The Ontario Securities Commission

OSC Bulletin

March 31, 2022

Volume 45, Issue 13

(2022), 45 OSCB

The Ontario Securities Commission administers the
Securities Act of Ontario (R.S.O. 1990, c. S.5) and the
Commodity Futures Act of Ontario (R.S.O. 1990, c. C.20)

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Published under the authority of the Commission by:
Thomson Reuters
One Corporate Plaza
2075 Kennedy Road
Toronto, Ontario
M1T 3V4
416-609-3800 or 1-800-387-5164

42953138

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Printed in the United States by Thomson Reuters.

ISSN 0226-9325

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Notices

1.1 Notices

1.1.1 Notice of Ministerial Approval of Amendments to National Instrument 52-108 Auditor Oversight

NOTICE OF MINISTERIAL APPROVAL OF
AMENDMENTS TO
NATIONAL INSTRUMENT 52-108 *AUDITOR OVERSIGHT*

Amendments to National Instrument 52-108 *Auditor Oversight* (the **Amendments**) came into force on March 29, 2022, pursuant to section 143.4 of the *Securities Act* (Ontario).

The Amendments were published on January 13, 2022 on the Ontario Securities Commission website at www.osc.ca and in the OSC Bulletin (2022) 45 OSCB 287.

The amendments come into force on March 30, 2022.

The text of the Amendments is reproduced in **Chapter 5** of this Bulletin.

1.1.2 Kirkland Lake Gold Ltd. – s. 1(6) of the OBCA – Notice of Correction

Kirkland Lake Gold Ltd. – s. 1(6) of the OBCA, dated February 25, 2022, was published on March 10, 2022 at (2022), 45 OSCB 2479. The incorrect date was used at paragraph four and should be “February 18, 2022”.

The correct paragraph reads in full:

4. On February 18, 2022, the Applicant was granted an order (the **Reporting Issuer Order**) pursuant to subclause 1(10)(a)(ii) of the *Securities Act* (Ontario) that it is not a reporting issuer in Ontario and is not a reporting issuer or equivalent in any other jurisdiction in Canada in accordance with the simplified procedure set out in National Policy 11-206 *Process for Cease to be a Reporting Issuer Applications*; and

1.2 Notices of Hearing

1.2.1 Amin Mohammed Ali – ss. 8, 21.7

File No.: 2022-6

IN THE MATTER OF
AMIN MOHAMMED ALI

NOTICE OF HEARING
Sections 8 and 21.7 of the *Securities Act,* RSO 1990, c S.5

PROCEEDING TYPE: Application for Hearing and Review

HEARING DATE AND TIME: April 7, 2022 at 2:00 p.m.

LOCATION: By teleconference

PURPOSE

The purpose of this proceeding is to consider the Application dated March 14, 2022 made by the party named above to review the decision of the Mutual Fund Dealers Association dated February 11, 2022.

The hearing set for the date and time indicated above is the first attendance in this proceeding, as described in subsection 6(1) of the Commission's *Practice Guideline*.

REPRESENTATION

Any party to the proceeding may be represented by a representative at the hearing.

FAILURE TO ATTEND

IF A PARTY DOES NOT ATTEND, THE HEARING MAY PROCEED IN THE PARTY'S ABSENCE AND THE PARTY WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDING.

FRENCH HEARING

This Notice of Hearing is also available in French on request of a party. Participation may be in either French or English. Participants must notify the Secretary's Office in writing as soon as possible if the participant is requesting a proceeding be conducted wholly or partly in French.

AVIS EN FRANÇAIS

L'avis d'audience est disponible en français sur demande d'une partie, que la participation à l'audience peut se faire en français ou en anglais et que les participants doivent aviser le Bureau du secrétaire par écrit dès que possible si le participant demande qu'une instance soit tenue entièrement ou partiellement en français.

Dated at Toronto this 25th day of March, 2022

"Grace Knakowski"
Secretary to the Commission

For more information

Please visit www.osc.ca or contact the Registrar at registrar@osc.gov.on.ca.

1.3 Notices of Hearing with Related Statements of Allegations

1.3.1 Mark Edward Valentine – ss. 127(1), 127.1

File No.: 2022-7

IN THE MATTER OF
MARK EDWARD VALENTINE

NOTICE OF HEARING
Subsection 127(1) and Section 127.1 of the *Securities Act,* RSO 1990, c S.5

PROCEEDING TYPE: Enforcement Proceeding

HEARING DATE AND TIME: April 21, 2022, at 10:00 a.m.

LOCATION: By Teleconference

PURPOSE

The purpose of this proceeding is to consider whether it is in the public interest for the Commission to make the orders requested in the Statement of Allegations filed by Staff of the Commission on March 18, 2022.

The hearing set for the date and time indicated above is the first attendance in this proceeding, as described in subsection 5(1) of the Commission's *Practice Guideline.*

REPRESENTATION

Any party to the proceeding may be represented by a representative at the hearing.

FAILURE TO ATTEND

IF A PARTY DOES NOT ATTEND, THE HEARING MAY PROCEED IN THE PARTY'S ABSENCE AND THE PARTY WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDING.

FRENCH HEARING

This Notice of Hearing is also available in French on request of a party. Participation may be in either French or English. Participants must notify the Secretary's Office in writing as soon as possible if the participant is requesting a proceeding be conducted wholly or partly in French.

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L'avis d'audience est disponible en français sur demande d'une partie, que la participation à l'audience peut se faire en français ou en anglais et que les participants doivent aviser le Bureau du secrétaire par écrit dès que possible si le participant demande qu'une instance soit tenue entièrement ou partiellement en français.

Dated at Toronto this 23rd day of March, 2022

"Grace Knakowski"
Secretary to the Commission

For more information

Please visit www.osc.ca or contact the Registrar at registrar@osc.gov.on.ca.

IN THE MATTER OF
MARK EDWARD VALENTINE

STATEMENT OF ALLEGATIONS
(Subsection 127(1) and Section 127.1 of the *Securities Act*, RSO 1990, c S.5)

A. OVERVIEW

1. In response to breaches of Ontario securities law, the Ontario Securities Commission may impose restrictions on respondents to protect Ontario investors and capital markets. These restrictions often include bans on trading securities and from acting as directors or officers of issuers. It is critical to fostering fair and efficient capital markets and confidence in capital markets that persons and companies comply with all terms and conditions of Commission orders, including these bans.

2. In this case, Mark Edward Valentine failed to comply with Ontario securities law by:

   a. remaining a director and officer and becoming a director and officer of various issuers; and

   b. trading in securities,

   after the Commission made an order dated December 23, 2004 (**OSC Order**) approving a settlement agreement between Staff and Valentine. The OSC Order required Valentine to resign and permanently prohibited him from becoming an officer or director of any issuer. The OSC Order also required him to cease trading in securities and removed his trading exemptions for a period of 15 years.

3. Since December 23, 2004, Valentine remained or became a director or officer of approximately 38 different issuers in breach of the OSC Order. None of the 38 companies were reporting issuers.

4. During the period from December 23, 2004 to December 22, 2019, Valentine traded in securities of issuers in breach of the OSC Order by:

   a. participating in a sale of shares transaction; and

   b. participating in and facilitating various equity loans for which he also received compensation.

5. These are serious and unacceptable breaches of Ontario securities law. When persons flout the restrictions imposed on them by orders of the Commission, these persons undermine investor confidence and the fairness and efficiency of our markets.

B. FACTS

Staff makes the following allegations of fact:

(1) Background

6. On March 10, 2004, in the United States District Court for the Southern District of Florida, Valentine pleaded guilty to one count of securities fraud contrary to sections 78j(b) and 78(ff) of Title 15 of the United States Criminal Code.

7. As a result of his guilty plea, Valentine was sentenced to a term of probation for four years, including nine months of home detention, and deported from the United States.

8. On December 16, 2004, Valentine entered into a settlement agreement with Staff, which the Commission approved by the OSC Order on December 23, 2004. The OSC Order required that he, among other things, resign all positions that he held as an officer or director of an issuer and be permanently prohibited from becoming or acting as a director or officer of any issuer (**D&O Ban**). The Commission also ordered Valentine to cease trading in securities and removed his trading exemptions for a period of 15 years (**Trading Ban**).

9. In April 2006, the U.S. Securities and Exchange Commission issued an order prohibiting Valentine from participating in an offering of penny stocks.

(2) The Respondent

10. Valentine is a resident of Toronto, Ontario. He held the following registrations with the Investment Dealers Association (**IDA**) (now the Investment Industry Regulatory Organization of Canada) during the time periods specified below:

    a. a salesperson for an IDA registrant from December 17, 1992 to November 25, 1994;

b. a salesperson for an IDA registrant from December 6, 1994 to November 10, 1995; and

c. a trading officer and a director with an IDA registrant from November 10, 1995 to July 10, 2002.

(3) Breaches of the D&O Ban

11. Valentine remained or became a director and/or officer of 38 Ontario issuers after the date of the OSC Order, in breach of the D&O Ban.

a. Valentine Remained a Director and Officer of Q Capital and Wisdom Capital

12. Prior to the OSC Order, Valentine became the President and Secretary of Q Capital Corporation (**Q Capital**) on July 24, 2002, the date of its incorporation. He was the sole director and officer of Q Capital. Valentine remained President, Secretary and a director of Q Capital after the OSC Order. He still holds those positions.

13. Wisdom Capital Partners Inc. (**Wisdom Capital**) was incorporated on June 26, 2001, before the OSC Order. Valentine became a director and the chairman on that day and remained a director and officer of Wisdom Capital after the OSC Order. He still holds those positions.

14. Valentine breached the D&O Ban and the OSC Order by remaining a director and officer of Q Capital and Wisdom Capital after the date of the OSC Order.

b. Valentine Became a Director and Officer of Issuers After the OSC Order

15. Valentine breached the D&O Ban by becoming a director and/or officer of 36 Ontario issuers after the date of the OSC Order. A list of these 36 Ontario issuers, their incorporation date, Valentine's positions, and the period for which he held those positions are set out in Schedule "A".

(4) Breaches of the Trading Ban

16. The Trading Ban was in effect from the date of the OSC Order on December 23, 2004 to December 22, 2019. During this period, Valentine violated the Trading Ban on multiple occasions by: (a) trading in shares; and (b) participating in and facilitating equity loans.

a. Valentine Traded in Shares of Flyp After the OSC Order

17. Valentine caused Pecunia Holdings Ltd. (**Pecunia**) to dispose of shares of Flyp Technologies Inc. (**Flyp**), an Ontario corporation, for valuable consideration.

18. On April 5, 2018, Pecunia sold 5,932,410 shares in Flyp for cash consideration of $1,364,454.30. Valentine authorized the following documents necessary for the Flyp sale as "Authorized Agent" on behalf of Pecunia:

a. the Secondary Sale Share Purchase Agreement;

b. the Resolution of the Board of Director and Shareholders;

c. the Resolutions of the Shareholders;

d. the Waiver of Right of First Refusal; and

e. the Release re the Secondary Sale Share Purchase Agreement.

19. On April 6, 2018, Pecunia was incorporated and Valentine became its sole officer and director.

20. From April 16, 2018 to May 14, 2018, Thalerventures Ltd. (**Thalerventures**) and Dupont Family Office Ltd. (**Dupont**) received transfers from Pecunia of about $661,447 and $178,390, respectively. These funds were proceeds of the Flyp share sale. Valentine was the President, Secretary, Treasurer, and a director of Thalerventures. He was a director and 50% shareholder of Dupont.

21. By executing the documents listed in paragraph 18 and participating in the sale of Flyp shares by Pecunia, Valentine breached the Trading Ban and OSC Order.

b. Valentine Participated in Equity Loans and Their Financing After the OSC Order

i. The Parties, the Financing and the Structure of the Equity Loans

22. Pinnacle Global Partners Fund I Ltd. (**PGP Fund)**, a Cayman Islands corporation, provided funding to lenders. The lenders in turn entered into loans with borrowers which pledged Hong Kong listed equities as collateral against the loans (**Equity Loans**).

23. A United Kingdom based entity and its representative (collectively, the **UK Financier**) also provided funding to lenders which in turn entered into Equity Loans.

24. Great Wealth Asia Investment Limited (**Great Wealth**) is a Hong Kong corporation, which identified borrowers that would pledge Hong Kong listed equities as collateral for Equity Loans.

25. Jendens Equity Finance Ltd. (**Jendens**) is a Cayman Islands corporation, which acted as a lender. Bretonnia Capital Corp Ltd. **(Bretonnia**) is a Cayman Islands corporation, which also acted as a lender for Equity Loans.

26. The lenders entered into the Equity Loans on the basis that the lenders would sell the pledged equities to pay down the loans. The lenders were entitled to sell the pledged shares at any time after entering into the Equity Loans, even if the borrower had not defaulted on the loan.

27. Jendens and Bretonnia received funds from PGP Fund and/or the UK Financier and entered into Equity Loans with borrowers.

ii. Valentine's Role in the Equity Loans and Their Financing

28. Valentine's roles in the Equity Loans included sourcing financing from parties including PGP Fund and the UK Financier; analyzing pledged equities and assessing the parameters of the loans for the providers of funds; and facilitating communications among the parties.

29. Valentine introduced PGP Fund to Great Wealth for the purpose of PGP Fund financing Equity Loans.

30. Valentine also introduced Great Wealth to Jendens and to the UK Financier for the purpose of financing the Equity Loans.

31. Thalerventures and/or Pinnacle Global Partners Ltd. (**PGP**), both of which Valentine controlled, received a portion of the profits from these Equity Loans from PGP Fund and from Great Wealth on a deal-by-deal basis.

32. From 2015 to 2017, Thalerventures and PGP received shares of profit of these Equity Loans, and/or other compensation amounting to approximately $4.3 million from Great Wealth on account of the Equity Loans. No one other than Valentine acted on behalf of Thalerventures and PGP on the Equity Loans.

33. From 2015 to 2016, PGP received wire transfers totaling US$11,294,805 from PGP Fund which included descriptions including but not limited to "Funds Required For Purchase of HK1250 Security", "Brokerage Fees Acquisition HK 607", "Acquisition of Stock HK 1250", "Acquisition of Stock HK 204, HK 712" and "Ref. Purchase of HK 204 Stock."

34. At least four of the wire transfers from PGP Fund, totaling US$2,549,940, were in respect of fees paid to PGP on Equity Loans. Valentine was the 100% shareholder and an officer and director of PGP.

35. By participating in and facilitating the Equity Loans, and by entering into agreements that entitled him to share in the profits from the Equity Loans, Valentine engaged in trading in securities in breach of the Trading Ban and the OSC Order.

C. BREACHES OF ONTARIO SECURITIES LAW AND CONDUCT CONTRARY TO THE PUBLIC INTEREST

Staff allege the following breaches of Ontario securities law and conduct contrary to the public interest:

36. By remaining a director or officer of approximately two Ontario corporations and becoming a director or officer of approximately 36 Ontario corporations as set out in Schedule "A", Valentine breached the D&O Ban and acted contrary to the OSC Order and Ontario securities law.

37. By trading in shares of Flyp and by participating in and facilitating the Equity Loans as set out above, Valentine breached the Trading Ban and acted contrary to the OSC Order and Ontario securities law.

38. By engaging in the conduct set out above, Valentine engaged in conduct contrary to the public interest.

D. ORDERS SOUGHT

39. Staff request that the Commission make the following orders:

a. that Valentine cease trading in any securities or derivatives permanently or for such period as is specified by the Commission, pursuant to paragraph 2 of subsection 127(1) of the Act;

b. that Valentine be prohibited from acquiring any securities permanently or for such period as is specified by the Commission, pursuant to paragraph 2.1 of subsection 127(1) of the Act;

c. that any exemption contained in Ontario securities law not apply to Valentine permanently or for such period as is specified by the Commission, pursuant to paragraph 3 of subsection 127(1) of the Act;

d. that Valentine be reprimanded, pursuant to paragraph 6 of subsection 127(1) of the Act;

e. that Valentine resign any position he may hold as a director or officer of an issuer permanently or for such period as is specified by the Commission, pursuant to paragraph 7 of subsection 127(1) of the Act;

f. that Valentine be prohibited permanently from becoming or holding a position as a director or officer of an issuer or for such period as is specified by the Commission, pursuant to paragraph 8 of subsection 127(1) of the Act;

g. that Valentine resign any positions that he may hold as a director or officer of a registrant, pursuant to paragraph 8.1 of subsection 127(1) of the Act;

h. that Valentine be prohibited permanently from becoming or holding a position as a director or officer of a registrant or for such period as is specified by the Commission, pursuant to paragraph 8.2 of subsection 127(1) of the Act;

i. that Valentine be prohibited permanently from becoming or holding a position as a director or officer of an investment fund manager or for such period as is specified by the Commission, pursuant to paragraph 8.4 of subsection 127(1) of the Act;

j. that Valentine be prohibited permanently from becoming or acting as a registrant, as on investment fund manager or as a promoter or for such period as is specified by the Commission, pursuant to paragraph 8.5 of subsection 127(1) of the Act;

k. that Valentine pay an administrative penalty of not more than $1 million for each failure to comply with Ontario securities law, pursuant to paragraph 9 of subsection 127(1) of the Act;

l. that Valentine disgorge to the Commission any amounts obtained as a result of non-compliance with Ontario securities law, pursuant to paragraph 10 of subsection 127(1) of the Act;

m. that Valentine pay costs of the Commission investigation and the hearing, pursuant to section 127.1 of the Act; and

n. such other order as the Commission considers appropriate in the public interest.

40. Staff reserve the right to amend these allegations and to make such further allegations as Staff deem fit and the Commission may permit.

Dated this 18th day of March, 2022

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Staff of the Enforcement Branch

Schedule "A"

List of Ontario Companies of which Mark Valentine became a Director or Officer after the OSC Order

	Corporation	Incorporation Date	Valentine's Position	Start Date	End Date
1.	120 Dunvegan Holdings Ltd.	March 12, 2014	Director, President and Secretary	March 12, 2014	Ongoing
2.	2276552 Ontario Inc.	March 3, 2011	Director, President and Secretary	February 25, 2014	Ongoing
3.	2276557 Ontario Inc.	March 3, 2011	Director, President and Secretary	February 25, 2014	Ongoing
4.	2474117 Ontario Ltd., formerly Bayspring International Ltd.	July 8, 2015	Director, President, Secretary and Treasurer	July 8, 2015	Ongoing
5.	25 Ritchie Avenue Holdings Ltd.	July 22, 2014	Director, President, Secretary and Treasurer	July 22, 2014	Ongoing
6.	25 Sheffield Holdings Ltd	July 5, 2017	Director, President and Secretary	July 5, 2017	Ongoing
7.	250 Spadina Road Holdings Ltd.	May 22, 2014	Director, President and Secretary	May 22, 2014	Ongoing
8.	2624672 Ontario Inc., The Ridge at Manitou Golf Club	March 9, 2018	Director, President and Secretary	March 9, 2018	Ongoing
9.	2632216 Ontario Inc.	April 25, 2018	Director, President and Secretary	April 25, 2018	Ongoing
10.	346-350 Eglinton Avenue West Holdings Ltd.	May 1, 2014	Director, President, Secretary and Treasurer	May 1, 2014	November 27, 2015 or September 13, 2018
11.	352-356 Eglinton Avenue West Holdings Ltd.	April 23, 2014	Director, President and Secretary	April 23, 2014	November 27, 2015 or September 13, 2018
12.	4C-36 Hazelton Avenue Holdings Ltd.	February 23, 2016	Director, President and Secretary	February 23, 2016	Ongoing
13.	Boomphones Inc.	October 13, 2009	Director, Vice-President and Secretary	April 15, 2010	July 15, 2011
14.	Daily Life Living Corp.	November 5, 2009	Director	November 5, 2009	Ongoing
15.	Dupont Family Office Ltd.	February 27, 2018	Director	February 27, 2018	Ongoing
16.	Euro Dutch Investments Ltd.	July 29, 2014	Director	July 29, 2014	Ongoing
17.	Fetu Aviation Ltd.	April 15, 2015	Director, President and Secretary	April 15, 2015	September 1, 2017
18.	FLC Aviation Ltd.	August 6, 2015	Director	August 6, 2015	Ongoing
19.	Grand Master Acquirer Ltd.	June 3, 2014	Director	June 3, 2014	Ongoing
20.	Lucky Air Ltd.	October 30, 2015	Director	October 30, 2015	November 11, 2015

21.	Luminext Corporation	March 26, 2012	Director and Secretary	October 4, 2013	June 18, 2019
22.	Mercom Capital Corp, formerly Valentine Media Corp.	September 23, 2010	Director, President and Secretary	September 23, 2010	Ongoing
23.	MRKS Holdings Inc.	April 16, 2014	Director, President and Secretary	April 16, 2014	Ongoing
24.	MRVL 18 Ltd.	September 28, 2018	Director	September 28, 2018	Ongoing
25.	Nevo Ltd.	August 13, 2014	Director and President	August 13, 2014	Ongoing
26.	Pecunia Holdings Ltd.	April 6, 2018	Director	April 6, 2018	Ongoing
27.	Peter Burton Technologies Ltd.	March 23, 2018	Director	March 23, 2018	Ongoing
28.	Peterburton Mineral Corp.	October 26, 2016	Director	October 26, 2016	July 14, 2017
29.	Pinnacle Global Media Partners Ltd.	March 30, 2015	Director and President	March 30, 2015	Ongoing
30.	Pinnacle Global Partners Ltd.	March 30, 2015	Director	March 30, 2015	Ongoing
31.	Premier Selling Technologies Inc.	May 30, 2011	Director	May 30, 2011	July 14, 2011
32.	Scollard Family Office Holdings Inc.	February 14, 2014	Director, President and Secretary	February 14, 2014	Ongoing
33.	Sikara Operations Limited	July 27, 2012	Director	July 27, 2012	Ongoing
34.	Thalerventures Ltd.	September 5, 2013	Director, President, Secretary and Treasurer	September 5, 2013	Ongoing
35.	Transit Media Inc.	March 18, 2010	Director and Chief Executive Officer	July 7, 2010	Ongoing
36.	Two Tall Oaks Investment Corp.	June 10, 2014	Director	June 10, 2014	Ongoing

1.4 Notices from the Office of the Secretary

1.4.1 Mark Edward Valentine

FOR IMMEDIATE RELEASE
March 23, 2022

MARK EDWARD VALENTINE,
File No. 2022-7

TORONTO – The Office of the Secretary issued a Notice of Hearing on March 23, 2022 setting the matter down to be heard on April 21, 2022 at 10:00 a.m. or as soon thereafter as the hearing can be held in the above named matter.

A copy of the Notice of Hearing dated March 23, 2022 and Statement of Allegations dated March 18, 2022 are available at www.osc.ca.

OFFICE OF THE SECRETARY
GRACE KNAKOWSKI
SECRETARY TO THE COMMISSION

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inquiries@osc.gov.on.ca

1.4.2 David Sharpe et al.

FOR IMMEDIATE RELEASE
March 25, 2022

DAVID SHARPE,
File No. 2021-26

AND

BRIDGING FINANCE INC.,
DAVID SHARPE,
BRIDGING INCOME FUND LP,
BRIDGING MID-MARKET DEBT FUND LP,
BRIDGING INCOME RSP FUND,
BRIDGING MID-MARKET DEBT RSP FUND,
BRIDGING PRIVATE DEBT INSTITUTIONAL LP,
BRIDGING REAL ESTATE LENDING FUND LP,
BRIDGING SMA 1 LP,
BRIDGING INFRASTRUCTURE FUND LP, AND
BRIDGING INDIGENOUS IMPACT FUND,
File No. 2021-15

TORONTO – The Commission issued an Order in the above named matter.

A copy of the Order dated March 25, 2022 is available at www.osc.ca.

OFFICE OF THE SECRETARY
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1.4.3 Amin Mohammed Ali

FOR IMMEDIATE RELEASE
March 25, 2022

AMIN MOHAMMED ALI,
File No. 2022-6

TORONTO – The Office of the Secretary issued a Notice of Hearing to consider the Application dated March 14, 2022 made by the party named above to review the decision of the Mutual Fund Dealers Association dated February 11, 2022.

A preliminary attendance will be held on April 7, 2022 at 2:00 p.m.

A copy of the Notice of Hearing dated March 25, 2022 is available at www.osc.ca.

OFFICE OF THE SECRETARY
GRACE KNAKOWSKI
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1.4.4 ByBit Fintech Limited

FOR IMMEDIATE RELEASE
March 28, 2022

BYBIT FINTECH LIMITED,
File No. 2021-21

TORONTO – The Commission issued an Order in the above named matter.

A copy of the Order dated March 28, 2022 is available at www.osc.ca.

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1.4.5 Solar Income Fund Inc. et al.

FOR IMMEDIATE RELEASE
March 29, 2022

SOLAR INCOME FUND INC.,
ALLAN GROSSMAN,
CHARLES MAZZACATO, AND
KENNETH KADONOFF,
File No. 2019-35

TORONTO – The Commission issued its Reasons and Decision in the above named matter.

A copy of the Reasons and Decision dated March 28, 2022 is available at www.osc.ca.

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1.4.6 Fraser Macdougall et al.

FOR IMMEDIATE RELEASE
March 29, 2022

FRASER MACDOUGALL AND
CHRIS BOGART
AND
TRYP THERAPEUTICS INC.,
File No. 2022-4

TORONTO – Take notice that an attendance in the above named matter is scheduled to be heard on March 29, 2022 at 3:30 p.m.

OFFICE OF THE SECRETARY
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Chapter 2

Decisions, Orders and Rulings

2.1 Decisions

2.1.1 Société de gestion privée des Fonds FMOQ inc. and Conseil et investissement fonds FMOQ inc.

Headnote

Relief under paragraph 4.1(1)(b) of National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations – a registered firm must not permit an individual to act as a dealing, advising or associate advising representative of the registered firm if the individual is registered as a dealing, advising or associate advising representative of another firm registered in any jurisdiction of Canada. The individual will have sufficient time to adequately serve both firms. Conflicts of interest are unlikely to arise because clients of the Filers and the products offered by the Filers differ considerably. The firms have policies in place to handle potential conflicts of interest. The firms are exempted from the prohibition.

Applicable Legislative Provisions

Multilateral Instrument 11-102 Passport System, s. 4.7.
National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations, ss. 4.1 and 15.1.

March 23, 2022

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
QUEBEC AND
ONTARIO
(the "Jurisdictions")

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS
IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
SOCIÉTÉ DE GESTION PRIVÉE DES FONDS
FMOQ INC.
(SGPFF)

AND

CONSEIL ET INVESTISSEMENT FONDS FMOQ INC.
(CIFF)
(the "Filers")

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (the **Decision Maker**) has received an application from the Filers for a decision under the securities legislation of the Jurisdictions (the **Legislation**) for relief from the requirement in paragraph 4.1(1)(b) of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**), pursuant to section 15.1 of NI 31-103, to permit Ms. Annie Labbé to act as registered dealing representative for SGPFF, in addition to her current registration as dealing representative with CIFF (the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application).

1. the *Autorité des marchés financiers* (the **AMF**) is the principal regulator for this application;

2. the Filers have provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia and Nova Scotia; and

3. the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filers:

The Filers

1. SGPFF is a corporation incorporated under the Business Corporations Act (Québec). Its head office is located at 3500 De Maisonneuve West Blvd, Suite 1900, Westmount, Québec, H3Z 3C1.

2. SGPFF offers portfolio management services to its clients comprised mostly of members of the Fédération des Médecins Omnipraticiens du Québec, members of the Association des Optométristes du Québec, members of the overall medical community and their relatives (collectively, the **Members**) through the use of pooled funds managed by SGPFF. In certain circumstances, pooled funds are offered directly to the Members in the Jurisdictions that qualify as accredited investors

pursuant to National Instrument 45-106 *Prospectus Exemption* (**NI 45-106**). SGPFF is the fund manager for FMOQ pooled funds that are non-reporting issuers offered pursuant to NI 45-106 and the FMOQ mutual funds offered in accordance with National Instrument 81-101 *Mutual Fund Prospectus Disclosure* in Québec (**NI 81-101**) (collectively, the **FMOQ Funds**).

3. SGPFF is registered in the categories of investment fund manager, portfolio manager, derivatives portfolio manager and exempt market dealer in Québec. It is also registered in the category of exempt market dealer in Ontario.

4. CIFF is a corporation incorporated under the *Business Corporations Act* (Québec). Its head office is located at 3500 De Maisonneuve West Blvd, Suite 1900, Westmount, Québec, H3Z 3C1.

5. CIFF buys and sells investment funds for the Members located in Québec, and remains the principal distributor of the FMOQ mutual funds. It provides customer service, promotion and development of FMOQ mutual funds as well as other products and services. The FMOQ mutual funds are distributing their securities under a prospectus pursuant to NI 81-101.

6. CIFF is registered in the category of mutual fund dealer in Québec.

7. The principal regulator of both Filers is the AMF.

8. The Filers are affiliates as they are both subsidiaries of Société de Services Financiers Fonds FMOQ inc. a wholly owned subsidiary of the Fédération des médecins omnipraticiens du Québec (**FMOQ**, and all entities together being the **FMOQ Group**).

9. The Filers' offices are located at the same address and they share the same back-office functions; however, the Filers have their own respective office space.

10. Both of the Filers also share common officers and directors and have the same Chief Compliance Officer (CCO) and Ultimate Designated Person (UDP). Up until October 20, 2021, the Filers had one employee who was registered as dealing representative (exempt market dealer) of SGPFF and dealing representative (mutual fund dealer) of CIFF. The Filers have been able to deal with conflicts of interests that have arisen due to this arrangement.

11. Neither SGPFF nor CIFF is in default of any requirements of securities legislation in any jurisdiction of Canada.

Ms. Labbé's registration as dealing representative for SGPFF

12. Ms. Labbé is currently registered as dealing representative (mutual fund dealer) in Québec with CIFF. In this role, she sells FMOQ mutual funds to clients of CIFF in Québec.

13. If the Exemption Sought is granted, Ms. Labbé would also act as registered dealing representative (exempt market dealer) on behalf of SGPFF in the Jurisdictions, where Ms. Labbé will sell units of FMOQ pooled funds to clients who are accredited investors. Ms. Labbé will not solicit new clients on behalf of SGPFF in Ontario. Her clients will be clients of CIFF or SGPFF who have moved to Ontario from Québec.

14. From a geographical and business point of view, it would be optimal for the Filers if Ms. Labbé could provide services to clients of SGPFF who move to Ontario. Ms. Labbé has been with the FMOQ Group for five years and has valuable experience and extensive knowledge of the client base and products offered by the FMOQ Group.

15. Ms. Labbé has appropriate proficiency requirements for being registered as dealing representative (exempt market dealer) with SGPFF.

16. SGPFF's clients would benefit from the Exemption Sought as they will have better access to a duly registered dealing representative.

17. Ms. Labbé will have sufficient time to adequately serve both Filers. The CCO and UDP of each Filer will ensure that Ms. Labbé continues to have sufficient time and resources to adequately serve each Filer.

18. The dual registration of Ms. Labbé is less likely to give rise to the conflicts of interest that may be present in a similar arrangement involving unrelated, arm's length firms. The interests of the Filers are aligned as: a few of the clients of CIFF are or will also be clients of SGPFF; the Filers will carry out distinct but complementary business lines to fully service the needs of their generally shared clients; and both Filers are affiliates. Both Filers wish to leverage Ms. Labbé's knowledge, expertise and experience for the benefit of their clients and FMOQ Funds. As a result, the potential for conflicts of interest arising from the dual registration of Ms. Labbé is very remote.

19. The Filers have the same CCO and appropriate compliance and supervisory policies and procedures in place to monitor the conduct of its registered individuals, including any material conflicts of interest that may arise as a result of the dual registration of Ms. Labbé. In particular, Ms. Labbé will be subject to the supervisory, and the applicable compliance, requirements of each of the Filers. Furthermore, in the rare event that Ms. Labbé was to determine that it would be appropriate to have a client invest in financial products offered by the other Filer, this Filer would, at such time, first inform and get the approval of the CCO, and then notify in writing its client of the relationship between the Filers unless such

relationship is described in materials provided to the client in connection with such investment.

20. Ms. Labbé will act fairly, honestly and in good faith and in the best interests of the clients of each Filer.

21. The Filers will be able to appropriately deal with any conflict arising out of the dual registration, as the case may be. The Filers currently share a CCO and a UDP, and they have been able to deal with any potential conflicts of interest.

22. In order to minimize any client confusion, SGPFF, CIFF and Ms. Labbé will disclose the fact that Ms. Labbé is registered with both firms, and the relationship between SGPFF and CIFF will be explained to clients. This disclosure will be made in writing prior to Ms. Labbé providing services to clients of each of the Filers.

23. In the absence of the Exemption Sought, the Filers would be prohibited from permitting Ms. Labbé to act as a dealing representative (mutual funds dealer) of CIFF and as a dealing representative (exempt market dealer) of SGPFF, even though the Filers are affiliates and have controls and compliance procedures in place to deal with Ms. Labbé's dealing activities.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted, provided that:

Ms. Labbé is subject to supervision by, and the applicable compliance requirements of, both Filers;

(a) The Chief Compliance Officer and the Ultimate Designated Person of each Filer ensure that Ms. Labbé has sufficient time and resources to adequately serve each Filer and its respective clients;

(b) The Filers each have adequate policies and procedures in place to address any conflicts of interest that may arise as a result of the dual registration of Ms. Labbé and deal appropriately with any such conflicts; and

(c) The relationship between the Filers and the fact that Ms. Labbé is dually registered with both Filers is fully disclosed in writing to each client of the Filers that deal with Ms. Labbé.

French version signed by:

"Éric Jacob"
Superintendent
Client Services and Distribution Oversight
Autorité des marchés financiers

2.1.2 I.G. Investment Management, Ltd.

Headnote

National Policy 11-203 Process for Exemptive Relief in Multiple Jurisdictions – relief granted to permit investment funds subject to NI 81-102 to invest in securities of related underlying investment funds that are not reporting issuers.

Applicable Legislative Provisions

National Instrument 81-102 Investment Funds, ss. 2.5(2)(a) and (c), 19.1(2).

March 22, 2022

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
MANITOBA AND
ONTARIO

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS
IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
I.G. INVESTMENT MANAGEMENT, LTD.
(IGIM)

DECISION

I. BACKGROUND

The securities regulatory authority or regulator in each of the Jurisdictions (the **Decision Maker**) has received an application (the **Application**) from IGIM on behalf of iProfile US Equity Private Pool and iProfile International Equity Private Pool (the **Initial Top Funds**) and any additional existing mutual funds or those mutual funds established in the future of which IGIM is the manager (the **Additional Top Funds** and together with the **Initial Top Funds**, the "

Top Funds and individually a **Top Fund**) for relief to the Top Funds from:

1. Paragraph 2.5(2)(a) of NI 81-102, to permit each Top Fund that is a mutual fund to invest in securities of the Underlying Northleaf Funds, which Underlying Northleaf Funds are, or will be, non-redeemable investment funds that are not subject to NI 81-102; and

2. Paragraph 2.5(2)(c) of NI 81-102, to permit each Top Fund that is a mutual fund to invest in securities of the Underlying Northleaf Funds, which Underlying Northleaf Funds are not, or will not be, reporting issuers in any jurisdiction.

(the **Requested Relief**)

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

(a) the Manitoba Securities Commission is the principal regulator for this application;

(b) IGIM has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon Territory and Nunavut (together with Ontario and Manitoba, the **Jurisdictions**); and

(c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

II. INTERPRETATION

Terms defined in National Instrument 14-101 *Definitions* have the same meaning if used in this decision, unless otherwise defined.

III. REPRESENTATIONS

This decision is based on the following facts represented by IGIM:

IGIM

1. IGIM is a corporation continued under the laws of Ontario. It is, or will be, the trustee, portfolio advisor and manager of each Top Fund. IGIM's head office is in Winnipeg, Manitoba.

2. IGIM is registered as a Portfolio Manager and an Investment Fund Manager in Manitoba, Ontario and Quebec and as an Investment Fund Manager in Newfoundland and Labrador.

3. IGIM is not in default of securities legislation in any of the Jurisdictions.

The Top Funds

4. The Top Funds are, or will be, mutual funds subject to NI 81-102, organized and governed by the laws of a jurisdiction of Canada.

5. Each Top Fund distributes, or will distribute, its securities under a prospectus in accordance with National Instrument 81-101 *Mutual Fund Prospectus Disclosure* (**NI 81-101**) or a long form prospectus prepared pursuant to National Instrument 41-101 *General Prospectus Requirements* (**NI 41-101**) (each a **Prospectus**).

6. Securities of each Top Fund are, or will be, qualified for distribution in the Jurisdictions.

7. The Top Funds are, or will be, reporting issuers in the provinces and territories of Canada in which their securities are distributed.

8. Each Initial Top Fund is not in default of any of the requirements of securities legislation in any of the Jurisdictions.

9. The simplified prospectus of each Top Fund discloses, or will disclose, in its description of the Top Fund's investment strategies that the Top Fund may invest up to 10% of its assets directly or indirectly in a diversified portfolio of privately held companies. This limit is consistent with the classification of the Underlying Northleaf Funds as illiquid assets for purposes of NI 81-102.

10. Each Top Fund is, or will be, subject to National Instrument 81-107 *Independent Review Committee for Investment Funds* (**NI 81-107**) and IGIM has established an independent review committee (**IRC**) to review conflict of interest matters pertaining to the Top Funds as required by NI 81-107.

Northleaf and the Underlying Northleaf Funds

11. Northleaf Capital Partners (Canada) Ltd. (together with its affiliates, **Northleaf**) is a global private markets investment firm with more than US$19 billion in private equity, private credit and infrastructure commitments under management on behalf of more than 200 institutional and family office investors, as of the date hereof. Northleaf is led by an experienced group of professionals, who collectively have significant experience in structuring, investing and managing global private markets investments and in evaluating, negotiating, structuring and executing complex financial transactions.

12. On October 28, 2020, affiliates of IGIM, Mackenzie Financial Corporation (**Mackenzie**) and Great-West Lifeco Inc. (**Lifeco**) entered into a strategic partnership with Northleaf whereby Mackenzie and Lifeco jointly acquired a 49.9% non-controlling voting interest and 70% economic interest in Northleaf.

13. Northleaf Private Equity Investors VIII (**NPE VIII**) is a non-redeemable investment fund. NPE VIII consists of a series of investment vehicles created to meet the legal, tax, regulatory or other investment requirements of specific types of investors (both taxable and non-taxable) which together comprise the investment fund. "NPE VIII" refers collectively to such investment vehicles. It seeks to provide investors with access to private equity assets consisting of a combination of mid-market and growth-oriented primary investments, secondary investments and direct investments (each a **Portfolio Investment** and collectively the **Portfolio Investments**). A "primary investment" is an investment in non-redeemable securities of a

private equity fund issued directly by the issuer fund, whereas a "secondary investment" generally involves purchasing securities in an existing private equity fund from an existing securityholder through a private purchase and sale transaction between the existing securityholder and the buyer. A "direct investment" is an investment made directly in the securities of a private company, generally alongside other investment partners. NPE VIII seeks to earn a long-term rate of return in excess of returns generally available through conventional investments in public equity markets. NPE VIII's strategy is global in scope and, in making primary and secondary investments for NPE VIII, Northleaf focuses on making investments in or alongside a core group of private equity managers with well-established franchises, strong, long-term track records and demonstrated access to privileged deal flow.

