

POOLED FUNDS: BENEFITS AND PITFALLS

Sharon J. Morrisroe LL.B
In-house Counsel
Connor, Clark & Lunn Investment Management Ltd.

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SUMMARY OF CONTENTS

I.	INTRODUCTION	2
II.	BACKGROUND	2
	A. <i>Interpretation</i>	2
	B. <i>Nature of the Pooled Fund</i>	3
III.	BENEFITS OF POOLED FUNDS	4
	A. <i>Direct Pooled Fund Cost Savings</i>	5
	1. Custody (Administration) Fees.....	5
	2. Trade Settlement Fees	5
	3. Trading Efficiencies	5
	B. <i>Inherent Benefits</i>	5
	4. Fairness of Trade Allocation.....	5
	5. Portfolio Diversification.....	6
	6. Efficiency of Handling Cash Flows	6
	7. Facilitates Asset Mix Shifts.....	6
	8. Similarity of Performance	7
	9. Limited Policy Restrictions	7
IV.	LEGAL CONSIDERATIONS.....	7
	A. <i>Pension Law</i>	7
	B. <i>Other Legislation</i>	8
	C. <i>Securities Law</i>	9
	D. <i>Taxation Issues</i>	13
	E. <i>Funds on Funds Issues</i>	14
	1. Taxation Considerations	14
	2. Securities Law Considerations	16
V.	CONCLUSION.....	17

POOLED FUNDS: BENEFITS AND PITFALLS

by Sharon J. Morrisroe¹

I. INTRODUCTION

The use of pooled funds as an intermediary investment vehicle between the portfolio manager and the client has increased considerably in recent years. With in-house managed pooled funds, money belonging to various managed accounts is commingled, with the authority of clients, for the purpose of facilitating investment. When invested in a pooled fund, in contrast to owning a segregated portfolio of securities, a client achieves lower costs for portfolio diversification and benefits from the efficiencies of economies of scale. The laws that apply when utilizing pooled funds are based on pre-existing regulatory structures that were not designed with the regulation of pooled funds in mind. These laws have not kept up with current business practise and the pace of change. This is due, in part, to a lack of awareness and understanding as to how and when these vehicles are used and whom they benefit. This paper will highlight the distinctions between pooled funds and public mutual funds while providing an overview of the benefits and pitfalls of the investment adviser using pooled funds as an investment vehicle.

II. BACKGROUND

A. Interpretation

Although the term “pooled fund” has no legal definition under provincial securities legislation, I consider the term to refer to a unit trust established under a trust indenture, which is not required to have a prospectus, in which institutional,

¹ This paper was prepared by Sharon J. Morrisroe, LL.B., in-house counsel with the firm of Connor, Clark & Lunn Investment Management Ltd. (“CC&L”). The writer gratefully

sophisticated or high net worth investors contribute funds, that are invested and managed by an Investment Manager. Comments in this paper are limited to investments made by a portfolio manager acting on behalf of “managed accounts”.² A “Portfolio Manager” means an adviser registered for the purpose of managing the investment portfolio of clients through discretionary authority granted by the clients.³ A “Managed Account” means an investment portfolio account of a client established in writing under which the portfolio adviser to the account makes investment decisions for the account and has full discretion to trade in securities of the account without requiring the client’s express consent to a transaction.”⁴

B. Nature of the Pooled Fund

In a pooled fund, money belonging to various managed accounts is commingled, with the authority of clients, for the purpose of facilitating investment. It is the relationship between the client and portfolio manager that is key. A portfolio manager makes the investment decision, within the confines of client objectives/mandates and any legal or policy constraints. Management fees are based on the value of assets under management. There are no account opening charges, sales commissions or front or back end load fees charged to a discretionary managed client invested in a pooled fund, as there may be for an investor in a public mutual fund. Pooled funds are not generally advertised. The

acknowledges the assistance of Dennis Perry on the “Benefits of Pooled Funds” in section III of this paper, which will be the subject of his presentation at this conference.

² A discussion of employer sponsored capital accumulation plans (including money purchase pension plans, Group RRSP’s and deferred profit sharing plans) and variable annuities offered by life insurance companies is beyond the scope of this paper.

³ As defined in the Ontario *Securities Act* R.S.O. 1990, c. S.5, as amended (referred to herein as the “OSA”) and the Alberta *Securities Act* S.A. 1981, c. S-6.1, as amended. The abbreviation ICPM is used throughout to refer to an adviser registered as Investment Counsel/Portfolio Manager under the OSA.

⁴ A “Managed Account” is defined in Ontario Rule 45-504: “*Prospectus Exemption for Distributions of Securities to Portfolio Advisers on behalf of Fully Managed Accounts*”. The Ontario Securities Commission recognizes in this Rule that the portfolio manager is making the investment decision for a managed account. The British Columbia Securities Commission issued an Interpretation Note (NIN # 97/11) March 7, 1997 on the meaning of “Fully Managed Account” which is unworkable and is currently undergoing revision.

subscription of units of a pooled fund is not available to members of the public at large. This is in contrast to public mutual funds that are products that are “sold not purchased” by mutual fund dealers and their many thousands of sales people.⁵

The pooled fund is *de facto* an extension of the portfolio manager. It is simply the method by which the investment counsel/portfolio manager (“ICPM”) provides the service of investment management for clients entrusting their money to it. The ICPM, through its in-house managed pooled funds, provides a service, in contrast to a mutual fund that is sold as a product. The ICPM purchases units of the pooled fund for the account of the client. The portfolio of the pooled fund is then managed by the ICPM. A dissatisfied client/investor obtains the benefit of professional money management and retains the right to withdraw from the arrangement by redeeming at net asset value and leaving the fund.⁶ This is similar to what a client does when terminating the services of a portfolio manager when the account is managed on a segregated basis.

III. BENEFITS OF POOLED FUNDS

Use of pooled funds has increased considerably in recent years. Survey results in 1998 showed a 26% jump in pension pooled fund assets to comprise \$106.6 billion as compared to only 11% year over year for pension money managed on a segregated basis (which comprises \$241.2 billion).⁷ What factors are driving leaders in the portfolio management industry to provide portfolio management services utilizing pools? The topic of the business rationale and benefits of using pooled funds will be discussed in more detail in the presentation by Dennis

⁵ From speech given by Mr. Charles MacFarlane, Executive Director, OSC “Dialogue with the OSC”, Toronto, November 3, 1998 (1998, 21 OSCB 6893).

⁶ This philosophy regarding the nature of the relationship among a mutual fund, its investors, and its management company is the view adopted in the 1969 report of the Canadian Committee on Mutual Funds & Investment Contracts. The philosophy holds true for pooled funds.

