

Proposed National Instrument 81-107

Independent Review Committee for Investment Funds

Table of Contents

Part 1 Definitions and application

- 1.1 Definitions
- 1.2 Investment funds subject to Instrument
- 1.3 Meaning of a “conflict of interest matter”
- 1.4 Meaning of “entity related to the manager”
- 1.5 Meaning of “independent”
- 1.6 Meaning of “inter-fund self-dealing investment prohibitions”
- 1.7 Meaning of “manager”

Part 2 Functions of the manager

- 2.1 Manager standard of care
- 2.2 Manager to have written policies and procedures
- 2.3 Manager to maintain records
- 2.4 Manager to provide assistance

Part 3 Independent review committee

- 3.1 Independent review committee for investment funds
- 3.2 Initial appointment
- 3.3 Nominating criteria
- 3.4 Written charter
- 3.5 Composition
- 3.6 Term of office and vacancies
- 3.7 Standard of care
- 3.8 Ceasing to be a member
- 3.9 Authority
- 3.10 Fees and expenses to be paid by the investment fund
- 3.11 Indemnification and insurance
- 3.12 Orientation and continuing education

Part 4 Functions of independent review committee

- 4.1 Review matters referred by the manager
- 4.2 Regular assessments
- 4.3 Reporting to the manager
- 4.4 Reporting to securityholders
- 4.5 Reporting to securities regulatory authorities
- 4.6 Independent review committee to maintain records

Part 5 Conflict of interest matters

- 5.1 Manager to refer conflict of interest matters to independent review committee
- 5.2 Matters requiring independent review committee approval
- 5.3 Matters subject to independent review committee recommendation
- 5.4 Standing instructions by the independent review committee

Part 6 Exempted transactions

- 6.1 Inter-fund trades
- 6.2 Transactions in securities of related issuers

Part 7 Exemption

- 7.1 Exemption
- 7.2 Existing exemptions, waivers or approvals

Part 8 Effective date

- 8.1 Effective date
- 8.2 Transition

Introduction

This National Instrument (the Instrument) is designed to improve the governance standards of investment funds. The Canadian securities regulatory authorities (the CSA) believe the Instrument will promote protection of investors in investment funds while fostering market efficiency. The Instrument introduces the requirement for an independent governance body (the independent review committee or IRC) for all publicly offered investment funds. The IRC is charged with reviewing conflicts of interest that may arise between a manager's own interests and the manager's duty to manage an investment fund in the best interests of the investment fund.

The Instrument requires there to be an independent perspective on all of the manager's decisions that may involve or be perceived to involve a conflict of interest, not just the prohibitions relating to related-party and self-dealing transactions currently restricted or prohibited in securities legislation.

For certain prohibited conflict of interest matters, the Instrument relieves an investment fund from seeking regulatory approval, provided the IRC has reviewed and given its approval before the manager proceeds to act on the matter, and subject to certain other conditions.

This document contains both rules and commentary on those rules. Each securities administrator in Canada has made these rules under authority granted by the securities legislation of its jurisdiction. The Instrument has been adopted as a rule in each of Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia,

Ontario and New Brunswick, as a commission regulation in Saskatchewan, as a regulation in Québec, and as a policy in the remaining jurisdictions represented by the CSA. Each securities administrator has also adopted the commentary on the rules as policies. The commentary may explain the implications of a rule, offer examples or indicate different ways to comply with a rule. It may expand on a particular subject without being exhaustive. The commentary is not legally binding, but it does reflect the views of the CSA. Commentary is labelled as such and it always appears in italic type.

Part 1 Definitions and application

1.1 Definitions

Terms defined elsewhere in securities legislation have the meaning given to them in those instruments.

1.2 Investment funds subject to Instrument

- (1) This Instrument applies to an investment fund that is a reporting issuer.
- (2) In Québec, this Instrument does not apply to a reporting issuer organized under
 - (a) an Act to establish the Fonds de solidarité des travailleurs du Québec (F.T.Q.) R.S.Q., chapter F-3.2.1;
 - (b) an Act to establish Fondaction, le Fonds de développement de la Confédération des syndicats nationaux pour la coopération et l'emploi (R.S.Q., chapter F-3.1.2); and
 - (c) an Act constituting Capital régional et coopératif Desjardins (R.S.Q., chapter C-6.1).

Commentary

1. *This Instrument applies to all publicly offered mutual funds and non-redeemable investment funds. Investment funds subject to this Instrument include:*
 - *labour sponsored or venture capital funds;*
 - *scholarship plans;*
 - *mutual funds and closed-end funds listed and posted for trading on a stock exchange or quoted on an over-the-counter market; and*
 - *investment funds not governed by National Instrument 81-102 Mutual Funds (NI 81-102).*

2. *This Instrument does not regulate mutual funds (commonly referred to as pooled funds) that sell securities to the public only under capital raising exemptions in securities legislation (and, therefore, are not reporting issuers).*

1.3 Meaning of “conflict of interest matter”

- (1) In this Instrument, “a conflict of interest matter” means a matter in respect of which a reasonable person would consider the manager or an entity related to the manager to have an interest that may conflict with the manager’s ability to act in good faith and in the best interests of the investment fund.
- (2) In this section, any proposed course of action that an investment fund, a manager or an entity related to the manager is restricted or prohibited from proceeding with by a conflict of interest or self-dealing provision contained in securities legislation, is a “conflict of interest matter”.

Commentary

1. *Subsection (1) is intended to capture, through the term “entity related to the manager”, the conflicts of interest faced by the portfolio manager or portfolio adviser which relate to their decisions on behalf of the investment fund, that may impact the manager’s ability to act in good faith and in the best interests of the investment fund.*
2. *For greater certainty, subsection (2) specifies that any course of action which the investment fund, manager or an entity related to the manager would otherwise be restricted or prohibited from proceeding with because of a conflict of interest or self-dealing prohibition in securities legislation, is a “conflict of interest matter”. The CSA consider conflict of interest matters in subsection (2) to include the types of transactions described under subsection 5.2(1) that may be exempted under Part 6 of this Instrument and under Part 4 of National Instrument 81-102 Mutual Funds, provided there is IRC approval. These transactions are: inter-fund trades, transactions in securities of related issuers, and purchases of securities underwritten by related underwriters.*
3. *This Instrument requires under section 5.1 that all conflict of interest matters defined under this section be referred by the manager to the IRC.*

1.4 Meaning of “entity related to the manager”

In this Instrument, an “entity related to the manager” means

- (a) a person or company who can direct or cause the direction of the management and policies of the manager or the investment fund, whether

through ownership of voting securities or otherwise, other than as a member of the independent review committee; or

- (b) an agent, associate, affiliate, partner, director, officer or subsidiary of the manager or of a person or company referred to in paragraph (a).

Commentary

- 1. *The CSA consider the portfolio manager or portfolio adviser (or sub-adviser) of the investment fund to be an “agent” for the purposes of paragraph (b).*

1.5 Meaning of “independent”

- (1) In this Instrument, a member of the independent review committee is “independent” if the member has no material relationship with the manager, the investment fund, or an entity related to the manager.
- (2) For the purposes of subsection (1), a material relationship means a relationship which could, in the opinion of a reasonable person, interfere with the member’s judgment regarding a conflict of interest matter.

