

**NITIJELA OF THE REPUBLIC OF THE MARSHALL ISLANDS
44TH CONSTITUTIONAL REGULAR SESSION, 2023**



Republic of the Marshall Islands
Jepilpilin Ke Ejukaan

NETTING ACT, 2023

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NETTING ACT, 2023

AN ACT to enact the new Chapter 1 and new Title 53 of the Marshall Islands Revised Code (MIRC) in order to provide for netting.

BE IT ENACTED BY THE NITIJELA OF THE REPUBLIC OF THE MARSHALL ISLANDS

§101. Short title.

This Act may be cited as the Netting Act, 2023.

§102. Definitions.

As used in this Act, unless the context otherwise requires, the following definitions shall apply:

- (a) "Authority" means the Banking Commissioner of the Republic;
- (b) "cash" means money credited to an account in any currency, or a similar claim for repayment of money, such as a money market deposit;
- (c) "collateral" means any of the following:
 - (i) cash in any currency;
 - (ii) securities of any kind, including, without limitation, debt and equity securities; sukuk and fund interests;
 - (iii) guarantees, letters of credit and obligations to reimburse; and
 - (iv) any asset commonly used as collateral in connection with qualified financial contracts in the United States of America;
- (d) "collateral arrangement" means any margin, collateral or security arrangement or other credit enhancement related to or forming part

of a netting agreement or one or more qualified financial contracts to which a netting agreement applies, including, without limitation:

- (i) a pledge or any other form of security interest in collateral, whether possessory or non-possessory;
 - (ii) a title transfer collateral arrangement; and
 - (iii) any guarantee, letter of credit or reimbursement obligation by or to a party to one or more qualified financial contracts, in respect of those qualified financial contracts; or a netting agreement;
- (e) “insolvency practitioner” means the liquidator, receiver, trustee, conservator or other person or entity which administers the affairs of an insolvent party during an insolvency proceeding under the laws of the Republic or any other jurisdiction;
- (f) “insolvency proceedings” means any collective proceedings, other than resolution proceedings, under the laws of the Republic or any other jurisdiction affecting the claims of creditors of an insolvent party including liquidation, winding up, reorganization, rehabilitation, administration, receivership, conservatorship or other similar form of collective proceedings;
- (g) “insolvent party” is the party in relation to which insolvency proceedings have been instituted;
- (h) “netting” means the operation of a set of provisions in an agreement between two or more persons that:
- (i) may be commenced by notice given by one party to another party upon the occurrence of an event of default with respect to the other party or other termination event or that may, in certain circumstances, occur automatically as specified in the agreement; and
 - (ii) has the following effect:
 - (a) the termination, liquidation and/or acceleration of any present or future payment or delivery rights or obligations arising under or in connection with one or more qualified financial contracts to which a netting agreement applies;
 - (b) the calculation or estimation of a close-out value, market value, liquidation value or replacement value in

- respect of each right and obligation or group of rights and obligations terminated, liquidated and/or accelerated under paragraph
- (iii) and the conversion of each such value into a single currency; and
 - (iv) the determination of the net balance of the values calculated under paragraph (ii), whether by operation of set-off or otherwise, giving rise to the obligation of one party to pay an amount equal to the net balance to the other party;
- (i) “netting agreement” means an agreement between two or more persons that provides for netting, including, without limitation:
- (i) an agreement that provides for the netting of amounts due under two or more netting agreements; and
 - (ii) a collateral arrangement relating to or forming part of a netting agreement;
- (j) “non-insolvent party” is the party that is not the insolvent party;
- (k) “party” means a person that is a party to a netting agreement;
- (l) “person” includes an individual, partnership, corporation, regulated entity such as a bank, investment firm, securities or commodities dealer, insurance company or investment manager, or any other body corporate whether organized under the laws of the Republic or under the laws of any other jurisdiction, and any unit or political subdivision of central or regional government, and any international or regional development bank or other international or regional organization;
- (m) “qualified financial contract” means any financial agreement, contract or transaction, including any terms and conditions incorporated by reference in any such financial agreement, contract or transaction, under which payment or delivery obligations are due to be performed at a certain time or within a certain period of time and whether or not subject to any condition or contingency, including, without limitation:
- (i) a currency, cross-currency or interest rate swap or profit rate swap;
 - (ii) a basis swap;

