

ASA Gold & Precious Metals Ltd
Form 40-APP/A
March 21, 2012
File No. 812-13877

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

In the Matter of

ASA Gold and Precious Metals Limited
(formerly known as ASA Limited)
Canon's Court
22 Victoria Street
Hamilton HM12
Bermuda

FIRST AMENDED AND RESTATED
APPLICATION FOR AN ORDER PERMITTING APPLICANT TO AMEND
PRIOR ORDER PURSUANT TO SECTION 7(d) OF
THE INVESTMENT COMPANY ACT OF 1940

As filed with the Commission on March 21, 2012

This document contains a total of 86 pages.

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ASA Gold and Precious Metals Limited ("ASA")¹ is a non-diversified closed-end management investment company registered with the Securities and Exchange Commission (the "Commission") pursuant to a 2004 order under Section 7(d) of the Investment Company Act of 1940, as amended (the "1940 Act") (the "Existing Order").²

I. SUMMARY

ASA hereby applies to the Commission for an order In the Matter of ASA Gold and Precious Metals Limited (File No. 812-13877), a proceeding under Section 7(d) of the 1940 Act to permit ASA to amend certain conditions of the Existing Order concerning the custody of ASA's assets and the consummation of its portfolio transactions. Applicant seeks an order, subject to the representations and conditions set forth in this application (the "Application"), to the extent necessary:

¹ As of February 29, 2012, ASA had net assets of \$591 million and had 19.3 million shares of common stock issued and outstanding. ASA was formerly known as ASA Limited.

² Investment Company Act Release Nos. 26582 (Aug. 27, 2004) (notice) and 26602 (Sep. 20, 2004) (order).

- (1) to permit ASA to appoint a primary custodian (“Primary Custodian”) or otherwise amend its agreement with the Primary Custodian without prior Commission approval;³
- (2) to permit ASA to settle purchases and sales of portfolio securities on an additional “established securities exchange,” the Stock Exchange of Hong Kong Limited (the “HKSE”);
- (3) to permit ASA (subject to the existing condition that ASA keep at least 20% of its assets in the United States in the custody of a U.S. bank) to maintain its assets in the custody of an eligible foreign custodian or an eligible securities depository in the Republic of South Africa (“South Africa”), the Hong Kong Special Administrative Region (“Hong Kong”), the United Kingdom of Great Britain and Northern Ireland (the “United Kingdom”), Canada, or the Commonwealth of Australia (“Australia”);⁴
- (4) to permit ASA’s Primary Custodian to change the eligible foreign custodian or eligible securities depository in whose custody it maintains ASA’s assets in these five countries⁵, and to amend the custodian agreement with ASA to reflect the change, without prior Commission approval;⁶
- (5) to permit ASA, through its Primary Custodian or its Primary Custodian’s agent, to exercise in Hong Kong, the United Kingdom, Canada, or Australia the rights issued to it as a shareholder in other companies for the purchase of securities; and

3 If the Commission grants the requested relief, a U.S. bank, as defined in Section 2(a)(5) of the 1940 Act and having the qualification described in Section 26(a)(1) of the 1940 Act, will serve as ASA’s Primary Custodian, and ASA will seek an order of the Commission prior to any amendment of its agreement with its Primary Custodian if the amendment conflicts with any of the representations or conditions applicable to the Existing Order, as amended by the requested order.

4 If the Commission grants the requested relief, ASA will comply with the requirements of Rule 17f-5 and Rule 17f-7 under the 1940 Act as if ASA were a registered management investment company organized or incorporated in the United States. The terms “eligible foreign custodian” and “eligible securities depository” have the same meaning as defined in Rule 17f-5 and Rule 17f-7 under the 1940 Act.

5 Hong Kong is one of the two Special Administrative Regions of the People’s Republic of China. For the sake of simplicity, however, the terms “country” and “countries” are used in this Application to refer to Hong Kong.

6 If the Commission grants the requested relief, ASA will comply with the requirements of Rule 17f-5 and Rule 17f-7 under the 1940 Act as if ASA were a registered management investment company organized or incorporated in the United States.

(6) to permit ASA and each of its present or future directors, officers or investment advisers who is not a resident of the United States (“Non-Resident Persons”) to irrevocably designate CT Corporation System (“CT Corp”) (instead of ASA’s Primary Custodian, as required by the existing condition) as an agent in the United States to accept service of process (“U.S. Service Agent”) in any suit, action, or proceeding (collectively, “Proceeding”) before the Commission or any appropriate court relating to the Non-Resident Persons’ activities as directors, officers or investment advisers of ASA, and to permit each of ASA’s subcustodians to irrevocably designate CT Corp (instead of ASA’s Primary Custodian) as U.S. Service Agent in any Proceeding before the Commission or any appropriate court relating to the activities of the subcustodian as ASA’s subcustodian.⁷

Section 7(d) of the 1940 Act prohibits foreign investment companies, their depositors, trustees, and underwriters from publicly offering the securities of those companies in the United States without an order of the Commission permitting the companies to register as investment companies under Section 8 of the 1940 Act. To issue an order under Section 7(d), the Commission must find that, by reason of special circumstances or arrangements (1) it is legally and practically feasible effectively to enforce the provisions of the 1940 Act against the registrant, and (2) the issuance of the order is otherwise consistent with the public interest and the protection of investors. Applicant believes that it would be legally and practically feasible effectively to enforce the provisions of the 1940 Act against ASA and that the issuance of the requested order would be consistent with the public interest and the protection of investors.

