Via Internet

January 24, 2011

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549–1090

Re: File No. S7-37-10, Cross Border Issues in Proposed Exemptions Rule

Ladies and Gentlemen:

Bank of Montreal, Royal Bank of Canada and The Toronto-Dominion Bank (together, the "Canadian Banks") appreciate this opportunity to provide comments on the U.S. Securities and Exchange Commission's ("SEC" or "Commission") proposed rule[1] intended to implement, among other things, the foreign private adviser amendments to the Investment Advisers Act of 1940, as amended ("Advisers Act"), enacted as part of Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[2] Among the largest banks in Canada, the Canadian Banks and their advisory affiliates collectively represent more than C$504 billion dollars under management in a mix of segregated account mandates, investment companies ("Funds") registered under the Investment Company Act of 1940, as amended ("Company Act"), and other pooled investment vehicles.

The Canadian Banks are filing this letter ("Comment Letter") in response to the Commission's invitation "to submit comment letters addressing with particularity and specificity interpretative issues that may not be addressed in our proposed rules."[3] In particular, we wish to address certain cross-border issues relating to the manner in which we do business with our affiliated advisers that are registered and regulated in the United States.

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1 *See* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Advisers Act Rel. No. 3111 (Nov. 19, 2010) [75 Fed. Reg. 77190 (Dec. 10, 2010)] ("Proposed Rule").

2 *See* Public Law 111–203, 124 Stat. 1376 (July 21, 2010) at 1571, "Title IV, Regulation Of Advisers To Hedge Funds And Others," also known as the "Private Fund Investment Advisers Registration Act of 2010."

3 *See* Proposed Rule, *supra* note 1, at n. 271.

Background

Each of the Canadian Banks' organizations include both U.S. and Canadian-domiciled investment adviser affiliates. In addition, each has at least one advisory affiliate registered as an investment adviser under the Advisers Act. Canadian-domiciled investment advisers are registered under, and subject to, applicable securities legislation and related regulations, including National Instrument 31-103 and related rules regarding registration obligations. Our Canadian-domiciled and Canadian-regulated advisers already provide to and share with our U.S.-registered affiliates at least some personnel and/or services, which may include portfolio managers, research analysts, traders, consolidated trading desks, back-office administrative services or other facilities pursuant to sharing arrangements. We would like to continue or to enhance such arrangements as appropriate.

Moreover, certain of our U.S.-registered advisory affiliates also provide portfolio management services to Funds. As with any other client of the U.S.-registered advisory affiliates, the Funds may benefit from the arrangements under which we share personnel and services between our Canadian-domiciled advisers and their U.S.-registered affiliates.

I. Exemptions for Foreign Private Advisers, Private Fund Advisers, and Venture Capital Advisers

We applaud the Commission's efforts to issue timely rule proposals to implement the requirements of Dodd-Frank and appreciate this opportunity to comment. However, we were concerned that the Proposed Rule fails either to propose the codification of longstanding no-action positions of Commission staff ("Staff") relating to the sharing of personnel and facilities between U.S.-registered advisers and their non-U.S. unregistered affiliates or even to affirmatively acknowledge their continued applicability.

Rather, the Commission has announced in the Proposed Rule its expectation that "an adviser with advisory affiliates will encounter interpretative issues as to whether it may rely on any of the exemptions discussed in this Release without taking into account the activities of its affiliates. The adviser, for example, might have advisory affiliates that are registered or that provide advisory services that are inconsistent with an exemption on which the adviser may seek to rely."[4] While acknowledging receipt of "a number of letters requesting interpretative guidance on whether and to what extent certain prior staff positions would apply to the new exemptions provided by the Dodd-Frank Act,"[5] the Commission simply invited further comment on "whether any proposed rule should provide that an adviser must take into account the activities of its advisory affiliates when determining eligibility for an exemption. For example, should the rule specify that the exemption is not available to an affiliate of a registered investment adviser?"[6]

We urge the Commission to avoid any decision that would make the foreign private adviser exemption, the private fund adviser exemption, or the venture capital adviser exemption

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4 *Id.* at text accompanying n. 270.

5 *Id*. at n. 271.

