

HOUSE AMENDMENT NO. ____

TO

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Offered By

1 AMEND House Amendment No. _____ to Senate Bill No. 777, Page 3, Line 24, by inserting
2 after all of said line the following:

3
4 "375.1152. For purposes of sections 375.570 to 375.750 and 375.1150 to 375.1246, the
5 following words and phrases shall mean:

6 (1) "Allocated loss adjustment expenses", those fees, costs or expenses reasonably
7 chargeable to the investigation, negotiation, settlement or defense of an individual claim or loss or
8 to the protection and perfection of the subrogation rights of any insolvent insurer arising out of a
9 policy of insurance issued by the insolvent insurer. "Allocated loss adjustment expenses" shall
10 include all court costs, fees and expenses; fees for service of process; fees to attorneys; costs of
11 undercover operative and detective services; fees of independent adjusters or attorneys for
12 investigation or adjustment of claims beyond initial investigation; costs of employing experts for
13 preparation of maps, photographs, diagrams, chemical or physical analysis or for advice, opinion
14 or testimony concerning claims under investigation or in litigation; costs for legal transcripts or
15 testimony taken at coroner's inquests, criminal or civil proceedings; costs for copies of any public
16 records; costs of depositions and court-reported or -recorded statements. "Allocated loss
17 adjustment expenses" shall not include the salaries of officials, administrators or other employees
18 or normal overhead charges such as rent, postage, telephone, lighting, cleaning, heating or similar
19 expenses;

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1 (2) "Ancillary state", any state other than a domiciliary state;

2 (3) "Creditor", a person having any claim, whether matured or unmatured, liquidated or
3 unliquidated, secured or unsecured, absolute, fixed or contingent;

4 (4) "Delinquency proceeding", any proceeding instituted against an insurer for the purpose
5 of liquidating, rehabilitating, reorganizing or conserving such insurer, and any summary
6 proceeding under sections 375.1160, 375.1162 and 375.1164;

7 (5) "Director", the director of the department of insurance, financial institutions and
8 professional registration;

9 (6) "Doing business" includes any of the following acts, whether effected by mail or
10 otherwise:

11 (a) The issuance or delivery of contracts of insurance to persons resident in this state;

12 (b) The solicitation of applications for such contracts, or other negotiations preliminary to
13 the execution of such contracts;

14 (c) The collection of premiums, membership fees, assessments, or other consideration for
15 such contracts;

16 (d) The transaction of matters subsequent to execution of such contracts and arising out of
17 them; or

18 (e) Operating under a license or certificate of authority, as an insurer, issued by the
19 department of insurance, financial institutions and professional registration;

20 (7) "Domiciliary state", the state in which an insurer is incorporated or organized or, in the
21 case of an alien insurer, its state of entry;

22 (8) "Fair consideration" is given for property or obligation:

23 (a) When in exchange for such property or obligation, as a fair equivalent thereof, and in
24 good faith, property is conveyed or services are rendered or an obligation is incurred or an
25 antecedent debt is satisfied; or

26 (b) When such property or obligation is received in good faith to secure a present advance

1 or antecedent debt in an amount not disproportionately small as compared to the value of the
2 property or obligation obtained;

3 (9) "Foreign country", any jurisdiction not in the United States;

4 (10) "Formal delinquency proceeding", any liquidation or rehabilitation proceeding;

5 (11) "General assets", all property, real, personal, or otherwise, not specifically
6 mortgaged, pledged, deposited or otherwise encumbered for the security or benefit of specified
7 persons or classes of persons. As to specifically encumbered property, "general assets" includes
8 all such property or its proceeds in excess of the amount necessary to discharge the sum or sums
9 secured thereby. Assets held in trust and on deposit for the security or benefit of all policyholders
10 or all policyholders and creditors, in more than a single state, shall be treated as general assets;

11 (12) "Guaranty association", the Missouri property and casualty insurance guaranty
12 association created by sections 375.771 to 375.779, as amended, the Missouri life and health
13 insurance guaranty association created by sections 376.715 to 376.758, RSMo, as amended, and
14 any other similar entity now or hereafter created by the laws of this state for the payment of claims
15 of insolvent insurers. "Foreign guaranty association" means any similar entities now in existence
16 or hereafter created by the laws of any other state;

17 (13) "Insolvency" or "insolvent" means:

18 (a) For an insurer issuing only assessable fire insurance policies:

19 a. The inability to pay an obligation within thirty days after it becomes payable; or
20 b. If an assessment be made within thirty days after such date, the inability to pay such
21 obligation thirty days following the date specified in the first assessment notice issued after the
22 date of loss;

23 (b) For any other insurer, that it is unable to pay its obligations when they are due, or
24 when its admitted assets do not exceed its liabilities plus the greater of:

