

By Garth Pepper and Andrew Brown

Growth of the Income Trust market in Canada has been explosive over the past few years, rising from a total capitalization of approximately \$45 billion in 2002 to around \$150 billion. Many experts are now concerned that this trend has created an Income Trust “bubble” likely to burst at any time.

The federal government’s decision to cease accepting advance tax rulings, accompanied by its launch of a process to gather public comments on what tax changes, if any, should be made to Income Trusts, essentially wiped approximately \$23 billion in market capitalization from the sector. That said, and in light of the strong recovery following the government’s latest decision not to impose a tax on Trusts, many believe that the Income Trust market is still overheated and unstable. There is some fear that the eventual market correction will trigger a flurry of litigation from investors and other stakeholders seeking compensation for the financial fall-out.

Trustees and operating entity directors and officers could face the brunt of such a litigious onslaught. Accordingly, a number of key issues should be explored when structuring a trustee/D&O liability policy to ensure it provides optimal protection against the personal liabilities these leaders have at stake.

Questions to consider include:

- Trustees typically face a more onerous liability exposure than the directors and officers of standard corporations. Do the policies anticipate that the trustees’ liability may be absolute and, if viewed as fiduciaries, do they have limited defenses or abilities to contract out their obligations?
- What are a trustee’s indemnity rights and do they work in conjunction with the presumptive indemnification clause of their D&O policy?
- Should trustees have their own limits of liability, separate and distinct from the operating company directors and officers, in order to avoid limit depletion issues?
- Trustees can be subject to both trust law *and* securities law – how does this influence their overall liabilities?
- How does the policy address potential conflict of interest scenarios in the context of liability when individuals simultaneously operate as retained owner, Trustee and/or an operating entity director or officer?

- As the reporting issuer, trustees retain the original prospectus disclosure liabilities *and* in the near future, the secondary market exposures (Bill 198, Ontario). What are the implications of this given that trustees are not the active managers of the operating entity?
- How do insured vs. insured issues correlate with fiduciary responsibilities and the typical D&O policy exclusionary language?

These and other issues have important implications relative to executive protection. We encourage you to review the efficacy of your D&O program in the context of the changing nature of your risks. For further details or to discuss the subject, please feel free to contact any member of Integro's Management Risk Practice group.

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