14. Northleaf Secondary Partners III (**NSP III**) is a non-redeemable investment fund. NSP III consists of a series of investment vehicles created to meet the legal, tax, regulatory or other investment requirements of specific types of investors (both taxable and non-taxable) which together comprise the investment fund. "NSP III" refers collectively to such investment vehicles. It seeks to provide investors with focused exposure to private equity secondary transactions. NSP III seeks to achieve superior returns for its investors through investments in privately negotiated secondary transactions, while offering the possibility of reduced risk through portfolio diversification. NSP III's strategy is global in scope, and Northleaf leverages its broader private equity program, global office presence, extensive industry network and deep investor relationships to source opportunities diversified by size of investment, private equity manager, investment partner, geography and industry sector. Secondary investments offer additional benefits to investors by providing early cash distributions and by capitalizing on market inefficiencies and motivated sellers with limited liquidity options. Northleaf's experienced secondaries team focuses on negotiated acquisitions of mature fund and portfolio company interests, taking an opportunistic approach in situations where Northleaf has a competitive advantage. NSP III benefits from the focused investment strategy, experienced team, disciplined investment process and rigorous valuation and reporting systems that Northleaf has developed since the inception of its private equity secondary investment strategy in 2003.

15. NPE VIII and NSP III fall within the definition of "investment fund" under the *Securities Act* (Manitoba) (the **Act**). Northleaf currently offers and in the future may offer other private market funds that, are or will be "investment funds" under the Act (together with NPE VIII and NSP III, the **Underlying Northleaf Funds**).

16. The Underlying Northleaf Funds are or will be, managed by Northleaf. Northleaf is registered as an Exempt Market Dealer in Alberta, British Columbia, Manitoba, Ontario, Quebec and Saskatchewan, as an Investment Fund Manager in Manitoba, Ontario and Quebec and as a Portfolio Manager in Manitoba and Ontario.

17. The Underlying Northleaf Funds are not, or will not be, subject to NI 81-102, and have not and will not prepare a simplified prospectus or annual information form in accordance with NI 81-101 or a long form prospectus in accordance with NI 41-101.

18. The Underlying Northleaf Funds are not, and will not be, reporting issuers in any of the Jurisdictions or listed on any recognized stock exchange.

19. The Underlying Northleaf Funds are, or will be, sold only to investors who qualify to invest in the Underlying Northleaf Funds pursuant to an exemption from the prospectus requirement under applicable Canadian securities laws.

20. Northleaf Capital Partners (Canada) Ltd. as well as NPE VIII and NSP III are not in default of the securities legislation of any of the Jurisdictions.

21. The Underlying Northleaf Funds are, or will be, primarily held by accredited investors who are not affiliated with IGIM or Northleaf.

22. There is no established, publicly available secondary market for interests in Underlying Northleaf Funds nor are there generally any redemption rights applicable to investors in Underlying Northleaf Funds. As such, investors in an Underlying Northleaf Fund cannot readily dispose of their interests in an Underlying Northleaf Fund and any interest that a Top Fund holds in an Underlying Northleaf Fund will be considered an "illiquid asset" under NI 81-102.

23. As the Underlying Northleaf Funds are, or will be, closed-end, non-redeemable investment funds, and there are no subscriptions after the fundraising period and no redemption rights, investors neither subscribe nor redeem based on the net asset value (**NAV**) of the Underlying Northleaf Funds.

24. Each Underlying Northleaf Fund invests, or will invest, in other private equity funds sponsored by, and direct investments in partnership with, fund managers with whom Northleaf has an investment relationship. Each Underlying Northleaf Fund is, or will be, valued quarterly by Northleaf. In preparing the quarterly valuations of the Underlying Northleaf Funds, Northleaf considers the quarterly valuations that it receives in respect of each Portfolio Investment from the applicable fund manager in respect of the applicable Underlying Northleaf Fund's proportionate share of the Portfolio Investment. For valuation purposes, the Underlying Northleaf Funds' Portfolio Investments are stated at

fair value based on financial statements and other relevant information as supplied by the relevant fund manager at each quarter end. Northleaf reviews each quarterly valuation for reasonability as compared to the prior quarter utilizing various performance metrics. Such valuations remain subject to adjustment in the event that Northleaf concludes that the valuation provided by the relevant fund manager does not accurately reflect the fair value of the Portfolio Investment. In such situations, Northleaf may consider other sources of fair value, such as trading comparables, transaction multiples or prior financing rounds.

25. On an annual basis the financial statements of each Underlying Northleaf Fund, are, or will be, audited by Northleaf's external auditors for its private equity funds, Ernst & Young LLP (Canada) (**E&Y**), where E&Y independently confirms the fair value of each Portfolio Investment. E&Y also audits the controls and processes in place to ensure Portfolio Investments are accurately valued in accordance with Northleaf's valuation policy.

26. Northleaf's private equity valuation policy is consistent with the *International Private Equity and Venture Capital Valuation Guidelines*.

General

27. Absent the Requested Relief, a Top Fund would be prohibited by sections 2.5(2)(a) and 2.5(2)(c) of NI 81-102 from purchasing or holding securities of an Underlying Northleaf Fund because the Underlying Northleaf Funds (i) are not subject to NI 81-102: and (ii) are not reporting issuers in the Jurisdictions.

28. IGIM believes that a meaningful allocation to private equity investments provides the Top Funds' investors with unique diversification opportunities and represents an appropriate investment tool for the Top Funds that has not been widely available in the past. Private equity investments have historically performed well in down markets; IGIM believes that permitting the Top Funds to invest in private equity, a subset of alternative investments, offers the potential to improve the Top Funds' risk adjusted returns.

29. An investment in an Underlying Northleaf Fund by a Top Fund is an efficient and cost-effective alternative to administering a private equity investment strategy directly. IGIM believes it is in the best interests of the Top Funds to make use of the experience and expertise of Northleaf to achieve exposure to a diversified portfolio of private companies. This will provide a Top Fund with exposure to world class private equity funds and assets the Top Fund would not be able access directly. Without established relationships and internal private equity expertise, which Northleaf possesses but IGIM does not, it is extremely difficult to invest with leading global private equity managers, due to capped fund sizes and limited access to the funds. As an asset class, there has historically been a much larger dispersion of returns across global private equity managers than there is for public equity managers. Accessing the top performing funds in private equity has historically made a material difference to returns. For this reason there is significant competition to access the strongest performers and many are closed to new investors. Northleaf's longstanding relationships with and access to strong performing private equity funds provides a distinct advantage that would be very difficult for IGIM to generate directly.

30. Further, Northleaf provides an active and purposeful approach to private equity portfolio construction, risk management and diversification that IGIM does not have the expertise to replicate. Northleaf engages in extensive due diligence of each investment opportunity to ensure that the investment meets the expected risk/return profile for each Underlying Northleaf Fund participating in the investment. In summary, investing in the Underlying Northleaf Funds will provide the Top Funds with access to investments in hard to access private equity funds and assets that the Top Funds would not otherwise have exposure to through portfolios of private equity investments diversified across different strategies, industry sectors and geographies constructed by Northleaf's experienced private equity professionals.

31. We note that the private equity funds that the Underlying Northleaf Funds will invest in are not, and will not be, considered "investment funds" under securities laws and, from a regulatory perspective, would be directly accessible by the Top Funds without regulatory relief.

32. We believe that Northleaf's expertise is also extremely beneficial in the secondaries market. As described above, the secondaries market involves purchasing interests in private equity funds from current investors or general partners who are seeking liquidity. The secondaries market has grown considerably over the past decade, but can generally only be accessed by firms like Northleaf that have extensive relationships with private equity managers and other investors in private equity funds. These relationships provide Northleaf with significant "deal flow". These interests can take many forms, including interests in one or more private equity funds sold as a portfolio and "single asset" vehicles where, as the name indicates, a sole company or asset is purchased in the secondary market indirectly through a managed vehicle structure. Since IGIM does not possess the applicable expertise internally, these opportunities cannot be accessed by the Top Funds except through a specialized secondaries manager like Northleaf.

33. Investments in the Underlying Northleaf Funds are considered illiquid investments under NI 81-102 and therefore are not permitted to exceed 10% of

the NAV of a Top Fund. The investments in the Underlying Northleaf Funds are included as part of the calculation for the purposes of the illiquid asset restriction in section 2.4 of NI 81-102 for a Top Fund. The Underlying Northleaf Funds are similarly illiquid to, for example, investments in privately held companies. NI 81-102 allows holdings in these illiquid private companies so long as the investment is within the thresholds of the rule. Furthermore, IGIM has its own liquidity policy and manages the Top Funds' liquidity prudently under the policy.

34. The decision to permit the Top Funds to invest in the Underlying Northleaf Funds represents IGIM's business judgment and is not influenced by factors other than the best interests of the Top Funds.

35. Aside from the sections covered by the Requested Relief, the Top Funds will comply with section 2.5 of NI 81-102 with respect to any investment in an Underlying Northleaf Fund.

IV. DECISION

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted, provided that:

1. No Top Fund will actively participate in the business or operations of any Underlying Northleaf Fund.

2. Each Top Fund will be treated as an arm's-length investor in each Underlying Northleaf Fund in which it invests, on the same terms as all other third-party investors.

3. In respect of an investment by a Top Fund in an Underlying Northleaf Fund, no sales or redemption fees will be paid as part of the investment in the Underlying Northleaf Fund.

4. In respect of an investment by a Top Fund in an Underlying Northleaf Fund, no management fees or incentive fees will be payable by the Top Fund that, to a reasonable person, would duplicate a fee payable by an Underlying Northleaf Fund for the same service.

5. Where applicable, a Top Fund's investment in an Underlying Northleaf Fund, will be disclosed to investors in such Top Fund's quarterly portfolio holding reports, financial statements and fund facts.

6. The prospectus of each Top Fund will disclose in the next renewal or amendment the fact that the Top Fund is invested in the Underlying Northleaf Funds, which are managed by Northleaf and that Mackenzie, an affiliate of IGIM holds a significant ownership interest in Northleaf.

7. The manager of each of the Top Funds complies with section 5.1 of NI 81-107 and the manager and the IRC of the Top Funds will comply with section 5.4 of NI 81-107 for any possible standing instructions concerning an investment by a Top Fund in an Underlying Northleaf Fund.

"Christopher Besko"
Director
General Counsel
The Manitoba Securities Commission

Application File #: 2021/0713

2.1.3 Pembroke Private Wealth Management Ltd. et al.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Relief granted to funds for extension of the lapse date of prospectus – Filer will incorporate a new fund into an existing prospectus that qualifies units of existing funds for distribution – Extension of lapse date will not affect the currency or accuracy of the information contained in the prospectus.

Policy Statement 11-203 Process for Exemptive Relief Applications in Multiple Jurisdiction – Regulation 11-102 respecting Passport System – Relief granted to mutual funds for extension of the lapse date of their prospectuses – Extension of the lapse date of the simplified prospectus until completion of mergers of the funds.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., s. 62(5).

[TRANSLATION]

March 24, 2022

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
QUEBEC AND
ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS
IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
PEMBROKE PRIVATE WEALTH MANAGEMENT LTD.
(the Filer)

AND

PEMBROKE MONEY MARKET FUND,
PEMBROKE CANADIAN BOND FUND,
PEMBROKE CORPORATE BOND FUND,
PEMBROKE CANADIAN BALANCED FUND,
PEMBROKE GLOBAL BALANCED FUND,
PEMBROKE CANADIAN GROWTH FUND,
PEMBROKE AMERICAN GROWTH FUND INC.,
PEMBROKE INTERNATIONAL GROWTH FUND AND
PEMBROKE CONCENTRATED FUND
(the Funds)

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (the "**Decision Maker**") has received an application (the "**Application**") from the Filer on behalf of the Funds for a decision under the securities legislation of the Jurisdictions (the "**Legislation**") allowing the Funds to extend the deadline for renewing the Funds' simplified prospectus, annual information form and fund facts documents (the "**Current Prospectus Materials**") as if the lapse date were April 25, 2022 (the "**Exemption Sought**")

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

(a) the Autorité des marchés financiers is the principal regulator for this Application,

(b) the Filer has provided notice that section 4.7(1) of *Regulation 11-102 respecting Passport System,* CQLR, c. V-1.1, r. 1 ("**Regulation 11-102**") is intended to be relied upon by the Filer in the following jurisdictions: Alberta, British Columbia, Prince Edward Island, Manitoba, New Brunswick, Nova Scotia, Saskatchewan and Newfoundland and Labrador (the "**Notified Passport Jurisdictions**" and collectively with the Jurisdictions, the **Jurisdictions of Canada**); and

(c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in *Regulation 14-101 respecting Definitions*, CQLR, c. V-1.1, r. 3, Regulation 11-102, *Regulation 81-101 respecting mutual fund prospectus* disclosure, CQLR, c. V-1.1, r. 38 ("**Regulation 81-101**"), *Regulation 81-102 respecting Investment* Funds, CQLR, c. V-1.1, r. 39 ("**Regulation 81-102**") have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

The Filer

1. The Filer is the investment fund manager, promoter and trustee of each of the Funds.

2. The Filer is a corporation governed by the laws of Canada with its head office in Montréal, Québec.

3. The Filer acts as the investment fund manager of the Funds and is registered as an investment fund manager in Quebec, Ontario and Newfoundland and Labrador.

The Funds

4. Each of the Funds is an open-end mutual fund trust established by way of a declaration of trust governed by the laws of the Province of Ontario, except for Pembroke American Growth Fund Inc. which is an open-end mutual fund corporation governed by the laws of Canada.

5. The securities of each of the Funds are distributed under the Current Prospectus Materials dated March 25, 2021 prepared in accordance with Regulation 81-101 and filed in the Jurisdictions of Canada.

6. Each Fund is therefore a reporting issuer or equivalent thereof in the Jurisdictions of Canada.

7. Neither the Filer nor the Funds are in default of securities legislation in any of the Jurisdictions of Canada.

8. The lapse date of the Current Prospectus Materials is March 25, 2022 (the "**Current Lapse Date**"). Accordingly, pursuant to paragraph 62(2) of the *Securities Act* (Ontario) and Section 2.5 of Regulation 81-101, the distribution of securities of each Fund must not continue after the Current Lapse Date unless: (i) a pro forma simplified prospectus is filed not less than 30 days before the Current Lapse Date (i.e. February 23, 2022); (ii) a new final simplified prospectus is filed no later than 10 days after the Current Lapse Date (i.e. April 4, 2022); and (iii) a receipt for the new final simplified prospectus is obtained within 20 days of the Current Lapse Date (i.e. April 14, 2022).

9. The Filer filed a pro forma simplified prospectus for each of the Funds more than 30 days before the Current Lapse Date, which has been done on February 23,2022.

New fund

10. On March 1, 2022, the Filer created a new mutual fund named Pembroke Canadian All Cap Fund governed by Regulation 81-102 (the "**New Fund**"). The New Fund was previously an open-end mutual fund trust named Pembroke Canadian All Cap Pooled Fund whose units were distributed to investors on a prospectus-exempt basis in accordance with *Regulation 45-106 respecting Prospectus and Registration Exemptions*.

11. On March 2, 2022, the Filer filed a preliminary and pro forma prospectus and preliminary and pro forma annual information form for the Funds and for the New Fund as well as preliminary fund facts for the New Fund for review by the Decision Makers. (the "**2022 Prospectus Materials**")

12. On the same date, the Filer filed an exemption application with the Decision Makers for a decision pursuant to section 19.1 of Regulation 81-102 and section 6.1 of Regulation 81-101 to be authorized to present the performance data of the New Fund for the time period since it commenced operations, before it became a reporting issuer, in sales communications and fund facts (the "**Past Performance Exemption Application**").

Submissions for the Exemption Sought

13. The Filer wishes to offer the securities of the Funds and the New Fund, under one combined simplified prospectus in order to reduce renewal and related costs. Offering the securities of the Funds and the New Fund under one combined simplified prospectus, annual information form and fund facts would facilitate the distribution of the securities of the Funds and the New Fund in the Jurisdictions of Canada under the same prospectus and enable the Filer to streamline disclosure across the Funds and the New Fund. As the Funds and the New Fund are managed by the Filer, offering the securities of the Funds and the New Fund under the same combined simplified prospectus will allow investors to compare their features more easily.

14. In addition, the Filer wishes to extend the Current Lapse Date to April 25, 2022 to allow sufficient time to address adequately all additional comments of the Decision Makers on the 2022 Prospectus Materials, to receive the decision from each of the Decision Makers with regards to the Past Performance Exemption Application and to prepare the final prospectus, annual information form and fund facts documents for each Fund and the New Fund accordingly.

15. The Exemption Sought will permit the renewal simplified prospectus of the Funds to include the New Fund.

16. Given the Current Lapse Date, an extension of the Current Lapse Date to April 25, 2022 is minimal and does not represent a disadvantage to unitholders of the Funds.

17. Since the Current Prospectus Materials, there have been no material changes to the Funds that have not been disclosed. Accordingly, the Current Prospectus Materials continue to contain accurate information.

18. Given the disclosure obligations of the Filer and the Funds, should any material changes in the affairs of the Funds occur, the Current Prospectus Materials will be amended accordingly.

19. New investors in the Funds will receive delivery of the most recently filed fund facts documents of the Funds. The Current Prospectus Materials will remain available to investors upon request.

20. The Filer Submits the Exemption Sought will not impair the reliability and accuracy of the information presented in the Current Prospectus Materials and is not prejudicial to the public interest.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Makers to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted.

"Frédéric Belleau"
Senior Director Investment Fund

2.1.4 Mackenzie Financial Corporation and Counsel Portfolio Services Inc.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Relief granted from the control restriction in section 2.2(1) of NI 81-102 to permit top funds subject to NI 81-102 to invest and hold more than 10% of the equity in securities of related underlying pools that are not funds and that are not reporting issuers. Relief is subject to conditions.

Applicable Legislative Provisions

National Instrument 81-102 Investment Funds, ss. 2.2(1) and 19.1.

March 28, 2022

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS
IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
MACKENZIE FINANCIAL CORPORATION
(Mackenzie)
COUNSEL PORTFOLIO SERVICES INC.
(Counsel)
(the Filers)

DECISION

Background

The securities regulatory authority in the Jurisdiction (the **Decision Maker**) has received an application (the **Application**) from the Filers on behalf of existing mutual funds managed by the Filers and any additional mutual funds established in the future of which a Filer is the manager (collectively, the **Top Funds**) for a decision under the securities legislation of the Jurisdiction (the **Legislation**) for relief from subsection 2.2(1) (the **Control Restriction**) of National Instrument 81-102 *Investment Funds* (**NI 81-102**) (the **Requested Relief**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application; and

(b) the Filers have provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Québec, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon Territory and Nunavut (together with Ontario, the **Jurisdictions**).

Interpretation

Terms defined in National Instrument 14-101 *Definitions*, MI 11-102 and NI 81-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filers:

Mackenzie

1. Mackenzie is a corporation formed under the laws of Ontario. It is the trustee, manager and portfolio advisor of certain Top Funds.

2. Mackenzie is registered as a portfolio manager, investment fund manager, exempt market dealer and commodity trading manager in Ontario. Mackenzie is registered as a portfolio manager, investment fund manager and exempt market dealer in Quebec and Newfoundland and Labrador. Mackenzie is also registered as a portfolio manager and exempt market dealer in Alberta, British Columbia, Manitoba, New Brunswick, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan, and Yukon.

3. Mackenzie is not in default of any of the requirements of securities legislation in any of the Jurisdictions.

Counsel

4. Counsel is a corporation formed under the laws of Ontario. It is the trustee, manager and portfolio adviser of certain Top Funds.

5. Counsel is registered as a commodity trading manager, investment fund manager and portfolio manager in Ontario. Counsel is registered as an investment fund manager in Quebec and Newfoundland and Labrador.

6. Counsel is not in default of any of the requirements of securities legislation in any of the Jurisdictions.

The Top Funds

7. Each Top Fund is, or once established will be, a mutual fund subject to NI 81-102.

8. Each Top Fund distributes, or will distribute, its securities under a prospectus prepared in accordance with National Instrument 81-101

Mutual Fund Prospectus Disclosure (**NI 81-101**) (each, a **Prospectus**).

9. Each Top Fund is, or will be, a reporting issuer in each of the Jurisdictions and is not or will not be in default of any of the requirements of securities legislation in any of the Jurisdictions.

10. Each Top Fund is, or will be, permitted by NI 81-102 to invest up to 10% of its net assets in illiquid assets, which includes Northleaf Funds (as defined below). The Prospectus of each Top Fund discloses or will disclose in its investment strategies that the Top Fund may invest up to 10% of its net assets directly or indirectly in illiquid assets, measured at the time of investment, including in Northleaf Funds.

11. Each Top Fund is, or will be, subject to National Instrument 81-107 *Independent Review Committee for Investment Funds* (**NI 81-107**) and the Filers have established, or will, establish an independent review committee (**IRC**) to review conflict of interest matters pertaining to the Top Funds as required by NI 81-107.

Northleaf and the Northleaf Funds

12. Each of the Northleaf Funds is managed by Northleaf Capital Partners (Canada) Ltd. or an affiliate (collectively, **Northleaf**).

13. Northleaf is a global private markets investment firm with more than US$19 billion in private equity, private credit and infrastructure commitments under management on behalf of more than 200 institutional and family office investors, as of the date hereof. Northleaf is led by an experienced group of professionals, who collectively have significant experience in structuring, investing and managing global private markets investments and in evaluating, negotiating, structuring and executing complex financial transactions.

14. On October 28, 2020 Mackenzie and Great-West Lifeco Inc. (**Lifeco**) entered into a strategic relationship with Northleaf whereby Mackenzie and Lifeco jointly acquired a 49.9% non-controlling voting interest and 70% economic interest in Northleaf.

15. Northleaf Growth Fund (**NGF**) is a closed-end pooled fund managed by Northleaf that seeks to provide investors with access to investments in privately held growth-stage companies in Canada and the United States. NGF consists of a series of one or more investment vehicles created to meet the legal, tax, regulatory or other investment requirements of specific types of investors (both taxable and non-taxable) which together comprise the fund. "NGF" refers collectively to such investment vehicles. NGF's portfolio of investments will be comprised of a mix of (i) direct investments in portfolio companies (ii) investments in portfolio companies via third-party managed co-investment vehicles and (iii) secondary investments. (each a **Portfolio Investment** and collectively the **Portfolio Investments**). A "direct investment" is an investment made directly in the securities of a private company, generally alongside other investment partners. A "secondary investment" generally involves purchasing securities in an existing private company or private equity fund from an existing securityholder through a private purchase and sale transaction between the existing securityholder and the buyer. NGF will seek to mitigate risk by building a portfolio that is diversified by business maturity, industry sector, and investment syndicate partner. According to its governing documents, the maximum amount NGF may invest in a single Portfolio Investment is 15% of the aggregate capital commitments to NGF.

16. Northleaf seeks to be an active investor engaged with the management of Portfolio Investments in which NGF invests to maintain an active ongoing governance role for the duration of NGF's investment. This includes Northleaf holding significant minority portions of the outstanding equity securities of NGF's Portfolio Investments with commensurate legal rights and/or having representation, as a voting member or observer, on the board of directors (or similar) of NGF's Portfolio Investments.

17. In addition to NGF, Northleaf currently offers, or in the future may offer, (i) other private markets funds that are actively involved in the management of the issuers in which they invest, and (ii) private credit funds that originate loans in the private credit market (collectively, together with NGF, the **Northleaf Funds**).

18. The Northleaf Funds are not, or will not be, subject to NI 81-102, and have not and will not prepare a prospectus in accordance with NI 81-101 or National Instrument 41-101 *General Prospectus Requirements* (**NI 41-101**).

19. The Northleaf Funds are not, and will not be, reporting issuers in any of the Jurisdictions or listed on any recognized stock exchange.

20. None of the Northleaf Funds is, or will be, an "investment fund" pursuant to the securities legislation of the Jurisdictions.

21. The Northleaf Funds are, or will be, sold only to investors who qualify to invest in the Northleaf Funds pursuant to an exemption from the prospectus requirement under applicable Canadian securities laws.

22. The Northleaf Funds are not in default of the securities legislation of any of the Jurisdictions.

23. The Northleaf Funds are, or will be, primarily held by accredited investors who are not affiliated with the Filers or Northleaf.

24. There is no established, publicly available secondary market for interests in Northleaf Funds nor are there generally any redemption rights applicable to investors in Northleaf Funds. As such, investors in a Northleaf Fund cannot readily dispose of their interests in a Northleaf Fund and any interest that a Top Fund holds in a Northleaf Fund is or will be considered an "illiquid asset" under NI 81-102.

25. Each Northleaf Fund is, or will be, valued quarterly by Northleaf. On an annual basis the financial statements of each Northleaf Fund, are, or will be, audited by Northleaf's external auditors, being an internationally recognized independent account and audit firm (typically Ernst & Young LLP or PricewaterhouseCoopers LLP (Canada)), as part of their annual independent audit. The applicable audit firm also audits the controls and processes in place to ensure Portfolio Investments are accurately valued in accordance with Northleaf's valuation policy.

Reasons for the Requested Relief

26. Absent the Requested Relief, a Top Fund would be prohibited by subsection 2.2(1)(a) of NI 81-102 from investing in NGF or any other Northleaf Fund beyond the confines of the Control Restriction. Due to the expected size disparity between the Top Funds and the Northleaf Funds, with the Top Funds expected be significantly larger than the Northleaf Funds, it is possible that a relatively small investment, on a percentage of NAV basis, by a relatively larger Top Fund in a Northleaf Fund could result in such Top Fund holding securities representing more than 10 per cent of (i) the votes attaching to the outstanding voting securities of the Northleaf Fund or (ii) the outstanding equity securities of the Northleaf Fund, contrary to the restrictions in paragraph 2.2(1)(a) NI 81-102.

27. A Top Fund will not invest in any Northleaf Fund for the purpose of exercising control over, or management of, the Northleaf Fund. The securities of each Northleaf Fund that would be held by the Top Funds do not, and will not, provide a Top Fund with any right to (i) appoint directors or observers to any board of the applicable Northleaf Fund or its manager, (ii) restrict management of any Northleaf Fund or be involved in the decision-making with respect to the investments made by the applicable Northleaf Fund or (iii) restrict the transfer of securities of the applicable Northleaf Fund by other investors in the Northleaf Fund. The voting rights associated with the securities of the Northleaf Funds that would be held by the Top Funds do not, and will not, provide a Top Fund with any right to approve, or otherwise participate in the decision-making process associated with the investments made by the Northleaf Funds.

28. The Top Funds will not have any look-through rights with respect to the individual portfolio investments held by any of the Northleaf Funds. Further, the Top Funds will not have any rights to, or responsibility for, administering any of the portfolio investments held by any of the Northleaf Funds.

29. Each of the existing Northleaf Funds have, and all future Northleaf Funds are expected to have, diversification requirements which limit the indirect exposure of the Top Funds to any single underlying portfolio company.

30. The Filers believe that a meaningful allocation to private markets investments will provide the Top Funds' investors with unique diversification opportunities and represents an appropriate investment tool for the Top Funds that has not been widely available in the past. Private equity, private infrastructure and private credit investments have historically performed well in down markets; the Filers believe that permitting a Top Fund to increase its allocation to such strategies, subsets of alternative investments, offers the potential to improve a Top Fund's risk adjusted returns.

31. The Filers believe that an optimal way to access private equity, private infrastructure and private credit is through investments in the Northleaf Funds. Investing in the Northleaf Funds will provide the Top Funds with access to investments in these strategies that the Top Funds would not otherwise have exposure to through portfolios diversified across different strategies, industry sectors and geographies constructed by Northleaf's experienced investment professionals.

32. Investments in the Northleaf Funds are considered illiquid investments under NI 81-102 and are therefore included as part of the calculation for the purposes of the illiquid asset restriction in section 2.4 of NI 81-102 for the Top Fund. Furthermore, the Filers each have their own liquidity policy and manage, or will manage, Top Funds' liquidity prudently under these policies.

33. Investments by a Top Fund in the Northleaf Funds do not qualify for the exemption from the Control Restriction in paragraph 2.2(1.1)(a) of NI 81-102 as the Northleaf Funds are not, or will not be, "investment funds" subject to NI 81-102.

34. The Filers believe that granting the Requested Relief is in the best interests of the Top Funds as it would provide the Top Funds with more flexibility to increase their allocation to the private markets.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision. The decision of the principal regulator under the Legislation is that the Requested Relief is granted, provided that:

1. No Top Fund is actively participating or will actively participate in the business or operations of any Northleaf Fund.

2. Each Top Fund is or will be treated as an arm's-length investor in each Northleaf Fund in which it invests, on the same terms as all other third-party investors.

3. A Top Fund does not or will not hold more than 20% of the outstanding equity or voting securities of any Northleaf Fund.

4. Investments in the Northleaf Funds are considered illiquid investments under NI 81-102 and therefore are not permitted to exceed, in aggregate, 10% of the net asset value of the Top Fund;

5. In respect of an investment by a Top Fund in a Northleaf Fund, no sales or redemption fees are, or will be paid as part of the investment in the Northleaf Fund.

6. In respect of an investment by a Top Fund in a Northleaf Fund, no management fees or incentive fees are, or will be payable by the Top Fund that, to a reasonable person, would duplicate a fee payable by a Northleaf Fund for the same service.

7. Where applicable, a Top Fund's investment in a Northleaf Fund is or will be disclosed to investors in the Top Fund's quarterly portfolio holding reports, financial statements and/or fund facts documents.

8. The manager of each of the Top Funds complies with section 5.1 of NI 81-107 and the manager and the IRC of the Top Funds will comply with section 5.4 of NI 81-107 for any possible standing instructions concerning an investment by a Top Fund in a Northleaf Fund.

9. The prospectus of the Top Fund discloses or will disclose in the next renewal or amendment as applicable the fact that the Top Fund is invested in the Northleaf Funds, and that Mackenzie holds a significant ownership interest in Northleaf.

"Darren McKall"
Manager
Investment Funds and Structured Products
Ontario Securities Commission

Application #: 2021/0761
SEDAR Project #: 3319205

2.1.5 Planet 13 Holdings Inc.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Application for exemptive relief from the filing deadline under subsection 4.3(4) of NI 51-102 in respect of the issuer's restated interim financial reports prepared in accordance with U.S. GAAP for the interim periods since its most recently completed financial year for which annual financial statements have been filed – pursuant to paragraph 4.3(4)(d) of NI 51-102, the issuer is required to file its restated interim financial reports and the accompanying MD&A on or before the filing deadline for its audited annual financial statements for the year ended December 31, 2021 – the issuer has encountered unanticipated delays in its work plan and the required restated interim financial reports will not be finalized when its annual financial statements are filed – relief granted subject to conditions set out in decision document.

Applicable Legislative Provisions

National Instrument 51-102 Continuous Disclosure Obligations, s. 4.3(4)(d) and Part 13.

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS
IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
PLANET 13 HOLDINGS INC.
(the Filer)

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) for an exemption from the requirement to file the Applicable Restated Interim Financial Reports (as defined herein) on or before the deadline set out in paragraph 4.2(b) of National Instrument 51-102 – *Continuous Disclosure Obligations* (**NI 51-102**) and in accordance with paragraph 4.3(4)(d) of NI 51-102, provided that the Filer files the Applicable Restated Interim Financial Reports and related MD&A on or before the earlier of (i) 45 days from the date the Filer files its Annual Financial Statements (as defined herein) and (ii) May 16, 2022 (the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application, and

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland.

Interpretation

Terms defined in National Instrument 14-101 *Definitions*, MI 11-102 and NI 51-102 have the same meanings if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filler:

1. The Filer is a corporation existing under the *Business Corporations Act* (British Columbia). The registered office of the Filer is located at 10th floor, 595 Howe St., Vancouver, British Columbia, V6C 2T5 and the head office of the Filer is located at 2548 West Desert Inn Road, Suite 100, Las Vegas, Nevada 89109.

2. The common shares of the Filer (the **Common Shares**) are listed and posted for trading on the CSE under the trading symbol "PLTH".

3. The Filer is a reporting issuer in each of the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland.

4. The Filer is subject to reporting obligations under the 1934 Act, and files continuous disclosure documents with the SEC.

5. As part of the Filer's obligations under the 1934 Act, the Filer was required by the SEC, at the end of every second fiscal quarter, to test whether it continued to qualify as a foreign private issuer as defined in Rule 405 of Regulation C under the 1933 Act and Rule 3b-4 under the 1934 Act.

6. As of June 30, 2021, the Filer determined that it no longer met the criteria for qualification as a foreign private issuer because (a) more than 50% of the outstanding Common Shares of the Filer were held by residents of the United States, and (b) the majority of the Filer's directors are resident in the United States.

7. The Filer's financial year end is December 31.

8. Effective January 1, 2022, the Filer is subject to the reporting requirements applicable to U.S. domestic registrants.

9. In accordance with Section 6120.4 of the SEC's Division of Corporation Finance Financial Reporting Manual, as of January 1, 2022, the Filer is required, to prepare its annual financial statements in accordance with U.S. GAAP.

10. Pursuant to subsection 4.3(4) of NI 51-102, the Filer is required to file restated interim financial reports prepared in accordance with U.S. GAAP for the interim periods since its most recently completed financial year for which annual financial statements have been filed (the **Restated Interim Financial Reports**) on or before the deadline for the Filer to file its audited annual financial statements for the year ended December 31, 2021 (the **Annual Financial Statements**). Pursuant to set paragraph 4.2(b) of NI 51-102, the deadline for the Filer to file the Annual Financial Statements is the earlier of (i) May 2, 2022, being the 120th day after the end of its most recently completed financial year, and (ii) the date of filing, in a foreign jurisdiction, the Annual Financial Statements.

11. The Filer is expected to file its annual report on Form 10-K for the year ended December 31, 2021 (the "**Annual Report"**) on or about March 28, 2022 in accordance with the requirements of the SEC, and concurrent therewith to file the Restated Interim Financial Report for September 30, 2021.

12. The COVID-19 pandemic has continued to result in recent staffing shortages and unanticipated employee departures critical to the Filer's financial reporting function, and the Filer's Chief Financial Officer's recent recovery from surgery on December 23, 2021, have combined to result in unanticipated delays in the Filer's work plan related to preparing the Restated Interim Financial Reports for March 31, 2021 and June 30, 2021 (the **Applicable Restated Interim Financial Reports**) in accordance with U.S. GAAP.

13. The Filer is not in default of securities legislation in any jurisdiction of Canada.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted, subject to all of the following conditions:

(a) on or before the earlier of (i) 45 days from the date the Filer files its Annual Financial Statements and (ii) May 16, 2022, the Filer files the Applicable Restated Interim Financial Reports and related MD&A, for the first two interim periods since December 31, 2020;

(b) the Filer issues and files on SEDAR, as soon as reasonably practicable, and in any event, no later than the date the Filer files its Annual Financial Statements, a news release that discloses:

a. it is relying on this exemption;

b. that its management and other insiders are subject to an insider trading black-out policy that reflects the principles in section 9 of National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions*; and

c. the anticipated date by which the Applicable Restated Interim Financial Reports and related MD&A are expected to be filed; and

(c) the Filer does not file a preliminary prospectus or a final prospectus for an offering of securities until it has filed all documents for which it is relying on this exemption.

DATED at Toronto, Ontario this 28th day of March 2022

"Lina Creta"
Manager
Corporate Finance
Ontario Securities Commission

2.2 Orders

2.2.1 Pepcap Resources, Inc. and PPX Mining Corp.

Headnote

National Policy 11-207 Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions – Application by an issuer for a full revocation of a cease trade order issued by the Commission – cease trade order issued because the issuer had failed to file certain continuous disclosure materials required by Ontario securities law – defaults subsequently remedied by bringing continuous disclosure filings up-to-date – cease trade order revoked.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., s. 144.

Citation: 2021 BCSECCOM 52

CEASE TRADE ORDER

PEPCAP RESOURCES, INC
PPX MINING CORP.
(each referred to separately as the Issuer)

UNDER THE SECURITIES LEGISLATION OF BRITISH COLUMBIA AND ONTARIO (Legislation)

Background

¶ 1 This is the order of the regulator of the British Columbia Securities Commission (the Principal Regulator) and evidences the decision of the regulator or securities regulatory authority in Ontario (each a Decision Maker).

¶ 2 The Issuer has not filed the following periodic disclosure required by the Legislation:

1. annual audited financial statements for the year ended September 30, 2020,

2. annual management's discussion and analysis for the year ended September 30, 2020,

3. certification of the annual filings for the year ended September 30, 2020.

¶ 3 As a result of this order, if the Issuer is a reporting issuer in a jurisdiction in which Multilateral Instrument 11-103 *Failure-to-File Cease Trade Orders in Multiple Jurisdictions* applies, a person or company must not trade in or purchase a security of the Issuer in that jurisdiction, except in accordance with the conditions that are contained in this order, if any, for so long as this order remains in effect.

¶ 4 Further, this order takes automatic effect in each jurisdiction of Canada that has a statutory

reciprocal order provision, subject to the terms of the local securities legislation.

Interpretation

¶ 5 Terms defined in the Legislation, National Instrument 14-101*Definitions* and National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions* have the same meaning if used in this order, unless otherwise defined.

Order

¶ 6 Each of the Decision Makers is satisfied that the decision concerning the cease trade meets the test set out in the Legislation to make this decision.

¶ 7 It is ordered under the Legislation that trading cease in respect of each security of the Issuer.

¶ 8 Despite this order, a beneficial securityholder of the Issuer who is not, and was not at the date of this order, an insider or control person of the Issuer, may sell securities of the Issuer acquired before the date of this order if both of the following apply:

1. the sale is made through a "foreign organized regulated market", as defined in section 1.1of the Universal Market Integrity Rules of the Investment Industry Regulatory Organization of Canada; and

2. the sale is made through an investment dealer registered in a jurisdiction of Canada in accordance with applicable securities legislation.

¶ 9 **February 3, 2021**

"Jody-Ann Edman", CPA, CA
Manager,
Financial Reporting Corporate Finance

2.2.2 David Sharpe et al.

**IN THE MATTER OF
DAVID SHARPE**

File No.: 2021-26

AND

**IN THE MATTER OF
BRIDGING FINANCE INC.,
DAVID SHARPE,
BRIDGING INCOME FUND LP,
BRIDGING MID-MARKET DEBT FUND LP,
BRIDGING INCOME RSP FUND,
BRIDGING MID-MARKET DEBT RSP FUND,
BRIDGING PRIVATE DEBT INSTITUTIONAL LP,
BRIDGING REAL ESTATE LENDING FUND LP,
BRIDGING SMA 1 LP,
BRIDGING INFRASTRUCTURE FUND LP, AND
BRIDGING INDIGENOUS IMPACT FUND**

File No.: 2021-15

Timothy Moseley, Vice-Chair and Chair of the Panel
M. Cecilia Williams, Commissioner
Lawrence P. Haber, Commissioner

March 25, 2022

ORDER

WHEREAS on December 16, 2021, the Ontario Securities Commission held a hearing by videoconference to consider an application commenced by David Sharpe, and a motion brought by David Sharpe within an application commenced by Staff of the Commission, and David Sharpe's request that the adjudicative record in the two proceedings (except for written submissions filed) be treated as confidential and not disclosed to the public, and on considering that this Panel has reserved its decision on David Sharpe's application and motion;

ON READING the materials filed by David Sharpe, Staff of the Commission, and Pricewaterhouse Coopers Inc. (the **Receiver**), and on hearing the submissions of the representatives for each of David Sharpe, Staff, and the Receiver;

IT IS ORDERED, for reasons to follow, that:

1. Mr. Sharpe's request to revoke or vary the order issued under s. 11 of the *Securities Act,* RSO 1990, c S.5, is dismissed; and

2. Mr. Sharpe's request to preserve the confidentiality of part of the adjudicative record is to be addressed in accordance with the mechanism to be set out in the reasons for decision.

