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October 9, 2007

Nancy M. Morris, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**RE: Response to Request for Comments with Regard to Expansion of the Definition of Qualified Institutional Buyer in Proposing Release Concerning Revisions of Limited Offering Exemptions (File No. S7-18-07)**

Ladies and Gentlemen:

We represent RBC Asset Management Inc. (“RBC AM”), a wholly owned subsidiary of the Royal Bank of Canada (“RBC”), and TD Asset Management, Inc. (“TDAM”), a wholly owned subsidiary of The Toronto-Dominion Bank (together referred to below as the “Banks”), and are writing in response to the request for comments in the Commission’s Proposing Release, “Revisions of Limited Offering Exemptions in Regulation D,” Release No. 33-8828 and Release No. IC-27922 (the “Proposing Release”). In particular, the Banks wish to comment on the portion of the Proposing Release that seeks commenters’ views concerning the desirability of formally expanding the definition of qualified institutional buyer (“QIB”) in Rule 144A to include the same kinds of additional entities that the Commission has proposed in the Proposing Release to add to the list of entities (including “other legal entit[ies] with substantially similar attributes”) that may be deemed accredited investors under Regulation D.<sup>1</sup> While the Banks support such an expansion of the list of entities that are defined, if they meet the other requirements of Rule 144A, as qualifying to be considered QIBs, the Banks also request that the Commission clarify that Canadian business trusts may come within the definition of “Massachusetts or similar business trusts” and therefore qualify as QIBs.

The Royal Bank of Canada has 70,000 employees serving 15 million clients through offices in North America and 34 countries around the world. RBC is the largest bank in Canada as measured by assets and market capitalization and offers a full range of financial products and services in personal and commercial banking, wealth management, insurance, corporate and investment banking and transactions processing on a global basis. RBC AM provides a broad range of investment services to investors through mutual funds, pooled funds and separately managed portfolios. With over C\$83 billion in assets under management and offices in major

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<sup>1</sup> See Section II.B.4 of the Proposing Release, text at footnote 114.

financial centers around the world, RBC AM is the top mutual fund provider among Canadian banks and is one of Canada's largest money managers.

The Toronto-Dominion Bank and its subsidiaries are collectively known as TD Bank Financial Group. They have 58,000 employees in offices around the world and C\$404 billion in assets (as of July 31, 2007). TD Bank Financial Group offers a full range of financial products and services to more than 14 million customers worldwide through four key business lines: Canadian Personal and Commercial Banking, Wealth Management, Wholesale Bank and U.S. Personal and Commercial Banking. TDAM is one of Canada's largest investment money managers with leading market positions in fixed income, enhanced, quantitative, passive and active portfolio management. TDAM manages portfolios on behalf of corporations, pension plans, foundations and endowments and retail mutual funds. TDAM and its affiliates currently manage over C\$162.26 billion in assets (September 2007), of which C\$85.46 billion are mutual fund and other pooled investment vehicle assets.

The Banks have joined together to explain the importance of clarifying the definition of QIB under Rule 144A and to encourage the Commission to include mutual funds and other pooled investment vehicles within the QIB definition regardless of the legal entity structure used to organize the mutual fund. Although the specific regulatory provisions that apply to Canadian mutual funds differ from the provisions that govern open-end investment companies registered under the Investment Company Act of 1940, in general such Canadian mutual funds are closely analogous to such U.S. open-end investment companies (also referred to colloquially as mutual funds). In addition, such Canadian mutual funds are managed by professional investment managers that are regulated as such under Canadian provincial laws that impose many of the same kinds of regulations and oversight that apply to an investment adviser registered under the Investment Advisers Act of 1940.

If such Canadian mutual funds were formed as corporations, they would straightforwardly fall within the QIB definition. The Banks strongly believe that the failure to confirm the QIB status of such funds and other investment vehicles, which otherwise have the substantive characteristics of a QIB, on the arbitrary grounds that they have been organized as business trusts under non-United States law is not only legally erroneous but is also economically counterproductive, both from the perspective of the U.S. securities markets and from the perspective of such funds as institutional investors.

To be sure, Canadian mutual funds and similar offshore entities could invest in securities of the same class if those securities were offered in parallel, coordinated or separate offerings under Regulation S. However, the Banks, as close observers of the U.S. capital markets, have encountered a number of circumstances in which no such Regulation S offering is made. The result is that it is not clear that mutual funds with highly sophisticated investment managers that have all the characteristics that are supposed to define a QIB, operating in a capital market that is closely integrated with that of the United States, may purchase Rule 144A securities in initial offerings or, until the passage of the time periods specified in Rule 144, on the secondary market.

Furthermore, even when a Regulation S tranche is offered in coordination with a Rule 144A tranche in the same overall securities offering and mechanisms are provided to sell securities purchased under Regulation S (either initially or on the secondary market) into the 144A marketplace (which is frequently more liquid), in the Banks' experience the mechanisms provided by issuers to transfer securities from one marketplace to another are cumbersome, thereby limiting liquidity.