Commentary

- 1. *Under subsection 3.5(3), all members of the IRC must be independent of the manager, the investment fund and entities related to the manager. The CSA believe that all members must be independent because the principal function of the IRC is to review activities and transactions that involve inherent conflicts of interest between an investment fund and its manager. Given this role, it is important that the members of the IRC are free from conflicting loyalties.*
- 2. *While the members of the IRC should not themselves be subject to inherent conflicts or divided loyalties, the CSA recognize that there may be inherent conflicts relating to inter-fund issues where a single IRC acts for a family of investment funds. In those cases, this Instrument requires that the members will conduct themselves in accordance with their written charter and in accordance with the standard of care set out in this Instrument.*

The CSA do not consider the IRC’s ability to set its own reasonable compensation to be a conflict of interest within the meaning of this definition.

- 3. *A material relationship referred to in subsection 1.5(1) may include ownership, commercial, charitable, industrial, banking, consulting, legal,*

accounting or familial relationships. The CSA expect managers and IRC members to consider both past and current relationships when determining whether a direct or indirect material relationship exists.

For example, depending on the circumstances, the following individuals may be independent under section 1.5:

- *individuals appointed as trustees for an investment fund,*
- *members of an existing advisory board or IRC of an investment fund,*
- *members of the board of directors, or of a special committee of the board of directors, of an investment fund, and*
- *members of the board of directors, or of a special committee of the board of directors, of a registered trust company that acts as trustee for an investment fund.*

By way of further example, depending on the circumstances, the CSA consider it unlikely that the following individuals will be independent under section 1.5:

- *a person whose immediate family member is or has recently been an executive officer of the manager or investment fund, and*
- *a person who is or has recently been an employee or executive officer of the manager or investment fund.*

The CSA also consider it unlikely that the members of a manager's board of directors, or special committee of the board of directors, could be 'independent' within the meaning of this Instrument.

1.6 Meaning of “inter-fund self-dealing investment prohibitions”

In this Instrument, “inter-fund self-dealing investment prohibitions” means the provisions of securities legislation that

- (a) prohibit a portfolio manager from knowingly causing any investment portfolio managed by it to purchase or sell, or
- (b) prohibit an investment fund from purchasing or selling,

the securities of an issuer from or to the account of a responsible person, an associate of a responsible person or the portfolio manager.

Commentary

1. *The term “inter-fund self-dealing investment prohibitions” is intended to capture the prohibitions contained in the securities act of each securities administrator regarding inter-fund trades.*

1.7 Meaning of “manager”

In this Instrument, “manager” means a person or company that directs the business, operations and affairs of an investment fund.

Commentary

1. *The term “manager” is intended to include instances where a corporate board or limited partnership of an investment fund acts in the capacity of “manager”/decision-maker, or when the circumstances of the investment fund merit the designation of more than one person or company as “manager”.*

Part 2 Functions of the manager

2.1 Manager standard of care

A manager of an investment fund in exercising its powers and discharging its duties related to the management of the investment fund,

- (a) must act honestly and in good faith, and in the best interests of the investment fund; and
- (b) owes a duty to the investment fund to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Commentary

1. *This section introduces a required standard of care for managers in certain jurisdictions and is intended to create a uniform standard of care provision for managers of investment funds subject to this Instrument.*

2.2 Manager to have written policies and procedures

- (1) Before proceeding to act on a conflict of interest matter, or any other matter that securities legislation requires the manager to refer to the independent review committee, the manager must
 - (a) establish written policies and procedures to be followed by it on the matter; and
 - (b) refer the policies and procedures to the independent review committee for its review and input.

- (2) The manager may change its policies and procedures if the manager provides a written description of any material change to the independent review committee for review and input before implementing the change.

Commentary

1. *Section 2.2 contemplates that a manager should identify for each investment fund all conflict of interest matters required to be referred to the IRC under section 5.1 and review its policies and procedures for those matters with the IRC.*
2. *A manager is expected to establish policies and procedures that are appropriate for the investment funds it manages. An example is a manager that manages more than one investment fund may establish one policy and procedure for an action or category of actions for all of the investment funds it manages. Alternatively, the manager may establish a separate policy and procedure for the action or category of actions for each of its investment funds, or groups of its investment funds.*

However structured, the CSA expect the written policies and procedures the manager establishes to be designed to prevent violations of securities legislation by the manager and the investment fund, to detect violations that have occurred, and to promptly correct any violations that have occurred.

3. *Small investment fund families may require fewer written policies and procedures than large fund complexes that, for example, have conflicts of interest as a result of affiliations with other financial service firms.*

2.3 Manager to maintain records

A manager must maintain a record of any activity that is subject to the review of the independent review committee, including

- (a) minutes of its meetings, if any;
- (b) a copy of the policies and procedures required under subsection 2.2(1); and
- (c) copies of materials, including any written reports, provided to the independent review committee.

Commentary

1. *This section is intended to assist the CSA in determining whether each of the manager and the investment fund is adhering to this Instrument and in*

identifying weaknesses in the manager's written policies and procedures if violations do occur.

2. *The CSA expect a manager to keep records of any otherwise prohibited or restricted transactions described in subsection 5.1(1) for which the manager has sought the approval of the IRC under Part 6 of this Instrument or under Part 4 of NI 81-102. (Such transactions are: inter-fund trading, transactions in securities of related issuers and purchases of securities underwritten by related underwriters).*

2.4 Manager to provide assistance

- (1) If a manager refers a conflict of interest matter or any other matter that securities legislation requires it to refer to the independent review committee, the manager must
 - (a) provide the independent review committee with information sufficient for the independent review committee to properly carry out its responsibilities, including
 - (i) a description of the facts and circumstances giving rise to the matter;
 - (ii) the manager's proposed course of action; and
 - (iii) all further information requested by the independent review committee;
 - (b) make its senior officers who are knowledgeable about the matter available to attend meetings of the independent review committee or respond to inquiries of the independent review committee about the matter; and
 - (c) provide the independent review committee with any other assistance it reasonably requests in its review of the matter.
- (2) A manager must not prevent or attempt to prevent the independent review committee, or a member of the independent review committee, from communicating with the securities regulatory authority or regulator.

Part 3 Independent review committee

3.1 Independent review committee for an investment fund

An investment fund must have an independent review committee that complies with this Instrument.

Commentary

1. *A manager is expected to establish an IRC using a structure that works for the investment funds it manages, having regard to the expected workload of that committee. For example, a manager that manages more than one investment fund may establish one IRC for all of the investment funds it manages. Alternatively, the manager may establish an IRC for each of its investment funds, or groups of its investment funds.*
2. *This Instrument does not impose any restrictions on who may act as a member of the IRC, provided that the IRC meets the minimum requirements set out in this Instrument. Depending on the circumstances, any of the individuals listed in Commentary 3 to section 1.5 potentially could act as the IRC.*

This Instrument does not prevent investment funds from sharing an IRC with another investment fund manager. Managers of smaller families of investment funds may find this a cost-effective way to set up IRCs for their funds.

3.2 Initial appointment

The manager must appoint each member of an investment fund's first independent review committee.

3.3 Nominating criteria

Before appointing a member of the independent review committee, the manager or the independent review committee, as the case may be, must consider

- (a) the competencies and skills the independent review committee, as a whole, should possess;
- (b) the competencies and skills of each member of the independent review committee; and
- (c) the competencies and skills the prospective member would bring to the independent review committee.

