POLICY STATEMENT TO REGULATION 81-102 RESPECTING INVESTMENT FUNDS

PART 1 PURPOSE

1.1. Purpose

The purpose of this Policy is to state the views of the Canadian securities regulatory authorities on various matters relating to *Regulation 81-102 respecting Investment Funds* (chapter V-1.1, r. 39) (the "Regulation"), including

(a) the interpretation of various terms used in the Regulation;

(b) recommendations concerning the operating procedures that the Canadian securities regulatory authorities suggest that investment funds subject to the Regulation, or persons performing services for the investment funds, adopt to ensure compliance with the Regulation;

(c) discussions of circumstances in which the Canadian securities regulatory authorities have granted relief from particular requirements of National Policy Statement No. 39 ("NP39"), the predecessor to the Regulation, and the conditions that those authorities imposed in granting that relief; and

(d) recommendations concerning applications for approvals required under, or relief from, provisions of the Regulation.

PART 2 COMMENTS ON DEFINITIONS CONTAINED IN THE REGULATION

2.1. "asset allocation service"

The definition of "asset allocation service" in the Regulation includes only specific administrative services in which an investment in mutual funds subject to the Regulation is an integral part. The Canadian securities regulatory authorities do not view this definition as including general investment services such as discretionary portfolio management that may, but are not required to, invest in mutual funds subject to this Regulation.

2.2. "cash equivalent"

The definition of "cash equivalent" in the Regulation includes certain evidences of indebtedness of Canadian financial institutions. This includes banker's acceptances.

2.3. "clearing corporation"

The definition of "clearing corporation" in the Regulation includes both incorporated and unincorporated organizations, which may, but need not, be part of an options or futures exchange.

2.4. "debt-like security"

Paragraph (b) of the definition of "debt-like security" in the Regulation provides that the value of the component of an instrument that is not linked to the underlying interest of the instrument must account for less than 80% of the aggregate value of the instrument in order that the instrument be considered a debt-like security. The Canadian securities regulatory authorities have structured this provision in this manner to emphasize what they consider the most appropriate manner to value these instruments. That is, one should first value the component of the instrument that is not linked to the underlying interest, as this is often much easier to value than the component that is linked to the underlying interest. The Canadian securities regulatory authorities recognize the valuation difficulties that can arise if one attempts to value, by itself, the component of an instrument that is linked to the underlying interest.

2.4.1. "designated rating" and "designated rating organization"

The Canadian securities regulatory authorities recognize there are existing contracts that use the predecessor terms "approved credit rating", "approved rating" and "approved credit rating

organization". The content of the new definitions "designated rating" and "designated rating organization" is substantially the same as the content of their respective predecessor terms, only the terminology has changed. Therefore, it is reasonable to interpret the predecessor terms as having the same meaning as the definition of "designated rating" and "designated rating organization" in the Regulation, as applicable.

2.5. "fundamental investment objectives"

(1) The definition of "fundamental investment objectives" is relevant in connection with paragraph 5.1(1)(c) of the Regulation, which requires that the approval of securityholders of an investment fund be obtained before any change is made to the fundamental investment objectives of the investment fund. The fundamental investment objectives of an investment fund are required to be disclosed in a prospectus under Part B of Form 81-101F1 *Contents of Simplified Prospectus* or under the requirements of Form 41-101F2 *Information Required in an Investment Fund Prospectus*. The definition of "fundamental investment objectives" contained in the Regulation uses the language contained in the disclosure requirements of Form 81-101F1 and Form 41-101F2, and the definition should be read to include the matters that would have to be disclosed under the Item of the applicable form concerning "Fundamental Investment Objectives". Accordingly, any change to the investment fund requiring a change to that disclosure would trigger the requirement for securityholder approval under paragraph 5.1(1)(c) of the Regulation.

(2) Form 41-101F2 and Part B of Form 81-101F1 set out, among other things, the obligation that an investment fund disclose in a prospectus both its fundamental investment objectives and its investment strategies. The matters required to be disclosed under the Item of the applicable form relating to "Investment Strategies" are not "fundamental investment objectives" under the Regulation.

(3) Generally speaking, the "fundamental investment objectives" of an investment fund are those attributes that define its fundamental nature. For example, investment funds that are guaranteed or insured, or that pursue a highly specific investment approach such as index funds or derivative funds, may be defined by those attributes. Often the manner in which an investment fund is marketed will provide evidence as to its fundamental nature; an investment fund whose advertisements emphasize, for instance, that investments are guaranteed likely will have the existence of a guarantee as a "fundamental investment objective".

(4) *(paragraph repealed).*

(5) One component of the definition of "fundamental investment objectives" is that those objectives distinguish an investment fund from other investment funds. This component does not imply that the fundamental investment objectives for each investment fund must be unique. Two or more investment funds can have identical fundamental investment objectives.

2.6. "guaranteed mortgage"

A mortgage insured under the *National Housing Act* (Canada) or similar provincial statutes is a "guaranteed mortgage" for the purposes of the Regulation.

2.7. "hedging"

(1) One component of the definition of "hedging" is the requirement that hedging transactions result in a "high degree of negative correlation between changes in the value of the investment or position, or group of investments or positions, being hedged and changes in the value of the instrument or instruments with which the investment or position is hedged". The Canadian securities regulatory authorities are of the view that there need not be complete congruence between the hedging instrument or instruments and the position or positions being hedged if it is reasonable to regard the one as a hedging instrument for the other, taking into account the closeness of the relationship between fluctuations in the price of the two and the availability and pricing of hedging instruments.

(2) The definition of "hedging" includes a reference to the "maintaining" of the position resulting from a hedging transaction or series of hedging transactions. The inclusion of this component in the definition requires an investment fund to ensure that a transaction continues to offset specific risks of the investment fund in order that the transaction be considered a "hedging"

transaction under the Regulation; if the "hedging" position ceases to provide an offset to an existing risk of an investment fund, then that position is no longer a hedging position under the Regulation, and can be held by the investment fund only in compliance with the specified derivatives rules of the Regulation that apply to non-hedging positions. The component of the definition that requires the "maintaining" of a hedge position does not mean that an investment fund is locked into a specified derivatives position; it simply means that the specified derivatives position must continue to satisfy the definition of "hedging" in order to receive hedging treatment under the Regulation.

(3) Paragraph (b) of the definition of "hedging" has been included to ensure that currency cross hedging continues to be permitted under the Regulation. Currency cross hedging is the substitution of currency risk associated with one currency for currency risk associated with another currency, if neither currency is a currency in which the investment fund determines its net asset value per security and the aggregate amount of currency risk to which the investment fund is exposed is not increased by the substitution. Currency cross hedging is to be distinguished from currency hedging, as that term is ordinarily used. Ordinary currency hedging, in the context of investment funds, would involve replacing the investment fund's exposure to a "non-net asset value" currency with exposure to a currency in which the investment fund calculates its net asset value per security. That type of currency hedging is subject to paragraph (a) of the definition of "hedging".

2.8. "illiquid asset"

A portfolio asset of a mutual fund that meets the definition of "illiquid asset" will be an illiquid asset even if a person, including the manager or the portfolio adviser of a mutual fund or a partner, director or officer of the manager or portfolio adviser of a mutual fund or any of their respective associates or affiliates, has agreed to purchase the asset from the mutual fund. That type of agreement does not affect the words of the definition, which defines "illiquid asset" in terms of whether that asset cannot be readily disposed of through market facilities on which public quotations in common use are widely available.

2.9. "manager"

The definition of "manager" under the Regulation only applies to the person that actually directs the business of the investment fund, and does not apply to others, such as trustees, that do not actually carry out this function. Also, a "manager" would not include a person whose duties are limited to acting as a service provider to the investment fund, such as a portfolio adviser.

2.10. "option"

The definition of "option" includes warrants, whether or not the warrants are listed on a stock exchange or quoted on an over-the-counter market.

2.11. "performance data"

The term "performance data" includes data on an aspect of the investment performance of an investment fund, an asset allocation service, security, index or benchmark. This could include data concerning return, volatility or yield. The Canadian securities regulatory authorities note that the term "performance data" would not include a rating prepared by an independent organization reflecting the credit quality, rather than the performance, of, for instance, an investment fund's portfolio or the participating funds of an asset allocation service.

2.12. "public medium"

An "advertisement" is defined in the Regulation to mean a sales communication that is published or designed for use on or through a "public medium". The Canadian securities regulatory authorities interpret the term "public medium" to include print, television, radio, tape recordings, video tapes, computer disks, the Internet, displays, signs, billboards, motion pictures and telephones.

2.13. "purchase"

(1) The definition of a "purchase", in connection with the acquisition of a portfolio asset by an investment fund, means an acquisition that is the result of a decision made and action taken by the investment fund.

(2) The Canadian securities regulatory authorities consider that the following types of transactions would generally be purchases of a security by an investment fund under the definition:

1. The investment fund effects an ordinary purchase of the security, or, at its option, exercises, converts or exchanges a convertible security held by it.

2. The investment fund receives the security as consideration for a security tendered by the investment fund into a take-over bid.

3. The investment fund receives the security as the result of a merger, amalgamation, plan of arrangement or other reorganization for which the investment fund voted in favour.

4. The investment fund receives the security as a result of the automatic exercise of an exchange or conversion right attached to another security held by the investment fund in accordance with the terms of that other security or the exercise of that exchange or conversion right at the option of the investment fund.

