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National Instrument 81-104 Commodity Pools

Part 1 Definitions, Application and Interpretation

1.1 Definitions

(1) In this Instrument

"Canadian Securities Course" means a course prepared and conducted by the Canadian Securities Institute and so named by that Institute as of the date on which this Instrument comes into force, every predecessor to that course, and every successor to that course that does not narrow the scope of the significant subject matter of the course;

"Chartered Financial Analyst Program" means the three level program prepared and conducted by the Association for Investment Management and Research, and so named by that Association as of the date on which this Instrument comes into force, every predecessor to that program, and every successor to that program that does not narrow the scope of the significant subject matter of the program;

"commodity pool" means a mutual fund, other than a precious metals fund, that has adopted fundamental investment objectives that permit it to use or invest in

(a) specified derivatives in a manner that is not permitted by National Instrument 81-102 *Investment Funds*, or

- (b) physical commodities in a manner that is not permitted by National Instrument 81-102;

"Derivatives Fundamentals Course" means a course prepared and conducted by the Canadian Securities Institute and so named by that Institute as of the date that this Instrument comes into force, every predecessor to that course, and every successor to that course that does not narrow the scope of the significant subject matter of the course;

"independent review committee" means the independent review committee of the investment fund established under National Instrument 81-107 *Independent Review Committee for Investment Funds*;

"mutual fund restricted individual" means an individual registered as a dealing representative of a registered dealer, if the activities of that individual are restricted to trading in securities of mutual funds; and

"precious metals fund" means a mutual fund that has adopted fundamental investment objectives, and received all required regulatory approvals, that permit it to invest in precious metals or in entities that invest in precious metals and that otherwise complies with National Instrument 81-102.

- (2) Terms defined in National Instrument 81-102 and used in this Instrument have the respective meanings ascribed to them in National Instrument 81-102.

1.2 **Application** — This Instrument applies only to

- (a) a commodity pool that
 - (i) offers, or has offered, securities under a prospectus for so long as the commodity pool remains a reporting issuer, or
 - (ii) is filing a preliminary prospectus or its first prospectus; and
- (b) a person or company in respect of activities pertaining to a commodity pool referred to in paragraph (a) or pertaining to the filing of a prospectus to which subsection 3.2(1) applies.

1.3 **Interpretation**

- (1) Each section, part, class or series of a class of securities of a commodity pool that is referable to a separate portfolio of assets is considered to be a separate commodity pool for purposes of this Instrument.

- (2) For the purposes of a commodity pool complying with section 2.3 of National Instrument 81-102, the definition of the term "public quotation" used in the definition of the term "illiquid asset" in section 1.1 of National Instrument 81-102, includes any quotation of a price for foreign currency forwards and foreign currency options in the interbank market.

Part 2

Investment Restrictions and Practices

2.1 Investment Restrictions and Practices

- (1) Section 2.1 of National Instrument 81-102 does not apply to restrict the exposure of a commodity pool to a counterparty of the commodity pool in specified derivatives transactions.
- (2) The following provisions of National Instrument 81-102 do not apply to a commodity pool:
 1. Paragraphs 2.3(d), (e), (f), (g) and (h).
 2. Paragraph 2.7(1)(a).
 3. Subsections 2.7(3), (4) and (5).
 4. Sections 2.8 and 2.11.

Part 3

New Commodity Pools

3.1 Non-Application

Sections 3.1 and 3.2 of National Instrument 81-102 do not apply to a commodity pool.

3.2 New Commodity Pools

- (1) No person or company shall file a prospectus for a newly established commodity pool unless
 - (a) an investment of at least \$50,000 in securities of the commodity pool has been made, and those securities are beneficially owned, before the time of filing by
 - (i) the manager, a portfolio adviser, a promoter or a sponsor of the commodity pool,

- (ii) the directors, officers or shareholders of any of the manager, a portfolio adviser, a promoter or a sponsor of the commodity pool, or
 - (iii) any combination of the persons or companies referred to in subparagraphs (i) and (ii); and
 - (b) the prospectus of the commodity pool states that the commodity pool will not issue securities other than those referred to in paragraph (a) unless subscriptions aggregating not less than \$500,000 have been received by the commodity pool from investors other than the persons and companies referred to in subparagraphs (i) and (ii) of paragraph (a) and accepted by the commodity pool.
- (2) A commodity pool may redeem, repurchase or return any amount invested in, securities issued upon the investment in the commodity pool referred to in paragraph (1)(a) only if
- (a) securities issued under paragraph (1)(a) that had an aggregate issue price of \$50,000 remain outstanding and at least \$50,000 invested under paragraph (1)(a) remains invested in the commodity pool; or
 - (b) the redemption, repurchase or return is effected as part of the dissolution or termination of the commodity pool.

