

HOUSE No. 4399

The Commonwealth of Massachusetts

In the Year Two Thousand 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. Chapter 175 of the General Laws is hereby amended by striking out section
2 180A, as appearing in the 2008 Official Edition, and inserting in place thereof the following
3 section:-

4 Section 180A. The following words as used in sections 180A to 180L1/2, inclusive, shall
5 unless the context otherwise requires or a different meaning is specifically prescribed, have the
6 following meanings:—

7 “Affiliate”, of, or person affiliated with, a specific person, is a person that directly or
8 indirectly through 1 or more intermediaries, controls, or is controlled by, or is under common
9 control with, the person specified.

10 “Ancillary state”, any state other than a domiciliary state.

11 “Control” , including the terms “controlling,” “controlled by” and “under common
12 control with”, the possession, direct or indirect, of the power to direct or cause the direction of
13 the management and policies of a person, whether through the ownership of voting securities, by

contract other than a commercial contract for goods or nonmanagement 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, 10 per cent 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.

“Delinquency proceeding”, any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving such insurer.

“Domiciliary state”, the state in which an insurer is incorporated or organized, or, in the case of an insurer incorporated or organized in a foreign country, the state in which such insurer, being authorized to do business in such state, has its principal office at the commencement of rehabilitation, conservation or liquidation proceedings or the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders and creditors in the United States; and any such insurer shall be deemed to be domiciled in such state.

“Foreign country”, a territory not in any state.

“General assets”, all property, real, personal or mixed, not specifically mortgaged, pledged, deposited or otherwise encumbered for the security or benefit of specified persons or a limited class or classes of persons; and as to such specifically encumbered property such term includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit

of all policyholders, or all policyholders and creditors in the United States, shall be deemed general assets. Pursuant to the applicable separate account agreements and section 132F or section 132G, assets of a separate account that are not chargeable with liabilities arising out of any other business of the insurer shall not be general assets.

“Insurer”, any person subject to the insurance supervisory authority of or to liquidation, rehabilitation, reorganization, or conservation by the commissioner or the equivalent insurance supervisory official of another state.

“Netting agreement”, (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 1 or more transactions between the parties to the agreement for or involving 1 or more qualified financial contracts and that provides for the netting, liquidation, setoff, termination, acceleration or close out under or in connection with 1 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 1 or more master agreements described in clause (1); or (3) any security agreement or arrangement or other credit enhancement or guarantee or reimbursement obligation related to any contract or agreement described in clause (1) or (2); provided that any contract or agreement described in said clause (1) or (2) 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”, 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.

“Preferred claim”, any claim with respect to which the law of a state accords priority of payment from the general assets of the insurer.

“Qualified financial contract”, 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 180A to 180L½, inclusive.

(1) “Commodity contract”:

(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.

“Receiver”, receiver, liquidator, rehabilitator or conservator as the context requires.

“Reciprocal state”, any other state in which provisions of like substance and effect with sections 180A to 180L, inclusive, are in force, including the provisions requiring that the commissioner or equivalent insurance supervisory official be the receiver of a delinquent insurer. The term “reciprocal state” shall also include any state also which has, through its commissioner or equivalent supervisory official, entered into a binding and enforceable written agreement with the commissioner of the commonwealth which provides that (1) a commissioner or equivalent supervisory official is required to be the receiver of a delinquent insurer; (2) title assets of the delinquent insurer shall vest in the domiciliary receiver, as of the date of any court order appointing him as receiver, and he shall have the same rights to recover such assets as provided under section 180E; (3) nondomiciliary creditors may file and prove their claims before ancillary receivers; (4) the laws of the domiciliary state of the delinquent insurer shall be applied uniformly to residents and nonresidents in the allowance of preference of claims, except for claims to special deposits created under the laws of the domiciliary state; (5) preferences, including attachments, garnishments and liens, for creditors with advance information shall be

prevented; and (6) the domiciliary receiver may sue in the reciprocal state to recover any assets of a delinquent insurer to which he or she may be entitled under the law.

“Secured claim”, any claim secured by mortgage, trust, deed, pledge, deposit as security, escrow or otherwise, and does not include special deposit claims or claims against general assets. Said term also includes claims which more than 4 months prior to the commencement of liquidation proceedings in the state of the insurer’s domicile have become liens upon specific assets by virtue of judicial process.