⁷ Benefits Canada, November, 1998 p.39 Source: Benefits Canada’s Top 40 Money Manager Survey, 1998. A record 159 professional money management firms active in the Canadian pension fund investment industry responded to the survey. p.42

Perry.⁸ Compared to a segregated portfolio, some of the benefits of utilizing pooled funds are:

A. Direct Pooled Fund Cost Savings

1. Custody (Administration) Fees

Clients having a custodian for their assets will pay custody fees relating only to the units held in the pooled fund as opposed to many security positions that make up a segregated managed portfolio. The comprehensive custody fees (to the pooled fund and client) should in all cases be lower to the client when invested through pooled funds.

2. Trade Settlement Fees

Segregated clients own each individual security directly. This results in many transactions and higher trade settlement fees. There are significant cost savings using pooled funds because the investment in a pooled fund constitutes one trade. The pooled fund then invests the money in underlying securities in an efficient manner.

3. Trading Efficiencies

Pooled funds, through economies of scale, provide for the possibility of purchasing and selling securities more efficiently. This may result in lower brokerage costs. In addition, there may be a reduced negative market impact when using pooled funds.

B. Inherent Benefits

4. Fairness of Trade Allocation

Money management through the use of pooled funds contributes to fairness in the allocation of investment opportunities among clients. Bunch trading and allocation of trades are considered by regulators to be high on the list of the

⁸ supra note 1. This section of the paper has been prepared with the assistance of Dennis Perry

villains of the money management industry⁹. When an ICPM purchases securities for the account of the pooled fund, all clients as unitholders are treated in the same manner without subjectivity bias. All investors participate equally in purchases and sales in accordance with their pro rata interest/unit ownership in the pooled fund, being a model for fairness in trade allocation.

5. Portfolio Diversification

Investing through pooled funds provides the client with a more cost effective way to achieve portfolio diversification. Pooled funds are in essence, portfolios of listed equities and fixed income securities designed to maximize the investor's exposure while minimizing, through diversification, the investor's investment risk. e.g. ICPM's often recommend the purchase of pooled funds in order to obtain the broadest exposure to world fixed income and equity markets with the least amount of risk, at lower cost.

6. Efficiency of Handling Cash Flows

Pooled funds permit the efficient deployment of cash flow across the entire portfolio. Investing client cash flow on a segregated basis is more difficult where liquidity may be a concern.

7. Facilitates Asset Mix Shifts

Pooled funds accommodate the active asset allocation process more efficiently than segregated money management. This results in lower costs to the client. Asset mix shifts are facilitated even more efficiently when utilizing a fund on fund investment structure.

who will be speaking on this subject during his presentation.

⁹ Chevreau, Jonathan, Serious Money, OSC Scrutinizes Counsellors, The Financial Post Weekend, September 27, 1998 quoting pension consultant Martino.

8. Similarity of Performance

Clients with the same investment mandate will achieve the same performance when money is commingled in a pooled fund. This contributes to the overall fairness element as between clients. The consistency of portfolio structure and performance is more difficult to achieve when client accounts are managed on a segregated basis.

9. Limited Policy Restrictions

The provisions of National Policy No.39 do not govern pooled funds. There is, therefore, more flexibility for the portfolio manager in making investments and managing the fund.

Pooled funds provide Managed Accounts with a lower cost, efficient method of investing. The portfolio of securities is designed to maximize the investor's exposure while minimizing, through diversification, the investor's investment risk, at lower cost.

IV. LEGAL CONSIDERATIONS

A. Pension Law

Not all pension plans are candidates for investment through pooled funds. The Statement of Investment Policy and Goals ("SIP&G") of a pension plan must be carefully considered in the context of investment by the pension plan in a pooled fund investment vehicle. The investment objectives and constraints of the pension plan must accord with those of the pooled fund. In the event accounts have mandates or specific needs that can not be satisfied or managed within the pooled fund structure, then that money will be managed on the basis of a segregated portfolio.

In addition to the SIP&G of a pension plan, the governing pension legislation should be carefully considered in the context of any investment by the pension plan in a pooled fund vehicle. Certain legislation prohibits a pension plan from investing more than 10% of its total book value in a pooled fund unless the pooled fund meets certain requirements.¹⁰ The pooled fund will have its own SIP&G and monitor the applicable investment restrictions applicable to pension plans, when pension plan assets are invested in the pooled fund. The investment restrictions contained in the pension investment regulations are designed to effect diversity of investments. These are coupled with restrictions in the *Income Tax Act* (“ITA”)¹¹ applying to tax-sheltered plans, which encourage Canadian content.

B. Other Legislation

The ICPM must be cognisant of any other legislation that may apply imposing investment restrictions on investing the assets of the client. In the event an institutional client is limited to making investments authorized for trustees, then an updated review of current legislation is warranted. The “legal for life” investment restrictions found in more antiquated legislation do not authorize investment in “mutual funds”.¹² Ontario is in the process of amending the investment restrictions applicable to trustees through red-tape reduction legislation.¹³ The legal for life approach will be replaced by “prudent investor” standards together with a prescribed mandatory list of criteria to be considered in

¹⁰ See Schedule III (section 9) to the Regulations (section 6) under the *Pension Benefits Standards Act* (Can.) 1985 containing the investment restrictions which apply to federally registered pension plans. These investment restrictions also apply to plans registered in certain provinces such as the western provinces which have incorporated the Sch. III federal pension investment regulations by reference in their legislation. Refer also to the investment regulations under the *Pension Benefits Act* (Ontario) which are less generous, as the 10% exemptions available do not extend to pooled funds that replicate a widely recognized index.

¹¹ RSC 1985, c.1 (5th Supp.), as amended (referred to in this paper as the “ITA”).

¹² A comprehensive list of restrictive statutes is beyond the scope of this paper. Refer to: Stikeman, Elliot, Legal for Life, Institutional Investment Rules in Canada (6th ed.), Carswell, 1996 and any subsequent legislative developments.

¹³ Bill 25 (Ontario) Red Tape Reduction Act, 1998, Schedule B, section 16.

planning the investment of the property. The legislation will permit investment in a “mutual fund”.¹⁴

C. Securities Law¹⁵

The balance of the morning session will be dealing with various securities law issues relating to pooled funds. I would, however, like to take this opportunity to highlight some implications important from the point of view of an investment manager.

For segregated money management, an ICPM must be concerned with the proficiency, insurance, capital, reporting, and numerous other requirements normally imposed on registrants. When using a pooled fund as an intermediary investment vehicle, there are not only adviser registration aspects to consider but also “registration in respect of the trade” and prospectus exemptions as additional factors.

The term mutual fund is defined as:

“Mutual Fund” includes an issuer of securities that entitle the holder to receive on demand, or within a specified period after demand, an amount computed by reference to the value of a proportionate interest in the whole or in a part of the net assets, including a separate fund or trust account, of the issuer of the securities.¹⁶

Accordingly, both the mutual fund, as a reporting issuer (“public mutual fund”) and the pooled fund, which is not a reporting issuer, fall within the securities law definition of “mutual fund”.

