopted by the commissioner;

14 (iv) The insurer has neglected or refused to observe a lawful order  
15 of the commissioner to comply, within the time prescribed by law, with  
16 any prohibited deficiency in its applicable capital, capital stock, or  
17 surplus;

18 (v) The insurer is continuing to transact insurance or write  
19 business after its license has been revoked or suspended by the  
20 commissioner;

21 (vi) The insurer, by contract or otherwise, has unlawfully or has  
22 in violation of an order of the commissioner or with respect to a  
23 transaction to which the insurer has without first having obtained  
24 written approval of the commissioner if approval is required by law:

25 (A) Totally reinsured its entire outstanding business; or

26 (B) Merged or consolidated substantially its entire property or  
27 business with another insurer; or

28 (vii) The insurer engaged in any transaction in which it is not  
29 authorized to engage under this title or any rules adopted by the  
30 commissioner.

31 (b) "Consent" means agreement to administrative supervision by the  
32 insurer.

33 (c) "CEA" means the commodity exchange act (7 U.S.C. Sec. 1 et  
34 seq.)

35 (d) "Delinquency proceeding" means any proceeding instituted  
36 against an insurer for the purpose of liquidating, rehabilitating or  
37 conserving the insurer, and any summary proceeding under a receivership  
38 court's rehabilitation order under RCW 48.31.040.

1 (e) "FDICIA" means the federal deposit insurance corporation  
2 improvement act of 1991, P.L. 102-242.

3 (f) "Formal delinquency proceeding" means any conservation,  
4 rehabilitation, or liquidation proceeding.

5 (g) "Insolvency" or "insolvent" means the insurer is unable to pay  
6 its obligations when they are due or does not have admitted assets at  
7 least equal to all its liabilities or has a total adjusted capital that  
8 is less than its mandatory control level RBC as defined in RCW  
9 48.05.430 or 48.43.300, whichever is applicable to that insurer. For  
10 purposes of this chapter, "assets" and "liabilities" have the meanings  
11 and must be treated in the same manner as "assets" and "liabilities" in  
12 chapter 48.12 RCW.

13 (h) "Netting agreement" means:

14 (i) A contract or agreement (including any terms and conditions  
15 incorporated by reference), including a master agreement (which master  
16 agreement, together with all schedules, confirmations, definitions, and  
17 addenda thereto and transactions under any thereof, is treated as one  
18 netting agreement), that documents one or more transactions between the  
19 parties to the agreement for or involving one or more qualified  
20 financial contracts and that provides for the netting, liquidation,  
21 setoff, termination, acceleration, or close out under or in connection  
22 with one or more qualified financial contracts or present or future  
23 payment or delivery obligations or payment or delivery entitlements  
24 thereunder (including liquidation or close-out values relating to such  
25 obligations or entitlements) among the parties to the netting  
26 agreement;

27 (ii) Any master agreement or bridge agreement for one or more  
28 master agreements described in (h)(i) of this subsection; or

29 (iii) Any security agreement or arrangement or other credit  
30 enhancement or guarantee or reimbursement obligation related to any  
31 contract or agreement described in (h)(i) or (ii) of this subsection.  
32 However, any contract or agreement described in (h)(i) or (ii) of this  
33 subsection relating to agreements or transactions that are not  
34 qualified financial contracts is a netting agreement only with respect  
35 to those agreements or transactions that are qualified financial  
36 contracts.

37 (i) "Qualified financial contract" means any commodity contract,  
38 forward contract, repurchase agreement, securities contract, swap

1 agreement, and any similar agreement that the commissioner determines  
2 by regulation, resolution, or order to be a qualified financial  
3 contract for the purposes of this chapter.

4 (i) "Commodity contract" means:

5 (A) A contract for the purchase or sale of a commodity for future  
6 delivery on, or subject to the rules of, a board of trade or contract  
7 market under the CEA or a board of trade outside the United States;

8 (B) An agreement that is subject to regulation under section 19 of  
9 the CEA and that is commonly known to the commodities trade as a margin  
10 account, margin contract, leverage account, or leverage contract;

11 (C) An agreement or transaction that is subject to regulation under  
12 section 4c(b) of the CEA and that is commonly known to the commodities  
13 trade as a commodity option;

14 (D) Any combination of the agreements or transactions referred to  
15 in this subsection; or

16 (E) Any option to enter into an agreement or transaction referred  
17 to in this subsection.

