

§ 270.17f-5

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pursuant to comparable regulations of other federal agencies.

[68 FR 8442, Feb. 20, 2003, as amended at 69 FR 18803, Apr. 9, 2004; 73 FR 32228, June 5, 2008]

§ 270.17f-5 Custody of investment company assets outside the United States.

(a) *Definitions.* For purposes of this section:

(1) *Eligible Foreign Custodian* means an entity that is incorporated or organized under the laws of a country other than the United States and that is a Qualified Foreign Bank or a majority-owned direct or indirect subsidiary of a U.S. Bank or bank-holding company.

(2) *Foreign Assets* means any investments (including foreign currencies) for which the primary market is outside the United States, and any cash and cash equivalents that are reasonably necessary to effect the Fund's transactions in those investments.

(3) *Foreign Custody Manager* means a Fund's or a Registered Canadian Fund's board of directors or any person serving as the board's delegate under paragraphs (b) or (d) of this section.

(4) *Fund* means a management investment company registered under the Act (15 U.S.C. 80a) and incorporated or organized under the laws of the United States or of a state.

(5) *Qualified Foreign Bank* means a banking institution or trust company, incorporated or organized under the laws of a country other than the United States, that is regulated as such by the country's government or an agency of the country's government.

(6) *Registered Canadian Fund* means a management investment company incorporated or organized under the laws of Canada and registered under the Act pursuant to the conditions of § 270.7d-1.

(7) *U.S. Bank* means an entity that is:

(i) A banking institution organized under the laws of the United States;

(ii) A member bank of the Federal Reserve System;

(iii) Any other banking institution or trust company organized under the laws of any state or of the United States, whether incorporated or not, doing business under the laws of any state or of the United States, a sub-

stantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by state or federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this section; or

(iv) A receiver, conservator, or other liquidating agent of any institution or firm included in paragraphs (a)(7)(i), (ii), or (iii) of this section.

(b) *Delegation.* A Fund's board of directors may delegate to the Fund's investment adviser or officers or to a U.S. Bank or to a Qualified Foreign Bank the responsibilities set forth in paragraphs (c)(1), (c)(2), or (c)(3) of this section, *provided that:*

(1) *Reasonable Reliance.* The board determines that it is reasonable to rely on the delegate to perform the delegated responsibilities;

(2) *Reporting.* The board requires the delegate to provide written reports notifying the board of the placement of Foreign Assets with a particular custodian and of any material change in the Fund's foreign custody arrangements, with the reports to be provided to the board at such times as the board deems reasonable and appropriate based on the circumstances of the Fund's arrangements; and

(3) *Exercise of Care.* The delegate agrees to exercise reasonable care, prudence and diligence such as a person having responsibility for the safekeeping of the Fund's Foreign Assets would exercise, or to adhere to a higher standard of care, in performing the delegated responsibilities.

(c) *Maintaining Assets with an Eligible Foreign Custodian.* A Fund or its Foreign Custody Manager may place and maintain the Fund's Foreign Assets in the care of an Eligible Foreign Custodian, *provided that:*

(1) *General Standard.* The Foreign Custody Manager determines that the Foreign Assets will be subject to reasonable care, based on the standards applicable to custodians in the relevant

market, if maintained with the Eligible Foreign Custodian, after considering all factors relevant to the safekeeping of the Foreign Assets, including, without limitation:

(i) The Eligible Foreign Custodian's practices, procedures, and internal controls, including, but not limited to, the physical protections available for certificated securities (if applicable), the method of keeping custodial records, and the security and data protection practices;

(ii) Whether the Eligible Foreign Custodian has the requisite financial strength to provide reasonable care for Foreign Assets;

(iii) The Eligible Foreign Custodian's general reputation and standing; and

(iv) Whether the Fund will have jurisdiction over and be able to enforce judgments against the Eligible Foreign Custodian, such as by virtue of the existence of offices in the United States or consent to service of process in the United States.

(2) *Contract.* The arrangement with the Eligible Foreign Custodian is governed by a written contract that the Foreign Custody Manager has determined will provide reasonable care for Foreign Assets based on the standards specified in paragraph (c)(1) of this section.

(i) The contract must provide:

(A) For indemnification or insurance arrangements (or any combination) that will adequately protect the Fund against the risk of loss of Foreign Assets held in accordance with the contract;

(B) That the Foreign Assets will not be subject to any right, charge, security interest, lien or claim of any kind in favor of the Eligible Foreign Custodian or its creditors, except a claim of payment for their safe custody or administration or, in the case of cash deposits, liens or rights in favor of creditors of the custodian arising under bankruptcy, insolvency, or similar laws;

(C) That beneficial ownership of the Foreign Assets will be freely transferable without the payment of money or value other than for safe custody or administration;

(D) That adequate records will be maintained identifying the Foreign As-

sets as belonging to the Fund or as being held by a third party for the benefit of the Fund;

(E) That the Fund's independent public accountants will be given access to those records or confirmation of the contents of those records; and

(F) That the Fund will receive periodic reports with respect to the safekeeping of the Foreign Assets, including, but not limited to, notification of any transfer to or from the Fund's account or a third party account containing assets held for the benefit of the Fund.