Commentary

1. *Section 3.3 sets out the criteria the manager and the IRC must consider before appointing a member of the IRC. Subject to these requirements, the manager and the IRC may establish nominating criteria in addition to those set out in this section.*

3.4 Written charter

- (1) The independent review committee must adopt a written charter that includes its mandate, responsibilities and functions, and the policies and procedures it will follow when performing its functions.
- (2) If the independent review committee and the manager agree in writing that the independent review committee will perform functions other than those prescribed by securities legislation, a description of the functions that are the subject of the agreement must be included in the charter.
- (3) The independent review committee, in adopting the charter, must consider the manager's recommendations, if any.

Commentary

1. *The CSA expect the written charter to set out the necessary policies and procedures to ensure the IRC performs its role adequately and effectively and in compliance with this Instrument. The CSA would expect an IRC acting for more than one investment fund complex to establish a separate charter for each fund complex.*
2. *The IRC should consider the specific matters subject to its review when developing the policies and procedures to be set out in its charter.*
3. *Without discussing all of the policies and procedures that may be set out in the written charter, the CSA expect that the written charter will include the following:*
 - *procedures the IRC must follow when reviewing conflict of interest matters;*
 - *criteria for the IRC to consider in setting its compensation and expenses and the compensation and expenses of any advisors employed by the IRC;*
 - *policies and procedures that describe how a member of the IRC is to conduct himself or herself when he or she faces a conflict of interest, or could be perceived to face a conflict of interest, with respect to a matter being considered, or to be considered, by the IRC; and*
 - *policies and procedures that describe how the IRC is to report to any existing advisory board or board of directors of the investment fund and the manager.*

3.5 Composition

- (1) An independent review committee must have at least three members.

- (2) The size of the independent review committee is determined by the manager, with a view to facilitating effective decision-making, and may only be changed by the manager.
- (3) Every independent review committee member must be independent.
- (4) An independent review committee must appoint a member as ‘Chair’.
- (5) The ‘Chair’ of the independent review committee appointed under subsection (4) is responsible for managing the mandate and responsibilities of the independent review committee.

Commentary

- 1. *To ensure its effectiveness, a manager should consider the workload of the IRC when determining its size.*
- 2. *The CSA would expect the IRC chair to be the primary person to interact with the manager on issues relating to the investment fund. The CSA anticipate that the chair will have regular communication with the manager, as a way of keeping informed of the operations of the investment fund between meetings, and of any significant events relating to the investment fund.*
- 3. *The requirement that all members of the IRC be independent does not preclude the IRC from discussing or holding meetings with other persons who can help the members understand matters that are beyond their specific expertise, or help them understand industry practices or trends, for example.*

3.6 Term of office and vacancies

- (1) The term of office of a member of an independent review committee must be not less than 2 years and not more than 5 years, and must be set by the manager or the independent review committee, as the case may be, at the time the member is appointed.
- (2) An independent review committee must fill a vacancy on the independent review committee as soon as practicable.
- (3) A member whose term has expired, or will soon expire, may be reappointed by the remaining members of the independent review committee.
- (4) If, for any reason, an independent review committee has no members, the manager must appoint a member to fill each vacancy as soon as practicable.

Commentary

1. *The manager will appoint the first members of an IRC and, if at any time the IRC has no members, the manager will also appoint the replacement members. The CSA anticipate that the circumstances contemplated in subsection (4) will rarely occur—generally only in the event of a change of manager or change in control of the manager. In these circumstances, managers should consider their timely disclosure obligations under securities legislation.*
2. *The manager may suggest candidates and may provide assistance to the IRC in the selection and recruitment process when a vacancy arises. Consistent with good governance practices, the CSA expect the IRC to consider the manager's recommendation, if any, when filling a vacancy.*
The CSA believe that the self-selection of members of the IRC fosters an environment in which independent-minded committees will be focussed on the best interests of the investment fund. The CSA also consider the members of the IRC to be best-positioned to judge the manner in which a prospective member can contribute to the effectiveness of the IRC.
3. *The CSA recommend that all members of an IRC be appointed with staggered terms. Staggered terms ensure continuity and continued independence from the manager. Terms of appointment may also differ.*

3.7 Standard of care

- (1) Every member of an independent review committee, in exercising their powers and discharging their duties as a member of the independent review committee,
 - (a) must act honestly and in good faith, with a view to the best interests of the investment fund; and
 - (b) owes a duty to the investment fund (and not to any other person) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
- (2) Every member of an independent review committee must comply with this Instrument and the written charter of the independent review committee required under section 3.4.
- (3) A member of the independent review committee does not breach paragraph (1)(b), if the member exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including reliance in good faith on

- (a) a report or certification represented as full and true to the independent review committee by the manager or an entity related to the manager; or
 - (b) a report of a person whose profession lends credibility to a statement made by the person.
- (4) A member of the independent review committee has complied with his or her duties under paragraph (1)(a) if the member has relied in good faith on
- (a) a report or certification represented as full and true to the independent review committee by the manager or an entity related to the manager; or
 - (b) a report of a person whose profession lends credibility to a statement made by the person.

Commentary

1. *The standard of care for IRC members under this section is consistent with the special relationship between the IRC and the investment fund.*

The CSA consider the role of the members of the IRC to be analogous to corporate directors, albeit with a more limited mandate, and therefore we would usually expect the common law defences available to corporate directors to also be available to IRC members.

2. *The CSA consider the best interests of the investment fund referred to in paragraph (1)(a) to generally be consistent with the interests of the securityholders in the investment fund as a whole.*

3.8 Ceasing to be a member

- (1) An individual ceases to be a member of an independent review committee when
- (a) the member resigns;
 - (b) the member is removed in accordance with subsection (2);
 - (c) the member ceases to be a member under subsection (3);
 - (d) the member's term of office expires and the member is not reappointed;
 - (e) the investment fund terminates;
 - (f) the manager of the investment fund changes, unless the new manager is an affiliate of the former manager; or

- (g) there is a change of control of the manager of the investment fund.
- (2) A member of an independent review committee can be removed from the committee
 - (a) by vote of a majority of the other members of the independent review committee; or
 - (b) by vote of a majority of the securityholders of the investment fund voting at a special meeting called for that purpose by the manager.
- (3) An individual ceases to be a member of the independent review committee if the individual is
 - (a) considered no longer independent within the meaning of section 1.5 and the cause of non-independence is not temporary for which the member can recuse himself or herself;
 - (b) of unsound mind and has been so found by a court in Canada or elsewhere; or
 - (c) bankrupt.
- (4) When an individual ceases to be a member of the independent review committee due to a circumstance described in paragraph (1)(a), (b), (c) or (d), the manager must, as soon as practicable, notify the securities regulatory authority or regulator of the date, and the reason, the individual ceased to be a member.
- (5) The notification referred to in subsection (4) is satisfied if the notification is made to the investment fund's principal regulator.
- (6) The notice of a meeting of securityholders of an investment fund called to consider the removal of a member under paragraph (2)(b) must comply with the notice requirements set out in section 5.4 of National Instrument 81-102 *Mutual Funds*.

