CSA/ACVM

Canadian Securities Administrators | Autorités canadiennes en valeurs mobilières

Notice

Replacement of
National Policy 41-201 *Income Trusts And Other Indirect Offerings*

July 6, 2007

Introduction
The Canadian Securities Administrators (CSA or we), are amending National Policy 41-201 – *Income Trusts and Other Indirect Offerings* (NP 41-201).

NP 41-201 first came into effect in December 2004. On January 5, 2007, we published our proposed amended policy for a 60-day comment period. The amended policy has been, or is expected to be, adopted in all jurisdictions and will replace the December 2004 version of the policy on **July 6, 2007**.

This notice provides a summary of the key changes to NP 41-201, the comments we received on the proposed amended policy and the additional changes we made to the policy as a result of those comments.

Substance and Purpose
We have reorganized NP 41-201 to more clearly group our guidance in the areas of distributable cash, prospectus offerings and continuous disclosure. The following is a summary of the key changes to the policy**:**

- Part 2 now focuses the guidance specifically on distributable cash. We have added guidance on distributable cash that was previously published in CSA Staff Notice 52-306 – *Non-GAAP Financial Measures* (Staff Notice 52-306) and CSA Staff Notice 41-304 – *Income Trusts: Prospectus Disclosure of Distributable Cash*, as well as other guidance about distributable cash disclosure.

- We have noted that the guidance on distributable cash applies to all disclosure about cash available for distribution, regardless of the terminology used by the issuer.

- We have noted that the guidance on disclosure of stability ratings will not apply to unsolicited stability ratings**.**

- We have provided guidance that issuers should include in their interim and annual MD&A a comparison between the expected yield figure previously disclosed and the actual yield.

- We have provided guidance on the presentation of distributable cash figures. We believe this disclosure should accompany all disclosures of distributable cash, including those contained in sales and marketing materials.

- We have clarified the content of the undertakings we expect for insider reporting and financial information of subsidiaries and the circumstances under which we expect these undertakings to be provided.

- We have clarified our expectations of MD&A disclosure of distributed cash.

- We have clarified our guidance on the disclosure of differences between corporate law protections and those provided by an issuer's declaration of trust.

Summary of Written Comments
We received submissions from 12 commenters during the comment period. See Appendix A for a list of the commenters and Appendix B for a summary of their comments and our responses. We would like to thank everyone who provided us with comments.

Canadian Performance Reporting Board Interpretive Release
When we published the policy for comment, we noted that the Canadian Performance Reporting Board (CPRB) of The Canadian Institute of Chartered Accountants had published for comment a draft interpretive release to the CICA publication, *Management's Discussion and Analysis: Guidance on Preparation and Disclosure*. This release provided the CPRB's views on the measurement and disclosure of distributable cash in MD&A by income trusts and other flow-through entities. We noted that we were looking forward to discussing with the CPRB the comments that they received on their draft interpretive release. We have reviewed these comments and would like to thank the CPRB for their co-operation and input.

The distributable cash guidance in this policy is intended to promote transparent disclosure for investors with respect to presentations of distributable cash. We understand that the CPRB is considering changes to its draft guidance in response to comments received and it plans to provide guidance not only on disclosure but also on a standardized measure of distributable cash derived directly from historical financial statements prepared in accordance with GAAP.

We will evaluate the form and impact of the final CPRB guidance when it is published. However, based on our current understanding of the likely content of the CPRB guidance, we believe that presentation of the standardized measure of distributable cash defined in the guidance is consistent with the objectives of the policy. Further, additional disclosure in MD&A consistent with the framework provided in the CPRB guidance would contribute to achieving the disclosure objectives of the policy.

Additional Changes to the Policy
After considering the comments, we made some changes to the proposed policy that was published for comment in January 2007. We do not believe these changes are material and are not republishing the policy for a further comment period. These changes are summarized in Appendix C.

