

Ontario Securities Commission

National Policy 41-201

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**NATIONAL POLICY 41-201
INCOME TRUSTS AND OTHER INDIRECT OFFERINGS**

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PART 1 INTRODUCTION

What is the purpose of the policy?

1.1 It is a fundamental principle that everyone investing in securities should have access to sufficient information to make an informed investment decision. The Canadian Securities Administrators (the CSA or we) believe that there are distinct attributes of an investment in income trust units that should be clearly disclosed.

Within our securities regulatory framework, raising capital in the public markets results in certain rights and obligations attaching to issuers and investors. We believe that it would be beneficial to express our view in a policy about how the existing regulatory framework applies to non-corporate issuers (such as income trusts) and to indirect offering structures in order to minimize inconsistent interpretations and to better ensure that the principles underlying the requirements are preserved. Our concerns relate to the quality and nature of prospectus and continuous disclosure, accountability for prospectus disclosure and liability for insider trading. We have drafted a policy rather than a rule because we believe that the existing regulatory requirements capture the necessary regulatory outcomes relating to income trusts and other indirect offering structures. Our goal is to provide guidance and recommendations about how income trusts and other indirect offering structures fit within the existing regulatory requirements rather than create new regulatory requirements for income trusts and other indirect offering structures. We also identify factors that relate to the exercise of the regulator's discretion in a prospectus offering.

This policy provides guidance and clarification by all jurisdictions represented by the CSA. The guidance generally relates to the requirements of National Instrument 51-102 *Continuous Disclosure Obligations* and the prospectus requirements in each jurisdiction. Although the primary focus of this policy is on income trusts, we believe that much of the guidance and clarification that we provide is useful for other indirect offering structures. As well, the guidance may apply more generally to issuers that offer securities which entitle holders of those securities to net cash flow generated by the issuer's business or its properties. We provide guidance about prospectus disclosure and prospectus liability to minimize situations where staff might recommend against issuance of a receipt for a prospectus where it would appear that the offering may be contrary to the public interest due to insufficient disclosure, the structure of the offering, or other factors.

Although the focus of this policy is on the income trust structure in the context of offerings by way of prospectus, these principles also apply to income trust structures in other contexts, such as the reorganization of a corporate entity into a trust. Although an offering document is not prepared in a reorganization, we expect that the information circular provided to relevant security holders, and that contains prospectus-level disclosure, will follow the principles set out in this policy. In addition when we are determining whether to grant exemptive relief to an income trust issuer in connection with a reorganization or other similar transaction, we will consider the principles described in Part 3 of this policy.

This policy may also apply to income trusts in the fulfillment of their continuous disclosure obligations.

What do we mean when we refer to an income trust in this policy?

1.2 When we refer to an income trust or issuer in this policy, we are referring to a trust or other entity (including corporate and non-corporate entities) that issues securities which provide for participation by the holder in net cash flows generated by: (i) an underlying business owned by the trust or other entity, or (ii) the income-producing properties owned by the trust or other entity. This includes business income trusts, real estate investment trusts and royalty trusts. In our view, this does not include an entity that falls within the definition of "investment fund"

contained in National Instrument 81-106 *Investment Fund Continuous Disclosure*, or an entity that issues asset-backed securities or capital trust securities.

What is an operating entity?

1.3 In the most basic income trust structure, the operating entity is: (i) a subsidiary of the income trust with an underlying business, or (ii) income-producing properties owned directly by the income trust. In more complex structures, there may be a number of intervening entities above the operating entity. Generally, the operating entity is the first entity in the structure that has an underlying business that generates cash flows. There may be more than one operating entity in the income trust structure.

In addition to identifying the operating entity, it is also important to understand the operating entity's business. In some cases, its business is to own, operate and produce revenues from its assets. In other cases, its business is to own an interest in a joint venture or to derive a revenue stream from holding a portfolio of investments or financial instruments.

How is an income trust structured?

1.4 Typically, an income trust holds a combination of debt and equity or royalty interests in an entity owning or operating a business. Net cash flows generated by the operating entity's business are distributed to the income trust. The income trust then distributes some or all of that cash flow to its investors (referred to as unitholders or investors).

What is an income trust offering?

1.5 In a typical income trust offering, an income trust is created to distribute units to the public. The income trust then uses the proceeds from the offering to acquire debt and equity or royalty interests in the operating entity, or interests in income producing properties. We view the income trust offering as a form of indirect offering. Instead of offering their securities directly to the public, the vendors sell their interests in the operating entity to the income trust. The income trust purchases those interests with proceeds that it raises through its offering of units to the public. The interests in the operating entity that the income trust acquires are thus indirectly offered to the public. Through their direct investment in units of the income trust, unitholders hold an indirect interest in the operating entity.

By issuing units under a prospectus, the income trust becomes a reporting issuer (or equivalent) under applicable securities laws. The operating entity typically remains a non-reporting issuer.

How does an indirect offering differ from a direct offering?

1.6 In a conventional direct offering, interests in the operating entity are offered to the public through a public distribution of the operating entity's securities. By contrast, in an indirect offering, interests in the operating entity are not offered directly to the public but are instead acquired by a separate entity (for example, an income trust or its subsidiary). The securities of this separate entity, such as units of a trust, are offered to the public under a prospectus. The issuer applies the proceeds of the offering to satisfy the purchase price of the interests in the operating entity.

In a direct initial public offering, an issuer may choose to finance the acquisition of another business with proceeds raised under the offering. In that scenario, the issuer and the vendors of the business are generally arm's length parties. This differs from the structure of an indirect offering, such as the initial public offering by most income trusts, where the income trust and the vendors of the business are not arm's length parties.

In an indirect offering, the vendors negotiate the terms of the purchase of the business by the income trust, and are also involved in the negotiation of the terms of the public offering with the underwriter(s).

If vendors initiate or are involved in the initial public offering process, we believe that they are effectively accessing the capital markets themselves. We consider them to be non-arm's length vendors. This fact gives rise to the concerns that we describe in Part 4. Non-arm's length vendors that are involved in a follow-on offering are also effectively accessing the capital markets through an indirect offering, and the concerns that we describe in Part 4 are equally applicable.

PART 2 DISTRIBUTABLE CASH

What is distributable cash?

2.1 Distributable cash is a term used to refer to the net cash generated by the income trust's businesses or assets that is available for distribution, at the discretion of the income trust, to the income trust's unitholders. Some issuers have referred to net cash available for distribution by a term other than distributable cash. In this policy "distributable cash" includes all such other terms used to describe the amount available for distribution to an income trust's or other indirect offering structure's securityholders (e.g. distributable income).

The cash that is available to an income trust for distribution per unit varies with the operating performance of the income trust's business or assets, its capital requirements, debt obligations and the number of units outstanding.

Income trust distributions are, for Canadian tax purposes, composed of different types of payments that are referred to as "returns on capital" or "returns of capital." These terms are also used more generally, to make an economic rather than a tax-driven distinction. The underlying concern is that the amount of cash distributed by an income trust may sometimes be greater than what it can safely distribute without eroding its productive capacity and threatening the sustainability of its distributions. In this situation, the "excess" amount of the distribution may be regarded as an economic "return of capital." We are concerned that disclosure by income trusts has not always been sufficiently plain to allow an investor to assess whether a possible concern exists in this respect.