In 2004 RBC AM submitted a draft request to the Commission Staff that the Staff take an interpretive or no-action position with respect to the qualification of Canadian business trusts under the rubric "Massachusetts or similar business trusts"; a copy of the arguments made in that submission (without updating) is attached to this letter as Exhibit A. The Staff ultimately declined to grant this request for two reasons: (1) most importantly, the Staff advised that the Commission had in recent years received a variety of requests to take no-action or interpretive positions concerning the QIB definition and, in light of indications by the Commission that the definition should be interpreted narrowly, had concluded that any clarifications of the definition should be undertaken in a rulemaking proceeding rather than through the route of no-action or interpretive letters; and (2) the Staff had previously been of the view that the phrase should be interpreted to cover only statutory, and not common law, trusts. For the reasons discussed in Exhibit A, we submit that the second ground for denial cited by the Staff was legally incorrect.<sup>2</sup>

The Banks believe that the Proposing Release's request for comments on this subject, and particularly the addition of the phrase "other legal entity with substantially similar legal attributes," signals an openness on the Commission's part to broadening the interpretation of the general parameters of the QIB definition, rather than simply narrowly adding specific kinds of entities to that definition. An excessively narrow interpretation of existing defined terms is surely as relevant for these purposes as a failure to list entities that there is no reason to exclude.

If, as discussed below, the Commission chooses not to engage in a formal expansion of the definition of the kind of trusts that may be considered QIBs, the Banks urge the Commission to at least modify the term "Massachusetts or similar business trusts" by changing it to "Massachusetts or similar common law or statutory business trusts organized in any common law jurisdiction." In addition, the Banks strongly urge the Commission to state specifically in the promulgating release for the rules that are the subject of the Proposing Release that the

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<sup>2</sup> As is explained in Exhibit A, Massachusetts business trusts (in contrast, for example, to Delaware statutory trusts) are in fact common law trusts, albeit The Commonwealth of Massachusetts long ago enacted a limited group of statutory provisions to regulate such matters as service of process on a business trust and prohibit business trusts from engaging in certain kinds of activities. As a result, an interpretation of the phrase "Massachusetts or similar business trust" to exclude common law trusts would mean that business trusts organized in Massachusetts would not fall within the definition.

Please note that, while Exhibit A has not been updated, we have been advised that National Instrument 81-107 of the Canadian Securities Commissioners now requires that all Canadian mutual funds have independent review committees similar to the Board of Governors described in Exhibit A that was already in place with respect to the RBC Funds in 2004.

Commission intends the QIB definition to be interpreted liberally to allow entities that meet Rule 144A's substantive requirements to be treated as QIBs, regardless of their form of organization.

Although the Banks believe that the Canadian business trusts that they organize as mutual funds should clearly qualify as "Massachusetts or similar business trusts," the Banks also question the utility of excluding any kind of centrally directed trust from the entities that may qualify as a QIB. In this connection the definition of QIB already includes public and private employee benefit plan trusts (except trust funds that include as participants individual retirement accounts and H.R. 10 plans). The exclusion of benefit plans with IRA and H.R. 10 plan assets points to the appropriate central concern, which is that QIBs should not include decision-making entities that do not meet the \$100 million threshold or that pass through decision-making powers with respect to investments to persons who do not meet that threshold. However, the Banks can discern no reason why a testamentary or intervivos trust (or any other kind of trust) that has at least \$100 million in qualifying assets should not qualify as a QIB.

Even if the Commission is of the view that the term "similar business trust" should be construed narrowly and that other kinds of trusts should not generally be permitted to be QIBs, the Banks suggest that, at a minimum, any centrally managed trust that meets the \$100 million threshold and is managed by a foreign or domestic bank or professional investment manager that itself meets the QIB definition should qualify as a QIB.

Finally, as was argued in the RBC AM no-action request letter, the Banks believe that the "family" treatment that is extended to U.S. registered investment companies that could not themselves qualify as QIBs, but that do so together with other members of the same investment company family, should be formally extended to mutual fund or investment company families established under the laws of Canada and other countries. The Banks believe it is clear that the standards of sophistication that the Commission wishes to assure of QIBs are met by the investment managers of such an investment fund complex, and believe that no coherent distinction can be drawn between U.S. and non-U.S. investment company complexes for these purposes.

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The Banks appreciate the Commission's attention to these matters in the Proposing Release. If the Staff wishes to discuss these comments, please call me at 212-547-5657.