6 *Id*. at text accompanying n. 271.

unavailable to a non-U.S. affiliate of a U.S.-registered adviser that shares resources with the registrant. Given the sharing arrangements already in place, a significant number of non-U.S. organizations like ours may have to register most, if not all, of their non-U.S. advisers simply because they share resources. Moreover, we strongly urge the Commission to take this opportunity to codify the fundamental conditions set forth in the Staff no-action precedent discussed below or, at a minimum, affirmatively acknowledge the survival of this precedent when adopting the Proposed Rule.

A. The *Unibanco* Precedent

We are well aware that the Advisers Act generally requires the registration of any investment adviser that uses the U.S. mails or any means or instrumentalities of interstate commerce in connection with its business as an investment adviser,[7] unless exempt or excluded from SEC registration. However, for nearly two decades, the Staff of the SEC's Division of Investment Management ("Division") has provided non-U.S. advisory affiliates of U.S.-registered investment advisers relief from the requirements of full adviser registration under certain circumstances.[8]

This Staff relief was a direct outgrowth of a 1992 Division report issued by the Commission ("Report").[9] Prior to the publication of the Report, the Advisers Act was interpreted by the Commission and its Staff to require "the registration of any investment adviser, whether domestic or foreign, that uses the United States mails or any other means or instrumentality of interstate commerce in connection with its business as an investment adviser," unless exempt.[10]

The Report recommended a new approach based on conduct and effects and included an affirmative acknowledgement of the potential burden of U.S. adviser registration requirements on international investment management organizations, stating:

> One area that is of great importance to the internationalization of investment management services is the reach of the Investment Advisers Act. . . . Many of the Advisers Act's provisions differ from or exceed those that apply to foreign advisers under the laws of their home country and also may be contrary to accepted business practices there. Consequently, a foreign adviser that registers under the Advisers Act because it does business with clients in the United States, as well as in its home country, may find itself unable to engage in conduct that is

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7 *See* Advisers Act Section 203(a), 15 U.S.C. §80b-3(a).

8 *See Royal Bank of Canada*, SEC No-Action Letter (June 3, 1998) ("*Royal Bank"*); *ABN AMRO Bank N.V.*, SEC No-Action Letter (July 1, 1997) ("*ABN AMRO*"); *Thomson Advisory Group L.P.*, SEC No-Action Letter (Sept. 26, 1995) ("*Thompson"*); *Murray Johnstone Holdings Limited*, SEC No-Action Letter (Oct. 7, 1994) ("*Murray Johnstone"*); *Kleinwort Benson Investment Management Limited*, SEC No-Action Letter (Dec. 15, 1993) ("*Kleinwort"*); *Mercury Asset Management plc*, SEC No-Action Letter (Apr. 16, 1993) ("*Mercury"*); *The National Mutual Group*, SEC No-Action Letter (Mar. 8, 1993) ("*National Mutual"*); and *Uniao de Bancos de Brasileiros S.A.*, SEC No-Action Letter (July 28, 1992) ("*Unibanco*"); collectively referred to hereinafter as, the *Unibanco* precedent.

9 *See* SEC DIVISION OF INVESTMENT MANAGEMENT, PROTECTING INVESTORS: A HALF CENTURY OF INVESTMENT COMPANY REGULATION, Chapter 5, The Reach of the Investment Advisers Act of 1940 (May 1992).

10 *Id*. at 223.

> legal and acceptable business conduct in its home country because the Act prohibits it. [citations omitted][11]

Within three months of the Report's publication, the Staff granted to Uniao de Bancos de Brasileiros S.A. ("*Unibanco*") the first no-action letter relieving non-U.S. advisers from the burden of unnecessary and potentially conflicting adviser registration requirements provided certain requirements were satisfied.[12] Although *Unibanco* involved an unregistered, non-U.S. parent company sharing certain advisory personnel with a U.S.-registered, non-U.S.-domiciled subsidiary, subsequent Staff no-action letters concluded that the same principles apply whether the registered affiliates are located inside or outside the U.S., whether the sharing occurs between or among unregistered parent companies and their subsidiaries or between and among affiliates under common control,[13] or whether it involves advisory or administrative personnel or facilities.[14]