18 (ii) "Forward contract," "repurchase agreement," "securities  
19 contract," and "swap agreement" have the same meanings as in the FDICIA  
20 (12 U.S.C. Sec. 1821(e)(8)(D)).

21 (j) "Receiver" means liquidator, rehabilitator, conservator, or  
22 ancillary receiver, as the context requires.

23 (k) "Receivership" means any liquidation, rehabilitation,  
24 conservation, or ancillary receivership, as the context requires.

25 (l) "Transfer" includes the sale and every other and different  
26 mode, direct or indirect, of disposing of or of parting with property  
27 or with an interest in property, including a setoff, or with the  
28 possession thereof or of fixing a lien upon property or upon an  
29 interest in property, absolutely or conditionally, voluntarily or  
30 involuntarily, by or without judicial proceedings. The retention of a  
31 security title in property delivered to an insurer and foreclosure of  
32 the insurer's equity of redemption is a transfer suffered by the  
33 insurer.

34 NEW SECTION. Sec. 2. A new section is added to chapter 48.31 RCW  
35 to read as follows:

36 (1) Notwithstanding any other provision of this chapter, including

1 any other provision of this chapter permitting the modification of  
2 contracts, or other law of a state, a person is not prohibited from  
3 exercising:

4 (a) A contractual right to cause the termination, liquidation,  
5 acceleration, or close out of obligations under or in connection with  
6 any netting agreement or qualified financial contract with an insurer  
7 because of:

8 (i) The insolvency, financial condition, or default of the insurer  
9 at any time, when the right is enforceable under applicable law other  
10 than this chapter; or

11 (ii) The commencement of a formal delinquency proceeding under this  
12 chapter;

13 (b) Any right under a pledge, security, collateral, reimbursement,  
14 or guarantee agreement or arrangement or any other similar security  
15 agreement or arrangement or other credit enhancement relating to one or  
16 more netting agreements or qualified financial contracts; or

17 (c) Subject to RCW 48.31.290, any right to set off or net out any  
18 termination value, payment amount, or other transfer obligation arising  
19 under or in connection with one or more qualified financial contracts  
20 where the counterparty or its guarantor is organized under the laws of  
21 the United States or a state or a foreign jurisdiction approved by the  
22 securities valuation office of the national association of insurance  
23 commissioners as eligible for netting.

24 (2) If a counterparty to a master netting agreement or a qualified  
25 financial contract with an insurer subject to a proceeding under this  
26 chapter terminates, liquidates, closes out, or accelerates the  
27 agreement or contract, damages are measured as of the date or dates of  
28 termination, liquidation, close out or acceleration. The amount of a  
29 claim for damages must be actual direct compensatory damages calculated  
30 in accordance with subsection (7) of this section.

31 (3) Upon termination of a netting agreement or qualified financial  
32 contract, the net or settlement amount, if any, owed by a nondefaulting  
33 party to an insurer against which an application or petition has been  
34 filed under this chapter must be transferred to or on the order of the  
35 receiver for the insurer, even if the insurer is the defaulting party,  
36 notwithstanding any walkaway clause in the netting agreement or  
37 qualified financial contract. For purposes of this subsection,  
38 "walkaway clause" means a provision in a netting agreement or a

1 qualified financial contract that, after calculation of a value of a  
2 party's position or an amount due to or from one of the parties in  
3 accordance with its terms upon termination, liquidation, or  
4 acceleration of the netting agreement or qualified financial contract,  
5 either does not create a payment obligation of a party or extinguishes  
6 a payment obligation of a party in whole or in part solely because of  
7 the party's status as a nondefaulting party. Any limited two-way  
8 payment or first method provision in a netting agreement or qualified  
9 financial contract with an insurer that has defaulted is a full two-way  
10 payment or second method provision as against the defaulting insurer.  
11 Any such property or amount is a general asset of the insurer, except  
12 to the extent it is subject to one or more secondary liens or  
13 encumbrances or rights of netting or setoff.

