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WHAT DIRECTORS SHOULD KNOW ABOUT INDEMNIFICATION AND INSURANCE

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I. **INTRODUCTION{**tc \l 1 "**I. INTRODUCTION**"**}**

Both SEC Chairman Arthur Levitt[1] and the ICI Advisory Group on Best Practices for Fund Directors[2] have strongly recommended that fund boards obtain D&O/E&O insurance coverage and/or indemnification from the fund that is adequate to ensure the independence and effectiveness of their independent directors. In addition to ensuring their independence, fund boards and the SEC have long recognized that adequate indemnification and insurance is critical to attracting qualified persons to serve as independent directors.[3]

Indemnification and insurance are important since directors have the potential to incur personal liability and can be sued in their capacity as representatives of a fund as a result of a breach or alleged breach of their fiduciary duties of care and loyalty to the fund and its shareholders, or as a result of failing to fulfill their obligations to the fund and its shareholders under federal securities laws. Director liability was not an area of great concern for the nation’s corporate directors until the 1980s. Prior to that time, lawsuits against directors for errors in judgment or insufficient care were rare, and relatively inexpensive liability insurance was readily available. Beginning in the 1980s, however, the issue of director liability became an area of increasing concern due to a combination of factors such as (i) increasing numbers of lawsuits being filed against directors, (ii) the potential for large monetary judgments or settlements in derivative and stockholder class action suits, (iii) increasing insurance premiums and deductible amounts for D&O insurance, (iv) decreased availability of D&O insurance and (v) exclusions and limitations in D&O insurance policies. These same circumstances now are a concern to fund directors because of increased litigation directed against them in the past several years.

While relatively unheard of a number of years ago, in recent times shareholders have brought an increasing number of lawsuits against funds and their directors. Suits range from the “traditional” claims of inaccurate prospectus risk disclosure[4] to the more recent claims stemming from common fund industry use of “pooled boards,”[5] to the specialized claims against closed end funds for approval of rights offerings.[6] Additional complications have been introduced in recent disputes in which the adviser sued the fund’s independent directors, a situation that occurred in the well publicized Navellier and Yacktman disputes discussed below.

II. **QUESTIONS THAT INDEPENDENT DIRECTORS {**tc \l 1 "**II. QUESTIONS THAT INDEPENDENT DIRECTORS "}** **SHOULD ASK ABOUT INDEMNIFICATION AND INSURANCE**

What is indemnification and how does it work?

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1 Remarks of SEC Chairman Arthur Levitt of the Mutual Funds and Investment Management Conference, Palm

Am I indemnified to the fullest extent permitted under applicable state and federal law?

Do I have a right to advancement of expenses, and if so, how do I exercise this right?

Should I have a separate indemnification agreement with the Fund?

Should the Fund and the directors obtain D&O/E&O insurance coverage?

- How much coverage?
- Which insurance provider?
- What are the terms of the coverage?

Should the Fund(s) and the Adviser obtain a "joint" insurance policy?

- What are the legal standards and findings I must make to approve a joint policy?

- Who should pay the premiums and how much?

- How is coverage allocated among the insureds?

What are the advantages/disadvantages of a multi-year policy?

III. INDEMNIFICATION — THE STARTING POINT{tc \l 1 "III. INDEMNIFICATION — THE STARTING POINT"}

A. Indemnification — A Creature of State Law{tc \l 2 " A. Indemnification — A Creature of State Law"}

Corporate indemnification of directors has its genesis in agency law.[7] In essence, directors argued that as "agents" for the corporation, they were entitled to reimbursement of their costs (including litigation expenses and damages) incurred in service of the corporation. The courts, however, did not warm to this approach, and early suits brought by directors for recovery of defense costs were not very successful.[8]

The impetus for states to enact statutes permitting indemnification for directors finally arose out of the many lawsuits brought against corporate directors as a result of the Great Depression. In many of those instances, decisions made in good faith in those difficult circumstances appeared very ill-conceived in hindsight. Indeed, a leading court held that corporate directors could not be indemnified even though the directors and the corporation prevailed in the suit.[9]

In response to the criticism of such a result, in 1941 New York enacted the first indemnification statute. Today, all 50 states have indemnification statutes.

While variations exist among the state indemnification statutes,[10] many state laws:

require indemnification for attorneys' fees and expenses of a director who has been fully exonerated.

permit a corporation or business trust to include provisions in their charter/bylaws or trust documents to permit indemnification of amounts paid in judgment or settlement and defense costs where the director acted in good faith.

do not permit indemnity for conduct which involves bad faith, willful misfeasance, reckless disregard of duty or which resulted from active and deliberate dishonesty, improper personal benefit or in a criminal proceeding, where the director knew or had reasonable basis to know that his conduct was unlawful.

provide a mechanism so that a fund can make a determination as to whether indemnity is proper. The statutes commonly provide that the determination can be made:

by a majority vote of the board of directors or by a committee of directors not involved in the proceeding;

by special legal counsel selected by the board or committee of the board to make the determination; or

by the stockholders.

In addition to the traditional manner of including indemnification provisions in a fund's charter or bylaws, most state laws also permit directors to enter into indemnity agreements with the fund. Such an agreement, may be desirable because it gives the directors an additional contractual basis to make a claim against the fund, secures indemnity rights in the event the board determines to change the bylaws and can clarify indemnification rights. A sample form of an indemnification agreement for a fund organized as a Maryland Corporation is attached as Annex B.

B. Advancement of Expenses — A Very Important Offshoot {tc \l 2 " B.

important to consider the ability of the directors to have funds advanced to pay legal fees and expenses in defense of the lawsuit. It is important, then, that indemnification provisions provide that expenses of preparation and presentation of a defense to a claim, action, suit or proceeding may be advanced by the fund prior to final disposition, upon receipt of an undertaking by the recipient to repay such amounts if it is ultimately determined that the director is not entitled to indemnification. As discussed later, under the 1940 Act, in order to get an advancement of expenses, the SEC staff believes one of the three following circumstances must exist:

the undertaking is secured by the recipient of the advances; or

the fund is insured against losses arising out of any such advances; or

a determination is made based upon a review of readily available facts (as opposed to a full trial type inquiry), that there is a reason to believe that the recipient ultimately will be found entitled to indemnification by either:

a majority of disinterested directors acting on the matter; or

independent legal counsel in a written opinion.

This SEC staff interpretation, which most funds follow, underscores the importance of insurance coverage because if coverage is in effect the fund may advance funds for attorneys fees without the need to require security from the directors or an opinion of independent counsel (which can be difficult to obtain as discussed below). The provision providing for approval by a majority of disinterested directors frequently is not useful because most, if not all, of the directors commonly are named in the suit so that a majority of disinterested directors does not exist to consider this matter.