Often referred to as "registration lite," the Staff's no-action position was consistently premised on specific undertakings to be made by both the U.S.-registered adviser and its unregistered advisory affiliates, referred to as "participating affiliates." The Staff represented that it would not recommend enforcement action to the Commission against participating affiliates, whether domiciled inside or outside the U.S., of a U.S.-registered adviser for failing to register under the Advisers Act where the registrant and each participating affiliate agreed, among other things, that: (1) the registrant and each participating affiliate are separately organized; (2) the registrant is staffed with personnel (whether located in the U.S. or abroad) who are capable of providing investment advice; (3) all persons who provide advice to U.S. clients or have access to any information concerning securities to be recommended to U.S. clients prior to the effective dissemination of the recommendations would be deemed "associated persons"[15] of the registrant and disclosed in the registrant's Form ADV, even if employed by a participating affiliate; (4) the SEC would have access to trading and other records of each participating affiliate involved in, or having access to, U.S. advisory activities, and to each participating affiliate's personnel

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11 *Id*. at 221.

12 *See Unibanco*, *supra* note 8.

13 *See, e.g.*, *Royal Bank*, *Murray Johnstone* and *Mercury*, *supra* note 8, each of which involved a U.S. registrant not domiciled in the U.S. sharing personnel with a variety of advisory affiliates under common control, sometimes including a non-U.S. parent; as well as *ABN AMRO* and *Kleinwort*, both of which involved a U.S. registrant domiciled in the U.S. sharing personnel with several entities under common control, whether foreign or domestic, which could include a non-U.S. parent. Further, in *National Mutual*, the U.S.-domiciled registrant shared personnel with several SEC-registered non-U.S. entities under common control.

14 For example, in *Murray Johnstone*, the no-action requestor made clear that the registrant and its participating affiliates intended to share personnel (including directors, officers and employees), office space, records, telephone lines and facilities. Similarly, in *Kleinwort*, the requestor noted that portfolio managers of the registrant's London office would share offices with portfolio managers employed by the participating affiliates in London and the London operations of the registrant were to be moved into a participating affiliate's office space in London.

15 This term is essentially derived from the statutory definition of "person associated with an investment adviser", which includes a partner, officer, or director of the adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by the adviser, including any employees of the adviser. *See* Advisers Act Section 202(a)(17), 15 U.S.C. §80b-2(a)(17). A registered adviser is obligated reasonably to supervise the activities of these persons. *See* Advisers Act Sections 203(e)(5) and 204A, 15 U.S.C. §§80b-3(e)(5) and 80b-4A.

(including personal trading records), to the extent necessary to monitor and police conduct that may harm U.S. clients or markets; and (5) each participating affiliate would consent to make available to the SEC books and records and the testimony of certain employees,[16] consent to the jurisdiction of the U.S. courts in connection with the investment advisory services it provides for the benefit of registrant's U.S. clients and consent to service of process by the SEC and the appointment and maintenance of a U.S. agent for service of process.[17] The result of the representations to comply with these conditions was to permit "a foreign adviser to avoid subjecting all of its operations to the Advisers Act."[18]

In essence, these same requirements were reiterated in each Staff letter. While later letters included certain refinements, the fundamental requirements remained intact. For example, certain shared personnel were always deemed "associated persons" of the registrant, but the condition was expanded over time to include not just those shared employees who determine investment advice, but also any persons having access to such information prior to dissemination of the information.[19] Similarly, clerical and ministerial personnel were initially excluded from the undertaking to require personnel of the participating affiliate to be made available for testimony.[20] However, this condition was subsequently expanded to require that "any and all personnel" of the unregistered adviser be made available "to testify about all advice given for or on behalf of U.S. Clients and any related transactions (except the identity of Foreign Clients)."[21]

B. Proposed Codification of the *Unibanco* Precedent

We are aware that certain of the Staff's conditions may need to be updated as a result of subsequent Commission action. For example, the no-action position requires compliance with the registrant's personal securities transaction reporting requirements by all persons deemed

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[16] *See, e.g., Royal Bank*; *Thompson*; *Murray Johnstone*; *Kleinwort*; *Mercury*; *National Mutual*; and *Unibanco, supra* note 8. An unregistered affiliate has accepted the books and records condition even when not conceding its status as an "associated person" of the registered adviser. *See* John W. Henry & Co., Inc., SEC No-Action Letter (Sept. 20, 1996) (unregistered affiliate represented SEC would have access to its books and records to the extent necessary to examine the businesses of the advisory affiliates even while contending it was not "associated person").