"Timothy Moseley"

"M. Cecilia Williams"

"Lawrence Haber"

2.2.3 ByBit Fintech Limited

File No.: 2021-21

IN THE MATTER OF
BYBIT FINTECH LIMITED

Timothy Moseley, Vice-Chair and Chair of the Panel

March 28, 2022

ORDER

WHEREAS on March 25, 2022, the Ontario Securities Commission held a hearing in writing with respect to a request by Staff of the Commission for an order requiring the respondent, ByBit Fintech Limited (**Bybit**), to deliver a further summary of the anticipated evidence of Bybit's witness identified by the initials S.L.;

ON READING the draft Order filed by Staff of the Commission, and considering the consent of Staff and Bybit to this Order;

IT IS ORDERED THAT: Bybit shall not, without a Panel's permission, be permitted to call S.L., or an alternative witness, at the merits hearing in this proceeding unless Bybit has served a further summary of S.L.'s, or the alternative witness's, anticipated evidence by no later than April 20, 2022, that:

1. contains the substance of the evidence S.L., or the alternative witness, is expected to give; and

2. identifies any documents to which S.L., or the alternative witness, is expected to refer in their evidence.

"Timothy Moseley"

2.2.4 MarketAxess SEF Corporation – s. 144

Headnote

Subsection 144(1) of the OSA – Application for an order revoking an order issued June 13, 2016, as varied March 11, 2021, granting MarketAxess SEF Corporation an exemption from the requirement to be recognized as an exchange under section 21 of the OSA – MarketAxess SEF Corporation no longer carrying on business in Ontario – requested order granted.

Applicable Legislative Provisions

Securities Act, RSO 1990, c. S.5, ss. 21(1), 144, 147.

March 26, 2022

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S.5, AS AMENDED
(the Act)

AND

IN THE MATTER OF
MARKETAXESS SEF CORPORATION
(MA SEF)

REVOCATION ORDER
(Section 144 of the Act)

WHEREAS the Ontario Securities Commission (**Commission**) issued an order dated June 13, 2016 pursuant to section 147 of the Act, as varied by an order of the Commission dated March 11, 2021, exempting MA SEF from recognition as an exchange under subsection 21(1) of the Act (the **2016 Order**);

AND WHEREAS MA SEF notified the Commission that:

(i) On July 30, 2021, MA SEF announced that it was suspending operations of the swap execution facility (**SEF**);

(ii) The last day of trading on the MA SEF was August 31, 2021 after which the MA SEF ceased to execute trades as a SEF; and

(iii) The U.S. Commodity Futures Trading Commission will deem MA SEF's registration to be "dormant" effective on or about September 1, 2022;

AND WHEREAS there is currently no trading activity on the MA SEF platform and MA SEF has ceased its activities as a SEF in Ontario;

AND WHEREAS MA SEF has no physical presence in Ontario and does not otherwise carry on business in Ontario;

AND WHEREAS the Commission has determined that revocation of the 2016 Order would not be prejudicial to the public interest;

THE COMMISSION hereby revokes the 2016 Order pursuant to section 144 of the Act.

Dated **March 26, 2022.**

"Frances Kordyback"

"Cecilia Williams"

2.4 Rulings

2.4.1 Barclays Capital Inc. – s. 38 of the CFA

Headnote

Application for a ruling pursuant to section 38 of the Commodity Futures Act (CFA) granting relief from the dealer registration requirement set out in section 22 of the CFA in connection with acting as a clearing broker in Give-Up Transactions involving commodity futures contracts and options on commodity futures contracts on exchanges located in Canada (Canadian Futures) to, from or on behalf of Canadian institutional permitted clients (institutional investors) – relief limited to trades in Canadian futures for institutional permitted clients – relief subject to sunset clause.

Statutes Cited

Commodity Futures Act, R.S.O. 1990, c. C.20, as am., ss. 22, 38, 78.
National Instrument 31-103 Registration Requirements, Exemptions, and Ongoing Registrant Obligations, ss. 1.1, 8.18, 8.26.
Ontario Instrument 32-507 (Commodity Futures Act) Exemptions for International Dealers, Advisers and Sub-Advisers (Interim Class Order).

March 26, 2022

IN THE MATTER OF
THE *COMMODITY FUTURES ACT*,
R.S.O. 1990, c. C.20, AS AMENDED
(the CFA)

AND

IN THE MATTER OF
BARCLAYS CAPITAL INC.
(the Filer)

RULING
(Section 38 of the CFA)

WHEREAS on February 16, 2017, the Ontario Securities Commission (the **Commission**) made a ruling (the **Previous Decision**) pursuant to section 38 of the CFA exempting

(a) the Filer from the dealer registration requirement set out in section 22 of the CFA in connection with providing Clearing Broker Services (as defined below) in Give-Up Transactions (as defined below) involving exchange-traded futures on exchanges located in Canada (**Canadian Futures**) to, from or on behalf of Institutional Permitted Clients (defined below); and

(b) an Institutional Permitted Client from the dealer registration requirement in the CFA in connection with receiving Clearing Broker Services (as defined below) in Give-Up Transactions (as defined below) in Canadian Futures from the Filer;

AND WHEREAS the Previous Decision was effective for a five-year period and terminated on February 15, 2022 (the **Termination Date**);

AND WHEREAS prior to the Termination Date, the Commission received an application from the Filer (the **Application**) pursuant to section 38 of the CFA for a ruling to extend the Termination Date for a five-year period and to make certain revisions to update the Filer's representations to the Commission (the **Ruling**);

AND WHEREAS for the purposes of the Ruling, "**Institutional Permitted Client**" shall mean a "permitted client" as defined in section 1.1 of National Instrument 31-103 *Registration Requirements, Exemptions, and Ongoing Registrant Obligations* (**NI 31-103**), except for:

(a) an individual,

(b) a person or company acting on behalf of a managed account of an individual,

(c) a person or company referred to in paragraph (p) of that definition, unless the person or company qualifies as a permitted client under another paragraph of that definition, or

(d) a person or company referred to in paragraph (q) of that definition unless that person or company has net assets of at least $100 million as shown on its most recently prepared financial statements or qualifies as a permitted client under another paragraph of that definition;

and provided further that, for the purposes of the definition of "Institutional Permitted Client", a reference in the definition of "permitted client" in section 1.1. of NI 31-103 to "securities legislation" shall be read as "securities legislation or Ontario commodity futures law, as applicable";

AND UPON considering the Application and the recommendation of Staff of the Commission;

AND UPON the Filer having represented to the Commission as follows:

1. The Filer is a corporation organized under the laws of the State of Connecticut, United States of America (**U.S.**). Its head office is located at 745 7th avenue, New York, NY 10019. The Filer is an indirect wholly owned subsidiary of Barclays PLC.

2. The Filer is registered as a broker-dealer with the U.S. Securities and Exchange Commission (**SEC**), a member of the U.S. Financial Industry Regulatory Authority (**FINRA**), a registered futures commission merchant (**FCM**) with the U.S. Commodity Futures Trading Commission (**CFTC**), and a member of the U.S. National Futures Association (**NFA**).

3. The Filer is a member of a number of major U.S. securities exchanges, including the New York Stock Exchange and NASDAQ. The Filer is also a member of the Chicago Board of Trade, the Chicago Mercantile Exchange, ICE Futures Exchange, and other principal U.S. commodity exchanges and trades through affiliated or unaffiliated member firms on other exchanges, including exchanges in Canada.

4. In connection with its securities trading activities, the Filer relies on the "international dealer exemption" under section 8.18 of NI 31-103 in Alberta, British Columbia, Manitoba, New Brunswick, Ontario, Québec and Saskatchewan. The Filer also currently relies on an order dated September 8, 2017 under the CFA, *Re Barclays Bank PLC and Barclays Capital Inc.*, granting an exemption from the dealer registration requirement in connection with certain execution and clearing activities in commodity futures contracts and options on commodity futures contracts that trade on exchanges located outside of Canada, subject to a five-year sunset clause. The Filer may also rely on Ontario Instrument 32-507 *(Commodity Futures Act) Exemptions for International Dealers, Advisers and Sub-Advisers (Interim Class Order)* which provides an exemption from the dealer registration requirement in connection with certain execution and clearing activities in commodity futures contracts and options on commodity futures contracts that trade on exchanges located outside of Canada.

5. Subject to the Ruling requested as a consequence of the recent expiry of the Previous Decision, the Filer is not in default of securities legislation in any jurisdiction in Canada or under the CFA. The Filer is in compliance in all material respects with U.S. securities and commodity futures laws.

6. Barclays Capital Canada Inc. (**BCCI**) is an affiliate of the Filer. BCCI is registered as an investment dealer in all of the provinces and territories of Canada and is a dealer member of the Investment Industry Regulatory Organization of Canada (**IIROC**).

7. The Filer has been providing Clearing Broker Services (as defined below) in Give-Up Transactions (as defined below) involving Canadian Futures to, from or on behalf of Institutional Permitted Clients in reliance on the Previous Decision since February 16, 2017. The Filer wishes to continue providing these services pursuant to the Ruling.

8. A **Give-Up Transaction** is a purchase or sale of futures contracts by a client that has an existing relationship with a clearing broker but wishes to use the trade execution services of one or more other executing brokers for the purpose of executing such purchases or sales (**Subject Transactions**) on one or more markets. Under these circumstances, the executing broker executes the Subject Transactions as directed by the client and "gives up" such trades to the clearing broker for clearing, settlement, record-keeping, bookkeeping, custody and other administrative functions (**Clearing Broker Services**). The service provided by the executing broker is limited to trade execution only.

9. In a Give-Up Transaction, the clearing broker will maintain an account for the client that is administered in accordance with the terms and conditions of the account documentation of the clearing broker that has been signed by the client. The clearing broker will handle record keeping and collateral for the client. The client will not sign clearing account documentation with the executing broker, nor will the executing broker typically receive monies, margin or collateral directly from the client. Although the executing broker is responsible for its own record-keeping, bookkeeping, custody and other administrative functions (**Account Services**) in respect of its own clients, it does not, subject to any applicable regulatory requirements that may otherwise apply, provide Account Services for execution-only clients. Such Account Services remain the responsibility of the clearing broker. The clearing broker will have the primary relationship with the client and is contractually responsible for trade and risk monitoring as well as reporting trade confirmations and sending out monthly statements.

10. In order to enter into a Give-Up Transaction, a client will enter into a tri-party agreement, known as a "give-up agreement" (**Give-Up Agreement**), between an executing broker, a clearing broker, and the client. The Filer, as clearing broker, will generally use the *International Uniform Brokerage Execution Services ("Give-Up") Agreement: Version 2017* (© Futures Industry Association, Inc. 2017), as may be revised from time to time, as the Give-Up Agreement entered into with Institutional Permitted Clients.

11. Each party to the Give-Up Agreement, including the Filer as clearing broker, will represent in the Give-Up Agreement that it will perform its obligations under the Give-Up Agreement in accordance with applicable laws, governmental, regulatory, self-regulatory, exchange or clearing house rules, regulations, interpretations, protocols and the customs and usages of the exchange or clearing house on which the transactions governed by the Give-Up Agreement are executed and cleared, as in force from time to time.

12. In Ontario, an Institutional Permitted Client would place orders for Canadian Futures for execution on Canadian futures exchanges with an Ontario-registered FCM, which would then be cleared locally on the applicable Canadian futures exchange by that Ontario-registered FCM (if qualified to do so) or another clearing member of the applicable Canadian futures exchange. The executed trades would be placed into a client omnibus account maintained by the Filer with the clearing member of the applicable Canadian futures exchange that locally clears the trades, and the executed trades would be booked by the Filer to the futures account of the Ontario client maintained with the Filer for trading on exchanges globally. In this arrangement, the Ontario-registered FCM would be responsible for all client-facing interactions relating to the execution of the Canadian Futures.

13. In the case of a Montréal Exchange-listed futures contract, a member of the Canadian Derivatives Clearing Corporation (**CDCC**) would clear the trade on the Filer's behalf. Therefore, trade execution would be done by an Ontario-registered FCM, the positions would be held at CDCC by a CDCC member (which could be, but would not necessarily have to be, the executing broker) and given up to the Filer at which the Ontario Institutional Permitted Client maintains a clearing account. The Filer would then carry the resulting positions in an account maintained on its books by the Institutional Permitted Client, and the Filer would call for and collect applicable margin from the Institutional Permitted Client. The Filer, in turn, would remit the required margin to the CDCC member that cleared the trades. That CDCC member would then make the required margin payment(s) to CDCC.

14. In respect of holding client assets, in order to protect customers in the event of the insolvency or financial instability of the Filer, the Filer is required under U.S. law to ensure that customer securities and monies be separately accounted for, segregated at all times from the securities and monies of the Filer and custodied exclusively with such banks, trust companies, clearing organizations or other licensed futures brokers and intermediaries as may be approved for such purposes under the U.S. *Commodity Exchange Act* (**CEA**) and the rules promulgated by the CFTC thereunder (collectively, the **Approved Depositories**). The Filer is further required to obtain acknowledgements from any Approved Depository holding customer funds or securities related to U.S.-based transactions or accounts that such funds and securities are to be separately held on behalf of such customers, with no right of set-off against the Filer's obligations or debts.

15. As a U.S. registered broker-dealer and FCM, the Filer is subject to regulatory capital requirements under the CEA and *Securities Exchange Act of 1934* (the **1934 Act**), specifically CFTC Regulation 1.17 *Minimum Financial Requirements for Futures Commission Merchants and Introducing Brokers* (**CFTC Regulation 1.17**), SEC Rule 15c3-1 *Net Capital Requirements for Brokers or Dealers* (**SEC Rule 15c3-1**) and SEC Rule 17a-5 *Reports to be Made by Certain Brokers and Dealers* (**SEC Rule 17a-5**).

16. SEC Rule 15c3-1 requires that the Filer account for any guarantee of debt of a third party in calculating its excess net capital when a loss is probable and the amount can be reasonably estimated. Accordingly, the Filer will, in the event that it provides a guarantee of any debt of a third party, take a deduction from net capital when both of the preceding conditions exist.

17. SEC Rule 15c3-1 and CFTC Regulation 1.17 are designed to provide protections that are substantially similar to the protections provided by the capital formula requirements and specifically risk adjusted capital to which dealer members of IIROC are subject. The Filer is in compliance with SEC Rule 15c3-1 and in compliance in all material respects with SEC Rule 17a-5. If the Filer's net capital declines below the minimum amount required, the Filer is required to notify the SEC and FINRA pursuant to SEC Rule 17a-11 *Notification Provisions for Brokers and Dealers* (**SEC Rule 17a-11**). The SEC and FINRA have the responsibility to provide oversight over the Filer's compliance with SEC Rule 15c3-1 and SEC Rule 17a-5.

18. The Filer is required to prepare and file a financial report, which includes Form X-17a-5 Financial and Operational Combined Uniform Single Report (the **FOCUS Report**), monthly with the CFTC, NFA, SEC and FINRA. The FOCUS Report provides a more comprehensive description of the business activities of the Filer, and more accurately reflects those activities including client lending activity, than would be provided by Form 31-103F1 *Calculation of Excess Working Capital* (**Form 31-103F1**). The FOCUS Report provides a net capital calculation and a comprehensive description of the

business activities of the Filer. The net capital requirements computed using methods prescribed by SEC Rule 15c3-1 are based on all assets and liabilities on the books and records of a broker-dealer whereas Form 31-103F1 is a calculation of excess working capital, which is a computation based primarily on the current assets and current liabilities on the books and records of the dealer. The Filer is up-to-date in its submission of annual reports under SEC Rule 17a-5(d), including the FOCUS Report.

19. The Filer is a member of the Securities Investors Protection Corporation (**SIPC**). Subject to the eligibility criteria of SIPC, client assets held by the Filer in connection with its activities as a broker-dealer are insured by SIPC against loss due to insolvency in accordance with the Securities Investor Protection Act of 1970. There is no SIPC or similar insurance protection in connection with activities undertaken as a U.S. registered FCM.

20. The Filer is subject to CFTC Regulation 30.7 regarding cash, securities and other collateral that are deposited with a FCM or are otherwise required to be held for the benefit of its customers to margin futures and options on futures contracts traded on non-U.S. boards of trade, including Canadian Futures, (**30.7 Customer Funds**). Accounts used to hold 30.7 Customer Funds must be properly titled to make clear that the funds belong to, and are being held for the benefit of, the FCM's customers who are trading foreign (i.e. non-U.S.) futures and futures options.

21. 30.7 Customer Funds may not be commingled with the funds of any other person, including the carrying FCM, except that the carrying FCM may deposit its own funds into the account containing 30.7 Customer Funds in order to prevent the accounts of the customers from becoming under-margined. Each Approved Depository (except for a derivatives clearing organization with specified rules) is required to provide the depositing FCM with a written acknowledgment that the depository was informed that such funds held in the customer account belong to customers and are being held in accordance with the CEA and CFTC Regulations. Among other representations, the depository must acknowledge that it cannot use any portion of 30.7 Customer Funds to satisfy any obligations that the FCM may owe the depository. The types of investments permitted for 30.7 Funds are restricted by CFTC Regulation 30.7(h), which refers to the list of permitted investments set forth in CFTC Regulation 1.25. The FCM is required, on a daily basis, to compute and submit to regulatory authorities a statement of the amounts of 30.7 Customer Funds held by the FCM.

22. In the event of a FCM's bankruptcy, funds allocated to each account class (i.e., the customer segregated, 30.7 secured amount and cleared swaps customer account classes established pursuant to CFTC Regulations 1.20, 30.7 and 22.2, respectively) or readily traceable to an account class must be allocated solely to that customer account class. The U.S. Bankruptcy Code also provides that non-defaulting customers in an account class that has incurred a loss will share in any shortfall, pro rata. However, customers whose funds are held in another account class that has not incurred a loss will not be required to share in such shortfall.

23. The Filer holds customer assets in accordance with Rule 15c3-3 of the 1934 Act, as amended (**SEC Rule 15c3-3**). SEC Rule 15c3-3 requires the Filer to segregate and keep segregated all "fully-paid securities" and "excess margin securities" (as such terms are defined in SEC Rule 15c3-3) of its customers from its proprietary assets. In addition to the segregation of customers' securities, SEC Rule 15c3-3 requires the Filer to deposit an amount of cash or qualified government securities determined in accordance with a reserve formula set forth in SEC Rule 15c3-3 in an account entitled "Special Reserve Account for the Exclusive Benefit of Customers" of such Filer at separate banks and/or custodians. The combination of segregated securities and cash reserve are designed to ensure that the Filer has sufficient assets to cover all net equity claims of its customers and provide protections that are substantially similar to the protections provided by the requirements dealer members of IIROC are subject. If the Filer fails to make an appropriate deposit, the Filer is required to notify the SEC and FINRA pursuant to SEC Rule 15c3-3(i). The Filer is in material compliance with the possession and control requirements of SEC Rule 15c3-3.

24. The Filer is subject to regulations of the Board of Governors of the U.S.A. Federal Reserve Board (**FRB**), the SEC, and FINRA regarding the lending of money, extension of credit and provision of margin to clients (the **U.S. Margin Regulations**) that provide protections that are substantially similar to the protections provided by the requirements regarding the lending of money, extension of credit and provision of margin to clients to which dealer members of IIROC are subject. In particular, the Filer is subject to the margin requirements imposed by the FRB, including Regulation T, and under applicable SEC rules and under FINRA Rule 4210. The Filer is in material compliance with all applicable U.S. Margin Regulations.

25. Section 22 of the CFA provides that no person may trade in a commodity futures contract or a commodity futures option unless the person is registered as a dealer [*Futures Commission Merchant*], or as a representative of the dealer, or an exemption from the registration requirement is available. The Filer's activities in providing Clearing Broker Services in Give-Up Transactions involving Canadian Futures to, from or on behalf of Institutional Permitted Clients may constitute trading in Canadian Futures.

26. The Filer's activities in providing Clearing Broker Services in Give-Up Transactions involving Canadian Futures to, from or on behalf of Institutional Permitted Clients may also constitute trading in Canadian Futures by Institutional Permitted Clients. Institutional Permitted Clients may be unable to rely on the exemptions from the dealer registration requirement

in the CFA because the Filer is not a registered dealer. Accordingly, the Filer is also seeking exemptive relief pursuant to the Ruling for Institutional Permitted Clients that receive Clearing Broker Services from the Filer.

27. The Filer believes that it would be beneficial to Institutional Permitted Clients in Ontario that trade in the international futures markets for the Filer to act as a clearing broker for both Canadian and non-Canadian futures for the Institutional Permitted Client because such an arrangement would enable the Institutional Permitted Client to benefit from significant efficiencies in collateral usage and consolidated reporting. Benefits would include single margin calls/payments, single wire transfer, ease of reconciliation, netting and cross product margining.

28. Clients may seek clearing services from the Filer in order to separate the execution of a trade from the clearing and settlement of a trade. This allows clients to use many executing brokers, without maintaining an active, ongoing clearing account with each executing broker. It also allows the client to consolidate the clearing and settlement of Canadian Futures in an account with the Filer.

29. The Filer does not dictate to its clients the executing brokers through which clients may execute trades. Clients are free to directly select their executing broker. Clients send orders to the executing broker who carries out the trade. The executing broker will be an appropriately registered dealer or a person or company relying on an exemption from dealer registration that permits it to execute the trade for clients.

30. The Filer is a "market participant" as defined under subsection 1(1) of the CFA. As a market participant, among other requirements, the Filer is required to comply with the record keeping and provision of information provisions under section 14 of the CFA, which include the requirement to keep such books, records and other documents: (a) as are necessary for the proper recording of business transactions and financial affairs, and the transactions executed on behalf of others, (b) as may otherwise be required under Ontario commodity futures law, and (c) as may reasonably be required to demonstrate compliance with Ontario commodity futures laws, and to deliver such records to the Commission if required.

AND UPON the Commission being satisfied that it would not be prejudicial to the public interest to do so;

IT IS RULED, pursuant to section 38 of the CFA, that the Filer is not subject to the dealer registration requirement set out in the CFA in connection with providing Clearing Broker Services in Give-Up Transactions involving Canadian Futures to, from or on behalf of Institutional Permitted Clients so long as the Filer:

(a) has its head office or principal place of business in the U.S.;

(b) is registered as a FCM with the CFTC, engages in the business of an FCM in the U.S., and is registered as a broker-dealer under the securities legislation of the U.S. and engages in the business of a broker-dealer in the U.S.;

(c) is a member firm of the NFA and FINRA;

(d) is a member of SIPC;

(e) is subject to requirements over regulatory capital, lending of money, extension of credit and provision of margin, financial reporting to the SEC and FINRA, and/or the CFTC and NFA, and segregation and custody of assets which provide protections that are substantially similar to the protections provided by the rules to which dealer members of IIROC are subject;

(f) limits its provision of Clearing Broker Services in respect of Give-Up Transactions involving Canadian Futures to Institutional Permitted Clients in Ontario;

(g) does not execute trades in Canadian Futures with or for Institutional Permitted Clients in Ontario, except as permitted under applicable Ontario securities or commodities futures laws;

(h) does not require its clients to use specific executing brokers through which clients may execute trades;

(i) submits the financial report and compliance report as described in SEC Rule 17a-5(d) to the Commission on an annual basis, at the same time such reports are filed with the SEC and FINRA;

(j) submits audited financial statements to the Commission on an annual basis, within 90 days of the Filer's financial year end;

(k) submits to the Commission immediately a copy of any notice filed under SEC Rule 17a-11 or under SEC Rule 15c3-3(i) with the SEC and FINRA;

(l) complies with the filing and fee payment requirements applicable to a registrant under OSC Rule 13-502 *Fees*; provided that, if the Filer does not rely on the international dealer exemption in section 8.18 of NI 31-103 (the **IDE**), by December

31st of each year, the Filer pays a participation fee based on its specified Ontario revenues for its previous financial year in compliance with the requirements of Part 3 and section 6.4 of OSC Rule 13-502 *Fees* as if the Filer relied on the IDE;

(m) files in an electronic and searchable format with the Commission such reports as to any or all of its trading activities in Canada as the Commission may, upon notice, require from time to time;

(n) pays the increased compliance and case assessment costs of the Commission due to the Filer's location outside Ontario, including, as required, the reasonable cost of hiring a third party to perform a compliance review on behalf of the Commission;

(o) has provided to each Institutional Permitted Client the following disclosure in writing:

(i) a statement that the Filer is not registered in Ontario to trade in Canadian Futures as principal or agent;

(ii) a statement that the Filer's head office or principal place of business is located in New York, New York, U.S.;

(iii) a statement that all or substantially all of the Filer's assets may be situated outside of Canada;

(iv) a statement that there may be difficulty enforcing legal rights against the Filer because of the above; and

(v) the name and address of the Filer's agent for service of process in Ontario; and

(p) has submitted to the Commission a completed *Submission to Jurisdiction and Appointment of Agent for Service* in the form attached as Appendix "A" hereto.

This Decision will terminate on the earliest of:

(i) the expiry of any transition period as may be provided by law, after the effective date of the repeal of the CFA; and

(ii) five years after the date of this Decision.

AND IT IS FURTHER RULED, pursuant to section 38 of the CFA, that an Institutional Permitted Client is not subject to the dealer registration requirement in the CFA in connection with trades in Canadian Futures when receiving Clearing Broker Services in Give-Up Transactions where the Filer acts in connection with trades in Canadian Futures on behalf of the Institutional Permitted Client from the Filer pursuant to the above ruling.

"Frances Kordyback"
Commissioner
Ontario Securities Commission

"M. Cecilia Williams"
Commissioner
Ontario Securities Commission

Application File #: 2022/0072

APPENDIX "A"

SUBMISSION TO JURISDICTION AND APPOINTMENT OF AGENT FOR SERVICE

INTERNATIONAL DEALER OR INTERNATIONAL ADVISER EXEMPTED FROM REGISTRATION UNDER THE COMMODITY FUTURES ACT, ONTARIO

1. Name of person or company ("International Firm"):

2. If the International Firm was previously assigned an NRD number as a registered firm or an unregistered exempt international firm, provide the NRD number of the firm:

3. Jurisdiction of incorporation of the International Firm:

4. Head office address of the International Firm:

5. The name, e-mail address, phone number and fax number of the International Firm's individual(s) responsible for the supervisory procedure of the International Firm, its chief compliance officer, or equivalent.

Name:

E-mail address:

Phone:

Fax:

6. The International Firm is relying on an exemption order under section 38 or section 80 of the ***Commodity Futures Act*** (Ontario) that is similar to the following exemption in National Instrument 31-103 ***Registration Requirements, Exemptions and Ongoing Registrant Obligations*** (the "Relief Order"):

[ ] Section 8.18 [international dealer]

[ ] Section 8.26 [international adviser]

[ ] Other

7. Name of agent for service of process (the "Agent for Service"):

8. Address for service of process on the Agent for Service:

9. The International Firm designates and appoints the Agent for Service at the address stated above as its agent upon whom may be served a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal or other proceeding (a "Proceeding") arising out of or relating to or concerning the International Firm's activities in the local jurisdiction and irrevocably waives any right to raise as a defence in any such proceeding any alleged lack of jurisdiction to bring such Proceeding.

10. The International Firm irrevocably and unconditionally submits to the non-exclusive jurisdiction of the judicial, quasi-judicial and administrative tribunals of the local jurisdiction in any Proceeding arising out of or related to or concerning the International Firm's activities in the local jurisdiction.

11. Until 6 years after the International Firm ceases to rely on the Relief Order, the International Firm must submit to the regulator

a. a new Submission to Jurisdiction and Appointment of Agent for Service in this form no later than the 30th day before the date this Submission to Jurisdiction and Appointment of Agent for Service is terminated;

b. an amended Submission to Jurisdiction and Appointment of Agent for Service no later than the 30th day before any change in the name or above address of the Agent for Service;

c. a notice detailing a change to any information submitted in this form, other than the name or above address of the Agent for Service, no later than the 30th day after the change.

12. This Submission to Jurisdiction and Appointment of Agent for Service is governed by and construed in accordance with the laws of the local jurisdiction.

Dated: _____

_____
(Signature of the International Firm or authorized signatory)

_____
(Name of signatory)

_____
(Title of signatory)

Acceptance

The undersigned accepts the appointment as Agent for Service of _____ [Insert name of International Firm] under the terms and conditions of the foregoing Submission to Jurisdiction and Appointment of Agent for Service.

Dated: _____

_____
(Signature of the Agent for Service or authorized signatory)

_____
(Name of signatory)

_____
(Title of signatory)

This form, and notice of a change to any information submitted in this form, is to be submitted through the Ontario Securities Commission's Electronic Filing Portal:

https://www.osc.gov.on.ca/filings

2.4.2 UBS Securities LLC – s. 38 of the CFA

Headnote

Application for a ruling pursuant to section 38 of the Commodity Futures Act (CFA) granting relief from the dealer registration requirement set out in section 22 of the CFA in connection with acting as a clearing broker in Give-Up Transactions involving commodity futures contracts and options on commodity futures contracts on exchanges located in Canada (Canadian Futures) to, from or on behalf of Canadian institutional permitted clients (institutional investors) – relief limited to trades in Canadian futures for institutional permitted clients – relief subject to sunset clause.

Statutes Cited

Commodity Futures Act, R.S.O. 1990, c. C.20, as am., ss. 22, 38, 78.
National Instrument 31-103 Registration Requirements, Exemptions, and Ongoing Registrant Obligations, ss. 1.1, 8.18, 8.26.
Ontario Instrument 32-507 (Commodity Futures Act) Exemptions for International Dealers, Advisers and Sub-Advisers (Interim Class Order).

March 26, 2022

IN THE MATTER OF
THE *COMMODITY FUTURES ACT*,
R.S.O. 1990, c. C.20, AS AMENDED
(the CFA)

AND

IN THE MATTER OF
UBS SECURITIES LLC
(the Filer)

RULING
(Section 38 of the CFA)

WHEREAS on February 13, 2017, the Ontario Securities Commission (the **Commission**) made a ruling (the **Original Decision**) pursuant to section 38 of the CFA exempting

(a) the Filer from the dealer registration requirement set out in section 22 of the CFA in connection with providing Clearing Broker Services (as defined below) in Give-Up Transactions (as defined below) involving exchange-traded futures on exchanges located in Canada (**Canadian Futures**) to, from or on behalf of Institutional Permitted Clients (defined below); and

(b) an Institutional Permitted Client from the dealer registration requirement in the CFA in connection with receiving Clearing Broker Services (as defined below) in Give-Up Transactions (as defined below) in Canadian Futures from the Filer;

AND WHEREAS the Previous Decision was effective for a five-year period and terminated on February 12, 2022 (the **Termination Date**);

AND WHEREAS prior to the Termination Date, the Commission received an application from the Filer (the **Application**) pursuant to section 38 of the CFA for a ruling to extend the Termination Date for a five-year period and to make certain revisions to update the Filer's representations to the Commission (the **Ruling**);

AND WHEREAS for the purposes of the Ruling, "**Institutional Permitted Client**" shall mean a "permitted client" as defined in section 1.1 of National Instrument 31-103 *Registration Requirements, Exemptions, and Ongoing Registrant Obligations* (**NI 31-103**), except for:

(a) an individual,

(b) a person or company acting on behalf of a managed account of an individual,

(c) a person or company referred to in paragraph (p) of that definition, unless the person or company qualifies as a permitted client under another paragraph of that definition, or

(d) a person or company referred to in paragraph (q) of that definition unless that person or company has net assets of at least $100 million as shown on its most recently prepared financial statements or qualifies as a permitted client under another paragraph of that definition;

and provided further that, for the purposes of the definition of "Institutional Permitted Client", a reference in the definition of "permitted client" in section 1.1. of NI 31-103 to "securities legislation" shall be read as "securities legislation or Ontario commodity futures law, as applicable";

AND UPON considering the Application and the recommendation of Staff of the Commission;

AND UPON the Filer having represented to the Commission as follows:

1. The Filer is a limited liability company organized under the laws of the State of Delaware, United States of America (**U.S.**). Its head office is located at 1285 Avenue of the Americas, New York, NY 10019. The Filer is an indirect wholly owned subsidiary of UBS AG, a publicly owned Swiss banking corporation.

2. The Filer is registered as a broker-dealer with the U.S. Securities and Exchange Commission (**SEC**), a member of the U.S. Financial Industry Regulatory Authority (**FINRA**), a registered futures commission merchant (**FCM**) with the U.S. Commodity Futures Trading Commission (**CFTC**), and a member of the U.S. National Futures Association (**NFA**).

3. The Filer is a member of a number of major U.S. securities exchanges, including the New York Stock Exchange and NASDAQ. The Filer is a Foreign Approved Participant of the Montreal Exchange. The Filer is also a member of the Chicago Board of Trade, the Chicago Mercantile Exchange, ICE Futures U.S., Inc., and other principal U.S. commodity exchanges and trades through affiliated or unaffiliated member firms on other exchanges, including exchanges in Canada and a number of other jurisdictions.

4. In connection with its securities trading activities, the Filer relies on the "international dealer exemption" under section 8.18 of NI 31-103 in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Québec and Saskatchewan. The Filer may also rely on Ontario Instrument 32-507 *(Commodity Futures Act) Exemptions for International Dealers, Advisers and Sub-Advisers (Interim Class Order)* which provides an exemption from the dealer registration requirement in connection with certain execution and clearing activities in commodity futures contracts and options on commodity futures contracts that trade on exchanges located outside of Canada.

5. Subject to the Ruling requested as a consequence of the recent expiry of the Previous Decision, the Filer is not in default of securities legislation in any jurisdiction in Canada or under the CFA. The Filer is in compliance in all material respects with U.S. securities and commodity futures laws.

6. UBS Securities Canada Inc. (**UBSSC**) is an affiliate of the Filer. UBSSC is registered as an investment dealer in Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Saskatchewan and is a dealer member of the Investment Industry Regulatory Organization of Canada (**IIROC**).

7. The Filer has been providing Clearing Broker Services (as defined below) in Give-Up Transactions (as defined below) involving Canadian Futures to, from or on behalf of Institutional Permitted Clients in reliance on the Original Decision since February 13, 2017. The Filer wishes to continue providing these services pursuant to the Ruling.

8. A **Give-Up Transaction** is a purchase or sale of futures contracts by a client that has an existing relationship with a clearing broker but wishes to use the trade execution services of one or more other executing brokers for the purpose of executing such purchases or sales (**Subject Transactions**) on one or more markets. Under these circumstances, the executing broker executes the Subject Transactions as directed by the client and "gives up" such trades to the clearing broker for clearing, settlement, record-keeping, bookkeeping, custody and other administrative functions (**Clearing Broker Services**). The service provided by the executing broker is limited to trade execution only.

9. In a Give-Up Transaction, the clearing broker will maintain an account for the client that is administered in accordance with the terms and conditions of the account documentation of the clearing broker that has been signed by the client. The clearing broker will handle record keeping and collateral for the client. The client will not sign clearing account documentation with the executing broker, nor will the executing broker typically receive monies, margin or collateral directly from the client. Although the executing broker is responsible for its own record-keeping, bookkeeping, custody and other administrative functions (**Account Services**) in respect of its own clients, it does not, subject to any applicable regulatory requirements that may otherwise apply, provide Account Services for execution-only clients. Such Account Services remain the responsibility of the clearing broker. The clearing broker will have the primary relationship with the client and is contractually responsible for trade and risk monitoring as well as reporting trade confirmations and sending out monthly statements.

10. In order to enter into a Give-Up Transaction, a client will enter into a tri-party agreement, known as a "give-up agreement" (**Give-Up Agreement**), between an executing broker, a clearing broker, and the client. The Filer, as clearing broker, will generally use the *International Uniform Brokerage Execution Services ("Give-Up") Agreement: Version 2017* (© Futures Industry Association, Inc. 2017), as may be revised from time to time, as the Give-Up Agreement entered into with Institutional Permitted Clients.

11. Each party to the Give-Up Agreement, including the Filer as clearing broker, will represent in the Give-Up Agreement that it will perform its obligations under the Give-Up Agreement in accordance with applicable laws, governmental, regulatory, self-regulatory, exchange or clearing house rules, regulations, interpretations, protocols and the customs and usages of the exchange or clearing house on which the transactions governed by the Give-Up Agreement are executed and cleared, as in force from time to time.

12. In Ontario, an Institutional Permitted Client would place orders for Canadian Futures for execution on Canadian futures exchanges with an Ontario-registered FCM, which would then be cleared locally on the applicable Canadian futures exchange by that Ontario-registered FCM (if qualified to do so) or another clearing member of the applicable Canadian futures exchange. The executed trades would be placed into a client omnibus account maintained by the Filer with the clearing member of the applicable Canadian futures exchange that locally clears the trades, and the executed trades would be booked by the Filer to the futures account of the Ontario client maintained with the Filer for trading on exchanges globally. In this arrangement, the Ontario-registered FCM would be responsible for all client-facing interactions relating to the execution of the Canadian Futures.

13. In the case of a Montréal Exchange-listed futures contract, a member of the Canadian Derivatives Clearing Corporation (**CDCC**) would clear the trade on the Filer's behalf. Therefore, trade execution would be done by an Ontario-registered FCM, the positions would be held at CDCC by a CDCC member (which could be, but would not necessarily have to be, the executing broker) and given up to the Filer at which the Ontario Institutional Permitted Client maintains a clearing account. The Filer would then carry the resulting positions in an account maintained on its books by the Institutional Permitted Client, and the Filer would call for and collect applicable margin from the Institutional Permitted Client. The Filer, in turn, would remit the required margin to the CDCC member that cleared the trades. That CDCC member would then make the required margin payment(s) to CDCC.

14. In respect of holding client assets, in order to protect customers in the event of the insolvency or financial instability of the Filer, the Filer is required under U.S. law to ensure that customer securities and monies be separately accounted for, segregated at all times from the securities and monies of the Filer and custodied exclusively with such banks, trust companies, clearing organizations or other licensed futures brokers and intermediaries as may be approved for such purposes under the U.S. *Commodity Exchange Act* (**CEA**) and the rules promulgated by the CFTC thereunder (collectively, the **Approved Depositories**). The Filer is further required to obtain acknowledgements from any Approved Depository holding customer funds or securities related to U.S.-based transactions or accounts that such funds and securities are to be separately held on behalf of such customers, with no right of set-off against the Filer's obligations or debts.

15. As a U.S. registered broker-dealer and FCM, the Filer is subject to regulatory capital requirements under the CEA and *Securities Exchange Act of 1934* (the **1934 Act**), specifically CFTC Regulation 1.17 *Minimum Financial Requirements for Futures Commission Merchants and Introducing Brokers* (**CFTC Regulation 1.17**), SEC Rule 15c3-1 *Net Capital Requirements for Brokers or Dealers* (**SEC Rule 15c3-1**) and SEC Rule 17a-5 *Reports to be Made by Certain Brokers and Dealers* (**SEC Rule 17a-5**).

16. SEC Rule 15c3-1 requires that the Filer account for any guarantee of debt of a third party in calculating its excess net capital when a loss is probable and the amount can be reasonably estimated. Accordingly, the Filer will, in the event that it provides a guarantee of any debt of a third party, take a deduction from net capital when both of the preceding conditions exist.

17. SEC Rule 15c3-1 and CFTC Regulation 1.17 are designed to provide protections that are substantially similar to the protections provided by the capital formula requirements and specifically risk adjusted capital to which dealer members of IIROC are subject. The Filer is in compliance with SEC Rule 15c3-1 and in compliance in all material respects with SEC Rule 17a-5. If the Filer's net capital declines below the minimum amount required, the Filer is required to notify the SEC and FINRA pursuant to SEC Rule 17a-11 *Notification Provisions for Brokers and Dealers* (**SEC Rule 17a-11**). The SEC and FINRA have the responsibility to provide oversight over the Filer's compliance with SEC Rule 15c3-1 and SEC Rule 17a-5.