Very truly yours,



Edwin C. Laurenson

**Exhibit A**

December \_\_, 2004

Mr. Paul Dudek  
Chief, Office of International Corporate Finance  
Securities and Exchange Commission  
450 5th Street, N.W.  
Washington, D.C. 20549

Re: Royal Bank of Canada Mutual Fund Trusts

Dear Mr. Dudek,

On behalf of our client, RBC Asset Management Inc. ("RBC AM"), an indirect wholly owned subsidiary of Royal Bank of Canada ("RBC"), we are writing to seek the Staff's concurrence in our view that that mutual fund trusts (the "RBC Funds") established by RBC AM's affiliate, The Royal Trust Company ("RTC"), pursuant to the Declaration of Trust described below (as well as mutual fund trusts that may subsequently be established pursuant to, or the terms of which may subsequently be amended to establish, similar declarations of trust), and operated in accordance with Canadian provincial securities legislation and National Instrument 81-102 of the Canadian Securities Administrators, may be considered to be qualified institutional buyers ("QIBs") under rule 144A ("Rule 144A") under the Securities Act of 1933 (the "Securities Act") by virtue of falling within the definition of "Massachusetts or similar business trust" in item (a)(1)(i)(H) of Rule 144A. In addition, we request the Staff's concurrence that RBC Funds that utilize the same investment adviser or sub-adviser may aggregate their securities holdings in order to determine QIB status (the "aggregation request") using the same principles that apply to a "family" of U.S. registered investment companies pursuant to item (a)(1)(iv) of Rule 144A.

As is explained in detail below, we believe it clear that the characteristics of the RBC Funds are such that they would fall within the definition of a Massachusetts or similar business trust were they organized in the United States. Furthermore, although the Canadian system for regulating investment companies differs from the system applicable to U.S. investment companies under the Investment Company Act of 1940 (the "Investment Company Act"), the Canadian system is nevertheless comprehensive and detailed, and Canadian mutual funds organized as trusts share many characteristics with registered U.S. open-end investment companies that are organized as business trusts.<sup>1</sup> With regard to the aggregation request, we believe that the relationship among the RBC Funds that utilize the same investment adviser or sub-adviser is altogether analogous to the relationship among member funds of the same investment company family that was cited by

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<sup>1</sup> Please note, however, that we do not argue in this letter that the RBC Funds should be considered the equivalent of investment companies registered under the Investment Company Act for purposes of item (a)(1)(i)(B) of Rule 144A.

the Commission as the rationale for permitting members of such an investment company family to aggregate their securities holdings in connection with determining QIB status pursuant to item (a)(1)(iv) of Rule 144A.<sup>2</sup>

#### Reason for the Request

Certain of the RBC Funds regularly invest in securities of the kind that are routinely offered and traded in the Rule 144A marketplace. In the case of U.S. issuers, offerings of such securities under Rule 144A may be made in tandem with offerings of tranches of the same securities outside the United States pursuant to Regulation S under the Securities Act. However, while the RBC Funds may purchase securities offered pursuant to Regulation S, many offerings pursuant to Rule 144A do not include a Regulation S tranche. Canadian investment funds that are organized as corporations could nonetheless purchase such securities in Rule 144A offerings (assuming that those funds meet the requirement that they own \$100 million in securities of unaffiliated issuers set forth in subparagraph (a)(1)(i) of Rule 144A), but the RBC Funds cannot do so because, unless they qualify to be treated as Massachusetts or similar business trusts, they do not come within the definition of the type of entity that can purchase securities in a Rule 144A offering.

We believe that this result is disadvantageous both to the RBC Funds and the U.S. capital markets and contrary to the policies that informed the adoption of Rule 144A. It is disadvantageous to the RBC Funds because they are thereby restricted in the securities in which they are permitted to invest. In addition, it is disadvantageous to the issuers of Rule 144A securities because large entities with a highly sophisticated investment manager that have all the characteristics that are supposed to define a QIB, operating in a capital market that is closely integrated with that of the United States, are not permitted to purchase those securities in initial offerings or, until the passage of the time periods specified in Rule 144, on the secondary market.

#### The Characteristics of Massachusetts or Similar Business Trusts

A business trust is defined in Massachusetts as “a voluntary association under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares.”<sup>3</sup> As noted in a 1988 article discussing the use of business trusts as investment companies registered under the Investment Company Act, “Unlike a corporation, which is a creature of state statute, a business trust is created by agreement. Filing a declaration of trust with the Commonwealth of Massachusetts is not a condition precedent to the existence of the trust. Indeed, if no filing of any kind is made, the trust entity will still exist, even though its trustees are in violation of Massachusetts law. In contrast, a corporation will not

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<sup>2</sup> Although the text of item (a)(1)(iv) on its face permits aggregation of this kind only by U.S. registered investment companies that are advised by the same investment “adviser” (or, the case of a unit investment trust, the same depositor), the Commission’s promulgating release for Rule 144A made it clear that sub-advisory relationships would also suffice to establish family status. See Securities Act Release No. 6862 (April 23, 1990) at n. 46.

