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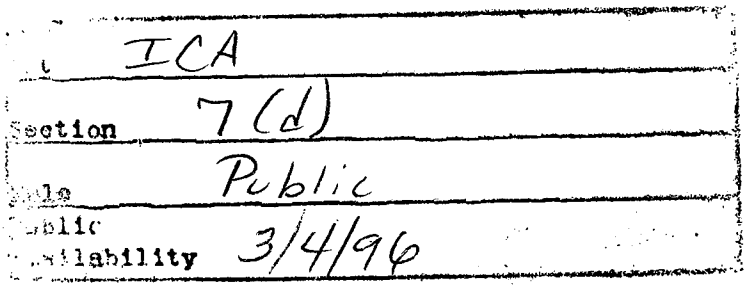


Jack W. Murphy, Esq.
Associate Director and Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 5th Street, NW
Room 10100 MS 10-6
Washington, DC 20549

Dear Mr. Murphy:

We are writing to you on behalf of the Investment Funds Institute of Canada (the "Institute" or "IFIC"), the national association of the Canadian investment fund industry. Its membership includes 916 open-end investment funds.[1] Its members manage, in the aggregate, assets of (Can.) $146.2 billion, accounting for approximately 99% of total industry assets. IFIC requests confirmation that the Division of Investment Management

[1] In Canada, the equivalent of a United States investment company is generally referred to as an "investment fund." However, because this letter discusses Canadian investment funds in the context of United States regulation, they are referred to herein as "investment companies" or generally as "funds." Similarly, an investment fund in Canada is typically organized as either a trust, which issues units of beneficial interest to investors, or a corporation, which issues shares of stock to investors. For purposes of this letter, the terms "shares" and "securities" and the terms "securityholder" and "shareholder" may be used interchangeably and shall have the same meaning, regardless of the organizational form of the investment fund.

(the "Division") would not recommend that the Securities and Exchange Commission (the "Commission") take any enforcement action under the Investment Company Act of 1940 (the "1940 Act") against investment companies organized under the laws of Canada which are not registered under the 1940 Act, and have more than 100 shareholders resident in the United States under the circumstances described below.

## I. BACKGROUND

It has come to the attention of IFIC through discussions with its members that some investment companies organized under the laws of Canada are concerned that they may inadvertently become subject to United States securities laws through the movement of Canadian shareholders to the United States. The overwhelming majority of IFIC members do not offer or sell their shares in the United States, though some funds offer their shares in private placements to a limited number of United States investors (such United States resident security holders who purchase securities in private offerings in the United States together with any subsequent United States resident transferees are hereafter referred to as "Private Offering Holders"). However, because Canadian shareholders may move from Canada to the United States after acquiring their shares, some IFIC members may find themselves inadvertently with United States resident shareholders, whose presence may present the Canadian funds with several impracticable or costly alternatives. The presence of United States residents among the shareholders of these funds may, under certain circumstances, raise questions as to whether the funds must seek an order from the Commission under Section 7(d) of the 1940 Act to register thereunder. Alternatively, to assure qualification for an exemption from registration, the funds may be required to cause investors who have become United States residents to terminate their investment in the funds through mandatory redemptions, transfers or otherwise. Moreover, the necessity of careful tracking of the residence of shareholders far in excess of what would generally be required for day-to-day operations under provincial law places an additional administrative burden and expense on the funds.

We are further advised by IFIC that many Canadian investment companies have not anticipated the regulatory concern created by the presence of United States resident shareholders. Consequently, under the governing documents of many Canadian investment companies, mandatory redemptions or transfers are not permitted to fund management, leaving such funds without an effective means of resolving the potential regulatory problem should it arise.

## II. REQUEST FOR NO-ACTION POSITION

On behalf of IFIC and its member funds, we hereby request that the Division confirm that it would not recommend that the Commission take any enforcement action under the 1940 Act if an investment company organized in Canada which is not registered under the 1940 Act permits more than 100 United States residents to remain investors in the fund provided that (i) the 100-investor limit is exceeded solely because shareholders who purchased their shares in Canada have moved to the United States after acquiring their shares ("Non-U.S. Purchasers"); and (ii) the fund is not offering or selling its shares in the United States.

