April 14, 2004

Canadian Securities Administrators
c/o John Stevenson, Secretary
Ontario Securities Commission
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and

c/o Denise Brousseau, Secretary
Autorite des Marches Financiers
800 Victoria Square, Stock Exchange Tower
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Dear Sirs:

Re: **Request for Comment on Proposed National Instrument 81-107**
Independent Review Committee for Mutual Funds

This letter is submitted in response to the request for comment dated January 9, 2004 by the Canadian Securities Administrators ("CSA") in respect of Proposed National Instrument 81-107 *Independent Review Committee for Mutual Funds* (the "Instrument").

This submission is provided by the Securities Law Subcommittee (the "Subcommittee") of the Business Law Section of the Ontario Bar Association. The members of the Subcommittee are listed in the Appendix attached. Please note that not all of the members of the Subcommittee participated in or reviewed this submission, and that the views expressed are not necessarily those of the firms and organizations represented by the members of the Subcommittee.

Our comments focus on the concepts underlying the Instrument. Generally, we have not commented on the technical workings of the Instrument or offered specific responses to the issues for comment set out in the Instrument because we believe others are better suited to this task.

General

We support the Instrument and the concept of introducing a mandatory fund governance regime focused on conflicts of interest, which it reflects. We believe that the conflict of interest rules currently reflected in securities legislation are outdated and unworkable. Their reform is long overdue. We also support the scaling back of the original mutual fund governance proposals to permit the gradual introduction of practical rules. In addition, we commend the efforts of the CSA Mutual Fund Committee in developing a uniform national position in this important area and encourage the CSA to do everything possible to ensure that the final form of the Instrument is adopted by all of its members.

Despite various assurances received by the CSA, we are still concerned about the ability of small mutual fund managers to attract knowledgeable people to serve on independent review committees ("IRCs"), given the high level responsibility and low level of compensation which membership may entail. Although we believe that non-professionals may have a place on IRCs, we feel that the committees can only fulfill their investor protection mandate if each committee includes persons with the necessary education and experience to identify and analyze the risks inherent in the proposals the committee is asked to review. After the Instrument is adopted, the CSA should monitor the composition and activities of IRCs until it is satisfied that these committees are capable of appropriately discharging their responsibilities and that the system reflected in the Instrument is protecting investors.

Role of the independent review committee

In order to protect IRC members, mutual fund security holders and managers, we believe that the Instrument should be revised to clarify the responsibilities of an IRC in at least two respects. While we acknowledge that these matters can be dealt with in an IRC's written charter**,** specific rules in these areas will be in everyone's interest. First, the Instrument should specify the circumstances in which an IRC may approve the actions of the manager in advance by approving a general policy so long as it monitors the manager's compliance with that policy. Second, the Instrument should acknowledge that there will inevitably be non-recurring situations in which there is a direct conflict between the interests of mutual fund security holders and the manager, but where the potential cost and risk to the mutual fund are so small that it would be inefficient to require the proposal to be submitted to an IRC[1].

[1] For example, the Instrument could provide that if the manager can quantify the cost and risk of loss to the mutual fund and that amount is less than 2% of the annual management fees payable by the mutual fund to the manager, the conflict can be considered de minimis and need not be referred to the IRC.

Liability of members of the independent review committee

While we agree that the personal liability of members of an IRC for their decisions is an important element of investor protection, we also believe that this liability must only arise in situations where IRC members have not fulfilled their responsibilities. Therefore, we believe that the Instrument should specify that members are protected by the "business judgement rule". In our view the standard of care set out in section 2.6 of the Instrument may not provide adequate protection for a committee member whose decision is taken on an informed basis, in good faith and in the best interests of the mutual fund.

We also believe that there should be monetary limits on the personal liability of IRC members. The contrast between the potential liability of a member of an IRC and the potential liability of a director of a responsible issuer under the civil liability for secondary market disclosure amendments is striking .We do not believe the difference can be justified by the differing circumstances from which the liability flows. If IRCs are to work, they must be filled with dedicated, knowledgeable people who do not fear the consequences of either challenging or supporting the mutual fund manager's position.

While we recognize that certain CSA members are concerned that their present rule-making authority does not permit them to limit the liability of members of IRCs, we believe that it is essential that these concerns be overcome .The Uniform Securities Act should limit the monetary liability of members of IRCs or include specific rule-making authority which permits such limitations to be included in the Instrument[2]. Pending the passage of legislation, mutual funds should be required to include such limitations in the provisions by which they create their IRCs.

Security holders' remedy if there is a dispute between the IRC and the manager

We believe that the remedy available to security holders if there is a dispute between the IRC and the manager should be strengthened. Under these circumstances security holders should be permitted to redeem their securities without charge during a 30 day period after the manager gives notice that it will, or has, acted contrary to a recommendation of its IRC, unless the IRC does not consider the dispute sufficiently material to warrant redemption without charge. While we support the CSA position that the IRC should not be able to fire the manager because this may be inconsistent with the expectations of many security holders, we do not believe that disclosure is an adequate remedy where a manager has decided to act in a manner which its IRC considers favours the manager's interests over those of security holders. Requiring the manager to permit redemption without charge favours security holders who have purchased units with back- end loads over those who have paid front-end loads and could impact overall compensation practices in the mutual fund industry. However, we still believe that such a remedy is needed.

[2] The rule-making authority reflected in the December 16. 2003 consultation draft of the Uniform Securities Act is not adequate.

Change in control of a manager

Finally, we believe that the Instrument should specifically address the responsibilities of all parties when there is a change in control of the mutual fund manager. The Instrument may imply that these responsibilities are the same as those which arise when there is a change of the manager but given the frequency and complexity of situations involving a change in control of the manager, we believe that clarification is needed.

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Thank you for the opportunity to comment on the Instrument. If you have any questions or comments, please do not hesitate to contact Susan McCallum at 416-783-5483 (simccallum200650@aol.com).

Yours truly,

Securities Law Subcommittee
Business Law Section
Ontario Bar Association

Appendix
OBA SECURITIES LAW SUBCOMMITTEE

Members:

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