5. (a) The investment fund has become legally entitled to dispose of the collateral held by it under a securities loan or repurchase agreement and to apply proceeds of realization to satisfy the obligations of the counterparty of the investment fund under the transaction, and

(b) sufficient time has passed after the event described in paragraph (a) to enable the investment fund to sell the collateral in a manner that maintains an orderly market and that permits the preservation of the best value for the investment fund.

(3) The Canadian securities regulatory authorities consider that the following types of transactions would generally not be purchases of a security by an investment fund under the definition:

1. The investment fund receives the security as a result of a compulsory acquisition by an issuer following completion of a successful take-over bid.

2. The investment fund receives the security as a result of a merger, amalgamation, plan of arrangement or other reorganization that the investment fund voted against.

3. The investment fund receives the security as the result of the exercise of an exchange or conversion right attached to a security held by the investment fund made at the discretion of the issuer of the security held by the investment fund.

4. The investment fund declines to tender into an issuer bid, even though its decision is likely to result in an increase in its percentage holdings of a security beyond what the investment fund would be permitted under the Regulation to purchase.

2.14. "restricted security"

A special warrant is a form of restricted security and, accordingly, the provisions of the Regulation applying to restricted securities apply to special warrants.

2.15. "sales communication"

(1) The term "sales communication" includes a communication by an investment fund to (i) a securityholder of the investment fund and (ii) a person that is not a securityholder if the purpose of the communication is to induce the purchase of securities of the investment fund. A sales communication therefore does not include a communication solely between an investment fund or its promoter, manager, principal distributor or portfolio adviser and a participating dealer, or between the principal distributor or a participating dealer and its registered salespersons, that is indicated to be internal or confidential and that is not designed to be passed on by any principal distributor, participating dealer or registered salesperson to any securityholder of, or potential investor in, the investment fund. In the view of the Canadian securities regulatory authorities, if a communication of that type were so passed on by the principal distributor, participating dealer or registered salesperson, the communication would be a sales communication made by the party passing on the communication if the recipient of the communication were a securityholder of the

investment fund or if the intent of the principal distributor, participating dealer or registered salesperson in passing on the communication were to induce the purchase of securities of the investment fund.

(2) The term "sales communication" is defined in the Regulation such that the communication need not be in writing and includes any oral communication. The Canadian securities regulatory authorities are of the view that the requirements in the Regulation pertaining to sales communications would apply to statements made at an investor conference to securityholders or to others to induce the purchase of securities of the investment fund.

(3) The Canadian securities regulatory authorities are of the view that image advertisements that are intended to promote a corporate identity or the expertise of an investment fund manager fall outside the definition of "sales communication". However, an advertisement or other communication that refers to a specific investment fund or funds or promotes any particular investment portfolio or strategy would be a sales communication and therefore be required to include warnings of the type now described in section 15.4 of the Regulation.

(4) In the case of an investment fund, paragraph (b) of the definition of a "sales communication" in the Regulation excludes sales communications contained in certain documents that the investment fund is required to prepare, including audited or unaudited financial statements, statements of account and confirmations of trade. The Canadian securities regulatory authorities are of the view that if information is contained in these types of documents that is not required to be included by securities legislation, any such additional material is not excluded by paragraph (b) of the definition of sales communication and may, therefore, constitute a sales communication if the additional material otherwise falls within the definition of that term in the Regulation.

2.16. "specified derivative"

(1) The term "specified derivative" is defined to mean an instrument, agreement or security, the market price, value or payment obligations of which are derived from, referenced to or based on an underlying interest. Certain instruments, agreements or securities that would otherwise be specified derivatives within the meaning of the definition are then excluded from the definition for purposes of the Regulation.

(2) Because of the broad ambit of the lead-in language to the definition, it is impossible to list every instrument, agreement or security that might be caught by that lead-in language but that is not considered to be a derivative in any normal commercial sense of that term. The Canadian securities regulatory authorities consider conventional floating rate debt instruments, securities of an investment fund, American depositary receipts and instalment receipts generally to be within this category, and generally will not treat those instruments as specified derivatives in administering the Regulation.

(3) However, the Canadian securities regulatory authorities note that these general exclusions may not be applicable in cases in which a mutual fund invests in one of the vehicles described in subsection (2) with the result that the mutual fund obtains or increases exposure to a particular underlying interest in excess of the limit set out in section 2.1 of the Regulation. In such circumstances, the Canadian securities regulatory authorities are likely to consider that instrument a specified derivative under the Regulation.

2.17. "standardized future"

The definition of "standardized future" refers to an agreement traded on a futures exchange. This type of agreement is called a "futures contract" in the legislation of some jurisdictions, and an "exchange contract" in the legislation of some other jurisdictions (such as British Columbia and Alberta). The term "standardized future" is used in the Regulation to refer to these types of contracts, to avoid conflict with existing local definitions.

2.18. "swap"

The Canadian securities regulatory authorities are of the view that the definition of a swap in the Regulation would include conventional interest rate and currency swaps, as well as equity swaps.

PART 3 INVESTMENTS

3.1. Evidences of Indebtedness of Foreign Governments and Supranational Agencies

(1) Section 2.1 of the Regulation prohibits mutual funds from purchasing a security of an issuer, other than a government security or a security issued by a clearing corporation if, immediately after the purchase, more than 10% of their net asset value would be invested in securities of that issuer. The term "government security" is defined in the Regulation as an evidence of indebtedness that is issued, or fully and unconditionally guaranteed as to principal and interest, by any of the government of Canada, the government of a jurisdiction or the government of the United States of America.

(2) Before the Regulation came into force, the Canadian securities regulatory authorities granted relief from the predecessor provision of NP39 to a number of international bond funds in order to permit those mutual funds to pursue their fundamental investment objectives with greater flexibility.

(3) The Canadian securities regulatory authorities will continue to consider applications for relief from section 2.1 of the Regulation if the mutual fund making the application demonstrates that the relief will better enable the mutual fund to meet its fundamental investment objectives. This relief will ordinarily be restricted to international bond funds.

(4) The relief from paragraph 2.04(1)(a) of NP39, which is replaced by section 2.1 of the Regulation, that has been provided to a mutual fund has generally been limited to the following circumstances:

1. The mutual fund has been permitted to invest up to 20% of its net asset value in evidences of indebtedness of any one issuer if those evidences of indebtedness are issued, or guaranteed fully as to principal and interest, by supranational agencies or governments other than the government of Canada, the government of a jurisdiction or the government of the United States of America and are rated "AA" by Standard & Poor's Rating Services (Canada) or its DRO affiliate, or have an equivalent rating by one or more other designated rating organizations or their DRO affiliates.

2. The mutual fund has been permitted to invest up to 35% of its net asset value in evidences of indebtedness of any one issuer, if those securities are issued by issuers described in paragraph 1 and are rated "AAA" by Standard & Poor's Rating Services (Canada) or its DRO affiliate, or have an equivalent rating by one or more other designated rating organizations or their DRO affiliates.

(5) It is noted that the relief described in paragraphs 3.1(4)1 and 2 cannot be combined for one issuer.

(6) (*paragraph repealed*).

(7) The relief from paragraph 2.04(1)(a) of NP39, which is replaced by section 2.1 of the Regulation, has generally been provided only if

(a) the securities that may be purchased under the relief referred to in subsection (4) are traded on a mature and liquid market;

(b) the acquisition of the evidences of indebtedness by the mutual fund is consistent with its fundamental investment objectives;

(c) the prospectus or simplified prospectus of the mutual fund disclosed the additional risks associated with the concentration of the net asset value of the mutual fund in securities of fewer issuers, such as the potential additional exposure to the risk of default of the

issuer in which the fund has so invested and the risks, including foreign exchange risks, of investing in the country in which that issuer is located; and

(d) the prospectus or simplified prospectus of the mutual fund gave details of the relief provided by the Canadian securities regulatory authorities, including the conditions imposed and the type of securities covered by the exemption.

3.2. Index Mutual Funds

(1) An "index mutual fund" is defined in section 1.1 of the Regulation as a mutual fund that has adopted fundamental investment objectives that require it to

(a) hold the securities that are included in a permitted index or permitted indices of the mutual fund in substantially the same proportion as those securities are reflected in that permitted index or permitted indices; or

(b) invest in a manner that causes the mutual fund to replicate the performance of that permitted index or those permitted indices.

(2) This definition includes only mutual funds whose entire portfolio is invested in accordance with one or more permitted indices. The Canadian securities regulatory authorities recognize that there may be mutual funds that invest part of their portfolio in accordance with a permitted index or indices, with a remaining part of the portfolio being actively managed. Those mutual funds cannot avail themselves of the relief provided by subsection 2.1(5) of the Regulation, which provides relief from the "10% rule" contained in subsection 2.1(1) of the Regulation, because they are not "index mutual funds". The Canadian securities regulatory authorities acknowledge that there may be circumstances in which the principles behind the relief contained in subsection 2.1(5) of the Regulation is also applicable to "partially-indexed" mutual funds. Therefore, the Canadian securities regulatory authorities will consider applications from those types of mutual funds for relief analogous to that provided by subsection 2.1(5) of the Regulation.