Please refer to subsection 6.5.2 for guidance on how issuers can address these concerns.

Do income trusts provide investors with a consistent rate of return?

2.2 No. In many ways, investing in an income trust is more like an investment in an equity security rather than in a debt security. A fundamental characteristic that distinguishes income trust units from traditional fixed-income securities is that the income trust does not have a fixed obligation to make payments to investors. In other words, it has the ability to reduce or suspend distributions if circumstances warrant (see section 2.3 below for further details). In contrast to a traditional fixed-income security, the trust's ability to consistently make distributions to unitholders is closely tied to the operations of the operating entity or the performance of the income trust's assets. The performance of the operating entity may fluctuate from period to period, which might impact both the distributions paid and value of the issuer's units.

Unlike an issuer of a fixed-income security, an income trust does not promise to return the initial purchase price of the unit bought by the investor on a certain date in the future. Investors who choose to liquidate their holdings would generally do so by selling their unit(s) in the market at the prevailing market price.

In addition, unlike interest payments on an interest-bearing debt security, income trust cash distributions are, for Canadian tax purposes, composed of different types of payments (portions of which may be fully or partially taxable or may constitute tax-deferred returns of capital). The

composition for tax purposes of those distributions may change over time, thus affecting the after-tax return to investors. Therefore, a unitholder's rate of return over a defined period may not be comparable to the rate of return on a fixed-income security that provides a "return on capital" over the same period. This is because a unitholder in an income trust may receive distributions that constitute a "return of capital" to some extent during the period. Returns on capital are generally taxed as ordinary income or as dividends in the hands of a unitholder. Returns of capital are generally tax-deferred (and reduce the unitholder's cost base in the unit for tax purposes).

How do the distribution policies of the income trust and the operating entity affect an investor's rate of return?

2.3 The distribution policy of the income trust generally stipulates that payments that the income trust receives from the operating entity (such as interest payments on the debt and dividends paid to common shareholders) will be distributed to unitholders. The distribution policy of the operating entity will generally stipulate that distributions to the income trust will be restricted if the operating entity breaches its covenants with third-party lenders (such as covenants requiring the operating entity to maintain specified financial ratios or to satisfy its interest and other expense obligations). Other operating entity obligations such as funding employee incentive plans or funding capital expenditures will frequently rank in priority to the operating entity's obligations to the income trust. In addition, the operating entity, or the income trust, might retain a portion of available distributable cash as a reserve. Funds in this reserve may be drawn upon to fund future distributions if distributable cash generated is below targeted amounts in any period.

What prospectus cover page disclosure do we expect about distributable cash?

2.4 To ensure that the information described in sections 2.1, 2.2 and 2.3 is adequately communicated to investors, we recommend that issuers consider including language substantively similar to the following on the prospectus cover page:

A return on your investment in • is not comparable to the return on an investment in a fixed-income security. The recovery of your initial investment is at risk, and the anticipated return on your investment is based on many performance assumptions. Although the income trust intends to make distributions of its available cash to you, these cash distributions may be reduced or suspended. The actual amount distributed will depend on numerous factors including: [insert a discussion of the principal factors particular to this specific offering that could affect the predictability of cash flow to unitholders]. In addition, the market value of the units may decline if the income trust is unable to meet its cash distribution targets in the future, and that decline may be significant.

It is important for you to consider the particular risk factors that may affect the industry in which you are investing, and therefore the stability of the distributions that you receive. See, for example, ***, under the section "Risk Factors" [insert specific cross-reference to principal factors that could affect the predictability of cash flow to unitholders]. That section also describes the issuer's assessment of those risk factors, as well as the potential consequences to you if a risk should occur.

The after-tax return from an investment in units to unitholders subject to Canadian income tax can be made up of both a return on and a return of capital. That composition may change over time, thus affecting your after-tax return. [If a forecast has been prepared, include specific disclosure about the estimated portion of the investment that will be taxed as a return on capital and the estimated portion that will be taxed as return of capital. If the issuer cannot estimate the portion that will be a return of capital, state that it is unable to reasonably estimate the return of capital on anticipated distributions, and that this amount might vary materially from period to period.] Returns on capital are generally taxed as ordinary income or as dividends in the hands

of a unitholder. Returns of capital are generally tax-deferred (and reduce the unitholder's cost base in the unit for tax purposes).

What disclosure should be provided for distributable cash?

2.5 As required by the accounting principles an issuer uses to prepare its financial statements (the issuer's GAAP), an income trust must disclose the cash distributed to unitholders in its financial statements. Income trusts may also disclose distributable cash. Income trusts generally include disclosure about historical distributable cash in continuous disclosure documents and estimated distributable cash in their prospectuses. We have concluded that distributable cash is a cash flow measure, not an income measure. To ensure readers understand the composition and relevance of distributable cash, income trusts should reconcile distributable cash to cash flows from operating activities. In determining cash flows from operating activities, income trusts should include borrowing costs and changes during the period in non-cash working capital balances.

Specifically, income trusts should:

- (i) state explicitly that distributable cash does not have any standardized meaning prescribed by the issuer's GAAP and is therefore unlikely to be comparable to similar measures presented by other issuers;
- (ii) present cash flows from operating activities with equal or greater prominence than distributable cash;
- (iii) explain why distributable cash provides useful information to investors and how management uses distributable cash as a financial measure;
- (iv) provide a clear quantitative reconciliation from distributable cash to cash flows from operating activities, and refer to the reconciliation where distributable cash first appears in the disclosure document, or in the case of content on a website, in a manner that meets this objective (for example, by providing a link to the reconciliation); and
- (v) explain any changes in the composition of distributable cash when compared to previously disclosed measures.

What format of distributable cash reconciliation should be used?

2.6 When presenting a reconciliation of distributable cash to cash flows from operating activities, income trusts should discuss any adjustments included in the reconciliation and these adjustments should be grouped separately based on the nature of the adjustment. In addition, income trusts should avoid reconciling cash flows from operating activities to a subtotal that is not a minimum line item in the financial statements required by the issuer's GAAP (for example, profit or loss is a minimum line item).

An issuer might group adjustments to cash flows from operating activities included in a reconciliation of distributable cash as follows:

- a. Capital adjustments – Adjustments for capital expenditures, whether to maintain productive capacity of the issuer or otherwise, should be included here and may be based on actual capital expenditures. An issuer that does not intend to maintain productive capacity (for example, in the case of depleting assets) should clearly state this in its distributable cash reconciliation.

Other examples of adjustments that might be included in this section include provisions for maintaining or replacing mineral reserves.

An issuer may include within this grouping a sub-total of cash flows from operating activities after deducting capital expenditures incurred during the period.