Commentary

1. *In the circumstances described in paragraphs 3.8(1)(f) and (g), all members of the IRC will cease to be members. This does not preclude the new manager from reappointing the former members of the IRC under subsection 3.6(4).*
2. *Paragraph 3.8(3)(a) is meant to exclude a situation where a member may face, or be perceived to face, a conflict of interest with respect to a specific (one-time) conflict of interest matter being considered by the IRC.*

3.9 Authority

- (1) An independent review committee has authority to
 - (a) obtain information it determines useful or necessary from the manager and its senior officers to carry out its duties;
 - (b) engage independent counsel and other advisors it determines useful or necessary to carry out its duties;
 - (c) set reasonable compensation and proper expenses for any independent counsel and other advisors engaged by the independent review committee;
 - (d) set reasonable compensation and proper expenses for the members of the independent review committee; and
 - (e) communicate directly with the securities regulatory authority or regulator with respect to any matter.
- (2) The independent review committee must consider the manager's recommendation, if any, in setting the compensation and expenses referred to in paragraphs (1)(c) and (1)(d).

Commentary

1. *In order to avoid undue influence from the manager, paragraph (1)(d) specifies that the members of the IRC have the sole authority for determining their compensation. The manager may, however, recommend to the members of the IRC the amount and type of compensation to be paid.*

The CSA expect the IRC to decide, in a manner consistent with good governance practices, its compensation considering the manager's recommendation, if any. Among the factors a committee should consider when determining the appropriate level of compensation are the following:

- *the nature of the investment fund and the investment fund's complexity,*
- *the workload of the members of the IRC, and*
- *the best interests of the investment fund.*

2. *The CSA recognize using the manager's staff and industry experts may be important to help the members of the IRC deal with matters that are beyond the level of their expertise, or help them understand different practices among investment funds.*

While this Instrument does not require legal counsel for the IRC to be independent of the manager or the investment fund, there may be instances when the members of the IRC believe they need access to counsel who is free from conflicting loyalties. Paragraph (1)(b) gives the IRC the choice and authority to hire independent legal counsel.

3. *Paragraph (1)(e) is intended to encourage the members of the IRC to inform the securities regulatory authority or regulator of any concerns that the IRC is not otherwise required to report. For example, the IRC may be concerned if very few matters have been referred by the manager for review, or it may have found, or have reasonable grounds to suspect, a breach of securities legislation has occurred.*

3.10 Fees and expenses to be paid by the investment fund

The investment fund must pay from the assets of its fund

- (a) the compensation and expenses referred to in paragraph 3.9(1)(c) and (1)(d) payable to the members of the independent review committee and to any advisors employed by the independent review committee;
- (b) the costs of the orientation and continuing education of the members of the independent review committee referred to in section 3.12; and
- (c) any other costs the independent review committee may reasonably incur.

Commentary

1. *The Instrument does not prohibit a manager from reimbursing the investment fund for the fees and expenses payable to the IRC or for the costs of the orientation and continuing education of the members of the IRC. The prospectus should disclose whether or not the manager will reimburse the investment fund.*

3.11 Indemnification and insurance

- (1) An investment fund and manager may indemnify a member of the independent review committee, a former member, and their successors and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the person in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of being or having been a member of the independent review committee.

- (2) An investment fund and manager may advance moneys to a member of the independent review committee for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual must repay the moneys if the individual does not fulfill the conditions of subsection (3).
- (3) An investment fund and manager may not indemnify a member of the independent review committee under subsection (1) unless
 - (a) the member acted honestly and in good faith, with a view to the best interests of the investment fund; and
 - (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the individual's conduct was lawful.
- (4) An investment fund or manager may, with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the investment fund to procure judgment in its favour, to which the individual is made a party because of the individual's association with the investment fund as described in subsection (1) against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfills the conditions set out in subsection (3).
- (5) Despite subsection (1), an individual referred to in that subsection is entitled to an indemnity from the investment fund and manager in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the investment fund as described in subsection (1), if the individual seeking indemnity
 - (a) was not judged by the court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and
 - (b) fulfills the conditions set out in subsection (3).
- (6) An investment fund and manager may purchase and maintain insurance for the benefit of any member of the independent review committee referred to in subsection (1) against any liability incurred by the member in his or her capacity as a member of the independent review committee.
- (7) An investment fund, manager or an individual referred to in subsection (1) may apply to a court for an order approving an indemnity under this section and the court may so order and make any further order that it sees fit.

Commentary

1. *This Instrument requires that members of an IRC be accountable for their actions. At the same time, the Instrument does not prevent an investment fund or a manager limiting a member's financial exposure through insurance and indemnification.*
2. *This section permits an investment fund and the manager to indemnify or purchase insurance coverage for the members of the IRC. The CSA would expect any such coverage to be on reasonable commercial terms.*
3. *It is open to members of the IRC to negotiate contractual indemnities with the manager or investment fund to provide the protection permitted by this section.*

3.12 Orientation and continuing education

- (1) The manager must provide a member of the independent review committee as part of a member's orientation, with educational or informational programs that enable a member to understand the nature and operation of the manager's and investment fund's businesses.
- (2) The manager and independent review committee must provide a new member of the independent review committee as part of a member's orientation, educational or informational programs that enable a member to understand
 - (a) the role of the independent review committee and its members; and
 - (b) the role of each individual member.
- (3) The independent review committee may reasonably supplement the educational and informational programs provided to its members under this section.

Commentary

1. *The CSA expect members of the IRC to regularly participate in educational or informational programs that may be useful to the members in understanding and fulfilling their duties.*

Section 3.12 sets out only the minimum education programs that a manager and IRC are expected to provide for members of the independent review committee. This Instrument does not restrict a manager or IRC from providing educational programs to IRC members on an ongoing basis. Educational activities could include presentations, seminars or discussion groups conducted by:

- *personnel of the investment fund or manager,*

- *outside experts,*
 - *industry groups,*
 - *representatives of the investment fund's various service providers, and*
 - *educational organizations and institutions.*
2. *The CSA expect a discussion of a member's role referred to in paragraph (2)(b) to include the commitment of time and energy that is expected from the member.*

Part 4 Functions of independent review committee

4.1 Review of matters referred by manager

- (1) The independent review committee must review and provide its determination under section 5.2 or its recommendation under section 5.3 to the manager on a conflict of interest matter which the manager refers to the independent review committee for review.
- (2) The independent review committee must perform any other function
 - (a) required by securities legislation; or
 - (b) as may be agreed in writing between the independent review committee and the manager.
- (3) The independent review committee must deliberate and decide on a matter referred to in subsection (1) in the absence of the manager or any entity related to the manager.
- (4) The independent review committee has no power, authority or responsibility for the operation of the investment fund or the manager except as provided in this section.
- (5) An independent review committee must hold at least one meeting annually in the absence of the manager, any representative of the manager or any entity related to the manager.

Commentary

1. *The Instrument requires the IRC to consider matters referred to it by the manager that involve or may be perceived to involve a conflict of interest for the manager between its own interests and its duty to manage an investment fund.*

Securities legislation also requires the IRC to consider other matters. For example, a change in a mutual fund's auditor and certain reorganizations

and transfers of assets between related mutual funds under Part 5 of NI 81-102 require the review and prior approval of the IRC for the manager to proceed.