Questions
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Appendix A

List of Commenters

	Commenter	Name	Date
1.	Standard & Poor's Canada	Kevin Hibbert	February 15, 2007
2.	Canadian Oil Sands Limited	Ryan M. Kubik	February 26, 2007
3.	The Canadian Institute of Chartered Accountants	Kevin Dancey	March 2, 2007
4.	Enerplus Resources Fund	Robert J. Waters	March 2, 2007
5.	Ontario Teacher's Pension Plan	Brian Gibson	March 6, 2007
6.	Canadian Coalition for Good Governance	David R. Beatty	March 6, 2007
7.	Torys LLP	James Scarlett	March 6, 2007
8.	Financial Executives International	Alister Cowan	March 6, 2007
9.	Pengrowth Corporation	Chris Webster	March 6, 2007
10.	Canadian Association of Income Funds	Margaret M. Lefebvre	March 6, 2007
11.	Global Financial Group	Robert Hudson	March 6, 2007
12.	ARC Resources Ltd.	John P. Dielwart	March 6, 2007

Appendix B

Summary of Comments on the Proposed Amended NP 41-201

Item	Reference	Summarized comment	CSA response
1.	General	Two commenters suggested that the work of the CSA in the policy be made into a rule.	We have considered the comment and continue to believe that a principles-based policy approach to the regulation of income trusts and other indirect offering structures is the appropriate regulatory course and that there is currently no justification for turning the policy into a rule.
2.	General	Four commenters suggested that the same concerns being addressed by the policy should be equally applied to corporations.	We acknowledge the comment and note that the policy applies to indirect offering structures, including those in corporate form.
3.	General	Two commenters questioned whether the policy would apply to trusts that do not use non-GAAP measures such as "distributable cash".	The presentation of non-GAAP measures, such as distributable cash, is optional disclosure for trusts. The distributable cash guidance in the policy only applies to trusts that present non-GAAP measures.
4.	Distributable Cash Part 2.1	Four commenters encouraged the CSA to incorporate the Canadian Performance Reporting Board's (CPRB) draft interpretive release relating to the definition of distributable cash, in order to provide greater certainty and consistency with respect to the application of this concept.	We acknowledge the comment and, where appropriate, we have made changes to the policy to more closely align with the CPRB draft guidance.
5.	Distributable Cash – Part 2.1	Three commenters expressed their support for the CSA's principles-based disclosure guidance for distributable cash. The commenters believed that a prescribed calculation for distributable cash may not be meaningful and would reduce the information's usefulness. The commenters also	We acknowledge these comments and continue to believe that a principles-based policy approach to the regulation of income trusts and other indirect offering

		believe that standardizing the concept of distributable cash would result in undue credibility on the amount and over-reliance by investors.	structures is the appropriate regulatory course.
6.	Distributable Cash – Part 2.1	One commenter suggested that distributable cash and distributable income should not be used interchangeably since cash and income have different meanings.	We acknowledge the comment and note that it is the responsibility of the issuer to ensure that it uses appropriate non-GAAP terminology to describe its cash available for distribution. As set out in the policy, we expect the guidance regarding distributable cash to apply to other non-GAAP terms used to describe the amount available for distribution to securityholders.
7.	Distributable Cash – Part 2.1	One commenter suggested that the use of discretionary adjustments would defeat the objective of comparability.	We acknowledge the comment and continue to believe that issuers should be permitted to make appropriate adjustments to the distributable cash reconciliation. We expect that if an issuer makes a discretionary adjustment to its distributable cash reconciliation, the guidance in Part 2.7 will apply.
8.	Distributable Cash – Parts 2.2, 2.4 and 2.5	Two commenters suggested that income trusts should not discuss “cash available for distribution”, but rather only “cash distributed”, and focus on key financial measures such as “net income” and “cash flow”. If distributable cash is to be provided, then the calculation would be derived from and reconciled to the GAAP financial statements and combined with disclosure containing a discussion of the reasons for, and the difference between distributable cash and the actual cash distributions paid.	We agree and have recommended in Part 6.5.2 that issuers provide a summary of actual cash distributions paid as compared to net income and cash flows from operating activities. We believe that a summary of the main elements of a trust’s