II. PRIOR EXEMPTIVE RELIEF

ASA, a limited liability company organized in the Commonwealth of Bermuda (“Bermuda”), is a non-diversified closed-end management investment company registered with the Commission pursuant to the Existing Order. A South African limited liability company, then known as ASA Limited (“ASA South Africa”), was the predecessor of ASA.⁸ The Existing

⁷ ASA will designate CT Corp as U.S. Service Agent in the same city in which ASA’s Primary Custodian is located.

⁸ When ASA South Africa reorganized from a South African limited liability company into a Bermuda limited liability company in November 2004, it changed its name from “ASA Limited” to “ASA

Order (1) permitted ASA South Africa to change its country of incorporation from South Africa to Bermuda by reorganizing itself into ASA; (2) allowed ASA to register as an investment company under Section 8 of the 1940 Act; and (3) permitted ASA South Africa to amend its custodian agreement with JPMorgan Chase Bank, N.A. ("Chase") and ASA to enter into a virtually identical custodian agreement with Chase. The Existing Order was granted, as relevant here, upon the following conditions:

(Bermuda) Limited". In 2007, ASA changed its name back to "ASA Limited". Then, in 2011, ASA changed its name to "ASA Gold and Precious Metals Limited".

ASA South Africa was a closed-end management investment company registered with the Commission pursuant to a 1958 order under Section 7(d) of the 1940 Act. Investment Company Act Release Nos. 2739 (July 3, 1958) (notice) and 2756 (Aug. 13, 1958) (order) (the "Original Order"). The Original Order was issued before the adoption in 1984 of Rule 17f-5 under the 1940 Act and was subject to conditions modeled on the provisions of Rule 7d-1 under the 1940 Act, including several restrictions concerning the custody of ASA's assets and the consummation of its portfolio transactions. Prior to ASA South Africa's reorganization in November 2004, the Original Order had been amended on a number of occasions: Investment Company Act Release Nos. 24321 (Feb. 29, 2000) (notice) and 24367 (Mar. 27, 2000) (order) (amending the 1995 Order to permit ASA South Africa to maintain its assets with a central securities depository ("CSD") for equity securities in South Africa) (the "2000 Order"); Investment Company Act Release Nos. 21161 (June 23, 1995) (notice) and 21220 (July 20, 1995) (order) (superseding all prior orders with respect to ASA South Africa's custodial arrangements to permit ASA South Africa to appoint Chase Manhattan Bank, N.A. (now JPMorgan Chase Bank, N.A.) as its custodian and to authorize Chase Manhattan Bank, N.A. to appoint The Standard Bank of South Africa Limited as ASA South Africa's subcustodian) (the "1995 Order"); Investment Company Act Release Nos. 17904 (Dec. 17, 1990) (notice) and 17945 (Jan. 15, 1991) (order) (increasing the amount of cash that ASA South Africa was permitted to maintain outside the United States for administrative purposes and expanding the entities with which ASA South Africa was permitted to maintain custody of the cash to any "eligible foreign custodian" or "overseas branch of a qualified United States bank" located in South Africa) (the "1991 Order"); Investment Company Act Release Nos. 14826 (Dec. 4, 1985) (notice) and 14878 (Dec. 31, 1985) (order) (permitting ASA South Africa to amend its custodian agreement to include the Tokyo Stock Exchange, the Toronto Stock Exchange, the Stock Exchange of Melbourne, Ltd. and the Effektenborsenverein Zurich Exchange in the definition of "established securities exchanges") (the "1985 Order"); Investment Company Act Release Nos. 11669 (Mar. 6, 1981) (notice) and 11722 (Apr. 7, 1981) (order) (permitting ASA South Africa to amend its custodian agreement to allow for cash investments in time deposits and bank certificates of deposit) (the "1981 Order"); Investment Company Act Release Nos. 8278 (Mar. 20, 1974) (notice) and 8312 (Apr. 17, 1974) (order) (declaring a director not an "interested person" of ASA South Africa as defined by the 1940 Act); Investment Company Act Release Nos. 7860 (June 12, 1973) (notice) and 7894 (July 10, 1973) (order) (declaring a director not an "interested person" of ASA South Africa as defined by the 1940 Act); Investment Company Act Release Nos. 2944 (Dec. 14, 1959) (notice) and 2957 (Dec. 29, 1959) (order) (permitting amendment to ASA South Africa's investment advisory agreement without shareholder approval); Investment Company Act Release Nos. 2883 (May 22, 1959) (notice) and 2886 (June 9, 1959) (order) (permitting ASA South Africa, through its custodian, to exercise rights issued to it as shareholder in other companies for the purchases of securities); and Investment Company Act Release Nos. 2817 (Jan. 5, 1959) (notice) and 2821 (Jan 20, 1959) (order) (permitting ASA South Africa, through its custodian, to purchase and sell South African Treasury Bills).

