

THE CONVENTION ON THE LAW APPLICABLE TO  
CERTAIN RIGHTS IN RESPECT OF SECURITIES  
HELD WITH AN INTERMEDIARY

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MESSAGE

FROM

**THE PRESIDENT OF THE UNITED STATES**

TRANSMITTING

THE CONVENTION ON THE LAW APPLICABLE TO CERTAIN RIGHTS  
IN RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY  
(THE "CONVENTION"), DONE AT THE HAGUE ON JULY 5, 2006,  
AND SIGNED BY THE UNITED STATES ON THAT SAME DAY



MAY 17, 2012.—Treaty was read the first time, and together with the  
accompanying papers, referred to the Committee on Foreign Relations  
and ordered to be printed for the use of the Senate

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U.S. GOVERNMENT PRINTING OFFICE



## LETTER OF TRANSMITTAL

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THE WHITE HOUSE, *May 17, 2012.*

*To the Senate of the United States:*

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the “Convention”), done at The Hague on July 5, 2006, and signed by the United States on that same day. The report of the Secretary of State, which includes an Overview of the proposed Convention, is enclosed for the information of the Senate.

The United States supported the development of the Convention, which provides uniform rules for determining the law applicable to certain rights in commercial transactions involving investment securities held through intermediaries (such as brokers, banks, and other financial institutions). The Convention incorporates modern commercial finance methods already market-tested in the United States through the Uniform Commercial Code. It would ensure that countries that become party to this Convention would also apply those methods. The Convention, once in force, would improve the functioning of investment securities markets, reduce uncertainty in cross-border commerce, and reduce national and cross-border systemic risk.

The Department of the Treasury, the U.S. Securities and Exchange Commission, the Commodities Futures Trading Commission, and the New York Federal Reserve Bank support ratification by the United States of this Convention, as do key private sector associations. I recommend, therefore, that the Senate give early and favorable consideration to the Convention and give its advice and consent to its ratification.

BARACK OBAMA.



## LETTER OF SUBMITTAL

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DEPARTMENT OF STATE,  
*Washington, July 18, 2011.*

The PRESIDENT,  
*The White House.*

THE PRESIDENT: I have the honor to submit to you, with a view to its transmittal to the Senate for advice and consent to ratification, the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, done at The Hague on July 5, 2006 (the “Convention”) and signed by the United States on that date. An overview of the Convention with a detailed article-by-article analysis is enclosed with this report.

Modern investment securities markets, such as those of the United States, have moved from a paper-based system largely to electronic transfer of securities, which makes possible higher volumes of transactions through “intermediaries” (such as brokers, banks, and other financial institutions). Such transactions can cross borders rapidly. The Convention provides uniform rules for determining the law applicable to certain rights in commercial transactions involving investment securities held through intermediaries. The question of which law governs such intermediated securities has become a matter of significant concern to market participants as well as banking supervisors and regulators. The objective of the Convention is to provide greater legal certainty in this area, thereby reducing legal and systemic risk, enhancing efficiency in market transactions, and facilitating the global flow of capital. The Convention was formulated at The Hague Conference on Private International Law by forty-five countries with substantial participation of the U.S. private sector. The rules of the Convention are compatible with modern finance law in the United States as set out in the Uniform Commercial Code, which has been adopted by all U.S. states and the District of Columbia.

The U.S. government and the U.S. financial community supported the Convention’s negotiation. Its ratification by the United States is supported by the relevant U.S. regulatory agencies, including the Department of the Treasury, the U.S. Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and the New York Federal Reserve Bank. The Convention is also supported by securities clearance and settlement entities, including the Depository Trust & Clearing Corporation (the U.S. central securities depository), commercial market interests including custodian banks, broker-dealers, securities intermediaries, and securities industry associations including the Securities Industry and Financial Markets Association (SIFMA), the International Swaps and Derivatives Association (ISDA), the

Emerging Markets Traders Association (EMTA), the Association of Global Custodians (AGC), and others. Experts from the National Conference of Commissioners on Uniform State Laws (ULC) were involved at all stages of the Convention's development and the ULC itself was represented at the Diplomatic Conference adopting the Convention. The American Bar Association has adopted a formal resolution recommending U.S. ratification on the recommendation of the Business Law and International Law Sections.

I recommend, therefore, that you transmit the Convention to the Senate for advice and consent to ratification.

Respectfully submitted,

HILLARY RODHAM CLINTON.

Enclosures: As stated.

## OVERVIEW

The Convention provides uniform rules for rapidly determining the law applicable to certain rights in commercial transactions involving investment securities held through intermediaries.

In modern capital markets, investment securities are commonly held in electronic form by banks, securities brokers and other entities collectively known as “securities intermediaries.” Securities interests in computer data form move today through intermediaries in increasingly high volumes and cross borders frequently, and it is exceedingly difficult to determine in advance which law would apply to particular transactions or intermediaries if traditional choice of law principles are employed. Even when the initial parties may be located within the United States, the nature of computer-based transfers of securities through various intermediaries means that any transfer typically involves book-entries by a chain of intermediaries located in several countries all in the same day; securities moving between accounts thus may quickly involve dispositions of securities or collateral in other jurisdictions, raising issues as to which countries’ laws may apply.

The question of which law governs has become a matter of significant concern to market participants as well as securities and derivatives markets regulators, banking supervisors, and regulators. The objective of the Convention is to provide greater legal certainty in this area, thereby reducing legal and systemic risk, enhancing efficiency in market transactions and facilitating the global flow of capital.

