HOUSE DOCKET, NO. FILED ON: 1/7/2009

**HOUSE . . . . . . . . . . . . . . . No.**

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The Commonwealth of Massachusetts

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PRESENTED BY:

**James M. Murphy**

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*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General
 Court assembled:*

 The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to qualified financial contracts.

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PETITION OF:

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| --- | --- |
| Name: | District/Address: |
| James M. Murphy | 4th Norfolk |

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 1039 OF 2007-2008.]

The Commonwealth of Massachusetts

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**In the Year Two Thousand and Nine**

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An Act relative to qualified financial contracts..

 *Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Section 180A of chapter 175 of the General Laws, as appearing in the 2004 Official Edition, is hereby amended by striking in line “2” the letter “L” adding the following:- “L½”

SECTION 2. Section 180A of chapter 175 of the General Laws, as appearing in the 2004 Official Edition, is hereby amended by adding the following:-

 “Affiliate” of, or person “affiliated” with, a specific person, is a person that directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

“Control” (including the terms “controlling,” “controlled by” and “under common control with”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagment services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing that control does not exist in fact. The commissioner may determine, after furnishing all persons in interest notice and an opportunity to be heard and making specific findings of fact to support the determination, that control exists in fact, notwithstanding the absence of a presumption to that effect.

“Netting agreement” means (1) a contract or agreement (including terms and conditions incorporated by reference therein), including a master agreement (which master agreement, together with all schedules, confirmations, definitions and addenda thereto and transactions under any thereof, 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 present or future payment or delivery obligations or payment or delivery entitlements thereunder (including liquidation or close-out values relating to such obligations or entitlements) among the parties to the netting agreement; (2) any master agreement or bridge agreement for one or more master agreements described in Paragraph (1) of this Subsection; or (3) any security agreement or arrangement or other credit enhancement or guarantee or reimbursement obligation related to any contract or agreement described in Paragraph (1) or (2) of this Subsection; provided that any contract or agreement described in paragraph (1) or (2) of this Subsection relating to agreements or transactions that are not qualified financial contracts shall be deemed to be a netting agreement only with respect to those agreements or transactions that are qualified financial contracts.

 “Person” is an individual, a corporation, a limited liability company, a partnership, an association, a joint stock company, a trust, an unincorporated organization, any similar entity or any combination of the foregoing acting in concert, but shall not include any joint venture partnership exclusively engaged in owning, managing, leasing or developing real or tangible personal property.

“Qualified financial contract” means a commodity contract, forward contract, repurchase agreement, securities contract, swap agreement and any similar agreement that the commissioner determines by regulation, resolution or order to be a qualified financial contract for purposes of sections one hundred and eighty A through one hundred and eighty L½.

(1) “Commodity contract” means:

(a) 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;

(b) An agreement that is subject to regulation under Section 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;

(c) An agreement or transaction that is subject to regulation under Section 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;

(d) Any combination of the agreements or transactions referred to in this paragraph; or

(e) Any option to enter into an agreement or transaction referred to in this paragraph.

(2) “Forward contract”, “repurchase agreement”, “securities contract” and “swap agreement” shall have the meanings set forth in the Federal Deposit Insurance Act, 12 U.S.C. § 1821(e)(8)(D), as amended from time to time.

“Transfer” shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein, including a setoff, or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings. The retention of a security title in property delivered to an insurer and foreclosure of the insurer’s equity of redemption shall be deemed a transfer suffered by the insurer.