Condition 1. Chase will serve as ASA's Primary Custodian and will continue to meet the qualifications of a custodian under Section 17(f) of the 1940 Act, and The Standard Bank of South Africa Limited ("Standard Bank") will serve as Chase's subcustodian in South Africa. As long as Standard Bank holds ASA's assets, Standard Bank will designate Chase as its agent for service of process in the United States. ASA will comply with Rule 17f-5 under the 1940 Act as if it were a registered management investment company organized or incorporated in the United States with respect to any of its assets held by eligible foreign custodians (including Standard Bank and the CSD⁹) or overseas branches of U.S. banks (including Chase) outside the United States.

Condition 3. ASA will seek an order of the Commission prior to any amendment of its agreement with its Primary Custodian.

Condition 11. ASA will file, and will cause each of its Non-Resident Persons to file with the Commission irrevocable designation of ASA's Primary Custodian as U.S. Service Agent in any Proceeding before the Commission or any appropriate court to enforce the provisions of the laws administered by the Commission, or to enforce any right or liability based upon ASA's charter or bylaws, contracts, or the respective undertakings and agreements of any of these persons required by the terms and conditions of the requested order, or which alleges a liability on the part of any of these persons arising out of their services, acts, or transactions relating to ASA.

Condition 12. After receipt of the requested order, ASA will file with the Commission a copy of the subcustodian agreement that irrevocably designates ASA's Primary Custodian as U.S. Service Agent in any Proceeding before the Commission or any appropriate court to enforce the provisions of the laws administered by the Commission in connection with the subcustodian agreement with Standard Bank ("Subcustodian Agreement"), or to enforce any right or liability ("Liability") based on the Subcustodian Agreement or which alleges a liability on the part of Standard Bank arising out of its services, acts, or transactions under the Subcustodian Agreement relating to ASA's assets. This designation will automatically terminate upon Standard Bank ceasing to hold ASA's assets, except as to a Proceeding or a Liability based on an action or inaction of Standard Bank prior to Standard Bank having ceased holding ASA's assets.

Condition 21. ASA will settle its purchases and sales of portfolio securities in the United States by use of the mails or means of interstate commerce, except for: (a) purchases and sales on an "established securities exchange" (defined as a national securities exchange as defined in Section 2(a)(26) of the 1940 Act, the JSE Limited (the "JSE")¹⁰, the London Stock Exchange (the "LSE"), the Tokyo Stock Exchange, the Toronto Stock Exchange (the "TSX"), the Australian Securities Exchange (the "ASX")¹¹, and the SIX Swiss

⁹ In the conditions to the Existing Order, "CSD" refers to the central securities depository (the "CSD") for South African equity securities. For a brief discussion regarding the CSD, see *infra* note 81.

¹⁰ When the Existing Order was granted, the JSE was known as the JSE Securities Exchange South Africa.

¹¹ When the Existing Order was granted, the ASX was known as the Australian Stock Exchange Limited.

Exchange¹² (collectively the “Established Exchanges”)) and (b) purchases and sales, through its Primary Custodian or its Primary Custodian’s agent, in South Africa of South African Treasury Bills from or to the South African Treasury, South African Reserve Bank securities, or CSD-eligible securities. Assets purchased on an Established Exchange will be maintained in the United States with ASA’s Primary Custodian, unless prohibited by law or regulation or financially impracticable as provided in condition 24 below.

Condition 23. ASA will keep at least 20% of its assets in the United States in the custody of a U.S. bank (the “20% Requirement”). ASA’s remaining assets (which may include U.S. dollars invested in time deposits and bank certificates of deposit) will be kept in the custody of such a U.S. custodian, except:

- a. subject to the 20% Requirement, up to 100% of its CSD-eligible securities may be kept in the CSD through its Primary Custodian and subcustodian;
- b. \$200,000 may be kept in cash to cover administrative expenses and expenses related to the winding up of ASA’s affairs in South Africa, to be kept in a checking account with a South African bank;
- c. up to 3% of its assets may be kept in South Africa in short-term rand-denominated investments issued or guaranteed by South Africa; and
- d. up to 5% of its assets may be kept in rand-denominated interest bearing bank accounts with eligible foreign custodians or overseas branches of U.S. banks.

Condition 24. If removal of securities purchased on the Established Exchanges becomes either prohibited by law or regulation or financially impracticable, up to 5% of ASA’s assets may be held by an eligible foreign custodian or overseas branch of ASA’s Primary Custodian in each of London, Japan, Australia, Switzerland, and Canada.

Condition 25. If an eligible foreign custodian or an overseas branch of the Primary Custodian is to be appointed as subcustodian, ASA will comply with the requirements of Rule 17f-5 under the 1940 Act prior to the purchase of securities on an Established Exchange.

Since the Commission issued the Existing Order, the above conditions have been modified in the following respects. In a letter dated December 13, 2006 (the “2006 Letter”),¹³ the staff of the Commission’s Division of Investment Management (the “Commission Staff”)

¹² When the Existing Order was granted, the SIX Swiss Exchange was known as the Effektenborsenverein Zurich Exchange.