- b. Non-recurring adjustments – Generally, an item is considered non-recurring if a similar loss or gain is not reasonably likely to occur within the next two years or if it has not occurred during the prior two years. An example of a non-recurring item is a payment in connection with litigation or a penalty that was levied in the current year and is not expected to be incurred going forward.
- c. Other adjustments including discretionary items – We recognize that, in limited circumstances, certain adjustments may not properly be classified as non-recurring or capital adjustments. Some examples of such adjustments include amounts for decommissioning, restoration and similar liabilities or external restrictions imposed on the issuer that limit their ability to pay distributions. Where an adjustment is discretionary in nature, we expect income trusts to clearly explain the basis for inclusion of the adjustment and any underlying assumptions which are being relied upon.

What disclosure do we expect about the adjustments and assumptions underlying distributable cash?

2.7 Income trusts should consider how best to provide transparency about the presentation of each adjusting item included in a reconciliation of distributable cash, including a discussion of the work that was done by the issuer to ensure the completeness and reasonableness of the information.

Generally, to achieve acceptable transparency, the reconciliation of distributable cash to cash flows from operating activities should be accompanied by detailed disclosure that:

- (i) explains the purpose and relevance of the distributable cash information;
- (ii) describes the extent to which actual financial results are incorporated into the reconciliation;
- (iii) explicitly states that the reconciliation has been prepared using reasonable and supportable assumptions, all of which reflect the income trust's planned courses of action given management's judgment about the most probable set of economic conditions; and
- (iv) cautions investors that actual results may vary, perhaps materially, from the forwardlooking adjustments.

Further adjustments made in the reconciliation of distributable cash to cash flows from operating activities should be supported by:

- (i) a detailed discussion of the nature of the adjustments;
- (ii) a description of the underlying assumptions used in preparing each element of the forward-looking information and the forward-looking information as a whole, including how those assumptions are supported; and
- (iii) a discussion of the specific risks and uncertainties that may affect each individual assumption and that may cause actual results to differ materially from the distributable cash figure.

For assumptions to be supportable, they should take into account the past performance of the underlying operating entity, the performance of other entities engaged in similar activities, and any other sources that provide objective corroboration of the assumptions used. Further, for assumptions to be considered reasonable, we believe that they should be consistent with the anticipated plans of the income trust.

In some circumstances, assumptions may be consistent with the issuer's anticipated plans but may not provide an adequate level of transparency about the sustainability of distributable cash. It is important for income trusts to disclose all factors, events or conditions that are likely to occur in the future that may impact the sustainability of future distributions.

For example, capital expenditures to replace productive capacity may be relatively low in initial years but may rise significantly in later years. In these instances, adequate disclosure of the adjustment for estimated future capital maintenance expenditures might include a discussion of the time period over which the income trust anticipates incurring capital maintenance expenditures at the level disclosed and any expected long-term plans to replace productive capacity. A clear and complete explanation should be provided of the reasons why these provisions will be adequate to cover future capital requirements and why these amounts vary from historical amounts, if applicable.

Another example of providing adequate transparency about the sustainability of distributable cash relates to instances where an issuer makes prior arrangements with investors. For example, for some income trusts, the original vendors' entitlement to cash distributions based on their continuing interest is subordinated to that of other investors. The original vendors will not receive cash distributions for a defined period of time if the estimated level of distributable cash disclosed in the prospectus is not achieved. Distributable cash available for distribution to other investors may be higher in the short term while cash distributions are not paid to the original vendors, but may decrease once the subordination conditions are satisfied. In these instances, the key terms and impact of these arrangements should be summarized in proximity to the distributable cash information.

When should the estimate of distributable cash be derived from a forecast?

2.8 When estimated distributable cash information contained in a prospectus includes forward-looking adjustments that are based on significant assumptions and those adjustments materially affect estimated distributable cash, the quantitative reconciliation discussed in section 2.5 should begin with cash flows from operating activities derived from future-oriented financial information (FOFI) that complies with sections 4A and 4B of National Instrument 51-102 *Continuous Disclosure Obligations*. The FOFI should reflect these forward-looking adjustments and the FOFI should be included in the prospectus.

FOFI may not be necessary if the adjusting items are derived from historical amounts and the adjusting items can be adequately explained by alternative disclosures. Alternative disclosures may include:

- (i) historical financial statements that support the adjustments. In some cases, a recent acquisition may not be considered significant under the significant acquisition tests set out in OSC Rule 41-501 *General Prospectus Requirements* (Rule 41-501) (or its successor) or the equivalent rule in the applicable jurisdiction for purposes of providing financial statements of the acquired entity. However, the acquisition's anticipated impact on distributable cash may be material. In these cases, income trusts may choose to provide financial statements of the acquired entity in the prospectus in addition to those required by Rule 41-501, and, when appropriate, include financial information from the acquired entity's financial statements in the issuer's pro forma financial statements; or
- (ii) other historical financial information that supports the calculation of the adjustments.

In some cases, distributable cash disclosure may contain adjusting items that are based on recent contracts or agreements for which historical financial statements or other historical financial information is not available. In these cases, issuers may instead disclose a detailed description of the contract or agreement including the relevant terms and conditions of the contractual commitment and any other financial information that supports the amount of the adjusting item.

PART 3 OTHER DISCLOSURE ISSUES

A. Material debt

Why are we concerned about material debt?

3.1 We are concerned about debt obligations that are incurred by the operating entity or other entity that rank before unitholders' entitlement to receive cash distributions. Although many non-income trust issuers have similar, or less conservative, capital structures, we are particularly concerned about the sensitivity of income trusts to cash flows. Specifically, we are concerned about reductions in distributions that might arise from increases in interest expense on floating-rate debt, a breach of financial covenants, a refinancing on less advantageous terms, or a failure to refinance.

What disclosure do we expect about material debt?

3.2 The principal terms of the material debt should be included in an income trust prospectus and in the income trust's Annual Information Form (AIF) filed under National Instrument 51-102 *Continuous Disclosure Obligations*, or its successor (NI 51-102). This would include the following information about the debt:

- (i) the principal amount and the anticipated amount to be outstanding when the offering is closed,
- (ii) the term and interest rate (including whether the rate is fixed or floating),
- (iii) the terms on which the debt is renewable, and the extent to which those terms could have an impact on the ability to distribute cash,
- (iv) the priority of the debt relative to the securities of the operating entity held by the income trust,
- (v) any security granted by the income trust to the lender over the operating entity's assets, and
- (vi) any other covenant(s) that could restrict the ability to distribute cash.

Are agreements relating to the material debt considered to be material contracts of the income trust?

3.3 We consider that in most cases, agreements relating to material debt that have been negotiated with a lender other than the income trust, will be material contracts pursuant to Rule 41-501 and NI-51-102 (or their respective successors) if those agreements have a direct correlation with the anticipated cash distributions. For example, distributions from the operating entity to the income trust may be restricted if the operating entity fails to maintain certain covenants under a credit agreement. If the agreement contains terms that have a direct correlation with the anticipated cash distributions, and will be entered into on or about closing, it should be listed as a material contract in the prospectus and AIF. We also expect a copy of the material agreement and any amendments to be filed on SEDAR.

Do we expect the income trust to include a separate risk factor about the material debt?