C. **Federal Law Limits{**tc \l 2 " **C. Federal Law Limits**"**}**

1. **Indemnification{**tc \l 3 " **1. Indemnification**"**}**

The 1940 Act limits the ability of a fund to indemnify its director. Consistent with the laws of many states, the 1940 Act prohibits indemnification for any liability to the company or its security holders where the director has engaged in willful misfeasance, bad faith, gross negligence or reckless disregard of the duties involved in the conduct of his office (“disabling conduct”).[11]

The SEC staff also requires that indemnification provisions set forth reasonable and fair means for determining whether indemnification shall be made.[12] In the staff's view, "reasonable and fair means" would include:

A final decision on the merits by a court or other body before whom the proceeding was brought that the person to be indemnified was not liable by reason of disabling conduct; or[13]

in the absence of such a decision, a reasonable determination, based upon a review of the facts, that the indemnitee was not liable by reason of disabling conduct by:

the vote of a majority of a quorum of directors who are neither "interested persons" of the fund nor parties to the proceeding ("disinterested, non-party directors"); or

an independent legal counsel in a written opinion.[14]

These procedures usually work effectively with respect to making *final* determinations regarding the right to indemnification. In such instances, either a court or other adjudicative body has made a final decision that the indemnitee was not liable by reason of disabling conduct or the parties have entered into a settlement, in which the directors do not admit any wrongdoing or liability. At that point, the indemnification issue normally would be submitted to a quorum of directors not parties to the proceeding or to an independent legal counsel for a determination. This determination is relatively straightforward after settlement or other conclusion of the matter, since the board or counsel generally has access to all readily available facts, including documents produced and testimony developed in pretrial discovery in the litigation.

The SEC staff's procedures can pose difficulties, however, in dealing with the issue of advancement of expenses. They may also pose issues in a adversarial change of control situation, particularly if the former directors must seek approval from the new board which may not consider the matter objectively on the merits.

2. Advancement of Expenses**{**tc \l 3 " 2. Advancement of Expenses"**}**

In the very important area of advancement of expenses, the SEC staff also takes the position that there must be a reasonable and fair means for determining whether an advancement should be made. As with ultimate indemnification, the SEC staff has set forth what

[12] In 1980, the SEC staff issued a release in which it confirmed that indemnification provisions are permissible so long as they do not permit indemnification for any damage or expense, whether or not there was an adjudication of liability, arising by reason of willful misfeasance, bad faith, gross negligence or reckless disregard of duties. This

it believes is a “reasonable and fair means” to include an undertaking by the indemnitee to repay the advance unless it is ultimately determined that the person is entitled to indemnification and one of the following:

the indemnitee shall provide security for the undertaking; or

the fund shall be insured against losses arising by reason of any lawsuit advances; or

a determination, based on a review of readily available facts (as opposed to a trial type inquiry), that there is reason to believe that the indemnitee ultimately will be found entitled to indemnification by:

either a quorum of the board (as described above); or

independent legal counsel.[15]

Complications and difficulties can arise, however, in employing independent legal counsel to make the advancement determination. In Yacktman, for example, independent counsel was engaged by the directors while litigation was pending between the adviser and the independent directors. The independent counsel determined that he was unable to render an opinion because, in light of the pending litigation, he did not have access to all required facts (those in sole possession of the adviser and its witnesses) while the action proceeded. This left the directors without a viable mechanism to obtain advancement of expenses that would satisfy state and federal laws. In order to ameliorate this problem, however, the SEC staff subsequently determined that the independent counsel could proceed to issue an opinion permitting advancement under a rebuttable presumption that the directors did not engage in disabling conduct.[16] Such a presumption could be rebutted by evidence that the directors had engaged in such conduct.

3. Cannot Insure Non-Indemnifiable Conduct**{**tc \l 3 " 3. Cannot Insure Non-Indemnifiable Conduct"**}**

The SEC staff has stated its belief [17] that 17(h) of the 1940 Act, which prohibits a fund from directly indemnifying a director from disabling conduct, also precludes the fund from indirectly indemnifying the director by insurance.[18] This view is more restrictive than most state

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15 SEC Release No. IC-11330 (Sep. 2, 1980).

16 The Yacktman Funds, Inc. (pub. avail. Dec. 18, 1998).

17 See Item 19 of the Guidelines for the preparation of Form N-8B-1 registration statement for open-end funds (the predecessor to current Form N-1A) issued by the SEC staff, provides: **?**[i]t is the Staff**?**s position that Section 17(h) does not prohibit the [fund] from paying for insurance which protects the directors against liabilities arising from

laws,[19] which allow insurance for conduct that would not be indemnifiable, subject to certain limitations. We are not aware of any court which has decided whether the SEC staff is correct in its view of the 1940 Act's limitation on insurance.

IV. D&O/E&O INSURANCE{tc \l 1 "IV. D&O/E&O INSURANCE"}

A. What is D&O/E&O Insurance?{tc \l 2 " A. What is D&O/E&O Insurance?"}

D&O/E&O Insurance policies generally provide two types of coverage: (1) "directors and officers" (D&O) and (2) "errors and omissions" (E&O). D&O coverage typically covers directors (and officers) of a fund for claims made against them for their designated acts, errors or omissions. E&O coverage typically covers the fund for claims made against the fund for designed acts, errors or omissions by the fund or its representatives (e.g., its directors and officers).

Generally, there are two types of D&O coverage: (1) "fund reimbursement" and (2) "direct." Fund reimbursement coverage covers the fund for amounts that the fund has indemnified or is required to indemnify. Fund reimbursement coverage is the most common type of coverage. Direct coverage, on the other hand, covers directors if the fund is not legally permitted to indemnify them. Direct coverage for investment company directors is rare since, as discussed above, the SEC staff takes the position that, for most practical purposes, it is not permitted under the 1940 Act.

There are also two general types of D&O/E&O policies: (1) "claims made;" and (2) "occurrence." Most funds have claims made policies. Under a claims made policy, coverage is triggered when a claim is made against an insured. Under an occurrence policy, coverage is triggered when the facts underlying the claim occur. Under either type of policy, giving timely notice of a claim (or potential claim) is of critical importance since failure to do so could result in a denial of coverage.

B. Issues Associated With Joint Policies{tc \l 2 " B. Issues Associated With Joint Policies"}

Funds often purchase D&O/E&O policies on a joint basis with the adviser and/or underwriter because frequently this is the most cost effective method to obtain coverage. A joint policy often allows each insured to obtain more aggregate coverage and/or lower premiums. Such joint policies are permissible under Rule 17d-1(d)(7) under the 1940 Act provided the directors of each covered fund determine that:

the fund's participation in the joint policy is in the best interest of the fund;

the board of directors of the fund, including a majority of the directors who are not interested persons with respect thereto, determine at least annually that the standards described above have been satisfied.[20]

The use of a joint policy, however, presents the tricky issue of how to allocate the premium; first, between the funds and the adviser, second, between each of the funds.

