ISDA Statement on Consent Requirement for Transfer of Transactions

The ISDA Trading Practice Committee wishes to remind market participants that, under the ISDA Master Agreement[1], a party to a transaction must obtain the written consent of the other party to the transaction prior to transferring its rights and obligations under that transaction to a third party.

The decision as to whether or not to agree to a transfer is within the discretion of the party whose consent is required. Relevant factors in deciding whether to consent to a transfer include credit, collateral, netting, tax, operational, accounting, relationship and other considerations. Furthermore, these considerations may relate to either the transferor or the transferee. Examples of these considerations include:

(1) The transfer of a single transaction or set of transactions can impact the credit exposure of the remaining party to the transferor by reason of the trades remaining in the portfolio or under other arrangements between the two parties that could be subject to a right of set-off.

(2) The remaining party may attribute a value to its mark-to-market exposure to the transferor that is different than the value that it determines when that exposure is to a different party. Also, the remaining party may have entered into other transactions with the transferor in reliance on the value or credit exposure attributable to transactions between the parties. Termination of those other transactions may create an expense for the remaining party.

(3) The cost to the remaining party to be in a contractual relationship with the transferee rather than the transferor may be materially different (for example, due to a requirement to post collateral to the transferee). The remaining party may wish to take this into account in evaluating its willingness to consent to the transfer of a transaction to that transferee.

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[1] Section 7 of the 1992 ISDA Master Agreement provides:

> Subject to Section 6(b) (ii), neither this Agreement nor any interest or obligation in or under this Agreement may be transferred (whether by way of security or otherwise) by either party without the prior written consent of the other party, except that: -
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> (a) a party may make such a transfer of this Agreement pursuant to a consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all its assets to, another entity (but without prejudice to any other right or remedy under this Agreement); and
> (b) a party may make such a transfer of all or any part of its interest in any amount payable to it from a Defaulting Party under Section 6(e).
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> Any purported transfer that is not in compliance with this Section will be void.

The 2002 ISDA Master Agreement is, in substance, the same with two modifications: (i) the phrase "and to the extent permitted by applicable law" is added in the first line after the reference to Section 6(b)(ii) and (ii) the phrase ", together with any amounts payable on or with respect to that interest and any other rights associated with that interest pursuant to Section 8, 9(h) and 11."

These considerations are provided by way of example. They are not intended to be an exclusive list of the considerations that may be taken into account by a party in deciding whether or not to agree to a transfer. Whether or not a party agrees to a transfer will be dependent on the facts and circumstances involved in any specific transfer request. In particular, because of the economic considerations involved for all three parties (transferor, transferee and remaining party), compensation may be an appropriate matter for discussion in connection with a transfer.

A novation working group, consisting of ISDA members active in the operations and documentation areas, was formed earlier this year and will look at various operational and legal issues surrounding the novation agreement published in May 2002 by ISDA and the novation provisions in the 2003 Credit Derivatives Definitions. Based on input from working group members, and expected input from a questionnaire that has been distributed to the wider Operations Committee, the working group will produce a flow-chart to describe the novation process. The working group will also start working on a novations definitions booklet with templates that cover different types of transfers and product categories.

If you would like to receive information regarding the consideration of these issues by the novation working group, please contact Kimberly Summe (ksumme@isda.org) or Karel Engelen (kengelen@isda.org).