

MEMORANDUM

TO: ISDA Energy, Commodities & Developing Products Group; ISDA Financial Law Reform Group

CC: ISDA Commodity Derivatives Working Group; ISDA European Government Relations Working Group

FROM: Peter Werner (pwerner@isda.org)

DATE: May 15, 2020

RE: ISDA FLRG: UK Insolvency Law Changes- FCA Statement on FS Exemptions

CONFIDENTIAL

(For use in connection with Committee deliberations - not for public dissemination)

Dear Members,

Together with yesterday's circular (copied below) regarding the final joint industry comments on the scope proposed by HMT/BEIS of the proposed exemptions for financial services/contracts (FS) in the forthcoming UK Corporate Insolvency and Governance Bill came the official outline of the scope (also attached). Parallel to that the FCA has published an [announcement on the FS exemptions as well](#).

We will keep members updated on the progress of the bill which is expected to enter Parliament next week.

For background: Circular dated 14 May 2020

In response to the recent industry submission (attached; cf circular dated 22 April; copied below) regarding the exemptions for financial services in the upcoming UK Corporate Insolvency and Governance Bill HMT/BEIS have shared with us the attached revised outline for comment on very short notice. No full drafts are being shared at this stage. The draft bill is subject to very tight timelines as it is intended to submit the bill before Parliament next week. We were given the opportunity for final informal comments to HMT/BEIS on very short notice.

Overall, the revised outline of the exemptions envisaged for financial services has improved significantly which will be very helpful indeed for the overall draft bill. In the final joint EFET/FIA/ISDA comments submitted to HMT/BEIS today we have highlighted 3-4 points for consideration.

For ease of reference please find the relevant excerpts copied below:

[...]

Definition of “commodities” and emissions/ green products

We welcome that for the purpose of the definition of “financial contract” the exclusion extends the term “commodities” to cover certain specified emissions allowances and green certificates. However, the current drafting only covers the specific types of emission allowance and green certificate recognised under current UK legislation (including EU emissions allowances). This area changes extremely quickly, and the current drafting does not address non-UK forms of allowance or certificate; nor does it address those types of allowance or certificate that the UK might issue in the future. We think this important issue could be easily addressed by including in the drafting a reference to any similar unit or certificate to those referenced in (a), (b) or (c) of the expansion to the definition of “commodities”.

We assume that the base definition of commodities used here is the same as the one in Art. 2 (6) of Commission Delegated Regulation 2017/565/EU, but it may be helpful to specify this.

Securities financing transactions

We welcome the inclusion of SFTs, however, the most recent ESMA SFTR reporting guidelines which help define what is a securities financing transaction provide that commodities transactions that are entered into for operational and/or industrial purposes are not considered SFTR transactions. We believe there will be some uncertainty as to how that exclusion should be interpreted, but it would seem unsatisfactory for the availability of the financial services exclusions in this legislation to turn on a test which is expressed to be based on the purpose for which a transaction is entered into. We think this is a particular concern in the context of commodities leasing transactions, and we fear that a failure to address this point could cause some entities to limit the services they provide in this market. The inclusion in the drafting of a reference to “similar transactions” to SFTs would in our view address this point.

Intercreditor Agreements

We note that Intercreditor agreements (agreements regulating the relationship between creditors) have not been included. As we noted previously, these agreements often include terms which involve the subordination of claims of an entity which is in default, including defaults consisting of or arising out of insolvency of that entity, and it would be both generally disruptive to the market and prejudicial to UK participants if the proposed ipso facto rule were to cut across this established market practice. It also seems difficult to explain given that loan agreements themselves would not be subject to the proposed ipso facto rule. We would therefore ask that this point be looked at again.

Trading Facilities

We welcome the inclusion of recognised investment exchanges, recognised clearing houses and their foreign equivalents in the exclusion. But we are somewhat surprised that other trading facilities (multilateral trading facilities and organised trading facilities (MTFs and OTFs)) are not included in scope and we wonder how the differing treatment of these entities is justified. In our view, MTFs and OTF should also be treated as excluded entities on a similar basis to exchanges, and we believe this can be easily addressed by extending the definition of an “investment bank” to include an entity that operates an MTF or OTF.

[...]

We will keep members updated as to the progress of this bill as it makes its way through Parliament.

