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VIA E-MAIL

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

c/o

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Dear Sirs/Mesdames:

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

Further to your request for comments dated October 24, 2003 on proposed NP 41-201, we are pleased to provide the following comments on behalf of the Calgary securities lawyers of Fraser Milner Casgrain LLP.

We would like to thank the Canadian Securities Administrators (the "***CSA***") for preparing the proposed NP 41-201 and for providing the opportunity to comment thereon.

1. General Comments on Proposed NP 41-201

Proposed NP 41-201 appears to be responding to the increased level of participation of income and royalty trusts in the Canadian capital market over the past several years. Parts 1.2-1.5 of NP 41-201 seem to set out definitional matters that set parameters for the application of the policy. These definitional sections seem based on income trust structures as they are generally constituted today and also to some extent seem limited in their application (see, for example, part 1.5) to conversion transactions where a corporate entity converts to an income trust. As the income trust has evolved relatively recently as a creative solution to challenges faced by market participants, it should be anticipated that the construction of income trusts will evolve over time and that these definitions may become outdated. We have already seen an evolution of some royalty trusts to a structure where a significant portion of cash flow is retained to fund exploration activities. We note that this type of vehicle may not satisfy the income trust criteria in part 1.2 of NP 41-201. Part 1.5 provides that "in a typical income trust offering, an income trust is created to distribute units to the public". We suggest that more typically an income trust offering is a public offering by an established entity where the disclosure issues revolve around the application of existing rules that apply to all issuers in such a manner as to achieve full, true and plain disclosure of all material facts. Rather than reacting to the income trust structure as it exists today and singling out this form of issuer for attention, we suggest that it may be more prudent to keep the policy focused on clarifying how the existing set of rules should apply to income trusts and other new or unconventional structures (and perhaps to existing corporate issuers if the CSA members believe the existing rules are not being implemented properly).

In our comments below we suggest that many of the concerns identified as applicable to income trusts are relevant to other types of investment vehicles. For example, it seems to us that the concerns identified would apply equally to a dividend-paying holding company with operating subsidiaries. Our comments therefore are generally to suggest that we stay away from a set of rules specifically applicable to income trusts.

2. Comment on part 1.2 (What do we mean when we refer to an income trust in this policy?)

The proposed definition of an income trust (an entity which issues securities which entitle the holder to substantially all of the net cash flows) doesn't seem technically accurate. In our experience, and as stated in other portions of the draft policy, the terms of the units of an income fund do not typically provide an "entitlement" to receive cash flow which is any different, from a legal perspective, than the entitlement of a holder of common shares to receive dividends. If a definition of income trust is required, you might consider instead defining an income trust as being a trust or other entity which has represented (in the prospectus for the offering of its securities or in the information circular or similar document leading to its creation) that it intends to distribute to investors all or a substantial portion of the net cash flow derived from the underlying operations of the trust or other entity.

3. *Comment on part 2.2 (Does an income trust's distributable cash provide an investor with a consistent rate of return?)*

The proposed NP 41-201 states that "in many ways, investing in an income trust is more like an investment in an equity security rather than a debt security". We agree and would reinforce this suggestion that, notwithstanding the expectation of regular cash payments, investing in an income trust is like an investment in an equity security. Trust units in a typical income trust have no priority of payment over any other liabilities of the trust or the operating entity subsidiaries. Distributions to the trust unitholders rank behind secured and unsecured debt and behind trade payables. The proposed NP 41-201 is correct in that the income trust does not have a fixed obligation to make the payments to investors. There should be no suggestion that unitholders in an income trust have any guarantee of a return (unless a sponsor is in fact guaranteeing a return for an initial period of time).

The holders of trust units of a typical income trust bear all of the business risk of the underlying operating entity (which is exactly the position that common shareholders are in when they purchase shares in the capital of a corporation) and would be in a similar position to holders of common shares in an entity that has committed to pay out substantial amounts of its cash flows.

4. *Comment on part 2.4 (What cover page disclosure do we expect about distributable cash?)*

Would the goals of the policy not be better served by a short statement about distributable cash on the cover page and a cross reference to the more fulsome disclosure (if required) of the risks in the body of the prospectus rather than adding two new paragraphs to the cover page? We wonder for example whether at least the disclosure in the first paragraph of the suggested face page disclosure could not equally be mandated for offerings of dividend-paying common shares.

