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Dear Sirs:

Re: Request for Comment - Proposed Amendments to National Policy 41-201 Income Trusts and Other Indirect Offerings

Thank you for providing the opportunity to comment on Proposed National Policy 41-201 Income Trusts and Other Indirect Offerings ("Proposed NP 41-201").

I have limited my comments to the proposals dealing with promoter liability contained in section 4.4 of Proposed NP 41-201. I have substantial experience with this issue since the increase in income trust and similar offerings that began in 2001. In my view, the analysis set out in section 4.4 does not provide an appropriate basis for addressing CSA concerns in this area.

The issue of prospectus liability for parties who are responsible for initiating and implementing an initial public offering is not new and has not arisen solely as a result of the recent spate of income trust and similar offerings. Securities legislation has dealt with this issue through the concepts of "selling securityholder" and "promoter" liability. There are significant problems with both of these concepts and Proposed NP 41-201 is attempting to deal with those issues in a manner that will not address the fundamental issue.

There are two obvious problems with the current concept of selling securityholder liability. First, "selling securityholder" is not defined in securities legislation with the result that, unless a party is selling securities under the prospectus in question, the general view is that selling securityholder liability does not attach to that party.

The second difficulty is that the liability attaching to a selling securityholder is simply too onerous, except in very limited circumstances. To make a selling securityholder jointly and severally liable, without a due diligence defence, for the entire proceeds raised under the prospectus is unreasonable - unless the selling securityholder is receiving all of the proceeds from the offering and has such intimate knowledge and control of the issuer that a due diligence defence is neither appropriate nor necessary. Because these factual circumstances almost never arise, it is commonplace for well-advised securityholders to structure their affairs so that they are not "selling securityholders" under the prospectus, whether it is a prospectus for an income trust issuer or some other type of issuer.

The definition of a "promoter" contained in securities legislation focuses on the formation and development of a business and the valuation of property or services contributed to that business. This definition is aimed at making a "promoter" of the business responsible for the value of that business if it is sold to the public within two years from the time it was formed. This concept may work well in certain contexts (e.g., the offering of unproven mining assets to the public market), but it is not an appropriate basis for addressing the "selling securityholder" issue that the CSA is concerned about in Proposed NP 41-201.

Section 4.4 of Proposed NP 41-201 advances the position that the formation of an income trust itself somehow constitutes a party as a "promoter" of the business of the income trust issuer (which is expressed to be the completion of a public offering and acquiring the operating entity interest). This interpretation strains any common sense understanding of the definition of "promoter" and is inconsistent with the remainder of Proposed NP 41-201 which focuses on the underlying operating entity as the business of substance. In any event, following Minister Flaherty's announcement on October 31, 2006, it is safe to say that there will not be any new income trust issuers created. As a result, the promoter analysis put forward under proposed section 4.4 will have no further application and we will be left with analyzing whether or not there is a promoter of the operating entity in accordance with the existing securities legislation.

It is clear that CSA staff are concerned about the appropriate degree of prospectus liability that should be accepted by vendors who are involved in the IPO process and can fairly be seen as accessing the capital markets of Canada. Although I believe that this issue has been well addressed in the market through the adoption of appropriate contractual accountability arrangements, if the CSA wishes to pass a rule in this area, I suggest that the current attempts to stretch the application of the promoter rules be put aside in favour of developing a new and more flexible rule that addresses what might more fairly be called "selling securityholder" liability. Such a rule might well follow the US example that looks at shareholders/vendors who are "control" persons with an active role in the going public process. We note that the proposed certification requirement for a "substantial beneficiary of the offering", as set out in draft National Instrument 41-101 ("Proposed NI 41-101") represents some movement in this direction. However, it does not address a key concept - that the extent of liability should focus specifically on the

proceeds received from the offering by those "control persons" and provide them with an appropriate diligence defence. Torys LLP will comment on these issues in a separate letter dealing with Proposed NI 41-101.

Yours truly,

"James Scarlett"

JDS/pd