## III. DISCUSSION AND LEGAL ANALYSIS

Section 7(d) of the 1940 Act prohibits any investment company organized outside the United States from making a public offering of its shares in the United States, unless the Commission issues an order permitting the foreign investment company to register under the 1940 Act. Under Section 7(d), before the Commission can issue such an order, it must find that "it is both legally and practically feasible effectively to enforce the provisions of [the 1940 Act] against such company and that the issuance of such order is otherwise consistent with the public interest and the protection of investors." As the Division has noted, however, in its May 1992 report, "Protecting Investors: A Half Century of Investment Company Regulation," (the "1992 Report"), the legislative history of the 1940 Act indicates that Section 7(d) was not intended to prevent the leakage of shares into the United States.[2]

The Division has also noted that Section 7(d) has presented difficulties to non-United States investment companies because, as a practical matter, the standard requires a foreign investment company organized in a country with substantially different investment company regulations to structure itself and operate as a United States

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[2]1992 Study at 213,n.76, citing *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess., at 199 (1940).

investment company.[3] Of the over 500 mutual funds in Canada in 1992, only three were actively registered with the Commission, and no Section 7(d) order has been issued since 1973. Moreover, receipt of a registration order under Section 7(d) of the 1940 Act does not eliminate the necessity for a non-United States investment company to satisfy the "blue sky" laws of those states in which it seeks to offer its securities.[4]

Because Section 7(d) by its terms applies only to public offerings, a non-United States investment company may avoid Section 7(d) registration requirements (and registration of its securities under the blue sky laws of most states) by making a private offering of its securities in the United States. In this connection, the Commission has taken the position that Section 7(d) permits a non-United States investment company to make a private offering of its securities in the United States (including offerings pursuant to Rule 506 under the Securities Act of 1933) without registering, provided that the company has no more than 100 beneficial owners of its shares who are United States

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[3] Rule 7d-1, adopted by the Commission in 1954 (Rel. Nos. IC-1945 and IC-1973) stated the conditions under which a Canadian investment company would satisfy the Commission that it could "enforce the provisions of [the 1940 Act] against such company." The rule requires, inter alia, that the Canadian fund incorporate into its charter or by-laws certain specified provisions of the 1940 Act, that a majority of the directors and officers of the fund be United States citizens (a majority of whom must be United States residents), and other measures designed to assure that compliance with the 1940 Act will be required and that the Commission will have jurisdiction over the fund's affairs. As noted by the Division in the 1992 Report, there are only four active funds (three of which are Canadian) which have received Section 7(d) orders after agreeing to comply with the conditions of Rule 7d-1.

[4] Because the Canadian funds shares are not registered under the Securities Act of 1933, they cannot register their shares by coordination under state securities laws. See §303 of the Uniform Securities Act, CCH Blue Sky Reporter ¶5533. Moreover, because Canadian funds are not registered under the 1940 Act and the investment adviser of the funds is generally not registered under the Investment Advisers Act of 1940, the funds cannot avail themselves of "blue chip" exemptions in those states which provide for them. See, e.g., Mich. Comp. Laws §451.802(a)(11)(A); N.J. Rev. Stat. §49:3-50(a)(12).

residents. This position, often referred to as the "Touche Remnant" doctrine, after a no-action letter issued by the Division staff in 1984 in which the staff articulated this view, is based on interpreting Section 7(d) concurrently with Section 3(c)(1) of the 1940 Act.[5]

Generally, Section 3(c)(1) excludes from the definition of "investment company" funds with 100 or fewer beneficial owners (subject to ownership attribution tests specified in the section). Canadian funds have been advised that under the Touche Remnant doctrine, as many as 100 existing shareholders may be United States residents without causing the fund to be required to seek authorization to register under the 1940 Act.[6]

As the Division has acknowledged, those investment companies which are publicly offered in Canada but which rely upon the Touche Remnant doctrine with regard to United States resident shareholders must adopt more costly and burdensome procedures in order to monitor the residence of the beneficial owners of their shares, which procedures would not otherwise be necessary to avoid inadvertent violations.[7] Moreover, these procedures must be combined with the capability on the part of the fund of controlling United States resident share ownership. These requirements may place such funds at a competitive disadvantage both as compared to funds organized in the United States and foreign funds which do not offer their shares privately in the United States.

