

IRC Member Risks and Insurance

The Canadian Securities Administrators (CSA) has instituted a new governance mandate with the introduction of National Instrument 81-107, *Independent Review Committee for Investment Funds*, requiring an independent governance body - the Independent Review Committee (IRC) - for all publicly offered investment funds.

The IRC is charged with reviewing conflicts of interest that may arise between a manager's own interests and the manager's duty to manage an investment fund in the best interests of the investment fund. The Instrument requires there to be an independent perspective on all of the manager's decisions that may involve or be perceived to involve a conflict of interest, this includes prohibitions relating to related-party and self-dealing transactions currently restricted or prohibited in securities legislation.

IRC members will be faced with potential liability for allegations of:

- Failure to abide by obligations imposed under National Instrument 81-107
- Breach of Fiduciary and Instrument-mandated Duties
- Failure to fulfill the obligations outlined in the IRC Charter
- Negligence, Negligent Misrepresentation and Defamation
- Liability for acting outside the Instrument and/or IRC Charter
- Liability for excessive compensation

Key Dates:

- November 1st, 2006 – NI 81-107 came into force
- May 1st, 2007 – Requirement to establish your initial Independent Review Committee
- November 1st, 2007 – Mandatory Full Compliance

As an IRC member I have an indemnity from the Fund Manager– so what's the issue?

IRC members cannot have a material relationship with the fund manager –IRC members that are reliant on the Fund Manager for defence costs may give rise to concerns about "independence". Now let's assume the Fund Manager brings an action against the IRC members – who are relying on its indemnity!

Why not just extend the fund manager's D&O/E&O policy to cover the IRC – or buy excess of it for the IRC?

Adding IRC members onto the Fund Manager's corporate D&O policy may create a perception that IRC members are dependant for coverage and give rise to concerns about "independence".

IRC members are not able to control the insurance policy purchased by the fund manager and/or the corporation.

IRC members are not directors nor officers of the manager or the corporation, and will not be given any priority in a suit.

Suits brought by one Insured vs. another Insured are typically excluded under standard D&O/E&O policies –how will a fund managers policy respond if the Fund Manager brings suit against the IRC, or vice versa (e.g.: defamation).

Fund managers and IRC members have separate interests and separate mandates – sharing coverage is not in the best interest of either party

Not having appropriate insurance for IRC members could discourage the best candidates.

Is there insurance specifically for IRC's? How do we get it?

Yes – there are new insurance products for IRC's that require an application to obtain coverage – available through HUNTERS. Call us for a cost estimate for your IRC.

Charlie Smith (charles.smith@hunterscorners.com) 416.323.9300

Additional Resources:

Stikeman Elliott – National Instrument 81-107
http://www.execurisk.com/pdf/presentations/Stikeman_Elliott_N1-81-107_Oct06.pdf