14 (4) In making any transfer of a netting agreement or qualified  
15 financial contract of an insurer subject to a proceeding under this  
16 chapter, the receiver shall either:

17 (a) Transfer to one party (other than an insurer subject to a  
18 proceeding under this chapter) all netting agreements and qualified  
19 financial contracts between a counterparty or any affiliate of the  
20 counterparty and the insurer that is the subject of the proceeding,  
21 including:

22 (i) All rights and obligations of each party under each netting  
23 agreement and qualified financial contract; and

24 (ii) All property, including any guarantees or other credit  
25 enhancement, securing any claims of each party under each netting  
26 agreement and qualified financial contract; or

27 (b) Transfer none of the netting agreements, qualified financial  
28 contracts, rights, obligations, or property referred to in subsection  
29 (1) of this section (with respect to the counterparty and any affiliate  
30 of the counterparty).

31 (5) If a receiver for an insurer makes a transfer of one or more  
32 netting agreements or qualified financial contracts, then the receiver  
33 shall use its best efforts to notify any person who is party to the  
34 netting agreements or qualified financial contracts of the transfer by  
35 twelve o'clock noon (the receiver's local time) on the business day  
36 following the transfer. For purposes of this subsection, "business  
37 day" means a day other than a Saturday, Sunday, or any day on which

1 either the New York stock exchange or the federal reserve bank of New  
2 York is closed.

3 (6) Notwithstanding any other provision of this chapter, a receiver  
4 may not avoid a transfer of money or other property arising under or in  
5 connection with a netting agreement or qualified financial contract (or  
6 any pledge, security, collateral, or guarantee agreement or any other  
7 similar security arrangement or credit support document relating to a  
8 netting agreement or qualified financial contract) that is made before  
9 the commencement of a formal delinquency proceeding under this chapter.  
10 However, a transfer may be avoided under RCW 48.31.270(3) if the  
11 transfer was made with actual intent to hinder, delay, or defraud the  
12 insurer, a receiver appointed for the insurer, or existing or future  
13 creditors.

14 (7)(a) In exercising the rights of disaffirmance or repudiation of  
15 a receiver with respect to any netting agreement or qualified financial  
16 contract to which an insurer is a party, the receiver for the insurer  
17 shall either:

18 (i) Disaffirm or repudiate all netting agreements and qualified  
19 financial contracts between a counterparty or any affiliate of the  
20 counterparty and the insurer that is the subject of the proceeding; or

21 (ii) Disaffirm or repudiate none of the netting agreements and  
22 qualified financial contracts referred to in (a) of this subsection  
23 (with respect to the person or any affiliate of the person).

24 (b) Notwithstanding any other provision of this chapter, any claim  
25 of a counterparty against the estate arising from the receiver's  
26 disaffirmance or repudiation of a netting agreement or qualified  
27 financial contract that has not been previously affirmed in the  
28 liquidation or immediately preceding conservation or rehabilitation  
29 case must be determined and allowed or disallowed as if the claim had  
30 arisen before the date of the filing of the petition for liquidation  
31 or, if a conservation or rehabilitation proceeding is converted to a  
32 liquidation proceeding, as if the claim had arisen before the date of  
33 the filing of the petition for conservation or rehabilitation. The  
34 amount of the claim is the actual direct compensatory damages  
35 determined as of the date of the disaffirmance or repudiation of the  
36 netting agreement or qualified financial contract. "Actual direct  
37 compensatory damages" does not include punitive or exemplary damages,  
38 damages for lost profit or lost opportunity, or damages for pain and

1 suffering, but does include normal and reasonable costs of cover or  
2 other reasonable measures of damages utilized in the derivatives,  
3 securities, or other market for the contract and agreement claims.

4 (8) "Contractual right" as used in this section includes any right  
5 set forth in a rule or bylaw of a derivatives clearing organization (as  
6 defined in the CEA), a multilateral clearing organization (as defined  
7 in the FDICIA), a national securities exchange, a national securities  
8 association, a securities clearing agency, a contract market designated  
9 under the CEA, a derivatives transaction execution facility registered  
10 under the CEA, or a board of trade (as defined in the CEA) or in a  
11 resolution of the governing board thereof and any right, whether or not  
12 evidenced in writing, arising under statutory or common law, or under  
13 law merchant, or by reason of normal business practice.

14 (9) This section does not apply to persons who are affiliates of  
15 the insurer that is the subject of the proceeding.

16 (10) All rights of counterparties under this chapter apply to  
17 netting agreements and qualified financial contracts entered into on  
18 behalf of the general account or separate accounts if the assets of  
19 each separate account are available only to counterparties to netting  
20 agreements and qualified financial contracts entered into on behalf of  
21 that separate account.

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