¹⁴Ibid, *Trustee Act* (Ontario) s. 27(3) as amended (when proclaimed in force). The term “mutual fund” does not appear to be defined for the purposes of this section.

¹⁵ Reference in this paper is limited to securities legislation in British Columbia and Ontario. A discussion of US Securities Law implications is beyond the scope of this paper. Refer to section IV.E of this paper for a brief discussion of funds on funds issues.

¹⁶ OSA s.1 supra note 3.

Further “Mutual Fund in the Province/Ontario” means a mutual fund that is a reporting issuer or that is organized under the laws of that province, but does not include a “Private Mutual Fund”. Therefore, a public mutual fund and a pooled fund (with its trust subject to the laws of that province) both fall within the definition of “Mutual Fund in the Province”. A client purchases units of a pooled fund resulting in a “trade” in a “security”. When an ICPM uses pooled funds, the nature of the services provided to the client is treated by securities law to change from “advising on” to “trading in” securities. (For an ICPM, this is often an unexpected and unwelcome result.) Hence, the requirement in Ontario to be registered also as a “limited market dealer”.¹⁷

The laws that apply when utilizing pooled funds are based on pre-existing regulatory structures, which were not designed with the regulation of pooled funds in mind. Historically, the commingling of client moneys in a pooled trust investment vehicle represented a relatively small portion of money in Canada. The private pooling of funds was relevant in the context of trust companies commingling funds in the administration of estates.¹⁸ The early days of securities regulation recognized the professional money management business of a trust company for private clients. The legislation has continued to treat the nature of the services provided by a trust company as “advising ” rather than “trading”. This has created an unlevel playing field in the private/exempt money management business. In British Columbia and Alberta, the trust company managed mutual fund is included in the definition of “Private Mutual Fund”:

“private mutual fund” means a mutual fund that is ...
(b) administered by a trust company but which has no promoter or manager other than a trust company, and consists of

¹⁷ The sale of mutual funds that are reporting issuers requires registration as a Mutual Fund Dealer and membership in a new self-regulatory organization. Sales practices are governed by NI 81-105 & 81-105CP.

¹⁸ Registration and prospectus exemptions for trust companies offering their own mutual funds were in place prior to the system of universal registration under the OSA which came into force in June 1987.

- (i) a pooled fund that is maintained solely to serve registered retirement savings plans, retirement income plans, deferred profit sharing plans, pension plans or other similar plans registered under the ITA,
- (ii) a common trust fund as defined by the Financial Institutions Act, or
- (iii) a pooled fund that is maintained by a trust company in which money, belonging to various estates and trusts in its care, is commingled, with the authority of the settlor, testator or trustee, for the purpose of facilitating investment if no general solicitations are made to sell securities in the fund.¹⁹

Note that the definition specifically excludes a pooled fund that is managed by a promoter or manager other than the trust company that administers the trust. Ontario securities legislation provides registration and prospectus exemptions to certain financial intermediaries through Rule 32-503.

There is a lack of uniformity in provincial securities legislation. The securities laws of British Columbia and Alberta recognize that the portfolio manager is making the investment decision on behalf of Managed Accounts and deems the portfolio manager to be acting as principal in those circumstances. For the sake of investment managers using in-house pooled funds, it is hoped that the Ontario Securities Commission (“OSC”) will soon adopt the same approach. Rule 45-504 provides for a prospectus exemption for distributions of securities to portfolio advisers on behalf of managed accounts. The Rule does not apply to in-house managed pooled funds. The OSC stated in Notice of Proposed Rule 45-504:

Ultimately, the Commission rejected the imposition of any monetary threshold on the basis that the portfolio adviser has the necessary sophistication to make an investment decision without a prospectus and in the context of a discretionary managed account, it is the portfolio adviser making the investment decision on behalf of the client. Therefore, the amount invested by the portfolio adviser and the amount held in the account by the client are not relevant for purposes of the proposed Rule and no monetary

¹⁹ *Securities Act* (British Columbia) S.B.C. 1996, c. 418, as amended by S.B.C. 1998, c. 42, s. 47. s.1.

thresholds need be imposed on the client or the portfolio adviser. In that regard, the Commission also took into account subsection 72(2) of the Act, which provides that a trust corporation registered under the *Loan and Trust Corporations Act* shall be deemed to be acting as principal when it trades as trustee or as agent for accounts fully managed by it.²⁰

By letter of September 5, 1997, I wrote the Ontario Securities Commission, on behalf of the Connor, Clark & Lunn Investment Ltd. (CC&L), in response to the notice of the subject draft rule. The submission expressed disappointment that the proposed relief from prospectus requirements did not extend to distributions to managed accounts of an in-house managed pooled fund where the portfolio adviser makes the investment decision on behalf of the managed account. The example was given of an ICPM managing money through the use of pooled funds, having set up various unit trusts with specific investment objectives e.g. a Canadian equity fund, US equity fund, bond fund, money market fund, foreign fund etc. It stated that in circumstances where total money under management on behalf of the client is well in excess of the private placement minimum of \$150,000, it fetters the discretion of a prudent portfolio manager to require that a minimum of \$150,000 be invested in each in-house managed pooled fund in which that account invests. It used the example of management of an account in the amount of \$500,000²¹ that is restricted by tax law to investing a maximum of 20% in foreign content. The ICPM could not manage this account through the efficiency of an in-house managed pooled fund structure (without going to the expense of preparing and filing a prospectus for the funds). In this example, a maximum of \$100,000 could be invested in a “foreign content” fund. This is below the Ontario securities law private placement threshold for exemption from prospectus requirements.²² At one point in the past the OSC granted discretionary

²⁰ Notice of Proposed Rule 45-504: “Prospectus Exemption for Distributions of Securities to Portfolio Advisers on behalf of Fully Managed Accounts. June 27, 1997 (1997), 20 OSCB 3367.

²¹ CC&L minimum account size for high net worth individuals. Assume for the purposes of this example that the account is an RRSP.

²² Refer to OSA s. 72(1)(d). Reg. 27(1) states that the private placement exemption in s. 72(1)(d) is not available where the trade has an aggregate acquisition cost to the purchaser of less than \$150,000.

relief in these circumstances on a case-by-case basis.²³ The 1990's have been a decade of paralysis on the part of the policy makers in this area.²⁴ Corollary relief for the discretionary money management business to facilitate the use of the pooled fund as a cost efficient investment vehicle is very much needed.