(3) It is noted that the manager of an index mutual fund may make a decision to base all or some of the investments of the mutual fund on a different permitted index than a permitted index previously used. This decision might be made for investment reasons or because that index no longer satisfies the definition of "permitted index" in the Regulation. It is noted that this decision by the manager will be considered by the Canadian securities regulatory authorities generally to constitute a change of fundamental investment objectives, thereby requiring securityholder approval under paragraph 5.1(1)(c) of the Regulation. In addition, this decision would also constitute a material change for the mutual fund, thereby requiring an amendment to the prospectus of the mutual fund and the issuing of a press release under Part 11 of *Regulation 81-106 respecting Investment Fund Continuous Disclosure* (chapter V1.1, r. 42).

3.2.1. Control Restrictions

An investment fund generally holds a passive stake in the businesses in which it invests; that is, an investment fund generally does not seek to obtain control of, or become involved in, the management of investee companies. This key restriction on the type of investment activities that may be undertaken by an investment fund is codified in section 2.2 of the Regulation. Exceptions to this are labour sponsored or venture capital funds, where some degree of involvement in the management of the investees is generally an integral part of the investment strategy.

In determining whether an investment fund exercises control over, or is involved in the management of, an investee company, for the purposes of compliance with section 2.2 of the Regulation, the Canadian securities regulatory authorities will generally consider indicators, including the following:

(a) any right of the investment fund to appoint directors, or observers, of the board of the investee company;

(b) any right of the investment fund to restrict the management of the investee company, or to approve or veto decisions made by the management of the investee company;

(c) any right of the investment fund to restrict the transfer of securities by other securityholders of the investee company.

The Canadian securities regulatory authorities will take the above factors into consideration when considering the nature of an investment fund's investment in an issuer to determine whether the investment fund is in compliance with section 2.2 of the Regulation. The Canadian securities regulatory authorities will also refer to the applicable accounting standards in determining whether an investment fund is exercising control over an issuer.

3.3. Special Warrants

An investment fund is required by subsection 2.2(3) of the Regulation to assume the conversion of each special warrant it holds. This requirement is imposed because the nature of a special warrant is such that there is a high degree of likelihood that its conversion feature will be exercised shortly after its issuance, once a prospectus relating to the underlying security has been filed.

3.3.1. Illiquid assets

(1) Although section 2.4 of the Regulation does not apply to non-redeemable investment funds, the Canadian securities regulatory authorities expect the manager of an investment fund (whether a mutual fund or a non-redeemable investment fund) to establish an effective liquidity risk management policy that considers the liquidity of the types of assets in which the investment fund will be invested, and the fund's obligations and other liabilities (for example, meeting redemption requests, or margin calls from derivative counterparties). Appropriate internal limits for the investment fund's liquidity needs, in line with its investment strategies, should be established.

(2) As portfolio assets may become illiquid when market conditions change, the Canadian securities regulatory authorities are of the view that the manager should regularly measure, monitor and manage the liquidity of the investment fund's portfolio assets, keeping in mind the time to liquidate each portfolio asset, the price the asset may be sold at and the pattern of redemption requests.

(3) Furthermore, the Canadian securities regulatory authorities are of the view that illiquid assets are generally more difficult to value, for the purposes of calculating an investment fund's net asset value, than assets which are liquid. As a result, where a non-redeemable investment fund has a large proportion of its assets invested in illiquid assets, this raises concerns about the accuracy of the fund's net asset value and the amount of any fees calculated with reference to net asset value. Accordingly, staff of the Canadian securities regulatory authorities may raise comments or questions in the course of their reviews of the prospectuses or continuous disclosure documents of non-redeemable investment funds where such funds have a significant proportion of their assets invested in illiquid assets.

3.4. Investment in Other Investment Funds

(1) (*paragraph repealed*).

(2) Subsection 2.5(7) of the Regulation provides that certain investment restrictions and reporting requirements do not apply to investments in other investment funds made in accordance with section 2.5 of the Regulation. In some cases, an investment fund's investments in other investment funds will be exempt from the requirements of section 2.5 of the Regulation because of an exemption granted by the regulator or securities regulatory authority. In these cases, assuming the investment fund complies with the terms of the exemption, its investments in other investment funds would be considered to have been made in accordance with section 2.5 of the Regulation. It is also noted that subsection 2.5(7) of the Regulation applies only with respect to an investment fund's investments in other investment funds, and not for any other investment or transaction.

3.5. Instalments of Purchase Price

Paragraph 2.6(d) of the Regulation prohibits an investment fund from purchasing a security, other than a specified derivative, that by its terms may require the investment fund to make a contribution in addition to the payment of the purchase price. This prohibition does not extend to the purchase of securities that are paid for on an instalment basis in which the total

purchase price and the amounts of all instalments are fixed at the time the first instalment is made.

3.6. Purchase of Evidences of Indebtedness

Paragraph 2.6(f) of the Regulation prohibits an investment fund from lending either cash or a portfolio asset other than cash. The Canadian securities regulatory authorities are of the view that the purchase of an evidence of indebtedness, such as a bond or debenture, a loan participation or loan syndication as permitted by paragraph 2.3(1)(i) or (2)(c) of the Regulation, or the purchase of a preferred share that is treated as debt for accounting purposes, does not constitute the lending of cash or a portfolio asset.

3.7. Securities Lending, Repurchase and Reverse Repurchase Transactions

(1) Section 2.12, 2.13 and 2.14 of the Regulation each contains a number of conditions that must be satisfied in order that an investment fund may enter into a securities lending, repurchase or reverse repurchase transaction in compliance with the Regulation. It is expected that, in addition to satisfying these conditions, the manager on behalf of the investment fund, in co-ordination with an agent, will ensure that the documentation evidencing these types of transactions contains customary provisions to protect the investment fund and to document the transaction properly. Among other things, these provisions would normally include

(a) a definition of an "event of default" under the agreement, which would include failure to deliver cash or securities, or to promptly pay to the investment fund amounts equal to dividends and interest paid, and distributions made, on loaned or sold securities, as required by the agreement;

(b) provisions giving non-defaulting parties rights of termination, rights to sell the collateral, rights to purchase identical securities to replace the loaned securities and legal rights of set-off in connection with their obligations if an event of default occurs; and

(c) provisions that deal with, if an event of default occurs, how the value of collateral or securities held by the non-defaulting party that is in excess of the amount owed by the defaulting party will be treated.

(2) Section 2.12, 2.13 and 2.14 of the Regulation each imposes a requirement that an investment fund that has entered into a securities lending, repurchase or reverse repurchase transaction hold cash or securities of at least 102% of the market value of the securities or cash held by the investment fund's counterparty under the transaction. It is noted that the 102% requirement is a minimum requirement, and that it may be appropriate for the manager of an investment fund, or the agent acting on behalf of the investment fund, to negotiate the holding of a greater amount of cash or securities if necessary to protect the interests of the investment fund in a particular transaction, having regard to the level of risk for the investment fund in the transaction. In addition, if the recognized best practices for a particular type of transaction in a particular market calls for a higher level of collateralization than 102%, it is expected that, absent special circumstances, the manager or the agent would ensure that its arrangements reflect the relevant best practices for that transaction.

(3) Paragraph 3 of subsection 2.12(1) of the Regulation refers to securities lending transactions in terms of securities that are "loaned" by an investment fund in exchange for collateral. Some securities lending transactions are documented so that title to the "loaned" securities is transferred from the "lender" to the "borrower". The Canadian securities regulatory authorities do not consider this fact as sufficient to disqualify those transactions as securities loan transactions within the meaning of the Regulation, so long as the transaction is in fact substantively a loan. References throughout the Regulation to "loaned" securities, and similar references, should be read to include securities "transferred" under a securities lending transaction.

(4) Subparagraph 6(d) of subsection 2.12(1) permits the use of irrevocable letters of credit as collateral in securities lending transactions. The Canadian securities regulatory authorities believe that, at a minimum, the prudent use of letters of credit will involve the following arrangements:

(a) the investment fund should be allowed to draw down any amount of the letter of credit at any time by presenting its sight draft and certifying that the borrower is in default of its obligations under the securities lending agreement, and the amount capable of being drawn down would represent the current market value of the outstanding loaned securities or the amount required to cure any other borrower default; and

(b) the letter of credit should be structured so that the lender may draw down, on the date immediately preceding its expiration date, an amount equal to the current market value of all outstanding loaned securities on that date.

(5) Paragraph 9 of subsection 2.12(1) and paragraph 8 of subsection 2.13(1) of the Regulation each provides that the agreement under which an investment fund enters into a securities lending or repurchase transaction include a provision requiring the investment fund's counterparty to promptly pay to the investment fund, among other things, distributions made on the securities loaned or sold in the transaction. In this context, the term "distributions" should be read broadly to include all payments or distributions of any type made on the underlying securities, including, without limitation, distributions of property, stock dividends, securities received as the result of splits, all rights to purchase additional securities and full or partial redemption proceeds. This extended meaning conforms to the meaning given the term "distributions" in several standard forms of securities loan agreements widely used in the securities lending and repurchase markets.

(6) Sections 2.12, 2.13 and 2.14 of the Regulation each make reference to the "delivery" and "holding" of securities or collateral by the investment fund. The Canadian securities regulatory authorities note that these terms will include the delivery or holding by an agent for an investment fund. In addition, the Canadian securities regulatory authorities recognize that under ordinary market practice, agents pool collateral for securities lending/repurchase clients; this pooling of itself is not considered a violation of the Regulation.

(7) Sections 2.12, 2.13 and 2.14 of the Regulation each require that the securities involved in a securities lending, repurchase or reverse repurchase transaction be marked to market daily and adjusted as required daily. It is recognized that market practice often involves an agent marking to market a portfolio at the end of a business day, and effecting the necessary adjustments to a portfolio on the next business day. So long as each action occurs on each business day, as required by the Regulation, this market practice is not a breach of the Regulation.