A joint policy also exposes one or more insureds to the risk that the limits of the policy may be exhausted by another insured.

C. Scope and Limits of Coverage**{**tc \l 2 " C. Scope and Limits of Coverage"**}**

All insurance is not created equally. There are various types, and many terms of D&O/E&O insurance. The policy is a complicated and elaborate system made up of various parts many of which can function to deny or limit coverage.

1. Policy Structure{tc \l 3 " **1. Policy Structure**"**}**

D&O insurance policies have traditionally been based on the Lloyds of London form which uses a two part structure. One part, "Part A" - insures directors and officers in situations where the fund cannot or does not provide indemnification. "Part B" - reimburses the fund for indemnification payments properly and lawfully made.

Under Part A, the insurer agrees to pay all "Loss" resulting from a "Wrongful Act" which the directors and officers shall become legally obligated to pay, except for such Loss which the fund (1) actually pays in indemnification or (2) for which the fund is legally permitted to indemnify the directors and officers but does not pay, unless the failure to pay is due to the financial incapability following bankruptcy or receivership.[21]

Most D&O policies available today are "claims made policies." Under this type of policy, coverage applies to claims first made during the policy period regardless of when the events giving rise to the claim occurred. This means that if a claim is not made while the insurance is in effect, no coverage exists even if the operative events took place while the policy was in force. This approach differs from other types of insurance such as general liability policies where coverage attaches to the policy in effect at the time of the occurrence of the events giving rise to coverage. Disputes can arise under D&O policies as to what constitutes a claim and when the claim was first made. A closely related concept is the "retroactive date" or prior acts date which is a starting point for coverage under the policy, the first date in which alleged wrongful acts may occur and be covered. This date is of central importance to the coverage provided; for example, a retroactive date the same as the policy inception date would limit

The first page of the policy typically is the "Declarations Page" which sets forth the policy period (frequently one year, but sometimes two or three years in recent policies); the name of the insured fund and other entities such as the adviser. The Declarations Page also sets forth the limit of liability for each coverage, that is the maximum aggregate amount the insurer is liable to pay concerning claims during the policy period. It also specifies the deductibles or retentions applicable to each claim and coinsurance provisions, if any. Coinsurance provisions are not common in today's insurance market.

Normally, there is no deductible for claims under Part A, the director's coverage. Under Part B, the fund's coverage, the deductible is usually substantial. Deductibles of $500.00 to $1 million are not uncommon for large funds.

Next, there are a series of definitions for key terms such as "Claim", "Loss", and "Wrongful Act," which must be reviewed with particular attention, as they materially affect the extent of coverage offered by the policy.

The next part of the policy is an exclusion section describing broadly those areas of liability that the policy does not cover.

General terms and conditions of the policy establish important procedures, presumptions and conditions to coverage, including provisions relating to notice of claims, the insured's rights with respect to defense of claims and circumstances in which the policy may be canceled. A particularly important provision here is the one that describes when the insurer will advance expenses to the insured.

Finally, at the end are the endorsements, a series of "side agreements" between policyholder and the insurer. These endorsements can have a significant practical effect in enhancing or diminishing the coverage of the policy.

2. Definition of Key Terms **{**tc \l 3 " 2. Definition of Key Terms "**}**

a. "Claim"

While actions brought in court for damages clearly constitute a "Claim," various D&O policies have differing definitions of "Claim" and certain policies do not include governmental or other regulatory investigations within their scope. More comprehensive policies explicitly include coverage for investigations into possible violations of law or regulation initiated by a governmental body or self-regulatory organizations, as well as more commonly covered court proceedings. Sometimes, it is not clear whether a "Claim" was made in a particular policy period. For example, a dispute may arise as to whether a letter from a uninsurable under applicable law, taxes, punitive or exemplary damages, or the excess portion (two-thirds) of treble damages.[22]

c. Wrongful Act

"Wrongful Act" with respect to the D&O coverage typically is defined to mean any actual or alleged error, misstatement, misleading statement, negligent act or omission, or neglect or breach of duty by the directors and officers in the discharge of their duties solely in their capacity as directors and officers of the fund. Disputes can arise as to whether "intentional" as opposed to negligent acts are insured.[23] Generally, insurance companies tend to insure against negligent acts and not intentional wrongdoing. Policy exclusions sometimes further limit the definition, for example by stating that there is not coverage for fraudulent or dishonest acts or the intentional violation by law by the insured. Courts have ruled that "intentional" conduct that was not intended to cause harm is covered, but these lines are sometimes difficult to draw.[24] Claims also have arisen as to whether a director was acting solely in his capacity as a director.

3. Exclusions{tc \l 3 " 3. Exclusions"}

a. Claims Against Co-Insureds

D&O policies typically include an exclusion for claims brought by one insured against another. Generally, the exclusion does not apply to derivative suits. The theory is to avoid providing insurance for collusive suits between insureds designed to reach insurance coverage. Such an exclusion may cause the director to be without coverage in the event of litigation brought by the investment adviser. The D&O carrier in the Yacktman dispute declined coverage for this reason. The ICI Advisory Group and SEC Chairman Levitt both have warned directors to be sure their policies do not contain such an exclusion in order to ensure their independence. ICI Mutual has offered an endorsement to eliminate this exclusion in bonafide disputes between co-insureds, and other insurers have indicated they intend to follow suit.

b. Other Common Exclusions

D&O/E&O policies generally contain several other limitations on coverage. Often, no coverage exists for any loss:

arising out of fraudulent, dishonest or criminal acts, or intentional violation of law;

based upon the insureds gaining any profit or advantage to which they were not legally entitled;

for return by directors to the fund of any renumeration held to be a violation of law;

based upon bodily injury, personal injury or damage to tangible property and certain other risks customarily covered by other insurance policies;

for which insured is entitled to indemnify under any other policy;

arising out of discrimination based upon race, sex or national origin;

arising out of discharge of duties as directors, officers or trustees of any entity other than the named policyholder, even if requested to do so by the policyholder.

arising out of the adoption, implementation or termination of a plan under Rule 12b-1 of the 1940 Act;

relating to payment to an affiliated person or the principal underwriter of management, investment advisory or other fees;

arising out of the inability of any bank or broker-dealer to make any payment or settle any transaction if the selection of such entity was based in whole or in part on any factor other than investment judgment.