18. The Filer is required to prepare and file a financial report, which includes Form X-17a-5 Financial and Operational Combined Uniform Single Report (the **FOCUS Report**), monthly with the CFTC, NFA, SEC and FINRA. The FOCUS Report provides a more comprehensive description of the business activities of the Filer, and more accurately reflects those activities including client lending activity, than would be provided by Form 31-103F1 *Calculation of Excess Working Capital* (**Form 31-103F1**). The FOCUS Report provides a net capital calculation and a comprehensive description of the business activities of the Filer. The net capital requirements computed using methods prescribed by SEC Rule 15c3-1 are based on all assets and liabilities on the books and records of a broker-dealer whereas Form 31-103F1 is a calculation of excess working capital, which is a computation based primarily on the current assets and current liabilities on the books and records of the dealer. The Filer is up-to-date in its submission of annual reports under SEC Rule 17a-5(d), including the FOCUS Report.

19. The Filer is a member of the Securities Investors Protection Corporation (**SIPC**). Subject to the eligibility criteria of SIPC, client assets held by the Filer in connection with its activities as a broker-dealer are insured by SIPC against loss due to insolvency in accordance with the Securities Investor Protection Act of 1970. There is no SIPC or similar insurance protection in connection with activities undertaken as a U.S. registered FCM.

20. The Filer is subject to CFTC Regulation 30.7 regarding cash, securities and other collateral that are deposited with a FCM or are otherwise required to be held for the benefit of its customers to margin futures and options on futures contracts traded on non-U.S. boards of trade, including Canadian Futures, (**30.7 Customer Funds**). Accounts used to hold 30.7 Customer Funds must be properly titled to make clear that the funds belong to, and are being held for the benefit of, the FCM's customers who are trading foreign (i.e. non-U.S.) futures and futures options.

21. 30.7 Customer Funds may not be commingled with the funds of any other person, including the carrying FCM, except that the carrying FCM may deposit its own funds into the account containing 30.7 Customer Funds in order to prevent the accounts of the customers from becoming under-margined. Each Approved Depository (except for a derivatives clearing organization with specified rules) is required to provide the depositing FCM with a written acknowledgment that the depository was informed that such funds held in the customer account belong to customers and are being held in accordance with the CEA and CFTC Regulations. Among other representations, the depository must acknowledge that it cannot use any portion of 30.7 Customer Funds to satisfy any obligations that the FCM may owe the depository. The types of investments permitted for 30.7 Funds are restricted by CFTC Regulation 30.7(h), which refers to the list of permitted investments set forth in CFTC Regulation 1.25. The FCM is required, on a daily basis, to compute and submit to regulatory authorities a statement of the amounts of 30.7 Customer Funds held by the FCM.

22. In the event of a FCM's bankruptcy, funds allocated to each account class (i.e., the customer segregated, 30.7 secured amount and cleared swaps customer account classes established pursuant to CFTC Regulations 1.20, 30.7 and 22.2, respectively) or readily traceable to an account class must be allocated solely to that customer account class. The U.S. Bankruptcy Code also provides that non-defaulting customers in an account class that has incurred a loss will share in any shortfall, pro rata. However, customers whose funds are held in another account class that has not incurred a loss will not be required to share in such shortfall.

23. The Filer holds customer assets in accordance with Rule 15c3-3 of the 1934 Act, as amended (**SEC Rule 15c3-3**). SEC Rule 15c3-3 requires the Filer to segregate and keep segregated all "fully-paid securities" and "excess margin securities" (as such terms are defined in SEC Rule 15c3-3) of its customers from its proprietary assets. In addition to the segregation of customers' securities, SEC Rule 15c3-3 requires the Filer to deposit an amount of cash or qualified government securities determined in accordance with a reserve formula set forth in SEC Rule 15c3-3 in an account entitled "Special Reserve Account for the Exclusive Benefit of Customers" of such Filer at separate banks and/or custodians. The combination of segregated securities and cash reserve are designed to ensure that the Filer has sufficient assets to cover all net equity claims of its customers and provide protections that are substantially similar to the protections provided by the requirements dealer members of IIROC are subject. If the Filer fails to make an appropriate deposit, the Filer is required to notify the SEC and FINRA pursuant to SEC Rule 15c3-3(i). The Filer is in material compliance with the possession and control requirements of SEC Rule 15c3-3.

24. The Filer is subject to regulations of the Board of Governors of the U.S.A. Federal Reserve Board (**FRB**), the SEC, and FINRA regarding the lending of money, extension of credit and provision of margin to clients (the **U.S. Margin Regulations**) that provide protections that are substantially similar to the protections provided by the requirements regarding the lending of money, extension of credit and provision of margin to clients to which dealer members of IIROC are subject. In particular, the Filer is subject to the margin requirements imposed by the FRB, including Regulation T, and under applicable SEC rules and under FINRA Rule 4210. The Filer is in material compliance with all applicable U.S. Margin Regulations.

25. Section 22 of the CFA provides that no person may trade in a commodity futures contract or a commodity futures option unless the person is registered as a dealer [*Futures Commission Merchant*], or as a representative of the dealer, or an exemption from the registration requirement is available. The Filer's activities in providing Clearing Broker Services in Give-Up Transactions involving Canadian Futures to, from or on behalf of Institutional Permitted Clients may constitute trading in Canadian Futures.

26. The Filer's activities in providing Clearing Broker Services in Give-Up Transactions involving Canadian Futures to, from or on behalf of Institutional Permitted Clients may also constitute trading in Canadian Futures by Institutional Permitted Clients. Institutional Permitted Clients may be unable to rely on the exemptions from the dealer registration requirement in the CFA because the Filer is not a registered dealer. Accordingly, the Filer is also seeking exemptive relief pursuant to the Ruling for Institutional Permitted Clients that receive Clearing Broker Services from the Filer.

27. The Filer believes that it would be beneficial to Institutional Permitted Clients in Ontario that trade in the international futures markets for the Filer to act as a clearing broker for both Canadian and non-Canadian futures for the Institutional Permitted Client because such an arrangement would enable the Institutional Permitted Client to benefit from significant

efficiencies in collateral usage and consolidated reporting. Benefits would include single margin calls/payments, single wire transfer, ease of reconciliation, netting and cross product margining.

28. Clients may seek clearing services from the Filer in order to separate the execution of a trade from the clearing and settlement of a trade. This allows clients to use many executing brokers, without maintaining an active, ongoing clearing account with each executing broker. It also allows the client to consolidate the clearing and settlement of Canadian Futures in an account with the Filer.

29. The Filer does not dictate to its clients the executing brokers through which clients may execute trades. Clients are free to directly select their executing broker. Clients send orders to the executing broker who carries out the trade. The executing broker will be an appropriately registered dealer or a person or company relying on an exemption from dealer registration that permits it to execute the trade for clients.

30. The Filer is a "market participant" as defined under subsection 1(1) of the CFA. As a market participant, among other requirements, the Filer is required to comply with the record keeping and provision of information provisions under section 14 of the CFA, which include the requirement to keep such books, records and other documents: (a) as are necessary for the proper recording of business transactions and financial affairs, and the transactions executed on behalf of others, (b) as may otherwise be required under Ontario commodity futures law, and (c) as may reasonably be required to demonstrate compliance with Ontario commodity futures laws, and to deliver such records to the Commission if required.

AND UPON the Commission being satisfied that it would not be prejudicial to the public interest to do so;

IT IS RULED, pursuant to section 38 of the CFA, that the Filer is not subject to the dealer registration requirement set out in the CFA in connection with providing Clearing Broker Services in Give-Up Transactions involving Canadian Futures to, from or on behalf of Institutional Permitted Clients so long as the Filer:

(a) has its head office or principal place of business in the U.S.;

(b) is registered as a FCM with the CFTC, engages in the business of an FCM in the U.S., and is registered as a broker-dealer under the securities legislation of the U.S. and engages in the business of a broker-dealer in the U.S.;

(c) is a member firm of the NFA and FINRA;

(d) is a member of SIPC;

(e) is subject to requirements over regulatory capital, lending of money, extension of credit and provision of margin, financial reporting to the SEC and FINRA, and/or the CFTC and NFA, and segregation and custody of assets which provide protections that are substantially similar to the protections provided by the rules to which dealer members of IIROC are subject;

(f) limits its provision of Clearing Broker Services in respect of Give-Up Transactions involving Canadian Futures to Institutional Permitted Clients in Ontario;

(g) does not execute trades in Canadian Futures with or for Institutional Permitted Clients in Ontario, except as permitted under applicable Ontario securities or commodities futures laws;

(h) does not require its clients to use specific executing brokers through which clients may execute trades;

(i) submits the financial report and compliance report as described in SEC Rule 17a-5(d) to the Commission on an annual basis, at the same time such reports are filed with the SEC and FINRA;

(j) submits audited financial statements to the Commission on an annual basis, within 90 days of the Filer's financial year end;

(k) submits to the Commission immediately a copy of any notice filed under SEC Rule 17a-11 or under SEC Rule 15c3-3(i) with the SEC and FINRA;

(l) complies with the filing and fee payment requirements applicable to a registrant under OSC Rule 13-502 *Fees*; provided that, if the Filer does not rely on the international dealer exemption in section 8.18 of NI 31-103 (the **IDE**), by December 31st of each year, the Filer pays a participation fee based on its specified Ontario revenues for its previous financial year in compliance with the requirements of Part 3 and section 6.4 of OSC Rule 13-502 *Fees* as if the Filer relied on the IDE;

(m) files in an electronic and searchable format with the Commission such reports as to any or all of its trading activities in Canada as the Commission may, upon notice, require from time to time;

(n) pays the increased compliance and case assessment costs of the Commission due to the Filer's location outside Ontario, including, as required, the reasonable cost of hiring a third party to perform a compliance review on behalf of the Commission;

(o) has provided to each Institutional Permitted Client the following disclosure in writing:

(i) a statement that the Filer is not registered in Ontario to trade in Canadian Futures as principal or agent;

(ii) a statement that the Filer's head office or principal place of business is located in New York, New York, U.S.;

(iii) a statement that all or substantially all of the Filer's assets may be situated outside of Canada;

(iv) a statement that there may be difficulty enforcing legal rights against the Filer because of the above; and

(v) the name and address of the Filer's agent for service of process in Ontario; and

(p) has submitted to the Commission a completed *Submission to Jurisdiction and Appointment of Agent for Service* in the form attached as Appendix "A" hereto.

This Decision will terminate on the earliest of:

(i) the expiry of any transition period as may be provided by law, after the effective date of the repeal of the CFA; and

(ii) five years after the date of this Decision.

AND IT IS FURTHER RULED, pursuant to section 38 of the CFA, that an Institutional Permitted Client is not subject to the dealer registration requirement in the CFA in connection with trades in Canadian Futures when receiving Clearing Broker Services in Give-Up Transactions where the Filer acts in connection with trades in Canadian Futures on behalf of the Institutional Permitted Client from the Filer pursuant to the above ruling.

"Frances Kordyback"
Commissioner
Ontario Securities Commission

"M. Cecilia Williams"
Commissioner
Ontario Securities Commission

Application File #: 2022/0079

APPENDIX "A"

SUBMISSION TO JURISDICTION AND APPOINTMENT OF AGENT FOR SERVICE

INTERNATIONAL DEALER OR INTERNATIONAL ADVISER EXEMPTED FROM REGISTRATION UNDER THE COMMODITY FUTURES ACT, ONTARIO

1. Name of person or company ("International Firm"):

2. If the International Firm was previously assigned an NRD number as a registered firm or an unregistered exempt international firm, provide the NRD number of the firm:

3. Jurisdiction of incorporation of the International Firm:

4. Head office address of the International Firm:

5. The name, e-mail address, phone number and fax number of the International Firm's individual(s) responsible for the supervisory procedure of the International Firm, its chief compliance officer, or equivalent.

Name:

E-mail address:

Phone:

Fax:

6. The International Firm is relying on an exemption order under section 38 or section 80 of the ***Commodity Futures Act*** (Ontario) that is similar to the following exemption in National Instrument 31-103 ***Registration Requirements, Exemptions and Ongoing Registrant Obligations*** (the "Relief Order"):

[ ] Section 8.18 [international dealer]

[ ] Section 8.26 [international adviser]

[ ] Other

7. Name of agent for service of process (the "Agent for Service"):

8. Address for service of process on the Agent for Service:

9. The International Firm designates and appoints the Agent for Service at the address stated above as its agent upon whom may be served a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal or other proceeding (a "Proceeding") arising out of or relating to or concerning the International Firm's activities in the local jurisdiction and irrevocably waives any right to raise as a defence in any such proceeding any alleged lack of jurisdiction to bring such Proceeding.

10. The International Firm irrevocably and unconditionally submits to the non-exclusive jurisdiction of the judicial, quasi-judicial and administrative tribunals of the local jurisdiction in any Proceeding arising out of or related to or concerning the International Firm's activities in the local jurisdiction.

11. Until 6 years after the International Firm ceases to rely on the Relief Order, the International Firm must submit to the regulator

a. a new Submission to Jurisdiction and Appointment of Agent for Service in this form no later than the 30th day before the date this Submission to Jurisdiction and Appointment of Agent for Service is terminated;

b. an amended Submission to Jurisdiction and Appointment of Agent for Service no later than the 30th day before any change in the name or above address of the Agent for Service;

c. a notice detailing a change to any information submitted in this form, other than the name or above address of the Agent for Service, no later than the 30th day after the change.

12. This Submission to Jurisdiction and Appointment of Agent for Service is governed by and construed in accordance with the laws of the local jurisdiction.

Dated: _____

_____
(Signature of the International Firm or authorized signatory)

_____
(Name of signatory)

_____
(Title of signatory)

Acceptance

The undersigned accepts the appointment as Agent for Service of _____ [Insert name of International Firm] under the terms and conditions of the foregoing Submission to Jurisdiction and Appointment of Agent for Service.

Dated: _____

_____
(Signature of the Agent for Service or authorized signatory)

_____
(Name of signatory)

_____
(Title of signatory)

This form, and notice of a change to any information submitted in this form, is to be submitted through the Ontario Securities Commission's Electronic Filing Portal:

https://www.osc.gov.on.ca/filings

Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 OSC Decisions

3.1.1 Solar Income Fund Inc. et al. – ss. 127(1), 127.1

Citation: *Solar Income Fund Inc. (Re)*, 2022 ONSEC 2
Date: 2022-03-28
File No.: 2019-35

IN THE MATTER OF
SOLAR INCOME FUND INC.,
ALLAN GROSSMAN,
CHARLES MAZZACATO AND
KENNETH KADONOFF

REASONS AND DECISION
(Subsection 127(1) and Section 127.1 of the *Securities Act*, RSO 1990, c S.5)

Hearing:	March 1, 3, 4, 5, 24, 25, 29, 31, April 1, 6, 7, 8, 9, 21, 22; written submissions filed on June 4 and 25, and July 5, 2021	
Decision:	March 28, 2022	
Panel:	Timothy Moseley	Vice-Chair and Chair of the Panel
	Craig Hayman	Commissioner
	Frances Kordyback	Commissioner
Appearances:	Andrew Faith Ryan Lapensée	For Staff of the Commission
	James W.E. Doris Sean R. Campbell Abhishek Vaidyanathan	For Solar Income Fund Inc. and Allan Grossman
	Andrea L. Burke Chantelle Cseh	For Charles Mazzacato
	Eli Lederman Brian Kolenda Madison Robins	For Kenneth Kadonoff

REASONS AND DECISION

I. OVERVIEW

[1] The respondent Solar Income Fund Inc. (**SIF Inc.**) was a small private company set up to develop and manage solar photovoltaic power generation installations. Staff's allegations in this case arise from SIF Inc.'s activities between 2013 and 2016. Each of the individual respondents – Allan Grossman, Charles Mazzacato and Kenneth Kadonoff – was a member of SIF Inc.'s senior management committee for part or all of that period.

[2] SIF Inc. and its principals established various funds, which paid SIF Inc. to provide consulting, development and management services. This proceeding focuses on two such funds. The first is SIF Solar Energy Income & Growth Fund, called **SIF #1**. The second, Solar Income and Growth Fund #2, is referred to as **SIF #2**.

[3] Both funds raised money from the public. In each case, investors purchased fund units through exempt market dealers based on disclosure contained in an offering memorandum and its amendments.

[4] The core of Staff's case is that the respondents used funds raised by SIF #1 in ways that were inconsistent with what was disclosed to potential and existing investors. Staff alleges breaches of two provisions of the *Securities Act*[1] (the **Act**).

[5] The first is s. 44(2) of the Act, which prohibits false or misleading representations that a reasonable investor would consider relevant in deciding whether to enter into or maintain a trading or advising relationship with the person or company making the representation.

[6] The factual matrix underlying Staff's s. 44(2) allegation is wide-ranging. It involves numerous loans by SIF #1 to related entities. Some loans were for significant amounts. The impugned transactions total up to one third of the approximately $60 million that SIF #1 raised from investors.

[7] Staff contends that by purchasing units of SIF #1, investors entered into a trading relationship with SIF Inc., and therefore any misrepresentations in the offering memorandum are a breach of s. 44(2) by SIF Inc., and possibly, by extension, one or more of the individual respondents. As we explain below, we do not accept Staff's submission that by purchasing a unit of SIF #1, an investor enters into a trading relationship with SIF Inc. Subsection 44(2) does not apply to the facts of this case, and we therefore dismiss that allegation.

[8] The second provision on which Staff relies is s. 126.1(1)(b) of the Act, which prohibits fraudulent conduct relating to securities. Unlike the wide range of conduct underlying Staff's s. 44(2) allegations, Staff's fraud allegations are limited to loans made by SIF #1 to SIF #2 for two specific purposes: (i) to pay distributions to SIF #2 investors, and (ii) to pay fees to SIF #2's exempt market dealers.

[9] The respondents submit that these loans were permissible under the terms of the SIF #1 offering memorandum. For reasons we explain below, we do not accept the respondents' interpretation of the offering memorandum, and we find that the loans were unauthorized diversions of investor funds.

[10] The respondents also submit that even if we find that the loans were unauthorized by the offering memorandum, the respondents relied on advice from the law firm of Aird & Berlis LLP, which had been SIF Inc.'s primary external legal counsel since late 2010. We explore in detail below the communications between the law firm and SIF Inc., and conclude that at no time did the lawyers opine on whether the SIF #1 offering memorandum permitted these loans. Accordingly, the defence of reasonable reliance on legal advice is unavailable to the respondents in this case.

[11] We conclude that SIF Inc. engaged in fraudulent conduct relating to securities and thereby breached s. 126.1(1)(b) of the Act. We find that each of the individual respondents caused one or more of the fraudulent diversions of investor funds, and we therefore conclude that all three individual respondents also breached s. 126.1(1)(b) of the Act.

II. FACTUAL BACKGROUND

A. General

[12] Before turning to our substantive discussion of the issues in this case, we set out some additional factual background. We begin with SIF Inc. and then speak about the individual respondents.

[13] Mr. Grossman and an individual named Paul Ghezzi founded SIF Inc., a private company, in 2009. The offering memorandum at issue in this proceeding stated that SIF Inc. was "focused on the development and management of solar photovoltaic… energy power generation installations backed by long-term Power Purchase Agreements."[2] Messrs. Grossman and Ghezzi intended that SIF Inc. would benefit from the Ontario government's "feed-in tariff" program, which, according to Mr. Grossman, could result in "very generous returns for solar projects in Ontario."[3]

[14] SIF Inc. had an informal management committee made up of the company's senior personnel. The composition of the committee changed over the period from 2013 to 2016. We specify below each individual respondent's time on the committee.

[15] Mr. Grossman described the committee as a "very close-knit group" that "met constantly" and would "discuss issues as they came up."[4] He testified that decisions were made within SIF Inc. by the whole management team acting together and unanimously. If a member of the management team did not agree with a transaction, SIF Inc. would not carry it out.

[16] Mr. Kadonoff gave a similar description, characterizing the relationship among members of the management group as "consensus-driven".[5]

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1 RSO 1990, c S.5
2 Exhibit 32, Revised Exhibit A to the Affidavit of Kevin Dusseldorp affirmed February 20, 2021 (**Dusseldorp Affidavit**), Offering Memorandum dated March 6, 2013 at p 5
3 Hearing Transcript, Solar Income Fund (Re), March 29, 2021 at p14 line 27 to p15 line 3
4 Hearing Transcript, Solar Income Fund (Re), March 29, 2021 at 17 lines 11-14
5 Hearing Transcript, Solar Income Fund (Re), April 1, 2021 at 111 line 11

[17] Only members of the management committee could authorize the movement of funds in and out of a SIF Inc.-related bank account. All members of the management committee had online access to the bank accounts of SIF Inc. and the entities that it managed.

B. Mr. Grossman

[18] Through a trust, Mr. Grossman's family held approximately 30% of the company.

[19] Mr. Grossman was a member of SIF Inc.'s management committee from at least March 2013 (the establishment of SIF #1) to November 2017, when SIF Inc. resigned as manager of SIF #1 and SIF #2. He was, at different times, SIF Inc.'s Chief Operating Officer, Vice-President Finance, Chief Financial Officer and Secretary. He also became a director of SIF Inc. in November 2013.

C. Mr. Mazzacato

[20] In May 2014, Mr. Ghezzi, one of the founders of SIF Inc., left the company. CPE Inc., a company run by Mr. Mazzacato and Jennifer Jackson (his then-partner) had done work for SIF Inc., and Mr. Mazzacato and Ms. Jackson were offered senior management positions by Mr. Grossman and Mr. Kadonoff. Ms. Jackson became SIF Inc.'s President and Chief Operating Officer. Mr. Mazzacato became Chief Technology Officer, VP Project Development, and a member of the management committee.

[21] In June 2014, Mr. Mazzacato became a director of SIF Inc. The following month, he and Ms. Jackson jointly acquired Mr. Ghezzi's approximately 30% share of SIF Inc., and SIF Inc. acquired 100% of CPE.

[22] During the summer of 2015, following Ms. Jackson's departure from SIF Inc., and at which time Mr. Kadonoff was interim President, Mr. Grossman and Mr. Kadonoff asked Mr. Mazzacato to become SIF Inc.'s President. Mr. Mazzacato assumed that role, and remained on the management committee to November 2017.

D. Mr. Kadonoff

[23] Mr. Kadonoff is a lawyer who began working with SIF Inc. in 2010, one year after its inception, as a part-time consultant. In 2011, after reinstating his status with the Law Society of Ontario, he signed a retainer agreement with SIF Inc. to work full-time, primarily preparing and negotiating contracts for solar acquisitions.

[24] Through a holding company, he became an indirect 30% shareholder of SIF Inc. around 2010.

[25] According to Mr. Grossman, Mr. Kadonoff was a member of SIF Inc.'s management committee:

a. along with Mr. Ghezzi and Mr. Grossman from the establishment of SIF #1 in March 2013 until May 2014;

b. along with Ms. Jackson, Mr. Mazzacato and Mr. Grossman from May 2014 until May 2015; and

c. along with Mr. Mazzacato and Mr. Grossman from May 2015 until at least the end of August 2015, at which time Mr. Kadonoff formally resigned as an officer and director of SIF Inc.

[26] Mr. Kadonoff's role after August 2015 is a matter of some dispute. He states that following his resignation as an officer and director, he "was no longer involved in management and did not have any decision-making authority."[6] He further states that he made clear to Mr. Grossman and Mr. Mazzacato that he would no longer play a role in management. He continued to hold his shares in SIF Inc., because neither Mr. Grossman nor Mr. Mazzacato would purchase them from him. He also continued to work as a consultant for SIF Inc. until February 2016, to complete financing transactions for SIF #1 and SIF #2.

[27] However, according to Mr. Grossman, Mr. Kadonoff was a member of the management committee until February 2016. Mr. Mazzacato has a similar recollection, testifying that on an ongoing basis between September 2015 and February 2016, Mr. Kadonoff participated in meetings with SIF Inc.'s management committee, and provided "opinions and direction" on SIF Inc.'s financial and legal affairs.[7] We will explore Mr. Kadonoff's role in greater detail in our analysis of Staff's fraud allegations.

6 Exhibit 38, Affidavit of Kenneth Kadonoff, affirmed March 30, 2021 at para 29 (**Kadonoff Affidavit**)
7 Exhibit 35, Affidavit of Charles Mazzacato, sworn March 29, 2021 at para 18

III. ISSUES

A. Earlier motion about proposed expert testimony

[28] Before we identify the issues that are raised by this hearing, and before we present our analysis of those issues, a preliminary comment is in order. Earlier in this proceeding, a different panel of the Commission heard a motion about Staff's intention to call a witness at this hearing to give expert testimony.

[29] Based on the Statement of Allegations, which defines the scope of an enforcement proceeding such as this, and with the benefit of an undertaking from the respondents not to call evidence or make submissions that would have made part of the expert's proposed testimony relevant, the Commission decided[8] that the proposed testimony was not admissible.

[30] We need not review here the reasons for that decision, but it is important to note that as a result of the motion, there is no issue before us as to the commercial reasonableness of any loan made by SIF #1 to SIF #2. Our analysis is confined to the specific issues before us, which we will now address.

B. Issues raised by Staff's allegations

[31] As discussed above, Staff's case rests on two alleged breaches of the Act.

[32] The first is of s. 44(2). In general, an alleged breach of s. 44(2) presents three issues:

a. whether the respondent made a statement;

b. whether the statement was untrue or misleading in the circumstances in which it was made; and

c. whether a reasonable investor would consider the subject of the statement to be relevant in deciding whether to enter into or maintain "a trading or advising relationship" with the respondent who made the statement.

[33] The second alleged breach is of s. 126.1(1)(b). The two high-level issues presented by that allegation are:

a. whether the respondent directly or indirectly engaged in or participated in acts, practices or courses of conduct relating to securities; and

b. whether the respondent knew or ought reasonably to have known that the acts, practices or courses of conduct perpetrated a fraud.

[34] These two issues can be broken down into their elements. We do that below, in our introduction to the analysis of the fraud allegations. We turn now, though, to our analysis of the alleged breach of s. 44(2).

IV. ANALYSIS

A. Subsection 44(2)

1. Introduction

[35] Staff alleges that all respondents made, or caused SIF #1 to make, untrue or misleading statements to investors about SIF #1's use of funds. Staff alleges that the respondents thereby contravened s. 44(2) of the Act. We conclude that they did not.

[36] As noted above, a threshold issue raised by this allegation is whether that subsection applies at all to the relationship between any of the respondents and the investors. If the subsection applies, we must then consider whether any respondent made any statement that contravenes the subsection.

[37] Subsection 44(2) provides:

> No person or company shall make a statement about any matter that a reasonable investor would consider relevant in deciding whether to enter into or maintain a trading or advising relationship with the person or company if the statement is untrue or omits information necessary to prevent the statement from being false or misleading in the circumstances in which it is made.

[38] As we noted above, for Staff to prove a direct contravention of s. 44(2) against a respondent, Staff must establish three things, one of which is that a reasonable investor would consider the subject of the statement to be relevant in deciding whether to enter into or maintain "a trading or advising relationship" with the respondent who made the statement.

[8] *Solar Income Fund Inc. (Re)*, 2021 ONSEC 2, (2021) 44 O.S.C.B. 557 (***Solar Income Fund Inc. (Re)* Motion Decision**)

[39] Staff does not suggest that any of the respondents was in an "advising" relationship with investors. As we will explain, Staff relies on the investors' purchases of fund units, and other connections between those investors and the fund, to submit that those connections establish a "trading" relationship.

[40] We conclude below that the relationship between SIF Inc. and existing or potential investors was not a trading relationship. As a result, Staff failed to establish the third of the three elements above, and s. 44(2) does not apply here. If s. 44(2) were to apply in the circumstances of this case, then every issuer might be said to be in a trading relationship with every holder of that issuer's securities. That cannot be the correct interpretation of s. 44(2), as we explain more fully below.

[41] Because we conclude that the third element above is not present, we need not consider the first two elements in the context of the s. 44(2) allegations. However, our assessment of some of the statements made, and the extent to which funds were used in a manner consistent with those statements, is central to our analysis of the fraud allegations, which follows below.

2. Factual background

[42] We therefore turn to a closer examination of our reasons for concluding that the relationship here between SIF Inc. and existing or potential investors was not a trading relationship. Staff cites the following facts in support of its position:

a. investors purchased SIF #1 units directly from SIF Inc.;

b. investors entered into a subscription agreement that was explicitly directed to SIF #1, and to SIF Inc. as the "Manager", and that was signed by SIF Inc. "as agent for" SIF #1;

c. SIF Inc. would determine the investor's eligibility to purchase the units;

d. SIF Inc. wrote to each purchaser to confirm details and to invite questions;

e. Raintree, the lead exempt market dealer retained to sell units, identified itself as an independent dealer and advised investors that the investors would "also be creating a relationship with [the] issuer for the ongoing care and control of [the] investment.";

f. the SIF #1 management agreement said that SIF Inc.'s role would include reporting to and liaising with investors about SIF #1;

g. SIF Inc. sent regular newsletters to unitholders;

h. units were redeemable at the unitholder's option, with the redemption price being tied to the units' market value, which was determined by SIF Inc.; and

i. SIF Inc. could cancel units at its discretion.

[43] The respondents do not dispute these facts, but assert that the facts do not create a trading relationship within the meaning of s. 44(2). We will now consider that submission.

3. Analysis

[44] Subsection 44(2) governs some relationships involving investors. The question here is whether it governs the relationship between SIF Inc. and investors in SIF #1.

[45] The term "trading relationship" is not defined in the Act. We begin our task of giving that phrase meaning by examining the context in which it appears, *i.e.*, "to enter into or maintain a trading… relationship."

[46] The plain meaning of the word "relationship", in its ordinary sense, evokes an ongoing connection involving enduring or repetitive behaviour. The word "maintain" in s. 44(2) highlights this enduring character. The alternative of "enter into" clearly aims the provision not only at existing participants in the subject relationship, but also at potential participants.

[47] There can be no question that for as long as an investor holds a security of an issuer, the investor and issuer are in a relationship. The question is whether it is a relationship that falls within the provision. To answer that question, we must look to the fact that the nature of the enduring or repetitive behaviour is defined by the qualifier "trading".

[48] Can it fairly be said in this case that the relationship between SIF #1 unitholders and SIF Inc. meets that qualifier? Looking solely at the words of s. 44(2), we think not.

[49] To further test that proposition, we look to the rest of s. 44, to give additional context. Is there anything about any other part of s. 44 that suggests one conclusion or the other?

[50] Section 44 has only one other subsection apart from s. 44(2). Subsection 44(1) provides that a person or company may make a representation about their registration status under the Act only if that representation is true and it specifies the particular category of registration. The subsection aims to ensure that investors can know whether or not they are dealing with a registrant, and if so, the category of registrant.

[51] Subsection 44(1) of the Act does not apply to the facts of this case. However, we still find it useful in assessing the purpose of s. 44(2). While we do not place significant weight on its presence, we note that it governs registrants or others who make representations about being a registrant. This reinforces our conclusion that the "trading or advising relationship" envisaged by s. 44(2) is of a nature typically provided by registrants, *i.e.*, to act on behalf of investors to assist with their trading, and to advise investors on investment decisions they may make.

[52] SIF Inc. is not a registered dealer and none of the individual respondents is a registrant. Should the provision apply in these circumstances? Of previous decisions that deal with s. 44(2), none is determinative, but two offer some assistance.

[53] The first is *Carter*,[9] a 2010 decision of a Director of the Commission. The respondent Carter Securities Inc. was a registered exempt market dealer who marketed and sold securities of an unrelated issuer. The dealer gave investors marketing materials that were found to have contravened s. 44(2). The Director therefore suspended the dealer's registration. Staff's allegations in the proceeding were confined to the dealer and did not extend to the issuer or to any of its principals.[10] Accordingly, the relationship between the respondent dealer in *Carter* and the investors was more immediate than, and is not analogous to, the relationship here between SIF Inc. and SIF #1 investors.

[54] In the Commission's 2013 decision in *Winick*,[11] the respondent Winick directed a transfer agent to send misleading correspondence to potential investors in two issuers of which Winick was the directing mind. The Commission dismissed Staff's allegation that by giving that direction, Winick breached s. 44(2). The Commission found that while the misstatements might have related to a trading relationship with the transfer agent, they did not relate to a trading relationship with Winick himself.[12]

[55] While the facts in *Winick* are distinct from those in this case, *Winick* does reinforce the importance not just of identifying who was responsible for a communication that contained untrue or misleading statements, but also of carefully identifying who the parties are in the relationship that is governed by s. 44(2), *i.e.*, a trading or advising relationship. In this case, we must look closely at the nature of the interaction between SIF Inc. and the SIF #1 investors.

[56] The respondents in this case point to other contested cases before the Commission or a Director of the Commission that featured alleged breaches of s. 44(2). As the respondents correctly submit, in none of those cases did Staff successfully establish a breach of s. 44(2) by a non-registrant,[13] other than one case in which the non-registrant was also found to have been carrying on the business of trading or advising without being properly registered.[14]

[57] In the one case in which a non-registrant was found to have contravened s. 44(2), the respondent Goddard had previously been a registrant but was no longer registered during the material time. He was the sole director, officer and directing mind of the respondent corporation. The respondents (Goddard and his corporation) issued documents to investors, pursuant to which the respondents promised those investors a return on their investment. The Commission found that:

a. the documents were themselves securities;

b. the respondents engaged in the business of trading in securities;

c. the documents were false and misleading; and

d. the documents were relevant to any investor who was deciding whether to enter into a trading relationship with the respondents.

[58] In that case, the trading relationship was clearly between the investors and the respondents. There was no intermediary. The fact that the respondents were not registered could not shield them from liability under s. 44(2), especially (but not exclusively) since the respondents were engaged in the business of trading and ought to have been registered if they were to carry on that business.

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9 *Carter Securities Inc. (Re)*, (2010) 33 OSCB 8691 (***Carter***)
10 *Carter* at paras 1, 53, 74, 87
11 *Winick (Re)*, 2013 ONSEC 31, (2013) 36 OSCB 8202 (***Winick***)
12 *Winick* at paras 157-8
13 See *Waterview Capital Corp (Re)*, (2011) 34 OSCB 5059; *Energy Syndications Inc. (Re),* 2013 ONSEC 24, (2013) 36 OSCB 6500; *David Charles Phillips (Re)*, 2015 ONSEC 24, (2015) 38 OSCB 617 (***Phillips***)
14 *Black Panther (Re)*, 2017 ONSEC 1, (2017) 40 OSCB 1115

[59] Staff has cited no other decision in which a breach of s. 44(2) was found against a non-registrant. While Staff correctly submits that we ought not to read words into s. 44(2) that are not there, we must interpret, give meaning to and apply the words that are there. The subsection contains the words "a trading or advising relationship", and to us these words mean something considerably more than the incidental and administrative relationship between unitholder and manager of the issuer in this case.

[60] We therefore agree with the respondents' submission that to apply s. 44(2) in this case would be a departure from previous decisions.

[61] We also agree that such a departure is not warranted on policy grounds. The connection between SIF Inc. and those who purchased units of SIF #1 was a relationship between the investor and an entity to which the issuer delegated all responsibility for management and general administration (*i.e.*, SIF Inc. as manager of SIF #1). We had no evidence before us that any investor had any trading-related connection with SIF Inc. that was anything more than, once, buying units of SIF #1.

[62] We do not accept that the facts cited by Staff, referred to in paragraph [42] above, create a trading relationship with any of the respondents. In particular:

a. SIF Inc.'s administrative steps at the time of purchase were typical of those of an issuer of exempt securities, and its after-purchase steps were typical of investor relations activities conducted by many issuers;

b. even if the exempt market dealer was correct when it told investors that they would "also be creating a relationship with [the] issuer for the ongoing care and control of [the] investment", that relationship was of an administrative nature, and there would not necessarily be any trading once the initial purchase was complete; and

c. any rights of redemption or cancellation did not create a "trading" relationship.

[63] Mr. Mazzacato's own testimony supports this conclusion. As he testified, SIF Inc. had an investor relations person "who did administration work".[15] Any interaction with investors was through SIF Inc.'s exempt market dealers. Mr. Mazzacato reported that he was told that interactions with investors were not permitted.

[64] Our conclusion on this issue is unaffected by the fact that Staff alleges that the trading relationship involving the investor is with SIF Inc. instead of SIF #1. For these purposes, SIF Inc. essentially stands in the shoes of SIF #1. SIF Inc. as manager did nothing more or differently than SIF #1 would have as issuer, had there been no manager.

[65] In addition, it is noteworthy that Staff does not allege that any of the impugned statements were made orally by any of the respondents. Instead, those statements were contained in the offering memorandum and its amendments. Those documents were given to investors by the exempt market dealer, not by the respondents. As a general proposition, that kind of distinction in a given case would not necessarily absolve a respondent of responsibility for any misstatements if the respondent were found to be an author of the document. However, the fact that there was no direct communication between a respondent and an investor helps to understand the nature of the relationship between them.

[66] We do not agree with the dire consequences behind Staff's warning that if the respondents are not held to have contravened s. 44(2) in this case, "an issuer could never be held liable under s. 44(2) for making misrepresentations to investors so long as the issuer retained an EMD to sell on its behalf."[16] It is true that if there is no trading or advising relationship between the issuer and its prospective or existing securityholder, then the issuer cannot be held liable under s. 44(2). But that is because the trading or advising relationship is an essential element of s. 44(2). The issuer about which Staff is concerned can still be held liable under other provisions of Ontario securities law more relevant to issuers.

[67] If we were to find the existence of a trading relationship in this case, every issuer could face a similar finding. There is nothing about this case to meaningfully distinguish the relationship from the common event of an investor completing a single trade in a security of an issuer.

[68] In summary, we find that it would take something more than a trade, and associated administrative and information-conveying steps, to create a trading relationship. The facts of this case do not support such a conclusion.

4. Conclusion about Staff's s. 44(2) allegations

[69] We therefore dismiss the allegation that SIF Inc. breached s. 44(2).

[15] Hearing Transcript, Solar Income Fund (Re), April 8, 2021 at 98 lines 22-23
[16] Written Reply Submissions of Staff of the Ontario Securities Commission dated July 5, 2021, para 40

[70] As for the individual respondents, Staff does not allege that any of them breached s. 44(2) directly; only that as officers and directors of SIF Inc. they should be found to share liability for any breaches by SIF Inc., pursuant to s. 129.2 of the Act. Having found no breach by SIF Inc., we dismiss the related allegations against the individual respondents.

[71] Having found that no reasonable investor would consider the subject of the impugned statements to be relevant in deciding whether to enter into or maintain a trading relationship with the respondent who made the statement, we decline to find, within the context of the s. 44(2) allegations, whether the statements were untrue or misleading (the second of the three elements to be proven, as referred to in paragraph [38] above). In our analysis below of Staff's fraud allegations, we will return to consider whether the respondents adhered to certain statements in the offering memorandum.

[72] We will now address Staff's allegations that all four respondents engaged in fraudulent acts.

B. Clause 126.1(1)(b)

1. Introduction

[73] In the Statement of Allegations, Staff alleges that the "offering memorandum led investors to believe that all of their invested funds would be used to buy, develop and operate physical assets that would produce a return on investment through the sale of solar energy." Staff alleges that the respondents did not live up to this promise, because they used SIF #1 funds "in a way that was contrary to the purpose and the short-term and long-term objectives of SIF #1 as provided in" the offering memorandum.[17]

[74] At the hearing, including in Staff's closing submissions, Staff limited and particularized that broad complaint of misuse of funds, alleging that the respondents caused SIF #1 to transfer funds to SIF #2 for the payment of:

a. distributions to SIF #2 investors; and

b. fees owed to SIF #2's exempt market dealers.

[75] Staff alleges that because the SIF #1 offering memorandum did not contemplate that SIF #1 would lend funds to another entity (even a related entity) for these purposes, the loans to SIF #2 were unauthorized. Further, Staff alleges, these loans caused a deprivation to SIF #1 investors, in that their funds were put at risk in a manner to which they had not agreed. As a result, says Staff, all four respondents contravened s. 126.1(1)(b) of the Act.