(8) As noted in subsection (7), the Regulation requires the daily marking to market of the securities involved in a securities lending, repurchase or reverse repurchase transaction. The valuation principles used in this marking to market may be those generally used by the agent acting for the investment fund, even if those principles deviate from the principles that are used by the investment fund in valuing its portfolio assets for the purposes of calculating net asset value.

(9) Paragraph 6 of subsection 2.13(1) of the Regulation imposes a requirement concerning the delivery of sales proceeds to the investment fund equal to 102% of the market value of the securities sold in the transaction. It is noted that accrued interest on the sold securities should be included in the calculation of the market value of those securities.

(10) Section 2.15 of the Regulation imposes the obligation on a manager of an investment fund to appoint an agent or agents to administer its securities lending and repurchase transactions, and makes optional the ability of a manager to appoint an agent or agents to administer its reverse repurchase transactions. A manager that appoints more than one agent to carry out these functions may allocate responsibility as it considers best. For instance, it may be appropriate that one agent be responsible for domestic transactions, with one or more agents responsible for offshore transactions. Managers should ensure that the various requirements of sections 2.15 and 2.16 of the Regulation are satisfied for all agents.

(11) It is noted that the responsibilities of an agent appointed under section 2.15 of the Regulation include all aspects of acting on behalf of an investment fund in connection with securities lending, repurchase or reverse repurchase agreements. This includes acting in connection with the reinvestment of collateral or securities held during the life of a transaction.

(12) Subsection 2.15(3) of the Regulation requires that an agent appointed by an investment fund to administer its securities lending, repurchase or reverse repurchase transactions shall be a custodian or sub-custodian of the investment fund. It is noted that the provisions of Part 6 of the Regulation generally apply to the agent in connection with its activities relating to securities lending, repurchase or reverse repurchase transactions. The agent must have been appointed as custodian or sub-custodian in accordance with section 6.1, and must satisfy the other requirements of Part 6 in carrying out its responsibilities.

(13) Subsection 2.15(4) of the Regulation provides that the manager of an investment fund must not authorize an agent to enter into securities lending, repurchase or, if applicable, reverse repurchase transactions on behalf of the investment fund unless there is a written agreement between the agent, the manager and the investment fund that deals with certain prescribed matters. Subsection (4) requires that the manager and the investment fund, in the agreement, provide instructions to the agent on the parameters to be followed in entering into the type of transaction to which the agreement pertains. The parameters would normally include

(a) details on the types of transactions that may be entered into by the investment fund;

(b) types of portfolio assets of the investment fund to be used in the transaction;

(c) specification of maximum transaction size, or aggregate amount of assets that may be committed to transactions at any one time;

(d) specification of permitted counterparties;

(e) any specific requirements regarding collateralization, including minimum requirements as to amount and diversification of collateralization, and details on the nature of the collateral that may be accepted by the investment fund;

(f) directions and an outline of responsibilities for the reinvestment of cash collateral received by the investment fund under the program to ensure that proper levels of liquidity are maintained at all times; and

(g) duties and obligations on the agent to take action to obtain payment by a borrower of any amounts owed by the borrower.

(14) The definition of “cash cover” contained in section 1.1 of the Regulation requires that the portfolio assets used for cash cover not be “allocated for specific purposes”. Securities loaned by a mutual fund in a securities lending transaction have been allocated for specific purposes and therefore cannot be used as cash cover by the mutual fund for its specified derivatives obligations.

(15) An investment fund sometimes needs to vote securities held by it in order to protect its interests in connection with corporate transactions or developments relating to the issuers of the securities. The manager and the portfolio adviser of an investment fund, or the agent of the investment fund administering a securities lending program on behalf of the investment fund, should monitor corporate developments relating to securities that are loaned by the investment fund in securities lending transactions, and take all necessary steps to ensure that the investment fund can exercise a right to vote the securities when necessary. This may be done by way of a termination of a securities lending transaction and recall of loaned securities, as described in paragraph 11 of subsection 2.12(1) of the Regulation.

(16) As part of the prudent management of a securities lending, repurchase or reverse repurchase program, managers of investment funds, together with their agents, should ensure that transfers of securities in connection with those programs are effected in a secure manner over an organized market or settlement system. For foreign securities, this may entail ensuring that securities are cleared through central depositories. Investment funds and their agents should pay close attention to settlement arrangements when entering into securities lending, repurchase and reverse repurchase transactions.

3.7.1. Money Market Funds

Section 2.18 of the Regulation imposes daily and weekly liquidity requirements on money market funds. Specifically, money market funds must keep 5% of their assets invested in cash or readily convertible into cash within one day, and 15% of their assets invested in cash or readily convertible into cash within one week. Assets that are "readily convertible to cash" would generally be short-term, highly liquid investments that are readily convertible to known amounts of cash and which are subject to an insignificant risk of changes in value. Such assets can be sold in the ordinary course of business within one business day (in the case of the daily liquidity requirement) or within 5 business days (in the case of the weekly liquidity requirement) at approximately the value ascribed to them by the money market fund. The Canadian securities regulatory authorities note that the securities do not have to mature within the one and 5 business day periods. For example, direct obligations of the Canadian or U.S. government, or of a provincial government, that mature after one or 5 business days but that can be readily converted to cash within one or 5 business days, would likely be eligible for the 5% and 15% liquidity requirements.

3.8. Prohibited Investments

(1) Subsection 4.1(4) of the Regulation permits a dealer managed investment fund to make an investment otherwise prohibited by subsection 4.1(1) of the Regulation and the corresponding provisions in securities legislation referred to in Appendix C to the Regulation if the independent review committee of the dealer managed investment fund has approved the transaction under subsection 5.2(2) of *Regulation 81-107 respecting Independent Review Committee for Investment Funds* (chapter V-1.1, r. 43) ("Regulation 81-107"). The Canadian securities regulatory authorities expect the independent review committee may contemplate giving its approval as a standing instruction, as contemplated in section 5.4 of Regulation 81-107.

(2) Subsection 4.3(2) of the Regulation permits an investment fund to purchase a class of debt securities from, or sell a class of debt securities to, another investment fund managed by the same manager or an affiliate of the manager where the price payable for the security is not publicly available, if the independent review committee of the investment fund has approved the transaction under subsection 5.2(2) of Regulation 81-107 and the requirements in section 6.1 of Regulation 81-107 have been met. The Canadian securities regulatory authorities expect the independent review committee may contemplate giving its approval as a standing instruction, as contemplated in section 5.4 of Regulation 81-107.

(3) In providing its approval under paragraph 4.3(2) of the Regulation, the Canadian securities regulatory authorities expect the independent review committee to have satisfied itself that the price of the security is fair. It may do this by considering the price quoted on a marketplace (e.g., CanPx or TRACE), or by obtaining a quote from an independent, arm's-length purchaser or seller, immediately before the purchase or sale.

PART 4 USE OF SPECIFIED DERIVATIVES

4.1. Exercising Options on Futures

Paragraphs 2.8(1)(d) and (e) of the Regulation prohibit a mutual fund from, among other things, opening and maintaining a position in a standardized future except under the conditions referred to in those paragraphs. Opening and maintaining a position in a standardized future could be effected through the exercise by a mutual fund of an option on futures. Therefore, it should be noted that a mutual fund cannot exercise an option on futures and assume a position in a standardized future unless the applicable provisions of paragraphs 2.8(1)(d) or (e) are satisfied.

4.2. Registration Matters

The Canadian securities regulatory authorities remind industry participants of the following requirements contained in securities legislation:

1. An investment fund may only invest in or use clearing corporation options and over-the-counter options if the portfolio adviser advising with respect to these investments

(a) is permitted, either by virtue of registration as an adviser under the securities legislation or commodity futures legislation of the jurisdiction in which the portfolio adviser is providing the advice or an exemption from the requirement to be registered, to provide that advice to the investment fund under the laws of that jurisdiction; and

(b) has satisfied all applicable option proficiency requirements of that jurisdiction.

2. An investment fund may invest in or use futures and options on futures only if the portfolio adviser advising with respect to these investments or uses is registered as an adviser under the securities or commodity futures legislation of the jurisdiction in which the portfolio adviser is providing the advice, if this registration is required in that jurisdiction, and meets the proficiency requirements for advising with respect to futures and options on futures in the jurisdiction.

3. A portfolio adviser of an investment fund that receives advice from a non-resident sub-adviser as contemplated by section 2.10 of the Regulation is not relieved from the registration requirements described in paragraphs 1 and 2.

4. In Ontario, a non-resident sub-adviser is required, under the commodity futures legislation of Ontario, to be registered in Ontario if it provides advice to another portfolio adviser of an investment fund in Ontario concerning the use of standardized futures by the investment fund. Section 2.10 of the Regulation does not exempt the non-resident sub-adviser from this requirement. A non-resident sub-adviser should apply for an exemption in Ontario if it wishes to carry out the arrangements contemplated by section 2.10 without being registered in Ontario under that legislation.

4.3. Leveraging

The Regulation is designed to prevent the use of specified derivatives for the purpose of leveraging the assets of the mutual fund. The definition of "hedging" prohibits leveraging with specified derivatives used for hedging purposes. The provisions of subsection 2.8(1) of the Regulation restrict leveraging with specified derivatives used for non-hedging purposes.