We are also concerned that mandating disclosure of the anticipated break down of distributions between the part that is taxable as income and the part that is expected to be treated as a return of capital for tax purposes is inappropriate for at least two reasons. First, it reinforces the misconception that there is an entitlement to a specified level of distributions. Second, not all issuers will be in a position to accurately predict this information. We don't let issuers state their expected cash flow for the coming year in a prospectus (except in the context of a forecast) and it is not obvious why it should then be mandatory to state which portion of the cash flow (the amount of which can't be stated) will be taxable (which, in our experience, usually can't be calculated or confirmed without a detailed model predicting the amount of the expected cash flow and its components).

We would support information about the taxable/non-taxable portion of distributions being required on an historical basis in respect of an existing issuer and on a prospective basis where the issuer has prepared a forecast in respect of a forthcoming period, in which case the information should be included as part of the information set out in the forecast. We suggest that a prescribed format for the disclosure is not necessary and that this should be left to participants in the offering to prepare in the context of the offering. For example, the prescribed disclosure may confuse an investor intending to purchase the security through his or her RRSP, because, although the wording of the second paragraph would implicitly exclude persons who hold through a registered plan from the scope of that paragraph, we would submit that this may not be evident to an individual RRSP investor.

5. Comment on part 2.6 (Why are we concerned about the operating entity's short-term debt?)

As implied by the proposed NP 41-201, almost all non-income trust issuers also have debt obligations that are renewable in five years or less. In fact, many issuers have demand lines of credit with banking syndicates that may be called at any time. If those lines of credit were called, many issuers would face a short-term cash flow problem while alternative financing arrangements were put in place. The disclosure of this issue should be treated no differently for income trust issuers. Also, changes in interest expense is just one factor that might cause a trust to be unable to make distributions at the advertised level.

6. Comment on part 2.8 (Are agreements relating to the operating entity's short-term debt material contracts of the income trust?)

While we agree that proper disclosure should be made of the operating entity's (and income trust's) financing arrangements, we disagree with requiring income trust issuers to file their financing documents on SEDAR when non-income trust issuers are not required to do so. See comment 5 above. The test for material contracts should be the same for income trusts and other issuers.

7. Comments on part 4 (Prospectus liability)

Part 4 is an example where, in our view, proposed NP 41-201 addresses a series of concerns which, while they may be raised by some income fund IPOs, are issues of general application to IPOs and other offerings which result in the direct or indirect acquisition of operating businesses or assets and are not unique to situations where the ultimate public issuer intends to distribute substantially all of the net cash flow of the operating business to investors.

Part 4.2, in particular, seems to assume that the vendor of the underlying business assets is the primary initiator of all income fund offerings which result in the acquisition of all or part of the underlying business asset, whereas this doesn't happen where the underlying assets are taken public through a "direct offering" made by an issuer which is not an income fund. We submit that this assumption is inferred principally from the experience in capital markets over the last two years or so, during which time income funds have dominated the IPO market, and is not supported by any longer term perspective, nor need it form the basis for a formal and entrenched policy. For the reasons outlined in parts 4.3.1 and 4.3.2 of proposed NP 41-201, if the vendor is the primary initiator of the offering, we would normally expect the vendor to be a promoter of the offering under existing principles.

Many of the substantive suggestions made in part 4 are quite sensible, and should generally apply in situations where the assets being acquired, directly or indirectly, represent a substantial portion of the issuer's undertaking.

8. *Comment on part 5.3 (Do we expect income trusts to provide us with copies of their green sheets?)*

While it has always within the authority of the members of the CSA to request copies of the greensheets and additional sales and marketing materials (and it was the practice of certain commissions in the past to require such filings), we are not aware of current requirements that would have other issuers file copies of the greensheets with securities regulatory authorities. The requirements to file any sales and marketing materials should be the same for income trusts and other issuers.

Once again, we would like to thank the members of the CSA who participated in the production of Proposed NP 41-201, and look forward to your responses to the comments of the various market participants and advisors who have submitted issues for your consideration.

Yours truly,

FRASER MILNER CASGRAIN LLP

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