



Agent/Debt and Warrant Unit Issue

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Ms. Manzer's more than 35 year legal practice encompasses a broad range of experience in the financial services sector, with a focus on Canada-US cross border issues involving financial institution regulation, secured and unsecured debt finance, asset-based financing, securitization and structured finance, project finance and syndicated lending. Restructuring and lender rights and remedies within these areas is also part of her active practice.

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AGENCY PROVISIONS: BALANCING THE OBLIGATIONS AND RIGHTS – AN ASSESSMENT OF SAMPLE AGENCY PROVISIONS IN PUBLIC DEBT AND EQUITY TRANSACTIONS

3. Agent/Debt and Warrant Unit Issue

To further illustrate requirements in the public capital markets, clauses have been taken from a publicly issued combined debt and warrant issue transaction. Like the foregoing, these clauses were selected as being balanced and reasonable clauses dealing with the agent roles and responsibilities in an agent and transaction. In this case a best efforts offering by an agent syndicate, through a selling syndicate, to underlying investors on a public basis. The clauses were selected both to illustrate a reasonable balancing of responsibilities between the issuer, agent and the syndicate as to compliance with securities law requirements, and the relationship between the agent and the syndicate. These clauses were taken from an agency agreement, entered into between the issuer and the agent. That agreement does however contemplate the relationship between the agent and the selling syndicate, and among the agents. Consideration will need to be given to using an underlying selling document, to address specific issues of the relationship between the agent and its selling syndicate. Each of the issues that need to be considered is, however, illustrated by the below clauses from the agency agreement.

The Agents further understand that the REIT has prepared and filed a preliminary short form prospectus and an amended and restated preliminary short form prospectus and all documents relating thereto with respect to the qualification for Distribution (as defined below) of the Debt Units and underlying Debentures and Warrants in each of the Qualifying Provinces (as defined below) and will prepare and file a (final) short form prospectus and all other necessary documents in order to qualify the Debt Units and underlying Debentures and Warrants for Distribution to the public in each of the Qualifying Provinces.

Appointment of Agent

It is necessary initially to consider the basis for the appointment of an agent, or agents, in the public combined

debt and equity transaction. In similar manner to the public debt and public equity offerings, the agent, or underwriter, will be engaged on either an underwritten basis, a bought deal basis, or a best efforts basis, and that initial business determination will dictate the nature of many of the terms between the issuer and the agent. There will also be the possibility of multiple agents in each of those types of offerings, in some instances with the multiple agents taking up the full offering, and thereby forming the syndicate, and in other circumstances with an agent or agents working with a selling syndicate. It will be necessary to understand what of those methods of offering have been selected, and to tailor the terms of the agreement accordingly.

Based on the foregoing, and subject to the terms and conditions contained in this Agreement, the REIT hereby appoints the Agents as the agents of the REIT to effect the sale of up to [] Debt Units (the "**Offering**"), at the Issue Price. The Agents hereby agree to act as the agent of the REIT, to effect the sale of the Debt Units on behalf of the REIT on a "best efforts" basis to Purchasers (as defined below) resident in the Qualifying Provinces and in those jurisdictions outside of Canada (including the United States (as defined below)) as may be agreed to by the REIT and the Agents, acting reasonably, through private placements or other offerings on an exempt basis and provided that the REIT shall not become obligated to file a registration statement or prospectus outside of Canada. It is understood and agreed that the Agents are under no obligation to purchase any of the Debt Units, although the Agents may subscribe for Debt Units at their sole option.

The REIT hereby grants to the Agents an option (the "**Over-Allotment Option**"), exercisable in whole or in part at any time up to 5:00 p.m. (Toronto time) on the 30th day following the Closing Date, to require the REIT to issue under the Offering that number of additional Debt Units of the REIT (the "**Additional Debt Units**") which is equal to [%] of the number of Debt Units issued under the Offering to cover over-allotments, if any, and for market stabilization purposes. The Additional Debt Units will have the same terms and conditions as the Debt Units and will be issued on the same basis as the Debt Units including, for the avoidance of doubt, with respect to the Commission (as defined below) payable to the Agents.