3.3 Prohibition Against Distribution

If a prospectus of a commodity pool contains the disclosure described in paragraph 3.2(1)(b), the commodity pool shall not distribute any securities unless the subscriptions described in that disclosure, together with payment for the securities subscribed for, have been received.

3.4 [Repealed]

Part 4 Proficiency And Supervisory Requirements

4.1 Proficiency and Supervisory Requirements

- (1) No mutual fund restricted individual shall trade in a security of a commodity pool unless that individual
 - (a) has received at least a passing grade for the Canadian Securities Course;

- (b) has received at least a passing grade for the Derivatives Fundamentals Course;
 - (c) has successfully completed the Chartered Financial Analyst Program; or
 - (d) meets the proficiency standards applicable to trading in securities of commodity pools required by a self-regulatory organization of which the individual, or his or her organization, is a member if the securities regulatory authority or regulator has completed any required review, approval or non-disapproval of the regulatory instrument of the self-regulatory organization that establishes those proficiency standards.
- (2) No principal distributor or participating dealer shall trade in a security of a commodity pool in the local jurisdiction unless the individual designated by the principal distributor or participating dealer to be responsible for the supervision of trades of securities of commodity pools in the local jurisdiction has received at least a passing grade for the Derivatives Fundamentals Course or has successfully completed the Chartered Financial Analyst Program.
- (3) Despite subsection (2), but subject to compliance with securities legislation, a principal distributor may agree to act as principal distributor of a commodity pool and may trade in securities of a commodity pool if all trades are effected through a participating dealer that satisfies the requirements of subsection (2).

4.2 [Repealed]

Part 5 Incentive Fees

5.1 Non-Application

Part 7 of National Instrument 81-102 does not apply to a commodity pool.

5.2 Incentive Fees

A commodity pool shall not pay, or enter into arrangements that would require it to pay, and no securities of a commodity pool shall be sold on the basis that an investor would be required to pay, a fee that is determined by the performance of the commodity pool, unless

- (a) the payment of the fee is based on the cumulative total return of the commodity pool for the period that began immediately after the last period for which the performance fee was paid; and
- (b) the method of calculation of the fee is described in the prospectus of the commodity pool.

5.3 Multiple Portfolio Advisors

Section 5.2 applies to fees payable to a portfolio adviser of a commodity pool that has more than one portfolio adviser, if the fees are calculated on the basis of the performance of the portfolio assets under management by that portfolio adviser, as if those portfolio assets were a separate commodity pool.

Part 6 Redemption of Securities of a Commodity Pool

6.1 Frequency of Redemptions

If disclosed in its prospectus, a commodity pool may include, as part of the requirements established under subsection 10.1(2) of National Instrument 81-102, a provision that security holders of the commodity pool shall not have the right to redeem their securities for a period up to six months after the date on which the receipt is issued for the initial prospectus of the commodity pool.

6.2 Required Notice of Redemption

Despite section 10.3 of National Instrument 81-102, a commodity pool may implement a policy providing that a person or company making a redemption order for securities shall receive the net asset value for those securities determined, as provided in the policy, on the first or second business day after the date of receipt by the commodity pool of the redemption order.

6.3 Payment of Redemption Proceeds

The references in subsection 10.4(1) of National Instrument 81-102 to "two business days" shall be read as references to "15 days" in relation to commodity pools.

Part 7 [Repealed]

Part 8 Continuous Disclosure — Financial Statements

8.1 [Repealed]

8.2 [Repealed]

8.3 [Repealed]

8.4 [Repealed]

8.5 Leverage Disclosure

- (1) A commodity pool shall include in its interim financial reports and its audited financial statements disclosure of the minimum and maximum level of leverage experienced by the commodity pool in the period covered by the financial statements, together with a brief explanation of how the commodity pool uses the term "leverage" and the significance of the maximum and minimum levels of leverage to the commodity pool.
- (2) The information required by subsection (1) may be included in the body of the financial statements or in notes to the financial statements.

8.6 [Repealed]

**Part 9
[Repealed]**

**Part 10
Exemption**

10.1 Exemption

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

**Part 11
Effective Date and Transitional**

11.1 Effective Date

This Instrument comes into force on 1 November 2002

11.2 Prospectus Disclosure

The prospectus of a commodity pool for which a receipt is obtained before the date

that this Instrument comes into force is not required to comply with the disclosure requirements of this Instrument.