The rules adopted by the Convention reflect modern finance law in the U.S. as set out in Articles 8 and 9 of the Uniform Commercial Code (“UCC”), adopted by all U.S. states and the District of Columbia, which have provided the necessary legal certainty for domestic securities transactions. That certainty is absent today from most transactions that cross national borders or for other countries and foreign markets in their relations to securities interests in the U.S. The Convention’s provisions would apply as stated to transactions within its scope, but would not otherwise displace applicable provisions of the UCC.

An Explanatory Report on the Convention was prepared by the Conference Drafting Group on which U.S. government and securities industry experts were represented, which sets forth interpretations of the provisions of the Convention that were agreed to in the negotiation process.

The Convention deals only with choice of law, and only with securities held with an intermediary and credited to a securities account. It has no effect on the substantive law that will be applied once the choice of law determination has been made. It does not otherwise deal with the relationship between an issuer and its reg-

istered owner or with interests in securities transferred by physical delivery or direct registration on the books of an issuer.

Because of the transactional and regulatory risk incurred by the inability to rapidly determine applicable law in cross-border securities-based commerce, U.S. agencies and financial and securities industries were active proponents of the negotiation, seeking to achieve sufficient certainty in world markets comparable to that already achieved in the U.S. by uniform state law through the Uniform Commercial Code.

The Convention would be self-executing. No implementing legislation would be required. We note that although the Convention would be self-executing, existing U.S. laws, including the Securities and Exchange Act of 1934, already provide to U.S. Government regulatory and supervisory authorities, including the Treasury Department and the Federal Reserve, authority to act in areas covered by the Convention. The U.S. and Switzerland signed the Convention together on July 5, 2006 in order to underscore the important level of support from two major banking and securities countries, and Switzerland has ratified it. U.S. ratification of the Convention is expected to have a positive effect on the willingness of other countries to take similar action.

#### ARTICLE-BY-ARTICLE ANALYSIS

##### CHAPTER 1—DEFINITIONS AND SCOPE

###### *Article 1—Definitions and interpretation*

Article 1 contains definitions and interpretive provisions. “Securities” (subparagraph (a)) are defined as “any shares, bonds or other financial instruments or financial assets (other than cash), or any interest therein”, and “intermediary” (subparagraph (c)) is defined as “a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and its own account and is acting in that capacity” (i.e., often brokers-dealers, banks and other financial institutions).

The key Convention language, which together with Article 2 determines scope of application, is the definition in subparagraph (1) (f) of “securities held with an intermediary” defined as “the rights of an account holder resulting from a credit of securities to a securities account”. Those terms have the same meaning as the Revised Uniform Commercial Code (UCC) Article 8 (uniform investment securities law) concept of a “securities entitlement.” The Convention does not cover transfers or security interests in securities held directly, i.e., which do not enter the intermediated system. The definition of “securities” under the Convention is sufficiently broad to cover various forms of financial assets that laws in any country permit to be carried in a securities account. The exclusion of cash from the definition of “securities” preserves the distinction between securities accounts and ordinary bank deposit accounts.

Article 1(2) clarifies that “disposition of securities held with an intermediary,” as defined in Article 1, subparagraph (h), covers both outright transfers of title and the grant of security interests. The term “disposition” includes a disposition of an entire securities account, as well as some or all of the securities credited to the account. Article 1(3) covers a holding pattern in which an entity that

might otherwise be acting as a central securities depository is acting only as a transfer or registration agent. Article 1(4) clarifies that a central securities depository is treated as an intermediary for purposes of the Convention.

*Article 2—Scope of the Convention and of the applicable law*

Article 2(1) sets forth the issues that are to be governed by the applicable law once that is determined pursuant to Articles 4 and 5 of the Convention. These issues parallel the securities transaction issues currently governed under Articles 8 and 9 of the UCC once the “securities intermediary’s jurisdiction” under UCC has been determined.

Under the Convention, if the applicable law is the law of a particular state in the United States, the relevant law would be Articles 8 and 9 of the UCC dealing with indirect holdings and interests in securities entitlements. That will be so regardless of the location, if determinable, of any security certificates, any securities register, any securities account, any intermediary, any issuer or any office. That result will apply in any transaction subject to the Convention.

The issues identified in Article 2(1)(d), whether a person’s interest in securities held with an intermediary extinguishes or has priority over another person’s interest, covers the issues that, in current U.S. law, are commonly referred to as “bona fide purchase” issues. The Convention would ensure that an investor to whose account securities are credited need look only to the law applicable pursuant to Article 4 or 5 of the Convention to determine whether the investor acquires its interest free from adverse claims. Existing choice of law rules in jurisdictions outside the United States often leave that in considerable doubt.

Article 2(1)(e) ensures that the law applicable pursuant to Article 4 or 5 governs the question of whether the intermediary owes any duties to a person who asserts an adverse claim to position held through that intermediary. This provision is very important to the safe and sound operation of the international and national central securities depositories and securities settlement systems. It ensures that an intermediary can look to the law applicable pursuant to Articles 4 or 5 alone to determine whether it owes any duties to persons asserting adverse claims. UCC Article 8–115 achieves a similar result with respect to intermediary protection against adverse claims. Article 2(1)(e) would ensure predictability for U.S. intermediaries, whenever U.S. law is the governing law, regardless of where the transaction takes place.

Article 2(2) clarifies that the Convention determines the law applicable to all of the issues identified in paragraph 1, irrespective of whether the rights resulting from the credit of the securities to a securities account are determined to be contractual in nature. This is consistent with Article 2(3), which provides that the Convention does not otherwise determine the law applicable to the purely contractual or personal rights and duties arising from the credit of securities to a securities account or of parties to a disposition.

Article 2(3)(c) provides that the Convention does not determine the law applicable to the rights and duties of an issuer of securities or the issuer's registrar or transfer agent.