3.4 Yes. We expect the income trust to include a separate risk factor about the material debt in the income trust's prospectus and AIF. A full and complete discussion of this risk factor would usually include the following:

- (i) the need for the borrower to refinance the debt when the term of that debt expires,
- (ii) the potential negative impact on the ability of the issuer and/or its subsidiaries to make distributions if the debt is replaced by new debt that has less favourable terms,
- (iii) the impact on distributable cash if the borrower cannot refinance the debt, and
- (iv) the fact that the ability of the operating entity to make distributions, directly or indirectly, to the income trust may be restricted if the borrower fails to maintain certain covenants under the credit agreement (such as a failure to maintain certain customary financial ratios).

B. Stability ratings

What is a stability rating?

3.5 A stability rating is an opinion of an independent rating agency about the relative stability and sustainability of an income trust's cash distribution stream. Standard & Poor's (S&P's) and Dominion Bond Rating Services (DBRS) currently provide stability ratings on Canadian income trusts. A stability rating reflects the rating agency's assessment of an income trust's underlying business model, and the sustainability and variability in cash flow generation in the medium to long-term. The objective of these stability ratings is to compare the stability of rated Canadian income trusts with one another within a particular sector or industry.

Does an income trust need to obtain a stability rating?

3.6 No. However, the CSA believes that stability ratings by rating agencies, such as S&P's and DBRS, can provide useful information to investors.

Some investors who choose to invest in income trust units may base that decision primarily on the cash flow generated by the operating entity. Distributable cash is often presented as a measure of the issuer's potential to generate cash for distribution. Stability ratings can supplement the presentation of distributable cash to provide an independent opinion on the ability of an income trust to meet its distributable cash targets consistently over a period of time relative to other rated Canadian income trusts within a particular sector or industry.

What disclosure do we expect about an income trust's stability rating?

3.7 If an income trust has asked for and received a stability rating, the rating should be described on the cover page of the prospectus and in the income trust's AIF. The income trust should include disclosure about the rating in accordance with section 10.8 of Ontario Securities Commission Form 41-501F1 Information Required in a Prospectus (or its successor), section 10.8 of Schedule 1 Information Required in a Prospectus to Quebec's Regulation Q-28 respecting General Prospectus Requirements (or its successor), section 7.9 of Form 44-101F1 Short Form Prospectus (or its successor) or item 7.3 of Form 51-102F2 (or its successor). This disclosure should explain that a rating measures an income trust's stability relative to other rated Canadian income trusts within a particular sector or industry. Issuers are required to make timely disclosure of any material change in their affairs, which we believe would include any change in a stability rating that constitutes a material change.

We understand that some stability ratings are provided to income trusts on an unsolicited basis. These ratings are not based on discussions with the income trust but, rather, on publicly available information. Our disclosure expectations do not extend to unsolicited stability ratings.

C. Executive compensation

What disclosure do we expect the income trust to provide about executive compensation for the operating entity?

3.8 We believe that the executive compensation of the operating entity's executives is important information for investors. The income trust should provide that information in its prospectus and information circular as if the operating entity were a subsidiary of the income trust.

What disclosure do we expect about the income trust's management contracts and management incentive plans?

3.9 We believe that the material terms of management contracts and management incentive plans are relevant information for investors if the terms of those contracts or plans have an impact on distributable cash. For example, if the term "distributable cash" is defined in a unique way in a management contract, we expect that term of the contract to be described. A further example would be information about why an issuer has decided to use an external management company rather than retain an internal management structure or, conversely, why an issuer has internalized management. Adequate information about those contracts and plans should be included in applicable disclosure documents. Even if those contracts and plans have not been finalized prior to the filing of an initial public offering (final) prospectus, the anticipated material terms should still be described in the prospectus.

Do we expect management contracts and management incentive plans to be filed on SEDAR?

3.10 We expect the material contracts and plans referred to in section 3.9 to be filed on SEDAR. If those material contracts and plans have not been finalized before filing a prospectus, we expect the income trust to provide an undertaking from the income trust and the operating entity to securities regulatory authorities that those contracts and plans will be filed as soon as practicable after execution.

D. Risk factors

General

3.11 Income trusts are required to disclose all material risk factors relating to the offering pursuant to a prospectus. A complete discussion of risk factors for an income trust should include the principal factors related to the specific offering that could affect the predictability of cash flow distributions to unitholders. It would also include an assessment of the likelihood of a risk occurring as well as the potential consequences to a unitholder if a risk should occur. Relevant risk factors may include risks relating to the operating entity business, the potential inapplicability to unitholders of certain corporate law rights and remedies, the potential inapplicability of insolvency and restructuring legislation in the trust context, and other factors relevant to income trusts and other indirect offerings that we have described in this policy. For income trusts, risk factor disclosure is also required on an ongoing basis in the issuer's AIF in accordance with Item 5.2 of Form 51-102F2 (or its successor).

PART 4 OFFERING-SPECIFIC ISSUES

A. Determination of offering price

What disclosure do we expect about the determination of the price of an income trust's units?

4.1 We do not require that income trusts obtain a third-party valuation of the operating entity interests to be acquired (unless that valuation is otherwise required under securities legislation). However, if a third-party valuation is obtained in connection with an initial public offering, the income trust should describe the valuation in the prospectus. The description should identify the parties involved, the principal variables and assumptions used in the valuation (particularly those which could, if adversely altered, cause a deterioration in the value of the issuer's investment). If no third-party valuation is obtained, the prospectus should disclose that fact and state that the price of the issuer's units was determined solely through negotiation between the operating entity security holders and the underwriter(s).

B. Prospectus liability

What is the regulatory framework?

4.2 The central element of the prospectus system is the requirement that disclosure of all material facts relating to the offered securities and the issuer be provided so that investors can make informed investment decisions.

Although the prospectus serves a role in marketing securities, from a regulatory perspective it is also a disclosure document that can give rise to regulatory and civil liability. To provide discipline on prospectus disclosure, and to protect the integrity of the Canadian public markets, securities legislation prohibits certain persons involved in a public offering from making a misrepresentation (as defined in applicable securities legislation) in a prospectus. Where a prospectus contains a misrepresentation, investors may have the right to either rescind their purchases or to claim damages from the issuer or selling security holder, every director of the issuer, any promoters of the issuer, the underwriter(s) and certain other parties. Each of those parties (including each selling security holder) is jointly and severally liable for the damages suffered by investors as a result of the misrepresentation(s). Although "selling security holder" is not defined under applicable securities laws, the term is generally considered to mean persons who are selling securities of the class being distributed under the prospectus.

How does the regulatory framework related to prospectus liability apply to indirect offerings?

4.3 In an indirect offering, the issuer uses the proceeds to acquire a business (and perhaps to repay indebtedness), and the disclosure (including financial disclosure) in the prospectus describes both the acquired business and the issuer. The proceeds are not retained by the issuer, and any prospectus misrepresentation that adversely affects the value of the acquired business may diminish the issuer's ability to satisfy a damages claim.

An underwriter's statutory liability in an indirect offering is the same as it is in a conventional direct offering. Underwriters sign a certificate about the disclosure contained in the issuer's prospectus and are potentially liable for a misrepresentation in the prospectus.

