# ISDA® CREDIT SUPPORT ANNEX—ONTARIO LAW, CREDIT SUPPORT AND COUNTERPARTY AMENDMENTS, INSTRUCTIONS AND ADDITIONAL PROVISIONS

## Guide to Amendments to the New York Form of Credit Support Annex

## I. General

These amendments are intended for consideration where the ISDA Master Agreement (including the Credit Support Annex) involves an Ontario counterparty, the collateral includes Canadian cash or securities and/or the ISDA Master Agreement is governed by Ontario law. These amendments do not address amendments that may be generally desirable from an operational or business perspective. Nor do these amendments address changes or additions that may be appropriate for a particular Canadian counterparty.

## II. Explanation of Amendments, Instructions and Additional Provisions

A number of the amendments proposed deal with the specific issue of Cash as Credit Support. The following amendments should be made if the parties wish to create a debtor/creditor relationship with respect to Cash and provide for a right of set-off in place of a security interest with respect to such Credit Support. The amendments provide for Cash to be treated as Other Eligible Support and Other Posted Support (in which no security interest is created) and not Posted Collateral, and make other required changes to reflect the fact that Cash is within this category of Credit Support. For an explanation as to the reasons for this approach in the Ontario context, see Part I.C.3.(a)(ii), Cash Collateral, of the Stikeman Elliott Credit Support Documents Ontario law opinion to ISDA dated October, 2000 (the ***Ontario Collateral Opinion***). Parties should note that if they use the Transfer Annex form of Credit Support Annex, they avoid the need to make any of these amendments. For a description of the other benefits of using the Transfer Annex in the Canadian context, refer to the discussion in Part I.A.3 of the Ontario Collateral Opinion.

The following amendments and provisions are those that would be included to accomplish this result. Parties that wish to retain the security interest approach to Cash should not make these amendments.

- Amendment 1: Paragraph 1(b)
- Amendment 3: Paragraph 6(d)(ii): Specifically it removes the words "Unless otherwise specified in Paragraph 13" because it would be inconsistent with a debtor/creditor relationship to permit the parties to specify that the return received by the Secured Party on the cash collateral be paid over to the Pledgor. The amendment also replaces the words "Posted Collateral" with

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"Other Posted Support" and removes the words "and will be subject to the security interest granted under Paragraph 2".

- Amendment 4: Paragraph 7(i)
- Amendment 5: Paragraph 8(a)(ii)
- Amendment 6: Paragraph 8(b)(ii)
- Amendment 7: Paragraph 8(c)
- Addition 8: Paragraph 9
- Amendment 9: Paragraph 11(a)
- Amendment 10: Paragraph 12 re definition of Interest Amount second alternative
- Amendment 12: Paragraph 13(b)(iii)
- Amendment 17: Paragraph 13(h)(i)
- Amendment 18: Paragraph 13(j)
- Addition 20: New Paragraph 13(m)

**Amendment 2: Paragraph 6(a)**

The reference to Section 9-207 of the New York Uniform Commercial Code is inappropriate in an Ontario law governed agreement between 2 Canadian counterparties dealing with collateral located in Canada and has been deleted. Including equivalent wording referring to section 17 of the PPSA or its equivalents in other Canadian provinces (the provision is similar to 9-207 of the New York Uniform Commercial Code) will not be effective, since a debtor cannot waive rights under section 17. Therefore, we do not recommend a similar clause. You may choose to keep the reference to Section 9-207 if the Annex is to be governed by New York law, one of the pledgors is located in New York or the collateral is held in New York.

**Amendment 10: Paragraph 12**

(i) The definition of "Cash" has been expanded to include the lawful currency of Canada.

(ii) The new definition of "Interest Amount", clause (z), requires that the amount of interest calculated for each day in the Interest Period in respect of an amount of interest calculated in Canadian Dollars be determined on the basis of a 365-day calculation period in accordance with Canadian interest calculation conventions. This amendment presupposes that the parties have designated in paragraph 13(h) a 365-day rate as the Interest Rate for amounts in Canadian currency and a 360-day rate for amounts in U.S. currency.

The alternative language for this definition should be used if the parties wish to create a debtor/creditor relationship with respect to Cash.

(iii) The definition of "Transfer", part (i), with respect to cash includes in the [ ] language that is appropriate only if the specified Party is a deposit taking institution. If funds are deposited with the Secured Party itself, then a right of set-off may exist independently of set-off under the Agreement itself.