The Commission response was published in the Notice of Commission Approval to Rule 45-504:

As stated in a footnote to the proposed Rule, the Commission takes the position that a rule dealing with discretionary money management through the use of in-house pooled funds would likely contain different restrictive conditions than the conditions contained in the Rule. In particular, the Commission is considering the imposition of monetary thresholds with regard to individual managed accounts and the appropriateness of other safeguards contained in National Policy No. 39 in the context of the creation and use of pooled funds for discretionary managed account clients.²⁵

The private money management industry has been waiting for the Commission to publish a draft rule dealing with discretionary money management through the use of in-house pooled funds. Hopefully, the Rule will appreciate the nature of the services provided and deal with the subject in the context of “advising” rather than “trading” in securities and place the private money management business on par with Trust Companies.

D. Taxation Issues

A discussion of the various taxation issues affecting pooled funds is beyond the scope of this paper. Marlene Davidge and Judith Harris will be addressing taxation issues in the afternoon session. Suffice to say that there are significant taxation issues relating to pooled funds as unit trusts compared to the taxation consequences applicable to funds that meet the definition of “mutual fund trust”

²³ Alboini, § 17.5.2 [a.3] Purchase of Securities on Behalf of Fully Managed Accounts or the Rolling \$150,000 Requirement.

²⁴ There are numerous reasons for this not the least of which, I suspect, has related to staff shortages, the rule reformulation process and the Stromberg Report.

under the ITA.²⁶ When operating as a pooled fund in the exempt market, it may be difficult to meet the 150-unitholder requirements²⁷ to achieve the status of a “mutual fund trust”. There are significant benefits available to a trust that qualifies as a mutual fund trust throughout a taxation year that are not available to a unit trust/quasi mutual fund trust.²⁸ The taxation issues that arise for unit trusts that are not mutual fund trusts were not designed with the regulation of pooled funds in mind. These anomalies must be understood and addressed by Revenue Canada/Ministry of Finance to provide certainty in this area of law and to facilitate economic efficiencies in the investment management business.

The taxation issues and consequences should be fully understood and explored prior to an investment manager embarking on a money management program utilizing pooled funds as investment vehicles.

E. Funds on Funds Issues²⁹

1. Taxation Considerations

In funds on funds investments, the tax status of the in-house pooled fund making the investment and the tax status of the in-house pooled fund in which the investment is made must be considered and monitored. A unit of a “unit trust” that is not a “mutual fund trust” generally will not be a “qualified investment” for deferred income plans unless it is a “registered investment”. Registered investment status guarantees the investment in the pooled fund to be considered

²⁵ December 19, 1997 (1997) 20 OSCB 6938

²⁶ Subsection 132(6) of the ITA defines a trust as a “mutual fund trust” if it meets the following conditions: i. It is a unit trust resident in Canada; ii. Its only undertaking is investing its funds and permitted real estate activities; and iii. It complies with the conditions prescribed by Regulation 4801 relating to the public distribution of units and the number of its unitholders. “Unit trust” is defined in subsection 108(2) of the ITA as an *inter vivos* trust where the interest of each beneficiary is described by reference to units.

²⁷ ITA Reg. 4801(b): No fewer than 150 beneficiaries of the trust, each of whom holds i) not less than one block of units of the class and ii) units of the class having an aggregate fair market value of not less than \$500.

²⁸ Refer to October 14, 1998 Investment Management Taxation Seminar materials by PricewaterhouseCoopers LLP for a discussion of taxation issues affecting Unit Trusts.

²⁹ This paper only highlights some selected considerations. It is by no means exhaustive e.g. it does not address theoretical designated beneficiary aspects of ITA. Part XII.2.

Canadian content. If the pooled fund becomes a registered investment by meeting so called “quasi mutual fund trust status” it may invest only in investments prescribed under the ITA, otherwise it may incur adverse tax consequences³⁰. The prescribed investments are the ones applicable for the type of deferred income plans for which the trust is registered. Generally, these prescribed investments will include, inter alia, a mutual fund trust and a registered investment. I will illustrate a problem given the above by an example: if Fund A qualifies as a “quasi-mutual fund trust” and becomes registered as a Registered Investment under the ITA (to be used as an investment vehicle for RRSPs) and Fund B is a “foreign content” in-house pooled fund (not a registered investment), then Fund B must have mutual fund trust status, to be a qualified investment for Fund A.

In addition to the tax status of each in-house managed pooled fund, the ICPM should also be aware of the status under the ITA of certain of its clients, to determine whether or not they are eligible to be invested in in-house pooled funds. Two or more pension plans may invest their funds jointly through a private pooled fund trust vehicle (“ABC Trust”) and in so doing, must structure the investment vehicle to make sure that the investment in ABC Trust will not be treated as foreign property. If ABC Trust is structured to take the form of a paragraph 149(1)(o.4) Master Trust, then pursuant to Regulation 5000(1.2), foreign property may be held at either the Master Trust level or the pension plan level, but not both. If ABC Trust is structured to take the form of a Regulation 5000(7) Pooled Fund Trust, in order to so qualify, ABC Trust must meet certain asset and income limitation tests. The 80% of assets test and the 95% of income test must be strictly monitored by the trustees of ABC Trust. Revenue Canada has stated by Technical Interpretation that with respect to units of an open-end

³⁰ If non-prescribed investments are held by the trust at month end then tax at a rate of 1% of the acquisition cost of the non-prescribed property is levied under ITA Part X.2.

trust, such a unit would not be a “marketable security” solely on the basis that it is redeemable on demand.³¹

The taxation law considerations when dealing with fund on fund structures are complicated and it is recommended that the advice of tax counsel be obtained.

2. Securities Law Considerations

As indicated previously, the provisions of National Policy No.39 do not apply to in-house managed pooled funds. Those policies require the prior approval of securities authorities before a mutual fund may invest more than 10% of its net assets (taken at market value at the time of such investment) in another mutual fund or hold more than 10% of any class or series of a class of securities of another mutual fund.³² However the self-dealing provisions in securities legislation³³ provide for an effective limit of 20% investment by an in-house managed pooled fund as a “substantial security holder” in another in-house managed pooled fund without obtaining discretionary exemptive relief from these provisions.

CC&L obtained a groundbreaking order of this nature from the British Columbia Securities Commission (“BCSC”) in the spring of 1997 for in-house managed pooled funds.³⁴ In determining whether or not such approval would be granted, the BCSC considered the fact that, besides the management fees (which are based on the amount of money under management for a client), there were no other management or administration fees, acquisition or redemption charges, commissions or similar charges common in the mutual fund industry. There was

³¹ IT #9311545 July 28, 1993 Refer also to a tax paper by Eva M. Krasa, LL.B., partner, Borden & Elliot entitled “Pension Plan Investment: The Income Tax Implications of Multiple Pension Plans Investing Through a Private Pooled Fund Vehicle” delivered at an Insight conference held on January 20-21, 1997 called: “Pension Funds As Investors – Maximizing Investor Return”.

³² See section 2.04(1)(k)(i) and s.2.04(4) of NP No.39 for Investment restrictions relating to funds on funds investments for mutual funds as reporting issuers.

