asifma

Growing Asia's Markets

31 May 2019

Ministry of Law
100 High Street
#08-02, The Treasury
Singapore 179434

Re: Contracts to be exempted under section 440 of the Insolvency, Restructuring and Dissolution Act

Dear Sirs and Madams,

The Asia Securities Industry and Financial Markets Association (ASIFMA)[1], on behalf of its members, appreciates the opportunity to comment on the the types of contracts that are to be prescribed by the Ministry for Law as exempt from the restriction on certain contractual rights under section 440 of the Insolvency, Restructuring and Dissolution Act ("**IRDA**")).

ASIFMA offers the following, in line with broader industry views:

- Section 440 of the IRDA allows for the possibility of carve-outs on an entity-level and at a transaction-level. Therefore we request, on an entity level, carve-out for banks and insurers that are domestic systemically important insurers (D-SIIs) to be excluded from the definition of "company". Also, where (potentially) failing financial institutions are concerned, the Monetary Authority of Singapore's resolution powers are a more appropriate tool, providing an additional rationale for carving these types of entity out of the *ipso facto* ban to avoid any overlap or unintended consequences.

- On a transaction-level, we request carve-outs for: derivatives transactions; lending and repurchase agreements for financial instruments; margin loans; and agreement related to or connected with those listed above including, in particular, security agreements. In other words, we would be grateful if the Ministry of Law would consider a carve-out for all "derivatives contracts" by prescribing such transactions as "eligible financial contracts".

- In respect of the transaction-level carve-outs, we request consideration of using an open-ended, non-exhaustive list of underlyers in any prescribed exemptions for "derivative contracts" under section 440(5)(a). Under the existing CPAR (Companies Prescribed Arrangements Regulations 2017) definition of "derivatives contract", it is sufficiently stated as a contract where obligations are

[1] ASIFMA is an independent, regional trade association with over 100 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, law firms and market infrastructure service providers. Together, we harness the shared interests of the financial industry to promote the development of liquid, deep and broad capital markets in Asia. ASIFMA advocates stable, innovative, competitive and efficient Asian capital markets that are necessary to support the region's economic growth. We drive consensus, advocate solutions and effect change around key issues through the collective strength and clarity of one industry voice. Our many initiatives include consultations with regulators and exchanges, development of uniform industry standards, advocacy for enhanced markets through policy papers, and lowering the cost of doing business in the region. Through the GFMA alliance with SIFMA in the United States and AFME in Europe, ASIFMA also provides insights on global best practices and standards to benefit the region.

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discharged at a future time and the value of the contract is determined and derived from the value of certain underlyers. In so doing, the definition remains close-ended without requiring a prescriptive list of underlyers or a prescriptive list of exempted contracts.

In addition to the above, we also submit the attached list of contracts for the Ministry of Law's consideration, as contracts to be exempted from the restriction on certain contractual rights under section 440.

We look forward to continued engagement with the Ministry of Law on this issue. If you have further questions or would otherwise like to follow up, please contact Matthew Chan, ASIFMA's Executive Director and Head of Policy and Regulatory Affairs, at mchan@asifma.org or +852 2531 6560.

Sincerely,

Mark Austen
Chief Executive Officer
Asia Securities Industry & Financial Markets Association

Appendix A

S/N	Type of Contract / Agreement	Brief Description of Contract / Agreement	Sub-para to be exempted under [i.e. section 440(5)(a), (c), or (f)?]	Justification for exemption
1	Contracts for (a) derivative transactions; (b) repurchase transactions; and (c) securities lending transactions.	Confirmations for transactions described in (a), (b) and (c).	Section 440(5)(a)	Section 440(1) may have a negative impact on the "flawed asset" provisions incorporated into these contracts / confirmations. This is especially in the case of confirmations referencing the ISDA where under Section 2(a)(iii) – a party may withhold performance if an Event of Default or Potential Event of Default has occurred in respect of the other party.
2	Netting agreements (including, without limitation, industry standard opinions such as the ISDA Master Agreement, Global Master Repurchase Agreement, Global Master Securities Lending Agreement)	Agreements that include provisions setting out a netting arrangement. Examples would include the ISDA, GMRA, GMSLA. This carve-out should not be limited to the 1992 or 2002 ISDA Master Agreements. Refer to the definition for "netting arrangement" in the MAS Act: "***netting arrangement***" means an arrangement under which 2 or more claims or obligations can be converted into a net claim or obligation, and includes a close-out netting arrangement (under which actual or theoretical debts are calculated during the course of a contract for the purpose of enabling them to be set-off against each other or to be converted into a net debt).	Section 440(5)(a)	As the value of derivative transactions can fluctuate rapidly, delay in closing out the transactions could result in increased losses to parties. Section 440(1) may negatively impact Singapore's status as a clean netting jurisdiction, including to the extent that a ban *on ipso facto* clauses could actually disqualify positive netting treatment. Please also see comments in item (1) above relating to the flawed asset provisions.
3	Credit support documentation (e.g. the Credit Support Annexes ("***CSAs***") published by ISDA) related to (1) and (2) above.	Credit support arrangements which cover both title transfer arrangements (e.g. the title transfer Variation Margin CSAs) and security arrangements (e.g. pledge agreements, New York law pledge CSAs, Initial Margin CSA).	Section 440(5)(a)	The efficacy of title transfer arrangements as credit support is dependent on there being clean netting opinions. Section 440(1) may negatively impact Singapore's status as a clean netting jurisdiction (see above). To enforce security, termination of the transactions needs to occur. Hence, delay in termination would result in delays in the enforcement of security. Please also see comments for items (1) and (2) above.

S/N	Type of Contract / Agreement	Brief Description of Contract / Agreement	Sub-para to be exempted under [i.e. section 440(5)(a), (c), or (f)?]	Justification for exemption
4	Netting agreements that are not industry standard but bespoke to each financial institution (including, without limitation, Clearing broker agreement for listed derivatives and OTC derivatives, prime brokerage agreement)	Agreements that include provisions setting out a netting arrangement but are not stipulated by industry standard form. They have the feature of "netting arrangement" under which 2 or more claims or obligations can be converted into a net claim or obligation, and includes a close-out netting arrangement (under which actual or theoretical debts are calculated during the course of a contract for the purpose of enabling them to be set-off against each other or to be converted into a net debt).	Section 440(5)(a)	Delay in closing out the transactions could result in increased losses to parties. Section 440(1) may negatively impact Singapore's status as a clean netting jurisdiction (see above), which in turn increases the capital requirement applicable to financial institutions that provide financial services to Singapore companies or companies with significant Singapore nexus. Financial institutions may take other measures to remove its nexus from Singapore such as not conducting relevant business from the Singapore branch/subsidiary and not use Singapore as governing law/dispute jurisdiction.
5	Margin loan and related agreements	Lending arrangement to a client for the purpose of buying securities, with the securities being used as credit support for the loan.	Section 440(5)(a)	Margin loans are a key component of prime brokerage and private wealth management businesses. Financial institutions rely on set-off, netting and timely enforcement of security interests. To enforce security, termination of the transactions needs to occur. Hence, delay in termination would result in delays in the enforcement of security. This would increase the capital requirement applicable to financial institutions that provide financial services to Singapore companies or companies with significant Singapore nexus. Financial institutions may take other measures to remove its nexus from Singapore such as not conducting relevant business from the Singapore branch/subsidiary and not use Singapore as governing law/dispute jurisdiction. Margin loans are protected in major jurisdictions such as US, UK, Canada and Australia, and carved out from *ipso facto* restrictions.