The Touche Remnant doctrine has been criticized as lacking a statutory basis, because Section 7(d) does not restrict private offerings. Nevertheless, the Division has

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[5] Touche Remnant (pub. avail. Aug. 23, 1984). In the 1992 Report, the Division stated that "The Commission . . . has married Section 7(d) to Section 3(c)(1)." Id. at 200.

[6] Under the laws of most Canadian provinces, a United States fund could engage in a private placement of its shares subject to certain conditions. For example, under Section 72(1) of the Ontario Securities Act, prospectus requirements do not apply to, inter alia, purchases by certain institutional investors, purchases of securities whose aggregate value equals or exceeds $150,000, and purchases by persons recognized by the Ontario Securities Commission as "exempt purchasers." There are no registration provisions for open-end investment companies comparable to Section 8 of the 1940 Act. Therefore, United States investment companies not engaged in public offerings in Canada are not subject to regulatory sanction under provincial laws regardless of the number of shareholders resident in a particular province.

[7] 1992 Study, at 201-202.

stated that, "the Commission's position does prevent foreign funds from circumventing the point at which a valid United States regulatory interest arises and from enjoying an unfair advantage over domestic funds."[8]

This request for no-action relief is consistent with the objective of preventing circumvention of valid United States regulatory interests, because it would be limited to Canadian funds and their affiliates: (1) which have not publicly offered or sold the fund's securities in the United States; (2) have at no time engaged in activities that could reasonably be expected, or are intended, to condition the United States market with respect to the fund's securities[9]; (3) which have not engaged in activities that could reasonably be expected, or are intended, to facilitate secondary market trading in the United States with respect to the fund's securities[10]; (4) may have exceeded the 100 United States resident investor limit solely because Non-U.S. Purchasers (i.e. securityholders who purchased their securities while residing outside the United States) have relocated to the United States; (5) which limit their activities with respect to Non-United States Purchasers to (a) the mailing of shareholder reports, account statements, proxy statements and other materials that are required to be provided by foreign law and the funds' governing documents; (b) the processing of redemption requests and payment of dividends and distributions; (c) the mechanical processing of transfers of ownership; and (d) the issuance of shares pursuant to a reinvestment plan for dividends and distributions; and (6) which have not knowingly engaged in a deliberate marketing

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[8] 1992 Study, at 202.

[9] We understand that the staff looks to the definition of "directed selling efforts" in paragraph 902(b) of Regulation S under the Securities Act of 1933 for guidance with respect to such activities.

[10] Under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act"), in the event that a foreign fund has, or believes it has, 300 or more United States shareholders, the fund is required to register with the Commission pursuant to Section 12(g) of the Exchange Act or seek the exemption from Exchange Act registration provided by Rule 12g3-2(b). Further, while the acts of registering under the Exchange Act or claiming the exemption provided by Rule 12g3-2(b) may arguably facilitate secondary market making activities in the United States, we do not believe that such acts, taken alone without further action by the fund or its affiliates, would implicate Section 7(d).

strategy, adopted directly by the Fund's manager[11] or implemented by the manager through its agents, calculated to result in the sale of shares to Canadian investors who are relocating to the United States. In sum, the relief requested would be limited to funds which, by the very nature of their limited activity in the United States, have clearly sought no competitive advantage over domestic funds and have not created significant regulatory concerns.[12]

We recognize that if a Non-U.S. Purchaser purchases additional securities of a Canadian fund while a resident of the United States, the fund and its affiliates would count such investor as a Private Offering Holder and thus subject to the 100 investor limit. Further, a Canadian fund could not effect a private placement of shares to United States investors unless, at the conclusion of the private placement and at all times subsequent to the private placement, the total number of Private Offering Holders of the fund's securities does not exceed 100.