Agent Offering Process

Compliance with securities law remains crucial in the public mixed debt and equity market, in many instances requiring consideration of a combination of both prospectus and private, exempt, placement requirements. It is necessary to clearly identify the role of the agent, and determine the rights and approach which the issuer, agent and selling syndicate member should have to ensure compliance with securities law requirements during the offering process.

- (a) The sale of the Debt Units to the Purchasers shall be effected in a manner that is in compliance with applicable Securities Laws and upon the terms set out in the Prospectus and in this Agreement. The Agents will use their best efforts to arrange for Purchasers for the Debt Units in the Qualifying Jurisdictions in connection with the Offering; however, it is understood and agreed that the Agents shall have no obligation to purchase any of the Debt Units.
- (b) The Agents shall have the right to invite one or more other qualified investment dealers (each, a "**Selling Firm**") to form a selling group to participate in the soliciting of offers to purchase the Debt Units, subject to the REIT agreeing to such Selling Firm being part of the selling group. The Agents have the exclusive right to control all compensation arrangements between the members of the selling group, which compensation shall be paid by the Agents out of the Commission. The REIT grants all of the rights and benefits of this Agreement to any Selling Firm so appointed by the Agents and appoints the Agents as trustees of such rights and benefits for such Selling Firms, and the Agents hereby accept such trust and agree to hold such rights and benefits for and on behalf of such Selling Firms. The Agents shall ensure that any Selling Firm appointed pursuant to the provisions of this Section or with whom the Agents have a contractual relationship with respect to the Offering, if any, agrees with the Agents to comply with the covenants and obligations given by the Agents herein. The Agents agree that the REIT is entitled to rely on the representations, warranties and covenants made by any such Selling Firm to the Agents in any selling firm agreement or otherwise and any such Selling Firm will acknowledge and agree that the Agents shall act as trustee for the REIT of the representations, warranties and covenants

under any selling firm agreement or otherwise and that the REIT shall be entitled to enforce these representations, warranties and covenants directly and on its own behalf against any such Selling Firm.

All capital market transactions involve elements of due diligence, which is frequently undertaken by the agent, underwriter, or selling agent, for and on behalf of both the selling syndicate and the ultimate purchasing investors. In many jurisdictions that lead agent is required to certify the prospectus certifying that they are not aware of any misrepresentation or material omission. The role and responsibility of the parties to the transaction, particularly where there are multiple agents, or where there is an agent and selling syndicate, needs to be clearly understood and the protocols set out. Allocations of duties and responsibilities, the ability to rely on a transaction party, and the ability of a party to direct, review and investigate all need to be considered. In the following example the agent assumed the responsibility for due diligence, which would result in responsibility to its selling syndicate, and potentially to the investors dependent upon the nature of the prospectus involvement requirements.

Due Diligence. Prior to the filing of the Final Prospectus, Documents Incorporated by Reference and any Supplementary Materials, the REIT shall permit the Agents to review each of the Final Prospectus, any Documents Incorporated by Reference and any Supplementary Materials and shall allow the Agents to continue to conduct any due diligence investigations which they reasonably require in order to fulfill their obligations as agents under Securities Laws and in order to enable them to responsibly execute the certificate in the Final Prospectus required to be executed by each of them. The REIT shall provide the Agents with full and free access to, and on request of the Agents (acting reasonably), copies of all materials and documents used or created in connection with the due diligence investigations or the Offering. Furthermore, the REIT must, at all reasonable times before the Closing Date or during, or in relation to, any threatened or pending inquiry, investigation or action, claim or proceeding arising in connection with the matters contemplated herein to which the Agents are a party or participant, provide reasonable and free access to the premises, books and records of the REIT and any Subsidiaries to enable each such person(s) to obtain any information in relation to the REIT or Subsidiary and any other matters which the Agents reasonably require in relation to the Offering or any such inquiry, investigation or action, claim or proceeding.