For background: Circular dated 22 April 2020

Many thanks for providing comments on very short notice. The final version of the EFET/FIA/ISDA submission has been sent to HMT now.

Please find attached a mark-up of our proposed amendments as well as the joint cover letter including the rationale.

We will keep members updated about next steps.

For background: Circular dated 21 April 2020

Further to the circular earlier today (copied below), please find attached draft EFET/FIA/ISDA comments on an outline of the proposed exemption provisions in the forthcoming legislation that was kindly shared by HMT today. The PDF version attached is a cumulative redline from HMT's original. The word document is a clean revised version. Please do not forward these documents. Many thanks for counsel at Reed Smith for providing this on very short notice.

Due to the extremely tight deadlines, please send only FATAL FLAW comments on the draft submission to pwerner@isda.org by tomorrow (Wednesday, 22 April), 0930hrs London time.

Apologies for the rush.

Please note the following points regarding the rationale:

- Although it appeared to us that the exclusions for Excluded FS Entities and Excluded FS Contracts were separate and independent we have clarified in this the text.
- HMT's inclusion of the concept of "financial contract" from BRRD was extremely helpful and addressed many of our concerns, however there remained issues that were not fully addressed:
 - contracts for delivery on a within-day basis (these are particularly important in the gas and power markets, where much of the liquidity is in the within-day and balancing markets and where, in fact, the contractual arrangements underpinning the National Grid's transmission networks may themselves also be adversely affected by the proposals) – we added a new exclusion to address this important issue;
 - commodity trade finance contracts, including commodity lending, commodity leasing, buy/sell-back and sell/buy-back, as well as repos/reverse repos (only the last of which is included in the "financial contract" definition under BRRD) – to address this we have created an expanded definition of financial arrangement which includes as well as financial contracts securities financing transactions under SFTR;
 - new products not adequately covered in BRRD including agreements relating to emission allowances & renewable energy credits/permits/allowances.

For background: Circular from earlier today:

In the context of monitoring Covid19-related insolvency law changes in over 80 jurisdictions (cf. circular dated 17 April, copied below) we are engaging in law reform efforts in certain jurisdictions across the globe that are currently in the process of drafting. One of these jurisdictions is the UK. A general announcement on insolvency reform was made by the UK Government just before Easter, but no official drafts are available yet. We are coordinating with EFET and FIA and have been in touch with the UK

Insolvency Service and BEIS (the relevant UK ministry in charge of the legislation) as well. We intend to make a joint submission on the proposed legislation. The draft letter will be circulated for comments shortly.

Please contact pwerner@isda.org with any questions.

For background: Circular dated 17 April 2020

You may recall that a fortnight ago we published the initial version of the global monitor on the status of emergency insolvency legislation as well as short-selling regulations in over 80 jurisdictions worldwide that are covered by ISDA legal opinion and/or informal country updates. The tracker reflects information on jurisdictions that are currently developing such legislation or in the process of enacting. Some have enacted legislation already. The monitor is updated on a regular basis.

Earlier today, the latest version (Version 3) of the [monitor](#) has been posted on ISDA's COVID-19 webpage. You can access it [here](#).

For any questions, suggestions or additional information regarding the ISDA Monitor, please email pwerner@isda.org; aakintomide@isda.org

Kind regards.



ISDA is continuously monitoring how COVID-19 impacts its members. Developments, including information on market closures, regulatory relief and electronic execution, can be found [here](#). Please email Covid19.MemberContact@isda.org if you have any questions.

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London, 22 April 2020

BEIS corporate insolvency reforms and draft exemptions

Dear Theo,

On behalf of FIA, EFET and ISDA (the Associations), we would like to thank you for giving us the opportunity to review and comment on the proposed exemptions to the BEIS corporate insolvency reform to avoid a negative impact on close-out netting, commodity markets and the supply chain.

UK financial and commodity markets have long benefited from a well-entrenched legal regime which underpins the ability of market participants to manage their exposures to counterparties effectively through allowing termination of financial and commodity contracts with insolvent counterparties as well as through robust support for set-off and close-out netting arrangements.