4. Important Procedures **{**tc \l 3 " 4. Important Procedures "**}**

a. Notice of Claim

D&O policies typically provide that notice of a claim must be received by the insured during the policy period, and that the insured must give notice of the claim to the insurance company within the policy period, or sometimes within a short period after it ends (generally 30 days). Many policies permit advance reporting of circumstances that may give rise to a claim. If such circumstances are reported in accordance with the policy's requirements, the result is that any claim arising from the reported circumstances subsequent to the policy period will be deemed a claim in that policy period.

b. Selection and Payment of Counsel

Selection of counsel and the reasonableness of "costs of defense" also can raise issues. Normally, the directors have the right to select their own counsel and to direct their own defense. Counsel retained must be agreed upon by the directors' and the insurer. Suits alleging wrongdoing by fund directors frequently involve very complex issues and a very large potential exposure. The directors have a strong interest to obtain the best legal representation available from attorneys experienced in investment company issues. Insurance companies generally are cost conscious with respect to rates and activities undertaken by the directors'

Certain D&O policies are not clear as to whether the insurer is required to advance attorneys fees and costs, and disputes and litigation have arisen concerning this issue. It is very important that the policy clearly provides that the insurer, upon request, shall advance costs of defense on behalf of the directors and officers. Certain policies, similar to corporate indemnification provisions, require that the directors and officers give a written undertaking that, in the event it is established that the insurer has no liability, the directors and officers shall repay the sum advanced, and the insurer shall have no obligation to advance costs of defense if it has reasonable grounds to believe that it will not ultimately have liability for Loss resulting from the claims.

d. Allocation

Unless specifically provided by "entity" coverage, D&O insurance does not insure against loss resulting from a fund's own liability as opposed to that of the officers and directors. While a D&O policy typically reimburses the fund for amounts it has paid in indemnification of directors and officers with respect to covered claims, such policies will not cover damages, defense costs or settlement amounts to the extent these amounts are attributable to the fault of the fund. Some types of claims, such as securities class actions routinely are brought against the fund and the directors. In these circumstances, allocation of losses among the fund and directors can be a difficult and financially significant matter, since the fund may end up with less insurance coverage than it believed it had. Courts have reached different conclusions on methods of allocation.[25]

As the foregoing discussion demonstrates, insurance is an important protection but many issues can arise in the application of the policy's coverage to a particular circumstance which provides an additional reason to ensure that indemnification provisions are as broad as possible.

D. Enhancements to Consider**{**tc \l 2 " D. Enhancements to Consider"**}**

Revised Insured vs. Insured Clause. Most D&O/E&O policies exclude coverage where a joint insured sues another insured (these were originally put in policies to avoid collusive conduct to obtain insurance proceeds). In "Yacktman," the adviser sued the fund's independent directors. This left the directors without coverage because the insurer invoked this exclusion. A few insurers, led by ICI Mutual, have offered an endorsement to this exclusion so that independent directors may recover for defense costs, settlements and judgments in bona fide "insured vs. insured" claims otherwise covered under the policy. Independent directors should strongly consider seeking such an endorsement if their policy contains the standard insured vs. insured clause.

allows independent directors to pre-purchase a right of reinstatement of coverage that can be exercised in the event coverage is canceled by someone other than the independent directors.

Reserved Limits. Often, a single joint policy insuring independent directors, the funds and the fund's service providers (such as the adviser) is the most cost-effective basis on which to purchase coverage. However, with a joint policy, independent directors run the risk that the policy limits may be eroded by claims, leaving them with insufficient coverage. Independent directors should consider an enhancement that offers coverage reserved exclusively for independent directors. This is an alternative to purchasing a separate policy just for the independent directors. It takes advantage of the lower pricing accorded "joint policies," yet preserves limits for the sole use of the independent directors.

Special Notice and General "Corporate Machinery" Provisions. D&O/E&O policies generally provide for a single named insured (usually the adviser) to act as agent for the other insureds (e.g., to receive notice in the event of cancellation of the policy and to operate the general "corporate machinery" of the policy). Independent directors should consider an enhancement that ensures that specific notice of cancellation of the policy will be provided to the independent directors, along with the ability to exercise the general corporate machinery of the policy.

Marital Extension. Independent directors should consider an enhancement to their D&O/E&O policies that extends coverage for spouses of independent directors. The coverage is for claims made against such spouses in their capacity as spouses for the wrongful acts of the independent directors (including claims seeking damages recoverable from marital community property jointly held by the director and spouse).

Travel Insurance. Independent directors should consider separate coverage for injuries sustained by directors as a result of an accident or injury while on the business of the fund.

V. FROM THE TABLOIDS — DISPUTES{tc \l 1 "**V. FROM THE TABLOIDS — DISPUTES"}** <u>BETWEEN ADVISERS AND INDEPENDENT DIRECTORS</u>

Typically, the need for indemnification and insurance coverage has arisen when shareholders sue the fund alleging such claims as improper disclosures in the prospectus, improper rights offerings or fees paid to the adviser. Recently, two unprecedented situations

A. Navellier{tc \l 2 " A. Navellier"}

The Dispute. Navellier, an adviser owned by Louis Navellier ("Navellier"), and the independent directors had serious disagreements because Navellier refused to provide financial and other information concerning its operation of the fund requested by the directors. Navellier claimed that the disagreements arose because the independent directors sought confidential financial information; desired to retaliate because of Navellier's firing of the fund's marketing director, who was an interested member of the Board and a friend of two of the independent directors; and because the directors wanted to perpetuate themselves in office to continue to collect fees of $20,000 per year. Unlike the Yacktman dispute discussed below, Navellier did not involve poor performance since the fund was doing well prior to and during the dispute.

Navellier next proposed to merge the existing load fund into a no-load fund it also managed, thus removing the directors from the fund's Board. The independent directors refused to consider the merger proposal until they received information that they deemed necessary to make an informed decision. During a one-year period while the parties discussed the information requests, the board extended the investment advisory agreement for short periods of time.

The Proxy Contest. When the merger issue was not resolved after a year, Navellier prepared and filed a proxy statement seeking shareholder permission to effect the transaction. Navellier then claimed its contract was terminated by the Board, while the independent directors claimed that Navellier had resigned. The independent directors then took steps to remove Mr. Navellier from the Board and entered into a contract with a new adviser to take over management of the fund. In accordance with the 1940 Act, they sought shareholder ratification of the new adviser by soliciting proxies approving the change.[26] While the proxy fight raged, the adviser filed litigation which initially sought to enjoin the independent directors from removing Mr. Navellier as an interested director. Navellier also sought an injunction to block the directors' efforts to obtain ratification of the new investment advisory agreement. If successful, this tactic would allow Navellier to regain control of the fund.

The shareholders voted to reject the new adviser. The independent directors, stymied in their efforts to replace Navellier, then entered into a new advisory contract with Navellier and resigned. But that was not the end of the story, or the agony, for the independent directors.

The Damage Lawsuit. Navellier filed an amended complaint against the independent directors, the new (proposed but rejected) adviser and the attorney for the independent directors. The suit now alleged that the independent directors breached their fiduciary duties under both state and federal law because:

they sought to entrench themselves on the board so they would continue receiving their $20,000 per year directors' fees.[27]

The plaintiffs also alleged that the directors wasted corporate assets by engaging in the proxy contests and hiring an attorney. Finally, in a claim which had large potential damages, Navellier alleged that the directors intentionally interfered with its economic prospects and sought recovery of lost advisory and administrative fees for the period it was removed as adviser.

