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날 짜 : 2006년 1월 31일
시 간 :

수 신 : 법무부

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전송매수 (표지포함): 7 매

제목 : 채무자 회생 및 파산에 관한 법률 시행령(안) 제15조에 대한 의견

법제 업무에 진력하시는 귀부의 노고에 먼저 감사의 말씀을 전합니다.

귀부에서 입법예고한 “채무자 회생 및 파산에 관한 법률 시행령(안)” 중 파생금융거래의 정의에 관한 제15조는 도산위험이 절연되는 파생금융거래의 범위를 정하는 조항으로서, 그 내용에 관하여 국내외의 파생금융거래 관련 업계의 관심이 집중되어 있습니다. 따라서, 파생금융거래 관련자들의 국제적인 기관인 국제파생금융거래협회(International Swaps and Derivatives Association; 이하 “ISDA”)는 귀부가 고시한 입법예고안에 대하여 관련 업계의 관심을 반영한 의견을 ISDA 명의로 제출하고자 합니다.

이 팩스는 변호사와 의뢰인 사이의 통신으로서, 위에 기재된 수신인만이 받아볼 수 있는 내용입니다. 이 팩스에는 임의로 공개해서는 안되는 정보 및 법률상 공개가 금지된 정보가 들어 있을 수 있으므로, 귀하가 지정 수신인이 아니면 이를 무단으로 보유, 전송, 배포할 수 없으며, 일부의 내용이라도 공개, 복사해서는 안됩니다. 그러므로, 잘못 수신된 경우에는 즉시 전화로 연락하여 주시고, 원본을 우편으로 반송해 주시면 대단히 감사하겠습니다.

저희 법률사무소는 동 협회가 제출하는 의견을 전달하여 드리는 한편, 귀부의 업무 편의를 위하여 ISDA의 의견 중 구체적으로 개정 법문을 예시한 부분에 대하여 국문 번역을 추가로 제공하여 드리오니 참고하시기 바랍니다.

감사합니다.

김장 법률사무소

변호사 박 준, 정 성 구 배상

이 팩스는 변호사와 의뢰인 사이의 통신으로서, 위에 기재된 수신인만이 받아들 수 있는 내용입니다. 이 팩스에는 임의로 공개해서는 안되는 정보 및 법률상 공개가 금지된 정보가 들어 있을 수 있으므로, 귀하가 지정 수신인이 아니면 이를 무단으로 보유, 전송, 배포할 수 없으며, 일부의 내용이라도 공개, 복사해서는 안됩니다. 그러므로, 잘못 수신된 경우에는 즉시 전화로 연락하여 주시고, 원본을 우편으로 반송해 주시면 대단히 감사하겠습니다.

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ISDA

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30 January 2006

Ministry of Justice
Building # 1, Gwacheon Government Complex,
Jungang-dong 1, Gwacheon-si,
Kyunggi-do, Korea
Attention: Legal Affairs Senior Public Prosecutor- Duty Assistant to Minister

Dear Sirs/Mesdames

Presidential Decree under Article 120, Paragraph 3 of the Debtor Rehabilitation and Bankruptcy Law (the "Presidential Decree")

On behalf of its members, the International Swaps and Derivatives Association, Inc. ("**ISDA**") respectfully presents to you this letter setting out comments on the draft Presidential Decree. We greatly appreciate being given this opportunity to make comments on the close-out netting legislation.

ISDA applauds the continuing efforts to refine and enhance the bankruptcy laws in order to provide greater certainty with respect to the enforceability of close-out netting and collateral arrangements for financial contracts which are important risk mitigation techniques for financial market participants in Korea. Korean financial institutions seeking to manage risks through close-out netting and collateral arrangements should enjoy lower capital and other costs knowing that these risk mitigation techniques are clearly enforceable.

Introduction

As you may be aware, ISDA is a leading global trade organisation representing professional market participants in privately negotiated derivative transactions ("**over-the-counter**" or "**OTC**" derivatives). ISDA's membership comprises over 680 of the world's largest commercial, merchant and investment banks, corporations, government entities and other institutions. ISDA's members represent a broad cross-section of the institutions that are dealers in and end-users of privately negotiated derivatives both in Korea and world-wide. A current list of ISDA's members can be found on the website of ISDA, www.isda.org.

ISDA is committed to promoting the development of sound risk management practice and has worked with regulators around the world to promote the legal enforceability of close-out netting

and collateral arrangements in commonly used financial documents (such as the ISDA Master Agreement and the ISDA Credit Support Annexes (under English law and New York law)). For example, ISDA has recently assisted Bank Negara Malaysia, the Ministry of Finance and Reserve Bank of India, the China Banking Regulatory Commission and the U.S. President's Working Group on Financial Markets¹ on legislation which is designed to ensure the enforceability of close-out netting and collateral arrangements in their respective jurisdictions.

ISDA has been very pleased to assist in the development of the Debtor Rehabilitation and Bankruptcy Law (the "DRBL"). We have set out our proposed suggestions and recommendations to the draft Presidential Decree in the Schedule to this letter.

We are very pleased that the current draft of the Presidential Decree seeks to encompass a wide range of derivatives. However, the derivatives market is continually evolving and the current list does not capture all of the OTC derivatives currently being traded today. For example, the range of credit events adopted in the credit derivative market extends beyond changes in credit rating; credit events commonly include failures to pay and moratorium events. We respectfully recommend against using the list of credit risks in the current draft of the Presidential Decree which would not capture these additional, currently traded credit events. We have suggested amendments to the Presidential Decree which will capture currently traded credit events and which will avoid the definition of "Credit Risk" in the Presidential Decree from becoming outdated as the credit derivatives market continues to develop.

