

304.33-055 Rights and requirements of netting agreements and qualified financial contracts.

Notwithstanding any other provision of this subtitle or statute to the contrary:

(1) As used in this section:

(a) 1. "Netting agreement":

a. Means an agreement, including a master agreement or bridge agreement for one (1) or more master agreements, that:

i. Documents one (1) or more transactions between parties to the agreement for or involving one (1) or more qualified financial contracts; and

ii. Provides for the netting or liquidation of qualified financial contracts among the parties to the agreement; and

b. Except as provided in subparagraph 2. of this paragraph, includes any security agreement or arrangement or other credit enhancement or guarantee or reimbursement obligation related to any contract or agreement described in this paragraph.

2. Any contract or agreement described in this paragraph relating to agreements or transactions that are not qualified financial contracts shall be deemed a netting agreement only with respect to those agreements or transactions that are qualified financial contracts.

3. A master agreement, or bridge agreement for one (1) or more master agreements, together with all schedules, confirmations, definitions, addenda thereto, and transactions under any thereof, shall be treated as one (1) agreement.

4. As used in this paragraph:

a. "Agreement" includes any terms and conditions incorporated by reference in the agreement; and

b. "Netting or liquidation of qualified financial contracts" includes netting or liquidation of:

i. Present or future payment obligations or payment entitlements under qualified financial contracts; and

ii. Liquidation or closeout values relating to present or future payment obligations or payment entitlements under qualified financial contracts; and

(b) "Qualified financial contract" means any:

1. Commodity contract;

2. Forward contract;

3. Repurchase agreement;

4. Securities contract;

5. Swap agreement; or

6. Similar agreement specified by the commissioner in an administrative regulation promulgated in accordance with KRS Chapter 13A;

- (2) A person shall not be stayed or prohibited from exercising any of the following rights:
- (a) 1. A contractual right to terminate, liquidate, close out, or accelerate any netting agreement or qualified financial contract with an insurer due to:
 - a. The insolvency, financial condition, or default of the insurer, if such right is enforceable under applicable law other than this subtitle; or
 - b. The commencement of a formal delinquency proceeding under this subtitle.
 2. As used in this paragraph, "contractual right" includes any right arising under:
 - a. Statutory or common law;
 - b. Rules or bylaws of a national securities exchange, clearing organization, or securities clearing agency;
 - c. Rules, bylaws, or resolutions of the governing body of a swap execution facility, designated contract market, board of trade, or any clearing organization relating to any of the foregoing; or
 - d. The law merchant;
 - (b) The right to enforce any pledge, security, collateral, guarantee agreement, or other credit support document related to a netting agreement or qualified financial contract; or
 - (c) Subject to subsection (3) of this section, the right to setoff or net any termination value, payment amount, or other transfer obligation arising under a netting agreement or qualified financial contract if the counterparty or its guarantor is organized under the laws of the United States, a state of the United States, or a foreign jurisdiction approved by the Securities Valuation Office of the National Association of Insurance Commissioners as eligible for netting;
- (3) (a) Upon termination of a netting agreement or qualified financial contract:
1. The net or settlement amount owed by a nondefaulting party to an insurer against which a delinquency proceeding has been initiated shall be transferred to, or on the order of, the receiver, even if the insurer is the defaulting party;
 2. Any limited two-way payment provision in a netting agreement or qualified financial contract with an insurer that has defaulted shall be deemed a full two-way payment provision as against the defaulting insurer; and
 3. Any amount referenced in subparagraph 1. of this paragraph, except to the extent it is subject to secondary liens or encumbrances, shall be considered a general asset of the insurer.
- (b) If a counterparty to a netting agreement or a qualified financial contract with an insurer against which a delinquency proceeding has been initiated terminates, liquidates, closes out, or accelerates the agreement or contract:

1. Damages shall be measured as of the date or dates of termination, liquidation, close out, or acceleration; and
 2. The amount of the claim for damages shall be actual direct compensatory damages calculated in accordance with subsection (7) of this section;
- (4) A receiver shall not transfer a netting agreement or qualified financial contract of an insurer unless the receiver transfers to one (1) counterparty, other than an insurer subject to a delinquency proceeding, all:
- (a) Netting agreements and qualified financial contracts between that counterparty, or any affiliate of the counterparty, and the insurer; and
 - (b) Rights, obligations, guarantees, collateral, and credit support documents related to the agreements and contracts referenced in paragraph (a) of this subsection;
- (5) (a) If a receiver transfers a netting agreement or qualified financial contract, the receiver shall make best efforts to notify all counterparties to the agreement or contract by noon, local time, of the next business day following the transfer.
- (b) As used in this subsection, "business day" means any day that is not a Saturday, a Sunday, or a day on which the New York Stock Exchange or the Federal Reserve Bank of New York is closed;
- (6) (a) Except as provided in paragraph (b) of this subsection, a transfer of money or other property made under a netting agreement or qualified financial contract, including under any pledge, security, collateral, guarantee arrangement, or other similar security arrangement or credit support document relating to a netting agreement or qualified financial contract, before the commencement of a delinquency proceeding shall not be:
1. Deemed fraudulent under this subtitle; or
 2. Avoided by the receiver.
- (b) A transfer may be deemed fraudulent and may be avoided by the receiver under KRS 304.33-290 if the transfer is made with actual intent to hinder, delay, or defraud the insurer, the receiver, or any creditor;
- (7) (a) If a receiver elects to disavow, reject, or repudiate a netting agreement or qualified financial contract of an insurer under KRS 304.33-240 or any other section of this subtitle, the receiver shall disavow, reject, or repudiate the entire netting agreement or qualified financial contract between the insurer and a counterparty, or any affiliate of the counterparty, including all related transactions in their entirety.
- (b) If the receiver disavows, rejects, or repudiates a netting agreement or qualified financial contract, a counterparty's claim against the estate of the insurer shall be:
1. Determined as if the claim arose before the date of:
 - a. Except as provided in subdivision b. of this subparagraph, the petition for liquidation; or
 - b. If a rehabilitation proceeding was converted to a liquidation, the

petition for rehabilitation; and

2. Limited to actual direct compensatory damages, determined as of the date of disavowal, rejection, or repudiation.
- (c) As used in paragraph (b) of this subsection, "actual direct compensatory damages":
1. Includes normal and reasonable costs of cover or industry-standard damages calculations that are applicable in the derivatives, securities, or other applicable market; and
 2. Does not include punitive damages, lost profits, lost opportunities, or pain and suffering;
- (8) This section shall not apply to netting agreements and qualified financial contracts between an insurer and any of its affiliates; and
- (9) All rights of a counterparty under this section shall apply to netting agreements and qualified financial contracts entered into on behalf of:
- (a) The general account of the insurer; and
 - (b) Any separate account of the insurer, if the assets of the separate account are available only to a counterparty to the netting agreements and qualified financial contracts entered into on behalf of that separate account.

Effective: June 27, 2025

History: Created 2025 Ky. Acts ch. 67, sec. 3, effective June 27, 2025.