*Article 3—Internationality*

Article 3 provides that the Convention applies “in all cases involving a choice between the laws of different States.” This broad application provision means the Convention would determine the applicable law regarding issues that arise, among other things, in transactional, credit assessment and other circumstances in addition to any matters in dispute or litigation. The reference in the text to “cases” means in U.S. usage “situations”—it does not mean that the Convention applies only in a judicial proceeding or formal dispute.

The Explanatory Report on the Convention issued by the Hague Conference states that Article 3 would mean that the Convention would generally apply whenever any two of the following factors are in different States:

- (i) the account holder;
- (ii) any of the parties to a disposition of the securities or the securities account, or an interest in either;
- (iii) the relevant intermediary; or
- (iv) the issuer or issuers of the securities.

The foregoing list is not exclusive; particular fact patterns may raise additional factors that make the choice of which countries' law applies necessary to resolve, which then would result in the application of the Convention. By avoiding a fixed rule on timing, Article 3 also means that the Convention's application is not limited temporally to the moment of litigation or other occurrence of a particular transaction, but can apply at any time to a later party in interest when it acquired its rights.

CHAPTER II—APPLICABLE LAW

*Article 4—Primary Rule on Applicable Law*

Article 4 sets forth the primary rule for determining the law applicable to the matters covered by the Convention, a straightforward choice of law rule, wherein the law of a single State applies. The basic Article 4 rule provides that the law applicable to the issues specified in Article 2(1) is “the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law.”

The second clause was included primarily to cover cases where the law of one State is selected for contractual matters under the account agreement, but another law is expressly selected to govern the issues listed in Article 2(1) of the Convention. Under section 8-110(e)(1) and (2) of the UCC, the parties are permitted to select as the “securities intermediary's jurisdiction” the law of a jurisdiction different from the law selected to govern the account agreement itself. The Article 4 rule determining the applicable law turns on the agreement between the customer and the intermediary that maintains the account. If a customer holds securities through an

account with a broker and wishes to use its holdings as collateral for a loan from a lender, the Article 4 test provides that the governing law is determined by the agreement between the customer and the broker concerning the account, not the loan or collateral agreement between the customer and the lender.

While under the UCC, the securities intermediary's jurisdiction can be determined entirely by agreement between the intermediary and the customer, there is an additional requirement under Convention Article 4 that the selection of governing law is effective only if certain minimal conditions are met, including the requirement that the intermediary had, at the time the law is selected, an office in that country that engaged in relevant securities work. Under Article 1(1), "office" is defined to mean a place of business of the intermediary that carries out functions relating to the maintenance of securities accounts. It does not have to have dealt with the particular accounts or securities at issue in order to qualify for this purpose. As an alternative to the activities related to securities account maintenance, a qualifying office can also be established by identification through an account number, bank code, or other specific means of identifying the office as one which maintains securities accounts in the chosen State.

#### *Article 5—Applicable law fall-back rules*

Article 5 of the Convention contains a set of "fall-back" rules that apply when Article 4 does not determine the law applicable to the Article 2(1) issues. This can occur if the parties have not expressly agreed upon a governing law in the account agreement, or if the agreement as to governing law is ineffective for purposes of the Convention by reason of failure to meet the qualifying office test. Article 5 also provides the fall-back rules when the analysis of pre-Convention account agreements and securities accounts under Article 16 fails to produce a result. These fall-back rules, as do their counterparts in the UCC, are designed to provide a rapid means of determining applicable law.

Article 5(1) provides that, if the parties expressly agree in writing that the intermediary entered into the account agreement through a particular office, then the law applicable to all the Article 2(1) issues is to be the law where that office was then located, provided that the office then satisfied the qualified office test in Article 4. In order to simplify the diligence process, Article 5(1) also lists a series of provisions commonly found in account agreements that are not to be considered as implying such an agreement, such as notice provisions and consents to jurisdiction for legal process.

If Article 5(1) is not applicable, Article 5(2) provides that the law under which an intermediary is incorporated or organized will govern the Article 2(1) issues, unless that law is the national law of a country with a federal structure, such as the United States, in which case the law of the place of its business (or its principal place of business if it has more than one place of business) will govern.

If Article 5(2) is not applicable, Article 5(3) provides that the law applicable in the intermediary's place of business will apply or if the intermediary has more than one place of business, its principal place of business.

The choice of law in both of the Article 5(2) or 5(3) fall-back rules is fixed at the time the account agreement is executed or, in the absence of a written agreement, at the time the relevant securities account is opened.

*Article 6—Factors to be disregarded*

Article 6 sets forth factors to be disregarded in a manner similar to the list of factors to be disregarded under UCC Section 8–110(f) in determining the “securities intermediary’s jurisdiction,” including (1) the place where the issuer is incorporated, or otherwise organized or has its statutory seat or registered office, central administration or place or principle place of business, (2) the place where security certificates are located, (3) the place where any securities register is located, or (4) the place where any intermediary other than the relevant intermediary is located. The Convention reflects the view of the United States and others that the “look-through” approach that has in the past been applied even in the United States to choice of law for securities held with intermediaries, and which requires a detailed and time-consuming analysis, is impractical in an age of rapidly moving electronic transactions.

Absent the Convention or laws similar to the UCC, use as collateral of a portfolio of securities issued by companies around the globe would be costly and difficult, even if held through a single account with an intermediary, since a lender could not be assured that appropriate steps had been taken to perfect an interest unless the transaction were examined under (1) the laws of all of the various jurisdictions of the issuers of all of the securities held through the account, (2) the location in which certificates representing the underlying securities might be held, (3) the various places where the account might be deemed to be located, and (4) the various offices that might be deemed to maintain the account.