Further, we respectfully propose the adoption of a flexible approach which would permit the inclusion of new types of derivatives which may be traded in the future. This flexible approach is generally being adopted by jurisdictions which have close-out netting legislation. For example, the U.S. Bankruptcy Code was amended in 1990 to include protection for close-out netting under "swap agreements". As the market evolved and new products were developed after 1991, the list of enumerated transactions in the definition of "swap agreement" in the U.S. Bankruptcy Code became increasingly outdated. In 2005, amendments to the U.S. Bankruptcy Code were passed amending the definition of "swap agreement" and a flexible approach has been adopted in the U.S. Bankruptcy Code to avoid the definition of "swap agreement" from being outdated to the greatest extent possible. Our proposed wording seeks to adopt a more flexible approach and captures any future derivative transaction similar to a forward, option or swap as well as derivative basket transactions relating to a combination of currencies, commodities or the other items set out in the Presidential Decree.

These amendments will greatly assist in ensuring that future types of derivatives transactions fall within the ambit of Article 120 of the DRBL. The legal certainty that this will provide will greatly assist in encouraging the growth of the Korean financial markets and is consistent with the desire to promote Korea as a financial centre.

Further, new pricing sources and indices are continually being developed and may not be based on or relate only to commodities, currencies and the other items listed in the current draft of the

¹ The President's Working Group includes representatives of the US Treasury, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Securities Exchange Commission and the Commodity Futures Trading Commission.

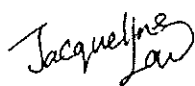
Presidential Decree. We envisage that the Presidential Decree may need to be amended in the future to take into account these market developments.

If considered helpful at any point in the future, ISDA would be available to provide updates on ongoing and future developments with respect to the OTC derivative markets and technical advice on whether further amendments will be required to the Presidential Decree to take into account possible future developments.

ISDA is grateful for the opportunity to comment on the Presidential Decree. We would be pleased to discuss further the issues highlighted above or otherwise to assist in any way that you deem appropriate. If you or your colleagues have any questions, please do not hesitate to contact Angela Papesch on (65) 6435 7520 or Jacqueline Low in Singapore on (65) 6328 5920, Thomas Jones of Allen & Overy in Hong Kong on (852) 2974 7130 and Suhm-Kyoung Hong of Kim & Chang in Seoul on (822) 3703-1132 or send a fax to us at the above number.

Yours faithfully

**For the International Swaps
and Derivatives Association, Inc.**



Jacqueline Low
CoChair of ISDA's Asia-Pacific
Legal & Regulatory Committee



Angela Papesch
Director of Policy &
Head of Asia-Pacific Office

SCHEDULE

Translation

Article 15: (Derivative Transactions)

1. “Derivative Transactions as specified in the Presidential Decree” under Article 120, Paragraph 3, Item 1 of the law [Debtor Rehabilitation and Bankruptcy Law] means a forward, option or swap or other similar transaction where the underlying is one or more of the price or unit of any of the following asset or indicator, or any index produced on the basis thereof (including any combination of one or more of such price, unit or index):

- (1) Instrument or document evidencing property interest, securities, deposit, loan or any other similar financial product
- (2) Currency (including foreign currency)
- (3) Interest rate
- (4) Commodity (including agricultural product, livestock product, fishery product, forest product, mineral product, energy product/source or any product produced or manufactured therefrom or any other similar product)
- (5) Credit risk (changes in credit of a party or a third party due to changes in credit rating, bankruptcy or debt restructuring or any other credit event agreed between the parties)
- (6) Weather, freight, electricity, electric wave (including bandwidth), inflation or emissions,
- (7) Any other natural, environmental or economic phenomenon with respect to which the price, indicia, index or unit can be produced or evaluated,

Deleted: product

Deleted: any of the following or price, interest rate, indicia or unit thereof

Deleted: Financial investment product (securities, any product based on a derivative transaction)

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Deleted: or a

Deleted: any

Deleted: risk where

Deleted: interest rate,

Deleted: in a reasonable and appropriate manner.

제15조(파생금융거래)

① 법 제120조 제3항 제1호 “파생금융거래로서 대통령령이 정하는 거래”는 다음 각호의 기초자산 또는 지표 중 하나 이상기초자산의 가격 또는 이자율·지표·단위나 이를 기초로 하는 지수(하나 이상의 가격, 단위 또는 지수로 구성된 집합을 포함한다)를 대상으로 하는 선도, 옵션, 스왑 또는 이와 유사한 거래를 말한다.

1. 재산적 가치를 포함한 증권 또는 증서, 유가증권, 예금, 대출 또는 이와 유사한 금융투자상품

(유가증권, 파생금융거래에 기초한 상품을 말한다)

2. 통화(외국의 통화를 포함한다)

3. 이자율

34. 일반상품(농산물·축산물·수산물·임산물·광산물·에너지원에 속하는 물품 또는 이 물품을 원재료로 하여 제조하거나 가공한 물품 그 밖에 이와 유사한 것을 말한다)

45. 신용위험(거래의 당사자 또는 제3자의 신용등급의 변동, 파산 또는 채무 재조정 등으로 인한 신용의 변동, 그 밖에 신용에 관하여 당사자들이 정한 사유율을 말한다)

6. 기후, 운임, 전력, 전파(주파수를 포함한다), 물가의 변동, 물질의 배출

57. 그 밖에 자연적·환경적·경제적 현상 등에 속하는 위험으로서 합리적이고 적정한 방법에 의하여 가격·이자율·지표·지수·단위의 산출이나 평가가 가능한 것