In an indirect offering, the former owners of the operating entity (referred to as vendors) who sell their ownership interests in the operating entity to the issuer and who are effectively accessing

the public markets to liquidate their holdings, are not generally considered to be "selling security holders" within the meaning of securities legislation, as they are not selling the securities being offered under the prospectus. As a result, vendors who indirectly receive part of the proceeds of the offering in exchange for their operating entity interests do not (unless they qualify as promoters, see below) have statutory liability for a misrepresentation in a prospectus as they would if their interest in the operating entity had been distributed directly to the public. Vendors of businesses to conventional issuers undertaking a direct offering would also not be considered "selling security holders" although they indirectly receive offering proceeds. However, as noted above, we believe those circumstances differ from an indirect offering because access to the public markets is being initiated primarily not by those vendors but by the conventional issuer.

Promoter liability

4.4

What is the meaning of promoter?

4.4.1 Persons that are promoters of an issuer within the meaning of securities legislation are required to sign the issuer's prospectus in that capacity. As a consequence, those persons assume joint and several liability for prospectus misrepresentations up to a maximum amount equal to the gross proceeds of the offering. The term "promoter" is defined differently in provincial securities legislation across the CSA jurisdictions. It is not defined in the *Securities Act* (Québec), and a broad approach is taken in Québec with respect to examining those persons who would be considered promoters. We believe that a vendor that receives, directly or indirectly, a significant portion of the offering proceeds as consideration for services or property in connection with the founding or organizing of the business of an income trust issuer, is a promoter and should sign the prospectus in that capacity.

What constitutes the "business" of the income trust?

4.4.2 In the context of indirect offerings, there appears to be uncertainty about whether the "business of an issuer", as that phrase is used in the definition of "promoter" in some of the CSA jurisdictions, refers to the business of the issuer (the income trust) or to the business of the operating entity. More specifically, the question is whether the test depends on a person's involvement in the founding, organization or substantial reorganization of the operating entity's business, or whether involvement in the founding, organization, or substantial reorganization of the income trust itself will make a person a promoter.

We believe that in most cases, the business of the income trust issuer is primarily to complete the public offering and to acquire the interest in the operating entity. Therefore, we generally focus on a person's involvement in the founding, organization, or substantial reorganization of the income trust itself.

We also believe that any person who initiated or took part in the formation, organization or substantial reorganization (as those terms are often used in the definition of "promoter") of the operating entity would not cease to be a promoter under the offering solely due to use of an indirect offering structure. The relationship between the income trust and the operating entity is not sufficiently at arm's length to support this result. The question of whether a person takes part in the founding, organizing or substantial reorganizing of the income trust's business and of the operating entity's business is one of fact. Therefore, this determination should be made by the income trust and the underwriter(s) after reviewing the relevant facts.

What disclosure do we expect about the implications of the operating entity being identified as a promoter?

4.4.3 Where the operating entity signs the prospectus as promoter but the vendors are retaining no interest, or only a nominal interest, in the operating entity upon closing of the offering, the right to claim damages from the operating entity for misrepresentations offers limited or no additional benefit to investors. This is because all or a substantial majority of the interests in the operating entity are acquired by the income trust. Therefore, the prospectus should explain that, despite the operating entity's statutory liability for a misrepresentation in the prospectus, there will be little or no practical benefit to investors who choose to exercise those rights against the operating entity. This is because a successful judgment would result in a deterioration of the operating entity's value (frequently the sole asset of the income trust) and a resulting decline in the value of the investor's securities of the income trust. It is also likely that the operating entity would have a limited ability to satisfy such a claim.

We believe this type of disclosure would be helpful to investors who may not understand the implications of the operating entity being identified as a promoter of the income trust, as is often the case.

Conversely, where the vendors retain a meaningful interest in the operating entity, the characterization of the operating entity as a promoter will offer an additional benefit because the value in the operating entity held by vendors as their retained interest would be potentially available to contribute to satisfying a damages claim without investors suffering a corresponding decline in the value of their securities of the income trust.

Contractual accountability

4.5

What accountability for prospectus disclosure is typically assumed by vendors through contractual arrangements?

4.5.1 Our review of indirect offering prospectuses indicates that in situations where vendors have not signed the prospectus, they typically assume, by contract, responsibility for matters relating to the operating entity's business. Vendors typically provide representations and warranties about the operating entity and its business to the issuer under the acquisition agreement pursuant to which the vendors sell, and the issuer acquires, the operating entity interests. As well, in several indirect offerings, the vendors have provided a representation in the acquisition agreement about the absence of any misrepresentation in the prospectus (a prospectus representation).

What are our concerns about the application of the regulatory requirements to indirect offerings?

4.5.2 We are concerned that:

- (i) investors in indirect offering structures may not appreciate that there is not always a statutory right of action against the vendors as there would be in a direct offering if the vendors were considered "selling security holders",
- (ii) prospectus representations may not be given by vendors in circumstances where we would consider those representations to be appropriate,
- (iii) prospectus disclosure of the vendors' representations and warranties, and limitations, in the acquisition agreement may not be sufficiently detailed or clearly set out to permit investors to understand the vendors' contractual accountability, and

- (iv) the vendors' representations and warranties may not adequately address the potential loss of rights and remedies that securities legislation would provide to investors in a direct offering.

What disclosure do we expect about the accountability of the vendors?

4.5.3 To address the concerns described in subsection 4.5.2, prospectuses relating to indirect offerings, where part of the proceeds are being paid to vendors, should:

- (i) include a clear statement that investors may not have a direct statutory right of action against each vendor for a misrepresentation in the prospectus unless that vendor is a promoter or director of the issuer, or is otherwise required to sign the prospectus,
- (ii) include a detailed description of the vendors' representations, warranties and indemnities contained in the acquisition agreement (and any significant related limitations) and details about the negotiations (including the parties involved), together with a summary of these items in the summary section of the prospectus,
- (iii) identify the acquisition agreement as a material contract and provide disclosure advising investors to review the terms of the acquisition agreement for a complete description of the vendors' representations, warranties and indemnities, and related limitations, and
- (iv) identify what measures have been implemented to provide investors with rights and remedies against the vendors in lieu of those afforded by securities legislation in a direct offering.

The summary of the relevant acquisition agreement provisions should include clear disclosure about the following:

- (i) the aggregate cash proceeds being paid to the vendors for the sale of their operating entity interests,
- (ii) the nature of the representations and warranties provided by the vendors, including any significant qualifications, and specifically whether a prospectus representation is provided,
- (iii) the period of time that the representations and warranties will survive after closing,
- (iv) any monetary limits on the vendors' indemnity obligations, and
- (v) any other limitations on, or qualifications to, the vendors' indemnity obligations.

The summary of the acquisition agreement provisions should provide investors with a clear description of the extent to which the vendors are supporting, with meaningful indemnities, the representations and warranties in favour of the issuer.

CSA staff may consider recommending against the issuance of a receipt for a prospectus if vendors receive cash proceeds from an indirect offering by selling their operating entity interests and do not take appropriate responsibility (directly or indirectly) for the information provided in the prospectus through the acquisition agreement, or as a result of signing the prospectus, or otherwise.

What are our concerns about the nature and extent of the representations, warranties and indemnities provided by vendors in the acquisition agreement?

