

ISDA

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The Honourable Dalton McGuinty
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And

The Honourable Jim Watson
Minister of Consumer and Business Services
Eaton Tower, 35th Floor
250 Yonge Street
Toronto, Ontario
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February 15, 2005

Dear Sirs:

Re: Uniform Securities Transfer Act

We understand that Ontario is currently considering its legislative agenda for the upcoming year. We urge you to ensure that the proposed Uniform Securities Transfer Act (USTA) is included among those priorities. Passage of the USTA is urgently needed to modernize the legal foundation of Ontario's financial services sector and enhance the sector's international competitiveness.

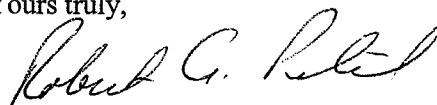
The current legislative regime in Ontario regarding the transfer of securities is out of step with modern securities transfer systems. The resulting legal uncertainty is adversely affecting the competitive position of Canadian participants and is adding significant costs for Canadians with respect to their participation in these important financial markets. As an example, many international market participants are unwilling to accept securities as collateral from Ontario (and other Canadian) entities, because of the uncertainty of enforcement. This puts the Ontario participants at a disadvantage because they often incur extra costs in dealing on an unsecured basis or providing a more expensive form of collateral, such as a letter of credit or cash. This disadvantage can only grow over time, since other countries are moving quickly to modernize their laws in this area.

On the other hand, enactment of the USTA will harmonize Ontario's regulatory environment with that of some of the world's most modernized regimes, and especially with the vast majority of the United States. The USTA is essentially identical with Revised Article 8 of the Uniform Commercial

Code, which has been functioning well in the U.S. for a number of years, and is evidence of why enactment of the USTA is a substantial and critical step, which should be taken without further delay.

We attach as part of this submission more detailed comments supporting the USTA, and thank you for your consideration.

Yours truly,



Robert G. Pickel
Executive Director and Chief Executive Officer

cc: The Honourable Michael Bryant
The Honourable Gerry Phillips
The Honourable Greg Sorbara
The Honourable Joseph Cordiano
Chair and Members of the Standing Committee on Finance and Economic Affairs

Submission of the
International Swaps and Derivatives Association, Inc.
in respect of the
Uniform Securities Transfer Act

This memorandum is written to express the International Swaps and Derivatives Association's strong support for the *Uniform Securities Transfer Act (USTA)* and consequential amendments to related legislation and to strongly encourage your Ministry to support its enactment as soon as possible.

The International Swaps and Derivatives Association, Inc.¹ (ISDA) is the global trade association representing participants in the privately negotiated derivatives industry. ISDA was chartered in 1985, and today numbers over 600 member institutions from 46 countries on six continents. ISDA's members include most of the world's major institutions who deal in, as well as leading end-users of, privately negotiated derivatives.

One of ISDA's key objectives is to promote legal certainty for cross-border financial transactions in or involving derivatives markets. ISDA and its members devote considerable resources to acquiring and updating legal opinions from a wide range of jurisdictions on netting, set-off and financial collateral arrangements and to promoting changes in laws to enhance the effectiveness of these types of arrangements. ISDA also pays close attention to developments affecting the international regulatory environment for derivatives. Our Collateral Law Reform Group, which was founded in early 1999, has participated in every significant European and international financial law reform consultation affecting collateral arrangements since 1999.

It is therefore with great interest that ISDA members have reviewed the USTA, the provisions of which are of fundamental and pressing concern to the financial markets, including, of course, the market for privately negotiated derivative transactions.

¹ For further information on ISDA and its activities, please consult our website at <http://www.isda.org/>.

The current Canadian legal regime, both federal and provincial, regarding the transfer of securities is out of step with modern securities transfer systems. The resulting legal uncertainty is adversely affecting the competitive position of Canadian participants and is adding significant costs for Canadians with respect to their participation in these important financial markets. As other countries modernize their laws Canadian participants will face further competitive disadvantages. It is critical that Canadian legislators act quickly to implement reform and Ontario, as the leading Canadian commercial jurisdiction, should lead the implementation process.

We would like to take this opportunity to make a few observations with respect to Canada's current regulatory regime and the USTA that are of particular relevance to the cross-border derivatives market.

Protecting Security and Other Interests in Securities

One of the most important changes sought to be introduced by the USTA is the modernization of the law with respect to the protection for purchasers of securities, including secured creditors, against adverse claims in securities and in securities accounts. From ISDA's perspective, this constitutes a significant enhancement of the legal certainty offered by Canada's personal property security regime.

Under the current system, there is a troubling lack of legal certainty with respect to determining what steps should be taken by a party seeking to obtain and protect a first priority interest in a security trading through a system involving clearing agencies and financial intermediaries. This uncertainty stems from the fact that the regulatory regime continues to reflect antiquated notions of possessory security interests and of financing statement-filing requirements that do not accommodate the modern realities of the indirect securities holding system. Possession or control should be the only steps required to ensure a first priority interest in securities, distributions on securities and proceeds of securities.

The current law in many provinces requires the secured party to protect its interest by registering a financing statement. This means of perfection does not ensure a first priority and it is, therefore, simply unacceptable to many market participants dealing with Canadian entities. In these circumstances, the Canadian participant will often incur the extra cost of dealing on an unsecured basis or providing a more expensive form of collateral, such as a letter of credit or cash.

The particular problem areas are (1) the lack of uniformity between the approaches in Canada and the United States, (2) uncertainty in the Canadian private international law rules and (3) an inadequate approach to the substantive issues regarding the means of protecting a purchaser of securities from adverse claims. Each of these problems would be addressed by the enactment of the USTA. The modernized, relatively certain approach of the USTA will be far more appealing to international participants dealing with Canadians, and this is enforced by the substantial harmonization of the USTA with other jurisdictions' modernized legal standards in this area, particularly as set out in Revised Article 8 of the Uniform Commercial Code (**Rev. 8**).

Characterization Issues

One of the major issues for participants in the international derivatives market seeking to transact business with Canadian counterparties is that the Canadian legal regime currently requires parties to consider characterization differences between transfers of securities and the taking of a security interest in securities. From a business perspective, modern securities trading practices draw no such distinctions. ISDA strongly supports the USTA's approach, which largely eliminates characterization differences between transfers of securities and the taking of security interests in securities.

Harmonization

The objectives of USTA, namely to provide a sound legal foundation for securities holding and transfer practices, particularly the indirect holding system, and to harmonize with Rev. 8, a clear and effective provision that attracts the confidence of participants in the global market, are in close accord with ISDA's objective of promoting legal certainty for cross-border financial transactions. The overarching policy of attaining uniform securities transfer laws in

Canada is very important as the full benefits of modernization will not be achieved without it. Also, without uniform and comprehensive choice of law provisions substantive law changes will not resolve legal uncertainty. The proposed reforms under the USTA clearly enhance legal certainty, and reduce legal risk, for parties engaging in financial transactions with Canadian counterparties.

Conclusion

To reiterate, we believe that Canada's current regulatory regime significantly disadvantages both Canadians seeking to engage in cross-border financial transactions and non-Canadians who would, but for the uncertainty and risk resulting from the traditional approach of the current Canadian regime, deal more advantageously with Canadian counterparties. Ongoing international developments, such as revisions to the Basel Rules governing international banking, will require the ability to be increasingly precise in the assessment of risk. The current lack of certainty in the Canadian legal landscape will make it increasingly difficult for Canadian counterparties to fully and competitively participate in these markets both domestically and internationally.