³³ Refer to clause 121(2)(b) and subsection 126(a) of the *Securities Act* (British Columbia) and clause 111(2)(b) and subsection 117(1) of the *Securities Act* (Ontario). Supra notes 19 and 3.

no duplication of fees payable to the ICPM as a result of the fund on fund investment. Further, each client receives continuous disclosure in the form of a quarterly report including a portfolio review, financial markets review, and details of the holdings of the client. CC&L periodically reviews the account with the client. It was the opinion of CC&L, that investment by the pool with a certain investment focus, which in turn invests in units of pooled funds with a certain market focus, are in the best interests of the pools and represent the business judgement of responsible persons uninfluenced by considerations other than the best interests of the pools.

The order did not address prospectus exemption filing issues to eliminate the duplication of filing fees payable on the same money under management. Further policy reform is required to facilitate active asset money management utilizing the efficiency of in-house managed pooled funds. Debra MacIntyre may provide an update on the position of the OSC on these securities law issues in her presentation that follows in the next session.

V. CONCLUSION

The transition for an investment manager from segregated money management to using pooled funds is logical given the many benefits of employing these intermediary investment vehicles. The business rationale is to attain maximum efficiency for the client. Clients benefit from economies of scale, lower costs and optimum portfolio diversification. Pooled funds comprise a portfolio of securities designed to maximize an investor's total return, while minimizing the investor's investment risk, through diversification at lower cost.

Enthusiasm for utilizing these investment vehicles is tempered by the myriad of legal implications in doing so. The taxation, securities and other "investment restriction" laws that may apply, were not designed with the regulation of pooled

³⁴ COR# 97/080 BCSC Weekly Summary 97:19 p. 43. (May 16, 1997)

funds in mind. There is great need in the private investment management industry for regulatory reform in the securities, “trustee” and taxation law areas. Canadian Securities Administrators must develop a uniform approach to pooled funds and harmonization of policy. In so doing, they should appreciate the distinctions between pooled funds and public mutual funds given the relationship between the investment manager and client. Policy makers of taxation law should consider the inappropriateness of certain provisions that may apply to pooled funds that do not meet the criteria for mutual fund trust status. Fund on fund structures should be understood and appropriate exemptions applied so as to avoid unintended negative taxation ramifications. The objective for policy makers must be to promote efficiency, capital formation and fairness in a competitive environment and to eliminate unnecessary and costly regulation.



Connor, Clark & Lunn
Investment Management Ltd.

September 23, 1997

Ontario Securities Commission
PO Box 55 Suite 800
20 Queen Street West
Toronto, Ontario, Ont. M5H 3S8

Attention: Ms. Susan Wolburgh Jenah

Dear Susan: Re: Discretionary Portfolio Management

Thank you for your telephone call today providing an update on the status of our letter of September 5, 1997. I am pleased that you have forwarded our submission to the Chairman and Executive Director of the Commission. I am delighted to hear that the issue will be on the agenda of the next policy committee meeting of the Commission and that you are a member of that committee. I look forward to hearing the outcome of the discussions.

As you know, we would very much like to have this matter brought forward on the agenda of the Commission. We would be happy to work with any designated Project Leader to help think through the issues in developing regulatory policy in this complicated, and often overlooked, area of investment management. As discussed, a potential solution would be to extend the relief afforded to a Trust Company under the definition of "Private Mutual Fund" to cover investment management through the use of "private" pools/unit trusts. Any concerns relating to the operations and policies of the portfolio manager could be addressed at the registration level.

As indicated, by letter dated September 9, 1997, we have written to the British Columbia Securities Commission to express our strong objections to BC Interpretation Note 97/11 on the meaning of "Fully Managed Account". We appreciate the difficulty in defining this term and note the proposed definition of "Managed Account" in Proposed Rule 45-504. The Ontario definition on a relative basis is more workable than the BC Interpretation. In the case of our clients, the discretion of the portfolio manager is limited/governed by the clients objectives or the clients' Statement of Investment Policies and Guidelines. Perhaps changing the word "all" to "the" and deleting the word "absolute" would assist in defining the term "Managed Account".

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September 23, 1997

We understand that Mr. Geller has strongly indicated that he does not want to approach registration and prospectus relief in the "family of pooled funds" area on a case by case basis. In placing this issue on the agenda of the Policy Committee, we are hopeful that the members will appreciate the importance that regulatory resolution to these problems will make in the day-to-day operations of portfolio managers operating in the non-prospectus realm. Our in-house pools, (comprised largely of pension funds), already contribute substantially through investment in the capital markets.

We look forward to hearing from you further.

Yours very truly,

Connor, Clark & Lunn
Investment Management Ltd.
per:

Sharon J. Morrisroe
Barrister & Solicitor

/sjm
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Connor, Clark & Lunn
Investment Management Ltd.

September 5, 1997

Ontario Securities Commission
PO Box 55 Suite 800
20 Queen Street West
Toronto, Ontario, Ont. M5H 3S8

Attention: Ms. Susan Wolburgh Jenah

PRIVATE AND CONFIDENTIAL

Dear Sirs: Re: Discretionary Portfolio Management

To confirm recent telephone conversations, our ongoing queries and comments concerning discretionary portfolio management have only partially been addressed by the release of Notice of Proposed Rule 45-504 - Prospectus Exemption for Distributions of Securities to Portfolio Advisors on behalf of Fully Managed Accounts. It is disappointing that the proposed relief from prospectus requirements does not extend to distributions to managed accounts of an in-house managed pooled fund where the portfolio adviser is making the investment decision on behalf of the managed account. We presume that you are planning to deal with that issue in the context of a separate rule. In our view, this "sister" issue needs to be addressed by the Commission as soon as possible.

The Notice of Proposed Rule 45-504 indicates that the Commission, in formulating the proposed rule, rejected the imposition of monetary thresholds on the basis that the portfolio adviser has the necessary sophistication to make an investment decision without a prospectus in the context of a discretionary managed account. It recognizes that it is the portfolio adviser making the investment decision on behalf of the client. We welcome recognition by the Commission of this circumstance. As you are aware, legislation in several other provinces deems a portfolio manager to be acting as principal when he purchases as an agent for accounts that are fully managed by him similar to the exemption available to a trust company in Ontario. The absence in the *Securities Act* (Ontario) of comparable provisions for accounts fully managed by a portfolio

December 8, 2000

manager is unfair and unfortunate in that it contributes to the lack of uniformity in Canadian securities regulation.