The Attempted Class Action. Navellier also recruited several friendly shareholders and attempted to bring the case as a class action on behalf of: (a) all shareholders who redeemed their shares after the new adviser was appointed (approximately 4,000) and (b) all shareholders who remained in the fund (also about 4,000). Navellier alleged that all shareholders were injured because they prematurely had to pay capital gains tax. The new adviser sold many of the fund's holdings and, as a result, the fund realized significant capital gains. This would have been an extremely large claim for damages given the number of shareholders. The Court refused to certify this class, so the case proceeded only on behalf of Navellier, Mr. Navellier personally and the individual shareholders.

The Directors Prevail at Trial. The case then proceeded to trial before a jury and the amount of claimed damage was reduced even further. Mr. Navellier personally claimed less than $10,000 in capital gains under his theory of damage. The other individual plaintiffs did not show up to testify so their relatively modest individual claims for excess capital gains were dismissed. The corporate waste claim was limited to about $225,000, the amount spent in the proxy contest to substitute the new adviser for Navellier. The court rejected Navellier's argument that this damage claim should include expenses relating to the proxy contest concerning the merger proposal and attorneys fees and expenses incurred to advise the independent directors and defend the litigation.

The independent directors testified and explained the reasons for their actions — that they acted in a manner that they believed in the best interest of the shareholders — that were accepted by the jury which found in favor of the directors.[28] One key fact which helped the defense was that the independent directors had agreed to step aside after the new Adviser was in place, which took all of the force out of the plaintiffs' entrenchment argument. Mr. Navellier says he is considering an appeal.

Issues remain as to who will bear the over $1 million in attorneys fees expended in defense of this suit. According to published reports, Navellier failed to keep the D&O insurance policy in force. The directors have made a claim for indemnification against the successor of their former fund. This important issue remains to be resolved and apparently is still contested by Mr. Navellier who asserts that the directors dropped this issue at trial, a contention that the directors hotly dispute.

B. Yacktman{tc \l 2 " B. Yacktman"}

The Dispute. Yacktman also involved a dispute between an adviser, owned and controlled by Don Yacktman, and the fund's independent directors. In this instance, the independent directors had questioned the adviser with respect to an apparent deviation in investment technique, the appropriate use of derivatives, violations by certain adviser employees of the fund's code of ethics, the management of the fund's portfolios by individuals other than those named in the prospectus, and the depth and experience of investment management personnel employed by the adviser. In addition, the independent directors expressed substantial concern that the fund's investment performance had been very disappointing.

In response, the adviser sent a letter to the independent directors demanding that they resign or a proxy statement would be filed seeking their replacement and threatening personal financial ruin if they opposed the adviser. The independent directors refused to resign. The president of the adviser (who was also the president of the fund) then called a special meeting of shareholders to remove the independent directors and replace them with a slate of directors chosen by the adviser. The adviser also filed a preliminary proxy statement with the SEC.

The SEC Does Not Enjoin the Meeting. The board revoked the call of the meeting and removed the president from office. The independent directors sent a letter to the Commission seeking intervention to stop the solicitation of proxies by the adviser. In this letter, the independent directors stated that they had attempted to fulfill their responsibilities as "watchdogs for the shareholders" by expressing their concerns. The independent directors expressed the view that the adviser's actions constituted an attempt to control the fund's independent directors. In addition, the independent directors stated that they believed the adviser's actions constituted a breach of the adviser's fiduciary duty to the fund in violation of Section 36(a) of the Act, and that, if allowed to stand, the adviser's actions would have a chilling effect upon independent directors of investment companies throughout the industry. The SEC commenced an inspection of the fund, but did not seek to stop the meeting.

The Suit. The adviser then sued the fund and the independent directors in Maryland state court seeking to compel holding of the shareholders meeting and, based upon Section 17(d) of the Act, to prohibit the fund from spending its own assets to solicit proxies for its own meeting. The state court judge, among other things, issued a temporary restraining order ("TRO") prohibiting the fund from spending its own assets to counter the adviser's proxy solicitation. The SEC staff then issued a letter that called into question the judge's ruling, saying that such a ruling could severely undermine the ability of independent directors to perform their duties under the

the fact that the holders of approximately 64% of the fund's shares had "voted with their feet" by redeeming their investments in the fund. The Funds' shares decreased from 81 million shares ($1.14 billion in assets) on January 1, 1998, to 29 million shares ($0.4 billion in assets) on November 24, 1998, the date of the shareholders meeting.

Yacktman then dismissed the lawsuit with the agreement of the independent directors and, to date, has not seen fit to bring an action for damages similar to Navellier, although the statute of limitations has not yet run.

C. Lessons To Be Learned**{**tc \l 2 " C. Lessons To Be Learned"**}**

These recent cases demonstrate the importance of having proper insurance coverage in place well before a dispute arises. Once hostilities begin, an adviser may take any steps possible to attempt to discourage the independent directors from continuing to challenge or oppose its activities by applying intense financial pressure and even threatening economic ruin. The adviser frequently has a tactical advantage at that point since it controls the corporate machinery and operates the fund. Navellier is reported to have either canceled the D&O policy or let it lapse. The result was that apparently no D&O coverage was available. In Yacktman, early on in the dispute the adviser wrote a letter to the directors pointing out that they should resign immediately because they were breaching their fiduciary duty and no coverage would be available for future litigation because of the insured versus insured exclusion. When the directors requested a defense against Yacktman's suit under the policy, the insurance company declined coverage, citing, among other provisions, this very exclusion.

Similarly, both of these instances demonstrate that broad and clear indemnification provisions should be in place. In Navellier the directors have won the damage suit (barring reversal on appeal and retrial with an adverse verdict) and undoubtedly should be entitled to be indemnified under federal and state law. It appears however that the directors, without any advancements, had to fund the entire defense of the litigation and are still in a dispute over indemnification. As described above, in Yacktman the independent directors also had difficulty in obtaining an advancement for their attorney's fees.

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ANNEX A{tc \l 1 "ANNEX A"}

SUMMARY OF STATE LAW ON INDEMNIFICATION

A. Maryland Corporation Law{tc \l 1 "A. Maryland Corporation Law"}

Maryland, like most states, allows funds to include provisions in their charter to indemnify their directors and provide for the advancement of legal fees. Indemnification provisions in the charter and bylaws, and any indemnification provided must comply with Section 2-418 of Maryland General Corporation Law (the "MGCL"). Under the MGCL, a "director" is defined to include both current and former directors.

1. Mandatory Indemnification.

Maryland law requires a corporation, unless limited by charter, to indemnify directors and officers who have been successful, on the merits or otherwise, in defense of any proceeding against reasonable expenses incurred in connection with the proceeding.[30] In the event that a corporation is legally obligated to indemnify a director and does not, a court can order the fund to indemnify a director for reasonable expenses, including attorneys fees, that the person incurs in securing the indemnification.

a. Permissible Indemnification.