			performance will assist investors in assessing the financial condition of the trust and, in turn, the sustainability of the trust's distributions. A discussion of the reasons for the difference between distributable cash and actual distributions paid should accompany the summary.
9.	Distributable Cash – Part 2.3	One commenter suggested that income trusts should fully disclose their distribution policies, including any amount of distributable cash retained in a reserve fund for future distributions, and that there should be a commentary on how the reserve fund is maintained, how it is funded and whether there has been any past usage of the fund.	We have considered this comment and are of the view that the provisions of item 1.6 – Liquidity of Form 51-102F1 MD&A would generally require this information to be disclosed in the MD&A.
10.	Distributable Cash – Part 2.6	One commenter stated that cash flows from operating activities before non-cash working capital is a more appropriate and widely used measure for comparison with distributed cash than cash flows from operating activities including changes in non-cash working capital.	We believe a distributable cash reconciliation should begin with cash flows from operating activities; a figure that can be derived from an issuer's GAAP financial statements. "Cash flows from operating activities before non-cash working capital" is not a recognized GAAP measure.
11.	Distributable Cash – Part 2.7	One commenter suggested that the proposal to discuss the work done by the issuer to ensure the completeness and reasonableness of the disclosure may not be practical or useful.	We disagree. Disclosure about what was done to support an underlying assumption for a reconciling adjustment is important information for investors.
12.	Distributable Cash – Part 2.7	Two commenters suggested that the proposals in sections 2.6 and 2.7 which suggest that issuers provide information allowing investors to anticipate distributable cash amounts and the sustainability of distributions is akin to asking issuer to prepare a forecast.	We disagree. The disclosure expectations in sections 2.6 and 2.7 of the policy are consistent with our expectations for other types of forward-looking information.

		For example, the statement under section 2.7 that the determination of distributable cash uses "supportable assumptions given management's judgement about the most probable set of economic conditions" implies that management has an ability to forecast such economic conditions. Further, a requirement to "disclose all factors, events or conditions that are likely to occur in the future that may impact the sustainability of future distributions" would be very difficult for any management team to achieve.	We strongly believe issuers and their management are in the best position to evaluate and discuss events or conditions that are likely to occur in the future that may impact the sustainability of distributions.
13	Distributable Cash – Part 2.7	One commenter suggested that information relating to provisions that stipulate when an original vendor's entitlement to distributions ceases to be subordinated is important because these provisions affect the amount of future distributions.	We acknowledge this comment and note that this information is generally disclosed in the IPO prospectus and the material contracts filed with the IPO. We are of the view that the provisions of item 1.6 – Liquidity of Form 51-102F1 MD&A require this information to be disclosed in the MD&A.
14.	Distributable Cash – Maintenance of Productive Capacity	One commenter suggested that the concept of "maintenance of productive capacity" must take into account that the cyclical nature of commodity prices influences the investment decision process of natural resource based income trusts.	We acknowledge this comment and note that the particular variables underlying the concept of "maintenance of productive capacity" may vary from issuer to issuer. Our intent is that issuers consider their particular situation when applying this concept.
15.	Distributable Cash – Maintenance of Productive Capacity	One commenter suggested that practical limitations exist in determining a distributable cash adjustment for maintenance of productive capacity. The commenter suggested that requiring	We acknowledge this comment and as a result, did not prescribe how issuers should calculate their distributable cash adjustment to maintain productive