4.4. Cash Cover

The definition of "cash cover" in the Regulation prescribes the securities or other portfolio assets that may be used to satisfy the cash cover requirements relating to specified derivatives positions of mutual funds required by Part 2 of the Regulation. The definition of "cash cover" includes various interest-bearing securities; the definition includes interest accrued on those securities, and so mutual funds are able to include accrued interest for purposes of cash cover calculations.

PART 5 LIABILITY AND INDEMNIFICATION

5.1. Liability and Indemnification

(1) Subsection 4.4(1) of the Regulation contains provisions that require that any agreement or declaration of trust under which a person acts as manager of an investment fund provide that the manager is responsible for any loss that arises out of the failure of it, and of any person retained by it or the investment fund to discharge any of the manager's responsibilities to the investment fund, to satisfy the standard of care referred to in that section. Subsection 4.4(2) of the Regulation provides that an investment fund must not relieve the manager from that liability.

(2) The purpose of these provisions is to ensure that the manager remains responsible to the investment fund and therefore indirectly to its securityholders for the duty of care that is imposed by the securities legislation of most jurisdictions, and to clarify that the manager is responsible for ensuring that service providers perform to the level of that standard of care. The Regulation does not regulate the contractual relationships between the manager and service providers; whether a manager can seek indemnification from a service provider that fails to satisfy that standard of care is a contractual issue between those parties.

(3) Subsection 4.4(5) of the Regulation provides that section 4.4 does not apply to any losses to an investment fund or securityholder arising out of an action or inaction by a custodian or sub-

custodian or by a director of an investment fund. A separate liability regime is imposed, on custodians or sub-custodians by section 6.6 of the Regulation. Directors are subject to the liability regime imposed by the relevant corporate legislation.

5.2. Securities Lending, Repurchase and Reverse Repurchase Transactions

(1) As described in section 5.1, section 4.4 of the Regulation is designed to ensure that the manager of an investment fund is responsible for any loss that arises out of the failure of it, and of any person retained by it or the investment fund to discharge any of the manager's responsibilities to the investment fund, to satisfy the standard of care referred to in that section.

(2) The retention by a manager of an agent under section 2.15 of the Regulation to administer the investment fund's securities lending, repurchase or reverse repurchase transactions does not relieve the manager from ultimate responsibility for the administration of those transactions in accordance with the Regulation and in conformity with the standard of care imposed on the manager by statute and required to be imposed on the agent in the relevant agreement by subsection 2.15(4) of the Regulation.

(3) Under subsection 2.15(3) of the Regulation, the custodian or sub-custodian of an investment fund must be the agent appointed to act on behalf of the investment fund to administer securities lending, repurchase or reverse repurchase transactions of the investment fund. The activities of the agent, as custodian or sub-custodian, are not within the responsibility of the manager of the investment fund, as provided for in subsection 4.4(5) of the Regulation. However, the activities of the agent, in its role as administering the investment funds' securities lending, repurchase or reverse repurchase transactions, are within the ultimate responsibility of the manager, as provided for in subsection 4.4(6) of the Regulation.

PART 6 SECURITYHOLDER MATTERS

6.1. Meetings of Securityholders

Subsection 5.4(1) of the Regulation imposes a requirement that a meeting of securityholders of an investment fund called for the purpose of considering any of the matters referred to in subsection 5.1(1) of the Regulation must be called on notice sent at least 21 days before the date of the meeting. Industry participants are reminded that the provisions of *Regulation 54-101 respecting Communication with Beneficial Owners of Securities of a Reporting Issuer* (chapter V-1.1, r. 29), or a successor instrument, may apply to any meetings of securityholders of investment funds and that those provisions may require that a longer period of notice be given.

6.2. Limited Liability

(1) Investment funds generally are structured in a manner that ensures that investors are not exposed to the risk of loss of an amount more than their original investment. This is a very important and essential attribute of investment funds.

(2) Investment funds that are structured as corporations do not raise pressing liability problems because of the limited liability regime of corporate statutes.

(3) Investment funds that are structured as limited partnerships may raise some concerns about the loss of limited liability if limited partners participate in the management or control of the partnership. The Canadian securities regulatory authorities encourage managers of investment funds that are structured as limited partnerships to consider this issue in connection with the holding of meetings of securityholders, even if required under subsection 5.1(1) of the Regulation. In addition, in the view of the Canadian securities regulatory authorities, all managers of investment funds that are structured as limited partnerships should include a discussion of this issue as a risk factor in prospectuses.

6.3. Calculation of Fees

(1) Paragraph 5.1(1)(a) of the Regulation requires securityholder approval before the basis of the calculation of a fee or expense that is charged to an investment fund is changed in a way that could result in an increase in charges to the investment fund. The Canadian securities regulatory

authorities note that the phrase “basis of the calculation” includes any increase in the rate at which a particular fee is charged to the investment fund.

(2) The Canadian securities regulatory authorities are of the view that the requirement of paragraph 5.1(1)(a) of the Regulation would not apply in instances where the change to the basis of the calculation is the result of separate individual agreements between the manager of the investment fund and individual securityholders of the investment fund, and the resulting increase in charges is payable directly or indirectly by those individual securityholders only.

6.4. Fund Conversions

(1) For the purposes of subparagraphs 5.1(1)(h)(i), (ii) and (iii) of the Regulation, the Canadian securities regulatory authorities consider that any change that will restructure an investment fund from its original structure requires the prior approval of the securityholders of the investment fund. For example, a non-redeemable investment fund may be designed to convert into a mutual fund on a specified date, or it may be designed to convert into a mutual fund after a specified date if the securities of the investment fund have traded at a specified discount to their net asset value per security for more than a set period of time. In each case, when the event that triggers the conversion occurs, the redemption feature of the securities of the non-redeemable investment fund changes and the securities of the non-redeemable investment fund will typically become redeemable at their net asset value per security daily. This change in the redemption feature of the securities of the investment fund may not be implemented unless securityholder approval has been obtained under subparagraph 5.1(1)(h)(i) of the Regulation. Another example of a change requiring securityholder approval is where an investment fund seeks to obtain control, or become involved in the management, of companies in which it invests, which is inconsistent with the nature of an investment fund. In such a situation, the investment fund would be required to obtain securityholder approval under subparagraph 5.1(1)(h)(iii) of the Regulation, in order to convert into a non-investment fund issuer, before it could become involved in the management of, or exercise control over, investees.

(2) For the purposes of subsection 5.1(2) of the Regulation, the Canadian securities regulatory authorities consider the costs and expenses associated with a change referred to in paragraph 5.1(1)(h) of the Regulation to include costs associated with the securityholder meeting to obtain approval of the change, the costs of preparing and filing a prospectus to commence continuous distribution of securities if the investment fund is converting from a non-redeemable investment fund to a mutual fund in continuous distribution, and brokerage commissions payable as a result of any portfolio realignment necessary to carry out the transaction.

PART 7 CHANGES

7.1. Integrity and Competence of Investment Fund Management Groups

(1) Paragraph 5.5(1)(a) of the Regulation requires that the approval of the securities regulatory authority be obtained before the manager of an investment fund is changed. Paragraph 5.5(1)(a.1) of the Regulation contemplates similar approval to a change in control of a manager.

(2) In connection with each of these approvals, applicants are required by section 5.7 of the Regulation to provide information to the securities regulatory authority concerning the integrity and experience of the persons that are proposed to be involved in, or control, the management of the investment fund after the proposed transaction.

(3) The Canadian securities regulatory authorities would generally consider it helpful in their assessment of the integrity and experience of the proposed new management group that will manage an investment fund after a change in manager if the application set out, among any other information the applicant wishes to provide

(a) the name, registered address and principal business activity or the name, residential address and occupation or employment of

(i) if the proposed manager is not a public company, each beneficial owner of securities of each shareholder, partner or limited partner of the proposed manager, and

(ii) if the proposed manager is a public company, each beneficial owner of securities of each shareholder of the proposed manager that is the beneficial holder, directly or indirectly, of more than 10% of the outstanding securities of the proposed manager; and

(b) information concerning

(i) if the proposed manager is not a public company, each shareholder, partner or limited partner of the proposed manager,

(ii) if the proposed manager is a public company, each shareholder that is the beneficial holder, directly or indirectly, of more than 10% of the outstanding securities of the proposed manager,

(iii) each director and officer of the proposed manager, and

(iv) each proposed director, officer or individual trustee of the investment fund.

(4) The Canadian securities regulatory authorities would generally consider it helpful if the information relating to the persons and companies referred to in paragraph (3)(b) included

(a) for a company

(i) its name, registered address and principal business activity,

(ii) the number of securities or partnership units of the proposed manager beneficially owned, directly or indirectly, and

(iii) particulars of any existing or potential conflicts of interest that may arise as a result of the activities of the company and its relationship with the management group of the investment fund; and

(b) for an individual

(i) his or her name, birthdate and residential address,

(ii) his or her principal occupation or employment,

(iii) his or her principal occupations or employment during the 5 years before the date of the application, with a particular emphasis on the individual's experience in the financial services industry,

(iv) the individual's educational background, including information regarding courses successfully taken that relate to the financial services industry,

(v) his or her position and responsibilities with the proposed manager or the controlling shareholders of the proposed manager or the investment fund,

(vi) whether he or she is, or within 5 years before the date of the application has been, a director, officer or promoter of any reporting issuer other than the investment fund, and if so, disclosing the names of the reporting issuers and their business purpose, with a particular emphasis on relationships between the individual and other investment funds,

(vii) the number of securities or partnership units of the proposed manager beneficially owned, directly or indirectly,

(viii) particulars of any existing or potential conflicts of interest that may arise as a result of the individual's outside business interests and his or her relationship with the management group of the investment fund, and

(ix) a description of the individual's relationships to the proposed manager and other service providers to the investment fund.