<sup>3</sup> Laws of Massachusetts, Chapter 182, § 1.

exist unless the requisite documents are executed and filed with the appropriate state authority because normally a corporation can be created only through statutory compliance.”<sup>4</sup>

The description of a Massachusetts business trust as a voluntary association has led courts generally to characterize business trusts as “common law trusts.” Indeed, a recent review of the modern legal status of business trusts begins with the statement, “The Massachusetts or business trust, which is also called a common-law trust, is essentially a business organization cast in the trust form.”<sup>5</sup> Thus, the distinction between business trusts and other kinds of trusts is not based upon the nature of the legal authority pursuant to which business trusts are organized but rather upon the purpose that a business trust serves and its characteristics. Many years ago the U.S. Supreme Court, in the course of deciding that, as a matter of statutory construction, certain business trusts should be taxed as corporations, characterized business trusts as follows in *Morrissey v. Commissioner*:<sup>6</sup>

[T]he nature and purpose of the cooperative undertaking will differentiate it from an ordinary trust. In what are called "business trusts" the object is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of a business and sharing its gains. Thus a trust may be created as a convenient method by which persons become associated for dealings in real estate, the development of tracts of land, the construction of improvements, and the purchase, management and sale of properties; or for dealings in securities or other personal property; or for the production, or manufacture, and sale of commodities; or for commerce, or other sorts of business; where those who become beneficially interested,

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<sup>4</sup> Sheldon A. Jones, Laura M. Moret and James M. Storey, “The Massachusetts Business Trust and Registered Investment Companies,” 13 *Del. J. Corp. L.* 421, 423 (1988)(footnotes omitted) (cited below as “Jones, Moret and Storey”).

<sup>5</sup> Herbert B. Chermiside, Jr., “Modern Status of the Massachusetts or Business Trust,” 88 A.L.R. 3<sup>rd</sup> (1978, most recently updated January 2001), § 2 (footnotes omitted)(cited below as “Chermiside”). *See also Navarro Savings Assn. v. Lee*, 446 U.S. 458 (1980). We note also that the provisions of Delaware law governing statutory trusts, initially enacted in 1988, provide that the term “statutory trust” means “an unincorporated association which (i) is created by a governing instrument under which property is or will be held, managed, administered, controlled, invested, reinvested and/or operated, or business or professional activities for profit are carried on or will be carried on, by a trustee or trustees ... for the benefit of such person or persons as are or may become entitled to a beneficial interest in the trust property, including but not limited to a trust of the type *known at common law* as a “business trust” [or] a “Massachusetts trust” ... and (ii) files a certificate of trust pursuant to § 3810 of this title.” Delaware Code, Title 12, § 3801 (italics added).

<sup>6</sup> 296 U.S. 344, 357 (1935). Under the Internal Revenue Code of 1986 and related Internal Revenue Service regulations, until 1996 a business trust would have been classified as a partnership (as opposed to a corporation) unless it exhibited at least three of the following “corporate” characteristics: (1) centralized management, (2) continuity of existence upon the death, incompetence or bankruptcy of each holder of beneficial interests therein, (3) free transferability of membership interests and (4) limited liability on the part of all members for the debts of the partnership. Former Treasury Regulation § 301.7701-2. Under the now-applicable “check the box” rules a business trust may elect to be treated as either a partnership or a corporation for federal income tax purposes. Treasury Regulations §§ 301.7701-2 and 3.

either by joining in the plan at the outset, or by later participation according to the terms of the arrangement, seek to share the advantages of a union of their interests in the common enterprise.

The case law is not clear, however, concerning what characteristics, if any, a trust must have, beyond being a medium for the conduct of a business and sharing its gains, in order to be deemed a business trust. The characteristic of issuing transferable interests is, of course, specified in the Massachusetts statutory provision noted above, as well as in the laws of certain other jurisdictions that have statutes on the subject.<sup>7</sup> However, as previously noted, Chapter 182 of the Laws of Massachusetts does not provide the source of law pursuant to which Massachusetts business trusts are organized;<sup>8</sup> the New York definition does not refer to transferability;<sup>9</sup> and a Delaware statutory trust may provide in its governing instrument that its beneficial interests are not transferable.<sup>10</sup> It has also frequently been noted that the “association” aspect of business trusts assumes that the holders of interests therein will be the contributors of the trust’s equity capital, and this factor has been taken by a number of courts as an additional distinguishing feature of business versus other trusts.<sup>11</sup>

On the other hand, properly established business trusts have been characterized as partnerships for certain legal purposes. For example, in Massachusetts the shareholders of a business trust can be held to the trust’s creditors as general partners if they possess “too much” power to govern the trust’s affairs in relation to its trustees.<sup>12</sup>

In recent decades by far the most intense efforts by courts to define what a business trust is have been undertaken in the context of the jurisdictional provisions of the federal Bankruptcy Code. Until the enactment of the Bankruptcy Reform Act of 1978, the issuance of certificates representing transferable interests was a qualifying factor in determining whether a trust would be classified as an entity eligible for reorganization or liquidation under the Bankruptcy Code.<sup>13</sup> However, the Bankruptcy Reform Act removed the transferable certificate requirement and provided that “business trusts” are one of the kinds of organizations coming within the definition

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<sup>7</sup> See, e.g., Ky. Rev. Stat. Ann. § § 386.370, 386.400.