[76] The burden of proof for this allegation is the same as for all allegations before us. It is the balance of probabilities. In other words, is it more likely than not that a particular fact is true, or that the allegation is proven? While any conclusion we reach by applying the balance of probabilities standard must be based only on clear, cogent and compelling evidence, that requirement does not elevate the standard of proof.[18] This is so, despite the use of the words "high standard of proof" in some decisions cited by the respondents from other jurisdictions.

[77] Staff makes no allegation that an individual respondent committed a fraud independent of any of SIF Inc.'s actions. Instead, Staff submits that the individual respondents share responsibility for those actions. Accordingly, in our analysis we focus first on SIF Inc.'s actions.

[78] We then consider what are, on the facts of this case, the two ways that an individual respondent can be found liable for a fraud committed by SIF Inc. As we explain further below, we may make such a finding against an individual respondent if:

a. Staff proves all the elements of s. 126.1(1)(b) against that respondent directly, one of which is that the respondent knew or ought to have known that SIF Inc. was perpetrating a fraud; or

b. pursuant to s. 129.2, Staff proves that SIF Inc. contravened s. 126.1(1)(b), that the individual respondent was a director or officer of SIF Inc. at the time of SIF Inc.'s non-compliance, and that the respondent authorized, permitted or acquiesced in that non-compliance.

[79] In their closing written submissions, the respondents submit that Staff has "impermissibly attempted to expand the scope of the case" beyond the Statement of Allegations, including by submitting that the impugned transactions "were not commercially reasonable or prudent".[19] For the reasons set out above regarding the motion about expert testimony, we

[17] Amended Statement of Allegations dated February 18, 2021, at paras 2 and 63
[18] *FH v McDougall*, [2008] 3 SCR 41 at para 46
[19] Joint Written Submissions of Solar Income Fund Inc., Allan Grossman, Charles Mazzacato, and Kenneth Kadonoff, dated June 25, 2021, at paras 6-7

agree with the respondents that that issue, framed that way, is not relevant in this proceeding. We confine our analysis to the elements required for proof of the s. 126.1(1)(b) allegations, which require Staff to establish that:

a. the respondent directly or indirectly engaged in or participated in acts, practices or courses of conduct relating to securities; and

b. the respondent knew or ought reasonably to have known that the acts, practices or courses of conduct perpetrated a fraud.

[80] There is no dispute that the first of these two elements is true in this case. The transfer of funds to pay investor distributions and dealer fees, whether permissible or not, relates to securities.

[81] The second element raises the central question. Was the transfer of funds for those purposes fraudulent, and if so, did each respondent know, or ought that respondent to have known, that the transfer was fraudulent? For Staff to establish that the transfer was fraudulent, Staff must prove two things:

a. the *actus reus*, a mostly objective element (except for the subjective requirement that the act have been a voluntary act of the person alleged to have committed it,[20] a consideration not relevant here), which must consist of:

   i. a prohibited act, which may be an act of deceit, falsehood, or some other fraudulent means; and

   ii. deprivation caused by that act; and

b. the *mens rea*, or subjective or mental element, which must consist of:

   i. subjective knowledge of the act referred to above; and

   ii. subjective knowledge that the act could have as a consequence the deprivation of another.[21]

[82] A corporation cannot be described as having "knowledge" in the same way that an individual does. A s. 126.1(1)(b) allegation is established against the corporation where Staff proves that the corporation's directing minds knew or ought reasonably to have known that the corporation perpetrated a fraud.[22]

[83] We will now review these elements individually, in each case in the context of Staff's two allegations about the transfer of funds to pay distributions to SIF #2 investors and fees owed to SIF #2's exempt market dealers.

2. Did the respondents engage in an act of deceit, falsehood, or some other fraudulent means?

(a) "Other fraudulent means" includes unauthorized diversion of funds, of the type Staff alleges here

[84] We begin by considering whether SIF Inc. engaged in an act of deceit, falsehood or other fraudulent means. Staff relies on the third of those elements, "other fraudulent means".

[85] The Supreme Court of Canada, in the leading case of *Théroux*, states that whether an act falls within "other fraudulent means" must be determined objectively, with reference to what a reasonable person would consider to be a dishonest act.[23] Even where deceit or falsehood cannot be established, a situation may still be dishonest and therefore be "other fraudulent means".

[86] That description applies to unauthorized diversions of funds[24] because they generally constitute, in the words of the Supreme Court of Canada, "the wrongful use of something in which another person has an interest, in such a manner that this other's interest is… put at risk."[25] The unauthorized nature of the diversion is the wrongful use that is at the heart of the dishonesty contemplated by "other fraudulent means". The separate question of whether a wrongful use puts one's interest at risk (as contemplated in the above quotation) is part of the analysis of deprivation. We address that question below.

[20] *R v Théroux*, [1993] 2 SCR 5 at para 17 (***Théroux***)
[21] *Théroux* at para 24, cited in *Re Quadrexx Hedge Capital Management Ltd*, 2017 ONSEC 3, (2017) 40 OSCB 1308 (***Quadrexx***) at para 19
[22] *Re Al-Tar Energy Corp*, 2010 ONSEC 11, (2010) 33 OSCB 5535 at para 221
[23] *Théroux* at para 14
[24] *Théroux* at para 15
[25] *R v Zlatic*, [1993] 2 SCR 29 at para 19 (***Zlatic***)

[87] Staff cites several previous decisions where diversion of investor funds has been found to have been fraudulent:

a. diversion, without notice to investors, of funds raised ostensibly for a factoring scheme ("a very specific investment proposal"), to a separate unrelated company ("funds… not used in the specific manner authorized by the clients");[26]

b. without first amending the relevant offering memorandum and notifying investors of the change, diversion of new investor funds to pay dividends to existing investors;[27] and

c. without proper authority, a corporation's diversion of funds to the personal benefit of two of the corporation's principals.[28]

[88] Each of those, to a greater or lesser extent, bears some similarity to the present case. All of them reinforce the principle that a use of funds that is inconsistent with what was promised to investors and that is without notice to them is dishonest.

[89] The respondents submit that the impugned transfers of funds from SIF #1 to SIF #2 cannot be found to be fraudulent, for two reasons:

a. the funds used for the transfers were not the funds of SIF #1 investors; and

b. the risks borne by SIF #1 investors in connection with the loans from SIF #1 to SIF #2 were exactly the risks that they had bargained for.

[90] We address the second of those two objections, about the risks borne by SIF #1 investors, in our discussion of deprivation below.

[91] As for the suggestion that the funds used for the transfers were not those of SIF #1 investors, we cannot accept that submission. Staff's investigator witness provided extensive evidence of cash flows to and from investors and various entities, and transfers between accounts. In addition to cross-examining that witness, the respondents provided an extensive appendix to their closing submissions, that they say exposes gaps and limits associated with the Staff witness's evidence. One of the respondents' main submissions on this point is that the impugned payments originated from third parties who loaned funds to SIF #1 and SIF #2.

[92] The respondents' submission is misguided, because it implies a necessary tracing of a particular dollar from an investor to its ultimate use. Such a tracing would be possible where funds are segregated, *e.g.*, in trust. However, no such segregation happened here, nor was one required. SIF #1's funds were to be fungible, whether their source was investors or a lender (or, eventually, revenue). This is reflected in the use of funds table in the offering memorandum, which aggregates the $30 million (maximum) to be received from investors and the approximately $72,462,000 in long-term debt, and then indicates how that total is allocated. There is no streaming of investor funds for some purposes and debt financing for others.

[93] An investor who decided to invest in SIF #1 was entitled to assume that all of SIF #1's affairs (not just a portion represented by the funds of that investor or all investors) would be conducted in a manner consistent with that set out in the offering memorandum.

[94] Our conclusion on the tracing point does not preclude the Commission's examination, for other purposes, of the overall cash flow and general financial condition of one or more entities. For example, the fact that at a given point in time, an entity had insufficient funds to make a necessary payment, and funds were transferred to that entity that were immediately used to make that payment, may be relevant evidence in support of a conclusion about either or both of:

a. a respondent's state of mind at the time; and/or

b. the purpose of a transfer of funds.

[95] We decline to apply the tracing approach urged by the respondents in the context of this issue. We agree with Staff's submission that the unauthorized diversion of funds from SIF #1 for the impugned purposes was wrongful.

[26] *R v Currie*, [1984] OJ No 147 at para 15
[27] *Quadrexx* at para 246
[28] *Money Gate Mortgage Investment Corporation (Re)*, 2019 ONSEC 40, (2019) 43 OSCB 35 at para 307

(b) As alleged, SIF #2 paid fees to exempt market dealers, and distributions to its investors

[96] Staff's investigator witness prepared an analysis of the flow of funds among various accounts. That analysis included a particular focus on transfers from SIF #1 to SIF #2 in the ten-month period from July 1, 2015, to May 5, 2016. During that time, according to the analysis:

a. approximately $5.31 million was transferred from the SIF #1 operating trust account to the SIF #2 operating trust account, being substantially all the external funds received in the SIF #2 account;

b. approximately $1.66 million went from the SIF #2 operating trust account to the SIF #2 fund account;

c. at least $223,224.04 was paid from the SIF #2 fund account to investors as distributions; and

d. $92,031 was paid from the SIF #2 fund account to exempt market dealers ($11,640) and a numbered Alberta corporation that was retained to provide marketing services to the dealers ($80,391).

[97] There is no real dispute that SIF #2 made some payments to exempt market dealers and to investors, and that the loans from SIF #1 to SIF #2 enabled SIF #2 to make these payments. This fact is evident from, among other things:

a. contemporaneous email correspondence;

b. cheques signed by Mr. Grossman and Mr. Mazzacato indicating that the funds were being paid for those purposes; and

c. Mr. Grossman's acknowledgment in his affidavit that he was aware at the time that some portion of the funds loaned by SIF #1 were used to pay SIF #2 distributions and exempt market dealer fees.

[98] Staff cites several payments out of SIF #1 as examples of the impugned transfers:

a. two payments relating to exempt market dealers and for marketing services:

i. a November 25, 2015, cheque for $15,000, signed by Mr. Grossman, from the SIF #1 operating trust to the SIF #2 operating trust, with the memo line showing: "Re Computershare annual fee+pinnacle"; and

ii. a February 4, 2016, wire transfer for $25,000, from the SIF #1 operating trust to the SIF #2 operating trust, with the memo line on the bank statement showing: "Re Geoff Lafleu", an apparent reference to Geoff Lafleur, the principal of the numbered Alberta corporation referred to in paragraph [96] above; and

b. payments to fund investor distributions:

i. a July 7, 2015, wire transfer for $35,000 from the SIF #1 operating trust to the SIF #2 operating trust, with the memo line on the bank statement showing: "MFT2JuneDist", "MFT2" being SIF #2; and

ii. a December 7, 2015, cheque for $80,000, signed by Mr. Mazzacato, from the SIF #1 operating trust to the SIF #2 operating trust, with the memo line showing: "MFT 2 Expenses & Distribution", and a cheque of the same day and in the same amount, from the SIF #2 operating trust to SIF #2, also signed by Mr. Mazzacato, and with the same memo line notation.

[99] The respondents correctly submit that the Alberta corporation providing marketing services to the exempt market dealers was not itself an exempt market dealer. The Statement of Allegations repeatedly describes the category of impugned payments as "exempt market dealer fees" or "fees owed to exempt market dealers". Staff's written submissions confirm that the fraud allegation is so limited. There are no words in the Statement of Allegations that would cover fees paid to a third party non-dealer for marketing. Accordingly, we exclude the $80,391 paid to the Alberta corporation, leaving $11,640 paid to the two exempt market dealers.

[100] The respondents also dispute the precise amount of the impugned payment from the SIF #2 fund account to investors. Staff's investigator witness arrived at the figure of $223,224.04 for distributions by a self-described conservative approach of taking the total of $261,159.38 paid for distributions during the period and deducting an adjustment of $37,935.34.

[101] Staff's investigator witness applied the adjustment on a chronological basis to reflect the fact that some funds were commingled in the SIF #2 fund account, and some or all of the $37,935.34 may have been used for various impugned purposes, including not only the payment of distributions and exempt market dealer fees, but also allegedly improper payments to SIF Inc. and CPE. While that last category of payments is not the subject of Staff's fraud allegation, the category is essential to understanding the adjustment.

[102] We accept this conservative approach as an appropriate methodology. Accordingly, for our purposes the amount transferred from SIF #1 to SIF #2 that funded distributions is not less than $223,224.04, and may be slightly higher. Using Staff's chronological approach, the opening balance adjustment referred to above was consumed by July 22, 2015, at the latest. This date is not material for the overall calculation we discuss here, but it becomes relevant when we address Mr. Kadonoff's responsibility below.

[103] Taking the $223,224.04 amount together with the dealer fees of $11,640, the total challenged amount is $234,864.04.

[104] Contrary to the respondents' submission, Staff's analysis does not demonstrate that the impugned uses of SIF #1 funds began no earlier than September 2015. Staff's analysis cannot be completely conclusive on the point, because of the commingling of funds. We accept Staff's conclusion that the use of SIF #1 funds to pay distributions and dealer and marketing fees began no later than June 2015. We are bolstered in this conclusion by Mr. Grossman's testimony that the "entire management team" in June and July of 2015 was aware that funds were being transferred at that time from SIF #1 to SIF #2 to pay distributions to SIF #2 investors.[29]

[105] The respondents describe the impugned amount as a small subset of the funds that SIF #1 advanced to SIF #2. Even accepting that characterization for the sake of argument, it is irrelevant to our analysis. If the transfer were isolated, inadvertent, and of an insignificant amount, then under certain circumstances it might justifiably be disregarded for not meeting the "dishonesty" criterion. In this case, that description does not apply. The absolute size of the amount in issue, and the ratio of the impugned amount to the total amount transferred, are meaningless in the context of this merits hearing.[30]

[106] We will now consider whether the transfer of $234,864.04 to pay distributions and dealer fees was authorized.

(c) Was the use of SIF #1's funds for those purposes authorized?

i. Introduction

[107] In addressing the question of whether the use of SIF #1's funds for the impugned purposes was authorized, the respondents rely not only on the SIF #1 offering memorandum, but also on the declaration of trust that established the SIF #1 operating trust. For reasons we expand on in our discussion below about legal advice given to the respondents, we focus our analysis on the language contained in the offering memorandum, since that is the investor-facing document. Further, while the two documents contain some language in common, there are significant differences as well. Nothing in the declaration of trust that is not already present in the offering memorandum affects, positively or negatively, the respondents' position in this case.

[108] We will first conduct a thorough analysis of relevant provisions in the offering memorandum, following which we will review related oral testimony.

ii. Text of the offering memorandum

[109] The offering memorandum was originally issued on March 6, 2013, in support of an intended $30 million capital raise. It contemplated that SIF #1 would create a subsidiary trust that would be the sole limited partner of one or more limited partnerships to be formed to conduct SIF #1's business. A July 3, 2013, amendment to the offering memorandum reflected the creation of the SIF #1 operating trust, which was the subsidiary trust referred to in the original offering memorandum.

[110] The offering memorandum was amended again on January 15, 2014, after approximately $25.5 million had been raised, to double the total size of the offering to $60 million. Two more amendments were made, on April 23 and June 10, 2014, respectively. Neither amendment is consequential for our purposes.

[111] The original offering memorandum describes the nature of SIF #1's business and short- and long-term objectives. According to the offering memorandum, SIF #1 "was established to invest in Subsidiaries which will in turn invest in the acquisition, development, financing and operation of solar energy power installations… and other ancillary or incidental business activities".[31] These words echo those set out in the Feb 4/13 declaration of trust by which SIF #1 was created.

[112] The word "Subsidiaries" in the above text is defined as "any company, partnership, limited partnership, trust or other entity either controlled, directly or indirectly, by the Fund or in which the Fund holds more than 50% of the outstanding equity securities."[32]

[29] Hearing Transcript, Solar Income Fund (Re), April 1, 2021 at 69-70
[30] *Quadrexx* at para 241
[31] Exhibit 32, Revised Exhibit A to the Dusseldorp Affidavit, Offering Memorandum dated March 6, 2013 at p 5
[32] Exhibit 32, Revised Exhibit A to the Dusseldorp Affidavit, Offering Memorandum dated March 6, 2013 at p 1

[113] The listed short-term objectives in the offering memorandum are specified to be "for the next 12 months" and are only two:

a. to raise capital through the offering that is the subject of the offering memorandum; and

b. to acquire and/or develop and operate solar energy installations on land or on rooftops, to generate power to be sold under long-term power purchase agreements.

[114] The description of SIF #1's long-term objective tracks the language set out in paragraph [111] above.

[115] SIF #1's purpose is to "invest in" subsidiaries, of which the SIF #1 operating trust is one. As noted above, the SIF #1 operating trust, in turn, is to invest in "the acquisition, development, financing and operation" of solar installations. The respondents contend that an "investment" by the SIF #1 operating trust can be in the form of an equity investment or a loan.

[116] As for permissible activities of the entity to which the loan is made (in this case, SIF #2), the respondents rely heavily on the word "financing" in the phrase quoted above. They submit that nothing in the offering memorandum specifies that any investment that is "financing" must occur in tandem with the acquisition, development or operation of a solar power energy installation.

[117] Staff rejects the respondents' proposed interpretation of the offering memorandum, *i.e.*, that it permitted the respondents to use investor funds to make unsecured loans to unowned third-party entities. Staff contends that even under the respondents' interpretation, the offering memorandum would not permit the impugned uses of SIF #1's funds.

[118] Staff submits that:

a. reasonably, "financing" could only have meant borrowing by SIF #1, and not SIF #1 lending to other entities; and

b. even if the respondents' proposed interpretation is correct, it would not have permitted SIF Inc. to use SIF #1's money to pay dealer fees or distributions to SIF #2 investors.

[119] In general, the word "financing" is capable of two meanings, representing two opposite directions of flow of funds. An entity that engages in financing may be raising or borrowing funds for its own purposes, as in financing one of its projects. Alternatively, an entity that engages in financing may be lending to another entity, *i.e.*, providing financing.

[120] This ambiguity is at the heart of the dispute between Staff and the respondents.

[121] Given that ambiguity, what meaning should we give the word in the description of permissible uses of funds? Does it mean, as Staff submits, that the subsidiaries in which SIF #1 will invest will not only acquire, develop and operate solar installations, but those subsidiaries will also borrow funds as necessary for those purposes? Or does it mean, as the respondents submit, that the subsidiaries in which SIF #1 will invest may acquire, develop and operate solar installations, and may also provide financing for such installations? Or can it mean both in that phrase?

[122] In order to answer those questions, we must examine the entire offering memorandum so that we can understand the context in which the word arises. Analyzing the question in this way best aligns with the fundamental purpose of an offering memorandum, and the interest at stake, *i.e.*, disclosure to investors, and how a reasonable investor would understand the offering memorandum's contents. We conduct the analysis by reviewing the relevant provisions or characteristics of the offering memorandum and assessing the effect of each.

[123] *Description of the business* – The offering memorandum defines the business of SIF #1 as being the investment by SIF #1 in subsidiaries that will in turn "invest in" the financing of solar installations, among other things.

[124] It is illogical to say that an entity would be "investing in financing" by borrowing money. The concept of investing in financing makes sense only if "financing" in this phrase means lending money. Had the intended allusion been to borrowing money in connection with the acquisition, development or operation of a solar installation, we would expect to see words such as "which will in turn invest in the acquisition, development and operation of solar installations, including by obtaining the necessary financing to do so". The wording of the phrase as it appears in the offering memorandum supports the respondents' proposed interpretation of "financing".

[125] *Use of funds under the original offering memorandum* – The maximum amount of the initial offering was $30 million. SIF #1 also intended to obtain long-term debt financing under a term loan of $72,462,000. After the deduction of selling commissions and fees, and offering and marketing costs (all of which totaled approximately $4 million), approximately 90% of the remaining $98,670,775 was to be used for hard costs to develop or acquire solar installations. The other 10% was to be used for: (i) cash to be held in trust in respect of the long-term debt; (ii) a development fee, or management

fee, of $1.62 million payable to SIF Inc.; (iii) an electricity grid connection fee; (iv) bank, legal and other professional fees; and (v) a reserve to fund distributions to SIF #1 unitholders.

[126] Of the above list, the only use of funds that was directly attributable to a solar installation was the hard costs "to develop or acquire" solar installations. No portion of the funds raised under the offering memorandum explicitly mentioned providing financing. The word "acquire" cannot imply the provision of financing. The respondents' best argument is that the "development" of a solar installation could include the provision of financing. In our view, that would be a strained interpretation that would be unlikely to alert a reasonable investor to that possible use of the invested funds. The description of use of funds supports Staff's proposed interpretation of "financing".

[127] *Timeline for deployment of funds under the original offering memorandum* – The offering memorandum states that all of the raised funds will be deployed within 12 months for "acquisition and/or development and operation" of solar installations.[33] Again, no mention is made of using funds to provide financing. Further, the timeline for the deployment of any funds would be inconsistent with any lending by SIF #1 for a term exceeding 12 months. These provisions support Staff's proposed interpretation of "financing".

[128] *Services covered by the development or management fee* – SIF #1 was to pay SIF Inc. a $1.62 million development fee pursuant to a management agreement. The offering memorandum sets out a long list of the "consulting, development and administrative services" to be provided by SIF Inc. to SIF #1.[34] Fourteen of the services on the list are in connection with solar installations that were not then currently operating. Of those fourteen, thirteen are clearly preparatory steps toward allowing the solar installation to begin operating or to sustain operation in its early days (*e.g.*, securing regulatory approvals, arranging a construction contract to build the installation).

[129] Only one of the fourteen items, when read on its own, does not definitively fall into that category: "negotiating and managing long-term debt financing". That phrase suffers from the same ambiguity that we seek to resolve. However, the item is followed immediately by: "preparing all technical and legal requirements required to receive approvals for long-term debt financing". Read together, these two items clearly contemplate SIF #1 receiving financing as opposed to providing it.

[130] None of the other items in the broader list of all services to be provided by SIF Inc. to SIF #1, including the eight relating to installations that will be acquired and that are currently operating, could conceivably oblige SIF Inc. to provide consultative, development or administrative services in respect of SIF #1 lending money. Such an obligation would not necessarily have to exist in the management agreement, so we attribute less weight to its absence than we do to the earlier-mentioned provisions. Nevertheless, its absence does support Staff's proposed interpretation of "financing".

[131] *Other uses of the word "financing" in the offering memorandum* – The word "financing" is used elsewhere in the offering memorandum, apart from the ambiguous phrase "the acquisition, development, financing and operation of Installations". For example, the offering memorandum contains a warning that "alternative financing" may be necessary to accomplish all SIF #1's objectives if the offering does not raise sufficient funds.[35]

[132] Mr. Grossman was asked on cross-examination to identify any occurrences of the word in the offering memorandum that could mean lending as opposed to borrowing. He was given several days to locate any occurrences but could not. This fact supports Staff's proposed interpretation of the word.

[133] *No reference in the offering memorandum to interest income* – In all the discussion of the inflow and outflow of funds, there is no reference to a projected contribution to be made by interest income on funds loaned. If funds were to be deployed by providing financing, one would expect to see the benefit of doing so, likely in the form of interest income. The absence of any such reference supports Staff's proposed interpretation of "financing".

[134] *No risk factors related to lending money* – The offering memorandum lists 25 "Risk Factors", each of which is a category of risks associated with SIF #1's business in general or the offering in particular. Some risk factors relate to solar installations, *e.g.*, seasonality and solar panel degradation. Others relate to unitholder rights, reliance on the manufacturer and installer, and on management, and other types of risk.

[135] Certain of the risks relate to financial concerns, including limited availability of working capital (because most of the proceeds would be used "to develop and operate" the installations), risks associated with tax consequences and currency exchange rates, and, significantly, risks associated with borrowing (*e.g.*, the availability of construction or term loans on acceptable terms).

[136] Enumerated risks relating to the lending of money are conspicuous by their absence. Many such risks exist for any lender, especially where, as here, the parties are related, funds are lent without collateral, and terms are indefinite. We would

[33] Exhibit 32, Revised Exhibit A to the Dusseldorp Affidavit, Offering Memorandum dated March 6, 2013 at p 11
[34] Exhibit 32, Revised Exhibit A to the Dusseldorp Affidavit, Offering Memorandum dated March 6, 2013 at pp 16-18
[35] Exhibit 32, Revised Exhibit A to the Dusseldorp Affidavit, Offering Memorandum dated March 6, 2013 at p 11

expect any issuer whose business is, in part, the lending of funds, to disclose these risks, among others. The fact that the SIF #1 offering memorandum does not strongly compels the conclusion that Staff's proposed interpretation of "financing" is correct.

[137] *General disclaimers* – The respondents also point to language in the offering memorandum that advises investors that:

a. "operations" may "differ materially from the forward looking statements in this Offering Memorandum"; and

b. the "risks and uncertainties" to which investors are exposed "include risks associated with the solar energy power generation business, financing, environmental and tax related risks."[36]

[138] These words are contained in the largely boilerplate language about forward looking statements generally, and the unpredictability of external factors. Permitting any issuer to depart from the use of funds described in an offering memorandum simply in reliance on language like this would be to open the door wide to unfettered changes without notice to investors. That approach is fundamentally at odds with the requirement of investor protection and the purpose of an offering memorandum. We reject it.

[139] *Financial statements* – A note to SIF #1's financial statements as at February 4, 2013 (a month prior to issuance of the offering memorandum), which are appended to the offering memorandum, describes the nature of SIF #1's operations. The note says that SIF #1 was formed "for the purpose of acquiring, developing and managing solar energy power generation installations." The note goes on to say that the "purpose of [SIF #1] is to invest in subsidiaries which will in turn invest in the acquisition, development, financing and operation of solar energy power installations."[37]

[140] These two parts of the note are almost entirely duplicative, except that: (i) the first part says it is SIF #1 will do the acquiring, developing and managing, while the second part says SIF #1's subsidiaries will do those things; and (ii) the second part mentions "financing" while the first part does not. Given that the financial statements are prepared by SIF #1's independent auditors, not SIF #1 or its counsel, it appears that these largely duplicative descriptions are drawn from other documents already referred to above. We attribute no weight to this note in the financial statements.

[141] *The Whitewater loan* – The respondents highlight a reference in the "Recent Developments" section of the second amendment to a particular unsecured loan to be made by SIF #1. The respondents submit that the reference makes clear that lending money had been and was part of SIF #1's business. Careful scrutiny of this submission is warranted, and requires a review of transactions that led up to the loan:

a. in 2012, SIF Capital Inc., a corporation controlled by SIF Inc., began an offering of 10.75% debentures;

b. in October 2013, by which time SIF Capital Inc. had raised almost $8 million under the offering, SIF Capital Inc. sent a notice of redemption to the debenture holders, advising of its intention to redeem the entire principal amount of the debentures, plus accrued but unpaid interest, on January 15, 2014;

c. when Mr. Grossman signed the redemption notice, he knew that SIF Capital did not have the cash to do the redemption on its own;

d. Mr. Kadonoff also knew that SIF Capital had financial difficulty, in that it required funds in order to continue to pay its distributions;

e. in November 2013, Whitewater entered into an agreement with a contractor, by which the Whitewater project would be expanded;

f. by December 19, 2013, SIF #1 had agreed to:

i. effective January 15, 2014, refinance SIF Capital's 10.75% debentures in exchange for a 9% debenture, in order for SIF Capital to "meet its distributions in the future"[38] in the absence of available third party lenders and, as Mr. Grossman agreed, to "ease the burden on SIF Capital"[39]; and

ii. lend $900,000 to Whitewater, an operating solar facility and joint venture owned 80% by SIF Capital to expand production capacity of that project, an expansion made necessary (according to Mr. Kadonoff) in order to produce additional revenue to allow the joint venture to meet the new 9% debenture obligations;

[36] Exhibit 32, Revised Exhibit A to the Dusseldorp Affidavit, Offering Memorandum dated March 6, 2013 at p 3
[37] Exhibit 32, Revised Exhibit A to the Dusseldorp Affidavit, Offering Memorandum dated March 6, 2013 at p 44 of PDF
[38] Exhibit 2, Memorandum to File dated December 19, 2013 at p 4-5
[39] Hearing Transcript, Solar Income Fund (Re), March 31, 2021 at 51 lines 22-23

g. on January 13, 2014, SIF #1 issued the second amendment to the offering memorandum, which amendment referred to SIF #1's intention to make the $900,000 loan;

h. despite the language in the second amendment about the intention to make the loan, by January 13, 2014, SIF #1 had already transferred to Whitewater $600,000 of what would by December 23, 2014, total $965,000

i. on January 15, 2014, SIF #1 loaned $8 million to SIF Capital to redeem the debentures, with the rate set at 9%.

[142] We review this series of events not because the propriety of any of the transactions is at issue, but in order to put into context the respondents' submission that by the time of the second amendment, it was apparent to investors that SIF #1 was engaged in financing in the form of lending funds. It is clear that SIF #1 funds were used to come to SIF Capital's rescue, and that commitments to do so had been made even before the second amendment was issued.

[143] In our view, the fact that the respondents chose at the time to adopt an interpretation of "financing" that allowed them to effect this rescue is neutral on the question of how the word should be interpreted in the operative provisions of the offering memorandum.

[144] Further, by the time SIF #1 acquired a 20% interest in Whitewater, SIF #1 had advanced $750,000 to Whitewater. Therefore, at the time of those advances, Whitewater was not a subsidiary of SIF #1, contrary to the limiting provision in the offering memorandum's description of SIF #1's business.

[145] *Summary* – We summarize the relevant provisions of the offering memorandum as follows:

a. the only provision that supports the respondents' proposed interpretation of "financing" is the reference to SIF #1 investing in subsidiaries that would in turn "invest in… financing"; and

b. the promised use of funds, the timeline for deployment of funds raised and borrowed, the silence of the management agreement about any lending by SIF #1, and particularly the absence of any risk factors related to lending or any mention in the offering memorandum of interest income (two notable absences on which we place great weight), all support Staff's proposed interpretation.

iii. Testimony

[146] Having concluded our analysis of relevant provisions of the offering memorandum, we turn to consider testimony at the hearing that relates to this issue.

[147] Margaret Nelligan, one of the two Aird & Berlis partners principally responsible for providing legal services to SIF Inc., testified that when the phrase "acquisition, development, financing and operation of solar power installations" was drafted as part of the offering memorandum, SIF Inc. management and Aird & Berlis did not discuss "this".[40] It is unclear from Ms. Nelligan's answer whether the "this" to which she referred was the phrase itself or a possible desire by SIF Inc. management to be able to lend money directly to "third party corporations".

[148] When asked whether SIF Inc. management told Aird & Berlis at the time that management would like to be able to lend money to limited partnerships "that they didn't own", Ms. Nelligan confirmed that management did not do so.

[149] Staff describes these answers as a concession by Ms. Nelligan that when SIF #1 was formed, "no one specifically contemplated that it would lend funds as part of its business."[41]

[150] Similarly, Staff cites an answer that Mr. Grossman gave while being cross-examined about instructions that he gave Aird & Berlis around the time the offering memorandum was being prepared. Staff asked Mr. Grossman whether he gave Aird & Berlis any reason to believe that he wanted to be able to "lend money to other unowned entities with no collateral". Mr. Grossman's response was: "I don't think we said that specifically. But I said we wanted to have the ability to invest and finance the solar projects."[42]

[151] Staff says that this answer, like Ms. Nelligan's, was a concession by Mr. Grossman that when SIF #1 was formed, "no one specifically contemplated that it would lend funds as part of its business."

[152] We do not read either Ms. Nelligan's or Mr. Grossman's answers as supporting that broad statement.

[153] Ms. Nelligan's answers were about loans to "third party corporations" and limited partnerships that "they didn't own".[43] It is unclear that these questions as phrased would include SIF #2 (which is not a corporation that "they" owned, depending

[40] Hearing Transcript, Solar Income Fund (Re), April 22, 2021 at 69-70
[41] Written Submissions of Staff of the Ontario Securities Commission dated June 4, 2021, para 371
[42] Hearing Transcript, Solar Income Fund (Re), March 29, 2021 at 88 lines 21-23
[43] Hearing Transcript, Solar Income Fund (Re), April 22, 2021 at 70 lines 2-12

on who "they" is). The answers certainly do not go so far as to support a statement that no one contemplated that SIF #1 would do any lending.

[154] The question to Mr. Grossman that drew his answer was limited to lending money to unowned entities, and with no collateral. Mr. Grossman confirmed that those specific instructions were not given. He maintained that the SIF Inc. management group's desire was to be able "to invest and finance the solar projects." Again, this answer does not support Staff's characterization.

[155] To summarize our review of the relevant oral testimony, we heard nothing in the above that persuades us one way or the other about any of the respondents' understanding at the time the offering memorandum was being drafted as to whether the word "financing" permitted loans from SIF #1 to SIF #2 for the purpose of paying dealer fees or SIF #2 distributions.

[156] While we heard no oral testimony that influences our view on this specific issue, Mr. Grossman did, in his affidavit, shed some light on what SIF Inc. contemplated at the time the offering memorandum was prepared. He states that "[b]eginning in the summer of 2014" (more than a year after the issuance of the offering memorandum), SIF Inc. sought Aird & Berlis's advice about whether SIF #1 could lend funds to other entities managed by SIF Inc. "to finance solar projects". Mr. Grossman explains that this happened because SIF #1 had a surplus of cash and was seeking higher returns than it had been obtaining.[44]

[157] What was in SIF Inc.'s corporate "mind" at the time the offering memorandum was prepared (or one year later) is not determinative of how a reasonable investor would read that document. However, Mr. Grossman's explanation corroborates Ms. Nelligan's testimony and reinforces the inference that even SIF Inc.'s principals did not originally consider that the SIF #1 offering memorandum contemplated SIF #1 lending money to other SIF Inc.-managed entities.

iv. Concession by Mr. Grossman

[158] In his cross-examination, Mr. Grossman agreed that loans "from SIF #1 to SIF #2 to make distributions to SIF #2 investors is not financing a solar installation".[45] This was truly a concession, not necessarily that such loans were unauthorized, but that the word "financing" in the offering memorandum could not be relied on to support them.

[159] We believe that this admission against interest accurately reflects Mr. Grossman's true state of mind. We accord it significant weight, despite:

a. the respondents' joint submission that SIF #2's payments of distributions to its investors and fees to its exempt market dealers were permitted by the SIF #2 offering memorandum (as opposed to the SIF #1 offering memorandum) and were legitimate business purposes of SIF #2, a question that is not before us and that is distinct from the question of whether the transfers from SIF #1 to SIF #2 for these purposes were authorized;

b. Mr. Grossman's submission that funds transferred by SIF #1 for the impugned purposes "were not diverted to a purpose unrelated to a business in the solar industry or otherwise used to enrich any of the Respondents personally", a factual assertion that even if true does not reflect the test for whether the diversion was authorized, given the language of the offering memorandum; and

c. the respondents' unfounded attempt to minimize the admission's importance by distinguishing the factual background of this case from that of other cases.[46]

v. Conclusion on the question of whether the impugned uses of SIF #1's funds were authorized

[160] We conclude our analysis by noting the obvious; that the ambiguity in the pivotal language of the offering memorandum is unfortunate. However, the only reason we have found to justify interpreting "financing" in favour of the respondents (the words "invest in… financing") is overwhelmed by the many reasons not to. Viewed from the perspective of a reasonable investor reading the offering memorandum, the respondents' position cannot be sustained.

[161] The offering memorandum paints a clear overall picture of an entity that is not only raising funds, but borrowing significant funds as well; in fact, a multiple of the funds to be raised through the offering. It was doing so in order to acquire, develop and operate solar installations.

[162] A suggestion that SIF #1 would also be engaged in lending money comes only after microscopic scrutiny of one phrase in the entire offering memorandum. The explanation that the phrase permits lending, without any of the ancillary language one would reasonably expect to see in the offering memorandum, is decidedly inferior to the more reasonable explanation, that lending is not contemplated. Instead, an inartful and aberrant phrase is used, intended to mean, but not

44 Exhibit 35, Affidavit of Allan Grossman, affirmed March 26, 2021 at para 77
45 Hearing Transcript, Solar Income Fund (Re), April 1, 2021 at 72 lines 19-22
46 *Zlatic; Hibbert (Re)*, 2012 ONSEC 11, (2012) 35 OSCB 8583

saying clearly, that SIF #1 may need to obtain financing to support the acquisition, development and operation of solar installations.

[163] In our view, that conclusion is compelling. It was unreasonable for the respondents to rely on that language for the purposes of paying dealer fees and distributions of another fund. Even if "financing" in the offering memorandum included lending, which we have concluded it did not, neither of those two purposes could reasonably be said to be closely related to acquisition, development and operation of a solar installation. The offering memorandum did not authorize a loan, or diversion of funds, for either purpose.

[164] Before leaving this topic, we repeat our earlier comment that we reach all our conclusions in this case without reference to the commercial reasonableness of any of the transactions, including the prospect of repayment of any loan.

[165] Repeating that caution is necessary because Staff, in its reply submissions, asserts that the prospect of repayment is directly relevant to whether a loan could properly be considered "financing". While Staff's submission is not framed in terms of "commercial reasonableness", the two are inextricable. Staff essentially submits that the farther the terms of a loan are from what would be considered commercially reasonable, the less likely the loan would be considered by a reasonable investor to be financing. Such an allegation would have to have been particularized in the Statement of Allegations. It would be improper for us to consider this submission, given:

a. the absence of any allegation in the Statement of Allegations tying the prospect of repayment to "financing";

b. the Commission's previous decision in this proceeding about Staff's proposed expert; and

c. the respondents' undertaking not to lead or elicit evidence, or make any submission, about the soundness of any allocation of funds.

3. Was there a deprivation caused by the dishonest act, *i.e.*, the unauthorized diversion of funds?

[166] We have found the diversion of funds to pay dealer fees and distributions to have been unauthorized and therefore dishonest. We turn now to consider whether that diversion caused a deprivation.

[167] We begin by reviewing the specific allegation in the Statement of Allegations. At paragraph 10, Staff alleges that "by causing SIF #2 to pay exempt market dealer fees and distributions to SIF #2 investors using SIF #1 funds, Grossman, Mazzacato and SIF Inc. engaged in conduct that they knew or ought to have known perpetrated a fraud, and deprived SIF #1 investors of their capital and/or put their capital at risk."

[168] We have two comments about this allegation. First, while it excludes Mr. Kadonoff, the exclusion is inconsequential, since the allegation is essentially repeated in paragraph 65(c) of the Statement of Allegations. In that allegation, Mr. Kadonoff is included.

[169] Second, the respondents submit that for the fraud allegation, there is an important distinction between SIF #1's own capital and the SIF #1 investors' capital. While there clearly is a difference between the two, we do not accept that anything flows from that difference in this case. Staff's allegation is that the respondents, by their conduct, deprived SIF #1 investors of their capital and/or put their capital at risk.

[170] The respondents submit that there was no evidence that the loans to SIF #2 increased the risk to SIF #1 investors to a level greater than if the funds had been similarly deployed within SIF #1.

[171] The respondents are correct in their statement that we heard no such evidence. However, there was no need to. As the respondents acknowledge in their submissions, a risk of prejudice to economic interests causes a deprivation,[47] and that risk of prejudice can be established where investors are induced, by dishonest means, to purchase or hold an investment, even if doing so causes no actual economic loss.[48] Accordingly, we are not required to engage in an assessment of the relative risks of the authorized use of funds and the unauthorized use of funds.

[172] There is a causal link between a diversion of invested funds like the one that occurred in this case, and a risk of prejudice to those funds. In these circumstances, the investors unwittingly took on risks they did not bargain for.

[173] We do not accept the respondents' contention that the risks borne by the SIF #1 investors following the impugned transfers were precisely those they had already bargained for. The respondents base that submission on their characterization of those risks as "those related to the ability to earn a return on solar projects". That description is generic and superficial, it fails to take account of the many different risks that contribute to a return, and it fails to take account of the significance of risks that may be different in degree, not only in kind.