(5) The Canadian securities regulatory authorities would generally consider it helpful in their assessment of the integrity and experience of the persons that are proposed to manage an

investment fund after a change of control of the manager, if the application set out, among any other information that applicant wishes to provide, a description of

(a) the proposed corporate ownership of the manager of the investment fund after the proposed transaction, indicating for each proposed direct or indirect shareholder of the manager of the investment fund the information about that shareholder referred to in subsection (4);

(b) the proposed officers and directors of the manager of the investment fund, of the investment fund and of each of the proposed controlling shareholders of the investment fund, indicating for each individual, the information about that individual referred to in subsection (4);

(c) any anticipated changes to be made to the officers and directors of the manager of the investment fund, of the investment fund and of each of the proposed controlling shareholders of the investment fund that are not set out in paragraph (b); and

(d) the relationship of the members of the proposed controlling shareholders and the other members of the management group to the manager and any other service provider to the investment fund.

7.2. Mergers of Investment Funds

Subsection 5.6(1) of the Regulation provides that mergers of investment funds may be carried out on the conditions described in that subsection without prior approval of the securities regulatory authority. The Canadian securities regulatory authorities consider that the types of transactions contemplated by subsection 5.6(1) of the Regulation when carried out in accordance with the conditions of that subsection address the fundamental regulatory concerns raised by mergers of investment funds. Subsection 5.6(1) of the Regulation is designed to facilitate consolidations of investment funds within fund families that have similar fundamental investment objectives and strategies and that are operated in a consistent and similar fashion. Since subsection 5.6(1) will be unavailable unless the investment funds involved in the transaction have substantially similar fundamental investment objectives and strategies and are operated in a substantially similar fashion, the Canadian securities regulatory authorities do not expect that the portfolios of the consolidating funds will be required to be realigned to any great extent before a merger. If realignment is necessary, the Canadian securities regulatory authorities note that paragraph 5.6(1)(h) of the Regulation provides that none of the costs and expenses associated with the transaction may be borne by the investment fund. Brokerage commissions payable as a result of any portfolio realignment necessary to carry out the transaction would, in the view of the Canadian securities regulatory authorities, be costs and expenses associated with the transaction.

7.3. Regulatory Approval for Reorganizations

(1) Paragraph 5.7(1)(b) of the Regulation requires certain details to be provided in respect of an application for regulatory approval required by paragraph 5.5(1)(b) that is not automatically approved under subsection 5.6(1). The Canadian securities regulatory authorities will be reviewing this type of proposed transaction, among other things, to ensure that adequate disclosure of the differences between the issuers participating in the proposed transaction is given to securityholders of the investment fund that will be merged, reorganized or amalgamated with another issuer.

(2) If an investment fund is proposed to be merged, amalgamated or reorganized with an investment fund that has a net asset value that is smaller than the net asset value of the terminating investment fund, the Canadian securities regulatory authorities will consider the implications of the proposed transaction on the smaller continuing investment fund. The Canadian securities regulatory authorities believe that this type of transaction generally would constitute a material change for the smaller continuing investment fund, thereby triggering the requirements of paragraph 5.1(1)(g) of the Regulation and Part 11 of *Regulation 81-106 respecting Investment Fund Continuous Disclosure* (chapter V-1.1, r. 42).

7.4. (*paragraph repealed*).

7.5. Circumstances in Which Approval of Securityholders Not Required

(1) Subsection 5.3(2) of the Regulation provides that an investment fund's reorganization with, or transfer of assets to, another issuer may be carried out on the conditions described in paragraph 5.3(2)(a) or (b) without the prior approval of the securityholders of the investment fund.

(2) If the manager refers the change contemplated in subsection 5.3(2) of the Regulation to the investment fund's independent review committee, and subsequently seeks the approval of the securityholders of the investment fund, the Canadian securities regulatory authorities expect the manager to include a description of the independent review committee's determination in the written notice to securityholders referred to in section 5.4 of the Regulation.

(3) The Canadian securities regulatory authorities expect the written notice referred to in subparagraph 5.3(2)(a)(iv) and (v) of the Regulation to include, at a minimum, the expected date of the reorganization, the name of the other investment fund with which the investment fund will be reorganized, how a securityholder of the investment fund may obtain a copy of the other investment fund's fund facts, simplified prospectus or annual information form, as applicable, and a description of the determination of the investment fund's independent review committee with respect to the reorganization.

7.6. Change of Auditor

Section 5.3.1 of the Regulation requires that the independent review committee of the investment fund give its prior approval to the manager before the auditor of the investment fund may be changed.

7.7. Connection to Regulation 81-107

There may be matters under subsection 5.1(1) of the Regulation that may also be a conflict of interest matter as defined in Regulation 81-107. The Canadian securities regulatory authorities expect any matter under subsection 5.1(1) of the Regulation subject to review by the independent review committee to be referred by the manager to the independent review committee before seeking the approval of securityholders of the investment fund. The Canadian securities regulatory authorities further expect the manager to include a description of the independent review committee's determination in the written notice to securityholders referred to in subsection 5.4(2) of the Regulation.

7.8. Termination of an Investment Fund

Subsection 5.8(2) of the Regulation requires a mutual fund that is terminating to give notice of the termination to all securityholders of the mutual fund. Section 5.8.1 of the Regulation requires a non-redeemable investment fund that is terminating to issue and file a press release announcing the termination. Investment funds for which the termination is a material change must also comply with the requirements of Part 11 of *Regulation 81-106 respecting Investment Fund Continuous Disclosure* (chapter V-1.1, r. 42).

PART 8 CUSTODIANSHIP OF PORTFOLIO ASSETS

8.1. Standard of Care

The standard of care prescribed by section 6.6 of the Regulation is a minimum standard only. Similarly, the provisions of section 6.5 of the Regulation, designed to protect an investment fund from loss in the event of the insolvency of those holding its portfolio assets, are minimum requirements. The Canadian securities regulatory authorities are of the view that the requirements set out in section 6.5 may require custodians and sub-custodians to take such additional steps as may be necessary or desirable properly to protect the portfolio assets of the investment fund in a foreign jurisdiction and to ensure that those portfolio assets are unavailable to satisfy the claims of creditors of the custodian or sub-custodian, having regard to creditor protection and bankruptcy legislation of any foreign jurisdiction in which portfolio assets of an investment fund may be located.

8.2. Book-Based System

(1) Subsection 6.5(3) of the Regulation provides that a custodian or sub-custodian of an investment fund may arrange for the deposit of portfolio assets of the investment fund with a depository, or clearing agency, that operates a book-based system. Such depositories or clearing agencies include The Canadian Depository For Securities Limited, the Depository Trust Company or any other domestic or foreign depository or clearing agency that is incorporated or organized under the laws of a country or a political subdivision of a country and operates a book-based system in that country or political subdivision or operates a transnational book-based system.

(2) A depository or clearing agency that operates a book-based system used by an investment fund is not considered to be a custodian or sub-custodian of the investment fund.

8.3. Compliance

Paragraph 6.7(1)(c) of the Regulation requires the custodian of an investment fund to make any changes periodically that may be necessary to ensure that the custodian and sub-custodian agreements comply with Part 6, and that there is no sub-custodian of the investment fund that does not satisfy the applicable requirements of sections 6.2 or 6.3. The Canadian securities regulatory authorities note that necessary changes to ensure this compliance could include a change of sub-custodian.

PART 9 CONTRACTUAL PLANS

9.1. Contractual Plans

Industry participants are reminded that the term “contractual plan” used in Part 8 of the Regulation is a defined term in the securities legislation of most jurisdictions, and that contractual plans as so defined are not the same as automatic or periodic investment plans. The distinguishing feature of a contractual plan is that sales charges are not deducted at a constant rate as investments in mutual fund securities are made under the plan; rather, proportionately higher sales charges are deducted from the investments made during the first year, or in some plans the first 2 years.

PART 10 SALES AND REDEMPTIONS OF SECURITIES

10.1. General

The purposes of Parts 9, 10 and 11 of the Regulation include ensuring that

(a) investors’ cash is received by an investment fund promptly;

(b) the opportunity for loss of an investors’ cash before investment in the investment fund is minimized; and

(c) the investment fund or the appropriate investor receives all interest that accrues on cash during the periods between delivery of the cash by an investor until investment in the investment fund, in the case of the purchase of investment fund securities, or between payment of the cash by the investment fund until receipt by the investor, in the case of redemptions.

10.2. Interpretation

(1) (*paragraph repealed*).

(2) The Regulation refers to “securityholders” of an investment fund in several provisions. Investment funds must keep a record of the holders of their securities. An investment fund registers a holder of its securities on this record as requested by the person placing a purchase order or as subsequently requested by that registered securityholder. The Canadian securities regulatory authorities are of the view that an investment fund is entitled to rely on its register of holders of securities to determine the names of such holders and in its determination as to whom it is to take instructions from.