<sup>8</sup> See the quotation from Jones, Moret and Storey accompanying note 4, *supra*.

<sup>9</sup> N.Y. General Associations Law, § 2.2.

<sup>10</sup> Delaware Code, Title 12, § 3805(d).

<sup>11</sup> See, e.g., Chermiside, § 5; *Pope & Cottle Co. v. Fairbanks Realty Trust*, 124 F.2d 132, 134 (1st Cir. 1941); *Plymouth Securities Co. v. Johnson*, 335 S.W. 2d 142 (Mo. 1960).

<sup>12</sup> See Jones, Moret and Storey at 439-443 and Chermiside, §§ 7-8 (noting, among other things, that a similar doctrine has been applied in California).

<sup>13</sup> See, *inter alia*, *In re Secured Equipment Trust of Eastern Air Lines, Inc.*, 38 F. 3d 86, 92 (2<sup>nd</sup> Cir. 1994)(Kearse, J., dissenting)(cited below as *Eastern Air Lines Trust*).



of “corporation,” which in turn is defined as a “person” for purposes of the Bankruptcy Code’s jurisdictional provisions.<sup>14</sup>

While there are few appellate decisions in the area, the issue did reach the Sixth Circuit in 2002 in the case of *Brady v. Schilling*.<sup>15</sup> After deciding that the question is one of federal rather than state law (*i.e.*, that whether (or not) a trust meets the technical definition of a business trust under a particular state’s law (if such law contains such a definition) does not control for purposes of deciding whether it is a business trust under the Bankruptcy Code), the *Brady* court reaffirmed two previously developed propositions (in an unpublished decision in the same case).<sup>16</sup> First, “[T]rusts created with the primary purpose of transacting business or carrying on commercial activity for the benefit of investors qualify as business trusts, while trusts designed merely to preserve the trust res for beneficiaries generally are not business trusts”; and second, “[T]he determination is fact-specific, and it is imperative that bankruptcy courts make thorough and specific findings of fact to support their conclusions.”<sup>17</sup>

We note, however, that a test of business trust status that would require a “thorough and specific” investigation of the characteristics of a particular trust is not practical in the context of developing a set of criteria for the application of the phrase “Massachusetts or similar business trusts” in Rule 144A to business trusts organized outside the United States. We suggest, therefore, that a test focused on the factors identified in *Morrissey* relating to when a trust was to be classified as a corporation under then-applicable tax rules,<sup>18</sup> combined with a requirement (which may be implicit in such factors in any event) that the business activity be for the benefit of investors, may be more appropriate in this context: (1) creation and maintenance for a business purpose or function, (2) title to property held by the trustee (or trustees), (3) centralized management, (4) continuity of business existence uninterrupted by the death of beneficial owners, (5) means for transfer of beneficial interests and introducing new participants without affecting the continuity of the enterprise and (6) limited liability on the part of investors.<sup>19</sup> We believe that, if these factors are substantially observed, the Staff will have ample basis for concluding that non-U.S. trusts with such characteristics are well distinguished from testamentary and intervivos trusts.

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<sup>14</sup> See §§ 101(9)(A)(v) and 101(41) of the Bankruptcy Code.

<sup>15</sup> 303 F.3d 671 (6<sup>th</sup> Cir. 2002). The only other Court of Appeals decision is *Eastern Air Lines Trust*, *supra* note 12.

<sup>16</sup> Although unpublished, the previous opinion is available as *Brady v. Schilling*, 1997 WL 415318 (6<sup>th</sup> Cir. 1997).

<sup>17</sup> 303 F. 3d at 680.

<sup>18</sup> The Sixth Circuit noted in *Brady* that a test based on the factors identified in *Morrissey*, with particular attention to the transferability of trust interests, has been the other primary candidate identified by courts for determining qualification as a business trust under the Bankruptcy Code. 303 F. 3d at 679-80.

<sup>19</sup> *Morrissey*, 296 U.S. at 357-359. See also *In re Sung Soo Rim Irrevocable Intervivos Trust*, 177 B.R. 673, 677 (Bankr. C.D. Cal. 1995).

With this background, we will now turn to a more thorough description of the RBC Funds, which will demonstrate that those Funds fall within the most stringent definition of a business trust. In addition, in view of the notation in the Rule 144A promulgating release that the Rule is “intended to cover only resales to institutions that are sophisticated securities investors,”<sup>20</sup> we will discuss the extent and nature of the sophistication of the RBC Funds’ investment advisers in investing in private placements of securities and securities generally.

### The RBC Funds, their Regulation and the Regulation of their Advisers

[Data concerning the RBC Funds omitted.]