2. *The manager and the IRC may agree that the IRC should have a mandate that is broader than what is required under the Instrument. For example, the IRC may monitor the administration and management of the investment funds or give general advice to the manager. This Instrument does not preclude those arrangements, provided the members of the IRC continue to meet the definition of independence and the standard of care set out in this Instrument.*
3. *Subsection (3) does not preclude the IRC from receiving oral or written submissions from the manager or from holding meetings with representatives of the manager or an entity related to the manager or any other person not considered to be independent under this Instrument. The CSA believe using the manager's staff and industry experts may be important to help the members of the IRC understand matters that are beyond their specific expertise, or help them understand different practices among investment funds.*
4. *The requirement in subsection (5) that the IRC meet at least once a year, without anyone else present (including management of the investment fund), is intended to afford the members of the IRC an opportunity to speak freely about any sensitive issues of concern to any of them, including any concerns about the manager.*

4.2 Regular assessments

- (1) The independent review committee must monitor and assess, at least annually, the adequacy and effectiveness of
 - (a) the manager's written policies and procedures required under section 2.2;
 - (b) any standing instructions it has provided to the manager under section 5.4; and
 - (c) the manager's and the investment fund's compliance with any conditions imposed by the independent review committee in a recommendation or approval it has provided to the manager.
- (2) The independent review committee must review, at least annually, its effectiveness as a committee, as well as the effectiveness and contribution of each of its members.

- (3) The review by the independent review committee required under subsection (2) must include a consideration of
- (a) the independent review committee's written charter referred to in section 3.4;
 - (b) the competencies and knowledge each member is expected to bring to the independent review committee;
 - (c) the level of complexity of the issues reasonably expected to be raised in the matters under review by the independent review committee; and
 - (d) the ability of each member to contribute the necessary time required to serve effectively on the independent review committee.

Commentary

1. *Section 4.2 sets out the minimum assessments the independent review committee must regularly perform. Subject to these requirements, the IRC may establish a process for (and determine the frequency of) assessments as it sees fit.*
2. *The annual self-assessment by the IRC should improve performance by strengthening each member's understanding of his or her role and fostering better communication and greater cohesiveness among members.*
3. *When evaluating individual performance, an IRC member should consider factors such as attendance and participation in meetings, educational activities and industry knowledge.*

When evaluating the IRC's structure and effectiveness, the IRC should consider factors such as the following:

- *the frequency of meetings,*
- *the substance of meeting agendas,*
- *the usefulness of the materials provided to the members of the IRC,*
- *the collective experience and background of the members of the committee,*
- *the number of funds the committee oversees, and*
- *the amount and form of compensation the members receive from an individual investment fund and in aggregate from the fund complex.*

4. *The CSA expect the members of an IRC to respond appropriately to address any weaknesses found in a self-assessment. For example, it may be necessary to improve the IRC members' continuing education, recommend ways to improve the quality and sufficiency of the information*

provided to them, or recommend to the manager decreasing the number of investment funds under the IRC's supervision.

In rare circumstances, the IRC may consider removing a member of the IRC as contemplated under paragraph 3.8(2)(a) as a result of the self-assessment.

4.3 Reporting to the manager

The independent review committee must as soon as practicable deliver to the manager a written report of the results of an assessment under subsection 4.2(1) that includes

- (a) a description of each instance of a breach of any of the manager's policies or procedures of which the independent review committee has become aware, or that it suspects;
- (b) a description of each instance of a breach of a condition imposed by the independent review committee in a recommendation or approval it has provided to the manager, of which the independent review committee has become aware, or that it suspects; and
- (c) recommendations for any changes the independent review committee considers should be made to the manager's policies and procedures.

4.4 Reporting to securityholders

- (1) An independent review committee must prepare, for each financial year of the investment fund and no later than the date the investment fund files its annual financial statements, a report to securityholders of the investment fund on the independent review committee's activities for the financial year that includes:
 - (a) the name of each member of the independent review committee at the date of the report, including the identity of the 'Chair', the member's length of service on the independent review committee and any changes in the composition or membership of the independent review committee;
 - (b) the aggregate compensation paid to the independent review committee;
 - (c) a description of any instance when, in setting the compensation and expenses of its members, the independent review committee did not follow the recommendation of the manager, including
 - (i) a summary of the manager's recommendation; and

- (ii) the independent review committee's reasons for not following the recommendation;
 - (d) if known, a description of each instance when the manager proceeded to act in a conflict of interest matter referred to the independent review committee for which the independent review committee did not give a positive recommendation, including
 - (i) a summary of the recommendation; and
 - (ii) if known, the manager's reasons for proceeding without following the recommendation of the independent review committee;
 - (e) if known, a description of each instance when the manager proceeded to act in a conflict of interest matter but did not meet a condition imposed by the independent review committee in its recommendation or approval, including
 - (i) the nature of the condition;
 - (ii) if known, the manager's reasons for not meeting the condition; and
 - (iii) whether the independent review committee is of the view that the manager has taken, or proposes to take, appropriate action to deal with the matter; and
 - (f) a description of any standing instructions the manager relied upon during the period.
- (2) The report required under subsection (1) must as soon as practicable upon the report being prepared
- (a) be sent by the investment fund, without charge, to a securityholder of the investment fund, upon the securityholder's request;
 - (b) be made available and prominently displayed by the manager on the investment fund's, investment fund family's or manager's internet site, if it has an internet site;
 - (c) be filed by the investment fund with the securities regulatory authority or regulator; and
 - (d) be delivered by the independent review committee to the manager.

Commentary

1. *The report to be filed with the security regulatory authority or regulator should be filed on the SEDAR group profile number of the investment fund as a continuous disclosure document. Any reasonable costs associated with the filing of the report are expected to be paid by the investment fund.*
2. *The report is to be displayed prominently on the internet site of the investment fund, the investment fund family's internet site or the manager's internet site, as applicable. The CSA expect the report to remain on the internet site at least until the posting of the next report.*

4.5 Reporting to securities regulatory authority

- (1) The independent review committee must, as soon as practicable, notify in writing the securities regulatory authority or regulator if the independent review committee becomes aware of an instance where the manager proceeded to act in a conflict of interest matter under subsection 5.2(1) but did not meet a condition imposed by securities legislation (including this Instrument) or the independent review committee in its approval.
- (2) The notification referred to in subsection (1) is satisfied if the notification is made to the investment fund's principal regulator.

Commentary

1. *Subsection (1) is intended to capture a breach of a condition imposed for an otherwise prohibited or restricted transaction described in subsection 5.2(1), for which the manager has proceeded to act under Part 6 of this Instrument or under Part 4 of NI 81-102. This includes a breach of a condition imposed by the IRC as part of its approval or standing approval. For example, any conditions imposed for inter-fund trading under section 6.1 of this Instrument or section 4.2 of NI 81-102, for transactions in securities of related issuers under section 6.2 of this Instrument, and for purchases of securities underwritten by related underwriters under section 4.1 of NI 81-102.*

The CSA consider that a breach of a condition imposed by securities legislation or by the IRC on a transaction described in subsection 5.2(1) will result in the transaction having been made contrary to securities legislation. In such instances, among the actions the securities regulatory authorities or regulators may take, is to require the manager to unwind the transaction and pay any costs associated with doing so.

2. *The CSA do not view the reporting by the IRC under this section to the securities regulatory authority or regulator to prevent the manager from*

reporting to the securities regulatory authorities or regulators any breaches by the manager or investment fund of securities legislation.