The origins of insolvency set-off under English law can be traced to an 1805 statute and insolvency set-off has been mandatory under English law since the 19th Century for all mutual debts, credits and dealings. This protection remains broader under UK insolvency law than that in other jurisdictions, although the tendency has been for other jurisdictions to expand the scope of the protection for the termination and close-out netting of financial contracts to include wholesale commodity contracts (both Germany and Italy have made this change in the last 5 years). The broad protection afforded under UK insolvency law has helped maintain efficient access for UK companies (both the financial regulated and unregulated) to financial and commodity markets and meant that UK companies remain appropriate corporate vehicles for these activities. A loss of these protections would adversely affect the view taken of UK counterparties in these markets, and may in some cases cause corporate groups to favour accessing these markets through non-UK entities.

In the light of this, it has been necessary for us to examine closely the proposed scope of the exclusion from the prohibition on enforcement of termination provisions to ensure these protections continue to be available. We welcome the work HM Treasury has done on these exemptions and the sharing of that work with us.

In particular, we think the use of the concept of a “financial contract” from Article 2(1)(100) of BRRD is extremely helpful and addresses several concerns. However, there are several



areas where we do not consider the current scope of the exclusions is sufficient to cover all relevant parts of the financial and commodity market relevant to the joint associations. Accordingly, we attach a clean and redline version of the exclusions drafting with our proposed amendments. The areas of concern where we have proposed additional coverage are set out below.

Excluded FS Entities and Excluded FS Contracts

Although it appeared to us that the exclusions for Excluded FS Entities and Excluded FS Contracts were separate and independent, we have clarified this in the text.

Intra-day commodity contracts

The definition of financial contracts does not cover intra-day commodity trading, only trading for delivery on a future date. But intra-day trading is extremely important in some commodity markets. For example, the arrangements for the balancing of electricity and (in some cases) gas markets in the UK and elsewhere rely on trading for delivery on a within day basis. It is extremely important that termination rights in these markets are protected, as to do otherwise would threaten liquidity in these markets and raise concerns about the contractual frameworks supporting intra-day trading on the UK gas and power transmission networks. Please see the new definition of “financial arrangement” which covers this (at paragraph (b)).

Securities and commodity financing transactions

The definition of financial contracts includes some title finance arrangements (such as repo and reverse repo), but the scope is somewhat unclear in that for example it does not clearly cover arrangements included within the scope of subsequent Securities Financing Transactions Regulation (SFTR), including securities or commodity lending, commodity leasing, buy/sell-back and sell/buy-back transactions. We suggest that to address this issue we include within the scope securities financing transactions under SFTR.

Emerging products – emissions allowances and renewable energy certificates

The definition of financial contracts does not deal adequately with the rapidly developing area of environmental products. For example, it makes reference to emission allowance derivatives but not to emissions allowances themselves, and makes no reference to renewable energy and green certificates. In our view these products are traded in the same way as wholesale commodities and should be afforded the same protections. Please see the additions in paragraphs (c) and (e) of the new definition of “financial arrangement”.

Derivatives under EMIR

The concept of a financial contract appears to cover most derivatives, but it is not clear that it covers all of them. Indeed, the PRA in implementing BRRD appeared to have considered that the concept of a financial contract did not cover all EMIR derivatives (<http://www.prarulebook.co.uk/rulebook/Content/Part/318771/21-04-2020>) as otherwise there would be no need to reference them. We suggest this drafting take a similar approach.

Set-off arrangements and netting arrangements

Set-off and close-out netting are techniques which are broadly used in financial markets. Such arrangements were protected from partial property transfers pursuant to the Banking Act 2009



and there are good reasons why such arrangement should be excluded from the termination prohibition as well. As you will have gathered the scope of transactions that needs to be excluded is complex. It is important that netting and set off arrangements relating to a mix of excluded and non-excluded contracts do not fall outside the exclusion because they are tainted by the non-excluded contracts. The inclusion of such arrangements will ensure there is no question of this. In addition, set-off and close-out netting techniques may be used in other arrangements (not involving excluded contracts) which ought to be protected (e.g. cash pooling arrangements).

Intercreditor Agreements

Intercreditor agreements (agreements regulating the relationship between creditors) often include terms which involve the subordination of claims of an entity which is in default, including defaults consisting of or arising out of insolvency of that entity. For example, in many securitisation transactions, the interest rate or exchange rate hedge provider will agree, for the benefit of other creditors of the securitisation issuer, that any claim it has to payment of a net close-out amount following its own default will be subordinated to the claims of other creditors. It would be both generally disruptive to the market and prejudicial to UK participants if the proposed ipso facto rule were to cut across this established market practice. We have therefore suggested the addition of intercreditor agreements to the list of excluded contracts.