In other situations, § 2-418(b) sets forth a wide range of conduct for which a corporation may, but is not required to, indemnify a director. The MGCL *allows* a corporation to indemnify a director against judgments, penalties, fines, settlements and reasonable expenses actually incurred by the director, unless it is established that:

the director acted in bad faith and the act or omission was material to the matter giving rise to the claim;[31]

the director's actions resulted from active and deliberate dishonesty;

the director actually received an improper personal benefit in money, property or services;

[30] (MGCL), ? 2-418(d)(1). The indemnification rights apply to any threatened, pending or completed action, suit or proceeding, whether criminal, civil or investigative. MGCL ? 2-418(a)(6). This broad definition includes both

in the case of a criminal proceeding, the director had reasonable cause to believe that the act or omission was unlawful; or

the director is adjudged liable to the corporation regarding a claim brought by or in the right of the corporation.[32]

Indemnification must be authorized for a specific proceeding and only after a determination has been made that the director has met the standard of conduct described above. The termination of any proceeding by judgment, order or settlement does not create a presumption that the director did not meet the requisite standard of conduct.[33]

The determination as to the propriety of indemnification and reasonableness of amount may be made either by the board of directors, by special legal counsel or the shareholders. (Section 2-418(e)).[34]

b. Advancement of Expenses

Under Maryland law, a fund may pay a director's defense expenses before final disposition of the claim if: (i) the director provides a written undertaking to repay such expenses if it is later determined that the director is not entitled to indemnification; and (ii) the director affirms in writing, a good faith belief that the director has met the standard of conduct necessary for the fund to provide indemnity. The undertaking must be an unlimited general obligation, but need not be secured.

c. Non-Exclusivity

Maryland Law also provides that the above-described rights are not exclusive of any other rights to which the directors are entitled under the charter and bylaws, by resolution or agreement. MGCL § 2-418(g). Of course, such resolution or agreement must be consistent with

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32 MGCL **?** 2-418(b). Of course, settlement of a claim brought by, or a derivative suit on behalf of the corporation, can be indemnified (provided it is not otherwise prohibited) because the director will not have been adjudged liable to the corporation.

33 Section 2-418(b)3(ii) provides that a **?**conviction or plea of *nolo contendere* or its equivalent, or entry of an order of probation prior to judgment, creates a rebuttable presumption that the director did not meet the standard of conduct of **?** 2-418(b)(1). This limited statutory presumption is unusual among state indemnification statutes. The Model Act is to the contrary.

34 If the determination is made by the board of directors, it must be made **?**by a majority note of a quorum consisting of directors, not, at the time, parties to the proceeding.**?** If such a quorum cannot be obtained, then a determination must be made **?**by a majority vote of a committee of the board consisting of two or more directors not, at the time, parties to such proceeding and who were duly designated to act in the matter by a majority vote of the full

the requirements of the Act. This means that the directors can enter into an indemnification agreement which more precisely sets forth rights to indemnification, a step that we recommend.

The MGCL also authorizes a corporation to purchase and maintain insurance on behalf of any director, officer, agent or deputy of the corporation against any liability asserted and incurred by such person in such capacity, whether or not the corporation would have the power to indemnify against liability under the provisions of § 2-418. Thus, the corporation may purchase insurance to cover liabilities that it could not indemnify.[35] While D&O insurance often covers claims not covered by state indemnification statutes, as discussed below, D&O policies generally contain exclusions for self-dealing, libel and slander, violations of securities laws, bad faith, willful misconduct and the like.

Section 2-418(k)(2) also authorizes a corporation to provide protection similar to insurance, including a trust fund, letter of credit or surety bond so long as it is not inconsistent with § 2-418.

B. Massachusetts Business Trusts{tc \l 1 "B. Massachusetts Business Trusts"}

Massachusetts business trusts have very broad powers to indemnify directors and officers. Since Massachusetts business trusts are considered to be a unique and separate type of entity from a corporation, the Massachusetts Business Corporation Law, including its indemnification provisions, does not directly apply to these entities. As a practical matter, their power of indemnification is limited only by the 1940 Act and public policy.

It is helpful, however, to look to Massachusetts law because a court is likely refer to the statute to resolve questions concerning a business trust.

Massachusetts law[36] provides for broad indemnification authorizing a corporation to make provisions in its charter and by-laws for the indemnification of its directors, officers, employees or other agents, including the payment of expenses incurred in defending a civil or criminal action. The corporation may advance expenses incurred in defending such a proceeding in advance of final disposition, upon receipt of an undertaking by the person indemnified to repay such payment if “adjudicated to be not entitled to indemnification under this section,” and no security is required. The only limitation stated is that “no indemnification shall be provided for any person with respect to any matter as to which he shall have been adjudicated in any proceeding not to have acted in good faith in the reasonable belief that his action was in the best interest of the corporation.”

Similar to Maryland, Massachusetts law also authorizes a corporation to purchase and maintain insurance on behalf of directors and officers, whether or not the corporation would have

Based upon both Massachusetts law and the 1940 Act, it is likely that courts would permit indemnification and advancement of expenses for directors of a Massachusetts business trust, so long as the provisions of the 1940 Act were satisfied, and provided no bad faith was involved.

C. Delaware Business Trusts**{**tc \l 1 "C. Delaware Business Trusts"**}**

The Delaware statute governing business trust explicitly provides for broad indemnification of trustees providing:

subject to any standards and restrictions set forth in its governing instrument, a business trust shall have the power to indemnify and hold harmless any trustee, beneficial owner or other person from any and all claims and demands whatsoever.

the absence of an indemnity provision in the trusts governing instrument shall not deprive the trustee, beneficial owner or other person of any right to indemnify which is otherwise available to such person under the law.[37]

It appears that advancement is permissible, even though the statute does not provide for it explicitly. In the only court decision which construes this statute, the Delaware Chancery Court held that advancement was permissible despite the fact that the statute did not explicitly provide for it.[38] In its analysis, the court noted that the Business Trust Act ("BTA") was intended to be more flexible than the Corporation Act. The court cited the BTA's provision which states that: "it is the Act's policy to give maximum effect to the principles of freedom of contract and to the enforceability of governing instruments."[39]

ANNEX B{tc \l 1 "ANNEX B"}

SAMPLE FORM OF INDEMNIFICATION AGREEMENT
(MARYLAND CORPORATION)

INDEMNIFICATION AGREEMENT

This INDEMNIFICATION AGREEMENT is made this _____ day of _______,199_ ("Agreement"), by and between [Fund], a [_____ Maryland corporation] (the "Company"), and [Director] ("Indemnitee").