*Article 7—Protection of rights on change of the applicable law*

Article 7 deals with the situation in which an account agreement is amended so as to change the applicable law. The Convention includes rules to protect a secured party or other transferee against potential adverse effects of such a change, and was included in the Convention primarily for the benefit of countries, unlike the United States, where establishing a security interest does not as readily permit a secured party to eliminate the problem of change in law. In the United States, Article 9 of the UCC generally provides certain grace periods to address these issues.

Article 7 uses the terms “old law” and “new law” as, respectively, the law determined under the Convention before and after the change in the agreement. The most important part of Article 7 is subsection (3), which provides that, except as stated in subsection (4) to Article 7, the new law governs all of the issues governed by the Convention. Exceptions to that general rule are set forth in Article 7(4).

*Article 8—Insolvency*

The Convention is consistent with U.S. insolvency laws. The Convention provides that the applicable law determined under Articles 4 or 5 will govern the Article 2(1) issues with respect to any event

that occurred prior to the opening of an insolvency proceeding. This is consistent with the U.S. Bankruptcy Code. It is also consistent with Section 210 of the Dodd-Frank Wall Street and Consumer Protection Act and with the bank resolution provisions of the Federal Deposit Insurance Act and the resolution provisions applicable to the GSEs and the Federal Home Loan Banks under the Housing and Economic Recovery Act.

Article 8(1) thus provides that the applicable law determined by Articles 4 or 5 governs the Article 2(1) issues with respect to any event that occurred prior to the opening of an insolvency proceeding (a defined term in Article 1), subject to Article 8(2) which provides that the “substantive or procedural” insolvency rules of the insolvency forum State shall govern the ranking of claims, voidable transactions such as preferences and fraudulent conveyances and statutory or judicial stays on realization of collateral. Thus, under the Convention (as in the case under the U.S. Bankruptcy Code), a creditor’s security interest perfected under the law governing the Article 2(1) issues would be subject to the automatic stay and to avoidance rules on preferential transfers.

#### CHAPTER III—GENERAL PROVISIONS

##### *Article 9—General applicability of the Convention*

Under Article 9, the Convention applies in a ratifying State or when the law of such a State is being applied, whether or not the law determined to be applicable under the Convention is that of a State party to the Convention.

##### *Article 10—Exclusion of choice of law rules (renvoi)*

Article 10 provides that the law to be applied by operation of the Convention’s rules is the law in force in a State other than its choice of law rules. This is also consistent with the choice of law rules in Articles 8 and 9 of the UCC.

##### *Article 11—Public policy and internationally mandatory rules*

Article 11 deals with the extent to which a forum court may decline to apply the Convention’s choice of law rules on grounds of public policy of the forum. Subsection (1) provides that a forum state can refuse to apply the substantive law determined under the Convention only if application of that law would be “manifestly contrary to the public policy of the forum.” The Explanatory Report clarifies that this public policy exception applies only in the admittedly extremely rare cases where the relevant foreign rule, as applied to the facts of the case, would produce a result that departs so radically from the forum’s concepts of fundamental justice that its application would be intolerably offensive to the forum’s basic values. Subsection (2) provides that the Convention does not preclude application of any rules of the forum that must be applied irrespective of conflict of law rules.

The more significant feature of Article 11 is found in subparagraph (3), which provides that the exception for rules of public policy and internationally mandatory rules does not apply to rules of the forum relating to perfection and priorities. Those are key factors on which parties must be able to rely for the treaty to be effec-

tive, and were specifically requested by the United States and other countries that wanted the Convention to provide an adequate level of legal certainty for secured transactions.

*Article 12—Determination of the applicable law for Multi-unit States*

Article 12 contains a number of interpretive rules for Multi-unit States. The term Multi-unit State is defined in Article 1 as “a State within which two or more territorial units of that State, or both the State and one or more of its territorial units, have their own rules of law governing the issues specified in Article 2(1).” The United States qualifies as such a “Multi-unit State,” given that there are U.S. federal laws that apply to U.S. government and agency securities, and state laws that apply to state, municipal and private sector corporate securities.

The fundamental interpretive rule of Article 12 provides that, when an account agreement specifies that it is to be governed by the laws of a territorial unit, (1) the laws of that territorial unit are to be the law applicable to the Article 2(1) issues, but (2) that the local office requirement of Article 4 applies to the Multi-unit State as a whole. Thus, if an account agreement specifies that it is governed by the law of a particular U.S. state, that designation will be effective under Article 4 if the intermediary has a qualifying office anywhere within the United States.

Article 12(2)(a) provides that, in applying the Convention, the law in force in a territorial unit of a Multi-unit State (such as the law of a particular U.S. state) will include not only the law of that unit but also national law of that country to the extent applicable in the territorial unit. This would preserve the application of federal law in the context of U.S. government and agency securities. Article 12(2) also preserves choice of law rules applicable pursuant to the law in force in a territorial unit in respect of perfection by filing.

*Article 13—Uniform interpretation*

Article 13, a standard provision in Hague Conventions and other international private law conventions, provides that in interpreting the Convention regard is to be had to its international character and to the need to promote uniformity in its application.

*Article 14—Review of practical operation of the Convention*

Article 14, also a standard provision in Hague Conventions, provides for the Permanent Bureau (Secretariat) of the Hague Conference to convene meetings to review the operation of the Convention.