25 a. Any capital and surplus required by law for its organization; or

26 b. The total par or stated value of its authorized and issued capital stock;

1 (c) As to any insurer licensed to do business in this state as of August 28, 1991, which
2 does not meet the standards established under paragraph (b) of this subdivision, the term
3 "insolvency" or "insolvent" shall mean, for a period not to exceed three years from August 28,
4 1991, that it is unable to pay its obligations when they are due or that its admitted assets do not
5 exceed its liabilities plus any required capital contribution ordered by the director under any other
6 provisions of law;

7 (d) For purposes of this subdivision "liabilities" shall include but not be limited to
8 reserves required by statute or by the department of insurance, financial institutions and
9 professional registration regulations or specific requirements imposed by the director upon a
10 subject company at the time of admission or subsequent thereto;

11 (e) For purposes of this subdivision, an obligation is payable within ninety days of the
12 resolution of any dispute regarding the obligation;

13 (14) "Insurer", any person who has done, purports to do, is doing or is licensed to do
14 insurance business as described in section 375.1150, and is or has been subject to the authority of,
15 or to liquidation, rehabilitation, reorganization, supervision, or conservation by, any insurance
16 department of any state. For purposes of sections 375.1150 to 375.1246, any other persons
17 included under section 375.1150 shall be deemed to be insurers;

18 (15) "Netting agreement":

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

1 such obligations or entitlements, among the parties to the netting agreement;

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

4 (c) Any security agreement or arrangement or other credit enhancement or guarantee or
5 reimbursement obligation related to any contract or agreement described in paragraph (a) or (b) of
6 this subdivision; provided that any contract or agreement described in paragraph (a) or (b) of this
7 subdivision relating to agreements or transactions that are not qualified financial contracts shall be
8 deemed to be a netting agreement only with respect to those agreements or transactions that are
9 qualified financial contracts;

10 (16) "Preferred claim", any claim with respect to which the terms of sections 375.1150 to
11 375.1246 accord priority of payment from the general assets of the insurer;

12 (17) "Qualified financial contract", any commodity contract, forward contract, repurchase
13 agreement, securities contract, swap agreement, and any similar agreement that the director
14 determines by regulation, resolution, or order to be a qualified financial contract for the purposes
15 of sections 375.1150 to 375.1246;

16 (a) "Commodity contract", shall mean:

17 a. A contract for the purchase or sale of a commodity for future delivery on, or subject to
18 the rules of, a board of trade or contract market under the Commodity Exchange Act, 7 U.S.C.
19 Section 1, et seq., or a board of trade outside the United States;

20 b. An agreement that is subject to regulation under Section 19 of the Commodity
21 Exchange Act, 7 U.S.C. Section 1, et seq., and that is commonly known to the commodities trade
22 as a margin account, margin contract, leverage account, or leverage contract;

23 c. An agreement or transaction that is subject to regulation under Section 4c(b) of the
24 Commodity Exchange Act, 7 U.S.C. Section 1, et seq., and that is commonly known to the
25 commodities trade as a commodity option;

26 d. Any combination of the agreements or transactions referred to in this paragraph; or

1 e. Any option to enter into an agreement or transaction referred to in this paragraph;

2 (b) "Forward contract", "repurchase agreement", "securities contract", and "swap
3 agreement" shall have the meaning set forth in the Federal Deposit Insurance Act, 12 U.S.C.
4 Section 1821(e)(8)(D), as amended;

5 _____ [(16)] (18) "Receiver", a receiver, liquidator, administrative supervisor, rehabilitator or
6 conservator, as the context requires;

7 [(17)] (19) "Reciprocal state", any state other than this state in which in substance and
8 effect, provisions substantially similar to subsection 1 of section 375.1176 and sections 375.1235,
9 375.1236, 375.1240, 375.1242 and 375.1244 have been enacted and are in force, and in which
10 laws are in force requiring that the director of the state department of insurance, financial
11 institutions and professional registration or equivalent official be the receiver of a delinquent
12 insurer, and in which some provision exists for the avoidance of fraudulent conveyances and
13 preferential transfers;

14 [(18)] (20) "Secured claim", any claim secured by mortgage, trust deed, pledge, deposit as
15 security, escrow, or otherwise, including a pledge of assets allocated to a separate account
16 established pursuant to section 376.309, RSMo; but not including special deposit claims or claims
17 against general assets. The term also includes claims which have become liens upon specific
18 deposit claims or claims against general assets. The term also includes claims which have become
19 liens upon specific assets by reason of judicial process;

20 [(19)] (21) "Special deposit claim", any claim secured by a deposit made pursuant to
21 statute for the security or benefit of a limited class or classes of persons, but not including any
22 claim secured by general assets;

23 [(20)] (22) "State", any state, district, or territory of the United States and the Panama
24 Canal Zone;

25 [(21)] (23) "Transfer" shall include the sale and every other and different mode, direct or
26 indirect, of disposing of or of parting with property or with an interest therein, or with the

possession thereof, or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily, by or without judicial proceedings. The retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by the debtor.