(ii) The contract may contain, in lieu of any or all of the provisions specified in paragraph (c)(2)(i) of this section, other provisions that the Foreign Custody Manager determines will provide, in their entirety, the same or a greater level of care and protection for the Foreign Assets as the specified provisions, in their entirety.

(3)(i) *Monitoring the Foreign Custody Arrangements.* The Foreign Custody Manager has established a system to monitor the appropriateness of maintaining the Foreign Assets with a particular custodian under paragraph (c)(1) of this section, and to monitor performance of the contract under paragraph (c)(2) of this section.

(ii) If an arrangement with an Eligible Foreign Custodian no longer meets the requirements of this section, the Fund must withdraw the Foreign Assets from the Eligible Foreign Custodian as soon as reasonably practicable.

(d) *Registered Canadian Funds.* Any Registered Canadian Fund may place and maintain its Foreign Assets outside the United States in accordance with the requirements of this section, *provided*

(1) The Foreign Assets are placed in the care of an overseas branch of a U.S. Bank that has aggregate capital, surplus, and undivided profits of a specified amount, which must not be less than \$500,000; and

(2) The Foreign Custody Manager is the Fund's board of directors, its investment adviser or officers, or a U.S. Bank.

NOTE TO §270.17f-5: When a Fund's (or its custodian's) custody arrangement with an Eligible Securities Depository (as defined in

§ 270.17f-6

§ 270.17f-7) involves one or more Eligible Foreign Custodians through which assets are maintained with the Eligible Securities Depository, § 270.17f-5 will govern the Fund's (or its custodian's) use of each Eligible Foreign Custodian, while § 270.17f-7 will govern an Eligible Foreign Custodian's use of the Eligible Securities Depository.

[65 FR 25637, May 3, 2000]

§ 270.17f-6 Custody of investment company assets with Futures Commission Merchants and Commodity Clearing Organizations.

(a) A Fund may place and maintain cash, securities, and similar investments with a Futures Commission Merchant in amounts necessary to effect the Fund's transactions in Exchange-Traded Futures Contracts and Commodity Options, *Provided that:*

(1) The manner in which the Futures Commission Merchant maintains the Fund's assets shall be governed by a written contract, which provides that:

(i) The Futures Commission Merchant shall comply with the segregation requirements of section 4d(2) of the Commodity Exchange Act (7 U.S.C. 6d(2)) and the rules thereunder (17 CFR Chapter I) or, if applicable, the secured amount requirements of rule 30.7 under the Commodity Exchange Act (17 CFR 30.7);

(ii) The Futures Commission Merchant, as appropriate to the Fund's transactions and in accordance with the Commodity Exchange Act (7 U.S.C. 1 through 25) and the rules and regulations thereunder (including 17 CFR part 30), may place and maintain the Fund's assets to effect the Fund's transactions with another Futures Commission Merchant, a Clearing Organization, a U.S. or Foreign Bank, or a member of a foreign board of trade, and shall obtain an acknowledgment, as required under rules 1.20(a) or 30.7(c) under the Commodity Exchange Act [17 CFR 1.20(a) or 30.7(c)], as applicable, that such assets are held on behalf of the Futures Commission Merchant's customers in accordance with the provisions of the Commodity Exchange Act; and

(iii) The Futures Commission Merchant shall promptly furnish copies of or extracts from the Futures Commission Merchant's records or such other information pertaining to the Fund's

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assets as the Commission through its employees or agents may request.

(2) Any gains on the Fund's transactions, other than de minimis amounts, may be maintained with the Futures Commission Merchant only until the next business day following receipt.

(3) If the custodial arrangement no longer meets the requirements of this section, the Fund shall withdraw its assets from the Futures Commission Merchant as soon as reasonably practicable.

(b) For purposes of this section:

(1) *Clearing Organization* means a clearing organization as defined in rule 1.3(d) under the Commodity Exchange Act (17 CFR 1.3(d)) and includes a clearing organization for a foreign board of trade.

(2) *Exchange-Traded Futures Contracts and Commodity Options* means commodity futures contracts, options on commodity futures contracts, and options on physical commodities traded on or subject to the rules of:

(i) Any contract market designated for trading such transactions under the Commodity Exchange Act and the rules thereunder; or

(ii) Any board of trade or exchange outside the United States, as contemplated in Part 30 under the Commodity Exchange Act.

(3) *Fund* means an investment company registered under the Act (15 U.S.C. 80a-1 *et seq.*).

(4) *Futures Commission Merchant* means any person that is registered as a futures commission merchant under the Commodity Exchange Act and that is not an affiliated person of the Fund or an affiliated person of such person.

(5) *U.S. or Foreign Bank* means a bank, as defined in section 2(a)(5) of the Act (15 U.S.C. 80a-2(a)(5)), or a banking institution or trust company that is incorporated or organized under the laws of a country other than the United States and that is regulated as such by the country's government or an agency thereof.

[61 FR 66212, Dec. 17, 1996]