		disclosure about potential commitments for replacing and maintaining capital assets is not sufficient to result in a meaningful discussion of an entity's productive capacity maintenance strategy.	capacity. We expect issuers to have extensive knowledge about the operations of their underlying entities and to be able to reasonably determine their current and future cash needs to maintain productive capacity. This determination will likely vary from trust to trust and may be based on actual capital expenditures incurred in prior periods.
16.	Material Debt Part 3 – A.	One commenter suggested that the debt disclosure would be enhanced by including disclosure of how much of the debt is secured and what assets have been pledged as security, and what entity level the debt is being issued at. On an ongoing basis, disclosure of covenants and how the trust is performing relative to each measure is important.	Details about debt are generally disclosed in the IPO prospectus and in the material contract(s) relating to the debt. We have considered the comment about ongoing covenant disclosure and are of the view that the provisions of item 1.6 – Liquidity of Form 51-102F1 MD&A generally require similar information to be disclosed in the MD&A.
17.	Material Debt Part 3 – A.	One commenter suggested that a separate category on SEDAR be included to identify material contracts.	SEDAR currently has a category for material contracts called "Other – material contract(s)".
18.	Material Debt Part 3 – A.	One commenter suggested that debt obligations also be disclosed in the annual proxy circular in situations where debt covenants are in danger of being breached.	We disagree. We believe that this information is more appropriately disclosed in the MD&A and/or in a material change report (Form 51-102F2), if applicable.
19.	Material Debt Part 3 – A.	One commenter suggested that debt agreements are normal course contracts and that they need not be filed on SEDAR. The filing of these agreements can confuse and overwhelm the	We disagree. We continue to believe that, in most cases, agreements relating to the material debt that have been

		reader, and these agreements often contain confidentiality conditions imposed by lenders.	negotiated with a third-party lender other than the issuer will be material contracts under Rule 41-501 and NI 51-102 (or their respective successors) if terms of those agreements have a direct correlation with the anticipated cash distributions.
20.	Stability Ratings Part 3 – B.	One commenter suggested that unsolicited stability ratings be disclosed with the fact that they were unsolicited, and that the disclosure of the source of the rating may be useful. Another commenter suggested that if a poor stability rating has been received, the rating should also appear in the annual proxy circular.	We disagree. We believe that imposing an obligation on issuers to disclose unsolicited stability ratings is not currently justified. Management will not have been involved in preparing the rating and may not even know that a stability rating had been determined. We also disagree that stability ratings be disclosed in annual proxy circulars. We continue to believe that solicited stability ratings should be disclosed in prospectuses and AIFs.
21.	Executive Compensation Part 3 – C.	One commenter suggested that management contracts and incentive plans need not be filed on SEDAR if the key details are adequately disclosed elsewhere.	We continue to believe that management contracts and management incentive plans that contain terms which impact distributable cash are material contracts and should be filed on SEDAR.
22.	Executive Compensation Part 3 – C.	One commenter suggested that any management contract of the operating entity should be disclosed on SEDAR and either referenced or disclosed in the proxy circular.	We currently expect management contracts and management incentive plans that may have an impact on distributable cash to be filed on SEDAR. We also expect these plans to be disclosed in the prospectus.

			We note that disclosure of these contracts is also currently required by Form 51-102F5 – *Information Circular* (Item 13). We note that disclosure of provisions related to external management companies is currently required by Form 51-102F6 – *Statement of Executive Compensation* (Item 1.4(e)).
23.	Executive Compensation Part 3 – C.	One commenter suggested that the compensation of the top five paid named executive officers should be disclosed, whether or not they function at the operating or issuer level.	We believe that the existing rules about disclosure of executive compensation will require the disclosure suggested by this comment. We note that proposed amendments to Form 51-102F6 – *Statement of Executive Compensation*, which are consistent with Part 3 of the policy, are currently out for comment.
24.	Offering Specific Issues – Part 4	One commenter suggested that requiring issuers to file the full details of valuations in the context of acquisitions would put them at a competitive disadvantage relative to non-trust issuers because confidential details about earnings estimates, synergies, etc. would be required to be disclosed.	We acknowledge the comment and have removed the expectation that issuers file the valuation report on SEDAR.
25.	Offering Specific Issues – Parts 4.3, 4.4, 4.5 and 4.5.2	Two commenters stated that many income trusts are acquisitive by nature and expressed concern that the regulator might require the vendor to certify the prospectus disclosure of a trust issuer. Such a requirement would restrict the ability of trusts to make acquisitions and place them at a major competitive disadvantage.	We acknowledge this comment. Currently, vendors are required to certify the prospectus only if they would otherwise be promoters or if it is necessary in the public interest. Proposed National Instrument 41-101 *General Prospectus*

