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To John Stevenson

Secretary to The Ontario Securities Commission

20 Queen Street West

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**Re: request for comments on the Proposed Implementing Rule and Proposed Companion Policy regarding NI 81-107**

I have been a member of a Fund Board of Governors for some 20 years and I am currently a member of an IRC. In 1992/93 I served a term as Chairman of IFIC.

The concept of establishing an Independent Review Committee [IRC] to deal with conflicts as described in the May 2005 draft 81-107 is original and has much merit. It will form a key building block for supervision of investment funds stretching years out into the future .

Since the majority of Canadians will be relying on some form of unitized investment product to fund part or all of their retirement , this new regime of "citizen oversight" will touch the lives of most of our adult population.

There is however one particular element of the proposed structure which I believe requires further attention.

The latest draft proposal acknowledges the need to give special consideration to the personal liability of IRC members. It acknowledges that **IRC members are not**

**Corporate Directors** and should not be held as accountable as a Director. However in my view it does not go far enough.

**For the following reasons, I would recommend that members of an IRC should be answerable only to the regulator, and not be expected to perform their duties with the threat of a lawsuit hanging over their heads, for years into the future.**

### **1]Product complexity.**

The products which are right now in the marketplace are in some cases exceedingly complex. Over the next few years they will probably increase in complexity. Even today, members of the Canadian legal and accounting professions themselves have difficulty understanding exactly how some of today's products are structured. Not surprising, since arcane sections of the Income Tax are often driving the design of the product.

. Clone Funds, different classes of funds, structured products using credit note strategies, hedging practices, the use of derivatives and leverage, are some of the very complex concepts which IRC members will have to get their heads around if they are to feel comfortable with giving advice and approvals as set out in the draft Instrument. In some instances some of these products will be too complex for the average IRC member to fully comprehend.

Defending a lawsuit instituted against IRC members as individuals by an injured unitholder, by pleading that the IRC members really did not understand the Fund's products will represent a very weak defense.

### **2]Profile of an IRC member.**

Increasingly, corporations and other organizations are recognizing the amount of time and effort that is involved in serving on outside Boards. They are becoming less willing to allow senior officers and staff to serve on demanding outside involvements, such as an IRC.

The new IRC regime will require that over the next few years we recruit and train and replace, as necessary, several hundred IRC members.

**Because of the personal liability issue many highly qualified candidates will refuse to serve on an IRC.**

The chances are good that the majority of the new IRC members will be retired or semi-retired. These individuals will have a limited –and declining ability to assume the risk of being held personally liable, in lawsuits arising from actions they may have taken or not taken years before, in their capacity as IRC members. Even though lawsuits by injured investors directed at IRC members may have little chance of succeeding, they will still have to be defended and they will still represent an unwelcome intrusion into the lives of these IRC members, particularly if at the time of the lawsuit they are retired and in declining health.

### **3]Two classes of IRC member.**

The draft instrument offers members of an IRC the opportunity to negotiate with the Manager for an indemnity from the Manager, or the chance to be covered by a commercial insurance policy.

A large well financed Mutual Fund Manager will be able to offer its IRC members an indemnity which will cover all eventualities and will assure its IRC members that they have no need to worry about personal liability, if they act properly. Likewise a Manager who can afford to buy a “Bullet-proof” insurance policy will also have IRC members who can rest comfortably.

But what about the IRC members of smaller less well financed fund groups, who may be unable to offer an adequate indemnity?

What about changes in the practices of Insurers who will always have the right to introduce new limits to policy coverage and conditions to reflect adverse experience?

It may well be that we will end up with two classes of IRC members. One class which has indemnity from large financially strong Financial Institutions, and another class of IRC members who represent smaller less financially robust organizations. Surely not a result which will contribute to the future health of the concept of an IRC regime. Also not likely to be in the interests of fundholders in general.

It seems to me that the IRC member is in fact acting in a limited way on behalf of the Regulator.

Why not give the IRC member a similar protection to that enjoyed by a regulator. Just as an injured unitholder cannot sue a provincial securities regulator to seek redress, so such a unitholder should not be able to sue an IRC member. This will take nothing away from the unitholder who will still retain all of his or her existing rights of redress. It will also not promote lax conduct on behalf of IRC members---since the vast majority of IRC members will be acting in good faith and giving their best efforts. IRC s themselves are well capable of dealing with any member who does not act responsibly. Indeed the self assessment recommendations and the ability of IRCs to retain outside professional assistance as envisaged in the proposal will also help ensure that there are few unproductive IRC members. In any case the regulator will always be able to take any disciplinary action which is called for.

**Removing the spectre of personal liability will cause a greater number of qualified individuals to make themselves available to serve on an IRC.**

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