- (iii) a spot, future, forward or other foreign exchange transaction;
- (iv) a cap, collar or floor transaction;
- (v) a commodity swap;
- (vi) a forward rate agreement;
- (vii) a currency or interest rate future;
- (viii) a currency or interest rate option;
- (ix) an equity derivative, such as an equity or equity index swap, equity forward, equity option or equity index option;
- (x) a derivative relating to bonds or other debt securities or to a bond or debt security index, such as a total return swap, index swap, forward, option or index option;
- (xi) a credit derivative, such as a credit default swap, credit default basket swap, total return swap or credit default option;
- (xii) an energy derivative, such as an electricity derivative, oil derivative, coal derivative or gas derivative, including a derivative on physical transmission rights, financial transmission rights or transmission capacity;
- (xiii) a weather derivative, such as a weather swap or weather option;
- (xiv) a bandwidth derivative;
- (xv) a freight derivative;
- (xvi) an emissions derivative, such as an emissions allowance or emissions reduction transaction;
- (xvii) an economic statistics derivative, such as an inflation derivative;
- (xviii) a property index derivative;
- (xix) a spot, future, forward or other securities or commodities transaction;
- (xx) a securities contract, including a margin loan and an agreement to buy, sell, borrow or lend securities, such as a securities repurchase or reverse repurchase agreement, a securities lending agreement or a

- securities buy/sell-back agreement, including any such contract or agreement relating to mortgage loans, interests in mortgage loans or mortgage-related securities;
- (xxi) a commodities contract, including an agreement to buy, sell, borrow or lend commodities, such as a commodities repurchase or reverse repurchase agreement, a commodities lending agreement or a commodities buy/sell-back agreement;
 - (xxii) a collateral arrangement;
 - (xxiii) an agreement to clear or settle securities transactions or to act as a depository for securities;
 - (xxiv) any other agreement, contract or transaction similar to any agreement, contract or transaction referred to in paragraphs (a) to (w) with respect to one or more reference items or indices relating to, without limitation, interest rates, currencies, commodities, energy products, electricity, equities, fund interest, weather, bonds and other debt instruments, sukuk, precious metals, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial or economic consequence, or economic or financial indices or measures of economic or financial risk or value ;
 - (xxv) any swap, forward, option, contract for differences or other derivative in respect of, or combination of, one or more agreements or contracts referred to in paragraphs (a) to (x); and
 - (xxvi) any agreement, contract or transaction designated as a qualified financial contract by the Authority under this Act;
- (n) “resolution proceedings” means a statutory regime for the recovery and resolution of a financial institution following a significant deterioration in its financial position, including any preventive measures taken or powers exercised by a competent public authority in relation to the financial institution under the statutory regime prior to a financial institution’s formal entry into resolution and including,

without limitation, any insolvency proceedings in relation to the financial institution, or the whole or part of its business, following its formal entry into resolution;

- (o) “title transfer collateral arrangement” means a margin, collateral or security arrangement related to a netting agreement based on the transfer of title to collateral, whether by outright sale or by way of security, including, without limitation, a sale and repurchase agreement, securities lending agreement, securities buy/sell-back agreement or an irregular pledge.

§103. Powers of the Authority

The Authority may, by notice issued under this section, designate as “qualified financial contracts” any agreement, contract or transaction, or type of agreement, contract or transaction, in addition to those listed in this Act.

§104. Enforceability of a Qualified Financial Contract

A qualified financial contract shall not be and shall be deemed never to have been void or unenforceable by reason of any laws or regulations relating to games, gaming, gambling, wagering or lotteries.

§105. Enforceability of a Netting Agreement

- (a) General rule. The provisions of a netting agreement will be enforceable in accordance with their terms, including against an insolvent party and, where applicable, against a guarantor or other person providing collateral or security for any obligation of the insolvent party and may not be stayed, avoided or otherwise limited by any action taken or power exercised by the insolvency practitioner or by any other provision of law applicable to the insolvent party by virtue of its being subject to insolvency proceedings.
- (b) Limitation on obligation to make payment or delivery. After commencement of insolvency proceedings in relation to a party, the only obligation, if any, of either party to make payment or delivery under a netting agreement in respect of all rights and obligations terminated, liquidated or accelerated pursuant to the application of netting under that netting agreement shall be its obligation to pay a net amount to the other party as determined in accordance with the terms of the netting agreement.