			Requirements (NI 41-101) includes proposals regarding certification requirements for prospectuses generally. The proposed NI 41-101 was published for comment on December 21, 2006. We do not propose changing the existing guidance in the policy at this time and have referred this comment to the CSA Committee responsible for NI 41-101. NP 41-201 may be amended to reflect the conclusions reached with respect to NI 41-101.
26.	Promoter Liability – Part 4.4	One commenter suggested that the lack of clarity of the terms "selling securityholder" and "promoter" is problematic. The concept under section 4.4 that the formation of an income trust itself constitutes the party as a promoter of the business of the income trust issuer strains the common sense understanding of "promoter" and is inconsistent with the remainder of the policy which focuses on the underlying operating entity as the business of substance. As a result of the October 31, 2006 federal government announcement on income trusts, the commenter believes that it is unlikely that any new income trusts will be created, and as a result the promoter analysis under section 4.4 will have no further application. The commenter suggested that current attempts to stretch the application of the promoter rules should be put aside in favour of developing a new and more flexible rule that addresses what might more fairly be called "selling securityholder" liability.	We acknowledge this comment. Proposed National Instrument 41-101 *General Prospectus Requirements* (NI 41-101) includes proposals regarding certification requirements for prospectuses generally. The proposed NI 41-101 was published for comment on December 21, 2006. We do not propose changing the existing guidance in the policy at this time and have referred this comment to the CSA Committee responsible for NI 41-101. NP 41-201 may be amended to reflect the conclusions reached with respect to NI 41-101.
27.	Sales and	Three commenters suggested that income trusts	We expect trusts that use the

	Marketing Materials – Part 5	should refrain from using the term “yield” due to its association with fixed income investments and instead use “return on capital” and “return of capital”. Another commenter suggested that since yields are determined by the distributions and the market price of the security and because the market price is determined by factors that are outside the influence of the issuer, it is inappropriate for issuers to comment on their yield.	term “yield” to comply with the guidance set out in Part 5 including supplemental disclosure distinguishing units from a fixed income security. As discussed in Part 5.1, we believe is important for the issuer to disclose whether it has made all distributions necessary to achieve the previously stated “yield” figure.
28.	Continuous Disclosure – Part 6	One commenter suggested that disclosing economic return of capital would require complex explanation of these concepts which would result in a discussion that is not meaningful or useful.	We disagree. We believe it is important for investors to be aware that a portion of distributions received may represent a repayment of their principal investment. This disclosure will assist investors in assessing the sustainability of distributions.
29.	Continuous disclosure – Maintenance Capital	One commenter suggested that the deduction of “maintenance capital” is extremely difficult to derive for energy trusts. The commenter suggested making the disclosure of “maintenance capital” voluntary for trusts that claim they have a sustainable business model.	We agree with the first comment and have made corresponding changes to Part 2.6 of the policy. We disagree with the second comment. We believe that adjustments for capital expenditures, whether to maintain productive capacity of the issuer or otherwise, should be included in an issuer’s distributable cash reconciliation. We expect issuers that do not claim to have a sustainable business model to adequately disclose this fact and its implications.