CHAPTER IV—TRANSITION PROVISIONS

*Article 15—Priority between pre-Convention and post-Convention interests*

Article 15 addresses one situation involving pre-Convention interests, but does not provide a general rule as to prospective effect of the Convention. It provides that the substantive law determined under the Convention rules will determine whether an interest ac-

quired after the Convention enters into force extinguishes or has priority over an interest acquired prior to the Convention entering into force. The effect of this provision is that the law determined applicable under the Convention will apply to disputes on matters covered by the Convention as between other post-Convention interests, and to such disputes between the post-Convention interest and any pre-Convention interests. This is consistent with the 1994 revision of UCC Article 8 and the subsequent revision of UCC Article 9.

*Article 16—Pre-Convention account agreements and securities accounts*

Under the basic rule of Article 4, the parties to an account agreement can include an explicit provision specifying the law that will govern the issues covered by the Convention. The Convention will also apply, however, to transactions where the relevant account agreement was entered into before the Convention came into force. Article 16 provides transitional rules on the extent to which the Convention applies to pre-Convention account agreements and securities accounts. Article 16(1) provides that references in the Convention to account agreements and securities accounts include those entered into or opened before the Convention entered into force. Article 16(2) makes clear that the transitional rules contained in that subparagraph do not apply if the account agreement makes express reference to the Convention.

Article 16(3) sets out a transitional rule designed primarily with U.S. account agreements in mind, that is, agreements that were entered into in contemplation of the choice of law rules contained in UCC Articles 8 and 9. Article 16(3) provides that if the agreement contains a provision that would have the effect under its governing law—e.g., under U.S. law as set out in the UCC—that the issues covered by the Convention are governed by a particular law, then the agreement shall be treated as if it referred to the Hague Convention and selected that law. For example, if parties operating under Articles 8 and 9 of the UCC include in their account agreement a provision specifying that “the securities intermediary’s jurisdiction” is a particular U.S. state, the fact that the Hague Convention uses a different formulation could, absent this provision, create doubt whether that pre-Convention agreement has the expected effect under the Convention. Article 16(3) is designed to remove doubt on this point.

Article 16(4) sets out a transitional rule intended primarily for non-U.S. agreements. Under Article 16(4), if the parties to an account agreement have agreed that the securities account is maintained in a particular State, then the law of that State shall be the law applicable to the Article 2(1) issues, provided that the relevant intermediary satisfied the qualified office test in Article 4(1) at the time it entered into the agreement. Unlike the rules in Articles 4, 5 and 16(3), the agreement as to the account location in pre-Convention agreements may be express or implied from the circumstances.

Article 16 also provides that a State may, upon ratification of the Convention, make various declarations limiting the effect of Article 16. We do not recommend that the United States make such dec-

larations, so that the applicable transitional rules would be those set out in Article 16(2) or 16(3).

#### CHAPTER V—FINAL PROVISIONS

##### *Article 17—Signature, ratification, or accession*

This article, standard in Hague Conventions, provides the technical rules describing the way in which a State can become bound by the Convention, thus becoming a “Contracting State”.

##### *Article 18—Regional Economic Integration Organizations*

Article 18 deals with the way in which a Regional Economic Integration Organization (such as the European Union) can become bound by the Convention to the extent such Organization has competence over matters governed by the Convention. The United States supports the possible assumption by the European Union of the obligations of a Contracting State in view of the shared competence in securities law and regulation between the European Union and its member states.

##### *Article 19—Entry into force*

This article provides that the Convention will enter into force three months after three States have become Contracting States, and provides for the date of entry into force for subsequent ratifying States.

##### *Article 20—Multi-unit States*

Article 20 permits Multi-unit States to apply the Convention by way of declaration only to certain of its territorial units. We do not recommend that the United States make such a declaration in view of the need of securities markets to apply common rules to transactions throughout the U.S.

##### *Article 21—Reservations*

Article 21 states that reservations to this Convention are not permitted.

##### *Article 22—Declarations*

Article 22 provides the technical rules governing the manner in which the various declarations permitted to be made under the terms of the Convention become effective, modified or withdrawn. No declarations are recommended to be made by the United States.

##### *Article 23—Withdrawal*

Article 23 permits a Contracting State to withdraw from the Convention by notification in writing to the Depositary, which will become effective twelve months after the date on which the notification is received by the Depositary.

**CONVENTION ON THE LAW APPLICABLE TO CERTAIN RIGHTS IN  
RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY**

The States signatory to the present Convention,

Aware of the urgent practical need in a large and growing global financial market to provide legal certainty and predictability as to the law applicable to securities that are now commonly held through clearing and settlement systems or other intermediaries,

Conscious of the importance of reducing legal risk, systemic risk and associated costs in relation to cross-border transactions involving securities held with an intermediary so as to facilitate the international flow of capital and access to capital markets,

Desiring to establish common provisions on the law applicable to securities held with an intermediary beneficial to States at all levels of economic development,

Recognising that the "Place of the Relevant Intermediary Approach" (or PRIMA) as determined by account agreements with intermediaries provides the necessary legal certainty and predictability,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

**CHAPTER I**  
**DEFINITIONS AND SCOPE OF APPLICATION**

*Article 1*

*Definitions and interpretation*

1. In this Convention –
  - a) "securities" means any shares, bonds or other financial instruments or financial assets (other than cash), or any interest therein;
  - b) "securities account" means an account maintained by an intermediary to which securities may be credited or debited;
  - c) "intermediary" means a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity;
  - d) "account holder" means a person in whose name an intermediary maintains a securities account;
  - e) "account agreement" means, in relation to a securities account, the agreement with the relevant intermediary governing that securities account;
  - f) "securities held with an intermediary" means the rights of an account holder resulting from a credit of securities to a securities account;
  - g) "relevant intermediary" means the intermediary that maintains the securities account for the account holder;
  - h) "disposition" means any transfer of title whether outright or by way of security and any grant of a security interest, whether possessory or non-possessory;
  - i) "perfection" means completion of any steps necessary to render a disposition effective against persons who are not parties to that disposition;
  - j) "office" means, in relation to an intermediary, a place of business at which any of the activities of the intermediary are carried on, excluding a place of business which is intended to be merely temporary and a place of business of any person other than the intermediary;

- k) "insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the debtor are subject to control or supervision by a court or other competent authority for the purpose of reorganisation or liquidation;
- l) "insolvency administrator" means a person authorised to administer a reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law;
- m) "Multi-unit State" means a State within which two or more territorial units of that State, or both the State and one or more of its territorial units, have their own rules of law in respect of any of the issues specified in Article 2(1);
- n) "writing" and "written" mean a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion.