WHEREAS, at the request of the Company, Indemnitee currently serves as a director of the Company and may, therefore, be subjected to claims, suits or proceedings arising as a result of his service; and

WHEREAS, as an inducement to Indemnitee to continue to serve as such director, the Company has agreed to indemnify Indemnitee against expenses and costs incurred by Indemnitee in connection with any such claims, suits or proceedings, to the fullest extent that is lawful; and

WHEREAS, the parties by this Agreement desire to set forth their agreement regarding indemnification;

NOW, THEREFORE, in consideration of the premises and the covenants contained herein, the Company and Indemnitee do hereby covenant and agree as follows:

Section 1. Definitions. For purposes of this Agreement:

(a) "Board of Directors" means the Board of Directors of the Company.

(b) "Corporate Status" means the status of a person as a director, officer, employee or agent of the Company.

(c) "Disinterested Director" means a director of the Company who is not and was not a party to the Proceeding in respect of which indemnification or advance of Expenses is sought by Indemnitee and who is not an "interested person" of the Company as that term is defined by Section 2(a)(19) of the Investment Company Act of 1940.

(d) "Expenses" shall include all reasonable attorneys' fees, retainers, court costs, transcript costs, fees of experts, witness fees, travel expenses, duplicating costs, printing

(e) “Independent Counsel” means a law firm, or a member of a law firm, other than a law firm or a member of a law firm that has previously served as Independent Counsel pursuant to the terms of this Agreement, that is experienced in matters of corporation law and neither presently is, nor in the past five years has been, retained to represent: (i) the Company or Indemnitee in any matter material to either such party, or (ii) any other party to the Proceeding giving rise to a claim for indemnification hereunder. Independent Counsel shall be selected by the Indemnitee and approved by the Board of Directors (which approval shall not be unreasonably withheld). In the event that the Board of Directors does not approve Indemnitee’s selection within 30 days of written notice by Indemnitee of his selection, Indemnitee may select a law firm: (a) having 100 or more attorneys and (b) rated “av” by Martindale-Hubbell Law Directory, to act as Independent Counsel for purposes of this Agreement. Notwithstanding the foregoing, the term “Independent Counsel” shall not include any person who, under the applicable standards of professional conduct then prevailing, would have a conflict of interest in representing either the Company or Indemnitee in an action to determine Indemnitee’s rights under this Agreement.

(f) “MGCL” means Maryland General Corporation Law.

(g) “Proceeding” includes any action, suit, arbitration, alternate dispute resolution mechanism, investigation, administrative hearing or any other proceeding, whether civil, criminal, administrative or investigative, except one initiated by an Indemnitee pursuant to Section 9 of this Agreement to enforce his rights under this Agreement.

Section 2. Services by Indemnitee. Indemnitee agrees to continue to serve as a director of the Company and may at any time and for any reason resign from such position (subject to any other contractual obligation or any obligation imposed by operation of law), in which event the Company shall have no obligation under this Agreement to continue Indemnitee in such position, but Indemnitee shall nevertheless retain all rights provided under this Agreement..

Section 3. Indemnification - General. The Company shall indemnify, and advance Expenses to, Indemnitee (a) as specifically provided in this Agreement and (b) otherwise to the fullest extent permitted by applicable law in effect on the date hereof and as amended from time to time; provided, however, that no change in applicable law shall have the effect of reducing the benefits available to Indemnitee hereunder based on applicable law as in effect on the date hereof. The rights of Indemnitee provided in this Section shall include, but shall not be limited to, the rights set forth in the other Sections of this Agreement.

Section 4. Proceedings Other Than Proceedings by or in the Right of the Company. Indemnitee shall be entitled to the rights of indemnification provided in this Section 4 if, by extent permitted by Maryland law in effect at the date of this Agreement or at the time of the request for indemnification, whichever is greater, including any additional indemnification permitted by Section 2-418(g) of the MGCL.

Section 5. Proceedings by or in the Right of the Company. Indemnitee shall be entitled to the rights of indemnification provided in this Section 5 if, by reason of his Corporate Status, he is made a party to any threatened, pending or completed Proceeding brought by or in the right of the Company to procure a judgment in its favor. Pursuant to this Section 5, Indemnitee shall be indemnified against all amounts paid in settlement and all Expenses actually and reasonably incurred by him or on his behalf in connection with such Proceeding, to the maximum extent permitted by Maryland law in effect at the date of this Agreement or at the time of the request for indemnification, whichever is greater, including any additional indemnification permitted by Section Maryland law..

Section 6. Indemnification for Expenses of a Party Who is Wholly or Partly Successful. Notwithstanding any other provision of this Agreement, to the extent that Indemnitee is, by reason of his Corporate Status, made a party to and is successful, on the merits or otherwise, in the defense of any Proceeding, he shall be indemnified against all Expenses actually and reasonably incurred by him or on his behalf in connection therewith. Without limiting any other rights of Indemnitee in this Agreement, if Indemnitee is not wholly successful in such Proceeding but is successful, on the merits or otherwise, as to one or more but less than all claims, issues or matters in such Proceeding, the Company shall indemnify Indemnitee against all Expenses actually and reasonably incurred by him or on his behalf in connection with each successfully resolved claim, issue or matter. For purposes of this Section and without limitation, the termination of any claim, issue or matter in such a Proceeding by dismissal, with or without prejudice, shall be deemed to be a successful result as to such claim, issue or matter.

Section 7. Advancement of Expenses. The Company shall advance all Expenses incurred by or on behalf of Indemnitee in connection with any Proceeding to which Indemnitee is, or is threatened to be, made a party, within five days after the receipt by the Company of a statement or statements from Indemnitee requesting such advance or advances from time to time, whether prior to or after final disposition of such Proceeding. Such statement or statements shall reasonably evidence the Expenses incurred by Indemnitee and shall include or be preceded or accompanied by (a) a written affirmation by the Indemnitee of the Indemnitee’s good faith belief that the standard of conduct necessary for indemnification by the Company as authorized by law and by this Agreement has been met and (b) a written undertaking by or on behalf of Indemnitee to repay any Expenses advanced if it shall ultimately be determined that such standard of conduct has not been met or as required by Section 6 if Indemnitee is not wholly successful. Furthermore, any such advancement shall be subject to the requirements and limitations of Section 17(h) of the Investment Company Act.

such a request for indemnification, advise the Board of Directors in writing that Indemnitee has requested indemnification.