- (c) Limitation on right to receive payment or delivery. After commencement of insolvency proceedings in relation to a party, the only right, if any, of either party to receive payment or delivery under a netting agreement in respect of all rights and obligations terminated, liquidated or accelerated pursuant to the application of netting under that agreement shall be equal to its right to receive a net amount from the other party as determined in accordance with the terms of the netting agreement.
- (d) Limitation on powers of the insolvency practitioner. Any powers of the insolvency practitioner to assume or repudiate individual contracts or transactions will not prevent the termination, liquidation and/or acceleration of all payment or delivery obligations or rights under one or more qualified financial contracts to which a netting agreement applies, and will apply, if at all, only to the net amount due in respect of all of such qualified financial contracts in accordance with the terms of such netting agreement.
- (e) Limitation of insolvency laws prohibiting set-off. The provisions of a netting agreement that provide for the determination of a net balance of the close-out values, market values, liquidation values or replacement values calculated in respect of accelerated and/or terminated payment and/or delivery obligations or rights under one or more qualified financial contracts to which a netting agreement applies will not be affected by any applicable insolvency laws limiting the exercise of rights to set off, offset or net out obligations, payment amounts or termination values owed between an insolvent party and another party.
- (f) Preferences and fraudulent transfers. An insolvent party or its representative, including an insolvency practitioner, may not avoid:
 - (i) any transfer, substitution or exchange of cash, collateral or any other interests under or in connection with a netting agreement from the insolvent party to the non-insolvent party; or
 - (ii) any payment or delivery obligation incurred by the insolvent party and owing to the non-insolvent party under or in connection with a netting agreement on the grounds of it constituting a preference or a transfer during a suspect period by the insolvent party to the non-insolvent party, unless there is clear and convincing

evidence that the insolvent party made such transfer, substitution or exchange or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the insolvent party was indebted or became indebted, on or after the date such transfer was made or such obligation was incurred.

- (g) Pre-emption. No stay, injunction, avoidance, moratorium, or similar proceeding or order, whether issued or granted by a court, administrative agency, insolvency practitioner or otherwise, shall limit or delay application of otherwise enforceable netting agreements in accordance with subsections (a), (b) and (c) of this section of this Act.
- (h) Realization and liquidation of collateral. Unless otherwise agreed by the parties, the realization, appropriation and/or liquidation of collateral under a collateral arrangement shall take effect or occur without any requirement that prior notice shall be given to, or consent be received from, any party, person or entity, provided that this subsection is without prejudice to any applicable provision of law requiring the realization, appropriation and/or liquidation of collateral to be conducted in a commercially reasonable manner.
- (i) Scope of this provision. For the purposes of this section:
 - (i) A netting agreement shall be deemed to be a netting agreement notwithstanding the fact that such netting agreement may contain provisions relating to agreements, contracts or transactions that are not qualified financial contracts in terms of section 102 of this Act, provided, however, that, for the purposes of this section, such netting agreement shall be deemed to be a netting agreement only with respect to those agreements, contracts or transactions that fall within the definition of “qualified financial contract” in section 102 of this Act.
 - (ii) A collateral arrangement shall be deemed to be a collateral arrangement notwithstanding the fact that such collateral arrangement may contain provisions relating to agreements, contracts or transactions that are not a netting agreement or a qualified financial contract entered into under a netting agreement in terms of

section 102 of this Act, provided, however, that, for the purposes of this section, such collateral arrangement shall be deemed to be a collateral arrangement only with respect to those agreements, contracts or transactions that fall within the definition of “netting agreement” or “qualified financial contract” in section 102 of this Act.

- (iii) A netting agreement and all qualified financial contracts to which a netting agreement applies shall constitute a single agreement.

§106. Effective Date.

This Bill, and all Acts contained herein, shall take effect in accordance with the Constitution and the Rules of Procedures of the Nitijela.

CERTIFICATE

I hereby certify:

1. That Nitijela Bill No: 94 was passed by the Nitijela of the Republic of the Marshall Islands on the 28th day of September 2023; and
2. That I am satisfied that Nitijela Bill No: 94 was passed in accordance with the relevant provisions of the Constitution of the Republic of the Marshall Islands and the Rules of Procedures of the Nitijela.

I hereby place my signature before the Clerk this 25th day of October 2023.



Hon. Kenneth A. Kedi
Speaker
Nitijela of the Marshall Islands

Attest:



Carl Alik
Assistant Clerk
Nitijela of the Marshall Islands