4.5.4 Circumstances, including the nature of the operating entity and its business and the nature and extent of the vendors' interests (individually and in the aggregate) and their involvement in the operating entity, will affect the types of representations, warranties and

indemnities that can reasonably be expected to be provided to the issuer by vendors in the context of an indirect offering.

Examples of circumstances where we have had concerns about vendors not taking appropriate responsibility in the context of indirect offerings have included situations where:

- (i) certain vendors, who we refer to as active vendors, such as:
 - vendors that affect materially the control of the operating entity prior to the offering, and who are involved in the offering process and/or the management or supervision of management of the operating entity prior to the offering,
 - vendors that influence (whether alone or in conjunction with others) the offering process, and
 - members of senior management of the operating entity,sell a substantial portion of their interest in the operating entity to the issuer on closing but do not
 - a. sign the prospectus as promoter, or
 - b. provide a prospectus representation in the acquisition agreement;
- (ii) a vendor's obligation to indemnify the issuer if the prospectus contains a misrepresentation is limited to an amount less than the proceeds received by the vendor from the sale of the vendor's interest in the operating entity or is subject to a deductible or other threshold that precludes claims against the vendor that are not, individually or in the aggregate, above a certain value; and
- (iii) the vendor's responsibility for the information on which the offering is based is reduced unduly, having regard to the nature of the vendor's investment, as a result of the period during which claims may be asserted against the vendor for a prospectus misrepresentation being significantly shorter than the period in which claims may be asserted against the issuer for a prospectus misrepresentation.

If an active vendor's liability for a misrepresentation in the acquisition agreement is conditional on the active vendor having knowledge of the misrepresentation, we expect that the active vendor would generally have a corresponding obligation to take reasonable steps to confirm the accuracy of the representation. For example, a non-management active vendor should make appropriate inquiries of management of the operating entity.

The CSA acknowledges that there may be constraints on the indemnities that certain vendors can provide and the survival period of those indemnities. In assessing whether the vendors have taken appropriate responsibility (directly or indirectly) for the information provided as a basis for the offering, we will generally assess the entire framework of representations, warranties and indemnities provided by the vendors as a group, as opposed to assessing each component or vendor individually. We believe this approach is consistent with the commercial realities within which the parties to these transactions allocate the risks and rewards of the transactions.

PART 5 SALES AND MARKETING MATERIALS

What are our concerns about sales and marketing materials?

5.1 Registrants often solicit interest from potential investors during the “waiting period” between the issuance of a receipt for a preliminary prospectus and the issuance of a receipt for the prospectus, and in the period following the receipt for the prospectus until the primary distribution is completed. Along with the distribution of the preliminary prospectus (or

prospectus, if then available) to potential investors, that process often involves the preparation and distribution of materials such as:

- green sheets, for the benefit of registered salespersons and banking group members; or
- standard term sheets or marketing materials prepared in accordance with National Instrument 41-101 *General Prospectus Requirements* and other prospectus rules.

The information included in green sheets is typically a simplified summary version of the disclosure in the prospectus, and should be limited to information included in, or directly derivable from, the prospectus (the exceptions are information about the basic terms of comparable offerings and general market information not specific to the issuer).

The information included in standard term sheets and marketing materials must comply with the conditions in National Instrument 41-101 *General Prospectus Requirements* and other prospectus rules.

Green sheets and marketing materials used in the context of income trust offerings often include prominent reference to “yield”. We are concerned that expressions of “yield” in these marketing materials may not be clearly understood, both because the term itself may have connotations or common usages that are not consistent with the attributes of income trust units and because the relationship between the “yield” described in the marketing materials and the information in the prospectus may not be clear.

“Yield” is generally used in the context of income trust offerings to refer to the return that would be generated over a one-year period, as a percentage of the offering price of the units, if the amounts intended to be distributed by the income trust according to its distribution policy are so distributed. In connection with their ongoing approach to disclosure, issuers should carefully consider yield expectations previously communicated to investors through marketing materials or otherwise. Whether and to what extent those yield expectations are met are important aspects of overall disclosure of performance. Issuers should include in their interim and annual MD&A, where applicable, a comparison between the expected yield figure previously communicated and the actual yield.

What information do we expect green sheets and marketing materials to contain?

5.2 We are concerned that use of the term “yield” in green sheets and marketing materials may imply that the entitlement of unitholders to distributions is fixed. We expect expressions of yield to be accompanied by disclosure that, unlike fixed-income securities, there is no obligation of the income trust to distribute to unitholders any fixed amount, and reductions in, or suspensions of, cash distributions may occur that would reduce yield based on the offering price.

A related concern is that disclosure of a yield in green sheets may cause confusion because yield is not typically disclosed in the prospectus. If a green sheet contains an expression of yield, we expect the statement to be tied to the disclosure in the prospectus on which the marketing is based (including, in particular, the pro forma presentation of distributable cash in the prospectus). Specifically, expressions of yield in green sheets for income trust offerings should be accompanied by disclosure indicating the proportion of the pro forma distributable cash (as set out in the prospectus) that the stated yield would represent. Guidance for disclosure about distributable cash in green sheets is set out in section 6.5.2 of this policy.

Under National Instrument 41-101 *General Prospectus Requirements* and other prospectus rules, all information in marketing materials must generally be disclosed in, or derived from, the prospectus on which the marketing is based.

In addition, if reference is made to tax efficiencies that may be realized on distributions (such as returns of capital to investors), we expect that disclosure to be clear and, to the extent practical, quantified. For example, the estimated tax-deferred portion of distributions for the foreseeable period, and the tax implications, should be clearly stated or cross-referenced.

Do we expect income trusts to provide us with copies of their green sheets and marketing materials?

5.3 Income trust issuers should provide copies of all green sheets to the securities regulatory authorities when filing the preliminary prospectus, together with separate documentation providing a clear and concise explanation of how the yield figure (if contained in the green sheet) is derived from the prospectus disclosure. In addition, we may request that additional sales and marketing materials used in connection with an income trust offering be provided.

Under National Instrument 41-101 *General Prospectus Requirements* and other prospectus rules, a template version of marketing materials must be filed on or before the day that the marketing materials are first provided.

PART 6 CONTINUOUS DISCLOSURE-SPECIFIC ISSUES

What continuous disclosure do we expect about the operating entity?

6.1 An income trust's performance and prospects depend primarily on the performance and operations of the operating entity. To make an informed decision about investing in an income trust's units, an investor generally needs comprehensive information about the operating entity, including: (i) the operating entity's interim financial reports and annual financial statements together with corresponding MD&A for the relevant periods, (ii) complete business disclosure about the operating entity of the scope expected in an annual information form, and (iii) press releases and material change reports about any material changes in the business, operations or capital of the operating entity.

If a business acquisition report (a BAR) is filed for the acquisition by the income trust of the operating entity, in accordance with Part 8 of NI 51-102 (or its successor), the income trust must include within the BAR updated financial information about the operating entity.