¹³ ASA (Bermuda) Limited, SEC No-Action Letter (pub. avail. December 13, 2006).

granted no-action relief to permit ASA to continue to rely on the Existing Order while First National Bank (“First National”), a division of FirstRand Bank Limited (“FirstRand”), serves as Chase’s subcustodian for ASA’s assets in South Africa. In addition, the Commission Staff granted no-action relief to permit ASA to continue to rely on the Existing Order while CT Corp serves as FirstRand’s U.S. Service Agent in any Proceeding before the Commission or any appropriate court relating to the activities of First National as ASA’s South African subcustodian.

III. ASA’S DESIRED PORTFOLIO DIVERSIFICATION

1. Diversification of ASA’s Investments Globally

Prior to July 2005, ASA was subject to a number of fundamental investment policies relating to the concentration of its investments inside and outside of South Africa, including a fundamental investment policy that required ASA to invest more than 50% of its assets in equity securities of gold mining companies in South Africa and no more than 20% of its assets in equity securities of companies outside of South Africa.¹⁴ Because of significant changes in the gold mining industry,¹⁵ certain of these policies made it difficult for ASA to implement a flexible investment strategy, placing ASA’s shareholders at a disadvantage compared to shareholders of

¹⁴ Prior to July 2005, ASA’s fundamental investment policies concerning the concentration of its investments inside and outside of South Africa required it to invest over 50% of the value of its total assets in common shares or securities convertible into common shares of companies conducting, as the major portion of their business, gold mining and related activities in South Africa. The balance of ASA’s assets, other than small amounts held in cash, were permitted to be (i) invested in common shares or securities convertible into common shares of companies engaged in other types of businesses in South Africa, (ii) held in the form of gold bullion or certificates of deposit for gold bullion (up to 25% of the value of ASA’s total assets), and/or (iii) invested in common shares or securities convertible into common shares of companies primarily engaged outside of South Africa in extractive or related industries or in the holding or development of real estate (up to 20% of the value of ASA’s total assets). The foregoing fundamental policies were in effect at the time the Commission granted the 2000 Order to ASA’s predecessor, ASA South Africa, and at the time the Commission granted the Existing Order.

¹⁵ The significant changes in the gold mining industry include the decline in gold production by the South African gold mining industry compared to the rest of the world and the widespread consolidation of the worldwide gold mining industry, which has resulted in a decline in the number of gold mining companies located in South Africa. By 2004 South African gold production had declined to approximately 343 tonnes, the lowest level of gold production in the country since 1931. In 1994, over 50 South African gold mining companies were listed on the JSE. By 2004 approximately a dozen such companies were listed, only three of which management believed were suitable in size for investment by ASA.

other gold and precious minerals funds that are not similarly limited by their investment policies. To enhance the potential to improve ASA's long-term investment results and growth, the board of directors ("Board") believed that it was important that ASA be able to invest wherever opportunities in the gold and other precious minerals industry arise. Accordingly, ASA's Board proposed replacing ASA's fundamental investment policies relating to the concentration of its investments inside and outside of South Africa with a new fundamental investment policy that, among other things, eliminates the requirement that ASA invest more than 50% of its assets in equity securities of gold mining companies in South Africa and no more than 20% of its assets in equity securities of companies outside of South Africa, and permits ASA to invest in bullion or other direct forms of gold, silver, platinum or other precious minerals. At a special general meeting of ASA shareholders held on July 21, 2005, ASA shareholders approved the proposed changes in ASA's fundamental investment policies.¹⁶

Since ASA shareholders approved the current fundamental investment policy, ASA has continued to evaluate carefully its investment options and make investments only when the investments align with its investment strategy, when market conditions warrant the investments, and when the investments are consistent with the Existing Order. ASA's main focus continues to be to invest in securities of companies involved in the exploration and mining of gold and other precious minerals. To this end, ASA's management is seeking to take advantage of investment opportunities in non-South African companies that are, or in the future may be, listed on the HKSE, the LSE, the TSX, or the ASX.¹⁷ ASA's management believes that ASA must be able to

¹⁶ ASA's current fundamental investment policy requires that at least 80% of its total assets be (i) invested in common shares or securities convertible into common shares of companies engaged, directly or indirectly, in the exploration, mining or processing of gold, silver, platinum, diamonds or other precious minerals, (ii) held as bullion or other direct forms of gold, silver, platinum or other precious minerals, (iii) invested in instruments representing interests in gold, silver, platinum or other precious minerals such as certificates of deposit for gold, silver, platinum or other precious minerals, and/or (iv) invested in securities that seek to replicate the price movement of gold, silver or platinum bullion.

¹⁷ Companies that are listed on the HKSE, the LSE, the TSX, or the ASX are not necessarily located, and do not necessarily operate, in Hong Kong, the United Kingdom, Canada, or Australia.

invest effectively and efficiently in these additional securities markets for the benefit of its shareholders.¹⁸

The following chart shows, as of November 30, 2011, the number of mining companies listed on various exchanges:

Since ASA shareholders approved the current fundamental investment policy, ASA's management has, to a certain extent, diversified ASA's investments outside of South Africa consistent with the Existing Order. The following chart shows, as of November 30, 2011, the approximate¹⁹ allocation of ASA's 34 portfolio securities by exchange of primary listing:²⁰

¹⁸ By 2011 South African gold production had declined to approximately 198 tonnes, the lowest level of gold production in the country since 1931.