(3) Accordingly, when the Regulation refers to "securityholder" of an investment fund, it is referring to the securityholder registered as a holder of securities on the records of the investment fund. If that registered securityholder is a participating dealer acting for its client, the investment fund deals with and takes instructions from that participating dealer. The Regulation does not regulate the relationship between the participating dealer and its client for whom the participating dealer is acting as agent. The Canadian securities regulatory authorities note however, that the participating dealer should, as a matter of prudent business practice, obtain appropriate instructions, in writing, from its client when dealing with the client's beneficial holdings in an investment fund.

10.3. Receipt of Orders

(1) A principal distributor or participating dealer of a mutual fund should endeavour, to the extent possible, to receive cash to be invested in the mutual fund at the time the order to which they pertain is placed.

(2) A dealer receiving an order for redemption should, at the time of receipt of the investor's order, obtain from the investor all relevant documentation required by the mutual fund in respect of the redemption including, without limitation, any written request for redemption that may be required by the mutual fund, duly completed and executed, and any certificates representing the mutual fund securities to be redeemed, so that all required documentation is available at the time the redemption order is transmitted to the mutual fund or to its principal distributor for transmittal to the mutual fund.

10.4. Backward Pricing

Subsections 9.3(1) and 10.3(1) of the Regulation provide that the issue price or the redemption price of a security of a mutual fund to which a purchase order or redemption order pertains shall be the net asset value per security, next determined after the receipt by the mutual fund of the relevant order. For clarification, the Canadian securities regulatory authorities emphasize that the issue price and redemption price cannot be based upon any net asset value per security calculated before receipt by the mutual fund of the relevant order.

10.5. Coverage of Losses

(1) Subsection 9.4(6) of the Regulation provides that certain participating dealers may be required to compensate a mutual fund for a loss suffered as the result of a failed settlement of a purchase of securities of the mutual fund. Similarly, subsection 10.5(3) of the Regulation provides that certain participating dealers may be required to compensate a mutual fund for a loss suffered as the result of a redemption that could not be completed due to the failure to satisfy the requirements of the mutual fund concerning redemptions.

(2) The Canadian securities regulatory authorities have not carried forward into the Regulation the provisions contained in NP39 relating to a participating dealer's ability to recover from their clients or other participating dealers any amounts that they were required to pay to a mutual fund. If participating dealers wish to provide for such rights they should make the appropriate provisions in the contractual arrangements that they enter into with their clients or other participating dealers.

10.6. Issue Price of Securities for Non-Redeemable Investment Funds

(1) Paragraph 9.3(2)(a) of the Regulation provides that the issue price of the securities of a non-redeemable investment fund must not, as far as reasonably practicable, be a price that causes dilution of the net asset value of the other outstanding securities of the investment fund at the time the security is issued. The Canadian securities regulatory authorities consider that, to satisfy this requirement, the issue price of the securities should generally not be a price that is less than the net asset value per security of that class, or series of a class, determined on the date of issuance. However, the Canadian securities regulatory authorities recognize that the determination of what is "reasonably practicable" is fact-specific and will vary depending on the type of offering or issuance.

(2) For example, the Canadian securities regulatory authorities generally expect that any issuances of new securities of a non-redeemable investment fund in connection with a merger of the fund, or any issuances of new securities to the manager of the non-redeemable investment

fund as payment of management fees, be issued at a price that is not less than the NAV per security on the date of issuance. However, the Canadian securities regulatory authorities have observed when an existing non-redeemable investment fund issues new securities under a prospectus, the issue price typically exceeds the net asset value per security on the day before the date of the prospectus, such that the net proceeds of the offering on a per unit basis is no less than the net asset value per security on the day before the date of the prospectus. The Canadian securities regulatory authorities do not consider this issue price to cause dilution to the net asset value of other outstanding securities of the investment fund.

PART 11 COMMINGLING OF CASH

11.1. Commingling of Cash

(1) Part 11 of the Regulation requires principal distributors and participating dealers to account separately for cash they may receive for the purchase of, or upon the redemption of, investment fund securities. Those principal distributors and participating dealers are prohibited from commingling any cash so received with their other assets or with cash held for the purchase or upon the sale of securities of other types of securities. The Canadian securities regulatory authorities are of the view that this means that dealers may not deposit into the trust accounts established under Part 11 cash obtained from the purchase or sale of other types of securities such as guaranteed investment certificates, government treasury bills, segregated funds or bonds.

(2) Subsections 11.1(2) and 11.2(2) of the Regulation state that principal distributors and participating dealers, respectively, may not use any cash received for the investment in investment fund securities to finance their own operations. The Canadian securities regulatory authorities are of the view that any costs associated with returned client cheques that did not have sufficient funds to cover a trade ("NSF cheques") are a cost of doing business and should be borne by the applicable principal distributor or participating dealer and should not be offset by interest income earned on the trust accounts established under Part 11 of the Regulation.

(3) No overdraft positions should arise in these trust accounts.

(4) Subsections 11.1(3) and 11.2(3) of the Regulation prescribe the circumstances under which a principal distributor or participating dealer, respectively, may withdraw funds from the trust accounts established under Part 11 of the Regulation. This would prevent the practice of "lapping". Lapping occurs as a result of the timing differences between trade date and settlement date, when cash of an investment fund client held for a trade which has not yet settled is used to settle a trade for another investment fund client who has not provided adequate cash to cover the settlement of that other trade on the settlement date. The Canadian securities regulatory authorities view this practice as a violation of subsections 11.1(3) and 11.2(3) of the Regulation.

(5) Subsections 11.1(4) and 11.2(4) of the Regulation require that interest earned on cash held in the trust accounts established under Part 11 of the Regulation be paid to the applicable investment fund or its securityholders "pro rata based on cash flow". The Canadian securities regulatory authorities are of the view that this requirement means, in effect, that the applicable investment fund or securityholder should be paid the amount of interest that the investment fund or securityholder would have received had the cash held in trust for that investment fund or securityholder been the only cash held in that trust account.

(6) Paragraph 11.3(b) of the Regulation requires that trust accounts maintained in accordance with sections 11.1 or 11.2 of the Regulation bear interest "at rates equivalent to comparable accounts of the financial institution". A type of account that ordinarily pays zero interest may be used for trust accounts under sections 11.1 or 11.2 of the Regulation so long as zero interest is the rate of interest paid on that type of account for all depositors other than trust accounts.

PART 12 (*Revoked*)

PART 13 PROHIBITED REPRESENTATIONS AND SALES COMMUNICATIONS

13.1. Misleading Sales Communications

(1) Part 15 of the Regulation prohibits misleading sales communications relating to investment funds and asset allocation services. Whether a particular description, representation, illustration or other statement in a sales communication is misleading depends upon an evaluation of the context in which it is made. The following list sets out some of the circumstances, in the view of the Canadian securities regulatory authorities, in which a sales communication would be misleading. No attempt has been made to enumerate all such circumstances since each sales communication must be assessed individually.

1. A statement would be misleading if it lacks explanations, qualifications, limitations or other statements necessary or appropriate to make the statement not misleading.

2. A representation about past or future investment performance would be misleading if it is

(a) a portrayal of past income, gain or growth of assets that conveys an impression of the net investment results achieved by an actual or hypothetical investment that is not justified under the circumstances;

(b) a representation about security of capital or expenses associated with an investment that is not justified under the circumstances or a representation about possible future gains or income; or

(c) a representation or presentation of past investment performance that implies that future gains or income may be inferred from or predicted based on past investment performance or portrayals of past performance.

3. A statement about the characteristics or attributes of an investment fund or an asset allocation service would be misleading if

(a) it concerns possible benefits connected with or resulting from services to be provided or methods of operation and does not give equal prominence to discussion of any risks or associated limitations;

(b) it makes exaggerated or unsubstantiated claims about management skill or techniques; characteristics of the investment fund or asset allocation service; an investment in securities issued by the fund or recommended by the service; services offered by the fund, the service or their respective manager; or effects of government supervision; or

(c) it makes unwarranted or incompletely explained comparisons to other investment vehicles or indices.

4. A sales communication that quoted a third party source would be misleading if the quote were out of context and proper attribution of the source were not given.

(2) Performance data information may be misleading even if it complies technically with the requirements of the Regulation. For instance, subsections 15.8(1) and (2) of the Regulation contain requirements that the standard performance data for investment funds given in sales communications be for prescribed periods falling within prescribed amounts of time before the date of the appearance or use of the advertisement or first date of publication of any other sales communication. That standard performance data may be misleading if it does not adequately reflect intervening events occurring after the prescribed period. An example of such an intervening event would be, in the case of money market funds, a substantial decline in interest rates after the prescribed period.

(3) An advertisement that presents information in a manner that distorts information contained in the preliminary prospectus or prospectus, or preliminary prospectus, preliminary fund facts document and preliminary annual information form or prospectus, fund facts document and annual information form, as applicable, of an investment fund or that includes a visual image that provides a misleading impression will be considered to be misleading.

(4) Any discussion of the income tax implications of an investment in an investment fund security should be balanced with a discussion of any other material aspects of the offering.

(5) Paragraph 15.2(1)(b) of the Regulation provides that sales communications must not include any statement that conflicts with information that is contained in, among other things and as applicable, a prospectus or fund facts document. The Canadian securities regulatory authorities are of the view that a sales communication that provides performance data in compliance with the requirements of Part 15 of the Regulation for time periods that differ from those shown in a prospectus, fund facts document or management report of fund performance does not violate the requirements of paragraph 15.2(1)(b) of the Regulation.

