17th August, 2005

John Stevenson
Secretary to the Commission
Ontario Securities Commission
20 Queen Street West
Suite 1903, Box 55
Toronto, Ontario M5H 3S8

Dear Mr. Stevenson,

Re: Request for comments on the Proposed Implementing Rule and Proposed Companion Policy regarding NI 81-107 (the "Instrument")

The proposed requirement for all public investment funds to establish an Independent Review Committee (IRC) to deal with conflict of interest matters, as described in the revised draft of proposed NI 81-107, is unique to Canada and, in our opinion, has much merit.

Independent Review Inc. (IRI) offers to establish and run independent governance bodies for appointment by public and private investment funds (either in accordance with the legal requirements proposed in the Instrument or by way of voluntary compliance with the current best practices in fund governance). IRI now offers a turn-key IRC service (i.e. an investment fund can outsource its IRC obligations to IRI).

The proposed new provisions mean that setting up and running an IRC will be more complicated than originally envisaged. In addition, we have a number of practical comments on the Instrument, as published. We, therefore, appreciate being given the opportunity to comment on the proposed rules and policy.

Definition of "Conflict of Interest Matters"

The guidance note on the definition of an "entity related to the manager" now includes any sub-adviser as an "agent" of the manager – which considerably widens the potential scope of matters that fall within the definition. Given that the fund manager is under a duty of care to act honestly and in good faith, and in the best interests of the investment fund, we are not sure why the manager cannot review and deal with any conflict of interest matters that involve only a sub-adviser and, absent the guidance note, do not otherwise raise a conflict of interest for the manager. (e.g., where a sub-adviser recommends that the fund purchase securities issued by an entity that is related to the sub-adviser, but not otherwise related to the manager).

Standing Instructions

The Instrument allows an IRC to give "written standing instructions" that permit a fund manager to act in a pre-agreed way in a conflict of interest matter, on such terms and conditions as the IRC requires. Standing instructions will be particularly useful for managers in respect of time sensitive matters, such as inter-fund trading and the sale or purchase of securities of related issuers. However, the IRC must regularly re-evaluate the adequacy and effectiveness of the standing instructions, review the manager's policies and procedures in respect of such matters and then reaffirm its approval or recommendation of the actions covered, before the manager can continue to rely on the standing instruction.

This seems a rather convoluted procedure, and may leave the manager in a position where it is not totally sure whether the standing instruction is still in force or not. It would certainly be more straight forward if such standing instructions were stated to be "good till cancelled", albeit subject to regular, at least annual, review by the IRC.

Whistleblower Function

IRCs are expressly given the authority under the Instrument to communicate directly with the securities regulators – which, by itself, seems fine.

However, the Instrument goes further and states that the IRC must report to the regulators any instance of non-compliance, including any instance where the IRC "suspects" non-compliance. In addition, the guidance notes encourage an IRC to inform the regulators of "any concerns that the IRC is not otherwise required to report" (e.g. if very few matters have been referred to the IRC by a manager).

Our concerns with these new provisions are threefold. Firstly, it raises a question regarding the IRC's primary duty. Is the IRC primarily a governance body of the fund or is an IRC serving a regulatory function, with a duty to report to regulators? Secondly, the whistleblower obligation, as worded, will be difficult to manage. Thirdly, while the Instrument elsewhere seeks to limit the potential liability of the members of an IRC, these new "whistleblower" obligations may well expose an IRC and its members to additional liabilities.

If an IRC is part of the governance structure of a fund, and reports to the board of the fund, then arguably the IRC should first raise any concerns with the board of the fund and/or the manager. At the end of the day, compliance is a board responsibility. The board should have a chance to investigate and respond to any alleged violations of regulations, including the responsibility to report to regulators, if appropriate. Only if the board does not respond in a satisfactory manner to an issue raised by the IRC should the IRC have an obligation to raise the matter with regulators, in our opinion. If the IRC is now proposed to be a regulatory mechanism, we believe that it fundamentally changes the mandate of the IRC from the pure governance role that was originally conceived.

As regards the management of this new function, it is not clear what procedures an IRC should follow before reporting to regulators. Should the IRC carry out a review or investigation? Should the IRC advise the management of the fund and request a response? How much fact checking is required to verify a "suspicion"? Will the IRC's reports to regulators be public (under freedom of information legislation), or otherwise discoverable?

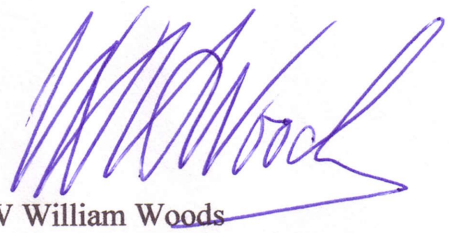
In terms of additional liability, security holders may point to this new regulatory obligation and raise the argument that an IRC should have taken a more pro-active role in the oversight of an investment fund, rather than just considering conflict of interest matters that are referred to it by the manager. On the other hand, in our opinion, it is not appropriate for an IRC to be raising suspicions, which may well have no merit, with regulators. Such reports could expose the fund to legal and regulatory liabilities. The manager would sue the IRC members if they raised concerns with the regulators, if such concerns caused harm to the fund and the manager but later turned out to be unwarranted. For example, where a disaffected former employee of the manager made allegations to the IRC, under the Instrument the IRC would be obliged to pass those allegations onto the regulators and probably to raise them with the fund and the manager; but how could the IRC substantiate those allegations before doing so?

Conclusion

Given that these fund governance proposals have been under discussion for more than 4 years, we would suggest that the Instrument should now be brought into force, but with an undertaking from the CSA to review the Instrument again after it has been in effect for 12 months.

Please do not hesitate to contact us if you wish to discuss any of these comments.

Yours sincerely,



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