¹⁹ The percentages are shown rounded to the nearest whole number.

²⁰ The Bolsa de Valores de Lima (BVL) is the stock exchange of Peru.

Of the 15 mining companies with a primary listing on the TSX that ASA currently holds, six of the companies are dually listed on U.S. exchanges (and it was through their secondary listings on U.S. exchanges that ASA purchased them), and ASA purchased securities for nine of the companies on the TSX and currently maintains those securities either in the custody of Chase's subcustodian in Canada, or in the custody of Chase in the United States. (As discussed below, ASA has, to a limited extent, been able to purchase securities on the TSX, use Canadian-Link Services ("CLS") to settle the transactions through The Depository Trust Company ("DTC"), and then maintain the securities in the United States with ASA's Primary Custodian.)

Of the two mining companies with a primary listing on the LSE that ASA currently holds, ASA purchased American Depository Receipts ("ADRs") in the U.S. market for one of the company's securities, and ASA purchased securities for the other company when it was listed on the JSE but the company has since changed its country of domicile from South Africa to the United Kingdom and is now also listed on the LSE (ASA currently maintains those securities in the custody of Chase's subcustodian in South Africa).

Of the three mining companies with a primary listing on the ASX that ASA currently holds, one of the companies is also listed on the LSE (and it was through its listing on the LSE that ASA purchased it) and ASA currently maintains those securities in the custody of Chase's subcustodian in the United Kingdom; ASA purchased securities for one of the companies on the ASX and currently maintains those securities in the custody of Chase's subcustodian in Australia; and ASA created ADRs in the U.S. market for one of the company's securities.

In the case of the one mining company with a primary listing on the BVL that ASA currently holds, ASA purchased ADRs in the U.S. market for the company's securities.

As of November 30, 2011, ASA held approximately 99.5% of its net assets in common shares of mining companies and approximately 0.5% of its net assets in cash and short-term securities. The percentage of ASA's net assets held in common shares of mining companies included approximately 75.8% held as ordinary shares and approximately 23.7% held as ADRs.

ASA's management has diversified ASA's investments outside of South Africa mainly by taking the following actions:

(1) Divestment – ASA sold a substantial portion of its portfolio securities in order to raise cash to finance two tender offers, one each conducted in 2008 and 2009. From April 30, 2008 to November 30, 2011, ASA's percentage allocation to mining companies with a primary listing on the JSE decreased from approximately 38% to approximately 19%. This percentage decrease was attributed almost entirely to ASA's sale of portfolio securities in connection with the tender offers (approximately 43% of all securities sold were securities of mining companies with a primary listing on the JSE).²¹ During this same period, ASA's percentage allocation to mining companies with a primary listing on the TSX, for example, increased from approximately 21% to approximately 42%. This percentage increase was attributed to ASA's sale of portfolio securities in connection with the tender offers (the sales decreased the overall size of ASA's portfolio and, as a result, the remaining percentage allocations increased accordingly), as well as to ASA management's use of the following two investment techniques that are consistent with the conditions of the Existing Order.

(2) Investment in Dually-Listed Companies – ASA has purchased on U.S. exchanges the securities of non-South African mining companies (e.g., Canadian gold mining companies) that are dually listed on U.S. and foreign exchanges (e.g., the TSX).²² However, as discussed

²¹ During this same period, because ASA's portfolio was overweighted in South Africa and the portfolio manager viewed this sector of the industry to be in decline, ASA purchased (ADRs in the U.S. market for) only one South African mining company's securities. The company is developing new assets outside of South Africa. Although ASA purchased ADRs in the U.S. market for the company's securities, ASA has since converted the ADRs into ordinary shares listed on the JSE. The disadvantages associated with holding ADRs are discussed below under "Purchasing ADRs for Foreign Securities in the U.S. Market".

²² As of November 30, 2011, ASA held approximately 33.5% of its net assets in ordinary shares of dually-listed mining companies. ASA considers a security to be "dually-listed" if the security has a listing on a foreign exchange and a comparable listing on a U.S. exchange.

below, it has been management's experience that non-South African mining companies whose securities are dually listed on U.S. and foreign exchanges tend to be companies in the later stages of their development, when they typically are mature or "senior" producers.²³ ASA's management seeks to invest in non-South African mining companies in the earlier stages of their development, when they typically are "intermediate" or "junior" producers (or non-producers) and are listed only (or primarily) on a foreign exchange.

(3) Investment in ADRs – ASA has purchased ADRs for the securities of non-South African gold mining companies (e.g., a Channel Islands mining company) in the U.S. market.²⁴ However, as discussed below, it has been management's experience that trading in ADRs represents an inefficient method of investing with increased costs to shareholders and lower levels of liquidity.

2. Diversification of ASA's Investments by Stage of Development

As stated above, ASA's management seeks to invest in non-South African mining companies in the earlier stages of their development, when they typically are "intermediate" or "junior" producers (or non-producers). The earlier stages of a company's life cycle can be the periods of greatest growth and share price appreciation. ASA's management believes that ASA must be able to invest effectively and efficiently in earlier-stage companies for the benefit of its shareholders.