(6) Subsection 15.3(1) of the Regulation permits an investment fund or asset allocation service to compare its performance to, among other things, other types of investments or benchmarks on certain conditions. Examples of such other types of investments or benchmarks to which the performance of an investment fund or asset allocation service may be compared include consumer price indices; stock, bond or other types of indices; averages; returns payable on guaranteed investment certificates or other certificates of deposit; and returns from an investment in real estate.

(7) Paragraph 15.3(1)(c) of the Regulation requires that, if the performance of an investment fund or asset allocation service is compared to that of another investment or benchmark, the comparison sets out clearly any factors necessary to ensure that the comparison is fair and not misleading. Such factors would include an explanation of any relevant differences between the investment fund or asset allocation service and the investment or benchmark to which it is compared. Examples of such differences include any relevant differences in the guarantees of, or insurance on, the principal of or return from the investment or benchmark; fluctuations in principal, income or total return; any differing tax treatment; and, for a comparison to an index or average, any differences between the composition or calculation of the index or average and the investment portfolio of the investment fund or asset allocation service.

13.2. Other Provisions

(1) Subsection 15.9(1) of the Regulation imposes certain disclosure requirements for sales communications in circumstances in which there was a change in the business, operations or affairs of an investment fund or asset allocation service during or after a performance measurement period of performance data contained in the sales communication that could have materially affected the performance of the investment fund or asset allocation service. Examples of these changes are changes in the management, investment objectives, portfolio adviser, ownership of the manager, fees and charges, or of policies concerning the waiving or absorbing of fees and charges, of the investment fund or asset allocation service; or of a change in the characterization of a mutual fund as a money market fund. A reorganization or restructuring of an investment fund that results in a conversion of a non-redeemable investment fund into a mutual fund, or the conversion of a mutual fund into a non-redeemable investment fund, would also be an example of such a change.

(1.1) Subparagraph 15.6(1)(d)(i) of the Regulation prohibits a sales communication pertaining to a mutual fund from including performance data for a period that is before the time when the mutual fund offered its securities under a prospectus. Where the mutual fund has previously existed as a non-redeemable investment fund and has been a reporting issuer in a jurisdiction for a period of at least 12 consecutive months, either as a mutual fund or a non-redeemable investment fund, subsection 15.6(2) requires any sales communication that contains performance data of the mutual fund to include performance data for the period that the fund existed as a non-redeemable investment fund. The Canadian securities regulatory authorities are of the view that performance data pertaining to a mutual fund that has converted from a non-redeemable investment fund should include both the periods before and after the converting transaction, similar to the past performance information presented in the mutual fund's management report of fund performance. Performance data must not be included for any period before the time the non-redeemable investment fund was a reporting issuer.

(2) Paragraph 15.11(1)5 of the Regulation requires that no non-recurring fees and charges that are payable by some or all securityholders and no recurring fees and charges that are payable by some but not all securityholders be assumed in calculating standard performance data. Examples of non-recurring types of fees and charges are front-end sales commissions and

contingent deferred sales charges, and examples of recurring types of fees and charges are the annual fees paid by purchasers who purchased on a contingent deferred charge basis.

(3) Paragraphs 15.11(1)2 and 15.11(2)2 of the Regulation require that no fees and charges related to optional services be assumed in calculating standard performance data. Examples of these fees and charges include transfer fees, except in the case of an asset allocation service, and fees and charges for registered retirement savings plans, registered retirement income funds, registered education savings plans, pre-authorized investment plans and systematic withdrawal plans.

(4) The Canadian securities regulatory authorities are of the view that it is inappropriate and misleading for an investment fund that is continuing following a merger to prepare and use *pro forma* performance information or financial statements that purport to show the combined performance of the two funds during a period before their actual merger. The Canadian securities regulatory authorities are of the view that such *pro forma* information is hypothetical, involving the making of many assumptions that could affect the results.

(5) Subsections 15.8(2) and (3) of the Regulation require disclosure of standard performance data of a mutual fund, in some circumstances, from “the inception of the mutual fund”. It is noted that paragraph 15.6(1)(d) generally prohibits disclosure of performance data for a period that is before the time when the mutual fund offered its securities under a prospectus or before an asset allocation service commenced operation. Also, each of Instruction (1) to Item 5 of Part B of Form 81-101F1 *Contents of Simplified Prospectus* and Instruction (1) to Item 2 of Part I of Form 81-101F3 *Contents of Fund Facts Document* requires disclosure of the date on which a mutual fund's securities first became available to the public as the date on which the mutual fund “started”. Therefore, consistent with these provisions, the words “inception of the mutual fund” in subsections 15.8(2) and (3) of the Regulation should be read as referring to the beginning of the distribution of the securities of the mutual fund under a prospectus of the mutual fund, and not from any previous time in which the mutual fund may have existed but did not offer its securities under a prospectus. If a mutual fund previously existed as a non-redeemable investment fund, the words “inception of the mutual fund” in subsections 15.8(2) and (3) of the Regulation should be read as referring to the date that the non-redeemable investment fund became a reporting issuer.

(6) Paragraph 15.6(1)(a) of the Regulation contains a prohibition against the inclusion of performance data for a mutual fund that has been distributing securities for less than 12 consecutive months. The creation of a new class or series of security of an existing mutual fund does not constitute the creation of a new mutual fund and therefore does not subject the mutual fund to the restrictions of paragraph 15.6(1)(a) unless the new class or series is referable to a new portfolio of assets.

(7) Section 15.14 of the Regulation contains the rules relating to sales communications for multi-class investment funds. Those rules are applicable to an investment fund that has more than one class of securities that are referable to the same portfolio of assets. Section 15.14 does not deal directly with asset allocation services. It is possible that asset allocation services could offer multiple "classes"; the Canadian securities regulatory authorities recommend that any sales communications for those services generally respect the principles of section 15.14 in order to ensure that those sales communications not be misleading.

(8) The Canadian securities regulatory authorities believe that the use of hypothetical or *pro forma* performance data for new classes of securities of a multi-class investment fund would generally be misleading.

13.3. Sales Communications of Non-Redeemable Investment Funds During the Waiting Period and the Distribution Period

The Canadian securities regulatory authorities remind non-redeemable investment funds of the restrictions contained in securities legislation relating to the distribution of material and advertising and marketing in connection with a prospectus offering during the waiting period and during the distribution period following the issuance of a receipt for the final prospectus. Part 15 of the Regulation does not vary any of the restrictions imposed during these periods.

PART 14 (*Revoked*)

PART 15 SECURITYHOLDER RECORDS

15.1. Securityholder Records

(1) Section 18.1 of the Regulation requires the maintenance of securityholder records, including past records, relating to the issue and redemption of securities and distributions of the investment fund. Section 18.1 of the Regulation does not require that these records need be held indefinitely. It is up to the particular investment fund, having regard to prudent business practice and any applicable statutory limitation periods, to decide how long it wishes to retain old records.

(2) The Canadian securities regulatory authorities are of the view that the requirements in section 18.1 to maintain securityholder records may be satisfied if the investment fund maintains up to date records of registered securityholders. Each investment fund may decide whether it wishes to maintain records of beneficial securityholders.

PART 16 EXEMPTIONS AND APPROVALS

16.1. Need for Multiple or Separate Applications

The Canadian securities regulatory authorities note that a person that obtains an exemption from a provision of the Regulation need not apply again for the same exemption at the time of each prospectus or simplified prospectus refiling unless there has been some change in an important fact relating to the granting of the exemption. This also applies to exemptions from NP39 granted before the Regulation; as provided in section 19.2 of the Regulation, it is not necessary to obtain an exemption from the corresponding provision of the Regulation.

16.2. Exemptions under Prior Policies

(1) Subsection 19.2(1) of the Regulation provides that a mutual fund that has obtained, from the regulatory or securities regulatory authority, an exemption from a provision of NP39 before the Regulation came into force is granted an exemption from any substantially similar provision of the Regulation, if any, on the same conditions, if any, contained in the earlier exemption.

(2) The Canadian securities regulatory authorities are of the view that the fact that a number of small amendments have been made to many of the provisions of the Regulation from the corresponding provision of NP39 should not lead to the conclusion that the provisions are not "substantially similar", if the general purpose of the provisions remain the same. For instance, even though some changes have been made in the Regulation, the Canadian securities regulatory authorities consider paragraph 2.2(1)(a) of the Regulation to be substantially similar to paragraph 2.04(1)(b) of NP39, in that the primary purpose of both provisions is to prohibit mutual funds from acquiring securities of an issuer sufficient to permit the mutual fund to control or significantly influence the control of that issuer.

(3) The Canadian securities regulatory authorities are of the view that the new provisions of the Regulation relating to mutual funds investing in other mutual funds introduced on December 31, 2003 are not "substantially similar" to those of the Regulation which they replace.

16.3. Waivers and Orders concerning "Fund of Funds"

(1) The Canadian securities regulatory authorities in a number of jurisdictions have provided waivers and orders from NP39 and securities legislation to permit "fund of funds" to exist and carry on investment activities not otherwise permitted by NP39 or securities legislation. Some of those waivers and orders contained "sunset" provisions that provided that they expired when legislation or a policy or regulation of the Canadian securities regulatory authorities came into force that effectively provided for a new "fund of funds" regime. For greater certainty, the Canadian securities regulatory authorities note that the coming into force of the Regulation will not trigger the "sunset" of those waivers and orders.

(2) For greater certainty, note that the coming into force of the Regulation did not trigger the "sunset" of those waivers and orders. However, the coming into force of section 19.3 of the Regulation will effectively cause those waivers and orders to expire one year after its coming into force.