United States resident shareholders will not be permitted to exchange shares among investment companies within the same Canadian fund complex, or purchase additional shares under a periodic investment plan offered by a Canadian investment company. As indicated above, however, the Canadian funds could issue shares pursuant to a dividend

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[11] In Canada, the entity responsible for the business and affairs of a fund is typically the fund's manager.

[12] In the 1992 Report, the Division proposed an amendment to Section 7(d) which would require a foreign fund to register only if: (i) it makes any public offering using United States jurisdictional means, or (ii) if the fund has more than 100 shareholders of record who are United States residents, the fund makes *any* offering (public or private) in the United States or facilitates secondary trading in the United States. 1992 Report, at 212. The relief sought herein is not inconsistent with the Division's proposal. As the 1992 Report states, at 214:

> [I]t would be inappropriate to place a registration obligation on a foreign fund that has never taken any steps either to offer its shares in the United States or to facilitate secondary market trading in the United States, but whose shares have inadvertently leaked into the United States.

reinvestment plan to existing shareholders who have become United States residents after purchasing their shares.[13]

Finally, we do not believe that granting the requested no-action relief raises any substantial regulatory concerns. Investors who purchase Canadian fund shares in Canada do so in reliance on the investor protections afforded under Canadian law, not the 1940 Act. Moreover, investors who purchase Canadian fund shares in Canada do not have a reasonable expectation that changing their residence should subject a Canadian fund to regulation under the 1940 Act.

They have received the benefit of the securities regulatory scheme of their province of residence at the time of their purchase, and will continue to receive the benefit of the same regulatory oversight over the fund's affairs. The Commission has in the past recognized that the regulatory regime provided for under the laws of the

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[13]It has been the Commission's long-standing position that the issuance of shares in connection with a dividend reinvestment plan is not a sale subject to registration under the Securities Act of 1933, provided that a shareholder can elect whether to receive a dividend in stock or in cash prior to the declaration of the dividend, no sales load is deducted upon issuance of the additional shares, and the shareholder provides no consideration (besides the foregone cash dividend) for the additional securities. Release Nos. 33-929 (1936) and 33-5515 (1974); Lucky Stores, Inc. (pub. avail. June 5, 1974); Growth Stock Outlook Trust, Inc. (pub. avail. April 7, 1988). We are aware that the Division has taken the position that whether there is a sale for Securities Act purposes is not dispositive of whether there is a sale for purposes of Section 23 of the 1940 Act. SEC Letter (to unidentified recipient) (pub. avail. Feb. 11, 1993). However, the staff took that position in the context of a discussion of the issuance of shares in connection with transferable rights offerings by closed end investment companies at prices below net asset value in a manner resulting in dilution of existing shareholders' interests. We do not believe that the February 1993 letter should be regarded as a departure from the general principle that dividend reinvestment plans meeting the requirements of Release No. 33-929 are not sales subject to registration under the Securities Act of 1933. And, in any event, the no-action request in this letter does not involve any of the issues considered in the February 1993 letter.

provinces of Canada provides for substantial protections for investors.[14] United States resident investors will continue to receive the benefit of those protections.

Indeed, continuing the current interpretation is unlikely to result in registration of the funds under the conditions and procedures set forth in Rule 7d-1, or any increased related investor protections for the funds' United States resident investors. Rather, it is much more likely that a fund would redeem or cancel those investors' shares (if that is possible under the fund's governing instruments) when the number of United States resident investors inadvertently exceeds 100. Thus, the current interpretation, even with advance prospectus disclosure of the possibility, can result in forced premature relinquishment of investments, and frustrate normal investment expectations.