[17] Advisers Act Rule 0-2 requires registering non-resident investment advisers to appoint the SEC as agent for service of process. In each relevant no-action letter, the Staff required the participating affiliates to designate a U.S. resident agent for service of process and to file a copy of the corporate resolution designating such agent with the SEC. *See, e.g., Unibanco, Mercury, Kleinwort, Murray Johnstone,* and *Royal Bank, supra* note 8.

[18] *Unibanco, supra* note 8.

[19] In *Unibanco*, the Staff defined "associated persons" to include "research analysts and other employees of the unregistered entity whose functions or duties relate to the determination of which recommendations the registered entity may make to its United States clients." However, in *Kleinwort* and subsequent letters, the staff expanded the definition as follows: "[E]ach employee of the Participating Affiliate, including research analysts, who (i) provide advice to . . . United States clients; or (ii) has access to any information concerning which securities are being recommended to . . . United States clients prior to the effective dissemination of the recommendations." *See, also, Murray Johnstone*; and *Royal Bank, supra* note 8.

[20] *See Unibanco, supra* note 8.

[21] *Royal Bank*, *supra* note 8. While the term "related transactions" is not defined, the Staff has repeatedly stated that "[t]he Division interprets the term 'related transactions' broadly" which, presumably, includes contemporaneous transactions in the same securities made for foreign clients of the participating affiliates. *See, e.g., Mercury, Kleinwort, Murray Johnstone,* and *Royal Bank, supra* note 8.

"associated persons" of the registered adviser and by all employees of a participating affiliate who maintain or have access to the registrant's records.[22] No mention was ever made of compliance by associated persons with a registrant's code of ethics for the simple reason that Advisers Act Rule 204A-1, also known as the Code of Ethics Rule, had not even been proposed at the time the position was established.[23] Similarly, the undertaking requiring ADV disclosure of a list of and biographies for all directors and portfolio managers, as well as all individuals involved in generating or having access to investment advice for U.S. clients, would need to be updated in light of the recently issued amendments to Form ADV Part 2.[24]

Far from being impediments to codification, updating these and similar outdated requirements as part of a formal rulemaking is not only within the Commission's purview as part of the Proposed Rule, but also well within past practice. For years, the Division has proposed rules based on the existence of a body of oft-repeated conditions set forth in applications for exemptive relief or no-action letters. A recent, unambiguous example is the 2002 proposal to amend and update the adviser custody rule, which stated: "[T]he accumulated guidance in these no-action and interpretive letters, while helpful to advisers, has diminished the transparency of the rule's requirements because an adviser seeking to understand the rule must review a large body of letters in addition to the rule itself."[25]

Given that nearly two decades have elapsed since the Staff's position was first enunciated and, more importantly, that dozens of international organizations like the Canadian Banks have structured their participation in the U.S. investment management market in reliance on this relief, it is manifestly clear that proposing formal rules would be appropriate and timely. Codification would also improve the global understanding of relationships between U.S.-registered advisers and their international affiliates under the Advisers Act.

Moreover, nothing set forth in Title IV of Dodd-Frank is inherently contrary to the existing Staff position. There is no indication that Congress intended to dismantle arrangements that have worked effectively for nearly two decades.[26] Both the plain meaning of the language within Title IV and its interpretation by the Commission support the conclusion that its primary purpose was

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[22] As used in the Staff letters, this condition meant that all such persons were "advisory representatives" under then-extant Rule 204-2(a)(12). Subsequent to the issuance of the last letter, the Commission adopted Rule 204A-1 which replaced the earlier rule's advisory representative reporting requirements.