Taking into account market factors such as capitalization, valuation, and liquidity, ASA's management has narrowed the universe of mining companies down to an "investable" universe

²³ Mining assets have a typical life cycle from discovery, to development, to construction, through extraction of a resource. Once the extraction stage commences, the value of the asset typically begins to decline (or "waste"). Nearly all senior producers are in the extraction stage. In addition, a company's status as a producer often correlates with its market capitalization (e.g., senior producers are often larger capitalization companies). However, this is not always the case. Therefore, ASA's management (following the mining industry practice) generally considers mining companies in terms of their stage of development, rather than their market capitalization.

²⁴ As of November 30, 2011, the percentage of ASA's net assets held in common shares of mining companies included approximately 23.7% held as ADRs. ASA believes that currently ADRs do not exist for Canadian gold mining companies (whether in the later or earlier stages of their development) and it is not economical for ASA to create them.

(or subset) of approximately 210 mining companies currently.²⁵ This subset of 210 mining companies comprises 168 junior producers, 26 intermediate producers, and 16 senior producers. Based on the subset, the following chart shows the three year average annual total returns for these producers:

As the chart shows, the intermediate and junior producers in the subset posted significantly higher returns during the period than the senior producers in the subset. Given the intermediate and junior producers' returns relative to the senior producers' returns (and considering the companies' relative return potential), ASA's management seeks to invest a greater portion of ASA's assets in intermediate and junior producers.²⁶

²⁵ Many mining companies are highly speculative and are excluded from ASA's securities selection process. ASA's internal "screen" narrows the universe of mining companies down to this subset of, currently, 210 mining companies. Whether ASA would seek to invest in one or more of these companies would depend on a variety of factors, including market conditions at the time of investment.

²⁶ Given the nature of mining projects, in which the assets are "wasting" over time, not investing in new projects over time ignores the basic principles of the mining industry (i.e., wasting assets) and can result in an investment portfolio's long-term underperformance relative to investment portfolios with greater exposure to the segments of the industry with higher growth potential. ASA's management believes that

Intermediate and junior producers (or earlier-stage companies) are currently underrepresented in ASA's portfolio. It has been management's experience that non-South African mining companies in the earlier stages of their development typically are listed only on a foreign exchange. Based on the subset of 210 mining companies (described above), the following chart shows, as of January 19, 2012, the number of junior, intermediate, and senior producers²⁷ with a U.S. exchange listing and the number of such producers without such a listing:

Of the 26 intermediate producers in the subset, only 11 are dually listed on U.S. and foreign exchanges. Of the 168 junior producers in the subset, only 11 are dually listed on U.S. and foreign exchanges.²⁸

ASA's inability to invest effectively and efficiently in intermediate and junior producers has negatively affected its performance.

²⁷ In the chart, the junior producers have an average market capitalization of US\$0.4 billion, the intermediate producers have an average market capitalization of US\$2.3 billion, and the senior producers have an average market capitalization of US\$15.7 billion.

²⁸ ASA does not currently hold securities of all of these dually-listed companies because, as stated above, whether ASA would seek to invest in one or more of the companies in the subset would depend on a variety of factors, including market conditions at the time of investment.

Under the terms and conditions of the Existing Order, ASA is permitted to settle securities transactions on Established Exchanges, including the LSE, the TSX, and the ASX, but if ASA does so it must then satisfy the requirement that such securities be maintained in the United States with ASA's Primary Custodian.²⁹ The terms and conditions of the Existing Order have made it difficult, if not impossible, for ASA to invest in many of the companies in its investable universe. One way for ASA to meet these terms and conditions is for ASA to purchase on U.S. exchanges the securities of non-South African mining companies that are dually listed on U.S. and foreign exchanges.³⁰ However, as shown in the chart above, the majority of intermediate mining companies and the vast majority of junior mining companies do not have a secondary listing on a U.S. exchange. Another way for ASA to meet these terms and conditions (but only with respect to the securities of mining companies with a primary listing on the TSX) is for ASA to use CLS.³¹ Presently, the TSX is one of the primary markets for raising investment capital for mining companies in the earlier stages of their development. The following chart shows, from 2005 to 2010, the number of new mining company listings on various exchanges:

²⁹ If ASA were to purchase securities on the LSE, the TSX, or the ASX, ASA would then have to move physical securities away from their primary trading market in order to maintain the securities in the United States with its Primary Custodian. For a discussion of the reasons why ASA's management believes that moving physical securities away from their primary trading markets is not an effective and efficient means for ASA to achieve its desired portfolio diversification, see "U.S. Custody Requirement", "Moving Physical Securities Away From Their Primary Trading Markets" below. For a discussion of a related foreign custody matter, see *infra* note 87.

³⁰ Indeed, as stated above, of the 15 mining companies with a primary listing on the TSX that ASA currently holds, 6 of the companies are dually listed on U.S. exchanges and it was through their secondary listings on U.S. exchanges that ASA purchased them.