(iv) The definition of "Currency Equivalent" has been added to Paragraph 12 in order to provide a mechanism for converting amounts under the Annex denominated in a currency other than Canadian Dollars into Canadian Dollars for the purpose of calculating Exposure, Interest Amount and Value.

The Annex contemplates that Independent Amount, Threshold and Minimum Transfer Amount will be expressed in Canadian Dollars. If a currency other than Canadian Dollars is used, the Independent Amount, Threshold and Minimum Transfer Amount each will have to be added to the clause with respect to Currency Equivalents (Amendment 21).

**Amendment 11: Paragraph 13(b)(ii)**

Negotiable debt obligations issued by the Government of Canada or by a Province of Canada of varying maturities have been added to the express list of Eligible Collateral that a party may deliver to satisfy a Delivery Amount. Cash should not be selected as Eligible Collateral if the parties wish to create a debtor/creditor relationship with respect to Cash.

**Instruction 13: Paragraph 13(b)(iv)**

Canadian Dollars should be specified as the currency in which Independent Amount, Threshold and Minimum Transfer Amount, if any, for Party A and Party B are to be expressed.

**Instruction 14: Paragraph 13(c)(iv)**

If you have two Ontario counterparties, designate Toronto as the city in which the Notification Time is to be determined. Consider doing so if one of the counterparties is an Ontario counterparty.

**Addition 15: Paragraph 13(f)(i)**

The addition clarifies that the notice referred to in the fallback definition of "Resolution Time" is the notice of the dispute given by the Disputing Party, not the Valuation Agent's initial notice of Exposure or Value and changes New York to Toronto time.

**Instruction 16: Paragraph 13(g)(i)**

Ontario and New York are specified as the jurisdictions in which Posted Collateral may be held by Party A and Party B and their respective Custodians, if any.

**Addition 19: Paragraph 13(m)**

Amendment 6 specifically acknowledges the Secured Party's potential status as a purchaser of Posted Collateral consisting of securities. See the Ontario Collateral Opinion, Part I.C.3(a), for a description of the priorities issues with respect to securities collateral and the significance of attaining good faith purchaser status.

**Addition 20: Paragraph 13(m)**

This amendment creates a debtor-creditor relationship with respect to Cash and provides for a right of Set-off against the claim with respect to the Cash for both the Secured Party and the Pledgor in a realization scenario.

## III. Additional Optional Provisions

The PPSA permits a secured party to commingle fungible collateral in its possession. For the purposes of the PPSA, fungible collateral includes securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit, and includes unlike units to the extent that they are treated as equivalents under a security agreement. If the Secured Party has a concern that it may not be able to replace rehypothecated securities at the time they are required to be redelivered under the Annex (for example, if the securities are thinly traded), then it may want to consider expanding the class of securities which can be returned as equivalents. The following paragraph can be added to Paragraph 13(m):

> ***Commingling of Posted Collateral.*** In the event the Secured Party exercises its right to commingle Posted Collateral pursuant to Paragraph 6(c) or applicable law, any and all Fungible Securities shall be deemed to be fungible with and equivalents of any Posted Collateral consisting of securities.

This provision deems all Fungible Securities, as defined, to be equivalents of any Posted Collateral consisting of securities, so that a Secured Party is entitled to commingle Posted Collateral consisting of securities with any other securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit of Posted Collateral, or of the kind which would qualify as Eligible Collateral for the Pledgor in the Annex. The purpose of including this provision is to address with a technical amendment a potential issue under the PPSA where the Secured Party is

entitled to use the Posted Collateral as its own pursuant to Paragraph 6(c)(i). Since unrestricted use of the Posted Collateral is arguably a breach of the PPSA unless replacement securities are provided in a timely manner, a Secured Party that has not replaced the Posted Collateral with or continued to hold sufficient unencumbered exact equivalents, but which does hold any other type of unencumbered Eligible Collateral (i.e. Fungible Securities), will be in a position to argue that there is no breach of the PPSA. This addition requires a corresponding addition to Paragraph 12, as follows:

> "***Fungible Securities***" means securities of equivalent value [in the aggregate] (i) of which any unit is, by nature or usage of trade, the equivalent of any other like unit of Posted Collateral, or (ii) of the kind which would qualify as Eligible Collateral for the Pledgor in this Annex.