4.6 Independent review committee to maintain records

An independent review committee must maintain records, including

- (a) a copy of its current written charter;
- (b) minutes of its meetings;
- (c) copies of materials and any written reports provided to it; and
- (d) copies of materials, written reports and the determinations made by it.

Commentary

1. *Section 4.6 sets out the minimum requirements regarding the record keeping of an IRC. The CSA expect records to be kept with regard to existing best practices.*
2. *The CSA expect the IRC to keep records of any otherwise prohibited or restricted transactions in securities legislation described in subsection 5.2(1) for which the manager has sought the approval of the IRC under Part 6 of this Instrument or under Part 4 of NI 81-102. Such transactions include: inter-fund trading, transactions in securities of related issuers and purchases of securities underwritten by related underwriters.*

Part 5 Conflict of interest matters

5.1 Manager to refer conflict of interest matters to independent review committee

Subject to section 5.4, if a conflict of interest matter arises, and before taking any action in the matter, the manager must

- (a) determine what action it proposes to take in respect of the matter, having regard to
 - (i) its duties under applicable securities legislation; and
 - (ii) its written policies and procedures on the matter; and

- (b) refer the matter, along with its proposed action, to the independent review committee for its review and determination.

Commentary

1. *Section 5.1 recognizes that a manager may not be able to objectively determine whether it is acting in the best interests of the investment fund when it has a conflict of interest. This section requires managers to refer all conflict of interest matters – not just those subject to prohibitions or restrictions under securities legislation - to the IRC so that an independent perspective can be brought to bear on the manager’s proposed action in a conflict of interest matter.*

Section 5.1 sets out how the manager must proceed when faced with a conflict of interest matter.

Referring proposed actions involving conflict of interest matters to the IRC for its review is not considered by the CSA to detract from the manager’s obligations to the investment fund under securities legislation to make decisions in the best interests of the fund. Paragraph (a) is intended to mandate this view.

2. *The CSA expect that, consistent with good governance practices, a determination of at least a majority of the IRC will represent a decision of the members of the IRC.*
3. *There may be matters that are subject to a securityholder vote under Part 5 of National Instrument 81-102 Mutual Funds that may also involve a “conflict of interest matter” under this Instrument. For example, increases in the charges of the manager to the mutual fund for costs incurred in operating the fund may be a conflict of interest matter as well as a matter subject to a securityholder vote. For these matters, the CSA would expect a manager to include a description of the IRC’s determination in the written notice to securityholders referred to in section 5.4 of NI 81-102.*

5.2 Matters requiring independent review committee approval

- (1) If the proposed action by the manager in a conflict of interest matter under section 5.1 is
 - (a) an inter-fund trade as described in section 6.1 of this Instrument or a transaction as described in subsection 4.2(3) of National Instrument 81-102 *Mutual Funds*;
 - (b) a transaction in securities of a related issuer as described in section 6.2 of this Instrument; or

- (c) an investment in a class of securities of an issuer underwritten by an entity related to the manager as described in subsection 4.1(4) of National Instrument 81-102 *Mutual Funds*

the manager may not proceed with the proposed action without the approval of the independent review committee.

- (2) An independent review committee must not approve an action described in subsection (1) unless it has determined, after reasonable inquiry, that the action
- (a) is proposed by the manager free from any influence by an entity related to the manager and without taking into account any consideration relevant to an entity related to the manager;
 - (b) represents the business judgment of the manager uninfluenced by considerations other than the best interests of the investment fund;
 - (c) is in compliance with the manager's written policies and procedures relating to the action; and
 - (d) achieves a fair and reasonable result for the investment fund.

Commentary

1. *For the transactions described in subsection (1), provided the manager receives the IRC's approval under this section, and satisfies the additional conditions imposed under the applicable sections of Part 6 of this Instrument or Part 4 of NI 81-102, the manager will be permitted to proceed with the action without obtaining regulatory exemptive relief.*
2. *If the IRC does not approve a proposed transaction described in subsection (1), the manager is not permitted to proceed, subject to exemptive relief. The CSA consider it in the best interests of the investment fund, and ultimately investors, for the IRC to be able to stop any proposed action which does not meet the test in subsection (2).*
3. *The CSA would usually expect that, before it approves a transaction described in subsection (1), the independent review committee will have requested from the manager or other persons a report or certification to assist in its determination that the test in subsection (2) has been met.*
4. *The CSA expect that the manager will discuss with the IRC any instance where the IRC does not approve of a proposed action, so that an action satisfactory to both the manager and the IRC can be found, if possible.*

5. *The CSA consider the ability of the manager to seek the removal of a member or members of the IRC under paragraph 3.8(2)(b) sufficiently addresses any concern that a manager may have about an IRC's ongoing refusal to approve matters.*

5.3 Matters subject to independent review committee recommendation

- (1) For any proposed action by the manager in a conflict of interest matter under section 5.1 other than those set out in subsection 5.2(1)
 - (a) the independent review committee must provide a recommendation to the manager as to whether, in the opinion of the independent review committee, the proposed action achieves a fair and reasonable result for the investment fund; and
 - (b) the manager must consider the recommendation of the independent review committee,

before the manager may proceed with the action.
- (2) If the manager decides to proceed with an action in a conflict of interest matter that, in the independent review committee's view, does not achieve a fair and reasonable result for the investment fund under paragraph (1)(a), the independent review committee may require the manager to notify securityholders in the investment fund of the manager's decision.
- (3) A notification under subsection (2) must
 - (a) sufficiently describe the proposed action of the manager, the recommendation of the independent review committee and the manager's reasons for proceeding;
 - (b) state the date of the proposed implementation of the action; and
 - (c) be sent by the manager to each securityholder of the investment fund at least thirty days before the effective date of the proposed action.
- (4) The investment fund must, as soon as practicable, file the notification referred to in subsection (3) with the securities regulatory authority or regulator upon the notice being sent to securityholders.
- (5) The manager must pay the costs associated with the filing referred to in subsection (4).

Commentary

1. *This section captures all conflict of interest matters faced by the manager other than those listed in section 5.2. This includes conflict of interest matters prohibited or restricted by securities legislation not specified in subsection 5.2(1), and a manager's business and commercial decisions made on behalf of the investment fund that may be motivated, or be perceived to be motivated, by the manager's own interests rather than the best interests of the investment fund. For example, this might include the following:*

- *increasing charges to the investment fund for costs incurred by the manager in operating the fund,*
- *correcting material errors made by the manager in administering the investment fund,*
- *negotiating soft dollar commissions with dealers with whom the manager places portfolio transactions for the investment fund, and*
- *choosing to bring services in-house over using third-party service providers.*

The CSA expect the IRC's recommendation to state a positive or negative response as to whether they view the proposed action as achieving a fair and reasonable result for the investment fund.

For a proposed action in a conflict of interest matter under this section that is prohibited or restricted by securities legislation, a manager will still have to seek exemptive relief from the securities regulatory authority or regulator before proceeding.

2. *Subsection (2) recognizes that, in exceptional circumstances, the manager may decide to proceed with a proposed course of action despite a negative recommendation from the IRC. In such instances, if the IRC determines that the proposed action is sufficiently important to warrant notice to securityholders in the investment fund, it has the authority to require the manager to give such notification before proceeding with the action.*

The CSA expect instances of the manager proceeding with a proposed course of action with a negative recommendation of the IRC to be rare and to occur only in exceptional circumstances.