[47] *Théroux* at para 13
[48] *Quadrexx* at para 21

[174] Whether those different risks would ultimately turn out to be neutral, or to the investors' benefit or their detriment, is not determinative. It should have been for the investors, not the respondents, to evaluate the relative merits of the promised uses of the funds and uses other than those promised.[49]

[175] We therefore conclude that the unauthorized diversion of funds resulted in a deprivation of the SIF #1 investors' funds, by causing a risk of prejudice to those funds and to the investors' interests.

[176] Because of the causal link between the diversion and a risk of prejudice, and because Staff relies here on "other fraudulent means" (*e.g.*, unauthorized diversion of funds) as opposed to falsehood or deceit, Staff need not prove that investors actually relied on the act that proved to be dishonest.[50] Staff has proven the dishonest act undertaken voluntarily by the respondents, and a deprivation caused by that dishonest act. Staff has therefore established the *actus reus* elements of its fraud allegations.

4. Subject to their defence of reasonable reliance on legal advice, did each respondent have subjective knowledge of the fraudulent act?

(a) Introduction

[177] We turn to consider the mental element of the fraud allegations, which is established where: one is subjectively aware that (i) they are undertaking a prohibited act; and (ii) the prohibited act could cause deprivation.[51]

[178] Staff need not show that a respondent regarded the act as dishonest. In the case of a dishonest means (*e.g.*, unauthorized diversion of funds), subjective awareness of the prohibited act is proven where the person knowingly undertook the act. It is not necessary to prove that they knew that the act was prohibited.[52]

[179] We begin our analysis of the mental element with the first of the two elements mentioned above, *i.e.*, whether the respondent was subjectively aware that they were undertaking a prohibited act. We will review the circumstances relevant to each respondent and then, before concluding on this first component, consider whether the legal advice provided by Aird & Berlis to the respondents affects our conclusions.

[180] As we consider each respondent individually, we bear in mind that subjective awareness may be established by showing recklessness.[53] If one is aware that there is danger that their conduct could bring about the prohibited result, but persists despite the risk, that person is reckless and that subjective element is proved.[54]

[181] We also highlight the words "reasonably ought to know" in s. 126.1(1). This constructive knowledge principle makes clear that Staff may prove the element of knowledge of the fraudulent act by establishing that the respondent reasonably ought to have known that the impugned act, practice or course of conduct perpetrates a fraud. The Commission has previously[55] adopted the reasoning of the British Columbia Court of Appeal, which held in the context of the corresponding provision in the British Columbia statute that the words "reasonably ought to know" bring within the provision those who engage in a course of conduct and ought reasonably to know that a fraud is being perpetrated by others.[56]

[182] Staff and the respondents approach the import of those words differently. The respondents note that the *Natural Bee Works* decision of the Commission, on which Staff relies, applies the "reasonably ought to have known" standard to those who participate in the same "scheme" as an individual found to have perpetrated a fraud. The respondents imply, without saying as much, that the word "scheme" carries a more pejorative meaning and requires a greater degree of co-operation in the fraud than would be the case without that word. Whether or not that is a fair interpretation of the word "scheme", that submission does not assist the respondents. While *Natural Bee Works* happened to involve a "scheme" (as described by the Commission in its decision), we reject the respondents' submission that in that case the Commission noted that the constructive knowledge element applies only where there is a 'scheme'. We read nothing in the decision as limiting the application of the constructive knowledge standard to where a "scheme" exists.

[183] Neither the words of s. 126.1(1)(b) nor the words of the British Columbia Court of Appeal referred to above support the respondents' suggestion. Nor do those words undermine the principle, correctly submitted by the respondents, that Staff must prove a mental element for each participant in the fraud. The point is that under s. 126.1(1)(b), Staff need not prove that the particular respondent actually knew that the course of conduct was fraudulent; rather, Staff may prove the mental

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49 *Re Borealis International Inc.,* 2011 ONSEC 2, (2011) 34 OSCB 777 at para 108
50 *R v Riesberry*, 2015 SCC 65 at para 26
51 *Théroux* at para 21
52 *Théroux* at para 22
53 *Théroux* at para 25
54 *Sansregret v The Queen*, [1985] 1 SCR 570
55 *Re Bradon Technologies Ltd*, 2015 ONSEC 26, (2015) 38 OSCB 6763 at para 232 (***Bradon***); Re Natural Bee Works Apiaries, 2019 ONSEC 23, (2019) 42 O.S.C.B. 5905 at para 104 (***Natural Bee Works***)
56 *Anderson v. British Columbia Securities Commission*, 2004 BCCA 7

element by showing that the respondent reasonably ought to have known that the course of conduct in which the respondent is participating amounts to a fraud being perpetrated by one of the other participants.

[184] Finally, by way of introduction, we repeat the limits of Staff's fraud allegations. In its written submissions, Staff addresses in detail each respondent's knowledge of and involvement in the loans of funds from SIF #1 to SIF #2. Many of these submissions relate to the s. 44(2) allegations. In analyzing the fraud allegations, we confine ourselves to those payments relating to the payment of dealer fees and investor distributions, without reference to loans made for other purposes.

(b) Mr. Grossman

[185] With those principles in mind, we begin with Mr. Grossman.

[186] Mr. Grossman was SIF Inc.'s Chief Operating Officer from December 18, 2009, to May 15, 2014, its Chief Financial Officer from November 25, 2013, to June 10, 2014, and its Vice President Finance from May 15, 2014, onwards. He became a director of SIF Inc. on November 25, 2013. He was the only person who was a director and/or officer of SIF Inc. for the entire period of March 2013 to December 2016.

[187] Mr. Grossman agreed that an investor reading the offering memorandum would conclude that he was a directing mind of SIF Inc., and that there was nothing in the offering memorandum to suggest otherwise. We find that he was a directing mind of SIF Inc. throughout the period of March 2013 to December 2016.

[188] Mr. Grossman testified that the management committee authorized all of the transfers from SIF #1 to SIF #2, whether individually or as one or more groups of transactions. As a general matter, transfers were made from SIF #1 to SIF #2 whenever the need for money arose in SIF #2.

[189] Mr. Grossman admitted that he authorized the use of SIF #1 funds to pay SIF #2's dealer fees and distributions, and he did so to maintain the confidence of the SIF #2 investors and exempt market dealers. However, he explained that based on his own interpretation of the offering memorandum and advice he had earlier received from Aird & Berlis, he believed this was an authorized use of funds.

[190] We discuss the Aird & Berlis legal advice below. Mr. Grossman's mistaken interpretation of the offering memorandum is of no assistance to him. He is bound by what the offering memorandum said and what it actually meant, not his interpretation at the time, an interpretation he now concedes was incorrect.

[191] Mr. Grossman authorized the transfers of funds for the unauthorized purposes, and knew that by doing so, SIF #1's funds (and by extension the funds of SIF #1 investors) were being subjected to risks not previously applicable to those funds. Staff has therefore proven, subject to the legal advice defence, that Mr. Grossman was subjectively aware of the fraudulent act.

[192] Because Mr. Grossman was a directing mind of SIF Inc., the company is deemed to have had subjective knowledge of the fraudulent act, subject to the legal advice defence.

(c) Mr. Mazzacato

[193] Staff submits that it is uncontroverted that Mr. Mazzacato was an owner and director of SIF Inc., a member of the management team, and a directing mind for all the impugned fraudulent transactions. Indeed, Mr. Mazzacato does not dispute this assertion in his submissions. He acknowledges that he became a member of SIF Inc.'s management team upon joining the company in May 2014, even though at the time he joined, he knew little to nothing about SIF #1 or how it worked (although he was aware that SIF Inc. was SIF #1's manager), but as time went on, he came to understand what SIF #1 and the offering memorandum were.

[194] Mr. Mazzacato also emphasizes that he had no prior experience with respect to the exempt market. He testified that he relied on Mr. Grossman and Mr. Kadonoff to advise him of the contents of the offering memorandum. Mr. Mazzacato took no independent steps to understand what the document contained.

[195] He testified that in the late summer of 2015, when Mr. Grossman and Mr. Kadonoff asked him to become SIF Inc.'s President, he was reluctant to take on the role because of his lack of education or expertise in financing, accounting or legal matters, and his lack of knowledge about the financial and legal aspects of SIF Inc.'s business. He states that Mr. Grossman and Mr. Kadonoff assured him that he could rely on them for those matters and continue to focus on project origination and the technical aspects of the business.

[196] From Mr. Mazzacato's perspective, he had no responsibilities beyond those. During the hearing, Mr. Mazzacato took pains to confine the subject areas over which he exercised oversight while he was President. However, he agreed that he had "ultimate responsibility" for ensuring that SIF #1 didn't do anything that was contrary to its offering memorandum.[57]

[197] Mr. Mazzacato signed many cheques transferring funds from SIF #1 to SIF #2. Two are relevant – one in December 2015 (referred to in paragraph [98] above) and one in February 2016, both on the operating trust account of SIF #1. The two cheques were payable to the SIF #2 operating trust and clearly showed that the payments were to cover SIF #2 distributions. However, he testified that he chose not to scrutinize the reasons for the funds transfers being effected by cheques he signed, because he relied on others.

[198] Similarly, he never reviewed detailed bank statements for any of the SIF Inc. entities, nor did he monitor the amounts that were flowing into the various bank accounts. On August 21, 2015, when he signed the amended and restated management agreement between SIF Inc. and SIF #1, he did not carefully review the three-page schedule that specified the services that SIF Inc. was to provide to SIF #1. Once more, he relied on Mr. Grossman and Mr. Kadonoff to advise him of anything he needed to know of a legal or financial nature.

[199] Mr. Mazzacato submits that he should benefit from the same consideration given to two of the respondents in the Commission's decision in *YBM Magnex International Inc*.[58] Like Mr. Mazzacato, those two respondents (Messrs. Antes and Greenwald, who were retired scientists) were not experienced in securities law or public financing. They were involved with the company because of their scientific expertise, experience and connections. Under the circumstances present in that case, the Commission found that it was reasonable for the two respondents to rely on counsel.[59]

[200] While Mr. Mazzacato's circumstances have some commonality with those of the two *YBM Magnex* respondents, the differences easily outweigh those similarities. Messrs. Antes and Greenwald were directors only, and not officers of the company, and the context of their reliance was the actions of a special committee of the board, a committee of which neither respondent was a member. In stark contrast, Mr. Mazzacato was an officer of SIF Inc. throughout his time with the company, a member of the senior management group that made decisions by consensus, president of the company for part of his tenure, and by his own admission ultimately responsible for SIF #1's compliance with the offering memorandum during that time.

[201] Further, the Commission in *YBM Magnex* found that the two respondent directors "took their duties as directors seriously".[60] They made efforts to engage with the areas, unfamiliar to them, that formed part of their responsibilities as directors. The Commission acknowledged the position that the two individuals found themselves in, including their lack of experience in the capital markets.

[202] Despite this, the Commission concluded that Mr. Antes (who was more involved in the company's affairs than Mr. Greenwald was, and who was an active member of the Audit Committee) ought to have challenged legal advice given about potential disclosure of a material change.[61] In other words, the position of director (or officer) brings with it certain responsibilities that cannot be escaped by asserting a limited expertise and experience.

[203] Mr. Mazzacato did not demonstrate any interest in going beyond his area of expertise, even when he was president of the company. He was content to stick to what he knew and to rely on others for everything else, despite the fact that he was ultimately responsible.

[204] Mr. Mazzacato states that in early 2016, he was generally aware that SIF #1 was lending money to SIF #2, including for development of one particular project. However, Mr. Mazzacato says that because he did not have day-to-day responsibility for, or oversight of, financial matters at SIF Inc., SIF #1 or SIF #2, he was not aware of all circumstances relating to the loans.

[205] Mr. Mazzacato, in his affidavit, describes his understanding that SIF #1 was entitled to lend to SIF #2, and that SIF #2 was entitled to use those funds in accordance with the SIF #2 OM, which permitted the payment of dealer fees and investor distributions. Mr. Mazzacato explains that his understanding arose in the context of the decision to lend funds to SIF #2 in order to develop the project referred to in the preceding paragraph. Mr. Mazzacato says that he relied on assurances from Mr. Grossman and Mr. Kadonoff that SIF #1 could make these loans, and that they had obtained advice from Aird & Berlis regarding "all important matters".

[206] In his written submissions, Mr. Mazzacato challenges Staff's submission that he provided no support for his understanding as to the effect of the SIF #1 and SIF #2 offering memoranda. Mr. Mazzacato contends that Staff's submission is improper, because Staff did not cross-examine him on the point. We reject Mr. Mazzacato's submission,

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57 Hearing Transcript, Solar Income Fund (Re), April 8, 2021 at p91 line 25 to p92 line 2
58 (2003) 26 OSCB 5285 (***YBM Magnex***)
59 *YBM Magnex* at paras 326, 332
60 *YBM Magnex* at para 327
61 *YBM Magnex* at paras 329, 551

because Staff merely observes the absence of anything to corroborate his own testimony. In any event, though, nothing turns on it. Such a belief on Mr. Mazzacato's part would not constitute a defence to the allegation.

[207] With respect to exempt market dealers, Mr. Mazzacato states that he knew that SIF #2 had engaged various dealers, but he was not aware at the time that any fees were paid from any of the funds that SIF #1 loaned to SIF #2, although as stated above he believed such payments were permitted.

[208] Staff submits that this understanding is inconsistent with the SIF #1 offering memorandum and the purported advice received from Aird & Berlis.

[209] Staff asks us to reject Mr. Mazzacato's testimony about his lack of understanding and oversight, and participation in the decisions being made about the transfer of funds, because:

a. Mr. Mazzacato was an evasive witness who sought to minimize his involvement in the affairs of SIF Inc.;

b. Mr. Grossman testified that everyone on the management team authorized all transfers of cash from SIF #1 to SIF #2, and Mr. Grossman was not cross-examined on this point;

c. in a December 2017 written response to Staff's request for documents supporting authorization of transfers in 2013 to 2016, SIF Inc. described the management team as a "closed knit [*sic*] group" that had *ad hoc* meetings (without formal minutes) "all the time to make decisions", and stated that "the Board of Directors at the time was the group who authorized the transactions."[62]

[210] We do not accept Staff's characterization of Mr. Mazzacato as "evasive". Mr. Mazzacato answered questions directly. He did, however, consistently seek to minimize his involvement in SIF Inc.'s affairs.

[211] We weigh his testimony against the documentary evidence (including emails and cheques) and the testimony of the other principals. We conclude that it is more likely than not that Mr. Mazzacato sought then, as he does now, to limit his day-to-day activities to the areas in which he felt comfortable, *i.e.*, project origination and technical matters. Having said that, we also conclude that it is more likely than not that: (i) Mr. Mazzacato was present for, and participated in, discussions and decisions to a greater extent than he describes; and (ii) he had a greater understanding of the overall financial picture than his testimony would suggest.

[212] We have no doubt that at least in some measure, he deferred to Mr. Grossman and Mr. Kadonoff. But we do not accept that his deference excluded him from the decision-making process. It is apparent that he did not then, and does not now, fully appreciate the obligations that come with being a director and officer of a company that, through the related entities that it managed, raised funds from the public.

[213] Mr. Mazzacato was a directing mind of SIF Inc. from the time he joined the company in 2014. He is correct in saying that he had ultimate responsibility.

[214] It was not sufficient for him to abdicate that responsibility. One need not be expert in legal or financial matters to question whether it is appropriate to use the money raised from the public in one fund to pay distributions to investors in another fund, at a time when, to everyone's knowledge, the latter fund had insufficient cash to pay those distributions. We accept that someone with Mr. Mazzacato's background would not have a deep understanding of the competing principles at play, but the situation ought to have been a red flag for Mr. Mazzacato. As President with ultimate responsibility, the red flag should have prompted him to exercise some independent oversight regarding the legal advice that he says he understood had been obtained. Mr. Mazzacato took no such steps.

[215] Given his position, even if Mr. Mazzacato did not know that the transfer of funds for the impugned purposes was unauthorized, he was reckless about that, and he reasonably ought to have known. Staff has therefore successfully established that mental element, subject to the legal advice defence.

(d) Mr. Kadonoff

[216] During the summer of 2015, at the beginning of the ten-month period that is the subject of Staff's financial analysis in support of the fraud allegation (see paragraph [96] above), Mr. Kadonoff was the interim President of SIF Inc. He had previously been Vice President and General Counsel and had become a registered director and officer on June 10, 2014. This step did not significantly change his role at SIF Inc., although he states that while he "had a voice before", these new responsibilities gave him "a different voice", and he was "definitely involved in decision-making… from that point on."[63]

[62] Exhibit 32, Revised Exhibit A to the Dusseldorp Affidavit, Letter from Solar Income Fund enclosing response to November 10, 2017 Summons at p 3

[63] Exhibit 38, Kadonoff Affidavit at para 24; Hearing Transcript, Solar Income Fund (Re), April 1, 2021 at 110 lines 22-25

[217] Mr. Kadonoff testifies that Mr. Grossman was generally responsible for the financial aspects of SIF Inc. and the entities under SIF Inc.'s management. We accept that characterization. Mr. Kadonoff does concede, though, that when he became interim President in May 2015, his level of involvement in management increased. We have no difficulty concluding that Mr. Kadonoff was a directing mind of SIF Inc. from at least May 2015.

[218] While he testified that he did not focus on the source of funds used to pay the distributions, he states his belief that none of the funds used for distributions came from SIF #1 investor funds.

[219] Mr. Kadonoff described his involvement in SIF Inc.'s financial affairs as "extremely limited". He testified that he did not pay attention to the financial statements unless there was a problem or concern with them. He testified that he was "quite excluded" from the financial aspects at SIF Inc., but we interpret the word "excluded" to mean that he chose not to participate, as opposed to having his efforts to participate rebuffed. As Mr. Kadonoff himself explained:

> I didn't have an interest in it… both Paul [Ghezzi] and Allan [Grossman] were chartered accountants. There was, frankly, nothing I could add that – no value I could add to any of the conversations they were having on analysis, financial analysis, financial statements, any of that stuff. I trusted, I trusted them both in terms of taking care of the financial aspects of the business.[64]

[220] Whatever the extent of Mr. Kadonoff's obligation to familiarize himself with financial matters may be, it is clear that he chose not to do so. Further, the fact that Mr. Grossman was primarily responsible for financial matters does not preclude involvement by others or, more importantly, an obligation on others to have some degree of familiarity, especially when a management decision is made to effect a transaction.

[221] Staff submits that despite Mr. Kadonoff's denials, he must have known that the SIF #2 distribution payments in June, July and August 2015 were funded by loans from SIF #1:

a. on June 2/15 he signed a SIF #1 cheque for $530,000 payable to SIF #2; and

b. he knew that SIF #2:

   i. had stopped raising funds from investors in the spring of 2015 and did not resume that summer;

   ii. had not yet obtained any loans that could be used for distribution payments; and

   iii. was not generating any revenue because the project referred to above, SIF #2's only project, was under development and not yet operating.

[222] Staff does not allege that the $530,000 cheque signed by Mr. Kadonoff was specifically targeted for the payment of SIF #2 distributions. Indeed, Mr. Kadonoff submits that this amount did not pass through the SIF #2 account from which distributions were being paid. In reply, Staff did not contest this submission. Instead, Staff cites this payment in support of the proposition that Mr. Kadonoff was generally aware of SIF #2's financial situation (for the reasons listed above), and that money was being lent by SIF #1 to SIF #2 during that period.

[223] Mr. Kadonoff also testified that Mr. Grossman told him that the necessary funds originated in a loan that had been made from CPE Inc. to SIF #2. Staff asks us to reject this explanation, given Mr. Kadonoff's concession that he did not know at the time precisely when the loan was made or how much CPE Inc. was advancing. In fact, the CPE Inc. loan was for $51,500, which was a small fraction of the total amount transferred from SIF #1 to SIF #2 that summer, and less than one quarter of the total distributions paid to SIF #2 investors during that period.

[224] Mr. Kadonoff resigned on August 31, 2015, but continued some limited involvement in SIF Inc., partly because he retained signing authority on the bank account, and that authority had not yet been transferred to someone else.

[225] On September 1, 2015, Mr. Kadonoff wrote an email to a number of people, including Mr. Mazzacato and Mr. Grossman. In that email, Mr. Kadonoff relayed concerns from SIF Inc.'s then-CFO that SIF #2 did "not have the cash to pay distributions." Mr. Kadonoff said that he was "not comfortable borrowing funds from [SIF #1] for this purpose." He recommended that SIF #2 unitholders be advised that distributions could not be paid until additional funds were raised.[65]

[226] Soon after sending that email, and despite his concerns, Mr. Kadonoff signed a cheque for August distributions. Mr. Kadonoff says that he must have had discussions with one or more of Mr. Grossman, the CFO, the controller or others in accounting, in which he received comfort that there were sufficient funds. He also relied on a discussion he had with one of the Aird & Berlis lawyers (who had been copied on his September 1 email) about his concerns. Mr. Kadonoff says that in that discussion, he heard no advice that it would be improper to use loaned funds to pay distributions.

[64] Hearing Transcript, Solar Income Fund (Re), April 1, 2021 at 104 lines 21-28
[65] Exhibit 38, Kadonoff Affidavit, Tab 69

[227] Mr. Kadonoff submits that with respect to the impugned transactions in July and August of 2015, while he was an officer and director, and before he began objecting to the transfers, Staff has not proven that he approved the transactions or knew that they were occurring or inappropriate.

[228] In response, Staff emphasizes that by his own admission, Mr. Kadonoff failed to focus on or to investigate the source of funds used to make distributions. Staff relies on these concessions in support of its submission that Mr. Kadonoff was reckless or wilfully blind. Staff also cites a portion of Mr. Kadonoff's testimony in which he described his involvement in the financial areas of the firm as being "extremely limited", and "if they didn't bring up a question, I wasn't asking."[66] However, that answer specifically relates to the time period before June 2014, more than one year prior to the period during which Staff alleges that Mr. Kadonoff was complicit in using SIF #1 funds to pay SIF #2 distributions. We reject Staff's invitation to link the two.

[229] Staff also points out that Mr. Kadonoff did not ask questions about the fact that SIF #2 was making payments for marketing services in July and August of 2015. As we concluded above, the payments for marketing services are not properly the subject of Staff's fraud allegations. However, Mr. Kadonoff's inaction with respect to them reinforces his own contention that he paid little attention to financial matters at the firm.

[230] There is a troublesome similarity between Mr. Kadonoff's characterization of his obligations as President and that of Mr. Mazzacato. SIF Inc. was a small company with just a few members of senior management. We find it implausible that Mr. Grossman was left to manage, on his own, the financial affairs of SIF Inc. and entities it managed, and that two Presidents in a row chose to ignore even high-level indicators of the financial health of the business.

[231] We find that it is more likely than not that Mr. Kadonoff understood the overall financial picture, and that he knew funds were being transferred from SIF #1 to SIF #2 to pay whatever obligations SIF #2 had. As Staff correctly observes, during the summer of 2015, SIF #2 was no longer raising funds, had not obtained any loans that could be used to fund distributions, and was not earning any revenue.

[232] SIF #2's suspension of the capital raise was caused by Ms. Jackson identifying concerns about SIF Inc.'s accounting and record-keeping. Mr. Kadonoff supported Ms. Jackson's request that SIF Inc. retain a forensic accounting firm to conduct a preliminary investigation. The investigation resulted in no findings of negligence or misconduct, but SIF #2's situation caused significant turmoil, including the temporary exclusion of Mr. Grossman and some accounting staff from SIF Inc.'s office. There can be no doubt that SIF #2's need for funds was prominent for all of the individual respondents.

[233] After his resignation, Mr. Kadonoff briefly retained signing authority, until that was fully transferred to Mr. Mazzacato. Mr. Kadonoff continued to work as a consultant for SIF Inc. until February 16, 2016, so that he could complete financing transactions for SIF #1 and SIF #2. His relationship with SIF Inc. during this period was governed by the original retainer agreement entered into in mid-2011, although Mr. Kadonoff drafted a revised consulting agreement reflecting his narrow responsibilities, an agreement that Mr. Mazzacato refused to sign.

[234] In early October 2015, Mr. Kadonoff met with Mr. Grossman and Mr. Mazzacato to discuss, among other things, Mr. Kadonoff's view that unitholder distributions to SIF #2 investors should stop until SIF #2 could resume fundraising. Mr. Grossman and Mr. Mazzacato rejected this advice and advised that distributions would continue.

[235] Mr. Kadonoff wrote to Mr. Mazzacato and Mr. Grossman to express his opposition, stating that in his view "the distribution should not be made".[67]

[236] Mr. Kadonoff submits that he was clearly not part of any consensus decision-making after August 31, 2015. His involvement with SIF Inc. continued only until he could close a SIF #1 loan from a third-party lender in November 2015 and could help secure additional financing from that lender for SIF #2 in January 2016. Mr. Kadonoff's services were terminated in mid-February 2016.

[237] Mr. Kadonoff was right to raise concerns in September 2015 about SIF #1 lending funds to SIF #2 to pay distributions, although it is unclear precisely what motivated him to raise those concerns, and it is troubling that he signed the cheque for August distributions. Mr. Kadonoff is vague about comfort that he might have obtained to support his decision. Because a reasonable inquiry would have revealed that exactly what Mr. Kadonoff had feared was indeed happening, we cannot accept his wishful assertion that he relied on others to justify his signing the cheque.

[238] We find that Mr. Kadonoff was a directing mind of SIF Inc. until September 14, 2015, the date on which he authorized the cheque to pay the August distributions. We therefore conclude that Mr. Kadonoff was at least reckless, if not aware of, the fraudulent act. Staff has established that mental element, subject to the legal advice defence, to which we now turn.

[66] Hearing Transcript, Solar Income Fund (Re), April 1, 2021 at 105 lines 16-18
[67] Exhibit 38, Kadonoff Affidavit, para 127, footnote 72

5. Is the defence of reasonable reliance on legal advice available to the respondents on the facts of this case?

(a) Introduction

[239] We will now review the defence of reasonable reliance on legal advice and consider whether it is available to the respondents on the facts of this case.

[240] The defence is available in a Commission proceeding in respect of an allegation that requires Staff to establish an intentional or wilful act.[68] An allegation of fraud contrary to the Act falls into that category. The defence is therefore available, subject to a respondent satisfying the criteria for its use.

[241] Subsection 126.1(1) of the Act does not provide for a due diligence defence, and under these circumstances none is available. Instead, a respondent who asserts the defence must establish that:

a. the lawyer had sufficient knowledge of the facts on which to base the advice;

b. the lawyer was qualified to give the advice;

c. the advice was credible given the circumstances under which it was given; and

d. the respondent made sufficient enquiries and relied on the advice.[69]

[242] The last of these four components has a due diligence aspect to it, and even though the defence in this context is not a true due diligence defence, diligence on the part of the respondent asserting the defence may play a role both in the assessment of the mental element at the merits stage and as a potential mitigating factor at the sanctions stage (if any) of a proceeding.[70]

[243] In order to show actual reliance on the advice, as is required by the fourth criterion, the respondent must show that the advice was sufficiently clear, specific and connected to the impugned act, by addressing the question raised by that impugned act.[71] The advice need not necessarily be in contemplation of a single instance or transaction, but on the other hand it cannot be so broad or vague as to preclude reasonable reliance.

[244] With that legal background, we now consider whether the facts of this case support the availability of the defence for the respondents. We will then review the involvement of each individual respondent in the subject communications.

(b) Overall characterization of the advice given

[245] Aird & Berlis's client was SIF Inc., not the individual respondents. As a result, we focus on advice that Aird & Berlis provided to SIF Inc., no matter to which individual or individuals it was communicated.

[246] Staff and the respondents adopt starkly different characterizations of the legal advice that the respondents obtained from Aird & Berlis. Staff submits that the respondents and their counsel all conceded that the respondents never received specific legal advice on the permissibility of the various impugned transactions in this case. The respondents submit that Ms. Nelligan's evidence was that the respondents "sought and received advice on the very issue at the heart of the case – whether it was permissible for SIF1 to lend money to related or third party entities."[72]

[247] The apparent contradiction between Staff's assertion that the respondents conceded the point and the respondents' assertion that the evidence shows they received advice on the central issue can be explained by noting the difference in the way the parties describe the issue about which advice was sought. This difference is critical as we analyze the availability of the defence.

[248] Staff and the respondents agree that the advice related to the permissibility of SIF #1 lending money to SIF #2. However, in their characterization of the issue, the respondents stop there. In so doing, they fail to embrace the pivotal element of Staff's fraud allegations – whether the loans were made for permissible purposes.

[249] We agree with Staff's framing of the issue. The Statement of Allegations does not allege that no loans from SIF #1 to SIF #2 would be permissible. The allegation is that loans made for the purpose of paying dealer fees or distributions to SIF #2 investors would be impermissible. Staff submits that if advice was not received about this narrower issue, the defence

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68 *Re Crown Hill Capital Corp*, 2013 ONSEC 32, (2013) 36 OSCB 8721 at para 150, aff'd *Pushka v Ontario (Securities Commission)*, 2016 ONSC 3041 (***Crown Hill***)

69 *Phillips* at para 212; *Re Mega-C Power Corp*, 2010 ONSEC 19, (2010) 33 OSCB 8290 at para 261 (***Mega-C***)

70 *Re Aitkens*, 2018 ABASC 27 at para 72

71 *Crown Hill* at para 606; *Re CTC Crown Technologies* (1998), 8 ASCS 1940 at p8

72 Joint Written Submissions of Solar Income Fund Inc., Allan Grossman, Charles Mazzacato, and Kenneth Kadonoff, dated June 25, 2021 at para 17

of reliance on legal advice is unavailable, because the respondents cannot demonstrate that they fully complied with the fourth criterion above, *i.e.*, that they reasonably relied on advice that squarely addressed the issue presented.

[250] A close examination of the advice given is therefore required.

(c) Evidence about the advice sought and received

[251] In testifying about the advice she gave, Ms. Nelligan of Aird & Berlis distinguished between SIF #1's offering memorandum and the declaration of trust. She emphasized that in giving advice about what SIF #1 was permitted to do, she would refer to the declaration of trust (and not the offering memorandum), since the declaration of trust is the constating document.

[252] Ms. Nelligan testified that the offering memorandum summarizes the declaration of trust, but that it also contains elements not present in the declaration of trust, specifically a description of the short- and long-term goals of the SIF #1 trusts. She further testified that in assessing the propriety of proposed payments by SIF #1 for proposed investments, she would do so with reference to two components: (i) mutual fund trust rules; and (ii) the declaration of trust, and related considerations under general trust law.

[253] It is noteworthy that neither component refers to the offering memorandum or to Ontario securities law.

[254] In the summer of 2014, Mr. Kadonoff corresponded with Anne Miatello, the other partner at Aird & Berlis who was principally responsible for providing legal services to SIF Inc. (and who was then known as Anne Markle; we will refer to her throughout as Ms. Miatello). On June 25, Mr. Kadonoff wrote to her, saying that based on his reading of a provision of the SIF #1 offering memorandum, SIF #1 could "lend money for financing third party solar deals (including other SIF LPs) as an ancillary activity without acquiring the asset." He then asked whether she agreed with his conclusion that "acting as a short term lender (i.e. less than 1 year) is permitted."[73]

[255] On July 3, Ms. Miatello replied. The entire relevant portion of her email said: "I've looked at both declarations of trust. The operating trust can lend funds for financing solar deals to the LPs or unrelated entities. The MFT should not lend the money."[74]

[256] Ms. Nelligan testified that Ms. Miatello brought the question to her when Mr. Kadonoff asked it, that they discussed how to respond, and that Ms. Nelligan reviewed the reply before Ms. Miatello sent it.

[257] Ms. Nelligan explained that the reply's distinction between the operating trust and the mutual fund trust was to ensure compliance with the federal *Income Tax Act*.[75] She explicitly confirmed that Aird & Berlis did not consider the offering memorandum in giving the advice.

[258] Again, it is noteworthy that Ms. Miatello's reply does not refer to the offering memorandum, despite the fact that Mr. Kadonoff's question of Ms. Miatello referred to the offering memorandum and not the declarations of trust. We return below to this important misalignment of question and answer.

[259] The individual respondents rely heavily on the Aird & Berlis reply:

a. In his affidavit, Mr. Kadonoff describes Ms. Miatello's reply as having advised that SIF #1's operating trust could lend funds to other entities for solar deals (the acquisition, development, operation or financing of solar projects). In his oral testimony, Mr. Kadonoff's description was less limiting – he said that Ms. Miatello was opining that SIF #1 could make loans "really unconditionally" and without restriction as to the identity of the borrower, as long as the money came out of the operating trust.[76]

   Mr. Kadonoff further reports his second-hand understanding that in the fall of 2014, Aird & Berlis specifically confirmed the permissibility of short-term loans from SIF #1 to SIF #2 that were associated with the financing of solar projects.

b. In his affidavit, Mr. Mazzacato sets out his similar understanding. He also states that in September 2014, Mr. Kadonoff sought and obtained advice from Aird & Berlis about a proposed loan by SIF #1 to a related limited partnership for purposes of financing a solar project. Aird & Berlis gave advice and provided draft language setting out the terms.

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73 Exhibit 32, Revised Exhibit A to the Dusseldorp Affidavit, Emails between Allan Grossman, Ken Kadonoff, Jennifer Jackson, Charles Mazzacato and Anne Markle Re: MFT as a lender at p 1

74 Exhibit 32, Revised Exhibit A to the Dusseldorp Affidavit, Emails between Allan Grossman, Ken Kadonoff, Jennifer Jackson, Charles Mazzacato and Anne Markle Re: MFT as a lender at p 2

75 RSC, 1985, c 1 (5th Supp)

76 Hearing Transcript, Solar Income Fund (Re), April 6, 2021 at 17-18

c. On direct examination by his counsel, Mr. Grossman described the reply from Aird & Berlis as having given "carte blanche on lending funds". When cross-examined, Mr. Grossman apologized for that choice of words, but agreed with the suggestion that he believed that the Aird & Berlis reply confirmed an unlimited opportunity to lend money from SIF #1 to other entities, as long as that was done through the operating trust.

[260] The respondents' description of the Aird & Berlis advice as being unrestricted permission, subject only to the funds coming out of the operating trust as opposed to the mutual fund trust, is at odds with the text of Ms. Miatello's email, for two reasons.

[261] First, that text clearly states that loans must be "for financing solar deals", and that the advice is based on her review of the declarations of trust. We note Ms. Nelligan's testimony that Aird & Berlis was never asked for, and never provided, advice about whether that phrase could encompass any specific kinds of transactions. In particular, Aird & Berlis did not provide advice about whether loans to permit payment of distributions, or loans to permit payment of dealer fees, would constitute financing of a solar deal. Given that the ordinary meaning of the words "financing solar deals" would not include the payment of distributions at least, if not exempt market dealer fees as well, it was incumbent on those claiming to have received legal advice to have ensured that they truly were receiving an answer to a question they now say they asked.

[262] Second, since Mr. Kadonoff's email to Ms. Nelligan asking for the advice was limited to loans of less than one year, her advice must be taken to apply to such loans. We can neither conclude that the advice would apply equally to longer-term loans, nor can we exclude that possibility. What is clear is that in the context of the exchange of emails, no advice was given about loans of more than one year. Accordingly, Staff submits that the respondents cannot rely on the legal advice contained in this email as a defence in respect of the SIF #2 loans, which were advanced over more than 20 months.

[263] The respondents also seek comfort from Aird & Berlis's letter of April 24, 2015, about a credit agreement of the same day involving a loan from a third-party lender to Solar Income Fund LP (#5), an LP unrelated to the issues before us. In the relevant part of that opinion, Aird & Berlis opines that the various agreements making up the transaction did not and would not breach or constitute a default under "to our knowledge, any of the terms, provisions or conditions of any agreement, indenture, instrument or other document to which SIF or SIF Trust is party or by which SIF or SIF Trust or any of their respective property or assets is or may be bound or subject."[77]

[264] We reject the respondents' submission that this letter is of any assistance. It is a transaction-related opinion addressed to third parties, with no reference to the offering memorandum or to Ontario securities law. The cited passage has neither the specificity nor the relevance to entitle a respondent to rely on it as part of a legal advice defence.

[265] We pause our review of the evidence to emphasize that reviewing declarations of trust to determine what is permissible according to trust law is significantly different from reviewing an offering memorandum to determine whether an intended use of investor funds conforms to investors' reasonable expectations. The two questions arise in different contexts, and each requires its own lens.

[266] The reasonable expectations of investors who receive an offering memorandum inform the answer to the pivotal question of whether a use of SIF #1 funds was authorized or not. For a respondent to rely on legal advice in respect of the allegations in this proceeding, that advice must be viewed not only in the context of securities law (as opposed to trust law), but also in the context of the relationship between legal counsel and their client.

[267] Ms. Nelligan testified that as far as she could recall, only once in the course of the relationship with SIF Inc. was Aird & Berlis asked to give advice about the permissibility of a specific use of funds loaned from SIF #1 to SIF #2. The request for advice was about a short-term loan to pay deposits in connection with the purchase of a particular project.

[268] Mr. Grossman suggests that there was at least one other occasion on which the question was asked of Aird & Berlis. He cites the September 1, 2015, email from Mr. Kadonoff to Mr. Mazzacato and him, as well as the Aird & Berlis lawyers, in which Mr. Kadonoff asks Aird & Berlis to opine on various issues relating to SIF #2 (discussed at paragraph [225] above). That email contains Mr. Kadonoff's concern about SIF #2 borrowing funds from SIF #1 to pay distributions to SIF #2 investors.

[269] The respondents rely in part on a handwritten note in the Aird & Berlis file, most of which is redacted in our record. The visible portions record the date (September 1, 2015), the subject "MFT #2 raise", and a list of issues, only one of which is unredacted. The text relating to that issue is limited to the question "suspending distributions?", to which the notes in apparent response are "OK → at Manager's discretion" and "what about DRIP?". There is one marginal note "o/s issue" with an arrow pointing to one or both of those last two lines.[78] This note confirms the respondents' contention that one of

[77] Exhibit 32, Revised Exhibit A to the Dusseldorp Affidavit, Letter from Aird & Berlis to Sprott Bridging Income Fund LP c/o Bridging Finance Inc. and Dale & Lessmann LLP at p 7

[78] Exhibit 38, Kadonoff Affidavit, Tab 70

the topics of the call was distributions. Nothing in the note suggests that the question of whether loans could be made from SIF #1 to SIF #2 to pay distributions was mentioned in the call.

[270] Further, Ms. Nelligan testified that she understood Mr. Kadonoff's concern to be whether he might have been personally liable in the same way that a director of a corporation would.

[271] In conversations leading up to November 25, 2014, and in an email of that date to Mr. Grossman confirming those conversations, Aird & Berlis listed a number of concerns that should be addressed. These included considerations about the method by which the deposits would be paid, the time horizon and risks of the loan, costs and benefits to each of SIF #1 and SIF #2, and SIF Inc.'s policy for allocating opportunities between funds.

[272] The subject matter and form of this email stand in stark contrast to the advice on which the respondents say they should be able to rely. First, the payments that are the subject of the email relate directly and immediately to the acquisition of a solar project (unlike distributions and dealer fees). Second, the email carefully documents concerns that Aird & Berlis raised in earlier conversations.

[273] We accept Ms. Nelligan's testimony that this was the only occasion on which Aird & Berlis gave advice about a specific use of funds loaned from SIF #1 to SIF #2. The only evidence that might suggest a contrary conclusion is that relating to the July 3, 2014, email from Ms. Miatello (which we have already discussed) and Mr. Kadonoff's testimony about a telephone call he had with Ms. Nelligan on October 8, 2015.

[274] In his affidavit, Mr. Kadonoff states that he sought Ms. Nelligan's advice on, among other things, the propriety of continuing distributions to SIF #2 unitholders in light of SIF #2's lack of cash, and of using a loan from SIF #1 to SIF #2 to fund the distributions.

