



INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

Barbara Amsden
Director, Capital Markets
Tel: (416) 687-5476
E-mail: bamsden@iiac.ca

June 8, 2007

Ms. Sandra Dunn / Mr. Alain Michaud
Chief, Financial Sector Stability / Economist, Financial Sector Stability
Finance Canada
Government of Canada
140 O'Connor St.
Ottawa, ON K1A 0G5
Tel: (613) 943-7942
Fax: (613) 943-8436
E-mail: Dunn.Sandra@fin.gc.ca / Michaud.Alain@fin.gc.ca

Dear Sandra and Alain:

Re: Definition of Eligible Financial Contract

The Investment Industry Association of Canada (IIAC)¹ appreciates your efforts to update the regulatory definition of eligible financial contract. We also hope to continue working with Finance Canada and Industry Canada on remaining changes about which we wrote to and spoke with Finance Canada regarding, respectively, the *Winding-up and Restructuring Act* (WURA), *Payment Clearing and Settlement Act* (PCSA) and *CDIC Act* (CDICA) and to the *Bankruptcy and Insolvency Act* (BIA) and *Companies' Creditors Arrangements Act* (CCAA). We believe that the amendments are necessary:

- To continue bringing Canada more closely into line with international standards as embodied in U.S. legislation and European Union directives, maintaining the competitiveness of Canada's capital markets and avoiding risks of economic dislocation and
- To ensure consistency in the application of relevant protections and provisions across the WURA, PCSA, CDICA, BIA and CCAA.

The IIAC has discussed these issues with our Debt Markets Committee and Repo & Funding Subcommittee members, who view the amendments and clarifications as necessary to conduct their businesses effectively and successfully. This is particularly true in the case of repos, securities lending and derivatives. We have worked for over a year with representatives of the Canadian Bankers Association, International Swaps and Derivatives Association and experts in

¹ On April 1, 2006, the Investment Dealers Association of Canada (IDA) legally divided into a self-regulatory organization (SRO) and IIAC – the industry association. The Association represents the position of the Canadian investment industry on regulatory and public policy issues. Its mandate is to promote efficient, fair and competitive capital markets for Canada while helping its member firms succeed in the industry.

the Canadian industry to bring about the necessary changes to bankruptcy and insolvency legislation and regulation. We support their efforts and recommendations as set out most recently in the June 8, 2007 letter from Margaret Grottenthaler, Stikeman Elliott, to you. Generally, we agree that the definition must be as broad as is reasonable to prepare for new types of derivatives given the continuing evolution of capital markets, however, specifically, we agree with:

- Replacing the general definition in the preamble with an appropriately defined basket clause and expansion in other definitions by the words "without limitation," "similar" and "combinations of" transactions
- Adding a "futures agreement or futures option agreement" that trades on an exchange, board of trade or other regulated market to the list under the eligible financial contract definition
- Re-organizing and regrouping the list of derivatives transaction categories to classify more distinctly swap transaction types versus the underlying interest types
- Changing "carbon emissions derivatives" to "qualifiable environmental attributes allowance" to better reflect trades in rights granted under multinational, national or regional agreements to emit a certain amount of a regulated substance
- Either amending the term "margin loan" to remove reference to intermediary (preferred alternative) or clarifying that the loan may be made by a party other than the relevant intermediary
- Expanding agreements to clear or settle securities to reflect the clearing of futures contracts, depository bills and notes and deposit instruments through the Canadian Depository for Securities Ltd. (CDS), Canadian Derivatives Clearing Corporation (CDCC), NGX, the Winnipeg Commodity Exchange Clearing Corporation or clearing and settlement facilities that may emerge for transactions included in the definition of eligible financial contract
- Add "without limitation," "similar" and "combinations of" transactions as noted in the June 8, 2007 Stikeman Elliott submission.

We would also like to confirm that other recommendations made in our June 26, 2006 letter to Minister Flaherty are going to be enacted in short order, where already introduced into legislation, and, where not, that they will continue to be considered for future changes (June 26, 2006 letter excerpt attached).

Thank you for this opportunity to provide comments and we would be pleased to answer any questions that you may have.

Yours truly,



CC: Éric Dagenais, Matthew Dooley – Industry Canada
Margaret Grottenthaler – Stikeman Elliott LLP
Katherine Tew Darras – ISDA
François Bourassa – National Bank Financial Group
Bill Randle – Canadian Bankers Association

**EXCERPT FROM JUNE 26, 2006 LETTER FROM IAN RUSSELL, IIAC PRESIDENT AND CEO,
TO THE HONOURABLE JIM FLAHERTY, MINISTER OF FINANCE**

“6. Recommendations

Working with colleagues within Industry Canada, update Canadian insolvency law to international standards to:

i. Provide necessary collateral protections by:

- Making it clear that the special priorities provided for in Bill C-55, introduced by the last government, under the BIA and the CCAA, including the potential overriding of the first priority interest collateral by statutory claims (the wage arrears superpriority and pension claim priority under the BIA) and debtor-in-possession financing charges under the BIA and CCAA, which apply to all or any of a debtor’s assets, do *not* take priority over financial collateral for eligible financial contracts such as repos (*an issue for Industry Canada*)
- Including title transfer collateral arrangements in the list of eligible financial contracts to ensure that they can be included in master agreements’ termination and netting mechanisms (*Industry Canada and Finance Canada*)
- Exempting from automatic and court-ordered stays the exercise of rights (including sale, foreclosure and set-off) against financial collateral held by the party taking the collateral (cash, debt and equity securities of incorporated and unincorporated entities, negotiable instruments, letters of credit, claims or rights – for example, options, exchangeable features – with respect to any of the foregoing) related to eligible financial contracts (*Industry Canada and Finance Canada*)
- Removing unacceptable clawback risk under creditor preference legislation by expressly recognizing that the provision of top-up and substitute financial collateral is not voidable and does not lead to the assumption that the transaction is voidable because it takes place within specified pre-proceeding periods (*Industry Canada and Finance Canada*)

ii. Update netting protection, specifically:

- Expand the list of eligible financial contracts by regulation or legislative amendment to add items identified in the ISDA drafting recommendations, including margin loans, derivatives, title transfer collateral arrangements, etc. (*Industry Canada and Finance Canada*)
- Introduce a clearer basket clause, such as that in the U.S. *Bankruptcy Code*, to capture clearly developments in the fast-changing financial markets (*Industry Canada and Finance Canada*)
- Explicitly provide that rights under a master agreement are not affected if any particular transaction is not an eligible financial contract or the collateral arrangements also secure transactions that are not eligible financial contracts (*Industry Canada and Finance Canada*)
- Ensure that multibranch netting is fully effective in Canadian proceedings with respect to foreign branches of non-Canadian institutions (*Finance Canada*)
- Add mutual funds to the definition of “financial institution” in the PCSA (*Finance Canada*)

iii. Where there is no specific need for different protections and other provisions, consistently apply relevant protections across the BIA, CCAA, WURA, PCSA and CDICA (Industry Canada and Finance Canada).”