(b) Upon written request by Indemnitee for indemnification pursuant to the first sentence of Section 8(a) hereof, a determination, if required by applicable law, with respect to Indemnitee's entitlement thereto shall promptly be made in the specific case: (i) by a final decision on the merits by a court that the Indemnitee was not liable by reason of active and deliberate dishonesty, willful misfeasance, bad faith, gross negligence, or reckless disregard of his duties as a director ("disabling conduct"), provided that such decision may have been rendered in an action for which the Indemnitee seeks indemnification under this Agreement, or (ii) by a reasonable determination, based upon a review of the facts, that the Indemnitee was not liable by reason of disabling conduct by either (a) the vote of a majority of a quorum of the Disinterested Directors of the Company, or (b) Independent Counsel in a written opinion. If it is determined that Indemnitee is entitled to indemnification, payment to Indemnitee shall be made within ten days after such determination. Indemnitee shall cooperate with the person making such determination with respect to Indemnitee's entitlement to indemnification, including providing to such person upon reasonable advance request any documentation or information which is not privileged or otherwise protected from disclosure and which is reasonably available to Indemnitee and reasonably necessary to such determination. Any costs or expenses (including reasonable attorneys' fees and disbursements) incurred by Indemnitee in so cooperating with the person making such determination, in response to a request by such person, shall be borne by the Company (irrespective of the determination as to Indemnitee's entitlement to indemnification).

Section 9. Remedies of Indemnitee.

(a) In the event that (i) a determination is made pursuant to Section 8 that Indemnitee is not entitled to indemnification under this Agreement, (ii) advancement of Expenses is not timely made pursuant to Section 7, (iii) no determination of entitlement to indemnification shall have been made pursuant to Section 8(b) within 90 days after receipt by the Company of the request for indemnification, (iv) payment of indemnification is not made pursuant to Section 6 within ten days after receipt by the Company of a written request therefor, or (v) payment of indemnification is not made within ten days after a determination has been made that Indemnitee is entitled to indemnification, Indemnitee shall be entitled to an adjudication in an appropriate court of the State of Maryland, or in any other court of competent jurisdiction, of his entitlement to such indemnification or advancement of Expenses. Alternatively, Indemnitee, at his option, may seek an award in arbitration to be conducted by a single arbitrator pursuant to the commercial Arbitration Rules of the American Arbitration Association. Indemnitee shall commence such proceeding seeking an adjudication or an award in arbitration within 180 days after the date on which Indemnitee first has the right to commence such proceeding pursuant to this Section 9.

definition of Expenses in Section 1) actually and reasonably incurred by him in such judicial adjudication or arbitration, but only if he prevails therein. If it shall be determined in said judicial adjudication or arbitration that Indemnitee is entitled to receive part but not all of the indemnification or advancement of expenses sought, the expenses incurred by Indemnitee in connection with such judicial adjudication or arbitration shall be appropriately prorated.

Section 10. Non-Exclusivity; Insurance; Subrogation; Exclusions.

(a) The rights of indemnification and advance of Expenses as provided by this Agreement shall not be deemed exclusive of any other rights to which Indemnitee may at any time be entitled under applicable law, the charter or Bylaws of the Company, any agreement, a vote of stockholders or a resolution of directors, or otherwise. No amendment, alteration or repeal of this Agreement or of any provision hereof shall limit or restrict any right of Indemnitee under this Agreement in respect of any action taken or omitted by such Indemnitee in his Corporate Status prior to such amendment, alteration or repeal.

(b) To the extent that the Company maintains liability insurance for directors, officers, employees, or agents of the Company, Indemnitee shall be covered by such policy or policies in accordance with its or their terms to the maximum extent of the coverage available (including coverage after Indemnitee is no longer serving in a Corporate Status for acts and omissions while serving in a Corporate Status) for any such director, officer, employee or agent under such policy or policies.

(c) In the event of any payment under this Agreement, the Company shall be subrogated to the extent of such payment to all of the rights of recovery of Indemnitee, who shall execute all papers required and take all action necessary to secure such rights, including execution of such documents as are necessary to enable the Company to bring suit to enforce such rights.

(d) The Company shall not be liable under this Agreement to make any payment of amounts otherwise indemnifiable hereunder if and to the extent that Indemnitee has otherwise actually received such payment under any insurance policy, contract, agreement or otherwise.

(e) Notwithstanding any other provision of this Agreement to the contrary, the Company shall not be liable for indemnification or advance of Expenses in connection with any settlement or judgment for insider trading or for disgorgement of profits pursuant to Section 16(b) of the Securities Exchange Act of 1934.

Section 11. Duration of Agreement. This Agreement shall continue until and

Agreement shall be binding upon the Company and its successors and assigns and shall inure to the benefit of Indemnitee and his heirs, executors and administrators.

Section 12. Severability. If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable for any reason whatsoever: (a) the validity, legality and enforceability of the remaining provisions of this Agreement (including, without limitation, each portion of any section of this Agreement containing any such provision held to be invalid, illegal or unenforceable that is not itself invalid, illegal or unenforceable) shall not in any way be affected or impaired thereby; and (b) to the fullest extent possible, the provisions of this Agreement (including, without limitation, each portion of any section of this Agreement containing any such provision held to be invalid, illegal or unenforceable that is not itself invalid, illegal or unenforceable) shall be construed so as to give effect to the intent manifested thereby.

Section 13. Exception to Right of Indemnification or Advancement of Expenses.

(a) Notwithstanding any other provision of this Agreement, Indemnitee shall not be entitled to indemnification or advance of Expenses under this Agreement with respect to any Proceeding brought by Indemnitee, unless the bringing of such Proceeding or making of such claim shall have been approved by a vote of the Board of Directors as required by the Company's Bylaws.

(b) Notwithstanding any other provision of this Agreement, the Company shall not be liable to indemnify Indemnitee against any liability to the Company or its stockholders to which Indemnitee (other than a Proceeding under Section 9(a) of this Agreement) would otherwise be subject by reason of willful misfeasance, bad faith, or gross negligence, in the performance of Indemnitee's duties, or by reason of Indemnitee's reckless disregard of his obligations and duties as a director or officer of the Company.

Section 14. Identical Counterparts. This Agreement may be executed in one or more counterparts, each of which shall for all purposes be deemed to be an original but all of which together shall constitute one and the same Agreement. Only one such counterpart signed by the party against whom enforceability is sought needs to be produced to evidence the existence of this Agreement.

Section 15. Headings. The headings of the paragraphs of this Agreement are inserted for convenience only and shall not be deemed to constitute part of this Agreement or to affect the construction thereof.

Section 16. Modification and Waiver. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by both of the parties hereto. No information or other document relating to any Proceeding or matter which may be subject to indemnification or advance of Expenses covered hereunder.

Section 18. Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if (i) delivered by hand and receipted for by the party to whom said notice or other communication shall have been directed, or (ii) mailed by certified or registered mail with postage prepaid, on the third business day after the date on which it is so mailed:

(a) If to Indemnitee, to:

with a copy to:

(b) If to the Company to:

with a copy to:

or to such other address as may have been furnished to Indemnitee by the Company or to the Company by Indemnitee, as the case may be.

Section 19. Governing Law. The parties agree that this Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Maryland.

Section 20. Miscellaneous. Use of the masculine pronoun shall be deemed to include usage of the feminine pronoun where appropriate.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

[FUND]

By:___SEAL)
Its:________________