## IV. CONCLUSION

We believe that it is consistent with Section 7(d) of the 1940 Act and with the public interest that Canadian funds which may be regarded as subject to the Commission's jurisdiction under the 1940 Act not be treated as in violation of that Act or be required to seek the Commission's approval to register under the Act solely because their shareholders have established residence in the United States under the conditions set forth above. In view of their limited activity in the United States, no meaningful United States regulatory interest is served by effectively requiring such funds either to seek a Section 7(d) order to register under the 1940 Act or to cause their shareholders who have moved to the United States to redeem or transfer their shares.

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[14] The Multijurisdictional Disclosure System ("MJDS") adopted by provincial securities regulators in Canada and by the Commission in 1991 (Rel. No. 33-6902) is the most extensive fulfillment of the objective of facilitating reciprocal arrangements between the securities laws of the two countries. One of the underlying assumptions behind the MJDS is the Commission's confidence in the capabilities of provincial securities regulators to provide satisfactory review over prospectus disclosure for offerings which will be marketed to United States investors. Canadian issuers are required to meet antifraud standards under United States securities laws in preparing registration statements on Forms F-9 and F-10. However, the Commission has indicated that it will not, in the ordinary course, review such registration statements, and will rely upon review by the regulatory authorities of the province designated as the review jurisdiction by the issuer. Rel. No. 33-6902, CCH 1991 Transfer Binder ¶84,812, at 81877.

For the reasons stated above, we ask that the requested no-action relief be granted. If you need further information regarding the request, please contact me at 617-728-7161 or Caroline Pearson at 617-728-7152.

Very truly yours,

Joseph R. Fleming

Joseph R. Fleming

MAR - 4 1996

Our Ref. No. 95-450-CC
Investment Funds
Institute of Canada
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter dated February 6, 1996 requests assurance that we would not recommend enforcement action to the Commission under Section 7(d) of the Investment Company Act of 1940 (the "Investment Company Act") if an investment company organized in Canada proceeds in the manner described in your letter.

The Investment Funds Institute of Canada ("IFIC") is the national association of the Canadian investment fund industry. You state that the overwhelming majority of IFIC members do not offer or sell their shares in the United States, although some funds offer and sell their securities in private placements to not more than 100 U.S. investors. You state that IFIC has requested no-action relief on behalf of its members organized under the laws of Canada because some of those members are concerned that they may inadvertently become subject to the Investment Company Act through the relocation of Canadian securityholders to the United States. Specifically, IFIC seeks assurance that the staff would not recommend enforcement action to the Commission under Section 7(d) if a Canadian fund that is not registered under the Investment Company Act has more than 100 U.S. residents as securityholders, as long as the 100 investor limit is exceeded because securityholders who purchased their securities while residing outside the United States subsequently relocate to the United States. 1/

Background

Section 7(d) of the Investment Company Act prohibits a foreign investment company from using the U.S. mails or any means or instrumentality of interstate commerce to offer or sell its securities in connection with a public offering unless the Commission issues an order permitting the foreign investment company to register under the Investment Company Act. Section 7(d) authorizes the Commission to issue such an order only if the Commission finds that it is both legally and practically feasible to enforce the provisions of the Investment Company Act against the foreign investment company, and that the issuance of the order is consistent with the public interest and the protection

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1/ In Canada, the equivalent of a U.S. investment company is generally referred to as an "investment fund." Because this letter discusses Canadian investment funds in the context of U.S. regulation, they are referred to in this letter as "investment companies" or "funds. In addition, your letter does not specify whether the funds in question are open-end or closed-end funds. We do not believe that the type of fund is of consequence in analyzing the requested relief.

of investors. Congress has indicated that Section 7(d) was intended to subject foreign investment companies that access the U.S. market to the same type and degree of regulation that applies to U.S. investment companies. 2/