2. References in this Convention to a disposition of securities held with an intermediary include –

- a) a disposition of a securities account;
- b) a disposition in favour of the account holder's intermediary;
- c) a lien by operation of law in favour of the account holder's intermediary in respect of any claim arising in connection with the maintenance and operation of a securities account.

3. A person shall not be considered an intermediary for the purposes of this Convention merely because –

- a) it acts as registrar or transfer agent for an issuer of securities; or
- b) it records in its own books details of securities credited to securities accounts maintained by an intermediary in the names of other persons for whom it acts as manager or agent or otherwise in a purely administrative capacity.

4. Subject to paragraph (5), a person shall be regarded as an intermediary for the purposes of this Convention in relation to securities which are credited to securities accounts which it maintains in the capacity of a central securities depository or which are otherwise transferable by book entry across securities accounts which it maintains.

5. In relation to securities which are credited to securities accounts maintained by a person in the capacity of operator of a system for the holding and transfer of such securities on records of the issuer or other records which constitute the primary record of entitlement to them as against the issuer, the Contracting State under whose law those securities are constituted may, at any time, make a declaration that the person which operates that system shall not be an intermediary for the purposes of this Convention.

#### *Article 2*

##### *Scope of the Convention and of the applicable law*

1. This Convention determines the law applicable to the following issues in respect of securities held with an intermediary –

- a) the legal nature and effects against the intermediary and third parties of the rights resulting from a credit of securities to a securities account;
- b) the legal nature and effects against the intermediary and third parties of a disposition of securities held with an intermediary;
- c) the requirements, if any, for perfection of a disposition of securities held with an intermediary;
- d) whether a person's interest in securities held with an intermediary extinguishes or has priority over another person's interest;
- e) the duties, if any, of an intermediary to a person other than the account holder who asserts in competition with the account holder or another person an interest in securities held with that intermediary;
- f) the requirements, if any, for the realisation of an interest in securities held with an intermediary;

- g) whether a disposition of securities held with an intermediary extends to entitlements to dividends, income, or other distributions, or to redemption, sale or other proceeds.

2. This Convention determines the law applicable to the issues specified in paragraph (1) in relation to a disposition of or an interest in securities held with an intermediary even if the rights resulting from the credit of those securities to a securities account are determined in accordance with paragraph (1)(a) to be contractual in nature.

3. Subject to paragraph (2), this Convention does not determine the law applicable to –

- a) the rights and duties arising from the credit of securities to a securities account to the extent that such rights or duties are purely contractual or otherwise purely personal;
- b) the contractual or other personal rights and duties of parties to a disposition of securities held with an intermediary; or
- c) the rights and duties of an issuer of securities or of an issuer's registrar or transfer agent, whether in relation to the holder of the securities or any other person.

*Article 3*

*Internationality*

This Convention applies in all cases involving a choice between the laws of different States.

**CHAPTER II  
APPLICABLE LAW**

*Article 4*

*Primary rule*

1. The law applicable to all the issues specified in Article 2(1) is the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement

expressly provides that another law is applicable to all such issues, that other law. The law designated in accordance with this provision applies only if the relevant intermediary has, at the time of the agreement, an office in that State, which –

- a) alone or together with other offices of the relevant intermediary or with other persons acting for the relevant intermediary in that or another State –
  - i) effects or monitors entries to securities accounts;
  - ii) administers payments or corporate actions relating to securities held with the intermediary; or
  - iii) is otherwise engaged in a business or other regular activity of maintaining securities accounts; or
- b) is identified by an account number, bank code, or other specific means of identification as maintaining securities accounts in that State.

2. For the purposes of paragraph (1)(a), an office is not engaged in a business or other regular activity of maintaining securities accounts –

- a) merely because it is a place where the technology supporting the bookkeeping or data processing for securities accounts is located;
- b) merely because it is a place where call centres for communication with account holders are located or operated;
- c) merely because it is a place where the mailing relating to securities accounts is organised or files or archives are located; or
- d) if it engages solely in representational functions or administrative functions, other than those related to the opening or maintenance of securities accounts, and does not have authority to make any binding decision to enter into any account agreement.

3. In relation to a disposition by an account holder of securities held with a particular intermediary in favour of that intermediary, whether or not that intermediary maintains a securities account on its own records for which it is the account holder, for the purposes of this Convention –

- a) that intermediary is the relevant intermediary;
- b) the account agreement between the account holder and that intermediary is the relevant account agreement;
- c) the securities account for the purposes of Article 5(2) and (3) is the securities account to which the securities are credited immediately before the disposition.