“Separate account agreement”, any life policy or contract, annuity contract, funding agreement or other policy or contract referred to in section 132F, 132G or 132I, providing for the allocation of amounts received in connection with such policy, contract or agreement to a separate investment account or accounts created pursuant to section 132F or section 132G.

“Special deposit claim”, any claim secured by a deposit of a fund, property or bond, which deposit has been made pursuant to law for the security or benefit of a limited class or classes of persons and does not include any general assets.

“State”, any state of the United States, and also the District of Columbia, Alaska, Hawaii and Puerto Rico.

“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.

123 SECTION 2. Said chapter 175 is hereby further amended by inserting after
124 section 180L the following section:-

125 Section 180L½. (A) Notwithstanding any other provision of sections 180A to 180L½,
126 inclusive, including any other provision of said sections 180A to 180L½, inclusive, permitting
127 the modification of contracts, or other law of a state, no person shall be stayed or prohibited from
128 exercising:

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

132 (a) the insolvency, financial condition or default of the
133 insurer at any time; provided, however, that the right is enforceable under applicable law other
134 than sections 180A to 180 L½, inclusive; or

135 (b) the commencement of a rehabilitation proceeding
136 under section 180B or a liquidation proceeding under section 180C;

137 (2) any right under a pledge, security, collateral, reimbursement or
138 guarantee agreement or arrangement or any other similar security agreement or arrangement or
139 other credit enhancement relating to 1 or more netting agreements or qualified financial
140 contracts;

141 (3) subject to the last paragraph of section 180C, any right to set off or
142 net out any termination value, payment amount, or other transfer obligation arising under or in
143 connection with 1 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 180B or a liquidation proceeding under section 180C 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).

(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 180B or a liquidation proceeding under section 180C 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 1 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 2-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 2-way payment or “second method” provision as against the defaulting insurer. Any such property or

167 amount shall, except to the extent it is subject to 1 or more secondary liens or encumbrances or
168 rights of netting or setoff, be a general asset of the insurer.

169 (C) In making any transfer of a netting agreement or qualified financial
170 contract of an insurer which is the subject of a rehabilitation proceeding under section 180B or a
171 liquidation proceeding under section 180C, the receiver shall either:

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

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

178 (b) all property, including any guarantees or other credit
179 enhancement, securing any claims of each party under each netting agreement and qualified
180 financial contract; or

181 (2) transfer none of the netting agreements, qualified financial
182 contracts, rights, obligations or property referred to in paragraph (1), with respect to the
183 counterparty and any affiliate of the counterparty.

184 (D) If a receiver for an insurer makes a transfer of 1 or more netting
185 agreements or qualified financial contracts, then the receiver shall use its best efforts to notify
186 any person who is party to the netting agreements or qualified financial contracts of the transfer
187 by 12 noon, the receiver's local time, on the business day following the transfer. For purposes of

188 this subsection, “business day” shall mean a day other than a Saturday, Sunday or any day on
189 which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

190 (E) Notwithstanding any other provision of sections 180A to 180L½,
191 inclusive, a receiver may not avoid a transfer of money or other property arising under or in
192 connection with a netting agreement or qualified financial contract, or any pledge, security,
193 collateral or guarantee agreement or any other similar security arrangement or credit support
194 document relating to a netting agreement or qualified financial contract, that is made before the
195 commencement of a rehabilitation proceeding under section 180B or a liquidation proceeding
196 under section 180C; provided, however, that a transfer may be avoided under chapter 109A if the
197 transfer was made with actual intent to hinder, delay or defraud the insurer, a receiver appointed
198 for the insurer, or existing or future creditors.

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

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

205 (b) disaffirm or repudiate none of the netting agreements and
206 qualified financial contracts referred to in clause (a), with respect to the person or any affiliate of
207 the person.

208 (2) Notwithstanding any other provision of sections 180A to 180L½, any
209 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” shall 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, shall include any right set forth in a rule or by-law 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.

233 (I) All rights of counterparties under sections 180A to 180L½, inclusive,
234 shall apply to netting agreements and qualified financial contracts entered into on behalf of the
235 general account or separate accounts if the assets of each separate account are available only to
236 counterparties to netting agreements and qualified financial contracts entered into on behalf of
237 that separate account.