By its terms, Section 7(d) does not preclude a foreign investment company from offering its shares privately in the United States. In light of the purpose of Section 7(d), however, the staff has interpreted and applied the section with reference to Section 3(c)(1) of the Investment Company Act. Section 3(c)(1) excepts from the definition of investment company any issuer whose securities are beneficially owned by no more than 100 persons and that is not making, and does not presently propose to make, a public offering of its securities. 3/ In Touche Remnant & Co. (pub. avail. Aug. 27, 1984), the staff concluded that an unregistered foreign fund could make a private offering in the United States concurrently with a public offering abroad without violating Section 7(d), only if after the private offering the fund's securities are held by no more than 100 beneficial owners resident in the United States (the "Touche Remnant position"). 4/ The Touche Remnant position reflects the staff's conclusion that Congress could not have intended unregistered foreign funds to be able to conduct private placements in the United States larger than those permitted to be conducted by unregistered private investment companies organized under U.S. law.

In applying the Touche Remnant position, the Division staff has indicated that once a foreign investment company uses U.S. jurisdictional means in connection with a private offering of its securities in the United States, the issuer must count all U.S. residents that beneficially own its securities for purposes of

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2/ See S. Rep. No 1775, 76th Cong., 3d Sess. 13 (1940); H.R. Rep. No. 2639, 76th Cong., 3d Sess. 13 (1940).

3/ Section 3(c)(1) reflects a determination that public interest concerns arise when an investment company has more than 100 shareholders and that, as a result, the investment company should be required to register under the Investment Company Act. See Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. 179 (1940).

4/ The Commission cited this position with approval in Securities Act Release No. 6862 (April 23, 1990) (adopting Rule 144A under the Securities Act of 1933).

determining compliance with the 100 U.S. securityholder limit. 5/ Thus, the position contemplates that issuers count toward this limit both beneficial owners of securities privately placed in the United States, as well as U.S. residents who beneficially own securities issued and acquired outside the United States. A foreign investment company whose securities are beneficially owned by more than 100 U.S. residents is effectively prevented from privately placing securities in the United States, even though some or all of the U.S. holders may have acquired their securities outside the United States. In addition, a foreign investment company that has offered its securities privately to 100 or fewer U.S. investors in reliance on the Touche Remnant position would become subject to regulation under the Investment Company Act if it subsequently exceeded the 100 investor limit as a result of the relocation of foreign securityholders to the United States or purchases of the fund's securities by U.S. residents in secondary market transactions outside the United States. This application of the Touche Remnant position has been criticized as unfairly subjecting a foreign investment company to U.S. regulation solely as a result of the actions of investors who are outside the control of the investment company. 6/

Discussion

You maintain that under the Touche Remnant position as applied by the staff, the relocation of Canadian securityholders from Canada to the United States places Canadian funds that have conducted private placements of their securities in the United States, or that intend to conduct such private placements, in a difficult position. To avoid the application of Section 7(d), as interpreted by the Touche Remnant position, the funds may be required to cause investors who have become U.S. residents to terminate their investment in the funds through mandatory redemptions, transfers or otherwise. You represent, however, that many Canadian funds have not anticipated the regulatory concern created by the presence of U.S. resident securityholders. Consequently, under the governing documents of many Canadian funds, mandatory redemptions or transfers are not permitted. Moreover, even if such redemptions or transfers are permitted, a

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5/ See, e.g., Win Global Fund (pub. avail. May 14, 1991); Alpha Finance Corporation Ltd. (pub. avail. July 27, 1990).

6/ See SEC Division of Investment Management, Protecting Investors: A Half Century of Investment Company Regulation (May 1992) (the "Protecting Investors Report"), at 201; see also, Letter from Cleary, Gottlieb, Steen & Hamilton to Jonathan Katz, Secretary, SEC (Oct. 12, 1990), File No. S7-11-90.

fund may be unaware of the change in residence of its shareholders for some time, and would be subject to regulation under the Investment Company Act. You contend that funds should not be required to amend their governing documents and make mandatory redemptions simply because of the independent actions of their shareholders.