[275] Mr. Kadonoff's description of his call with Ms. Nelligan is carefully worded. He does not actually state that Ms. Nelligan expressly gave any advice; rather, Mr. Kadonoff inferred the propriety of a loan because Ms. Nelligan raised no concerns. Mr. Kadonoff states that:

a. he "believes" that he "fully disclosed [his] understanding that advances for that purpose would be required if distributions continued" and that he raised concerns about the permissibility of such a loan;

b. he "believes" that he and Ms. Nelligan discussed the fact that he was seeking legal advice from Aird & Berlis "about the use of loaned funds for distributions in light of the cash flow issues"; and

c. he raised the issue "on several occasions and… was never advised by [any of the Aird & Berlis lawyers] that distributions to SIF #2 investors should not or could not be made".[79]

[276] Mr. Kadonoff also points to Ms. Nelligan's handwritten note of the conversation. That note is one half-page, most of which was redacted (for solicitor-client privilege) in the version tendered to us. The unredacted portion consists, in its entirety, of the date of the call, the fact that it was a call from Mr. Kadonoff, a hand-drawn diagram of overlapping ovals with two instances of the word "trustee", and one line saying "- distributions may be made".

[277] In his affidavit, Mr. Kadonoff states that this last element "is consistent with what" he believes the two discussed.[80] However, to the extent Mr. Kadonoff seeks to rely on this note as part of a legal advice defence, that reliance is misplaced, for many reasons:

a. as is quite often the case with notes of this kind, the note is, to use Mr. Kadonoff's own description of it, "cryptic" to anyone but the author;

b. on its face, the phrase "distributions may be made" is entirely ambiguous as to whether it reflects Mr. Kadonoff telling Ms. Nelligan that distributions might be made in the future (a possible interpretation that Mr. Kadonoff does not contradict), or Ms. Nelligan giving advice that distributions are permissible;

c. we are not persuaded by Mr. Kadonoff's attempt under direct examination to enhance the value of the phrase, when he testified that it "is really consistent with what I believe I heard";[81]

d. even if the phrase does reflect Ms. Nelligan's advice, it says only that distributions may be made – it makes no reference to a loan from SIF #1 to SIF #2 for the purpose; indeed, on cross-examination, Mr. Kadonoff conceded

[79] Exhibit 38, Kadonoff Affidavit at paras 128-129
[80] Exhibit 38, Kadonoff Affidavit at para 129
[81] Hearing Transcript, Solar Income Fund (Re), April 6, 2021 at 52 lines 27-28

that he did not recall Ms. Nelligan giving advice about that issue, although he "didn't hear any objection to it being done";[82] and

e. Ms. Nelligan acknowledged that information about distributions may have been imparted to her, but she testified that to her knowledge, no one raised with Aird & Berlis a concern about using SIF #1 loan funds to pay SIF #2 distributions, and Aird & Berlis never gave advice on that issue.

[278] We reach the same conclusion about the Aird & Berlis note of a call on October 21, 2015, that included Mr. Kadonoff, Mr. Mazzacato and Mr. Grossman. The unredacted part of the note reflects that SIF #1 had been and was continuing to fund SIF #2 to "keep #2 going", and that both were still paying distributions. The full context of the note is unclear, but Ms. Nelligan repeats her earlier assertion that Aird & Berlis was not asked if it had any concerns, and Aird & Berlis did not raise any concerns.

[279] We conclude our review of the advice sought and received by finding that to the extent Ms. Nelligan's testimony differs from Mr. Kadonoff's or that of either of the other individual respondents, we prefer hers. She was candid about her ability to recall events, her testimony was internally consistent about the scope of questions asked and advice given, her testimony was consistent with the documentary record, and her explanations were reasonable. Her distinction between the questions on which Aird & Berlis gave advice and questions that were not asked was consistent with the documentary record and with the practice that would be expected from any professional giving advice.

[280] Any attempts by the respondents to undermine or embellish her testimony are, in our view, the product of after-the-fact mischaracterizations of documents in the record, and wishful (at best) recollections of conversations that occurred more than five years before the respondents testified about them in this hearing.

(d) Involvement of the individual respondents in receiving the legal advice

[281] SIF Inc. used the law firm of Aird & Berlis for much of its legal work. Mr. Grossman recounted interviewing two law firms to do SIF Inc.'s legal work and choosing Aird & Berlis.

[282] The individual respondents were, to varying extents, involved in some way in communication with Aird & Berlis. While Mr. Grossman and Mr. Kadonoff had more frequent communication with Aird & Berlis than Mr. Mazzacato did, all three were included on most or all of the material written communications.

[283] The most pivotal communication, according to the respondents, serves as an example. When Mr. Kadonoff received the July 3, 2014, response from Aird & Berlis noting that Ms. Miatello had "looked at both declarations of trust" and had concluded that the "operating trust can lend funds for financing solar deals to the LPs or unrelated entities", Mr. Kadonoff forwarded the email minutes later to Mr. Grossman and Mr. Mazzacato.[83]

[284] Mr. Mazzacato testified that he did not believe he saw the email at the time, that he was focused at the time on origination and technical matters, and that he relied on others to tell him that SIF Inc. had received the necessary legal advice. He submits that because Staff did not question him about his understanding of the legal advice or the reasonableness of his belief about that advice, Staff is precluded from arguing to the contrary.

[285] We disagree. As Staff correctly submits, the burden is on Mr. Mazzacato to establish reasonable reliance on legal advice. Mr. Mazzacato failed to do so. Staff is entitled to rely, as it has, on all of the relevant evidence regarding the steps Mr. Mazzacato took and did not take with respect to the legal advice. Further, it was abundantly clear at least from the beginning of the hearing, if not earlier in the proceeding, that Staff sought to challenge the reasonableness of the respondents' reliance on legal advice. The principle protected by *Browne v Dunn*, *i.e.*, affording a respondent a fair opportunity to address the case against them, suffered no damage whatsoever.

[286] We conclude from the fact that the individual respondents are shown on the material communications, together with the ongoing discussions among the small management committee, that there is no reason to differentiate among the individual respondents with respect to the benefit any of them might derive from Aird & Berlis's advice.

(e) Conclusion about legal advice

[287] None of the respondents' assertions about advice received approaches the level necessary to establish the defence of reasonable reliance on legal advice. Even if Mr. Kadonoff's recollection of the discussion set out beginning at paragraph [285] above is correct (a determination we need not make and decline to make), silence from one's lawyer is insufficient to establish reasonable reliance on a question as central and as specific as this, *i.e.*, does the offering memorandum permit loans from SIF #1 to SIF #2 for these two purposes?

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82 Hearing Transcript, Solar Income Fund (Re), April 6, 2021 at 52 lines 5-7

83 Exhibit 32, Revised Exhibit A to the Dusseldorp Affidavit, Emails between Allan Grossman, Ken Kadonoff, Jennifer Jackson, Charles Mazzacato and Anne Markle Re: MFT as a lender

[288] In concluding that silence is insufficient, we need not resort to the American jurisprudence that Staff submitted as part of its reply submissions. The test set out in *Phillips* and in *Mega-C* (see paragraph [239] above) necessarily presumes that the client received advice. This is not the defence of reliance on passive acquiescence.

[289] The respondents refer to a number of communications between SIF Inc. and Aird & Berlis where some sort of concerns were raised, and some answer was given. In none of these communications was there sufficient precision in either the questions (which were generally not focused on one particular concern) or more importantly the answers, for us to conclude that the respondents received the legal advice they now submit they did receive.

[290] As the respondents have correctly submitted that we must do, we have considered the nature of the communications between SIF Inc. and Aird & Berlis in the context of the overall solicitor-client relationship. We have used the many communications in evidence before us as a standard against which to measure the advice that the respondents say SIF Inc. received on the question of whether loans to pay distributions and dealer fees were permitted. We agree with the respondents' submission that Aird & Berlis's silence on the point is "significant". However, we reach the opposite conclusion from this than the respondents suggest when they say that the silence "was something that the Respondents could reasonably rely upon".

[291] The evidence demonstrates that all respondents were included on communications on which they now rely. It was open to each one of them, whether legally trained or not, at least to read carefully the advice on the important question, and to form an independent view and to ask questions if necessary. None of them did.

[292] Before we leave our discussion of the defence of reliance on legal advice, we wish to address Staff's request that we draw an adverse inference against the respondents, due to their decision not to call Ms. Miatello, author of the two emails sent in July and November, 2014. We decline to draw such an inference in this case. The emails speak for themselves, and having Ms. Miatello explain what she intended by their content would not assist us in determining their value to the respondents.

[293] We do not accept Staff's reply submission that the respondents' decision not to call Ms. Miatello precludes Staff from testing the respondents' understanding of her advice and whether it was reasonable in the circumstances. We have found no advice from Ms. Miatello that could operate as a defence to the two fraud allegations in this case, so there is no need to consider the respondents' understanding of any other advice she gave.

[294] In conclusion, there is no clear evidence whatsoever that Aird & Berlis actually gave any advice regarding the question at issue, *i.e.*, whether the offering memorandum permitted SIF #1 to use its funds to lend to SIF #2 for the purpose of paying dealer fees and SIF #2 investor distributions. Therefore, none of the four respondents has available the defence of reliance upon legal advice.

6. Did each respondent have subjective knowledge that the fraudulent act could have as a consequence the deprivation of another?

[295] The final element Staff must prove as part of its fraud allegations is that each respondent subjectively knew that the impugned act could have as a consequence the deprivation of another.

[296] As we have discussed above, the deprivation at issue in this case arises because the investors' funds were subjected to risks that the investors had not bargained for and that were not disclosed to them.

[297] We have found that all individual respondents were aware or reasonably ought to have been aware that the purpose of the impugned transactions was to pay SIF #2 investor distributions and dealer fees. It follows inexorably from the unauthorized diversion of funds that those funds are exposed to different risks, and therefore that deprivation is a consequence. Staff having proved the first part of the mental element need not prove anything further, given the circumstances of this case where the deprivation is an automatic result of the fraudulent act. It is sufficient to infer, as we do, subjective awareness from the act itself.[84]

7. Conclusion regarding fraud

[298] For the reasons we have set out above, SIF Inc. effected an unauthorized and wrongful transfer of funds from SIF #1 to SIF #2 for improper purposes, and thereby deprived SIF #1 investors. The *actus reus* has been established.

[299] SIF Inc. is deemed to have had subjective knowledge of the fraudulent act, since all three of its directing minds knew or ought reasonably to have known of the fraudulent act.

[84] *Théroux* at para 20

[300] We find that by causing SIF #1 to make loans to SIF #2 that were improper to the extent of the investor distributions and dealer fees (*i.e.*, $234,864.04; see paragraph [103] above for the calculation of that amount), SIF Inc. contravened s. 126.1(1)(b) of the Act.

[301] As for the individual respondents, each attempted to limit his own responsibility, including by professing near-total reliance on others. We found that to be remarkable, particularly for Mr. Mazzacato and Mr. Kadonoff, each of whom was President of SIF Inc. for part of the period during which the impugned transfers were made.

[302] The individual respondents' submissions are inconsistent with the obligations that come with being one of three or four members of senior management of an entity that raises funds from the public. This is particularly so, given the overwhelming preponderance of evidence, which we accept, that the management team met regularly and made decisions by consensus. We recognize that each member of a corporation's management will inevitably adopt a unique focus, often based in large part on previous experience and expertise. This reality does not, however, relieve a corporation's officers from their legal obligations. These three officers, under these circumstances, suggest an approach to corporate governance that is inappropriate for a public issuer and that undermines investor protection and the integrity of the capital markets.

[303] Mr. Grossman conceded that he knew the purpose of the transfers. If Mr. Mazzacato and Mr. Kadonoff did not know, they were reckless about that.

[304] As for any legal advice that was obtained, we conclude that it is more likely than not that the respondents were not focused at that time on whether the offering memorandum permitted the loans. Their concerns about the propriety of the loans arose from other considerations, including tax law, trust law, and personal liability. Had the respondents asked the right question of their lawyers, as they ought to have done, they would likely have received a direct answer. They could then have acted with the benefit of that advice.

[305] Instead, the respondents did not afford Aird & Berlis an opportunity to answer the direct question that was not asked. The diversion of funds they caused was an unauthorized one, and they knew or ought to have known that the funds were being diverted for those purposes.

[306] We therefore find that since Staff has established the necessary elements as against all three individual respondents, each of them contravened s. 126.1(1)(b) of the Act. We must now calculate the amount of the fraud for which each individual respondent is responsible.

[307] Because Mr. Grossman and Mr. Mazzacato were directing minds of SIF Inc. throughout the ten-month period of July 1, 2015, to May 5, 2016 that Staff used for its calculations, they are responsible for the full amount of $234,864.04, being the total of $223,224.04 for distributions and $11,640.00 for dealer fees. We repeat our note above that we accept Staff's conservative analysis of the use of funds available in the SIF #2 fund account, and specifically Staff's application of a $37,935.34 reduction to reflect the use of an opening balance in that account. That reduction is reflected in the total of $234,864.04.

[308] Mr. Kadonoff's responsibility spans only a portion of the ten-month period that is the subject of Staff's analysis. For Mr. Kadonoff, the relevant sub-period runs from July 1, 2015 (the beginning of Staff's ten-month period) to September 14, 2015 (the date on which he authorized payment of SIF #2 distributions using funds loaned from SIF #1). In that shorter period, three months' worth of distributions were paid -- $25,680.67 in the first half of July, and the same amount in each of the first half of August and the first half of September.

[309] As we mentioned above in paragraph [102], Staff's adjustment was applied on a chronological basis as impugned payments were made, and was fully consumed by those payments by July 22, 2015. We give Mr. Kadonoff the benefit of that conservative approach and exclude the June 2015 distributions paid in the first half of July. That leaves a total of $51,721.34 that Mr. Kadonoff shares responsibility for, being the two $25,860.67 payments in August and September. In the relevant period, no dealer fees were paid until September 22, 2015, by which time Mr. Kadonoff had resigned and was no longer signing cheques.

C. Are any of the individual respondents to be held liable under s. 129.2 of the Act?

[310] Section 129.2 of the Act attaches liability to an individual for non-compliance by a corporation, in certain circumstances. For s. 129.2 to apply, the individual must have been a director or officer of the company that failed to comply with Ontario securities law. The individual director or officer must also have "authorized, permitted or acquiesced in" the company's non-compliance.

[311] Having found that each of the individual respondents directly contravened s. 126.1(1)(b) of the Act to the full extent of SIF Inc.'s non-compliance during the period relevant to each respondent, it is unnecessary for us to consider separately any potential liability under s. 129.2. We decline to do so.

D. Conduct contrary to the public interest

[312] The Statement of Allegations includes an allegation that the respondents engaged in conduct "contrary to the public interest". The Statement of Allegations contains no particulars of that allegation.

[313] As the Commission found on the earlier motion in this proceeding, referred to above, a submission that the Commission ought to make an order under s. 127 of the Act absent a contravention of Ontario securities law must be supported by sufficient particulars and submissions.[85] Staff offered no particulars or submissions on this point, other than a bald suggestion that the respondents' conduct was contrary to the public interest.

[314] Accordingly, Staff's allegation is dismissed.

V. CONCLUSION

[315] We dismiss Staff's allegations that the respondents contravened s. 44(2) of the Act, because we conclude that statements made by the respondents to investors (including in the offering memorandum) were not ones that a reasonable investor would consider relevant in deciding whether to enter into or maintain a trading relationship with SIF Inc.

[316] With respect to the allegations that the respondents contravened s. 126.1(1)(b) by causing SIF #1 to divert funds for purposes unauthorized by the offering memorandum, we find each of them to have contravened s. 126.1(1)(b), to the following extents:

a. $234,864.04 for SIF Inc., Mr. Grossman and Mr. Mazzacato; and

b. $51,721.34 for Mr. Kadonoff.

[317] The parties shall contact the Registrar by 4:30pm on April 14, 2022, to arrange an attendance in respect of a hearing regarding sanctions and costs. The attendance is to take place on a date that is mutually convenient, that is fixed by the Secretary and that is no later than April 29, 2022.

[318] If the parties are unable to present a mutually convenient date to the Registrar, then each party may submit to the Registrar, for consideration by a panel of the Commission, one-page written submissions regarding a date for the attendance. Any such submissions shall be submitted by 4:30pm on April 14, 2022.

Dated at Toronto this 28th day of March, 2022.

"Timothy Moseley"

"Frances Kordyback"

"Craig Hayman"

[85] *Solar Income Fund Inc. (Re)* Motion Decision at paras 70-76

Chapter 4

Cease Trading Orders

4.1.1 Temporary, Permanent & Rescinding Issuer Cease Trading Orders

Company Name	Date of Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/Revoke
THERE IS NOTHING TO REPORT THIS WEEK.				

Failure to File Cease Trade Orders

Company Name	Date of Order	Date of Revocation
RAMM Pharma Corp.	March 4, 2022	March 22, 2022
Reservoir Capital Corp.	August 4, 2021	March 22, 2022

4.2.1 Temporary, Permanent & Rescinding Management Cease Trading Orders

Company Name	Date of Order	Date of Lapse
THERE IS NOTHING TO REPORT THIS WEEK.		

4.2.2 Outstanding Management & Insider Cease Trading Orders

Company Name	Date of Order or Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/Expire	Date of Issuer Temporary Order
Performance Sports Group Ltd.	19 October 2016	31 October 2016	31 October 2016		

Company Name	Date of Order	Date of Lapse
Agrios Global Holdings Ltd.	September 17, 2020	
Reservoir Capital Corp.	May 5, 2021	

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Chapter 5

Rules and Policies

5.1.1 National Instrument 52-108 Auditor Oversight

AMENDMENTS TO
NATIONAL INSTRUMENT 52-108 *AUDITOR OVERSIGHT*

1. National Instrument 52-108 Auditor Oversight is amended by this Instrument.

2. The following is added after Part 3:

PART 3.1
SIGNIFICANT COMPONENT AUDITOR'S WORKING PAPERS

Definitions

7.1 In this Part,

"component" has the same meaning ascribed to it in Canadian GAAS;

"component auditor" has the same meaning ascribed to it in Canadian GAAS;

"CPAB access agreement" means a written agreement between CPAB and a significant component auditor governing access by CPAB to the significant component auditor's records related to audit work the significant component auditor has performed in relation to a component of a reporting issuer;

"CPAB access-limitation notice" means a written notice issued by CPAB that a significant component auditor has failed to provide CPAB with access to the significant component auditor's records related to audit work the significant component auditor has performed in relation to a component of a reporting issuer;

"CPAB no-access notice" means a written notice issued by CPAB that a significant component auditor has failed to enter into a CPAB access agreement;

"significant component auditor" means, with respect to a financial period of a reporting issuer, a component auditor that performs audit work involving financial information related to a component of the reporting issuer if the reporting issuer has the power to direct the component on its own or jointly with another person or company and if any of the following apply:

(a) the number of hours spent by the component auditor performing audit work in respect of the financial period is 20% or more of the total hours spent on the audit of the reporting issuer's financial statements relating to that period;

(b) the amount of fees paid to the component auditor for audit work in respect of the financial period is 20% or more of the total fees paid for the audit of the reporting issuer's financial statements relating to that period;

(c) both of the following apply:

(i) the assets or revenues of the component are 20% or more of the reporting issuer's consolidated assets at the end of the financial period or the reporting issuer's consolidated revenues for that period;

(ii) the number of hours spent by the component auditor performing audit work in respect of the financial period exceeds 50% of the total hours spent on audit work relating to the component in connection with the audit of the reporting issuer's financial statements relating to that period.

Reporting Issuer to Permit Provision of Access

7.2 (1) If an audit of a reporting issuer's financial statements for a financial period involves audit work performed by a significant component auditor for the financial period, the reporting issuer must give notice in writing to the significant component auditor that the reporting issuer permits the significant component auditor to provide

CPAB with access to the significant component auditor's records relating to that audit work if that access is requested by CPAB.

(2) The notice referred to in subsection (1) must be given on or before the date of the auditor's report on the reporting issuer's financial statements referred to in subsection (1).

Failure to Voluntarily Provide CPAB with Access to a Significant Component Auditor's Records

7.3 (1) If a participating audit firm receives a CPAB access-limitation notice, the participating audit firm must, not more than 5 business days after receipt of the notice, deliver a copy of the notice to all of the following:

(a) the reporting issuer identified in the notice;

(b) the audit committee of that reporting issuer;

(c) the regulator or securities regulatory authority for that reporting issuer.

(2) If a reporting issuer receives a copy of a CPAB access-limitation notice with respect to a significant component auditor, the reporting issuer must, not more than 5 business days following the receipt of the copy of the notice, give notice in writing to the significant component auditor that the reporting issuer permits the significant component auditor to enter into a CPAB access agreement.

Failure of a Significant Component Auditor to Enter into a CPAB Access Agreement if Requested to Do So

7.4 (1) If a participating audit firm receives a CPAB no-access notice, the participating audit firm must, not more than 15 business days after receipt of the notice, deliver a copy of the notice to all of the following:

(a) each reporting issuer audited by the participating audit firm if the public accounting firm identified in the notice was a significant component auditor for the reporting issuer's most recently completed financial period for which an auditor's report has been issued;

(b) the audit committee of each reporting issuer referred to in paragraph (a);

(c) the regulator or securities regulatory authority for each reporting issuer referred to in paragraph (a).

(2) If a participating audit firm receives a CPAB no-access notice, the participating audit firm must not,

(a) subject to subsection (3), use the public accounting firm referred to in the notice as a significant component auditor in respect of an audit of any reporting issuer's financial statements for a financial period ending more than 180 days after the date of the notice, or

(b) in respect of an audit of a reporting issuer's financial statements for a period ending more than 180 days after the date of the notice, use any other public accounting firm as a significant component auditor in respect of a component of the reporting issuer, if audit work in the current or preceding year was done by the public accounting firm referred to in the notice, unless the other public accounting firm satisfies one or both of the following and delivers a notice stating that fact to the participating audit firm and CPAB at least 90 days before the participating audit firm issues its auditor's report in respect of the audit:

(i) the other public accounting firm gives an undertaking to CPAB in writing to provide CPAB with prompt access to its records relating to audit work performed on financial information related to the component of the reporting issuer;

(ii) the other public accounting firm has entered into a CPAB access agreement in respect of the reporting issuer.

(3) Paragraph (2)(a) does not apply to a participating audit firm in respect of a financial period of a reporting issuer ending more than 180 days after the date of the notice if

(a) CPAB has notified the participating audit firm that the significant component auditor has entered into a CPAB access agreement in respect of the reporting issuer before the participating audit firm issues its auditor's report in respect of the financial period, and

(b) CPAB has not, before the participating audit firm issues its auditor's report in respect of the financial period, notified the participating audit firm that the significant component auditor has withdrawn from the CPAB access agreement referred to in paragraph (a).

Application in Québec

7.5 In Québec, the requirements in section 7.2 and subsection 7.3(2) apply to a reporting issuer, provided that an agreement referred to in section 9 of the Chartered Professional Accountants Act (chapter C-48.1) is entered into..

3. Subsection 8(3) is amended by replacing "Except in Ontario***" with "***Except in Alberta and Ontario***".***

4. This Instrument comes into force on March 30, 2022.

5. In Saskatchewan, despite section 4. above, if this Instrument is filed with the Registrar of Regulations after March 30, 2022, this Instrument comes into force on the day on which it is filed with the Registrar of Regulations.

5.1.2 Companion Policy 52-108 Auditor Oversight

CHANGES TO
COMPANION POLICY 52-108CP *AUDITOR OVERSIGHT*

1. Companion Policy 52-108 Auditor Oversight is changed by this Document.

2. The following is added at the end of the Companion Policy:

Section 7.1 – Definition of Component and Component Auditor

The terms "component" and "component auditor" have the same meaning as "component" and "component auditor" in Canadian GAAS. As a result, the terms are interpreted in a manner consistent with how the terms are used in Canadian Auditing Standard 600 *Special Considerations – Audits of Group Financial Statements (Including the Work of Component Auditors)* (CAS 600).

In CAS 600, the term "component" means an entity or business activity for which a group or component management prepares financial information that should be included in the group financial statements, and the term "component auditor" means an auditor who, at the request of the group engagement team, performs work on financial information related to a component for the group audit.

Section 7.1 – Definition of CPAB Access Agreement

The Instrument does not prescribe the content to be included in a CPAB access agreement. It is not intended to be equivalent to a "participation agreement". The terms and conditions set out in a CPAB access agreement, including the manner and conditions for when access is to be provided, will be agreed to by CPAB and the significant component auditor.

Section 7.1 - Definition of Significant Component Auditor

A component controlled or jointly controlled by a reporting issuer

The definition of significant component auditor refers to a component auditor that performs audit work involving financial information related to a component of a reporting issuer if the reporting issuer has the power to direct on its own or jointly with another person or company. Financial information related to a component that a reporting issuer does not have power to direct, at least jointly, is excluded from the definition.

For example, under IFRS, a subsidiary or joint arrangement are captured by the reference noted above in the significant component auditor definition, whereas an investment that is accounted for using the equity method of accounting, or a variable interest entity that a reporting issuer does not have power to direct on its own or jointly with another person or company, is not captured.

Determination of what constitutes an 'audit hour' or 'audit fee'

The term 'hours' in this Instrument refers to 'audit hours' and is intended to include any hours that are billed in respect of a financial period as 'audit fees' or 'audit-related fees' (other than hours pertaining to the review of interim financial report), as those terms are described in Forms 52-110F1 *Audit Committee Information Required in an AIF* and 52-110F2 *Disclosure by Venture Issuers* (52-110 Forms).

The term 'fees' in this Instrument is intended to include any fees that are billed in respect of a financial period as 'audit fees' or 'audit-related fees' (other than fees pertaining to the review of interim financial report), as those terms are described in the 52-110 Forms.

Determination of percentage of audit hours spent by a component auditor on a financial statement audit

Paragraph (a) in the definition of significant component auditor applies if the number of hours spent by the component auditor performing audit work in respect of the financial period is 20% or more of the total hours spent on the audit of the reporting issuer's financial statements relating to that period.

For example, if a reporting issuer audit took 100 hours to complete, and the reporting issuer's auditor performed 80 hours of audit work, and the component auditor performed 20 hours of audit work, paragraph (a) of the definition would apply since the hours spent by the component auditor would be 20% (20 hours / 100 hours) of the audit hours spent by the reporting issuer's auditor.

Determination of percentage of audit fees paid to a component auditor for the financial statement audit

Paragraph (b) of the definition of significant component auditor applies if the amount of fees paid to the component auditor for audit work in respect of the financial period is 20% or more of the total fees paid for the audit of the reporting issuer's financial statements relating to that period.

For example, if a reporting issuer paid $100,000 for the audit of its financial statements, and $80,000 of the fee was paid to the reporting issuer's auditor for its audit work, while $20,000 of the fee was paid to the component auditor for its audit work, paragraph (b) of the definition would apply since the percentage of fees paid to the component auditor would be 20% ($20,000 / $100,000).

Determination of number of audit hours a component auditor spent on a significant component

Subparagraph (c)(i) of the definition of significant component auditor applies if a reporting issuer has a component with assets that represent 20% or more of the reporting issuer's consolidated assets at the end of the financial period, or revenues that represent 20% or more of the consolidated revenues for that financial period, and it has the power to direct the activities of the component on its own or jointly with another person or company. If subparagraph (c)(i) applies, subparagraph (c)(ii) of the definition would be considered.

Subparagraph (c)(ii) of the definition of significant component auditor applies if the number of hours spent by the component auditor performing audit work in respect of the financial period exceeds 50% of the total hours spent on audit work relating to the component that meets the application requirements in subparagraph (c)(i) of the definition.

For example, assume a reporting issuer has a subsidiary (Component A) that has revenues representing 30% of the consolidated revenues of the reporting issuer, and therefore satisfies subparagraph (c)(i) of the definition. If the audit of Component A took 10 hours to complete and the component auditor performed 6 hours of the audit work and the reporting issuer's auditor performed 4 hours of the audit work, the work performed by the component auditor would satisfy subparagraph (c)(ii) of the definition. The component auditor would have performed 60% (6 hours / 10 hours) of the total hours to audit the component for the reporting issuer audit. The component auditor would therefore meet the definition of a significant component auditor.

In the example above, the 6 hours of work performed by the component auditor would represent the amount of time spent to perform audit work in connection with the audit of the reporting issuer's financial statements. If additional audit work was performed to support the completion of a separate audit engagement (e.g., the audit of the standalone financial statements of Component A), those audit hours would be excluded from the calculation in subparagraph (c)(ii).

Section 7.2 – Reporting Issuer to Permit Provision of Access

Section 7.2 requires a reporting issuer to, on or before the date of the auditor's report on the reporting issuer's financial statements for a financial period, give notice in writing to the significant component auditor that the reporting issuer permits the significant component auditor to provide CPAB with access to the significant component auditor's records relating to the audit work performed for those financial statements if that access is requested by CPAB. Effectively, this communication confirms to the significant component auditor that the reporting issuer has no objection with CPAB having access to any information about the reporting issuer that was retained as audit evidence to support the significant component auditor's audit work.

A reporting issuer can give notice to a significant component auditor to provide CPAB with access to inspect the significant component auditor's records by communicating directly with the significant component auditor (e.g., a letter to the significant component auditor), or indirectly through the reporting issuer's auditor (e.g., state in the engagement letter with the reporting issuer's auditor that it shall inform in writing that all significant component auditors involved in the audit that the reporting issuer is permitting them to provide CPAB with access to the records relating to the audit work they perform in connection with the reporting issuer's audit).

Regardless of whether the communication referred to in section 7.2 is received directly from the reporting issuer, or indirectly through the reporting issuer's auditor, it is important that the reporting issuer's auditor communicate to the significant component auditor the importance of the significant component auditor providing access to CPAB, and the implications for all involved if access is not voluntarily provided or a CPAB access agreement is not signed, since this could have a significant impact on future audits of the reporting issuer.

Subsection 7.3(1) and Subsection 7.4(1) – CPAB Access-limitation Notice and CPAB No-access Notice

Both subsection 7.3(1) and subsection 7.4(1) of the Instrument require a participating audit firm to deliver a copy of a notice to the regulator or securities regulatory authority. The securities regulatory authorities will consider the delivery requirement to be satisfied if a copy of the notice is sent to auditor.notice@acvm-csa.ca.

The Instrument does not prescribe the content of a CPAB access-limitation notice and CPAB no-access notice. If a copy of a CPAB access-limitation notice or CPAB no-access notice is delivered to the email address identified above, the communication should identify each regulator or securities regulatory authority that is to receive a copy of the notice if such information is not specified in the notice.

Subsection 7.3(2) – Impact of a Significant Component Auditor Being Permitted to Enter into a CPAB Access Agreement

If subsection 7.3(2) applies, the significant component auditor and CPAB would immediately begin the process of negotiating a CPAB access agreement. The negotiations should be completed in a reasonable period of time.

Section 7.4 – Impact of Participating Audit Firm Receiving a CPAB No-access Notice

If a participating audit firm receives a CPAB no-access notice and was planning to use the public accounting firm named in the notice as a significant component auditor for an upcoming reporting issuer audit, it may continue to do so provided that the reporting issuer's upcoming year end is not more than 180 days after the date of the notice.

If a reporting issuer's upcoming year end is more than 180 days after the date of the notice, the participating audit firm may not use the public accounting firm named in the notice as a significant component auditor for the reporting issuer's upcoming year end unless CPAB has notified the participating audit firm that the named firm has entered into a CPAB access agreement in respect of the reporting issuer before the reporting issuer's year end.

The participating audit firm also must not use any other public accounting firm as a significant component auditor for the audit of the reporting issuer's financial statements unless the other public accounting firm delivers a notice to the participating audit firm and CPAB at least 90 days before the issuance of an auditor's report in respect of that audit stating that it has given an undertaking to CPAB or entered into a CPAB access agreement and, in addition, one or both of the following apply:

- the other public accounting firm gives an undertaking to CPAB in writing to provide CPAB with prompt access to its records relating to audit work performed on financial information related to the component of the reporting issuer, or
- the other public accounting firm has entered into a CPAB access agreement in respect of the reporting issuer.

Participating audit firms should consider how they track the use of component auditors for their reporting issuer clients to meet the requirements of subsection 7.4(1) within the specified time period of 15 business days..

3. These changes become effective on March 30, 2022.

Chapter 11

IPOs, New Issues and Secondary Financings

INVESTMENT FUNDS

Issuer Name:
Picton Mahoney Fortified Alpha Alternative Fund
Principal Regulator – Ontario
Type and Date:
Combined Preliminary and Pro Forma Simplified Prospectus dated Mar 22, 2022
NP 11-202 Preliminary Receipt dated Mar 23, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3353671

Issuer Name:
Brompton European Dividend Growth ETF
Brompton Flaherty & Crumrine Enhanced Investment Grade Preferred ETF
Brompton Flaherty & Crumrine Investment Grade Preferred ETF
Brompton Global Dividend Growth ETF
Brompton Global Healthcare Income & Growth ETF
Brompton North American Financials Dividend ETF
Brompton North American Low Volatility Dividend ETF
Brompton Sustainable Real Assets Dividend ETF (formerly, Brompton Global Real Assets Dividend ETF)
Brompton Tech Leaders Income ETF
Principal Regulator – Ontario
Type and Date:
Final Long Form Prospectus dated Mar 25, 2022
NP 11-202 Final Receipt dated Mar 28, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3340895

Issuer Name:
Black Diamond Impact Core Equity Fund
Foundation Wealth Diversifier Pool
Foundation Wealth Equity Pool
Foundation Wealth Income Pool
Purpose Cash Management Portfolio
Purpose Credit Yield Plus Fund
Purpose Money Market Fund
Purpose Monthly Yield Plus Fund
Principal Regulator – Ontario
Type and Date:
Combined Preliminary and Pro Forma Simplified Prospectus dated Mar 22, 2022
NP 11-202 Final Receipt dated Mar 23, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3338291

Issuer Name:
Scotia Wealth Credit Absolute Return Pool
Principal Regulator – Ontario
Type and Date:
Preliminary Simplified Prospectus dated Mar 22, 2022
NP 11-202 Final Receipt dated Mar 23, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3335255

Issuer Name:
Purpose Diversified Real Asset Fund
Purpose Multi-Strategy Market Neutral Fund
Principal Regulator - Ontario
Type and Date:
Amendment #1 to Final Simplified Prospectus dated March 18, 2022
NP 11-202 Final Receipt dated Mar 24, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3253208

Issuer Name:
Franklin High Income Fund
Franklin Bissett Canadian Balanced Fund
Franklin Bissett Dividend Income Fund
Franklin U.S. Monthly Income Fund
Franklin ActiveQuant Canadian Fund
Franklin Bissett Canadian Dividend Fund
Franklin Bissett Canadian Equity Fund
Franklin ActiveQuant U.S. Fund
Franklin U.S. Opportunities Fund
Franklin U.S. Rising Dividends Fund
Templeton Emerging Markets Fund
Principal Regulator - Ontario
Type and Date:
Amendment #5 to Final Simplified Prospectus and Amendment #6 to AIF dated March 7, 2022
NP 11-202 Final Receipt dated Mar 25, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3203753

Issuer Name:
IA Clarington Target Click 2025 Fund
IA Clarington Target Click 2030 Fund
IA Clarington Global Equity Exposure Fund
Principal Regulator - Quebec
Type and Date:
Amended and Restated to Final Simplified Prospectus dated March 14, 2022
NP 11-202 Final Receipt dated Mar 24, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3220080

Issuer Name:
Purpose International Tactical Hedged Equity Fund
Purpose Conservative Income Fund
Purpose Global Bond Fund
Purpose International Dividend Fund
Principal Regulator - Ontario
Type and Date:
Amendment #1 to Final Simplified Prospectus dated March 18, 2022
NP 11-202 Final Receipt dated Mar 25, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3281203

Issuer Name:
Purpose Core Dividend Fund
Purpose Tactical Hedged Equity Fund
Purpose Monthly Income Fund
Purpose Total Return Bond Fund
Purpose Best Ideas Fund
Purpose Real Estate Income Fund
Purpose Strategic Yield Fund
Purpose Multi-Asset Income Fund
Purpose Enhanced Premium Yield Fund
Purpose Global Resource Fund
Purpose Special Opportunities Fund
Purpose Global Bond Class
Purpose Global Innovators Fund
Principal Regulator - Ontario
Type and Date:
Amendment #2 to Final Simplified Prospectus dated March 18, 2022
NP 11-202 Final Receipt dated Mar 28, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3201076

Issuer Name:
Dynamic Credit Absolute Return II Fund
Principal Regulator - Ontario
Type and Date:
Amendment #2 to Final Simplified Prospectus dated March 22, 2022
NP 11-202 Final Receipt dated Mar 28, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3267119

NON-INVESTMENT FUNDS

Issuer Name:
Alexco Resource Corp.
Principal Regulator - British Columbia
Type and Date:
Preliminary Shelf Prospectus dated March 25, 2022
Offering Price and Description:
CDN$100,000,000.00 - COMMON SHARES, WARRANTS, SUBSCRIPTION, RECEIPTS, UNITS
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3356370

Issuer Name:
Ambari Brands Inc.
Principal Regulator - British Columbia
Type and Date:
Preliminary Long Form Prospectus dated
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
RESEARCH CAPITAL CORPORATION
Promoter(s):
Avneesh Dhaliwal
Project #3357509

Issuer Name:
Copper King Resources Corp.
Principal Regulator - British Columbia
Type and Date:
Preliminary Long Form Prospectus dated March 25, 2022
Offering Price and Description:
$1,000,000.00 - 5,000,000 COMMON SHARES
PRICE OF $0.20 PER SHARE
Underwriter(s) or Distributor(s):
PI Financial Corp.
Promoter(s):
Max Sali
Project #3356206

Issuer Name:
Fire & Flower Holdings Corp. (formerly Cinaport Acquisition Corp. II)
Principal Regulator - Ontario
Type and Date:
Preliminary Shelf Prospectus dated March 22, 2022
Preliminary Receipt dated March 22, 2022
Offering Price and Description:
$100,000,000.00 - COMMON SHARES, WARRANTS, UNITS, SUBSCRIPTION RECEIPTS, DEBT SECURITIES
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3353465

Issuer Name:
Geologica Resource Corp.
Principal Regulator - British Columbia
Type and Date:
Preliminary Long Form Prospectus dated March 22, 2022
Preliminary Receipt dated March 23, 2022
Offering Price and Description:
Minimum Offering of 6,500,000 Shares at $0.10 per Share for Gross Proceeds of $650,000.00
Maximum Offering of 10,000,000 Shares at $0.10 per Share for Gross Proceeds of $1,000,000.00
Underwriter(s) or Distributor(s):
Research Capital Corp.
Promoter(s):
Douglas H. Unwin
Project #3353803

Issuer Name:
Gravitas III Capital Corp.
Principal Regulator - British Columbia
Type and Date:
Preliminary CPC Prospectus dated March 21, 2022
Preliminary Receipt dated March 24, 2022
Offering Price and Description:
Minimum Offering: $300,000.00 - 1,500,000 Common Shares
Maximum Offering: $9,000,000.00 - 45,000,000 Common Shares
Price: $0.20 per Common Share
Underwriter(s) or Distributor(s):
GRAVITAS SECURITIES INC.
Promoter(s):
Drew Green
Project #3353724

Issuer Name:
Kiwetinohk Energy Corp.
Principal Regulator - Alberta
Type and Date:
Preliminary Shelf Prospectus dated March 24, 2022
Preliminary Receipt dated March 25, 2022
Offering Price and Description:
$500,000,000.00 - Common Shares, Subscription Receipts, Warrants, Debt Securities Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3355510

Issuer Name:
Kontrol Technologies Corp.
Principal Regulator - Ontario
Type and Date:
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3321957