Financial market infrastructure

We note the list of Excluded FS Companies includes a range of financial services and financial market infrastructure companies. At present, however, the list does not cover all of the types of financial market infrastructure companies to which protection should be afforded, which means that there appear to us to be somewhat arbitrary differences in the treatment of different financial market infrastructure entities. So for example, all contracts of a recognised clearing house are protected but only a more limited set of contracts (e.g. market contracts, market charges and financial collateral arrangements) for a recognised investment exchange or an EEA or third country CCP. Please see the additional Excluded FS Entities.

There may be other issues

We have sought to address all of the issues arising to us with respect to the prohibition on enforcement of termination rights in the timescales available. We have not seen the drafting for the moratorium but when we do see it, then it is possible that its scope could give rise to further concerns, which we would need to raise. We should also point out that it is possible that other parts of the wholesale or commodity markets may have other concerns with respect to these proposals which have not arisen to us.

We would welcome the opportunity to discuss these proposals with you at your convenience.

Yours faithfully

FIA, EFET and ISDA

Association contacts:



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About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry.

FIA's mission is to:

- support open, transparent and competitive markets,
- protect and enhance the integrity of the financial system, and
- promote high standards of professional conduct.

As the leading global trade association for the futures, options and centrally cleared derivatives markets, FIA represents all sectors of the industry, including clearing firms, exchanges, clearing houses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the industry.

About EFET

The European Federation of Energy Traders (EFET) promotes competition, transparency and open access in the European energy sector. We build trust in power and gas markets across Europe, so that they may underpin a sustainable and secure energy supply and a competitive economy.

We do this by:

- Working to improve the functionality and design of European gas, electricity and associated markets for the benefit of the overall economy, society and especially end consumers.
- Developing and maintaining standard wholesale supply contracts and standardising related transaction and business processes.
- Facilitating debate amongst TSOs, regulators, policy makers, traders and others in the value chain about the future of the European energy market.

We currently represent more than 100 energy trading companies, active in over 28 European countries. For more information, visit our website at www.efet.org.



About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 73 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter @ISDA.

[Trade association comments – 22 April 2020](#)

Termination provision: draft exclusions re financial services (FS)

Excluded FS entities

We intend to provide that new s.233B(3) and (4) do not apply to the following types of FS firm whether it is the supplier or recipient of services under a contract:

- Insurance companies (effects or carries out contracts of insurance under FSMA)
- Banks (with permission under Part 4A to accept deposits)
- Investment firms (s.258A of the Banking Act 2009, but disapply effect of SI 2014/1832 made under s.258A(2)(b) so that investment firms with €125k initial investment fall within the definition for these purposes)
- Investment banks (s.232 Banking Act 2009)
- Infrastructure companies (s.112 of Financial Services (Banking Reform) Act 2013)
- Recognised clearing house (s.285(1)(b) FSMA)
- [Merchant acquirers (para. 13A of Sch 23 Finance Act 2011)]
- [Recognised investment exchanges \(s 285\(1\) FSMA\)](#)
- [Regulated markets \(MiFID II\)](#)
- [Recognised overseas investment exchanges \(s292 FSMA\)](#)
- [EEA central counterparties \(s 285 FSMA\)](#)
- [Third country central counterparties \(s285 FSMA\)](#)
- [Recognised overseas clearing houses \(s292 FSMA\)](#)

The exclusion would apply to any supply contract to which an excluded firm is counterparty, irrespective of whether the counterparties are ~~FS firms~~. Excluded [FS entities](#).