³¹ In 2005, The Depository Trust & Clearing Corporation ("DTCC") launched CLS, a settlement link with CDS Clearing and Depository Services Inc., Canada's national securities depository, clearing and settlement hub. CLS supports the processing and settlement of transactions in Canadian dollars at The Depository Trust Company ("DTC"), a subsidiary of DTCC. All eligible and qualified DTC members, both broker-dealers and banks, can use CLS, but they must be participating in the program. Among other benefits, CLS provides customers with a single depository interface for U.S. and Canadian dollar transactions, reducing cross-border processing costs and inefficiencies; provides the option of settling in either U.S. or Canadian dollars; and enables customers to concentrate all U.S. and Canadian security positions in their DTC accounts.

http://www.dtcc.com/products/cs/equities_settlement/cndsettlement.php

ASA has, to a limited extent, been able to purchase securities on the TSX, use CLS to settle the transactions through DTC, and then maintain the securities in the United States with ASA's Primary Custodian. ASA has not used CLS more extensively, however, because it has been management's experience that CLS is not a reliable means to achieve this result,³² and not all of the mining companies in which ASA may seek to invest are eligible for settlement through CLS.

3. Changes in the Allocation of ASA's Investments

Certain conditions of the Existing Order have made it difficult for ASA to implement fully a flexible investment strategy consistent with its current fundamental investment policy and to achieve its desired portfolio diversification. If the Commission grants the requested relief, ASA's management anticipates that it would continue to decrease ASA's holdings in common shares of senior mining companies listed on the JSE and interlisted on U.S. and foreign exchanges, and continue to increase ASA's holdings in common shares of intermediate and junior mining companies (mining companies in the earlier stages of their development, which

³² ASA has been informed that if DTC places a so-called "chill" on a security, then the security is not DTC-eligible and cannot settle through DTC. To date, ASA has been unable to determine under what circumstances DTC would place a chill on (or lift a chill from) a security. Without complete certainty as to whether DTC will place a chill on (or lift a chill from) a security, ASA believes that CLS is not a reliable means for ASA to purchase securities on the TSX.

companies are currently underrepresented in ASA's portfolio) listed on the TSX, the ASX, and the LSE.³³ Furthermore, ASA's management anticipates that it would decrease ASA's holdings in ADRs, as ASA's management would seek to convert ADRs for Newcrest Mining Limited ("Newcrest Mining"), an Australian mining company, into ordinary shares listed on the ASX.³⁴ These anticipated changes in the allocation of ASA's investments are based on its allocations as of November 30, 2011, and any actual changes in the allocation of ASA's investments would depend upon management's evaluation of market conditions at the time. In addition, ASA's management anticipates that it would invest a portion of ASA's net assets in common shares of mining companies that are, or in the future may be, listed on the HKSE.³⁵

The requested relief will enable ASA better to participate in the rapidly evolving global securities markets, thereby opening up ASA's access to additional and, importantly, potentially higher-growth markets where shares of gold and other precious minerals companies are, or in the future may be, listed. This access, in turn, will enable ASA better to adapt to the changes in the gold and other precious minerals industry and to pursue the best investment prospects on a global scale, for the benefit of its shareholders.

IV. REQUESTED EXEMPTIVE RELIEF

The order requested hereby will amend certain representations and conditions of the Existing Order concerning the custody of ASA's assets and the consummation of its portfolio transactions.

1. Right to Appoint Primary Custodian or Otherwise Amend Agreement with Primary Custodian without Prior Commission Approval

Under the terms and conditions of the Existing Order, ASA agreed that Chase will serve as ASA's Primary Custodian and will continue to meet the qualifications of a custodian under

³³ The ability to invest effectively and efficiently in a greater number of mining companies in its investable universe also would enable ASA further to diversify its investments.

³⁴ Information about ASA's experience with Newcrest Mining ADRs and other ADRs is provided below under "U.S. Custody Requirement", "Purchasing ADRs for Foreign Securities in the U.S. Market".

³⁵ As discussed below, ASA is seeking an order expanding the definition of "established securities exchange" to permit it to settle securities transactions on the HKSE, as well. The dramatic increase in Chinese gold production in recent years, combined with the opening of that market, has increased the possibility that ASA's management would invest a portion of ASA's net assets in that market.

Section 17(f) of the 1940 Act. Furthermore, one of the conditions of the Existing Order requires ASA to seek an order of the Commission prior to any amendment of its agreement with its Primary Custodian. This condition, which requires prior Commission approval of even minor changes to ASA's agreement with its Primary Custodian, dates back to the Original Order issued on August 13, 1958, to ASA's predecessor, ASA South Africa.

For the reasons discussed below, ASA seeks an order to permit it to appoint a Primary Custodian or otherwise amend its agreement with the Primary Custodian without prior Commission approval. In this regard, ASA represents to the Commission that, if the Commission grants the requested relief, (1) a U.S. bank, as defined in Section 2(a)(5) of the 1940 Act³⁶ and having the qualification described in Section 26(a)(1) of the 1940 Act³⁷, will serve as ASA's Primary Custodian, and (2) ASA will seek an order of the Commission prior to any amendment of its agreement with its Primary Custodian if the amendment conflicts with any of the representations or conditions applicable to the Existing Order, as amended by the requested order.