3. *The notification referred to in subsection (4) should be filed on the SEDAR group profile number of the investment fund as a continuous disclosure document.*

5.4 Standing instructions by the independent review committee

- (1) The independent review committee may provide the manager with a written standing instruction permitting, on a continuing basis, a particular action by the manager in a conflict of interest matter, on such terms and conditions as the independent review committee requires. For the purposes of this Instrument, a standing instruction means the approval or recommendation required from the independent review committee, under sections 5.2 or 5.3, as the case may be.
- (2) Despite section 5.1, the manager is not required to refer a conflict of interest matter or its proposed action to the independent review committee before proceeding to act if the independent review committee has provided a written standing instruction that is in effect and permits that action in that conflict of interest matter.
- (3) For any course of action for which the independent review committee has provided a standing instruction, at the time of the independent review committee's regular assessment under paragraph 4.2(1)(b),
 - (a) the manager must inform the independent review committee in writing of each instance it has acted in reliance on the standing instruction; and
 - (b) before the manager may continue to act in reliance on subsection (2), the independent review committee must
 - (i) review and assess the adequacy and effectiveness of the manager's written policies and procedures with respect to that course of action;
 - (ii) review and assess the adequacy and effectiveness of the standing instruction;
 - (iii) monitor and assess the manager's compliance with the standing instruction;
 - (iv) reaffirm its approval or recommendation for the action; and
 - (v) make any appropriate amendments to the standing instruction and, if appropriate, confirm in writing to the manager that the manager may continue to rely upon the standing instruction.

Commentary

1. *Section 5.4 recognizes that there are certain actions or categories of actions of the manager for which it may be appropriate for the IRC to choose to provide a standing approval or recommendation. For example, this may include a manager's ongoing voting of proxies on securities held by the investment fund when the manager has a business relationship with*

the issuer of the securities, or, a manager's decision to initiate inter-fund trading.

2. *The CSA expect that before providing or continuing a standing instruction to the manager for an action or category of actions the IRC will have:*
 - *reviewed the manager's written policies and procedures with respect to the action or category of actions;*
 - *requested from the manager or other persons a report or certification to assist in determining its approval or recommendation for the action or category of action under subsections 5.2(1) or 5.3(1), as the case may be;*
 - *considered whether a standing instruction for the particular action or category of actions is appropriate for the investment fund; and*
 - *established very clear terms and conditions surrounding the standing instruction for the action or category of actions.*

The CSA also expect the IRC to consider the conditions in prior exemptive relief orders, waivers or approvals obtained from the securities regulatory authorities by the investment fund when contemplating appropriate terms and conditions, before providing or continuing a standing instruction to the manager for an action or category of actions referred to in subsection 5.2(1).

3. *As part of the IRC's review under paragraph (3)(b), the IRC is expected to be mindful of its reporting obligation under section 4.5 of this Instrument, which includes notifying the securities regulatory authority or regulator in the investment fund's principal jurisdiction of any instance where the manager, in proceeding with an action, did not meet a condition imposed by the IRC in its positive recommendation or approval (or standing instruction).*
4. *This section is intended to improve the flexibility and timeliness of the manager's decisions concerning a proposed course of action in a conflict of interest matter.*

Part 6 Exempted transactions

6.1 Inter-fund trades

- (1) The portfolio manager of an investment fund may purchase a security of any issuer from, or sell a security of any issuer to, another investment fund managed by the same manager or an affiliate of the manager, if, at the time of the transaction
 - (a) the investment fund is purchasing from, or selling to, another investment fund to which this Instrument applies;

- (b) the independent review committee has approved the transaction under subsection 5.2(1);
- (c) the bid and ask price of the security is readily available;
- (d) the investment fund receives no consideration and the only cost for the trade is the nominal cost incurred by the investment fund to print or otherwise display the trade;
- (e) the transaction is executed at the current market price of the security, which for the purposes of this paragraph is,
 - (i) if the security is an exchange-traded security or a foreign exchange-traded security,
 - (A) the closing sale price on the day of the transaction as reported on the exchange upon which the security is listed or the quotation trade reporting system upon which the security is quoted, or
 - (B) if there are no reported transactions for the day of the transaction, the average of the highest current bid and lowest current ask for the security as displayed on the exchange or the quotation trade reporting system upon which the security is quoted, or
 - (C) if the closing sale price on the day of the transaction is outside of the closing bid and closing ask, the average of the highest current bid and lowest current ask for the security as displayed on the exchange or the quotation trade reporting system upon which the security is quoted; or
 - (ii) for all other securities, the average of the highest current bid and lowest current ask determined on the basis of reasonable inquiry;
- (f) the transaction is subject to market integrity requirements, which for the purposes of this paragraph are,
 - (i) if the security is exchange-traded,
 - (A) the purchase or sale is printed to a marketplace that executes trades of the security; and

- (B) the purchase or sale is subject to the market conduct and display requirements of the marketplace, its regulation services provider and securities regulatory authorities; or
 - (ii) if the security is foreign exchange-traded, the purchase or sale complies with the requirements that govern transparency and trading of foreign exchange-traded securities on the foreign exchange or foreign quotation and trade reporting system; or
 - (iii) for all other securities, the purchase or sale is reported to a dealer, if the purchase or sale is required to be reported by a registered dealer under applicable securities laws; and
- (g) the investment fund keeps written records, including
- (i) a record of each purchase and sale of securities;
 - (ii) the parties to the trade; and
 - (iii) the terms of the purchase or sale
- for five years after the end of the fiscal year in which the trade occurred, the first two in an easily accessible place;
- (2) The provisions of National Instrument 21-101 *Marketplace Operations*, and Part 6 and Part 8 of National Instrument 23-101 *Trading Rules*, do not apply to a portfolio manager or adviser of an investment fund, or an investment fund, with respect to a purchases or sale of a security referred to in subsection (1) if the purchase or sale is made in accordance with that subsection.
- (3) The inter-fund self-dealing investment prohibitions do not apply to a portfolio manager or portfolio adviser of an investment fund, or an investment fund, with respect to a purchase or sale of a security referred to in subsection (1) if the purchase or sale is made in accordance with that subsection.

Commentary

1. *The term “inter-fund self-dealing investment prohibitions” is defined in this Instrument. It is intended to capture the prohibitions in the securities act of each securities administrator regarding inter-fund trades.*
2. *This section is intended to exempt investment funds from the prohibitions in the securities act of each securities administrator that preclude inter-fund trades. It is not intended to apply to securities issued by an investment fund that are purchased by another fund within the same fund family.*

The CSA are of the view that this section applies to inter-fund trades amongst fund families of a manager provided the purchase or sale is made in accordance with subsection (1).