[Excluded FS contracts](#)

We intend to provide that new s.233B(3) and (4) do not apply (if they otherwise would) to the agreements listed below, therefore set off or netting arrangements in the listed agreements will be excluded from the new provisions. The agreements will be excluded irrespective of whether [either of](#) the counterparties ~~are~~ [is an Excluded FS firm](#) ~~entity~~:

- financial [arrangement: means](#)
 - (a) [a financial contract \(see further below\) as defined in Art 2\(1\)\(100\) of BRRD;](#)
 - (b) [a contract for delivery on an intra-day basis which would be a financial contract if it were for delivery on a future date \(“spot commodity contract”\);](#)
 - (c) [a contract that would be a financial contract or a spot commodity contract, if the term “commodity” in the definition of “financial contract” also included any \(1\) emissions allowance or credit or \(2\) other renewable energy or green certificate, permit, credit or allowance;](#)
 - (d) [a derivative contract, other than any contract already covered in \(a\)-\(c\) above, as defined in article 2\(5\) of the European Market Infrastructure Regulation \(648/2012/EU\);](#)
 - (e) [a securities financing transaction as defined in Art 3\(11\) of SFTR, a commodity leasing transaction, or a similar transaction to any of them, including a similar transaction with respect to any \(1\) emissions allowance or credit or \(2\) other renewable energy or green certificate, permit, credit or allowance; or](#)

(f) a master agreement in so far as it relates to any of the contracts or agreements referred to in points (a) to (e);

- market contract (same meaning as in Part 7 of the Companies Act 1989);
- market charge (same meaning as in Part 7 of the Companies Act 1989);
- system charge (same meaning as in the Financial Markets and Insolvency Regulations 1996 (S.I. 1996/1469));
- collateral security charge (same meaning as in the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI 1999/2979));
- financial collateral arrangement (same meaning as in the Financial Collateral (No. 2) Regulations 2003 (SI 2003/3226));
- an agreement which is or forms part of a capital market arrangement as defined in [*cross refer to new moratorium in Insolvency Bill*] [i.e. see existing Sch A1, paras 4D to 4F. The exclusion for this purpose would apply to all capital market arrangements not only those where a debt of at least £10 million has been incurred (para 4A of Sch A1)];
- an agreement which is or forms part of a public private partnership as defined in [*cross refer to new moratorium in Insolvency Bill*] [i.e. see existing para 4I of Sch A1];
- a set-off arrangement as defined in Section 48(1)(c) of the Banking Act 2009 or a netting arrangement as defined in Section 48(1)(d) of the Banking Act 2009; and
- any agreement regulating the relationship between creditors.

Financial contract includes the following contracts and agreements (this list is based on Art 2(1)(100) of BRRD¹):

- a) securities contracts, including:
 - i. contracts for the purchase, sale or loan of a security, a group or index of securities;
 - ii. options on a security or group or index of securities;
 - iii. repurchase or reverse repurchase transactions on any such security, group or index;
- b) commodities contracts, including:
 - i. contracts for the purchase, sale or loan of a commodity or group or index of commodities for future delivery;
 - ii. options on a commodity or group or index of commodities;
 - iii. repurchase or reverse repurchase transactions on any such commodity, group or index;
- c) futures and forwards contracts, including contracts (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date;
- d) swap agreements, including:
 - i. swaps and options relating to interest rates; spot or other foreign exchange agreements; currency; an equity index or equity; a debt index or debt; commodity indexes or commodities; weather; emissions or inflation;
 - ii. total return, credit spread or credit swaps;
 - iii. any agreements or transactions that are similar to an agreement referred to in point (i) or (ii) which is the subject of recurrent dealing in the swaps or derivatives markets;

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014L0059-20200107>

- e) inter-bank borrowing agreements where the term of the borrowing is three months or less;
- f) master agreements for any of the contracts or agreements referred to in points (a) to (e).

[In this definition commodity means any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products and energy such as electricity [*This definition of “commodity” is from Art 2(6) of Commission Delegated Regulation (EU) 2017/565² which supplements MiFID 2 2014/65/EU*]

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02017R0565-20191011>

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Corporate Insolvency and Governance Bill – Financial Services Exclusions

This Bill will help companies to maximise their chances of survival, protect jobs and support the country's economic recovery. It consists of a number of insolvency and corporate governance measures, as outlined in the separate Corporate Insolvency and Governance Bill briefing note.

The UK has a number of special insolvency regimes which apply to certain financial services firms. These regimes provide the UK's financial regulators with bespoke powers in relation to the insolvency of financial services companies. Those powers reflect the complexity of dealing with firms that play an important role in supporting the economy where they are at risk of failing. In addition, the way that goods and services are traded in the financial sector is often different to the rest of the economy.