The circumstance that we wish to see addressed, whether by way of discretionary relief by separate application or whether by way of a rule of general application, is that where a portfolio manager is managing money through the use of "pooled funds", and various unit trusts are set up with specific investment objectives and managed by that portfolio manager eg., a Canadian Equity Fund, US Equity Fund, Foreign Fund, Diversified Fund, Bond Fund, Money Market Fund etc. In circumstances where total money under management on behalf of a client is well in excess of private placement minimums of \$150,000.00 it fetters the discretion of a prudent portfolio manager to require that a minimum of \$150,000 be invested in each in-house managed pooled fund in which that account is invested. (ie. without the delivery of a prospectus). These limitations do not operate in the best interest of the investor when a portfolio manager is investing, and making the investment decisions, on behalf of a fully-managed account. Take the example of management of an account in the amount of \$500,000 that is restricted by tax law to investing a maximum of 20% in foreign content. The portfolio manager could not manage this account through utilizing the efficiency of an in-house managed pool fund structure (without going to the expense of preparing and filing a prospectus) as a maximum of \$100,000 could be invested in a "foreign fund" which is below the securities law private placement threshold for exemption from prospectus requirements.

We appreciate that there are in fact, and should be by regulation, distinctions between types of investors such as unsophisticated investors investing smaller amounts that may benefit by receiving a prospectus. There should however be a distinction drawn for institutional investors and high net worth individuals that do not require such a disclosure document in circumstances where they are effectively granting a power of attorney to a portfolio manager to manage their money and to make all investment decisions on their behalf. It should also be recognized that the realities of efficient portfolio management are such that the pooling of funds for investment purposes by way of unit trusts provides greater trading efficiencies, cost savings for the client, and a model for fairness as between clients.

Proposed Rule 45-504 when implemented would permit portfolio advisers to invest client funds in treasury shares of any company in amounts less than \$150,000 yet would continue to prohibit the portfolio manager (even when managing accounts well in excess of \$150,000) from investing amounts less than \$150,000 in a lower risk professionally managed in-house diversified pooled fund of blue-chip securities (unless a prospectus is prepared, filed, approved and delivered).

-- 3

December 8, 2000

At one point in the past, the Commission granted discretionary relief in these circumstances on a case-by-case basis (see Alboini, §17.5.2 [a.3} Purchase of Securities on Behalf of Fully Managed Accounts or the Rolling \$150,000 Requirement.) As you are probably aware, there are certain portfolio managers entitled in these circumstances to operate under the discretionary relief previously granted and others who have been told by counsel when seeking such relief that there is no point in making application for discretionary relief as such applications are no longer being entertained by the Ontario Securities Commission.

Proposed Rule 45-504 is most welcome, however, it deals with only one important issue faced by portfolio managers when managing accounts on a discretionary basis. Unfortunately, the much needed corollary relief for discretionary money management through the use of in-house pooled funds is still missing.

We would appreciate the Commission bringing this issue forward on its agenda. We would like to proceed to make an application for discretionary relief on this issue should such an application be entertained at this time. Alternatively, in the interest of fairness, it would be preferable for the Commission to address this issue by way of a rule of general application by either extending the application of Proposed Rule 45-504 to cover these circumstances or by introducing a companion rule.

We look forward to hearing from you further on this issue.

Yours very truly,

Sharon J. Morrisroe
Barrister & Solicitor

cc. Daniel P. Iggers, Secretary



Connor, Clark & Lunn
Investment Management Ltd.

December 8, 2000

Mr. John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario
M5H 3S8

Dear Sir:

Re: Proposed OSC Rule 45-501- Exempt Distributions

Connor, Clark & Lunn Investment Management Ltd. ("CC&L") is pleased to respond to the Ontario Securities Commission's ("OSC") request for comments on proposed Rule 45-501. CC&L is an investment management firm registered (among other places) as an ICPM/Limited Market Dealer in Ontario with approximately \$15 billion of assets under management.

We have earlier provided comments to the OSC on the subject of the new regime for prospectus exemptions by letter dated August 19, 1999 (copy attached). The undersigned participated in a meeting at the OSC in July, 1998 with both Rebecca Cowdery and Susan Wolburgh Jenna in attendance, to explain the use of Pooled Funds. [For a discussion on the "Benefits and Pitfalls of Pooled Funds" we refer you to the attached paper written by the undersigned and presented at an Insight Information seminar "Everything You've Always Wanted to Know About Pooled Funds" that was held at the Sheraton Centre Hotel in Toronto on March 30, 1999.] At that meeting, the securities legal counsel and portfolio managers present highlighted pooled fund investment management issues and the need for prospectus exemption sprinkling relief among a family of in-house managed pooled funds. We were hopeful that a blanket rule would be drafted to address those issues. We have been disappointed that these issues have not been prioritized and dealt with sooner by the OSC.

Copies of letters to the OSC dated September 5, 1997 and September 23, 1997 on the subject of the limited scope of the Rule 45-504 prospectus exemption are also attached. We have asserted throughout the rule-reformulation process that Rule 45-504 should have extended to registered Portfolio Managers when investing a "Managed Account" through an in-house managed pooled

fund. In this regard, we use a more restricted definition of "Managed Account" to refer to a discretionary client of a registered Portfolio Manager rather than the broader term "Portfolio Adviser" as defined and used in the proposed rule.

Over the past year, we have worked to raise the profile and membership of the Investment Counsel Association of Canada ("ICAC") for there to be an effective industry voice in the portfolio management industry. Our more comprehensive views on the proposed Rule 45-501 have been made through board and committee representation and the submission we prepared on behalf of the Government Relations Committee of the ICAC. We endorse the ICAC submission dated December 8, 2000 concerning proposed OSC Rule 45-501.

A considerable time period has elapsed since initial discussions with the OSC on the need for more comprehensive registration and prospectus exemptions to facilitate portfolio management. We view Proposed Rule 45-501 as an opportunity for Ontario to modernize its prospectus exemption legislation and to bring it in line with Portfolio Manager "deemed principle" concepts operative in prospectus exemption regimes in other provinces. In so doing, the needs of the portfolio management industry can be met by recognizing that a registered Portfolio Manager is making investment decisions for a discretionary Managed Account of a Portfolio Manager whether that client account is invested on a segregated basis or collectively with its other Managed Accounts having similar investment objectives. Investor protection concerns should be addressed upon granting adviser registration in the category of "Portfolio Manager" requiring the highest proficiency requirements.

It would be preferable for the prospectus exemption regime to be addressed on a harmonized basis to simplify the complexity of the prospectus exemption regime across Canada and to facilitate doing business in Canada. We support the stated objectives that the new regime needs to be more consistent with the needs of the market and its investors and to provide a more rational basis for exempt financings.

Sincerely yours,

Connor, Clark & Lunn Investment Management Ltd.

Per:

Sharon J. Morrisroe B.A., LL.B.
In-House Legal Counsel

cc. British Columbia Securities Commission Att: B. Benham
Alberta Securities Commission Att: D. Hendrickson
OSC Corporate Finance: Att: Margot Paul, Iva Vranic, Jamie McVicar.
OSC Capital Markets: Att: Rebecca Cowdery, Manager Investment Funds





Connor, Clark & Lunn
Investment Management Ltd.