To the extent the securities laws in some CSA jurisdictions are ambiguous about whether the disclosure described above about the operating entity is required by a reporting issuer that is an income trust or other non-corporate entity, the income trust issuer should file one or more undertakings with the regulatory authorities prior to receiving a receipt for a prospectus, completing a plan of arrangement involving an operating entity or otherwise acquiring a direct or indirect interest in an operating entity. The following is an example of an undertaking that we would expect:

- (A) in complying with its reporting issuer obligations, the income trust will treat the operating entity as a subsidiary of the income trust; however, if generally accepted accounting principles (GAAP) used by the income trust prohibit the consolidation of financial information of the operating entity and the income trust, then for as long as the operating entity (including any of its significant business interests) represents a significant asset of the income trust, the income trust will provide unitholders with separate audited annual financial statements and interim financial reports, prepared in accordance with the same GAAP as the income trust's financial statements, and related management's discussion and analysis, prepared in accordance with National Instrument 51-102 – *Continuous Disclosure Obligations* or its successor, for the operating entity (including information about any of its significant business interests), and
- (B) the income trust will annually certify that it has complied with this undertaking, and file the certificate on SEDAR concurrently with the filing of its annual financial statements.

We recognize that there may be circumstances where the income trust does not have direct access to the operating entity's financial information. For example, in situations where the income trust holds less than a 50% interest in an operating entity, it may be difficult for the income trust to have direct access to that operating entity's financial information. If so, the income trust should ensure that it can follow the guidance described in this section 6.1 either through the terms of the acquisition agreement or otherwise.

Comparative financial information

6.2 Most income trusts are the continuation of an existing business that was previously operated under a different legal form (for example, a corporation). We believe that the change in legal form does not alter the substance of the business operations and therefore does not prevent an income trust from presenting comparative financial information for the underlying business during its initial interim and annual periods including the interim period during which the trust came into existence.

For those acquisitions accounted for by the acquisition method, income trusts should provide comparative financial information for the predecessor business in their interim and annual MD&A. For trusts that are created on a date within a given interim period, the trust's first interim MD&A should include both financial information about the predecessor business (from the beginning of the applicable interim period to the date of the creation of the trust) and financial information about the trust (beginning as of the date of its creation). Examples of relevant comparative information would include, but would not be limited to, the following:

- revenue,
- cost of sales,
- gross margin,
- general and administrative expenses, and
- profit or loss.

In situations where the transfer of the operating business into an income trust is accounted for at carrying amounts, we expect the income trust to provide comparative information for the operations of the business under the previous legal entity.

Where an issuer believes that providing comparative information would not be appropriate, such as where the income trust is formed as a result of multiple acquisitions, we encourage the issuer to discuss the circumstances with the relevant securities regulatory authority(ies) prior to filing the applicable continuous disclosure document(s).

Recognition of intangible assets

6.3 An issuer's GAAP requires the appropriate recognition of intangible assets acquired in business combinations. In addition, an issuer's GAAP generally requires that intangible assets acquired be measured at their acquisition date fair value. To assist investors in understanding the valuation process of the intangible assets, income trusts should provide in the offering document a description of the method(s) used to value the intangible assets.

Are "insiders" of the operating entity also insiders of the income trust for purposes of insider reporting obligations?

6.4 Consistent with our view that the performance and prospects of an income trust depend on the performance and prospects of the operating entity, we believe each person who would be an "insider" (as that term is defined in applicable securities legislation) of the operating entity if the operating entity were a reporting issuer should comply with insider reporting requirements as if that person were also an insider of the income trust.

To the extent securities laws in certain CSA jurisdictions are ambiguous about whether insiders of the operating entity are also insiders of the income trust or other non-corporate entity, that issuer is expected to file an undertaking with the regulatory authorities prior to receiving a receipt for a prospectus, completing a plan of arrangement involving an operating entity or otherwise acquiring a direct or indirect interest in an operating entity. We expect the undertaking to provide that for so long as the income trust is a reporting issuer, the income trust will take the appropriate measures to require each person who would be an insider of the operating entity or a person or company in a special relationship with the operating entity if the operating entity were a reporting issuer to: (i) file insider reports about trades in units of the income trust (including securities which are exchangeable into units of the income trust), and (ii) comply with statutory prohibitions against insider trading. We expect the income trust to annually certify in the certificate described in section 6.1(B) above that it has complied with this undertaking.

We are concerned that additional persons that may possess material undisclosed information about the income trust may: (i) not fall within the definition of "insider" (as that term is defined in applicable securities legislation) or (ii) not be caught by the undertaking. As a result, there may be situations where we will require that additional undertakings be provided. The income trust will need to obtain the relevant contractual commitments from these persons and entities in order to comply with the undertakings referred to above.

Recent amendments to securities legislation in Alberta deem insiders of operating entities and management companies to be insiders of the income trust. The CSA is in the process of developing a proposed national rule that would harmonize and streamline the requirements for insiders of reporting issuers to file insider reports. We expect that the proposed national rule will include harmonized requirements for insiders of operating companies and management companies to file insider reports about their transactions involving securities of the income trust. Pending the implementation of the proposed national insider reporting rule, we will continue to require income trusts to provide the undertaking described above.

MD&A

6.5

Risks and uncertainties

6.5.1 Under Form 51-102F1, an income trust must discuss important trends and risks that have affected the operating entity's financial statements, and trends and risks that are reasonably likely to affect them in the future. Although the instructions in Form 51-102F1 do not specifically state it, to meet the requirement to disclose risks, income trusts should provide a detailed risk factor discussion about the potential commitment to replace and maintain capital assets, including a quantitative discussion about expected annual capital maintenance expenditure levels relative to current levels, and the expected effect on distributions.

Discussion of distributed cash

6.5.2 Although most income trusts intend to make distributions of their available cash to unitholders, these cash distributions are not assured. The actual amount distributed depends on numerous factors, including the operating entity's financial performance, debt covenants and obligations, working capital requirements and future capital requirements. It is important for unitholders to have information about the source(s) of the distributed cash that they receive, including whether the issuer borrowed amounts to finance distributions, and whether distributions include amounts that are not properly classified as a return on capital. Although the instructions in Form 51102F1 do not specifically state it, to meet the disclosure requirements for liquidity in Form 51102F1, income trusts should provide sufficient disclosure about their sources of funding relating to current and future cash distributions so that unitholders can understand what portion, if any, of the distributions they receive were funded by sources other than cash

flows from operating activities. Also, income trusts should quantify these amounts and discuss the impact on the trust's long-term ability to sustain distributions if sources other than cash flows from operating activities are being used to fund distributions. In determining cash flows from operating activities, the issuer should include borrowing costs.