It is therefore necessary to have specific provisions in the Bill for the financial sector. These provisions will ensure that the UK's existing special insolvency regimes for financial sector firms are unaffected, and that financial market participants have the legal certainty needed to facilitate the efficient functioning of financial markets.

The Bill provides for our intention that the following measures will **not** apply to the financial services sector, in certain cases:

- **Company moratorium**
- **Ipsa facto (Termination) clauses**
- **Suspension of Wrongful Trading**

Further details regarding these exclusions are provided in the Annex.

In addition, the new **Restructuring Plan** will be available to financial services companies and entities, though with appropriate safeguards including a role for the financial services regulators.

Finally, the Bill contains a number of other insolvency and corporate governance changes where no specific exclusions for the financial services sector are proposed. These are the provisions regarding:

- **Statutory Demands and Winding up Petitions (2 measures).**
- **Annual General Meetings (AGMs) and other meetings.**
- **Filing Requirements.**

Technical Annex: Detail of exclusions for the financial services sector

1. Excluded entities

We intend for the following entities to be excluded from the effect of the **termination clauses** provision. This exclusion will apply both in the scenario where one of these entities is itself in distress, and in the scenario where one of these entities is a supplier to another firm in distress. In addition, where these entities are themselves in distress, they will not have access to the **company moratorium**, and the **suspension of Wrongful Trading** will not apply. However there will be no exclusion for these entities where they are a supplier to another (non-excluded) firm in distress which is using a **company moratorium**, though the exclusions in Section 2, below, will apply:

- Insurers, where the entity carries on the regulated activity of effecting or carrying out contracts of insurance within the meaning given by section 417 of the Financial Services and Markets Act 2000.
- Banks, where the entity;
 - o (a) has permission under Part 4A of the Financial Services and Markets Act 2000 to carry on the regulated activity of accepting deposits, where “regulated activity” has the meaning given by section 22 of the Financial Services and Markets Act 2000, taken with Schedule 2 to that Act and any order under that section.
 - o (b) is a banking group company within the meaning of Part 1 of the Banking Act 2009 (see section 81D of that Act), or
 - o (c) has a liability in respect of a deposit which it accepted in accordance with the Banking Act 1979 or the Banking Act 1987.
- Investment banks and investment firms, where;
 - o “investment bank” means a company or other entity that has permission under Part 4A of the Financial Services and Markets Act 2000 to carry on the regulated activity of—
 - (a) safeguarding and administering investments,
 - (b) managing an AIF or a UCITS,
 - (c) acting as trustee or depository of an AIF or a UCITS,
 - (d) dealing in investments as principal, or
 - (e) dealing in investments as agent;
 - But, only for the company moratorium and suspension of wrongful trading, does not include a company that has permission to arrange for one or more others to carry on the activity mentioned in (a) if it does not otherwise have permission to carry on the activities mentioned in (a) to (e);
 - o “investment firm” has the same meaning as in the Banking Act 2009 (see section 258A of that Act), disregarding any order made under section 258A(2)(b) of that Act;
 - o “regulated activity” has the meaning given by section 22 of the Financial Services and Markets Act 2000, taken with Schedule 2 to that Act and any order under that section.
- Electronic money institutions, where the entity is an electronic money institution within the meaning of the Electronic Money Regulations 2011 (S.I. 2011/99) (see regulation 2 of those Regulations).
- Payment institutions, where the entity is an authorised payment institution, a small payment institution or a registered account information service provider within the meaning of the Payment Services Regulations 2017 (S.I. 2017/752) (see regulation 2 of those Regulations).
- Operators of payment systems, infrastructure providers etc, where the entity;
 - o is (a) the operator of a payment system or an infrastructure provider within the meaning of Part 5 of the Financial Services (Banking Reform) Act 2013 (see section 42 of that Act), or

- (b) an infrastructure company within the meaning of Part 6 of that Act (see section 112 of that Act).
- Recognised investment exchanges etc, where the entity is a recognised investment exchange, a recognised clearing house or a recognised CSD within the meaning of the Financial Services and Markets Act 2000 (see section 285 of that Act).
- Securitisation companies, where the entity is a securitisation company within the meaning of the Taxation of Securitisation Companies Regulations 2006 (S.I. 2006/3296) (see regulation 4 of those Regulations)
- Any overseas entities whose functions correspond with the above list of entities.