You note that the funds could seek an order from the Commission under Section 7(d) allowing them to register under the Investment Company Act. You maintain, however, that Section 7(d) effectively requires a foreign investment company to structure itself and operate in a manner identical to that of a U.S. investment company. 7/ You point out that the staff has recognized that many foreign investment companies do not consider registration to be a viable option, because foreign investment companies are structured to comply with regulatory systems that differ greatly from the Investment Company Act. 8/

You propose that the Division modify the scope of the Touche Remnant position with respect to the definition of who must be counted toward the 100 U.S. investor limit. Specifically, you propose that for purposes of counting U.S. resident securityholders under the Touche Remnant position, foreign funds be permitted to distinguish between U.S resident beneficial owners of securities purchased in private offerings in the United States (and any subsequent U.S. resident transferees of such securities) ("Private Offering Holders"), and U.S resident beneficial owners who were not U.S. residents when they purchased their securities (and subsequent U.S. resident transferees of such securities) ("Non-U.S. Holders"). You propose that a foreign fund should have to count only the Private Offering Holders towards the 100 beneficial owner limit. Under your proposal, a Canadian fund could not effect a private placement of securities to U.S. investors unless, at the conclusion of the private placement, the total number of Private Offering Holders of the fund's securities does not exceed 100. The fund would also have to monitor the number of Private Offering Holders on a ongoing basis to ensure that the number does not exceed 100.

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7/ See Protecting Investors Report at 189.

8/ Id. For this reason, in 1983, the Commission issued a release encouraging foreign investment companies wishing to access U.S. markets to establish "mirror" funds organized under the laws of the United States. See Applications of Foreign Investment Companies Filed Pursuant to Section 7(d) of the Investment Company Act of 1940, Investment Company Act Release No. 13691 (December 23, 1983).

You represent that, with respect to Non-U.S. Holders, the funds' activities would be limited to continuing to provide the following services: (1) the mailing of securityholder reports, account statements, proxy statements and other materials that are required to be provided by Canadian provincial law and the funds' governing documents; (2) processing of redemptions and payment of dividends and distributions; (3) processing of transfers of ownership; and (4) the issuance of securities pursuant to a dividend reinvestment plan. You further represent that Non-U.S. Holders who purchase additional securities from a Canadian fund would have to be counted as Private Offering Holders of the fund. 9/ Non-U.S. Holders would not be permitted to exchange securities among funds within the same Canadian fund complex.

You assert that your proposal is consistent with the policy considerations underlying the Touche Remnant position, because foreign funds relying on this position, by the limited nature of their activity in the United States, would have sought no competitive advantage over domestic funds. You also maintain that these funds should not create significant regulatory concerns because investors who purchase securities of foreign funds outside the United States do so in reliance on the investor protections afforded under foreign law and not the Investment Company Act. Moreover, you argue that foreign investors who become United States residents after purchasing fund securities abroad do not have a reasonable expectation that changing their residence would subject a foreign fund to regulation under the Investment Company Act.

The legislative history of the Investment Company Act indicates that, despite Section 7(d), Congress anticipated that there would be some "leakage" of foreign fund securities into the United States. 10/ This legislative history appears to support the view that a valid U.S. regulatory interest in a foreign fund would not arise simply because foreign purchasers of securities of a foreign fund subsequently relocate to the United States. Regulatory concern under the Investment Company Act is, in our view, more appropriately triggered by activities undertaken by or on behalf of a foreign investment company,

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9/ In all cases, offers and sales of securities to persons in the United States must be either registered under the Securities Act of 1933 (the "Securities Act") or exempt from such registration requirements. This letter does not address whether any such exemption may be available.

10/ See Protecting Investors Report at 213, note 76; Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. at 199 (1940).

rather than by activities of the company's securityholders that occur outside the influence of the company or its affiliates.

