



FRASER MILNER CASGRAIN LLP

Heather L. Zordel
Direct Line: 416-863-4463
heather.zordel@fmc-law.com

John S. Elder
Direct Line: 416-863-4652
john.elder@fmc-law.com

September 9, 2005

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, ON M5H 3S8

Dear Sirs/Mesdames:

Comments on Proposed National Instrument 81-107 Independent Review Committee for Investment Funds

We are pleased to respond to the Canadian Securities Administrators (“CSA”) May 27, 2005 publication of a notice and request for comment on changes to proposed National Instrument 81-107 *Independent Review* (“NI 81-107”).

A. Lack of Exemptions

We are concerned that the CSA, in its move to expand the applicability of NI 81-107 from conventional mutual funds to all publicly offered investment funds, will be excessively

regulating some funds, primarily because NI 81-107 does not provide appropriate “carve-outs” from its application.

1. Size-Based Exemption

We suggest that you consider an exemption from the NI 81-107 Independent Review Committee requirements for a funds that are below a minimum size. As a general matter, regulation needs to balance benefits with costs. A small fund will be disproportionately burdened with the costs of compliance. As to the question, “What is smaller?”, we suggest exemptions should be considered for both funds with a small investment size and funds with a small number of investors.

As to appropriate size, a threshold of \$25 million of investments might be an appropriate threshold in that this size has been considered acceptable for a Toronto Stock Exchange (“TSX”) listing. In suggesting this, we note that the TSX does not have a specific minimum size requirement for listing a fund and does have the ability to list a smaller fund. Also, given that the TSX does have an advisory committee requirement for new listings (except for passive funds), we would suggest that the small size exemption need not be available for TSX-listed issuers.

Funds with small numbers of investors are often funds that are trying to grow and should be given an incentive to do so, in the form of reduced compliance costs. We would suggest a 300 public holder threshold, which is comparable to the minimum number of holders required for a TSX listing.

If the specific appointment of an Independent Review Committee is considered appropriate in all cases, we suggest that a two-tier set of compliance requirements be set out, in a manner similar to the size-based two-tier structure used for compliance by venture exchange issuers as compared to other issuers under National Instrument 58-101 *Disclosure of Corporate Governance Practices*.

2. Segment Exemptions

There are some types of funds to which the NI 81-107 Independent Review Committee requirements have no logical application. A closed-end commodity fund with a single investment is one such case. Requiring such a fund to have an Independent Review Committee would serve no useful purpose, as there is no reasonable prospect a conflict of interest would arise with regard to investments by the fund in the commodity, particularly if purchase decisions are made directly by the board and not through an advisor or manager. If the fund is a listed entity, it will already have independent directors on the board. It would be preferable to build in an appropriate exemption at this time, rather than requiring such issuers to make application for exemption under NI 81-107 Part 7.

C. Recognition of Independent Representatives

Labour sponsored investment funds and labour sponsored venture capital corporations already have independent representation on their boards from labour unions. It would be helpful to incorporate reference to the existence of these representatives, perhaps under the nominating criteria provisions and under s.1.5 Meaning of “independence”.

D. Comparison to Other Regulation

As a matter of comparative regulation approaches, we note that the American Stock Exchange does have “carve-outs” from some of its corporate governance requirements. For example, while AMEX has a general requirement that each member of the audit committee be independent, it also allows “small business issuers” to maintain a Board of Directors comprised of at least 50% independent directors, and an Audit Committee of at least two for small members, comprised solely of independent directors who also meet the requirements of Rule 10A-3 under the *Securities Exchange Act of 1934*.

E. Regular Assessments

We suggest that the proposal for regular assessments of the Independent Review Committee in NI 81-107 s.4.2 be removed. We submit that an independent committee of responsible individuals, which is given specific functions to perform as set out in the rule, can adequately determine its own effectiveness without the need to regulate the manner in which that assessment is done.

F. Reporting to Securities Regulatory Authority

We suggest that the requirement to report matters to the securities regulatory authority (s.4.5), the “whistle-blowing” requirement, may unduly interfere with the ability of the Independent Review Committee to effectively work with the fund’s manager. For the purposes of introducing this rule, it would be preferable to begin without such a requirement and to later evaluate whether it appears to be needed.

G. Comment on NI 81-106

Recognizing that National Instrument 81-106 has been implemented, we would appreciate it if the CSA staff would note for future reference that the formula for calculating the Management Expense Ratio (s.15.1) does not adequately address the situation of a commodity-related fund with one or two assets, especially where the assets are not traded and investment decisions are made by the fund’s board and, accordingly, this provision should be reviewed at the next opportunity.

Thank you for considering our comments.

Yours truly,

(Signed)

Heather Zordel & John Elder