August 19, 1999

The Secretary
Ontario Securities Commission
Suite 800 - 29 Queen Street West
Toronto, ON M5H 3S8

Dear Sirs:

Re: Concept Paper: Revamping the Regulation of the Exempt Market

This letter is written in response to a request for comments on the above concept paper. Arnold Hughes of our offices had earlier spoken to a member of your staff to obtain an extension to your submission deadline.

The concept paper proposes significant changes to the current private placement regime including the elimination of the \$150,000 private placement exemption. We are concerned about the timing of implementation of proposals of this nature, vis-a-vis proposals for development of a rule providing for registration and prospectus relief for managed accounts managed by a portfolio manager and invested through in-house managed Pooled Funds. We had understood that the development of a “rolling \$150,000 requirement” rule was in the works and we hope that you will continue, as an interim measure, to adopt such a rule.

The introduction of the closely held issuer exemption is recommended to be available for all issuers other than mutual funds. So called “Pooled Funds” (meaning in this context, a unit trust that is not a reporting issuer, having “exempt market type investors”) falls within the definition of mutual fund in the current regime of securities regulation. It has been our opinion that the use of a Pooled Fund for investment management purposes has significant cost savings and benefits and should more appropriately fall within the ambit of the definition of a private mutual fund. Private mutual funds are regulated under a separate scheme in the Act without registration, prospectus or filing requirements. We think one of the objectives should be to level the playing field in the exempt market. This may be achieved depending upon how and when the concept proposals are implemented. In the meantime, without adoption of a rule providing for sprinkling relief for in-house managed funds, trust companies can “sprinkle” Managed Accounts within a family of funds (ref. s. 72(2) Act.), whereas a portfolio manager (that is not a trust company) cannot.

Accredited Investor Exemption

We strongly support the recommendations of staff that the definition of Accredited Investor should include a Managed Account as defined in the Sprinkling Rule (45-504). We agree with staff recommendations that propose that the Accredited Investor exemption is to apply to all issuers, regardless of size and type.

Accredited Investor Classes

g. pension funds/societies

We agree with staff recommendations that a minimum asset threshold should not be necessary. Given that pension funds are sponsored by an employer and fiduciary duties are attributable to the trustee/pension committee of a pension fund, we think it is appropriate to include all corporate sponsored pension funds on the Accredited Investor list. In addition, many pension funds benefit from the advisory services of pension industry consultants.

h. registered charities

Consideration should be given for the inclusion of other tax exempt entities on the list of Accredited Investors such as:

- ◆ unincorporated societies,
- ◆ foundations,
- ◆ not for profit organizations (i.e. labour organizations),
- ◆ a benevolent society, fraternal benefit society or order.

i. individuals

“Net Worth”: From a clarity point of view, we think continued reference to including registered retirement savings plans in the calculation of an individual’s net worth is worthwhile. We do not agree with excluding one-half of the net equity of such individuals’ personal residence from the calculation of net worth as it is awkward. It would potentially require ongoing net worth monitoring for additional investments (given historical fluctuations in real estate markets). In addition, other jurisdictions with net worth tests, such as the Sophisticated Purchaser in British Columbia, do not have that exclusion.

The minimum threshold of \$2.5 million rather than the recommended \$1 million is, in our view, too high. The net worth and income thresholds for Accredited Investors under the OSC staff proposals are significantly higher than the thresholds under the BC exemptions that require a purchaser to be a Sophisticated Purchaser. In our view, the investment industry needs harmonization in Canadian securities regulation. Net worth and income levels should be co-ordinated and set at a level that the Canadian Securities Administrators are collectively comfortable with.

k. *an officer, director or promoter of the issuer*

The promoter class should be expanded to include an investment manager of a mutual fund and associated entities (whether or not the investment manager took the initiative in founding or organizing the trust).

l. *parents/brother/sister/child*

In our view, minor children, minor grandchildren and dependants of persons mentioned in (k) (promoter/investment manager), (i) (individual net worth) and (j) (individual net income) should be included on the list of Accredited Investors to recognize the business/family affairs of high net worth/net income individuals.

o. *research analyst*

We are of the view that a research analyst employed by a registrant that is a registered portfolio manager (who has been involved in financial/investment analysis relating to an issuer's portfolio) should be on the list of Accredited Investors.

p. *corporations/limited partnerships/trusts/estates*

We do not understand the rationale for establishing a threshold at \$5mm for these entities being double the threshold for individuals. (e.g. the threshold is twice as high if an individual is dead rather than alive.) In our view, a distinction between the two classes, requiring much higher minimum thresholds is not warranted.

r - t

The inclusion of these classes (mutual funds distributing securities only to persons or companies referred to in clauses (a) through (q) is both welcome and necessary. The cross-references should, in our view, be expanded to include Managed Accounts. Class "r" facilitates a fund on fund investment for one tier but should be expanded to envision a two or three-tier fund structure to facilitate investment in foreign replicated index funds. An amalgamation or merger of two or more of these types of funds and any distribution of units to unitholders should also be provided for.

Additional Classes of Accredited Investors

We recommend consideration of the inclusion of Corporate Sponsored Group RRSP's on the list of Accredited Investors. Given the involvement of the corporate sponsor, we are of the view that the prospectus regime may not be as beneficial to an investor as an education program. In lieu of a prospectus, criteria for investor education and suitability could be established, together with availability of an offering memorandum. The objective should be to establish a lower cost and more effective method of meeting the needs of investors.

Managed Account

Part B entitled “Benefits of Having a Complete Accredited Investor List” contains staff recommendations to include a Managed Account in the definition of Accredited Investor. As indicated above, we agree with this approach as the portfolio manager for a Managed Account makes investment decisions within the confines of client mandates or constraints. Rule 45-504 recognizes that it is the portfolio manager that makes the investment decisions for a Managed Account. Other jurisdictions such as BC, Alberta, Saskatchewan and Nova Scotia deem the portfolio manager to be acting as principal when the portfolio manager purchases or sells as an agent for accounts that are fully managed by the portfolio manager. A portfolio manager managing a client’s discretionary account on a segregated basis, is not restricted by securities regulation to the type, nature or size of the account taken on. Neither is a registered representative of a dealer so limited when taking on a discretionary account. Business factors dictate the minimum account size firms establish in respect of discretionary accounts. It is our view that portfolio managers should not be discouraged or hindered by securities legislation from using a Pooled Fund as an investment vehicle given the associated benefits of trading efficiencies and lower costs to the client.

Disclosure Documents and Civil Liability

We are in agreement with the approach taken by the OSC staff proposals.