 SECTION 3. Chapter 175 of the General Laws, as appearing in the 2004 Official Edition, is hereby amended by adding the following new section:-

180L½ Qualified Financial Contracts

 A. Notwithstanding any other provision of sections one hundred and eighty A through one hundred and eighty L½, including any other provision of sections one hundred and eighty A through one hundred and eighty L½ permitting the modification of contracts, or other law of a state, no person shall be stayed or prohibited from exercising:

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

 (a) The insolvency, financial condition or default of the insurer at any time, provided that the right is enforceable under applicable law other than sections one hundred and eighty A through one hundred and eighty L½; or

 (b) The commencement of a rehabilitation proceeding under section one hundred and eighty B or a liquidation proceeding under section one hundred and eighty C;

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

 (3) Subject to the final paragraph of section one hundred and eighty C, any right to set off or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one or more qualified financial contracts where the counterparty or its guarantor is organized under the laws of the United States or a state or foreign jurisdiction approved by the Securities Valuation Office of the National Association of Insurance Commissioners as eligible for netting; or

 (4) If a counterparty to a master netting agreement or a qualified financial contract with an insurer subject to a rehabilitation proceeding under section one hundred and eighty B or a liquidation proceeding under section one hundred and eighty C terminates, liquidates, closes out or accelerates the agreement or contract, damages shall be measured as of the date or dates of termination, liquidation, close out or acceleration. The amount of a claim for damages shall be actual direct compensatory damages calculated in accordance with Subsection F below.

 B. Upon termination of a netting agreement or qualified financial contract, the net or settlement amount, if any, owed by a non-defaulting party to an insurer which is the subject of a rehabilitation proceeding under section one hundred and eighty B or a liquidation proceeding under section one hundred and eighty C shall be transferred to or on the order of the receiver for the insurer, even if the insurer is the defaulting party, notwithstanding any walkaway clause in the netting agreement or qualified financial contract. For purposes of this subsection, the term “walkaway clause” means a provision in a netting agreement or a qualified financial contract that, after calculation of a value of a party’s position or an amount due to or from one of the parties in accordance with its terms upon termination, liquidation or acceleration of the netting agreement or qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of the party’s status as a non-defaulting party. Any limited two-way payment or “first method” provision in a netting agreement or qualified financial contract with an insurer that has defaulted shall be deemed to be a full two-way payment or “second method” provision as against the defaulting insurer. Any such property or amount shall, except to the extent it is subject to one or more secondary liens or encumbrances or rights of netting or setoff, be a general asset of the insurer.

 C. In making any transfer of a netting agreement or qualified financial contract of an insurer which is the subject of a rehabilitation proceeding under section one hundred and eighty B or a liquidation proceeding under section one hundred and eighty C, the receiver shall either:

 (1) Transfer to one party (other than an insurer which is the subject of either such proceeding) all netting agreements and qualified financial contracts between a counterparty or any affiliate of the counterparty and the insurer which is the subject of the proceeding, including:

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

 (b) All property, including any guarantees or other credit enhancement, securing any 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 Subparagraph (1) (with respect to the counterparty and any affiliate of the counterparty).

 D. If a receiver for an insurer 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 subsection, “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 sections one hundred and eighty A through one hundred and eighty L½, 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 rehabilitation proceeding under section one hundred and eighty B or a liquidation proceeding under section one hundred and eighty C. However, a transfer may be avoided under chapter 109A 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. (1) In exercising the rights of disaffirmance or repudiation of a receiver with respect to a netting agreement or qualified financial contract to which an insurer is a party, the receiver for the insurer shall either:

 (a) Disaffirm or repudiate all netting agreements and qualified financial contracts between a counterparty or an affiliate of a counterparty with the insurer that is the subject of a rehabilitation or liquidation proceeding; or

 (b) Disaffirm or repudiate none of the netting agreements and qualified financial contracts referred to in Subparagraph (a) (with respect to the person or any affiliate of the person).

 (2) Notwithstanding any other provision of sections one hundred and eighty A through one hundred and eighty L½, 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 proceeding shall be determined and shall be allowed or disallowed as if the claim had arisen before the date of the filing of the application for liquidation or, if a rehabilitation proceeding is converted to a liquidation proceeding, as if the claim had arisen before the date of the filing of the application 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. The term “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.

 G. The term “contractual right” as used in this section 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 national securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity 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, or under law merchant, or by reason of normal business practice.

 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 sections one hundred and eighty A through one hundred and eighty L½ shall 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 available only to counterparties to netting agreements and qualified financial contracts entered into on behalf of that separate account.