Issuer Name:
M3 Capital Corp.
Principal Regulator - Alberta
Type and Date:
Preliminary CPC Prospectus dated March 25, 2022
Offering Price and Description:
$500,000.00 - 5,000,000 Common Shares
PRICE: $0.10 per Common Share
Underwriter(s) or Distributor(s):
iA Private Wealth Inc.
Promoter(s):
Morris Chia
Project #3356427

Issuer Name:
MegaWatt Lithium and Battery Metals Corp. (formerly, Walcott Resources Ltd.)
Principal Regulator - British Columbia
Type and Date:
Preliminary Shelf Prospectus dated
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3357411

Issuer Name:
Origin Therapeutics Holdings Inc. (formerly, 1278700 B.C. Ltd.)
Principal Regulator - British Columbia
Type and Date:
Preliminary Long Form Prospectus dated March 25, 2022
Offering Price and Description:
0.00
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3356432

Issuer Name:
Pangenomic Health Inc.
Principal Regulator - British Columbia
Type and Date:
Amendment dated to Preliminary Long Form Prospectus
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
Francisco Kent Carasquero
Project #3326894

Issuer Name:
Playmaker Capital Inc. (formerly, Apolo III Acquisition Corp.)
Principal Regulator - Ontario
Type and Date:
Preliminary Shelf Prospectus dated March 23, 2022
Preliminary Receipt dated March 23, 2022
Offering Price and Description:
$75,000,000.00 - Common Shares, Preferred Shares, Units, Debt Securities, Warrants Subscription Receipts
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3354001

Issuer Name:
Primaris Real Estate Investment Trust
Principal Regulator - Ontario
Type and Date:
Preliminary Shelf Prospectus
dated March 21, 2022
Preliminary Receipt dated March 22, 2022
Offering Price and Description:
$3,000,000,000.00 - Trust Units, Debt Securities, Subscription Receipts, Warrants, Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3353079

Issuer Name:
Pure to Pure Beauty Inc. (formerly "P2P Info Inc.")
Principal Regulator - British Columbia
Type and Date:
Amendment dated March 23, 2022 to Preliminary Long Form Prospectus dated December 23, 2021
Preliminary Receipt dated March 24, 2022
Offering Price and Description:
0.00
Underwriter(s) or Distributor(s):
-
Promoter(s):
Simon Cheng
Project #3321677

Issuer Name:
Royal Bank of Canada
Principal Regulator - Quebec
Type and Date:
Preliminary Shelf Prospectus dated March 25, 2022
Preliminary Receipt dated March 28, 2022
Offering Price and Description:
Senior Debt Securities (Unsubordinated Indebtedness)
Debt Securities (Subordinated Indebtedness)
First Preferred Shares
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3356166

Issuer Name:
Small Pharma Inc. (formerly, Unilock Capital Corp.)
Principal Regulator - Ontario
Type and Date:
Preliminary Shelf Prospectus dated March 22, 2022
Preliminary Receipt dated March 22, 2022
Offering Price and Description:
$125,000,000.00 - Common Shares, Warrants, Units, Debt Securities, Subscription, Receipts
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3353469

Issuer Name:
Spectrum Global Investments Inc.
Principal Regulator - British Columbia
Type and Date:
Preliminary CPC Prospectus dated March 24, 2022
Offering Price and Description:
MINIMUM OFFERING: $204,000.00 (1,700,000 Common Shares)
MAXIMUM OFFERING: $504,000.00 (4,200,000 Common Shares) Price: $0.12 per Common Share
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3354930

Issuer Name:
The Valens Company Inc. (formerly Valens Groworks Corp.)
Principal Regulator - Ontario
Type and Date:
Amendment dated March 22, 2022 to Final Shelf Prospectus dated January 28, 2021
Offering Price and Description:
$150,000,000.00 - COMMON SHARES, DEBT SECURITIES, SUBSCRIPTION RECEIPTS, WARRANTS, UNITS
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3163125

Issuer Name:
A2ZCryptocap Inc.
Principal Regulator - Alberta
Type and Date:
Final CPC Prospectus dated March 23, 2022
Receipt dated March 25, 2022
Offering Price and Description:
$400,000.00 - 4,000,000 Common Shares
PRICE: $0.10 per Common Share
Underwriter(s) or Distributor(s):
LEEDE JONES GABLE INC.
Promoter(s):
Christopher Gulka
Project #3334886

Issuer Name:
Canadian North Resources Inc.
Principal Regulator - Ontario
Type and Date:
Final Long Form Prospectus dated March 28, 2022
Receipt dated March 28, 2022
Offering Price and Description:
$2,223,698.00 - 2,223,698 Common Shares on deemed exercise of 2,223,698 Special Warrants
Price per Special Warrant - $1,00
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3328579

Issuer Name:
enCore Energy Corp.
Principal Regulator - British Columbia
Type and Date:
Final Short Form Prospectus dated March 22, 2022
Receipt dated March 22, 2022
Offering Price and Description:
$26,086,955.94 - 17,050,298 Units
Price: $1.53 per Unit
Underwriter(s) or Distributor(s):
CLARUS SECURITIES INC.
PI FINANCIAL CORP.
RED CLOUD SECURITIES INC.
Promoter(s):
-
Project #3345795

Issuer Name:
Nepra Foods Inc.
Principal Regulator - British Columbia
Type and Date:
Final Short Form Prospectus dated March 24, 2022
Receipt dated March 24, 2022
Offering Price and Description:
$4,500,000 - 10,000,000 Units
Price: $0.45 per Unit
Underwriter(s) or Distributor(s):
Canaccord Genuity Corp.
Promoter(s):
-
Project #3349302

Issuer Name:
Nextech AR Solutions Corp.
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus dated March 21, 2022
Receipt dated March 22, 2022
Offering Price and Description:
$75,000,000.00 - Common Shares, Debt Securities, Warrants, Subscription Receipts Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3287849

Issuer Name:
OSISKO GOLD ROYALTIES LTD
Principal Regulator - Quebec
Type and Date:
Final Short Form Prospectus dated March 25, 2022
Receipt dated March 25, 2022
Offering Price and Description:
US$250,170,000.00 - 18,600,000 Common Shares
Price: US$13.45 per Offered Share
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3352072

Issuer Name:
Profound Medical Corp. (formerly Mira IV Acquisition Corp.)
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus dated March 23, 2022
Receipt dated March 23, 2022
Offering Price and Description:
Common Shares Warrants Debt Securities Subscription Receipts Units US$100,000,000
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3346422

Issuer Name:
Prudent Minerals Corp.
Principal Regulator - British Columbia
Type and Date:
Final Long Form Prospectus dated March 22, 2022
Receipt dated March 25, 2022
Offering Price and Description:
0.00
Underwriter(s) or Distributor(s):
-
Promoter(s):
Brett R. Matich
Alexander B. Helmel
Project #3314072

Issuer Name:
Redline Resources Inc.
Principal Regulator - British Columbia
Type and Date:
Amendment dated March 16, 2022 to Final Long Form Prospectus dated December 20, 2021
Receipt dated March 22, 2022
Offering Price and Description:
Maximum Offering: $1,050,000.00 (7,000,000 Units)
Minimum Offering: $900,000.00 (6,000,000 Units)
Price: $0.15 per Unit
Underwriter(s) or Distributor(s):
Leede Jones Gable Inc.
Promoter(s):
REDLINE MINERALS INC.
Raymond P. Strafehl
Project #3282141

Issuer Name:
Rubellite Energy Inc.
Principal Regulator - Alberta
Type and Date:
Final Short Form Prospectus dated March 23, 2022
Receipt dated March 23, 2022
Offering Price and Description:
$22,010,000.00 - 6,200,000 Common Shares
Price: $3.55 per Common Share
Underwriter(s) or Distributor(s):
PETERS & CO. LIMITED
BMO NESBITT BURNS INC.
ATB CAPITAL MARKETS INC.
STIFEL NICOLAUS CANADA INC.
CORMARK SECURITIES INC.
RAYMOND JAMES LTD.
Promoter(s):
PERPETUAL ENERGY INC.
Project #3349386

Issuer Name:
The Alkaline Water Company Inc.
Principal Regulator - British Columbia
Type and Date:
Final Prospectus - MJDS dated March 24, 2022
Receipt dated March 24, 2022
Offering Price and Description:
US$50,000,000.00, Common Stock, Preferred Stock, Debt Securities, Warrants, Subscription Receipts, Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3337878

Issuer Name:
Zedcor Inc.
Principal Regulator - Alberta
Type and Date:
Final Short Form Prospectus dated March 24, 2022
Receipt dated March 25, 2022
Offering Price and Description:
Minimum Offering: $2,250,000.00 (4,500,000 Units)
Maximum Offering: $3,500,000.00 (7,000,000 Units)
Price: $0.50 per Unit
Underwriter(s) or Distributor(s):
Paradigm Capital Inc.
Canaccord Genuity Corp.
Promoter(s):
-
Project #3343940

Issuer Name:
Northern Genesis Climate Solutions Corporation
Principal Jurisdiction - Ontario
Type and Date:
Amendment to Preliminary Long Form Prospectus dated October 12, 2021
on March 22, 2022
Offering Price and Description:
$200,000,000.00
(* Units)
Offering Price: $12.00 per Offered Unit
Underwriter(s) or Distributor(s):
TD SECURITIES INC.
RBC DOMINION SECURITIES INC.
SCOTIA CAPITAL INC.
CIBC WORLD MARKETS INC.
BMO NESBITT BURNS INC.
NATIONAL BANK FINANCIAL INC.
DESJARDINS SECURITIES INC.
RAYMOND JAMES LTD.
iA PRIVATE WEALTH INC.
Promoter(s):
NORTHERN GENESIS INVESTMENTS CORPORATION
Project #3280281

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Chapter 12

Registrations

12.1.1 Registrants

Type	Company	Category of Registration	Effective Date
Change in Registration Category	Blackheath Fund Management Inc.	From: Commodity Trading Manager To: Commodity Trading Manager and Portfolio Manager	March 25, 2022

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Chapter 13

SROs, Marketplaces, Clearing Agencies and Trade Repositories

13.2 Marketplaces

13.2.1 Neo Exchange Inc. – Trading Policies Amendments – Notice of Approval

NEO EXCHANGE INC.

TRADING POLICIES AMENDMENTS

NOTICE OF APPROVAL

Approval of Trading Policies Amendments

In accordance with the *Process for the Review and Approval of Rules and the Information Contained in Form 21-101F1 and the Exhibits Thereto*, Neo Exchange Inc. ("**NEO Exchange**") has adopted and the Ontario Securities Commission has approved Public Interest Rule Amendments to the NEO Exchange Trading Policies.

On February 10, 2022, NEO Exchange published for comment the Public Interest Rule Amendments relating to the introduction of a new volatility parameter, Closing Price Threshold for a Closing Call Eligible Security. For additional detail, please refer to the Request for Comments published on February 10, 2022. No comments were received.

A copy of the Trading Policies can be found on the NEO Exchange website.

NEO is planning to implement the Public Interest Rule Amendments on April 29, 2022.

13.2.2 MarketAxess SEF Corporation – Notice of Revocation Order

MARKETAXESS SEF CORPORATION

NOTICE OF REVOCATION ORDER

March 26, 2022

On March 26, 2022 at the request of MarketAxess SEF Corporation (**MarketAxess SEF**), the Commission revoked an exemption order issued to MarketAxess SEF on June 13, 2016 as varied on March 11, 2021 (**Exemption Order**). The Exemption Order granted an exemption to MarketAxess SEF from the requirement to be recognized as an exchange under subsection 21(1) of the *Securities Act* (Ontario).

A copy of the revocation order is published in **Chapter 2** of this Bulletin.

13.3 Clearing Agencies

13.3.1 CDS Clearing and Depository Services Inc. (CDS) – Material Amendments to CDS Rules – New York Link Service Investment Committee – Request for Comment

MATERIAL AMENDMENTS TO CDS RULES

NEW YORK LINK SERVICE INVESTMENT COMMITTEE

REQUEST FOR COMMENTS

All defined terms used herein and not otherwise defined shall have the meanings set forth in the CDS Participant Rules.

A. DESCRIPTION OF THE PROPOSED CDS RULE AMENDMENTS

Principles 4, 15 and 16 of the Principles For Financial Market Infrastructures ("**PFMIs**") issued by the Committee on Payments and Market Infrastructures of the Bank for International Settlements ("**CPMI**") and the International Organization of Securities Commission ("**IOSCO**, and collectively, "**CPMI-IOSCO**") require, among other things, that a CCP maintain financial resources to cover potential losses resulting from a participant default and general business risk, including custody and investment risks. In their July 2017 Report (Resilience of central counterparties (CCPs): Further guidance on the PFMI), CPMI-IOSCO indicated "*that the CCP's own contribution related to custody and investment losses should reflect the degree of the involvement of the CCP in the decision-making process related to the custody and investment of participants' assets, including any margin and prefunded default arrangements posted to the CCP*".[1]

According to CPMI-IOSCO, where "*the CCP has greater discretion in such a process, it should consider contributing a relatively larger amount of its financial resources to absorb the losses. Where participants have full decision-making authority on the custody and investment of their assets, the associated risks will depend on the decisions made by those participants and not the CCP. In these cases, the CCP would not be expected to identify an amount of its own resources to apply towards losses arising from those custody and investment risks. If a CCP operates multiple clearing services that apply different models for safeguarding participant assets, the exception noted here would only apply to those service lines for which the CCP does not have any decision-making authority on how assets are held and invested*".[2]

While, on the one hand, the PFMIs require CDS to have the ultimate responsibility in establishing and approving its risk-management framework, the PFMIs allow, on the other hand, a CCP to give some decision-making authority to its participants in the investment of their assets.

Based on the foregoing, and as further explained in this Notice and Request for Comment, CDS proposes the following amendments to the CDS Participant Rules in order to implement an Investment Committee ("**IC**") composed of CDS New York Link Service ("**NYL Service**") Participants. The IC will assume certain management responsibilities and decision-making authority for the investment of the collateral delivered to CDS by the Participants in the context of Participants' use of the NYL Service ("**Collateral**"):

(i) The addition of the definition "NYL Investment Committee";

(ii) Rule 4.2.3, which provides that CDS is liable to its Participants for any Participant Loss, in the manner set forth in Rule 4.2 of the Rules, will be modified to specify that the term "Participant Loss" does not include any losses resulting from an action, or omission, by CDS or of any director, officer, employee, contractor or agent of CDS, that is based on, results from, or is required by, a decision made by the NYL Investment Committee;

(iii) Rule 4.2.9, which states that CDS is not liable to any Participant for any "consequential loss" suffered or incurred by any Participant arising from any Service, including a consequential loss arising from or associated with a Participant Loss, or a Loss of Securities, will be modified to specify that CDS will not be liable for any consequential loss arising from an action or omission by CDS, or of any director, officer, employee, contractor or agent of CDS, that is based on, results from, or is required by, a decision made by the NYL Investment Committee; and

(iv) Rule 5.3.6, which states, *inter alia*, that CDS may invest Specific Collateral, Fund Contributions, Supplemental Liquidity Contributions or Collateral Pool Contributions in a reasonable and prudent manner, acting in the best interests of all Participants, will be modified to clarify that CDS will invest the Contributions made by NYL Participants to the Participant Fund established by CDS for NYL in accordance with the decisions of the NYL Investment Committee.

[1] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD568.pdf, page 42.
[2] Idem.

B. NATURE AND PURPOSE OF THE PROPOSED CDS RULE AMENDMENTS

CDS would like to provide to NYL Service Participants the authority to decide how their assets - the Collateral - are invested, and to delegate limited authority with respect to decisions related to the custody and investment of such assets. Providing the Participants with the authority to decide how the Collateral is invested is commensurate with the existing risks they assume as Participants of NYL. Pursuant to the proposed amendments, the risks associated with such limited delegated authority - custodial and investment losses - will be consequent to decisions made by the IC and not made by CDS. Such risk allocation is consistent with existing Rule 4.2, pursuant to which Participants ultimately bear the risks associated with such investments.

In compliance with the PFMIs, the CDS Board of Directors will adopt and approve an enterprise risk management framework, including custody and investment policies and standards, that will determine the areas (e.g., eligible investment counterparties, types and tenor of Collateral, etc.) in respect of which the Participants will make decisions and the parameters (of these items) within which the Participants will make decisions. The IC will not have the authority to make investment decisions that could result in CDS being in a Cover-1 breach scenario (not having the ability to cover at least one Participant and its affiliates' largest potential credit exposure(s) in extreme but plausible market conditions).

In the context of the foregoing framework, the investment policy will be aligned with the Risk Appetite Statement adopted by the CDS Board of Directors and the Custody and Risk Management Framework developed by CDS management. The CDS Board of Directors retains the ultimate responsibility for establishing and approving the CDS risk management framework. In fact, PFMI Principle 2 relating to Governance requires that a CCP's board of directors have and retain ultimate responsibility for establishing and approving an appropriate risk management framework, including investment risks (for example, maturities, concentration, risk limits). CDS is of the view that establishing an investment model for the affected Collateral is part of the risk management framework CDS must establish for the management of investment risks (Principle 2 of PFMIs). Doing otherwise could result in CDS not being Cover-1 compliant, which would compromise CDS' ability to access liquidity in a timely manner (same-day) in order to manage any potential default.

CDS proposes to introduce the IC in the Participants Rules. The IC will be a committee with investment decision-making authority within a predetermined set of parameters. As indicated above, these parameters will be determined in conformity with the enterprise risk management framework and applicable custody and investment policies and standards approved and established by CDS. The IC is not a participant advisory committee. Its role is not similar to those committees that advise the Board of Directors and CDS on various risk matters. In fact, the proposed structure is outside the scope of the market participant advisory committee structure contemplated in the AMF, BCSC and OSC recognition orders. The IC is a new decision-making committee with its own limited-scope decision-making authority.

As suggested by CPMI-IOSCO, where participants of a CCP have decision-making authority on the investment of their assets, the associated risks are consequent to the decisions made by the participants and not the CCP. NYL Service Participants will, therefore, collectively bear the burden of any losses suffered as a result of such decisions or investments in proportion to their Collateral size when the losses are incurred. For clarity, the members of the IC will not be personally liable. All NYL Service Participants will proportionally share any losses. As indicated earlier, the allocation of any loss to Participants is not a change from the current investment risks borne by Participants. The establishment of the IC, and the proposed rule amendments, however, offer the Participants transparency and decision-making powers with respect to these investments that correlate to that risk.

Finally, the IC will have the ability to make such recommendations to the CDS Board of Directors it deems appropriate for the benefit of any investment models but, ultimately, the Board of Directors remains responsible for the content of the investment policy and the Cover-1 compliance.

Charter and Membership

The IC will have the following responsibilities:

(1) within the Participant Asset Investment Policy and CDS Custody and Investment Risk Management Framework that CDS has established in accordance with the applicable legal, regulatory and compliance requirements, the IC reviews the investment type(s) and allocation in which the Collateral may be invested. With respect to those investments, CDS has determined (within these custody and investment policies and frameworks) the various items on which the IC makes decisions and the parameters (of these items) within which the Participants make decisions. The items and parameters, any specific voting thresholds as well as all other decision-making authority of the IC for each type of investment will be outlined and described in a schedule attached to the Charter of the IC.

(2) as part of their responsibilities, the IC members shall understand, without limitation, the regulatory standards that must be met, and the need to balance those regulatory obligations against the associated risks, operational impact, costs, or any other material investment considerations.

(3) the IC can make any recommendations to CDS with respect to any aspects of the Collateral investment approach in place.

Since the decisions and activities of the IC will be based on an investment policy adopted by the CDS Board of Directors, such decisions and activities will be subject to TMX/CDS Internal Audit's review in the manner, and at a frequency, determined by Internal Audit, from time to time.

Membership of the IC will be limited and will be subject to risk-based criteria and a rotating membership. CDS is of the view this form of membership is equitable and ensures the effective function of the IC. IC Representation will be based on the value of the Collateral provided.

The IC will be composed of :

(i) five (5) Participants identified by CDS, being the five largest Collateral providers from all the NYL Service Participants, over a 12-month period prior to determination;

(ii) two (2) Participants elected by and from the other NYL Service Participants (One Participant = One vote); and

(iii) CDS (without any voting right).

Each Participant identified or elected as IC member may be represented by one or more representatives (maximum three (3) representatives) with experience in operations, risk management, finance and/or business development, and who have knowledge of the CDS Participant Rules and Procedures applicable to the NYL Service, and an understanding of CDS NYL Service Collateral process. Notwithstanding the number of representatives attending a meeting on behalf of a Participant, each Participant will only have "one vote".

CDS itself may be represented by one or more individuals but will not have the right to vote with respect to investment decisions, provided such decisions are within the scope of the IC's authority. The role of one of the CDS representatives will be similar to a Chairperson (without any voting right). This CDS representative will help facilitate the deliberations and discussions of the IC, provide and/or present the IC with various data from time to time and on an ongoing basis, provide general information and support on the matters being decided by the IC, as may be required for the IC members to execute their responsibilities. Finally, one CDS representative will act as "committee secretary", recording minutes and coordinating meetings and agendas.

All IC members shall attend the IC meetings, which shall occur, at a minimum, quarterly. If not, the IC does not have a quorum. Notwithstanding the foregoing, if a decision must be taken on a same-day basis, the quorum will be the Participants attending the meeting. The IC shall be subject to the ongoing oversight of the CDS Board of Directors, with a quarterly obligation to report its minutes, decisions, activities and deliberations. The IC will provide the same reporting to all NYL Service Participants on a quarterly basis. The Meetings will be held at the offices of CDS or via teleconferencing or video-conferencing facilities to be provided by CDS. The IC Members' mandate term is for a period of two years. After the two-year period, CDS will constitute a new IC as per the above committee governance process.

Finally, unless otherwise indicated in a schedule attached to the Charter (such a schedule describing the items and parameters and the decision-making authority of the IC for each type of investment, as indicated earlier), all IC decisions shall be taken with a simple majority of votes.

C. IMPACT OF THE PROPOSED CDS RULE AMENDMENTS ON CDS AND ON CDS PARTICIPANTS

(a) CDS – The proposed rule amendments eliminate any potential risk exposure that may accrue to CDS from the investment of the NYL Service Participants' Collateral.

(b) CDS Participants – The proposed rule amendments provide the NYL Service Participants with authority to decide how the Collateral is deployed and invested, subject to CDS' investment policy.

(c) Other market participants – The proposed rule amendments will have no impact on other market participants.

(d) Securities and Financial Market in General – The proposed amendments will have no impact on the securities and financial market except as noted above.

C.1 Competition & Conflict of Interest Analysis

The proposed rule amendments will apply to CDS NYL Service Participants only. No CDS Participants will be disadvantaged or otherwise prejudiced by the introduction of the proposed changes except as detailed in the proposed amendments. A conflict of interest analysis with respect to the Canadian Derivatives Clearing Corporation, which is a CDS affiliate, a Participant, and a Third Party Clearing System pursuant to CDS' Participant Rules, is not necessary in the context of the proposed amendments.

C.2 Risks and Compliance Costs

The proposed amendments relate to the modification of governance processes and certain limitations on liability in respect of investment decisions made by the proposed IC, and not to compliance systems, technological, or regulatory compliance impacts

or costs. The formation of the proposed IC, as described in this Notice and Request for Comment, is intended to enhance the degree to which NYL Service Participants contribute to decisions related to the investment of Collateral while ensuring that the risk and liability profile of CDS itself, as a designated Clearing House operating a Designated Clearing System is not altered in an adverse way.

C.3 Comparison to Applicable International Standards

The proposed rule amendments are in compliance with, and in furtherance of, PFMI standards (including Principles 2, 4 and 16) and other CPMI-IOSCO guidance reports. Such compliance is required under CDS' designation as a Clearing House and operator of a Designated Clearing System, and is also required pursuant to CDS' recognition orders and under National Instrument 24-102 (Clearing Agency Requirements) and related Companion Policy 24-102CP.

D. DESCRIPTION OF THE RULE DRAFTING PROCESS

D.1 Development Context

CDS senior management, as well as CDS operations, legal, and risk management teams, have prepared documents describing the proposed rule amendments. Such amendments and the concept of the IC as a whole have been discussed with some NYL Service Participants on an informal basis. In fact, the concept of the IC has been raised during CDS RAC meetings (January 18, 2021 and January 28, 2022) and was discussed as part of 1-on-1 meetings with selected NYL participants. Those 1-on-1 meetings were held in October 2021 and January 2022.

D.2 Rule Drafting Process

The proposed rule amendments were drafted by representatives of CDS legal, in consultation with CDS risk management representatives, and were subsequently reviewed by CDS' Legal Drafting Group ("**LDG**") on January 31, 2022. The LDG is an *ad hoc* advisory committee composed of legal and business representatives of participating CDS Participants. The LDG comments on the drafting of proposed amendments to the CDS Rules and may suggest revisions and additions.

In the drafting process, CDS also took into consideration the informal comments received from NYL Service Participants, as indicated in subparagraph D.1 above.

D.3 Issues Considered

In drafting the proposed rule amendments and creating the IC, CDS' primary considerations were defining the role of the IC as a decision-making committee, distinct from other CDS Participants' committees, and clarifying that any losses resulting from the decisions of the IC would be borne directly by the NYL Service Participants. As indicated earlier, the NYL Service Participants are currently collectively liable for any losses suffered as a result of such investments or decisions, in proportion to their participation in the NYL Service. Providing the Participants with the authority to decide how the Collateral is invested is commensurate with the existing risks they assume as Participants of NYL.

D.4 Consultation

The proposed rule amendments were presented to the LDG on January 31, 2022, and subsequently to the Risk Management and Audit Committee and to the CDS Board of Directors on February 4, 2022. Approval of the proposed amendments for filing, public comment and regulatory review was received by written resolution of the CDS Board of Directors on February 4, 2022.

D.5 Alternatives Considered

Given the nature of the changes proposed, the scope of the applicable PMFIs and CPMI-IOSCO guidance on the matter, and the current provisions of CDS Participant Rules regarding Participants losses, it appears logical to provide NYL Service Participants with decision-making authority over the investment of the Collateral. Doing so in an efficient manner would require a decision-making committee with limited membership. Yet, such a committee would need to properly represent the interests of all NYL Service Participants.

Based on the foregoing, CDS has determined that the market participant advisory committee structure contemplated in the AMF, BCSC and OSC recognition orders would not be an appropriate alternative for the project. In fact, the RAC is not a decision-making committee. Its role is to advise the Board of Directors and CDS on various risk matters and all CDS Participants are members of that committee.

The proposed IC membership is only open to NYL Service Participants (and not all CDS Participants), based on the value of the Collateral provided to CDS for the use of the NYL Service. Such membership makes more sense given that the NYL Service Participants would not share any investment risks equally. Hence, the IC will be composed of the five largest NYL Service Collateral providers and two representatives of the other NYL Service Participants. Based on observations and reports, the

Collateral value of the five largest NYL Service Collateral providers would represent approx. 76.65% of all Collateral provided by the NYL Service Participants between June 1, 2021, and December 21, 2021.

D.6 Implementation Plan

CDS is recognized as a clearing agency by the Ontario Securities Commission pursuant to section 21.2 of the *Securities Act* (Ontario), by the British Columbia Securities Commission pursuant to Section 24(d) of the *Securities Act* (British Columbia) and by the *Autorité des marchés financiers* ("AMF") pursuant to section 169 of the *Securities Act* (Québec). In addition, CDS is deemed to be the clearinghouse for CDSX®, a clearing and settlement system designated by the Bank of Canada pursuant to section 4 of the *Payment Clearing and Settlement Act.* The Ontario Securities Commission, the British Columbia Securities Commission, the *Autorité des marchés financiers* and the Bank of Canada will hereafter be collectively referred to as the "**Recognizing Regulators**".

The amendments to CDS Participant Rules are expected to become effective on a date to be determined by CDS (expected to be in Q3 2022), such date to fall subsequent to approval of the amendments by the Recognizing Regulators following public notice and comments and be contingent on applicable notice to CDS participants.

E. Technological systems changes

The proposed rule amendments are not expected to have an impact on technological systems or require changes to such systems for CDS, CDS participants, or other market participants.

F. Comparison to other clearing agencies

In order to achieve collateral efficiencies for its clearing members, CME has established a number of collateral programs under the designation "Interest Earning Facility" or "IEF". The IEF2 Program has been offered by CME since 2002 and allows clearing members to invest their collateral in government money market mutual funds determined by CME (in shares of approved money market mutual funds). Dividends earned on these shares, net of fees, are solely for the account of the clearing members on whose behalf the shares were purchased. Such investments are not guaranteed by CME (or any other entity). In fact, CME recommends that the clearing members read the prospectus of the relevant mutual funds and contact the funds for any questions or issues they may have. In short, the clearing members assume the liability of the investment.[3]

From the example above, CDS notes the following:

- CME selects the investments;
- All benefits from the investments (net of administration costs) are sent back to clearing members;
- The clearing members assume the liability of the investments.

CDS notes, however, that the above program is different from CDS NYL Participant Fund rules, in its scope and its size, and that results in CME being able to offer more investment opportunities to the clearing members.

G. Public interest assessment

CDS believes that the proposed rule amendments are not contrary to the public interest and are aligned with the PFMI standards.

H. Comments

Comments on the proposed rule amendments must be made in writing and submitted within 30 calendar days following the date of publication of this notice in the Ontario Securities Commission Bulletin to:

CDS Clearing and Depository Services Inc.
Attn: Legal Department, Martin Jannelle, Senior Legal Counsel
100 Adelaide Street West – Suite 300
Toronto, Ontario, M5H 1S3
Email: martin.jannelle@tmx.com

[3] https://www.cmegroup.com/clearing/financial-and-collateral-management/ief2-eligibility.html#

Copies should also be provided to the Autorité des marchés financiers, British Columbia Securities Commission and the Ontario Securities Commission by forwarding a copy to each of the following individuals:

Philippe Lebel
Corporate Secretary and
Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640 Laurier boulevard, suite 400
Québec (Québec) G1V 5C1
Fax : (514) 864-8381
E-mail: consultation-en-cours@lautorite.qc.ca

Aaron Ferguson, Market Regulation
Market Regulation Branch
Ontario Securities Commission
Suite 1903, Box 55,
20 Queen Street West
Toronto, Ontario, M5H 3S8
Fax: (416) 595-8940
E-mail: marketregulation@osc.gov.on.ca

Meg Tassie
Senior Advisor
British Columbia Securities Commission
701 West Georgia Street
P.O. Box 10142, Pacific Centre
Vancouver, B.C. V7Y 1L2
Fax: (604) 899-6506
Email: mtassie@bcsc.bc.ca

CDS will make available to the public, upon request, all comments received during the comment period.

I. PROPOSED CDS RULE AMENDMENTS

Appendix “A” contains text of current CDS Participant Rules marked to reflect the proposed rule amendments as well as text of these rules reflecting the adoption of the proposed amendments.

APPENDIX "A"

PROPOSED CDS RULE AMENDMENTS

COMPARED VERSION	CLEAN VERSION
1.2 DEFINITIONS **1.2.1 Definitions** For the purposes of the Legal Documents, unless otherwise specified: […] "**NYL Investment Committee**" means a committee composed of certain NYL Participants making investment decisions regarding the Contributions made by NYL Participants to the Participant Fund established by CDS for NYL.	**1.2 DEFINITIONS** **1.2.1 Definitions** For the purposes of the Legal Documents, unless otherwise specified: […] "**NYL Investment Committee**" means a committee composed of certain NYL Participants making investment decisions regarding the Contributions made by NYL Participants to the Participant Fund established for NYL.
4.2.3 CDS Liability for Participant Loss CDS shall be liable to its Participants for any Participant Loss, subject to the limitations set out in Rules 4.2.5 and 4.2.9. A "**Participant Loss**" means any loss, damage, cost, expense, liability or claim suffered or incurred by a Participant, other than a Loss of Securities, which arises from a Participant's participation in a Service, but only to the extent such was caused or contributed to by any act or omission of CDS or of any director, officer, employee, contractor or agent of CDS done while acting in the course of office, employment or service or made possible by information or opportunities afforded by such office, employment or service. None of DTC, NSCC, or a TPCS shall be considered to be an agent of CDS for purposes of this Rule 4.2.3. For greater certainty, "Participant Loss" does not include any losses resulting from an action or omission of CDS or of any director, officer, employee, contractor or agent of CDS that is based on, that is the results of, or that is required by, any decisions made by the NYL Investment Committee. Notwithstanding the foregoing acceptance of liability, CDS shall not be liable to a Participant for any Participant Loss in respect of which that Participant is required to make indemnification pursuant to Rules 4.1, 10.2 or 10.5, nor for any Participant Loss arising from the Delivery Services.	**4.2.3 CDS Liability for Participant Loss** CDS shall be liable to its Participants for any Participant Loss, subject to the limitations set out in Rules 4.2.5 and 4.2.9. A "Participant Loss" means any loss, damage, cost, expense, liability or claim suffered or incurred by a Participant, other than a Loss of Securities, which arises from a Participant's participation in a Service, but only to the extent such was caused or contributed to by any act or omission of CDS or of any director, officer, employee, contractor or agent of CDS done while acting in the course of office, employment or service or made possible by information or opportunities afforded by such office, employment or service. None of DTC, NSCC, or a TPCS shall be considered to be an agent of CDS for purposes of this Rule 4.2.3. For greater certainty, "Participant Loss" does not include any losses resulting from an action or omission of CDS or of any director, officer, employee, contractor or agent of CDS that is based on, that is the results of, or that is required by, any decision made by the NYL Investment Committee. Notwithstanding the foregoing acceptance of liability, CDS shall not be liable to a Participant for any Participant Loss in respect of which that Participant is required to make indemnification pursuant to Rules 4.1, 10.2 or 10.5, nor for any Participant Loss arising from the Delivery Services.
4.2.9 Exclusion of CDS Liability CDS shall not be liable to any Participant for any loss of opportunity, profit, market, goodwill, interest or use of money or Securities, or any other special, indirect or consequential loss, damage, cost, expense, liability or claim (in this Rule, a "consequential loss") suffered or incurred by any Participant arising from any Service, including a consequential loss arising from or associated with a Participant Loss, ~~or~~ a Loss of Securities or a loss resulting from an action or omission of CDS or of any director, officer, employee, contractor or agent of CDS that is based on, that is the results of, or that is required by, any decision made by the NYL Investment Committee. CDS shall not be liable to any Participant for any loss, damage, cost, expense, liability or claim suffered or incurred by a Participant, which arises from any action taken by CDS in accordance with a lawful direction given by a	**4.2.9 Exclusion of CDS Liability** CDS shall not be liable to any Participant for any loss of opportunity, profit, market, goodwill, interest or use of money or Securities, or any other special, indirect or consequential loss, damage, cost, expense, liability or claim (in this Rule, a "consequential loss") suffered or incurred by any Participant arising from any Service, including a consequential loss arising from or associated with a Participant Loss, a Loss of Securities or a loss resulting from an action or omission of CDS or of any director, officer, employee, contractor or agent of CDS that is based on, that is the results of, or that is required by, any decision made by the NYL Investment Committee. CDS shall not be liable to any Participant for any loss, damage, cost, expense, liability or claim suffered or incurred by a Participant, which arises from any action taken by CDS in accordance with a lawful direction given by a

COMPARED VERSION	CLEAN VERSION
Regulatory Body having jurisdiction over CDS. The amount payable by CDS for any Participant Loss or Loss of Securities shall be limited to the amount payable pursuant to Rule 4.2.5 and shall not exceed that amount in any circumstances, including a Participant Loss or Loss of Securities arising from or in any way connected with a breach (including a fundamental breach) of the Legal Documents, or a Participant Loss or Loss of Securities arising from or in any way connected with any negligent or reckless act or omission of CDS or any fraudulent, negligent, reckless or wilful act or omission or any director, officer, employee, agent or contractor of CDS, whether or not the possibility of such Participant Loss or Loss of Securities was disclosed to or reasonably could have been foreseen by CDS.	Regulatory Body having jurisdiction over CDS. The amount payable by CDS for any Participant Loss or Loss of Securities shall be limited to the amount payable pursuant to Rule 4.2.5 and shall not exceed that amount in any circumstances, including a Participant Loss or Loss of Securities arising from or in any way connected with a breach (including a fundamental breach) of the Legal Documents, or a Participant Loss or Loss of Securities arising from or in any way connected with any negligent or reckless act or omission of CDS or any fraudulent, negligent, reckless or wilful act or omission or any director, officer, employee, agent or contractor of CDS, whether or not the possibility of such Participant Loss or Loss of Securities was disclosed to or reasonably could have been foreseen by CDS.
5.3.6 Custody of Collateral In exercising any of the powers conferred by this Rule 5.3, CDS shall take reasonable care in what it, in good faith, considers to be necessary to protect the interests of CDS and to be in the best interest of all Participants other than a Defaulter. CDS shall not be the agent, trustee or fiduciary (i) for a Participant in respect of its own Specific Collateral, Fund Contributions, Supplemental Liquidity Contributions, Collateral Pool Contributions or Settlement Service Collateral, nor (ii) for any other Category Credit Ring Member (except to the extent that it acts as the bare nominee of the Survivors of a suspended Extender) in respect of its interest in the Category Credit Ring Collateral of a Defaulter. Collateral in the form of money shall be held by CDS in accordance with this Rule 5.3 and need not be applied to reduce any obligation of the Participant to CDS. CDS may invest Specific Collateral, Fund Contributions, Supplemental Liquidity Contributions or Collateral Pool Contributions in a reasonable and prudent manner, acting in the best interests of all Participants. Notwithstanding the foregoing, CDS shall invest the Contributions made by NYL Participants to the Participant Fund established by CDS for NYL in accordance with the decisions of the NYL Investment Committee. CDS shall segregate any such collateral from its own money and shall make use of such collateral only for the purposes of this Rule 5. The net amount of any interest, dividend or income received by CDS on the collateral of a Participant (other than minimum cash contributions) shall be distributed to the Participant in accordance with the Procedures, provided the Participant's obligations to CDS have been fulfilled. In exercising any of the foregoing powers, CDS shall take reasonable care in what it, in good faith, considers to be necessary to protect the interests of CDS and to be in the best interest of all Participants making use of the Services.	**5.3.6 Custody of Collateral** In exercising any of the powers conferred by this Rule 5.3, CDS shall take reasonable care in what it, in good faith, considers to be necessary to protect the interests of CDS and to be in the best interest of all Participants other than a Defaulter. CDS shall not be the agent, trustee or fiduciary (i) for a Participant in respect of its own Specific Collateral, Fund Contributions, Supplemental Liquidity Contributions, Collateral Pool Contributions or Settlement Service Collateral, nor (ii) for any other Category Credit Ring Member (except to the extent that it acts as the bare nominee of the Survivors of a suspended Extender) in respect of its interest in the Category Credit Ring Collateral of a Defaulter. Collateral in the form of money shall be held by CDS in accordance with this Rule 5.3 and need not be applied to reduce any obligation of the Participant to CDS. CDS may invest Specific Collateral, Fund Contributions, Supplemental Liquidity Contributions or Collateral Pool Contributions in a reasonable and prudent manner, acting in the best interests of all Participants. Notwithstanding the foregoing, CDS shall invest the Link Fund Contributions and the Cross-Border Specific Collateral provided to CDS by NYL Participants for the use of NYL in accordance with the decisions of the NYL Investment Committee. CDS shall segregate any such collateral from its own money and shall make use of such collateral only for the purposes of this Rule 5. The net amount of any interest, dividend or income received by CDS on the collateral of a Participant (other than minimum cash contributions) shall be distributed to the Participant in accordance with the Procedures, provided the Participant's obligations to CDS have been fulfilled. In exercising any of the foregoing powers, CDS shall take reasonable care in what it, in good faith, considers to be necessary to protect the interests of CDS and to be in the best interest of all Participants making use of the Services.

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