[23] The last major letter enunciating the Unibanco conditions was issued in 1998, while the Code of Ethics Rule was not even proposed until 2004. *See* Investment Adviser Code of Ethics, Advisers Act Rel. No. 2209 (Jan. 20, 2004). *See also* Investment Adviser Code of Ethics, Advisers Act Rel. No. 2256 (July 2, 2004) (adopting Rule 204A-1).

[24] *See* Amendments to Form ADV, Advisers Act Rel. No. 3060 (July 28, 2010). The Commission would need to provide guidance on whether, and if so, to what extent, associated persons should be disclosed in Part 2B, the Supplemental Brochure.

[25] Custody of Funds or Securities of Clients by Investment Advisers, Advisers Act Rel No. 2044 (July 18, 2002).

[26] Although there is no legislative history on the issue, one may assume that Congress was as aware of the *Unibanco* precedent as it was of the counting guidelines incorporated in Rule 203(b)(3)-1. The Proposed Rule relies on that assumption to preserve the guidelines, stating: "As Congress was aware of rule 203(b)(3)-1's counting guidelines when it incorporated a limitation on the number of 'clients' in the definition of 'foreign private adviser,' we believe it would be consistent with Congress's amendment to preserve generally the method for counting clients, together with the requirement to count clients." Proposed Rule, *supra* note 1, at text following n. 237.

"to require advisers to 'private funds' to register under the Advisers Act,"[27] not to discard a position which is supported by regulatory efficiency and international comity.

In drafting and incorporating a new statutory definition of "foreign private adviser,"[28] there is no indication that Congress intended to count as U.S. clients or U.S. assets of a foreign private adviser those clients who enter into investment management agreements with an affiliated U.S.-registered adviser simply because the foreign adviser provides support to, or shares personnel or services with, its registered affiliate. There is also no indication that Congress intended that an unregistered non-U.S. adviser that otherwise meets the requirements of the private fund adviser exemption or venture capital adviser exemption should be unable to rely on those exemptions merely because it shares certain personnel with a U.S.-registered affiliate.

Yet, absent affirmation of the *Unibanco* precedent, whether by codification or at least by official recognition, nearly every foreign adviser, such as those affiliated with the Canadian Banks, that shares resources with U.S.-registered affiliates could be deemed to have more than 15 U.S. clients or U.S. investors in private funds and to have more than $25 million or more in U.S. assets under management for purposes of the foreign private adviser definition, and might be unable to rely on the private fund adviser exemption or venture capital adviser exemption. As a result, all would be required either to register or to cease sharing any personnel or services with their U.S.-registered affiliates. This anomalous result could occur even though, in fact, both the U.S. clients and the assets under management represented by their accounts are already required to be counted by the registrants that contractually agreed to serve as their investment adviser. This result is not only inefficient, but unnecessary given that, having once consented to the undertakings set forth in the *Unibanco* precedent, the Commission would already be entitled to enforce its rights under the Advisers Act against the participating affiliates and their associated persons.

II. Applicability of *Unibanco* Precedent to Funds

We are also aware that investment advisers seeking to provide advice to Funds are required both to register as advisers and to enter into written management agreements with the Funds.[29] However, under the sharing arrangements permitted by the *Unibanco* precedent, participating affiliates have been permitted to provide advisory personnel and support services to affiliated

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[27] See Proposed Rule, *supra* note 1, at n. 7 and accompanying text.

[28] See Dodd-Frank, Section 402, adding new Advisers Act Section 202(a)(30) to define a "foreign private adviser," in pertinent part, as any investment adviser who "(A) has no place of business in the United States; (B) has, in total, fewer than 15 clients and investors in the United States in private funds advised by the investment adviser; (C) has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25,000,000…; and (D) neither (i) holds itself out generally to the public in the United States as an investment adviser; nor (ii) acts as (I) an investment adviser to any investment company registered under the Investment Company Act of 1940…."