30.	Continuous Disclosure – Part 6.5.2	Several commenters suggested that there should be a clear distinction made between distributions classified as "return on capital" and distributions classified as "return of capital".	We acknowledge the comment. However, we understand that there are practical limitations that may prevent trusts from making a clear distinction between distributions that are a "return on capital" or a "return of capital" for tax purposes. Despite this limitation, if an issuer's distributed cash, at the end of a period exceeds either its cash flows from operating activities or net income, it should consider whether the excess distributions represent an economic return of capital. When distributions paid represent an economic return of capital, we expect issuers to include disclosure stating this and to discuss the impact on future distributions.
31.	Continuous Disclosure – Part 6.5.2	One commenter suggested that including net income as one of the measures in the table in the proposal seemed inconsistent with the earlier assertion that distributable cash is more closely aligned to cash flow from operations.	We did not intend to imply that net income was a more closely aligned measure to distributable cash than cash flows from operating activities. Net income is another performance indicator that will assist investors in assessing the financial condition of the trust and, in turn, the sustainability of the trust's distributions.
32.	Continuous Disclosure – Part 6.5.2	One commenter suggested that the discussion of cash flow from operating activities compared to net income is not indicative of the productive capacity of an oil and gas trust since net income	The primary goal of the table in Part 6.5.2 is to show the relationship between the GAAP figures for cash flows

		includes non-cash items such as future income tax and depletion, depreciation, amortization and accretion (DDA&A). DDA&A is based on historical costs of property, plant and equipment and not the fair market value of replacing those assets in the current environment.	from operating activities and net income and historical distributed cash figures. This table and the accompanying disclosure were not intended to indicate the productive capacity of an issuer. If applicable, we expect a discussion of productive capacity to be provided with the issuer's distributable cash reconciliation.
33.	Continuous Disclosure – Part 6.5.2	One commenter suggested that the concept of providing investors with "information about the sources of the distributed cash that they receive, including whether an issuer borrowed amounts to finance distributions" is an exercise in futility since the allocation of cash to specific sources is arbitrary.	Existing MD&A disclosure requirements for liquidity and capital resources under NI 51-102F1 sections 1.6 and 1.7 give the reader an understanding of the issuer's overall operating and capital requirements compared to their available sources of funding. However, we believe it is important to highlight for the reader cases where cash distributions exceed cash flow from operating activities and to explain how the distributions were funded.
34.	Continuous Disclosure – Part 6.5.2	One commenter suggested that the proposed tabular format does not provide additional useful information since all of this quantitative information can be obtained from an issuer's GAAP financial statements.	We acknowledge this comment. However, we believe providing additional prominence to specific financial indicators is useful information for investors.
35.	Corporate Governance – Part 7	One commenter suggested that information comparing the rights of unitholders of a trust to the rights of corporate shareholders should be included in the proxy circular.	We acknowledge this comment and note that we expect disclosure to be provided in the annual information form under the requirements of Item 15.1 of

			Form 51-102F2. We also note that this information is generally available in the IPO prospectus and in the material contract filed on SEDAR, which sets out the rights of securityholders.
36.	Corporate Governance – Part 7	One commenter suggested that operating entities, in addition to issuers, disclose how they will discharge their governance responsibilities.	Part 7 of the policy contains our expectation that the issuer disclose how the issuer and the operating entity will satisfy governance responsibilities.

Appendix C

Summary of Changes

The following summarizes the changes to the policy from the version published for comment on January 5, 2007.

- *Valuation reports:* In Part 4.1 we have deleted the expectation that, if a third-party valuation is obtained in an initial public offering, the valuation report should be filed on SEDAR.

- *Capital adjustments:* In Part 2.6 we have clarified the guidance to note that an issuer that does not intend to sustain the business of its operating entity going-forward (for example, in the case of depleting assets) should clearly state this in its distributable cash reconciliation.

  We further clarified the guidance in this part to note that capital adjustments may be based on actual capital expenditures.