An income trust can overcome the concerns noted in section 2.1 and in this subsection by providing information in its interim and annual MD&A that summarizes the main elements of its performance that are necessary to assess the sustainability of its cash distributions. One way to summarize this information is by using a table similar to the following:

		For the most recently completed quarter	Accumulated for the current fiscal year (Year 1)	Previously completed fiscal years	
				(Year 2)	(Year 3)
A.	Cash flows from operating activities*	\$ XX	\$ XX	\$ XX	\$ XX
B.	Profit or loss	\$ XX	\$ XX	\$ XX	\$ XX
C.	Actual cash distributions paid or payable relating to the period **	\$ XX	\$ XX	\$ XX	\$ XX
D.	Excess (shortfall) of cash flows from operating activities over cash distributions paid (A) – (C) ***	\$ XX	\$ XX	\$ XX	\$ XX
E.	Excess (shortfall) of profit or loss over cash distributions paid (B) – (C) ***	\$ XX	\$ XX	\$ XX	\$ XX

* Takes into account changes in non-cash working capital balances and includes borrowing costs

** Includes distributions paid or payable on all classes of units and any special distributions paid or payable during the period

*** Income trusts might choose to present the excess (shortfall) in lines D and/or E in the form of a ratio or percentage. In these instances, we expect this ratio or percentage to be determined based solely on amounts included in lines A, B, and C, as applicable, from the above table.

The above table provides clear disclosure about the relationship between cash flows from operating activities and profit or loss, and historical distributed cash amounts.

When cash distributions are greater than either profit or loss or cash flow from operating activities, creating a shortfall in any of the columns in the above table, disclosure of the following, as applicable, will help to provide a balanced discussion of the issuer's financial performance and financial condition:

- (i) why the trust has chosen to make distributions partly representing an economic return of capital, or, alternatively, why it does not believe that any portion of those distributions should be regarded as an economic return of capital, (ii) a quantification and description of the sources of cash used to fund the shortfall,
- (iii) the obligations of the issuer or its subsidiaries in connection with the sources of cash used to fund the shortfall, including repayment terms and interest payable,
- (iv) whether any material contract was amended in connection with the funding of the shortfall and whether any waivers or consents were obtained,
- (v) whether the issuer expects that cash distributions will continue, for the foreseeable future, to exceed profit or loss and/or cash flow from operating activities. If so, the trust should specifically address what implications this has for the sustainability of distributions. If not, the issuer should explain the reasons why it does not expect the situation to continue, and
- (vi) whether the issuer anticipates that cash distributions may be suspended in the foreseeable future.

In determining cash flows from operating activities, the issuer should include borrowing costs.

If cash distributions paid do not equal distributable cash, the issuer should also discuss the reasons for the difference between the two amounts. If cash distributions paid materially exceed distributable cash, the disclosure of distributable cash should include a detailed explanation of how the additional distributions were financed as this impacts the issuer's liquidity. Generic boiler-plate language about the issuer's sources of available capital or financing or simply pointing the reader to the statement of cash flows for further information is not sufficient. When distributions paid are materially less than distributable cash, the disclosure of the amounts distributed should include an explanation of why distributable cash was not fully distributed.

In order to meet the requirements for MD&A, disclosure of an issuer's distributable cash for a period should be accompanied by the information referred to in sections 2.5, 2.6, 2.7 and 2.8, as applicable, as well as the above table and accompanying narrative. Issuers should also refer to the guidance in sections 2.5, 2.6, 2.7, 2.8 and 6.5.2 of this policy when considering how to present disclosure of an issuer's distributable cash, including disclosure contained in:

- annual and interim MD&A,
- news releases, and
- sales and other materials such as:
 - green sheets, and
 - marketing materials prepared in accordance with National Instrument 41-101 *General Prospectus Requirements* and other prospectus rules.

See also Part 5 of this policy.

PART 7 CORPORATE GOVERNANCE

CEO/CFO certification, audit committees, and effective corporate governance

7.1 How each of the issuer and the operating entity will discharge their governance responsibilities is important information for investors. Issuers should provide prospectus disclosure about how each of the issuer and the operating entity will satisfy governance responsibilities including how they will comply with the following instruments or their successors as applicable in each jurisdiction:

- (a) National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (NI 52-109),
- (b) Multilateral Instrument 52-110 *Audit Committees or* BCI 52-509 *Audit Committees, as applicable, and*
- (c) National Instrument 58-101 *Disclosure of Corporate Governance Practices*.

For example, the issuer should consider disclosing which persons will be signing as chief executive officer and/or chief financial officer to meet the requirements of NI 52-109.

In particular, income trusts should refer to the following sections of the above-noted instruments or the related companion policies for specific guidance about income trusts and other similar structures:

- (a) section 3.2 of Companion Policy 52-109CP to National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*,
- (b) section 1.2 of Companion Policy 52-110CP to Multilateral Instrument 52-110 *Audit Committees*, and
- (c) section 1.2 of National Policy 58-201 *Corporate Governance Guidelines*.

Broader corporate law concerns

7.2 Corporations are governed by corporate statutes regulating their key obligations and the rights afforded to their shareholders. There is no equivalent statutory regime governing non-corporate entities like income trusts. Investors must look to the declaration of trust of each trust to determine the key obligations of the trust and unitholder rights and protections. It is important that unitholders understand that the provisions of the declarations of trust may differ from the minimum standards required under applicable corporate statutes and among various income trusts.

To facilitate unitholders' understanding of these differences, issuers should compare the rights and obligations generally available to corporate shareholders under applicable corporate statutes with those provided in the declaration of trust, highlighting any material differences. For example, under corporate law a corporation is required to hold an annual meeting enabling shareholders to exercise the right to elect directors to the board. If the declaration of trust does not enable unitholders to elect the directors to the board of the income trust, this fact should be clearly identified.

Because we are concerned that a unitholder may not be afforded the same protections, rights and remedies as a shareholder in a corporation, issuers should also provide the following disclosure in the issuer's AIF (if an AIF is filed) and any prospectus filed by the issuer:

A unitholder in the income trust has all of the material protections, rights and remedies a shareholder would have under the *Canada Business Corporations Act*. These protections, rights and remedies are contained in the [trust indenture, dated ***].

OR

A unitholder in the income trust has all of the material protections, rights and remedies a shareholder would have under the CBCA, except for the following: [list protections, rights and remedies that are not available to a unitholder.] The protections, rights and remedies available to a unitholder are contained in the [trust indenture, dated ***].

Some corporate legislation such as section 21 of the *Canada Business Corporations Act* provides a mechanism for persons to request a shareholder list for the purpose of making an offer to acquire securities of a corporation. An income trust that refuses to provide a unitholders' list should refer to National Policy 62-202 -*Take-Over Bids - Defensive Tactics* or in Québec Notice 62-202 *Relating to Take-Over Bids – Defensive Tactics* in the case of a potential offeror requesting a unitholders' list. If refusal to provide such a list is likely to deny or severely limit the ability of unitholders to receive or respond to a take-over bid or a competing bid, Canadian securities regulatory authorities may take action.

PART 8 OTHER ISSUES

Income trust names

8.1 As discussed above in section 1.2, this policy is intended to address income trusts, not "investment funds" as defined in National Instrument 81-106 *Investment Fund Continuous Disclosure*, or an entity that issues asset-backed securities or capital trust securities. On its initial formation an income trust should exercise caution to ensure that its disclosure makes it clear to investors that it is not an investment fund or mutual fund. Income trusts should avoid adopting a name that may mislead investors as to the nature of the issuer's structure or business purpose. By using terms such as 'equity fund' or 'income growth' in the name, an issuer may be inadvertently suggesting that it is an investment fund or mutual fund. Investors should be provided with a clear understanding of the structure of the issuer and the nature of the securities that they are investing in.