*Article 5*

*Fall-back rules*

1. If the applicable law is not determined under Article 4, but it is expressly and unambiguously stated in a written account agreement that the relevant intermediary entered into the account agreement through a particular office, the law applicable to all the issues specified in Article 2(1) is the law in force in the State, or the territorial unit of a Multi-unit State, in which that office was then located, provided that such office then satisfied the condition specified in the second sentence of Article 4(1). In determining whether an account agreement expressly and unambiguously states that the relevant intermediary entered into the account agreement through a particular office, none of the following shall be considered –

- a) a provision that notices or other documents shall or may be served on the relevant intermediary at that office;
- b) a provision that legal proceedings shall or may be instituted against the relevant intermediary in a particular State or in a particular territorial unit of a Multi-unit State;
- c) a provision that any statement or other document shall or may be provided by the relevant intermediary from that office;
- d) a provision that any service shall or may be provided by the relevant intermediary from that office;
- e) a provision that any operation or function shall or may be carried on or performed by the relevant intermediary at that office.

2. If the applicable law is not determined under paragraph (1), that law is the law in force in the State, or the territorial unit of a Multi-unit State, under whose law the relevant intermediary is incorporated or otherwise organised at the

time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened; if, however, the relevant intermediary is incorporated or otherwise organised under the law of a Multi-unit State and not that of one of its territorial units, the applicable law is the law in force in the territorial unit of that Multi-unit State in which the relevant intermediary has its place of business, or, if the relevant intermediary has more than one place of business, its principal place of business, at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened.

3. If the applicable law is not determined under either paragraph (1) or paragraph (2), that law is the law in force in the State, or the territorial unit of a Multi-unit State, in which the relevant intermediary has its place of business, or, if the relevant intermediary has more than one place of business, its principal place of business, at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened.

#### *Article 6*

##### *Factors to be disregarded*

In determining the applicable law in accordance with this Convention, no account shall be taken of the following factors –

- a) the place where the issuer of the securities is incorporated or otherwise organised or has its statutory seat or registered office, central administration or place or principal place of business;
- b) the places where certificates representing or evidencing securities are located;
- c) the place where a register of holders of securities maintained by or on behalf of the issuer of the securities is located; or
- d) the place where any intermediary other than the relevant intermediary is located.

*Article 7*

*Protection of rights on change of the applicable law*

1. This Article applies if an account agreement is amended so as to change the applicable law under this Convention.
2. In this Article –
  - a) “the new law” means the law applicable under this Convention after the change;
  - b) “the old law” means the law applicable under this Convention before the change.
3. Subject to paragraph (4), the new law governs all the issues specified in Article 2(1).
4. Except with respect to a person who has consented to a change of law, the old law continues to govern –
  - a) the existence of an interest in securities held with an intermediary arising before the change of law and the perfection of a disposition of those securities made before the change of law;
  - b) with respect to an interest in securities held with an intermediary arising before the change of law –
    - i) the legal nature and effects of such an interest against the relevant intermediary and any party to a disposition of those securities made before the change of law;
    - ii) the legal nature and effects of such an interest against a person who after the change of law attaches the securities;
    - iii) the determination of all the issues specified in Article 2(1) with respect to an insolvency administrator in an insolvency proceeding opened after the change of law;
  - c) priority as between parties whose interests arose before the change of law.

5. Paragraph (4)(c) does not preclude the application of the new law to the priority of an interest that arose under the old law but is perfected under the new law.

*Article 8*  
*Insolvency*

1. Notwithstanding the opening of an insolvency proceeding, the law applicable under this Convention governs all the issues specified in Article 2(1) with respect to any event that has occurred before the opening of that insolvency proceeding.

2. Nothing in this Convention affects the application of any substantive or procedural insolvency rules, including any rules relating to –

- a) the ranking of categories of claim or the avoidance of a disposition as a preference or a transfer in fraud of creditors; or
- b) the enforcement of rights after the opening of an insolvency proceeding.

**CHAPTER III**  
**GENERAL PROVISIONS**

*Article 9*  
*General applicability of the Convention*

This Convention applies whether or not the applicable law is that of a Contracting State.

*Article 10*  
*Exclusion of choice of law rules (renvoi)*

In this Convention, the term "law" means the law in force in a State other than its choice of law rules.

*Article 11*

*Public policy and internationally mandatory rules*

1. The application of the law determined under this Convention may be refused only if the effects of its application would be manifestly contrary to the public policy of the forum.

2. This Convention does not prevent the application of those provisions of the law of the forum which, irrespective of rules of conflict of laws, must be applied even to international situations.

3. This Article does not permit the application of provisions of the law of the forum imposing requirements with respect to perfection or relating to priorities between competing interests, unless the law of the forum is the applicable law under this Convention.

*Article 12*

*Determination of the applicable law for Multi-unit States*

1. If the account holder and the relevant intermediary have agreed on the law of a specified territorial unit of a Multi-unit State –

- a) the references to "State" in the first sentence of Article 4(1) are to that territorial unit;
- b) the references to "that State" in the second sentence of Article 4(1) are to the Multi-unit State itself.

2. In applying this Convention –

- a) the law in force in a territorial unit of a Multi-unit State includes both the law of that unit and, to the extent applicable in that unit, the law of the Multi-unit State itself;
- b) if the law in force in a territorial unit of a Multi-unit State designates the law of another territorial unit of that State to govern perfection by public filing, recording or registration, the law of that other territorial unit governs that issue.

3. A Multi-unit State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that if, under Article 5, the applicable law is that of the Multi-unit State or one of its territorial units, the internal choice of law rules in force in that Multi-unit State shall determine whether the substantive rules of law of that Multi-unit State or of a particular territorial unit of that Multi-unit State shall apply. A Multi-unit State that makes such a declaration shall communicate information concerning the content of those internal choice of law rules to the Permanent Bureau of the Hague Conference on Private International Law.

