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COMMENTS BY GOVERNMENTS AND INTERNATIONAL ORGANISATIONS

(Comments by the Government of the United States)

Securities Clearing or Settlement Systems

As is appropriate and necessary for the safe functioning of modern securities markets, the draft Convention recognizes and confers validity upon the rules of securities clearing or settlement systems in certain circumstances. For example, Article 8 of the draft Convention provides that the rules or agreements of securities clearing or settlement systems directed to matters of the finality of dispositions will be given effect notwithstanding other provisions of the Convention. Article 13 provides for the recognition of clearing or settlement system rules or agreements with respect to the effectiveness of credits, debits, instructions, or payments in the event of the commencement of an insolvency proceeding in respect of the operator of or any participant in such a system. These articles deal with matters that are critical to ensuring the systemic stability of clearing and settlement. We believe that further consideration needs to be given to the scope of the securities clearing or settlement rules that are recognized under the Convention.

In light of the Convention's recognition of undertakings by entities that are in many cases private rather than governmental but that perform critical clearing or settlement functions important to systemic stability in the financial markets, the standard for qualification as such must be drawn with great care. In our system, Article 8 of the Uniform Commercial Code establishes an analogous system of recognition for the rules of "clearing corporations," but defines this term carefully to include the central bank -- *i.e.* the Federal Reserve Banks that operate FEDWIRE® -- and parties subject to extensive regulation under our federal laws. Another important issue to be resolved is whether the rules of a clearing and settlement system can affect the rights of parties that are not participants of that system. Clearly, to some extent that must be possible -- for reasons of finality, loss-sharing and the like.

It is more difficult to write a definition that will serve a transnational, rather than simply domestic, function, however. In the U.S., our definition of "clearing corporations" clearly identifies a limited number of entities that are either public or that are heavily regulated. It may not be possible for a definition in an international convention to accomplish the same result. No matter how well the language is crafted, a definition, on its own, may not sufficiently identify the limited number of regulated entities whose rules contracting states would expect to become entitled to recognition under the Convention.

Accordingly, it may be appropriate to consider whether contracting states should play a gatekeeper role in providing certainty as to which qualifying systems are covered by the Convention through a declaration mechanism that may well need to be mandatory. This declaration mechanism could include certain options for identifying qualifying clearing or settlement systems. Thus, the Convention could provide that contracting states either publish a list of the entities within their jurisdictions that have met the applicable requirements of the Convention, or identify the categories of systems that should be qualified as a clearing or settlement system for purposes of the Convention. This would require contracting states to monitor and take responsibility for the entities that would receive this special recognition. Additionally, it may be appropriate to consider the extent to which the system's rules are publicly accessible and available as a condition to any declaration that the rules of a system should gain recognition under the Convention.

Notwithstanding the foregoing, the Convention would still require a carefully crafted definition that includes the qualifying characteristics, any one of which would be sufficient, to constitute a clearing and settlement system. This definition would serve as the baseline standard against which contracting states would judge qualification for "securities clearing or settlement system" status. The definition should clearly include central banks that operate a securities clearing or settlement system. The language of the definition should not, however, be so broad as to cover all intermediaries, such as custodian banks.

The U.S. delegation does not, at this point, have a ready drafting solution and looks forward to discussing and working with others on this matter at the Rome meetings.