Elimination of “Limited Market Dealer” Category of Registration

Portfolio managers investing client funds through the Pooled Fund investment vehicle currently operate in Ontario on the basis of registration as a “limited market dealer”. The Investment Counsel/Portfolio Manager category of registration is one of the more onerous categories of registration for proficiency requirements and is also subject to capital adequacy requirements. Although the concept proposals purport to extend registration exemptions for Accredited Investors, the concepts are premised on the assumption that all issuers have directors and officers. That is not the case for a Pooled Fund that is a unit trust. Wording needs to be expanded to cover directors, officers, or partners of an investment manager or trustee of an issuer that is a trust.

Conclusion

It may be that other classes of investors that need to be recognized as Accredited Investors come to mind or that our views on the above change going forward in the consultation process. However, we appreciate the opportunity to provide comments at the concept stage. We agree that change is desirable in the area of private market regulation and that changes need to be consistent with the needs of its investors. In general, we support the OSC staff proposals for revamping the regulation of the exempt market. Ideally, such initiatives should be undertaken in co-operation with other provincial securities commissions with the view of harmonisation of securities regulation in Canada.

As indicated above, we are concerned about the timing of implementation of these concept proposals. Registration and prospectus sprinkling relief is much needed in Ontario for investment management of Managed Accounts invested through in-house managed Pooled Funds. We ask that a rule providing such relief be finalized in the intervening period until the adoption of new rules implementing a comprehensive list of Accredited Investors.

Yours very truly,

Connor, Clark & Lunn Investment Management Ltd.

per:

Sharon J. Morrisroe
Barrister & Solicitor

cc: British Columbia Securities Commission Re: - NIN #99/18 Attn: Brenda Benham

OSCCONPF

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December 8, 2000

December 7, 1998

Ontario Securities Commission
PO Box 55 Suite 800
20 Queen Street West
Toronto, Ontario, Ont. M5H 3S8

Attention: Ms. Deborah MacIntyre

Dear Sirs: Re: Discretionary Portfolio Management – “Pooled Funds”

Further to our telephone conversation last week and subsequent fax please find enclosed the following:

1. Copy of correspondence dated September 5, 1997 – CC&L submission to the OSC concerning Rule 45-504;
2. Copy of correspondence dated January 15, 1998 to the BCSC concerning the interpretation note on “fully managed account” and “private mutual fund” exemptions;
3. **Pooled Fund Cost Savings** example illustrating the costs savings to a client through utilization of pooled funds as opposed to segregated money management. This example was prepared internally by Dennis Perry and John Flintoft based on certain assumptions as it is difficult to quantify precise savings given differences in costs depending on facts and circumstances (just one example being the dollar amount being invested). Although the actual results/savings will vary depending on the facts and circumstances applicable, the conclusion without question is that there are considerable cost savings by utilizing pooled funds for investment management.

Please note that the example does not take into account any securities regulatory fees attributable on utilization of prospectus exemptions. (The validity of the fee schedule for prospectus exemptions may be in question in light of the Supreme Court decision in Eurig Estate as the fees represent a direct tax bearing no resemblance or relation to work (none required) performed by

December 8, 2000

staff at the commission.) Keep in mind also that there are already substantial contributions to the Canadian markets by the investment of large sums in the Canadian financial markets.

Some of the benefits of utilizing Pooled Funds are: transaction cost efficiency, economies of scale, fairness of trade allocation, similarity of performance and ease of handling cash flows. Such factors have driven many leaders in the portfolio management industry to provide portfolio management services utilizing pools. Although the term “pooled fund” has no definition from a legal point of view, it is generally accepted that a “pooled fund” is a fund that has not been issued a receipt for a prospectus ie. not a reporting issuer. . The subscription of units of a Pooled Fund is not available to the public. The “pooled fund” is simply the method by which the portfolio manager provides the service of investment management for those clients that have entrusted their money to it. The pooled fund is *de facto* an extension of the manager. The portfolio manager operating on the basis of a fully managed account is in a fiduciary role and makes the investment decisions on behalf of clients within the confines of any legal or policy constraints and in accordance with the investment objectives of the particular client. It is the relationship between the client and the portfolio manager that is key. This is quite distinct from the concept of a “mutual fund”. As noted by Mr. Charles MacFarlane, Executive Director of the OSC in his speech “Dialogue with the OSC”, Toronto, November 3, 1998 (1998, 21 OSCB 6893):

Among the latter category were the investment fund or mutual fund dealers and their many thousands of sales people. Today, in Canada, as in the U.S. there is a mind boggling array of mutual fund products available to a potential investor.

Mutual funds feature different asset classes, industry sectors, and geographic regions They have higher or lower risk profiles. They are sold in different ways, with different payment structures, and different tax implications.

Moreover, mutual funds are heavily advertised, more so than any stock or bond. In short, **mutual funds are sold not purchased**, (*emphasis added*) and retail investors are putting their savings and their faith in mutual funds, for both the short-term and retirement. ...

Having “mutual funds” and “pooled funds” in the same fruit bowl is akin to apples and oranges. They are different and distinct. The former is a “product” for sale, the latter is an extension of the manager. The investor and the circumstances differ significantly.

-- 3

December 8, 2000

Historically, the "mutual fund business" represented a relatively small portion of money invested in Canada and the private pooling of funds was relevant in the context of Trust Company commingling of funds in the administration of estates. The picture has changed dramatically as evidenced by the extracts from the Benefits Canada article (provided to you under fax cover last week) showing the magnitude of money managed in Canada on both a segregated and pooled basis. Trust Companies are advantaged competitors in the money management industry operating with the benefit of various definitions, rules and statutory exemptions which permit them to pool client funds without securities law implications.

Continuous Disclosure

When dealing with pension funds and other fiduciaries at the board or plan level, the responsibility, sophistication and magnitude of dollars involved, together with the extremely competitive market demanding excellent client service, ensures an environment supporting a well-informed client. Pension plans require that the financial statements of the pooled funds in which they invest be audited. In fact, the most relevant financial information is available on a daily basis through daily net asset values ("NAV"). The client can request meetings and regular reporting which in some cases is as frequently as monthly. There is opportunity to have any questions or concerns posed or addressed. CC&L has a standard quarterly reporting process and provides reports more frequently when requested to do so by the client. The portfolio manager has personnel employed to support the client relationship. Should a client be disenchanted with investment performance or client relations they are entitled to redeem the units on demand and terminate the services of the portfolio manager in accordance with the terms of their agreement.

The application of securities law to the portfolio management business is more appropriate at the registration level where proficiency and capital requirements are reviewed.

We hope you will consider the above in the formulation of a rule providing prospectus exemptive relief for portfolio managers operating fully managed accounts and providing investment management services utilizing pooled fund trusts.

Should you have any questions or comments, feel free to contact the undersigned.

Yours truly,

Sharon J. Morrisroe

-- 4

December 8, 2000

Barrister & Solicitor

Encl/

/sjm

oscitdm