The selection and appointment of a custodian and the negotiation of a custody arrangement involve a fund board's careful consideration of several business-related concerns and, as such, are generally regarded as being business decisions to be made by a fund's board based on specific business issues considered within the context of the 1940 Act requirements

36 Section 2(a)(5) of the 1940 Act defines "bank" as:

(A) a depository institution (as defined in Section 3 of the Federal Deposit Insurance Act) or a branch or agency of a foreign bank (as such terms are defined in Section 1(b) of the International Banking Act of 1978), (B) a member bank of the Federal Reserve System, (C) any other banking institution or trust company, whether incorporated or not, doing business under the laws of any state or of the United States, a substantial 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 title, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clause (A), (B), or (C) of this paragraph.

37 Section 26(a)(1) of the 1940 Act provides that, in order to qualify as a trustee or custodian for the purposes therein, a bank "shall have at all times an aggregate capital, surplus, and undivided profits of a specified minimum amount, which shall not be less than \$500,000."

applicable to such arrangements. Prior to the appointment of a Primary Custodian for ASA's assets, the Board will consider a number of business-related concerns, including, but not limited to, the following (i) the Primary Custodian's financial strength; (ii) the Primary Custodian's creditworthiness; (iii) the Primary Custodian's general reputation (including industry recognition) and standing; (iv) the Primary Custodian's regulatory compliance history; (v) the length of time the Primary Custodian has been servicing the investment company industry, the number of U.S. fund clients the Primary Custodian serves, and the total market value of U.S. fund client assets in the custody of the Primary Custodian; (vi) the Primary Custodian's practices, procedures, and internal controls; (vii) the Primary Custodian's security, data protection, and privacy practices; (viii) the Primary Custodian's processing, settlement, and reporting capabilities; (ix) the Primary Custodian's method of keeping custodial records pertaining to ASA's assets; (x) the ability of ASA's independent public accountants to access those records or to confirm the content of those records; (xi) the Primary Custodian's insurance and indemnification policies and practices; (xii) the number of markets in which the Primary Custodian provides services and the size of the Primary Custodian's global custody network; (xiii) the Primary Custodian's process for selecting subcustodians for its network, including the factors it considers in assessing subcustodians (in particular, subcustodians in those jurisdictions in which ASA maintains or may seek to maintain its assets); (xiv) the Primary Custodian's process for monitoring the performance and service levels of the subcustodians in its network; (xv) the size and experience of the team that manages the Primary Custodian's global custody network; (xvi) the Primary Custodian's fees, costs, and charges; (xvii) the Primary Custodian's annual review of its global custody network; and (xviii) whether the proposed arrangement (including the use of subcustodians and securities depositories in those jurisdictions in which ASA maintains or may seek to maintain its assets) is consistent with the best interests of ASA and its shareholders. In addition, a majority of ASA's Board will have determined that the maintenance of ASA's assets with the Primary Custodian will provide reasonable protection for ASA's assets, and will have approved, as providing reasonable care for ASA's assets, a written contract that will govern the manner in which the Primary Custodian will maintain ASA's assets. Further, ASA's Board will establish a system to monitor the arrangement, and a majority of the Board will, at least annually, review the continued appropriateness of the arrangement and monitor performance of the contract.

As stated above, if the Commission grants the requested relief, a U.S. bank, as defined in Section 2(a)(5) of the 1940 Act and having the qualification described in Section 26(a)(1) of the 1940 Act, will serve as ASA's Primary Custodian. This is consistent with one of the undertakings and agreements that Rule 7d-1 under the 1940 Act requires a Canadian management investment company to include in its application for an order under Section 7(d) of the 1940 Act.³⁸ A Canadian fund's assets are required to be held in the United States in the custody of "a bank, as defined in Section 2(a)(5) of the [1940 Act] and having the qualification described in Section 26(a)(1) of the [1940 Act]," except as provided in Rule 17f-5 and Rule 17f-7.³⁹ In this regard, ASA requests that it be permitted to appoint a Primary Custodian on the same basis as a Canadian fund.

Furthermore, as discussed above, ASA's current investment policies are designed to enable ASA to invest wherever opportunities in the gold and other precious minerals industry arise. To invest in this manner, ASA must contract with a custodian bank that provides custody and settlement services for cross-border securities transactions and undertakes the management and monitoring of a network of foreign subcustodians and securities depositories. Custodian banks that both have these capabilities and satisfy the requirements of Section 17(f) of the 1940 Act tend to be major providers of global custody and settlement services to the world's largest institutional investors, including sophisticated U.S. investment company complexes. The legislative history and requirements of Section 17(f) indicate that Congress intended fund assets to be kept by financially secure entities that have sufficient safeguards against misappropriation.⁴⁰ Although the order ASA seeks would not designate a particular Primary Custodian, ASA expects that, should its current custody arrangements change, it would contract

³⁸ Rule 7d-1(a) provides that a Canadian management investment company may obtain an order under Section 7(d) to permit its registration under the 1940 Act and the public offering of its securities if it files an application that complies with all of the undertakings and agreements set forth in paragraph (b) of the rule. Although Rule 7d-1 by its terms applies only to Canadian investment companies, most non-Canadian investment companies seeking registration orders have represented that they would comply with the conditions of the rule.

³⁹ Rule 7d-1(b)(8)(v).

⁴⁰ Investment Trusts and Investment Companies: Hearing on S. 3580 Before a Subcomm. Of the Senate Comm. On Banking and Currency, 76th Cong., 3d Sess. 264 (1940).