#### Adviser Regulation and Sophistication

In Ontario, where the RBC Funds have been established, a portfolio manager of a mutual fund trust must be a professional fiduciary that is qualified to act as such under the Ontario Securities Act (the “OSA”), which imposes registration and ongoing regulatory requirements that are comparable to those imposed upon an investment adviser registered under the Investment Advisers Act of 1940 (under which all U.S. investment advisers to registered investment companies must be registered). In accordance with those requirements, RBC AM is registered in all provinces and territories of Canada as an investment adviser in the category of an ICPM. As such, RBC AM’s individual portfolio managers must meet certain defined proficiency requirements before qualifying for individual registration as an ICPM.<sup>21</sup>

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<sup>20</sup> Securities Act Release No. 6862, *supra* note 2, text following n. 33. See also the proposing and repropounding releases for Rule 144A: Securities Act Release No. 6806 (October 25, 1988), text following n. 168; and Securities Act Release No. 6839 (July 11, 1989), text following n. 15.

<sup>21</sup> An adviser in the ICPM category must see to the related registration of its partners, directors, officers and investment management personnel. Such a registrant must designate a compliance officer, provide a financial institution bond and comply with minimum working capital requirements. In addition, the OSA and other applicable provincial securities laws regulate such advisers with respect to their record keeping and reporting practices, the maintenance of client accounts, their provision of annual financial statements and certain other financial reporting requirements. Other regulations of the provincial securities regulatory authorities require such advisers to deal fairly, honestly and good faith with their clients (including with respect to conflicts of interest) and regulate communications with the public.

Under section 3.2 of Ontario Securities Commission rule 31-502, applicants to become an individual ICPM must meet one of the following four requirements:

- (a) previous registration as a full ICPM in Ontario;
- (b) (1) qualification under the Canadian Investment Management Program (a training program run by the Canadian Securities Institute) plus completion of the first year of courses to become a Chartered Financial Analyst (“CFA”) or (in the alternative) full qualification as a CFA, *plus* (2) five years’ employment as an investment analyst, three of which must have been with an ICPM that manages at least \$5 million (Canadian) of assets; or
- (c) (1)(A) three years of experience as an Associate ICPM (which requires similar educational attainments but is an

[Detailed description of RBC AM portfolio management practices omitted.]

In the case of RBC Funds managed in whole or in part by sub-advisers that are not affiliated with RBC, RBC AM conducts a due-diligence review of each sub-adviser's qualifications and experience and monitors the sub-adviser's compliance with its investment mandate on a regular basis. Each sub-adviser must hold all relevant registrations with the appropriate securities regulatory authorities of its jurisdiction.

*Mutual Fund Regulation and the Characteristics of the RBC Funds*

In Canada mutual funds, investment funds and other securities matters are regulated by the provinces, not the federal government, through the office of the provincial securities commissions (such as the Ontario Securities Commission). Such authorities have responsibility to ensure that investors have access to information that they need to make informed decisions about investment opportunities; require, and set standards for, the registration of brokerage and investment advisory firms; set educational and proficiency standards for brokers and investment advisory personnel; police compliance with applicable regulatory requirements; and investigate legal violations brought to their attention, bringing enforcement actions as they deem appropriate.

An umbrella body, the Canadian Securities Commissioners (the "CSA"), consists of representatives from each provincial and territorial securities commission and periodically coordinates the promulgation of national rules concerning securities matters. In particular with regard to the subject matter of this letter, the CSA has promulgated National Instrument 81-101 (*Mutual Fund Prospectus Disclosure*) and National Instrument 81-102 (*Mutual Funds*). National Instrument 81-101 specifies the information that mutual fund investors are to receive in a simplified prospectus. National Instrument 81-102 regulates the manner in which mutual funds are to be managed; the kinds of investments such funds may make; how mutual fund shares may be bought, sold and redeemed; how the funds' manager may effect amendments in the foregoing; and the advertisement of units of beneficial interest in mutual funds for sale.<sup>22/23</sup>

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employment position that does not entail making ultimate investment decisions), (B) three years of experience as a securities salesperson for a broker, investment dealer or securities dealer plus two years of experience as an Associate ICPM, (C) three years of experience as an investment analyst for a broker or an investment dealer plus two years of experience as an Associate ICPM or (D) five years of experience managing or supervising the discretionary management of a portfolio of securities worth at least \$5 million (Canadian) for a financial institution (i.e., a bank or an insurance company) or and pension fund, *plus* (2) direct management of a securities portfolio worth at least \$5 million (Canadian) during the year preceding the application; or

(d) registration as a full ICPM in the individual's province of residence (i.e., a province other than Ontario).