4. A Multi-unit State may, at any time, make a declaration that if, under Article 4, the applicable law is that of one of its territorial units, the law of that territorial unit applies only if the relevant intermediary has an office within that territorial unit which satisfies the condition specified in the second sentence of Article 4(1). Such a declaration shall have no effect on dispositions made before that declaration becomes effective.

*Article 13*

*Uniform interpretation*

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

*Article 14*

*Review of practical operation of the Convention*

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission to review the practical operation of this Convention and to consider whether any amendments to this Convention are desirable.

**CHAPTER IV  
TRANSITION PROVISIONS**

*Article 15*

*Priority between pre-Convention and post-Convention interests*

In a Contracting State, the law applicable under this Convention determines whether a person's interest in securities held with an intermediary acquired after this Convention entered into force for that State extinguishes or has priority over another person's interest acquired before this Convention entered into force for that State.

*Article 16*

*Pre-Convention account agreements and securities accounts*

1. References in this Convention to an account agreement include an account agreement entered into before this Convention entered into force in accordance with Article 19(1). References in this Convention to a securities account include a securities account opened before this Convention entered into force in accordance with Article 19(1).

2. Unless an account agreement contains an express reference to this Convention, the courts of a Contracting State shall apply paragraphs (3) and (4) in applying Article 4(1) with respect to account agreements entered into before the entry into force of this Convention for that State in accordance with Article 19. A Contracting State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that its courts shall not apply those paragraphs with respect to account agreements entered into after the entry into force of this Convention in accordance with Article 19(1) but before the entry into force of this Convention for that State in accordance with Article 19(2). If the Contracting State is a Multi-unit State, it may make such a declaration with respect to any of its territorial units.

3. Any express terms of an account agreement which would have the effect, under the rules of the State whose law governs that agreement, that the law in force in a particular State, or a territorial unit of a particular Multi-unit State,

applies to any of the issues specified in Article 2(1), shall have the effect that such law governs all the issues specified in Article 2(1), provided that the relevant intermediary had, at the time the agreement was entered into, an office in that State which satisfied the condition specified in the second sentence of Article 4(1). A Contracting State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that its courts shall not apply this paragraph with respect to an account agreement described in this paragraph in which the parties have expressly agreed that the securities account is maintained in a different State. If the Contracting State is a Multi-unit State, it may make such a declaration with respect to any of its territorial units.

4. If the parties to an account agreement, other than an agreement to which paragraph (3) applies, have agreed that the securities account is maintained in a particular State, or a territorial unit of a particular Multi-unit State, the law in force in that State or territorial unit is the law applicable to all the issues specified in Article 2(1), provided that the relevant intermediary had, at the time the agreement was entered into, an office in that State which satisfied the condition specified in the second sentence of Article 4(1). Such an agreement may be express or implied from the terms of the contract considered as a whole or from the surrounding circumstances.

## CHAPTER V FINAL CLAUSES

### *Article 17*

#### *Signature, ratification, acceptance, approval or accession*

1. This Convention shall be open for signature by all States.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. Any State which does not sign this Convention may accede to it at any time.

4. The instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Depositary of this Convention.

*Article 18*

*Regional Economic Integration Organisations*

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the Depositary in writing specifying the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary in writing of any changes to the distribution of competence specified in the notice in accordance with this paragraph and any new transfer of competence.

3. Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a Regional Economic Integration Organisation where the context so requires.

*Article 19*

*Entry into force*

1. This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Article 17.

2. Thereafter this Convention shall enter into force –
  - a) for each State or Regional Economic Integration Organisation referred to in Article 18 subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
  - b) for a territorial unit to which this Convention has been extended in accordance with Article 20(1), on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

*Article 20*  
*Multi-unit States*

1. A Multi-unit State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that this Convention shall extend to all its territorial units or only to one or more of them.
2. Any such declaration shall state expressly the territorial units to which this Convention applies.
3. If a State makes no declaration under paragraph (1), this Convention extends to all territorial units of that State.

*Article 21*  
*Reservations*

No reservation to this Convention shall be permitted.

*Article 22*  
*Declarations*

For the purposes of Articles 1(5), 12(3) and (4), 16(2) and (3) and 20 –

- a) any declaration shall be notified in writing to the Depositary;
- b) any Contracting State may modify a declaration by submitting a new declaration at any time;
- c) any Contracting State may withdraw a declaration at any time;
- d) any declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned; any declaration made at a subsequent time and any new declaration shall take effect on the first day of the month following the expiration of three months after the date on which the Depositary made the notification in accordance with Article 24;
- e) a withdrawal of a declaration shall take effect on the first day of the month following the expiration of six months after the date on which the Depositary made the notification in accordance with Article 24.

*Article 23*  
*Denunciation*

1. A Contracting State may denounce this Convention by a notification in writing to the Depositary. The denunciation may be limited to certain territorial units of a Multi-unit State to which this Convention applies.

2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the Depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the Depositary.

*Article 24*  
*Notifications by the Depositary*

The Depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration

Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 17 and 18, of the following –

- a) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles 17 and 18;
- b) the date on which this Convention enters into force in accordance with Article 19;
- c) the declarations and withdrawals of declarations referred to in Article 22;
- d) the notifications referred to in Article 18(2);
- e) the denunciations referred to in Article 23.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed this Convention.

DONE at The Hague, on the 5<sup>th</sup> day of July 2006, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Nineteenth Session and to each State which participated in that Session.

Certified true copy of the original

*for*  
The Director of Treaties  
of the Ministry of Foreign Affairs  
of the Kingdom of the Netherlands

*E. de Ruyter*

Copie certifiée conforme à l'original

*pour*  
Le Directeur des Traités  
du Ministère des Affaires Etrangères  
du Royaume des Pays-Bas

*E. de Ruyter*

