



December 23, 2003

**Delivered and Via E-Mail**

Alberta Securities Commission  
British Columbia Securities Commission  
Saskatchewan Financial Services Commission  
Manitoba Securities Commission  
Ontario Securities Commission  
Commission des valeurs mobilières du Québec

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Dear Securities Regulatory Authorities:

**Re: Comments on Proposed National Policy 41-201 *Income Trusts and Other Indirect Offerings* ("NP 41-201")**

TSX Group Inc. welcomes the opportunity to comment on behalf of both Toronto Stock Exchange ("TSX") and TSX Venture Exchange ("TSX Venture") (collectively, the "Exchanges") on proposed NP 41-201 published by the Canadian Securities Administrators (the "CSA") on October 24, 2003.

As you know, income trusts represent a growing percentage of issuers listed on the Exchanges, particularly TSX. To date, there has been little guidance available to issuers, their advisors and investors, to address the unique attributes of this type of issuer. As such, the Exchanges welcome the timely introduction of

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NP 41-201 in an effort to clarify the type of disclosure that is required for this type of investment, in the interests of both issuers and investors.

In light of this however, the intent should not be to subject income trusts, or issuers completing other indirect offerings, to more onerous requirements than are normally required for non-income trust issuers or other direct offerings. Rather, the intent should be to give guidance to such issuers or offerings on the type of disclosure that should be provided to investors in order to assist them to make informed investment decisions.

Our comments below are limited to those provisions where we believe additional guidance may be required or where we wish to provide our support, and to certain of the questions raised in the notice for comments. Please note that we have used the same numbering format as in the notice for comments.

## **Part 1 – Introduction**

The scope of NP 41-201 is appropriate, with one exception. The proposed policy does not expressly provide guidance with respect to ongoing governance disclosure for income trust structures. Such guidance would be beneficial given that income trusts often have complex structures of governance which can consist of a combination of trustees, senior management, investment managers, etc., making it more difficult to identify and measure independence, composition of committees and other governance objectives. While the Ontario Securities Commission will be proposing legislation which would require ongoing disclosure of governance by income trusts, it is unclear whether all CSA members will support such legislation.

The format of NP 41-201, as currently drafted, is also appropriate. As a policy intended to provide guidance and clarification, it is self explanatory, easy to follow and facilitates a principles-based approach to compliance with its recommendations.

## **Part 2 – Prospectus Disclosure**

### *A. Distributable Cash*

The Exchanges support CSA's recommendation that issuers include additional disclosure providing a distinction between "return on" and "return of" capital. Since units of income trusts are sold on the basis of distribution, which is similar to debt securities, it may appear that they share the same features as debt securities with the obligation to make fixed interest and principal payments. However, units of income trusts are equity securities whose distributions and

principal payments are not guaranteed, and additional disclosure in this regard will assist issuers in addressing the expectations of their investors.

### *C. Short-Term Debt*

Given the potential impact significant short-term debt could have on distributions, we support specific disclosure of principal terms of short-term debt and the inclusion of a separate risk factor describing same. However, we do not support the expectation that copies of such credit agreements be filed on SEDAR given the potential risk of disclosure of confidential or competitive information. We are of the view that the proposed disclosure alone should satisfy the regulators' concerns regarding the need to provide investors with sufficient information on the potential impact of short-term debt or a unitholder's entitlement to receive distributable cash.

### *D. Stability Ratings*

We agree that stability ratings should not be mandatory for income trusts. Although stability ratings play an important role in debt security investment decisions, they are less important for securities where there is sufficient information in the public domain for investors to make comparisons. The disclosure currently required for all public offerings, in addition to that proposed elsewhere in NP 41-201, should be sufficient for comparison purposes. The imposition of mandated stability ratings would add increased costs to issuers without adding equivalent benefit to investors.

However, where an income trust has a stability rating (or chooses to get one a later date) and there is a change in that rating, positive or negative, income trusts should be reminded that such a change would constitute material information that would require immediate disclosure to the public.

## **Part 3 – Continuous Disclosure**

The Exchanges support the recommendations relating to undertakings to provide ongoing continuous disclosure at the operating entity level. However, the insider reporting undertaking requires that the income trust “take the appropriate measures *to require* each person who would be an insider of the operating entity if the operating entity were a reporting issuer to file insider reports”. Although we support the intent of this recommendation, insider reporting is an obligation of the person/insider completing the applicable trade, and not the issuer. It is also unclear what “appropriate measures” an income trust would have to take to fulfill this undertaking. Subsequently, this undertaking may add little value given an issuer's limited ability to enforce such a requirement.

#### **Part 4 – Prospectus Liability**

The Exchanges welcome clarification on the issue of prospectus liability. It is critical to market integrity that issuers who access Canadian capital markets do so with transparency and full accountability. Vendors or promoters who indirectly access our capital markets through income trusts and other indirect offerings should be held accountable for their actions, as would any non-income trust or direct offering doing same.

Thank you for the opportunity to comment on this proposed policy. We look forward to the implementation of NP 41-201, subject to our comments as discussed above. Should you wish to discuss them with us in more detail, I would be pleased to respond.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. Labrecque". The signature is fluid and cursive, with a prominent loop at the end.

cc: Barbara Stymiest, CEO, TSX Group Inc.  
Linda Hohol, President, TSX Venture Exchange