<sup>22</sup> Separately, we note that mutual fund trusts are subject to a specified taxation regime under the Income Tax Act (Canada). In general, a mutual fund trust is a type of Canadian unit trust – i.e., an inter-vivos trust that either invests in real estate or holds a wide range of prescribed investments and in which each beneficiary's interest is described by reference to trust units. Such units must either be redeemable or listed on a prescribed securities exchange, and the

The RBC Funds have been established by RTC, an indirect wholly owned subsidiary of RBC, as trustee pursuant to a Master Declaration of Trust, as most recently amended and restated on July 14, 2003 (the "Declaration").<sup>24</sup> Each separate RBC Fund is maintained as a separate and independent trust fund subject to the provisions of the Declaration "for the purpose of the common or collective investment and reinvestment of moneys received by the Trustee for investment in such Fund."<sup>25</sup> The Declaration provides that all assets of an RBC Fund are considered as assets held in trust by RTC as trustee of that RBC Fund.<sup>26</sup>

RTC has exclusive management and control over each RBC Fund and its assets, with the authority to appoint managers to manage various aspects of the operation of an RBC Fund (ranging from portfolio management to accounting services), investment counsel, consultants and other advisers.<sup>27</sup> Unlike other Canadian funds established as business trusts, however, the Declaration also provides that RTC may appoint a Board of Governors, a majority of whom must be independent of RBC, to advise RTC concerning all aspects of Fund management, ranging from investment strategy to the approval of transactions with RBC affiliates.<sup>28</sup> The Board of Governors currently has eight members, all but one of whom are independent of RBC. While the Board of Governors generally has only an advisory role with respect to the RBC Funds, it functions much like a corporate board of directors, and RBC AM gives serious consideration to the views expressed and advice provided by the Board and its committees. In addition (and as required under National Instrument 81-102), certain fundamental decisions with regard to changes in an RBC Fund's management (appointment of a new trustee, transfer of substantially all management responsibilities for an RBC Fund to an entity not affiliated with RBC and

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trust must comply with conditions prescribed by regulation relating to the number of its unit holders and dispersal of unit ownership. If a trust qualifies as a mutual fund trust, its undistributed income is subject to income taxation in Canada at the highest marginal tax rate. As a result, such funds/trusts typically distribute all trust income to their unitholders. In addition, distributions of income to non-resident unitholders are subject to withholding tax under the Income Tax Act at standard withholding rates (subject to reduction pursuant to treaty provisions).

<sup>23</sup> A number of similarities between the manner in which the sale of mutual fund units is regulated by Canadian law, on the one hand, and the manner in which the sale of the shares of open-end investment companies is regulated under the Investment Company Act in the United States, on the other hand, are parsed in the no-action letter granted by the Staff of the Division of Investment Management to Manufacturers Adviser Corp. (publicly available September 10, 2002) (transactions in units of certain Canadian mutual funds could be treated in the same manner as shares of U.S. registered open-end funds for purposes of the application of exemptive provisions of rule 17j-1 under the Investment Company Act relating to the reporting of securities transactions by personnel of U.S. registered investment advisers that advise registered investment companies).

<sup>24</sup> A copy of the Declaration is attached to this letter as Exhibit A.

<sup>25</sup> Declaration, Article I, section 2.

<sup>26</sup> Declaration, Article V, section 2.

<sup>27</sup> Declaration, Article V, sections 1, 3 and 5-8.

<sup>28</sup> Declaration, Article XI.

change in an RBC Fund's fundamental investment objectives) must be approved by the investors in the RBC Fund in question.<sup>29</sup>

The continuity of the business of the RBC Funds is not interrupted by withdrawal of, or any other event affecting, an investor.<sup>30</sup> In addition, the Declaration states explicitly that unitholders in the RBC Funds are not liable for Fund liabilities and provides that they are to be indemnified out of Fund assets if any assertion is made that they are so liable.<sup>31</sup>

With regard to transferability and the ready admission of new investors, the Declaration provides that new unitholders may be readily admitted, subject to the approval of RTC, and that unitholders may redeem their units on demand.<sup>32</sup> While the ownership of particular units of beneficial interest is not transferable other than upon the occurrence of death or incompetence,<sup>33</sup> we have been advised that units of the RBC Funds are generally available for sale without a sales load and that no redemption fee is imposed upon the liquidation of all or part of an investor's RBC Fund interest. Therefore, although there can be no secondary market in the RBC Funds' units of beneficial interest, such units can in effect be transferred by gift through redemption and repurchase.<sup>34</sup> Although such a relatively complete restriction on transfer does not literally apply to open-end funds that are registered under the Investment Company Act and sold in the United States, we note that section 22(d) of, and rule 22c-1 under, the Investment Company Act in effect prohibit the development of a secondary market in the shares of U.S. open-end investment companies (unless otherwise exempted by Commission action).<sup>35</sup> Therefore, the transferability

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<sup>29</sup> Declaration, Article XII, section 2.

<sup>30</sup> Declaration, Article II and Article III, section 2.

<sup>31</sup> Declaration, Article XV, sections 2 and 3.

<sup>32</sup> Declaration, Article III.

<sup>33</sup> Declaration, Article IV, section 2 and Article V, section 4.

<sup>34</sup> In order to deter short-term trading, within the next year the RBC Funds may implement a fee on redemptions that are effected within a short period after purchase of the units in question.