We would not recommend enforcement action to the Commission under the Investment Company Act if a fund organized outside the United States that is not registered under the Investment Company Act permits more than 100 U.S. residents to remain beneficial owners of the fund's securities, if

(1) the fund has not publicly offered or sold its securities in the United States;

(2) the fund and its agents or affiliates have not engaged in activities that could reasonably be expected, or are intended, to condition the U.S. market with respect to the fund's securities, such as placing an advertisement in a U.S. publication; 11/

(3) the fund and its agents or affiliates have not engaged in activities that could reasonably be expected, or are intended, to facilitate secondary market trading in the United States with respect to the fund's securities; 12/

(4) the fund and its agents or affiliates have not knowingly engaged in a deliberate marketing strategy,

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11/ The staff would generally look to the definition of "directed selling efforts" in Section 902(b) of Regulation S under the Securities Act for guidance with respect to such activities.

12/ Such activities would include, among others things, listing shares on a national securities exchange or NASDAQ, arranging for one or more dealers to make a secondary market in its securities, or participating in or providing assistance with respect to, the creation of an ADR facility for the fund's shares. We note that, in the event that a foreign fund has, or believes it has, 300 or more U.S. shareholders, the fund may be required to register with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") or seek the exemption from Exchange Act registration provided by Rule 12g3-2(b). While the acts of registering under the Exchange Act or claiming the exemption provided by Rule 12g3-2(b) may arguably facilitate secondary market-making activities in the United States, we do not believe that such actions, taken alone and without any further action by the fund, its affiliates, or any depositor or trustee of, or underwriter for, the fund would implicate Section 7(d).

adopted directly by the fund's manager or other entity responsible for the business and affairs of the fund, that is calculated to result in the sale of securities to foreign investors who are relocating to the United States;

(5) the 100 U.S. investor limit is exceeded solely because Non-U.S. Holders (i.e., beneficial owners who purchased their securities while residing outside the United States) have relocated to the United States; 13/ and

(6) the fund's activities with respect to Non-U.S. Holders are limited to providing the following services: (a) the mailing of securityholder reports, account statements, proxy statements and other materials that are required to be provided by foreign law and the fund's governing documents; (b) the processing of redemption requests and payment of dividends and distributions; (c) the mechanical processing of transfers of ownership; and (d) the issuance of securities pursuant to a dividend reinvestment plan. 14/

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13/ The Division would deem U.S. residents who purchase securities from a foreign fund, its affiliates, agents or intermediaries, while outside the United States to be Private Offering Holders. A fund that knowingly sells securities to U.S. residents should, in our view, count such investors towards the 100 investor limit. In contrast, if a U.S. resident makes an offshore secondary market purchase of securities of a foreign investment company, and the purchase occurs without the direct or indirect involvement of the investment company, its affiliates, agents or intermediaries, we would consider the U.S. resident to be a Non-U.S. Holder.

14/ The Commission has taken the position that the issuance of securities pursuant to a dividend reinvestment plan is not a sale for value subject to Section 5 of the Securities Act if the plan complies with the provisions of Securities Act Release No. 929 (July 29, 1936)("Release No. 929"). A dividend reinvestment plan meets the terms and conditions described in Release 929 if, among other things, a securityholder is able to elect to receive the dividend in cash or stock prior to the declaration of the dividend, no sales load is deducted upon the issuance of the security dividend, and the securityholder provides no consideration for the securities issued. See Securities Act Release No.

(continued...)

Because this position is based on the facts and representations discussed above, different facts or representations may require a different conclusion. Moreover, this letter states the staff's views as to issues raised under the Investment Company Act, and not those that might be raised under any other laws administered by the Commission.

John O'Hanlon

John V. O'Hanlon
Assistant Chief Counsel

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14/(...continued)
5515 (July 22, 1974); MuniEnhanced Fund, Inc. (pub. avail. May 2, 1989); Growth Stock Outlook Trust, Inc. (pub. avail. April 7, 1988). You have not requested, nor do we express, any view with respect to the status under the Securities Act of any dividend reinvestment plan operated by a foreign investment company. To the extent that a dividend reinvestment plan of a foreign investment company complies with the requirements of Release No. 929, however, we believe that such a plan would not involve an offer for purposes of Section 7(d) of the Investment Company Act.