3. *This section does not specify the policies and procedures that a manager must have to effect inter-fund trades. However, the CSA expect the manager's policies to include factors or criteria for*
 - *allocating securities purchased for or sold by two or more investment funds managed by the manager; and*
 - *ensuring that the terms of purchase or sale will be no less beneficial to the investment fund than those generally available to other market participants in arm's-length transactions.*
4. *The CSA expect that the IRC may give its approval in the form of a standing instruction as described in section 5.4, to give the manager greater flexibility to take advantage of perceived market opportunity.*
5. *Paragraph (1)(c) requires that the market quotations for the transactions be transparent. The CSA expect that if the price information is publicly available from a marketplace, newspaper or through a data vendor, for example, this will be the price. If the price is not publicly available, the CSA expect the investment fund to obtain at least one quote from an independent, arm's-length purchaser or seller, immediately before the purchase or sale.*
6. *The CSA consider the requirements in paragraph (1)(f) to be a way to facilitate price discovery and integrity. The CSA believe this is essential to well-functioning and efficient capital markets. Subparagraph (1)(f)(iii) is intended to capture, for corporate debt securities, the requirement, if applicable, to report the trade to CanPx, and for illiquid securities, the requirement, if applicable, to report the trade to the Canadian Unlisted Board (CUB).*
7. *Paragraph (1)(g) sets out the minimum expectations regarding the records an investment fund must keep of its inter-fund trades made in reliance on this section. The records should be detailed, and sufficient to establish a good audit trail of the transactions.*

6.2 Transactions in securities of related issuers

- (1) An investment fund may make or hold an investment in the securities of an issuer related to it, its manager, or an entity related to the manager, if
 - (a) at the time that the investment is made, the independent review committee has approved the investment under subsection 5.2(1);

- (b) the purchase is made on an exchange on which the security of the issuer is listed and traded; and
 - (c) no later than the time the investment fund files its annual financial statements, the manager of the investment fund files with the security regulatory authority or regulator the particulars of the investment.
- (2) The mutual fund conflict of interest investment restrictions do not apply to a mutual fund with respect to an investment referred to in subsection (1) if the investment is made in accordance with that subsection.
- (3) In Quebec, Article 236 of the Regulations does not apply to a portfolio adviser or registered person acting under a management contract with respect to an investment referred to in subsection (1) on behalf of an investment fund, if the investment is made in accordance with that subsection.

Commentary

1. *The term “mutual fund conflict of interest investment restrictions” is defined in National Instrument 81-102 Mutual Funds. This section is intended to relieve investment funds in Quebec, and mutual funds elsewhere in Canada, from the prohibitions in the securities act of each securities administrator that preclude investments in securities of related issuers.*
2. *This section sets out the minimum conditions for purchases to proceed without regulatory exemptive relief. The CSA anticipate that the IRC will consider the conditions in past exemptive relief orders, waivers or approvals granted to the investment fund for such transactions, when contemplating the appropriate terms and conditions of its approval.*

The CSA expect that the IRC may give its approval in the form of a standing instruction as described in section 5.4 to allow the manager greater flexibility in its decisions.

3. *This section contemplates that the manager will comply with the applicable reporting requirements under securities legislation for each purchase. The filing referred to in paragraph (1)(c) should be filed on the SEDAR group profile number of the investment fund, as a continuous disclosure document.*

Part 7 Exemptions

7.1 Exemptions

- (1) The securities regulatory authority or regulator may grant an exemption from this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.
- (2) Despite subsection (1), in Ontario only the regulator may grant such an exemption.

7.2 Existing exemptions, waivers or approvals

- (1) A manager or an investment fund that has obtained an exemption, waiver or approval under a provision of securities legislation that was effective before this Instrument came into force and that deals with the matters regulated by this Instrument, may no longer rely on the exemption, waiver or approval as of the earlier of
 - (a) one year after this Instrument comes into force; and
 - (b) the date on which the investment fund first begins to comply with this Instrument.
- (2) In British Columbia, subsection (1) does not apply.

Commentary

1. *The CSA have in a number of jurisdictions, granted exemptions and waivers from the conflict of interest and self-dealing provisions in securities legislation to permit the manager and/or the investment fund to carry out investments not otherwise permitted by securities legislation. Some of those exemptions and waivers contained “sunset” provisions that provided for the expiry of the exemption or waiver upon the coming into force of legislation or a CSA policy or rule that effectively provides for fund governance.*

For greater certainty, the CSA note that the coming into force of section 7.2 of this Instrument will effectively cause all exemptions and waivers that deal with the matters regulated by this Instrument to expire one year after its coming into force, except in British Columbia. In British Columbia, the exemptions and waivers will be revoked by a separate order rather than through the operation of this Instrument.

Part 8 Effective date

8.1 Effective date

This Instrument comes into force on [].

8.2 Transition

- (1) Despite section 8.1, for an investment fund that was established before the date this Instrument comes into force,
 - (a) the appointment by the manager of the first members of the independent review committee in accordance with section 3.2 must occur within six months from the date this Instrument comes into force; and
 - (b) the adoption by the independent review committee of a written charter in accordance with subsection 3.4(1) must occur within three months from the date the independent review committee is formed under paragraph (a).
- (2) Despite section 2.2 and section 5.1, for investment funds that are established before the date this Instrument comes into force,
 - (a) the policies and procedures to be established by the manager must be in place; and
 - (b) the referral by the manager to the independent review committee of conflict of interest matters must begin,within six months from the date that the independent review committee adopts its written charter under subsection 3.4(1).
- (3) Despite section 4.4, for all investment funds subject to this Instrument, the first report to securityholders by the independent review committee that is required to be prepared in accordance with this Instrument must be prepared on or before the 120th day after the end of the first financial year of the investment fund to which this Instrument applies.
- (4) A manager of an investment fund established before the date this Instrument comes into force must at the time that it first intends to comply with this Instrument, if before the expiration of the transition period, notify the securities regulatory authority or regulator in writing of its intention.
- (5) The notification referred to in subsection (4) is satisfied if the notification is made to the investment fund's principal regulator.

Commentary

1. *For an investment fund established after the date this Instrument comes into force, the CSA contemplate that the investment fund will be compliant with this Instrument before any purchase order for securities of the investment fund is accepted.*

Section 8.2 (with the exception of subsection (3)) is intended to address the transitional concerns for investment funds established before the date this Instrument comes into force.

2. *Subsection (1) allows a manager of an existing investment fund six months from the date this Instrument is in force to appoint the initial members of the IRC, and gives the IRC three months from its formation to adopt a written charter.*

While a nine month transitional period exists for the appointment of IRC members and the IRC's adoption of its charter, the CSA strongly encourage a timely appointment of the IRC by the manager so that there is sufficient time for the IRC to review (subject to manager referral) any existing conflict of interest matters that are the subject of exemptive relief. Subsection 7.2(1) specifies that existing exemptions, waivers or approvals on any conflict of interest matters contemplated by this Instrument will expire one year after the Instrument comes into force, except in British Columbia, where the existing exemptions, waivers or approvals will be revoked by a special order.

3. *Subsection (2) allows a manager of an existing investment fund an extra six months from the IRC's adoption of its charter to establish its written policies and procedures on any existing matters now required to be referred to the IRC and for such referrals to begin to occur. This additional transitional period is intended to give the manager sufficient time to refer existing and new conflict of interest matters to the IRC for its review and determination.*
4. *Subsection (3) is a transitional section for all investment funds subject to this Instrument.*
5. *An investment fund established before the date this Instrument comes into force has a total transition period of fifteen months to comply with the Instrument. Only if the manager of an investment fund intends to comply with the Instrument before the expiry of the transition period is the notice in subsection (4) required.*