<sup>35</sup> The first sentence of section 22(d) of the Investment Company Act provides (subject to certain exceptions contained in the second sentence of the section that are not relevant here) that, "No registered investment company shall sell any redeemable security issued by it to any person except either to or through a principal underwriter for distribution or at a current public offering price described in the prospectus, and if such class of security is being currently offer to the public by or through an underwriter, no principal underwriter of such security and no dealer shall sell any such security to any person except a dealer, a principal underwriter or the issuer, except at a current public offering price described in the prospectus." Rule 22c-1(a) provides (again subject to certain exceptions not relevant here) that, "No registered investment company issuing any redeemable security, no person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and no principal underwriter of, or dealer in, any such security shall sell, redeem, or repurchase any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security ..."

of the RBC Funds' units of beneficial interest is for practical purposes comparable to the transferability of the shares of U.S. open-end investment companies.<sup>36</sup>

In addition, we note that the Internal Revenue Service has concluded that free redeemability of interests is essentially equivalent to transferability for purposes of determining whether interests in a fund should be deemed transferable in connection with determining a fund's status as a "publicly traded partnership" under the Internal Revenue Code.<sup>37</sup>

As this description indicates, the RBC Funds therefore have all of the characteristics noted above that distinguish business trusts: (1) they are established for the purpose of achieving investment returns for their investors, who contribute the capital that is used for that purpose; (2) the legal title to their assets is held by RTC as trustee; (3) they are centrally managed by RTC's affiliate, RBC AM, or a sub-adviser designee selected by RTC and RBC AM; (4) the continuity of their business is uninterrupted by the death of an investor; (5) their units are freely redeemable and therefore, in effect, transferable, and new participants are routinely admitted without affecting the continuity of the enterprise; and (6) their unitholders are not liable for the debts of the trust.

### The Aggregation Proposal

Item (a)(1)(iv) of Rule 144A provides that the securities holdings of U.S. registered investment companies in the same family of investment companies may be aggregated for purposes of the determining the QIB status of each member fund in the family. The term "family of investment companies" is generally defined to mean two or more registered investment companies that have the same investment adviser.<sup>38</sup> The promulgating release for Rule 144A states the rationale for the ability of registered investment companies in the same family to aggregate holdings as

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<sup>36</sup> We note that, in discussing the nature of the transferability-of-interests characteristics of trusts that would be taxable as corporations, the Supreme Court in *Morrissey* stated that, "[W]hile the faculty of transferring the interests of the members without affecting the continuity of the enterprise may be deemed to be characteristic, the test of an association is not to be found in the mere formal evidence of interests or in a particular method of transfer." 296 U.S. at 358.

<sup>37</sup> In response to a perceived abuse in the use of the partnership format by publicly traded limited partnerships to avoid entity-level taxation, as part of its general amendment of the Internal Revenue Code in 1986 Congress amended the Code to provide that partnership taxation is not generally available to "publicly traded" entities, regardless of their possession of "partnership" (versus corporate) characteristics. Internal Revenue Code § 7704. It was left to the Internal Revenue Service to develop the criteria for distinguishing private and public partnerships. In its final regulations on the subject, adopted in 1995 (Treasury Regulations §§ 301.7704-1(e) and (f)), the IRS established a safe harbor from publicly traded partnership treatment (in addition to other safe harbors based on the number of beneficial owners and the nature of the entity's assets) on the basis of a limitation on actual trading, and adopted restrictive rules under which only certain limited redemption rights are permissible without giving rise to "trading." See, e.g., Mitchell S. Fishman and Edwin C. Laurenson, "SEC Adopts New Private Investment Company Rules," 25 *Sec. Reg. L. J.* 365, 384-86 (1998).

<sup>38</sup> As indicated at note 2, *supra*, the promulgating release for Rule 144A states that funds that share the same sub-adviser should qualify for the same treatment.

follows: "Due to the existence of a common investment adviser or affiliated investment advisers, allowing aggregation in this context would appear appropriate."<sup>39</sup> We agree with this rationale and note that the close relationship of RBC Funds that share the same investment adviser or sub-adviser is in all respects similar to the relationship between U.S. registered investment companies in the same "family," as defined in Rule 144A. Accordingly, we believe it appropriate that securities holdings of the RBC Funds be aggregated in the same manner as the holdings of their U.S. counterparts for purposes of determining QIB qualification.

### Conclusion

Based upon the foregoing, it is our opinion that the RBC Funds constitute, and trusts established or amended by an RBC affiliate to include similar features in the future will constitute, business trusts within the meaning of the phrase "Massachusetts or similar business trust" as used in Rule 144A. In addition, we believe that RBC Funds, and such subsequently established or amended trusts, that are advised by the same investment adviser or sub-adviser should be deemed the equivalent of a "family of investment companies" and, accordingly, should be permitted to aggregate their securities holdings in determining the ability of such trusts to qualify for QIB status. We look forward to receiving the Staff's concurrence in these views.

Very truly yours,

Edwin C. Laurenson

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<sup>39</sup> Securities Act Release No. 6862, *supra* note 2, text at n. 46.