[29] *See* Company Act Sections 2(a)(20) and 15(a), 15 U.S.C. §80a-2(a)(20) and 15(a). Section 15(a) makes it "unlawful for any person to serve or act as an investment adviser of a registered investment company except pursuant to a written contract" approved by the company's shareholders. Section 2(a)(20) essentially defines an adviser to a U.S. registered investment company to include: "(A) any person … who pursuant to contract with such company regularly furnishes advice to such company with respect to the desirability of investing in, purchasing or selling securities or other property, or is empowered to determine what securities or other property shall be purchased or sold by such company …."

registrants without being subjected to the burden of registration or extraneous Fund subadvisory agreements in situations where the registrants provide advice to Fund clients. Even knowing that some registrants intended to share personnel with participating affiliates for purposes of managing Funds as well as other client accounts, the Staff still concluded that such sharing arrangements were appropriate.[30]

The *Unibanco* precedent is entirely consistent with the fact that since the participating affiliates would not themselves serve as investment adviser to Funds, but merely provide personnel and services to the Funds' registered advisers, it would make little sense to require multiple registrations and multiple Fund subadvisory agreements for affiliated advisers engaged in providing a unified package of advice and services to the Funds. Unlike concerns applicable to traditional subadvisory arrangements, in which one adviser officially delegates a portion of its responsibilities to an affiliated or unaffiliated adviser, under the *Unibanco* precedent, all advice is provided by the registrant with support from affiliated individuals or offices.

As a result, global advisory platforms have been able to leverage portfolio management, research, trading and other resources economically and efficiently without constantly having to consider whether conflicting aspects of the Advisers Act might prevent them from complying with the laws of their home jurisdictions. By subjecting only certain personnel to the specific requirements of the Advisers Act, the participating affiliates have been able to continue to meet their regulatory obligations in the jurisdictions in which they are established and regulated and still satisfy the Commission's regulatory objectives with respect to their U.S. registered affiliates. In turn, the U.S. registrants have benefited from economies of scale and access to portfolio management expertise that are not otherwise generally available to stand-alone investment advisers. Moreover, the same arguments for codification apply equally to Funds as to any other U.S. clients of registrants, since there is no indication that Congress intended to dismantle these relationships either.

Conclusion

Subjecting entire complexes of unified global investment management firms to U.S. registration is unreasonable and inefficient both for the Commission and the industry and is not called for by Dodd-Frank. By virtue of either the undertakings required by the *Unibanco* precedent itself or pursuant to a codification of the relevant conditions as part of this rulemaking, the Commission can obtain access to and control over everything it needs whether for regulatory or enforcement purposes. Forcing participating affiliates to execute subadvisory agreements, whether solely with their U.S. registered affiliates or directly with U.S. clients or Funds managed by the

[30] For example, the clients receiving investment advice from Unibanco and its registered adviser subsidiary included the Brazilian Investment Fund, Inc., a U.S.-registered closed-end investment company. *See Unibanco, supra* note 8. In *Kleinwort*, the requestor represented that the clients to whom services would be provided included at least 2 U.S.-registered open-end investment companies. *See Kleinwort, supra* note 8. Similarly, in *Mercury*, the requestor represented that the clients of its registered affiliate were "primarily institutional investors such as U.S. pension funds or investment companies registered under the Investment Company Act of 1940." *See Mercury, supra* note 8. In no case did the Staff conclude that the participating affiliate would be required to register because its U.S.-registered affiliate managed a Fund.

registrants, would complicate client relationships without providing any particular benefits to clients or investors. The Staff's approach as reflected in the *Unibanco* precedent is entirely consistent with congressional intent and with principals of international comity and regulatory efficiency.

Requiring non-U.S. advisers to register simply because affiliates within a complex share personnel or services to provide unified portfolio management, research and trading services across a global platform is counterproductive. By far the more efficient and economic approach, both from the standpoint of Commission resources and industry participants, is to codify the very practices which have been in place and relied upon by investment management organizations, like the Canadian Banks, to operate global advisory services firms for nearly two decades.

Should you have any questions about this submission, please contact Elizabeth M. Knoblock, 202-263-3263, at Mayer Brown LLP.

Respectfully submitted on January 24, 2011, on behalf of:

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By: _____
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Royal Bank of Canada

By: _____
Thomas A. Shee, Senior Vice President & Deputy General Counsel, RBC Law Group

The Toronto-Dominion Bank

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