375.1155. 1. Any receiver appointed in a proceeding under sections 375.1150 to 375.1246 may at any time apply for, and any court of general jurisdiction may grant, such restraining orders, preliminary and permanent injunctions, and other orders as may be deemed necessary and proper to prevent:

- (1) The transaction of further business;
- (2) The transfer of property;
- (3) Interference with the receiver or with a proceeding under sections 375.1150 to 375.1246;
- (4) Waste of the insurer's assets;
- (5) Dissipation and transfer of bank accounts;
- (6) The institution or further prosecution of any actions or proceedings;
- (7) The obtaining of preferences, judgments, attachments, garnishments or liens against the insurer, its assets or its policyholders;
- (8) The levying of execution against the insurer, its assets or its policyholders;
- (9) The making of any sale or deed for nonpayment of taxes or assessments that would lessen the value of the assets of the insurer;
- (10) The withholding from the receiver of books, accounts, documents, or other records relating to the business of the insurer; or
- (11) Any other threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of any proceeding under this act.

2. The receiver may apply to any court outside of the state for the relief described in subsection 1 of this section.

1 3. Notwithstanding anything to the contrary in this section, the commencement of a
2 delinquency proceeding under sections 375.1150 to 375.1246 shall not operate as a stay or
3 prohibition of any right to cause the netting, liquidation, setoff, termination, acceleration, or close
4 out of obligations, or enforcement of any security agreement or arrangement or other credit
5 enhancement or guarantee or reimbursement obligation, under or in connection with any netting
6 agreement or qualified financial contract as provided for in section 375.1191.

7 375.1191. 1. Notwithstanding any other provision of sections 375.1150 to 375.1246,
8 including any other provision of sections 375.1150 to 375.1246 permitting the modification of
9 contracts, or other law of a state, no person shall be stayed or prohibited from exercising:

10 (1) A contractual right to cause the termination, liquidation, acceleration, or close out of
11 obligations under or in connection with any netting agreement or qualified financial contract with
12 an insurer because of:

13 (a) The insolvency, financial condition, or default of the insurer at any time, provided that
14 the right is enforceable under applicable law other than sections 375.1150 to 375.1246; or

15 (b) The commencement of a formal delinquency proceeding under sections 375.1150 to
16 375.1246;

17 (2) Any right under a pledge, security, collateral, reimbursement, or guarantee agreement
18 or arrangement or any other similar security arrangement or arrangement or other credit
19 enhancement relating to one or more netting agreements or qualified financial contracts;

20 (3) Subject to any provision of section 375.1198, any right to set off or net out any
21 termination value, payment amount, or other transfer obligation arising under or in connection
22 with one or more qualified financial contracts where the counterparty or its guarantor is organized
23 under the laws of the United States or a state or a foreign jurisdiction approved by the Securities
24 Valuation Office (SVO) of the NAIC as eligible for netting; or

25 (4) If a counterparty to a master netting agreement or a qualified financial contract with an
26 insurer subject to a proceeding under sections 375.1150 to 375.1246 terminates, liquidates, closes

1 out, or accelerates the agreement or contract, damages shall be measured as of the date or dates of
2 termination, liquidation, close out, or acceleration. The amount of a claim for damages shall be
3 actual direct compensatory damages calculated in accordance with subsection 6 of this section.

4 2. Upon termination of a netting agreement or qualified financial contract, the net or
5 settlement amount, if any, owed by a nondefaulting party to an insurer against which an
6 application or petition has been filed under sections 375.1150 to 375.1246 shall be transferred to
7 or on the order of the receiver for the insurer, even if the insurer is the defaulting party,
8 notwithstanding any walkaway clause in the netting agreement or qualified financial contract. For
9 purposes of this subsection, the term "walkaway clause" means a provision in a netting agreement
10 or a qualified financial contract that, after calculation of a value of a party's position or an amount
11 due to or from one of the parties in accordance with its terms upon termination, liquidation, or
12 acceleration of the netting agreement or qualified financial contract, either does not create a
13 payment obligation of a party or extinguishes a payment obligation of a party in whole or in part
14 solely because of the party's status as a nondefaulting party. Any limited two-way payment or first
15 method provision in a netting agreement or qualified financial contract with an insurer that has
16 defaulted shall be deemed to be a full two-way payment or second method provision as against the
17 defaulting insurer. Any such property or amount shall, except to the extent it is subject to one or
18 more secondary liens or encumbrances or rights of netting or setoff, be a general asset of the
19 insurer.