In addition, a company which has permission under Part 4A of FSMA to carry on a regulated activity, and which is not subject to a requirement to refrain from holding money for clients, will also be specifically excluded from being eligible for the **company moratorium with temporary modifications** and from the **wrongful trading suspension**.

The new provisions relating to the **company moratorium**, **termination clauses** and **wrongful trading suspension** will also not apply to building societies (under the Building Societies Act 1986), friendly societies (under the Friendly Societies Act 1992) and credit unions (under the Credit Unions Act 1979).

2. Excluded contracts

We intend for the following financial contracts to be excluded from the effect of the **company moratorium** and **termination clauses** provision, in all scenarios:

- Financial contracts, meaning:
 - a contract for the provision of financial services consisting of (i) lending (including the factoring and financing of commercial transactions), (ii) financial leasing, or (iii) providing guarantees or commitments;
 - a securities contract, including (i) a contract for the purchase, sale or loan of a security, a group or index of securities; (ii) an option on a security or group or index of securities; (iii) a repurchase or reverse repurchase transaction on any such security, group or index;
 - a commodities contract, including (i) a contract for the purchase, sale or loan of a commodity or group or index of commodities for future delivery; (ii) an option on a commodity or group or index of commodities; (iii) a repurchase or reverse repurchase transaction on any such commodity, group or index;
 - For the purposes of this exclusion “commodities” includes (a) units recognised for compliance with the requirements of EU Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading; (b) allowances under paragraph 5 of Schedule 2 to the Climate Change Act 2008 relating to a trading scheme dealt with under Part 1 of that Schedule (schemes limiting activities relating to emissions of greenhouse gas); and (c) renewable energy certificates (ROCs) issued i.) by the Gas and Electricity Markets Authority under an order made under section 32B of the Electricity Act 1989, ii.) by the Northern Ireland Authority for Utility Regulation under the Energy (Northern Ireland) Order 2003 (S.I. 2003/419 (N.I. 6)) and pursuant to an order made under Articles 52 to 55F of that Order.
 - a futures or forwards contract, including a contract (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date;
 - a swap agreement, including (i) a swap or option relating to interest rates, spot or other foreign exchange agreements, currency, an equity index or equity, a debt index or debt, commodity indexes or commodities, weather, emissions or inflation; (ii) a total return, credit spread or credit

- swap; (iii) any agreement or transaction that is similar to an agreement referred to in sub-paragraph (i) or (ii) which is the subject of recurrent dealing in the swaps or derivatives markets;
- o an inter-bank borrowing agreement where the term of the borrowing is three months or less;
- o a master agreement for any of the contracts or agreements referred to above
- Securities financing transactions, within the meaning given by Article 3(11) of Regulation (EU) 2015/2365 on the transparency of securities financing transactions (but for the purposes of that Article, references to “commodities” in that Regulation are to be taken as including the units and allowances referred to above).
- Derivatives, within the meaning given by Article 2(5) of Regulation (EU) No. 648/2012.
- Spot contracts, within the meaning given by Article 7(2) or 10(2) of Commission Delegated Regulation of 25.4.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.
- Capital market arrangements, broadly following the exclusion for capital market arrangements from the existing small companies’ moratorium in Schedule A1 to the Insolvency Act 1986, which will be replicated in the new moratorium.
- Contracts forming part of a public-private partnership, broadly following the exclusion for public-private partnerships from the existing small companies’ moratorium in Schedule A1 to the Insolvency Act 1986, which will be replicated in the new moratorium.
- Contracts to accept and process card-based payment transactions, within the meaning given by Regulation (EU) 2015/751 of the European Parliament and of the Council of 29th April 2015 on interchange fees for card-based payment transactions, specifically from the **company moratorium**.

In addition, the Bill will provide that the protections provided by the following arrangements and legislation are unaffected by the new provisions:

- Set-off and netting arrangements (within the meanings given by section 48(1)(c) and (d) of the Banking Act 2009). These arrangements are excluded from the effect of the **termination clauses** provisions. The **company moratorium** will not affect the operation of set-off or netting.
- Part 7 of the Companies Act 1989 (financial markets and insolvency),
- The Financial Markets and Insolvency Regulations 1996 (S.I. 1996/1469),
- The Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (S.I. 1999/2979)
- The Financial Collateral Arrangements (No.2) Regulations 2003 (S.I. 2003/3226).