

HOUSE No.

The Commonwealth of Massachusetts

PRESENTED BY:

James M. Murphy

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.

PETITION OF:

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

In the Year Two Thousand and Nine

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:

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

3

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

6

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

10

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

22

23 “Netting agreement” means (1) a contract or agreement (including terms and conditions
24 incorporated by reference therein), including a master agreement (which master agreement, together
25 with all schedules, confirmations, definitions and addenda thereto and transactions under any thereof,
26 shall be treated as one netting agreement), that documents one or more transactions between the
27 parties to the agreement for or involving one or more qualified financial contracts and that provides for
28 the netting, liquidation, setoff, termination, acceleration or close out under or in connection with one or
29 more qualified financial contracts or present or future payment or delivery obligations or payment or
30 delivery entitlements thereunder (including liquidation or close-out values relating to such obligations or
31 entitlements) among the parties to the netting agreement; (2) any master agreement or bridge
32 agreement for one or more master agreements described in Paragraph (1) of this Subsection; or (3) any
33 security agreement or arrangement or other credit enhancement or guarantee or reimbursement

34 obligation related to any contract or agreement described in Paragraph (1) or (2) of this Subsection;
35 provided that any contract or agreement described in paragraph (1) or (2) of this Subsection relating to
36 agreements or transactions that are not qualified financial contracts shall be deemed to be a netting
37 agreement only with respect to those agreements or transactions that are qualified financial contracts.

38

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

43

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

48

49 (1) "Commodity contract" means:

50

51 (a) A contract for the purchase or sale of a commodity for future delivery on, or
52 subject to the rules of, a board of trade or contract market under the
53 Commodity Exchange Act (7 U.S.C. § 1, *et seq.*) or a board of trade outside the
54 United States;

55

56 (b) An agreement that is subject to regulation under Section 19 of the Commodity
57 Exchange Act (7 U.S.C. § 1, *et seq.*) and that is commonly known to the
58 commodities trade as a margin account, margin contract, leverage account or
59 leverage contract;

60

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

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

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

68

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

72

73 "Transfer" shall include the sale and every other and different mode, direct or indirect, of
74 disposing of or of parting with property or with an interest therein, including a setoff, or with the
75 possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or

76 conditionally, voluntarily or involuntarily, by or without judicial proceedings. The retention of a security
77 title in property delivered to an insurer and foreclosure of the insurer's equity of redemption shall be
78 deemed a transfer suffered by the insurer.

79

80

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

83

84 180L½ Qualified Financial Contracts

85

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

90

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

94

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

99
100 (b) The commencement of a rehabilitation proceeding under
101 section one hundred and eighty B or a liquidation proceeding under
102 section one hundred and eighty C;

103
104 (2) Any right under a pledge, security, collateral, reimbursement or guarantee
105 agreement or arrangement or any other similar security agreement or
106 arrangement or other credit enhancement relating to one or more netting
107 agreements or qualified financial contracts;

108
109 (3) Subject to the final paragraph of section one hundred and eighty C, any right to
110 set off or net out any termination value, payment amount, or other transfer
111 obligation arising under or in connection with one or more qualified financial
112 contracts where the counterparty or its guarantor is organized under the laws of
113 the United States or a state or foreign jurisdiction approved by the Securities
114 Valuation Office of the National Association of Insurance Commissioners as
115 eligible for netting; or

116

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

125

126 B. Upon termination of a netting agreement or qualified financial contract, the net or
127 settlement amount, if any, owed by a non-defaulting party to an insurer which is the
128 subject of a rehabilitation proceeding under section one hundred and eighty B or a
129 liquidation proceeding under section one hundred and eighty C shall be transferred to
130 or on the order of the receiver for the insurer, even if the insurer is the defaulting party,
131 notwithstanding any walkaway clause in the netting agreement or qualified financial
132 contract. For purposes of this subsection, the term “walkaway clause” means a
133 provision in a netting agreement or a qualified financial contract that, after calculation
134 of a value of a party’s position or an amount due to or from one of the parties in
135 accordance with its terms upon termination, liquidation or acceleration of the netting
136 agreement or qualified financial contract, either does not create a payment obligation
137 of a party or extinguishes a payment obligation of a party in whole or in part solely
138 because of the party’s status as a non-defaulting party. Any limited two-way payment
139 or “first method” provision in a netting agreement or qualified financial contract with an

140 insurer that has defaulted shall be deemed to be a full two-way payment or “second
141 method” provision as against the defaulting insurer. Any such property or amount shall,
142 except to the extent it is subject to one or more secondary liens or encumbrances or
143 rights of netting or setoff, be a general asset of the insurer.

144

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

149

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

154

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

157

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

161

162

(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).

163

164

165

166

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.

167

168

169

170

171

172

173

174

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

175

176

177

178

179

180

181

182 109A if the transfer was made with actual intent to hinder, delay or defraud the insurer,
183 a receiver appointed for the insurer, or existing or future creditors.

184

185 F. (1) In exercising the rights of disaffirmance or repudiation of a receiver with respect
186 to a netting agreement or qualified financial contract to which an insurer is a party, the
187 receiver for the insurer shall either:

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

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

194 (2) Notwithstanding any other provision of sections one hundred and eighty A through one
195 hundred and eighty L½, any claim of a counterparty against the estate arising from the
196 receiver's disaffirmance or repudiation of a netting agreement or qualified financial
197 contract that has not been previously affirmed in the liquidation or immediately
198 preceding rehabilitation proceeding shall be determined and shall be allowed or
199 disallowed as if the claim had arisen before the date of the filing of the application for
200 liquidation or, if a rehabilitation proceeding is converted to a liquidation proceeding, as
201 if the claim had arisen before the date of the filing of the application for rehabilitation.
202 The amount of the claim shall be the actual direct compensatory damages determined
203 as of the date of the disaffirmance or repudiation of the netting agreement or qualified

204 financial contract. The term “actual direct compensatory damages” does not include
205 punitive or exemplary damages, damages for lost profit or lost opportunity or damages
206 for pain and suffering, but does include normal and reasonable costs of cover or other
207 reasonable measures of damages utilized in the derivatives, securities or other market
208 for the contract and agreement claims.

209

210 G. The term “contractual right” as used in this section includes any right set forth in a rule
211 or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange
212 Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance
213 Corporation Improvement Act of 1991), a national securities exchange, a national
214 securities association, a national securities clearing agency, a contract market
215 designated under the Commodity Exchange Act, a derivatives transaction execution
216 facility registered under the Commodity Exchange Act, or a board of trade (as defined in
217 the Commodity Exchange Act) or in a resolution of the governing board thereof and any
218 right, whether or not evidenced in writing, arising under statutory or common law, or
219 under law merchant, or by reason of normal business practice.

220

221 H. The provisions of this section shall not apply to persons who are affiliates of the insurer
222 that is the subject of the proceeding.

223

224 I. All rights of counterparties under sections one hundred and eighty A through one
225 hundred and eighty L½ shall apply to netting agreements and qualified financial

226 contracts entered into on behalf of the general account or separate accounts if the
227 assets of each separate account are available only to counterparties to netting
228 agreements and qualified financial contracts entered into on behalf of that separate
229 account.
230