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

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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, clearinghouses, 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.