20 3. In making any transfer of a netting agreement or qualified financial contract of an
21 insurer subject to a proceeding under sections 375.1150 to 375.1246, the receiver shall either:

22 (1) Transfer to one party, other than an insurer subject to a proceeding under sections
23 375.1150 to 375.1246, all netting agreements and qualified financial contracts between a
24 counterparty or any affiliate of the counterparty and the insurer that is the subject of the
25 proceeding, including:

26 (a) All rights and obligations of each party under each netting agreement and qualified

1 financial contract; and

2 (b) All property, including any guarantees or other credit enhancement, securing any
3 claims of each party under each netting agreement and qualified financial contract; or

4 (2) Transfer none of the netting agreements, qualified financial contracts, rights,
5 obligations or property referred to in subdivision (1) of this subsection, with respect to the
6 counterparty and any affiliate of the counterparty.

7 4. If a receiver for an insurer makes a transfer of one or more netting agreements or
8 qualified financial contracts, then the receiver shall use its best efforts to notify any person who is
9 party to the netting agreements or qualified financial contracts of the transfer by 12:00 noon, the
10 receiver's local time, on the business day following the transfer. For purposes of this subsection,
11 "business day" means a day other than a Saturday, Sunday, or any day on which either the New
12 York Stock Exchange or the Federal Reserve Bank of New York is closed.

13 5. Notwithstanding any other provision of sections 375.1150 to 375.1246, a receiver may
14 not avoid a transfer of money or other property arising under or in connection with a netting
15 agreement or qualified financial contract, or any pledge, security, collateral or guarantee
16 agreement or any other similar security arrangement or credit support document relating to a
17 netting agreement or qualified financial contract, that is made before the commencement of a
18 formal delinquency proceeding under sections 375.1150 to 375.1246. However, a transfer may be
19 avoided pursuant to section 375.1192 if the transfer was made with actual intent to hinder, delay
20 or defraud the insurer, a receiver appointed for the insurer, or existing or future creditors.

21 6. (1) In exercising the rights of disaffirmance or repudiation of a receiver with respect to
22 any netting agreement or qualified financial contract to which an insurer is a party, the receiver for
23 the insurer shall either:

24 (a) Disaffirm or repudiate all netting agreements and qualified financial contracts between
25 a counterparty or any affiliate of the counterparty and the insurer that is the subject of the
26 proceeding; or

1 (b) Disaffirm or repudiate none of the netting agreements and qualified financial contracts
2 referred to in paragraph (a) of this subdivision, with respect to the person or any affiliate of the
3 person.

4 (2) Notwithstanding any other provision of sections 375.1150 to 375.1246, any claim of a
5 counterparty against the estate arising from the receiver's disaffirmance or repudiation of a netting
6 agreement or qualified financial contract that has not been previously affirmed in the liquidation
7 or immediately preceding conservation or rehabilitation case shall be determined and shall be
8 allowed or disallowed as if the claim had arisen before the date of the filing of the petition for
9 liquidation or, if a conservation or rehabilitation proceeding is converted to a liquidation
10 proceeding, as if the claim had arisen before the date of the filing of the petition for conservation
11 or rehabilitation. The amount of the claim shall be the actual direct compensatory damages
12 determined as of the date of the disaffirmance or repudiation of the netting agreement or qualified
13 financial contract. The term "actual direct compensatory damages" does not include punitive or
14 exemplary damages, damages for lost profit or lost opportunity or damages for pain and suffering,
15 but does include normal and reasonable costs of cover or other reasonable measures of damages
16 utilized in the derivatives, securities or other market for the contract and agreement claims.

17 7. The term "contractual right" as used in this section includes any right set forth in a rule
18 or bylaw of a derivatives clearing organization, as defined in the Commodity Exchange Act, a
19 multilateral clearing organization, as defined in the Federal Deposit Insurance Corporation
20 Improvement Act of 1991, a national securities exchange, a national securities association, a
21 securities clearing agency, a contract market designated under the Commodity Exchange Act, a
22 derivatives transaction execution facility registered under the Commodity Exchange Act, or a
23 board of trade, as defined in the Commodity Exchange Act, or in a resolution of the governing
24 board thereof and any right, whether or not evidenced in writing, arising under statutory or
25 common law, or under law merchant, or by reason of normal business practice.

26 8. The provisions of this section shall not apply to persons who are affiliates of the insurer

1 that is the subject of the proceeding.

2 9. All rights of counterparties under sections 375.1150 to 375.1246 shall apply to netting
3 agreements and qualified financial contracts entered into on behalf of the general account or
4 separate accounts if the assets of each separate account are available only to counterparties to
5 netting agreements and qualified financial contracts entered into on behalf of that separate
6 account.”; and

7
8 Further amend said bill by amending the title, enacting clause, and intersectional references
9 accordingly.