The following are illustrative of the obligations which are frequently imposed on an agent, and ultimately the selling syndicate, in the public combined debt and equity offering. These are not universal, but provide a reasonable outline of the allocation of duties and responsibilities. These are the obligations which are reasonably expected to be provided by the agent and selling group to the issuer to ensure protection of the issuer as to compliance with applicable law. The allocation is not universal and needs to be carefully considered for each transaction.

Distribution and Certain Obligations of the Agent.

- (a) The Agents shall, and shall require any Selling Firm to agree to, comply with Securities Laws in connection with the Distribution of the Debt Units and shall offer the Debt Units for sale to the public directly and through Selling Firms upon the terms and conditions set out in the Prospectus and this Agreement. The Agents shall, and shall require any Selling Firm to, offer for sale to the public and sell the Debt Units only in those jurisdictions where they may be lawfully offered for sale or sold. The Agents shall: (i) use all commercially reasonable efforts to complete and cause each Selling Firm to complete the Distribution of the Debt Units as soon as reasonably practicable; (ii) not make any representation or warranty with respect to the REIT or its securities other than as set forth in the Prospectus or any Supplementary Material; and (iii) promptly notify the REIT when, in their opinion, the Agents and the Selling Firms have ceased Distribution of the Debt Units and provide a breakdown of the number of Debt Units distributed in each of the Qualifying Jurisdictions where such breakdown is required for the purpose of calculating fees payable to the Securities Regulators.

- (b) The Agents shall, and shall require any Selling Firm to agree to, distribute the Debt Units in a manner which complies with and observes all applicable laws and regulations, including, for greater certainty, all Securities Laws, in each jurisdiction into and from which it may offer to sell the Debt Units or distribute the Prospectus, any Supplementary Material or the U.S. Private Placement Memorandum in connection with the Distribution of the Debt Units and will not, directly or indirectly, offer, sell or deliver any Debt Units or deliver the Prospectus, any Supplementary Material or the U.S. Private Placement Memorandum to any person in any jurisdiction other than in the Qualifying Provinces except in a manner which will not require the REIT to comply with the registration, prospectus, filing, continuous disclosure or other similar requirements under the applicable Securities Laws of such other jurisdictions or pay any additional governmental filing fees (other than any filing fees required to comply with state securities or "blue sky" laws in the United States) which relate to such other jurisdictions. Subject to the foregoing, the Agents and any Selling Firm shall be entitled to offer and sell the Debt Units in the United States solely pursuant to an applicable exemption or exemptions from the registration requirements of the U.S. Securities Act and applicable United States state Securities Laws and in other international jurisdictions in accordance with any applicable securities and other laws in the jurisdictions in which the Agents and/or Selling Firms offer the Debt Units. Any offer or sale of the Debt Units in the United States shall be made in accordance with the terms and conditions set out in Schedule "A" to this Agreement, which terms and conditions and the representations, warranties and covenants of the parties therein, are hereby incorporated by reference in and shall form part of this Agreement.
- (c) For the purposes of this Section, the Agents shall be entitled to assume that the Debt Units are qualified for distribution in any Qualifying Jurisdiction where a receipt for the Final Prospectus shall have been obtained from the Principal Regulator issued under the Passport System evidencing that a receipt has been issued for the Final Prospectus by or on behalf of each of the Securities Regulators following the filing of the Final Prospectus, unless otherwise notified in writing.

Closing Process

The following is a brief outline of a closing protocol for a public combined debt and equity issue. As was the case with public equity offering, it is necessary to consider whether syndicate members, multiple agents or an agent and selling syndicate, need to consider direct involvement in the closing. The protocols must at all times consider the rights and obligations of the selling syndicate, and the closing protocol consider the appropriate means of providing notification, completing drawdown of funds, and distributing the securities which are the subject of the issuance. These must be considered on a transaction specific basis, and more detailed review undertaken in a multi-jurisdictional, particularly multiple time zone, closing. Where the selling syndicate is broadly based, specific issues around notice, timing for funding, timing for closing, and timing for announcements all need to be considered based upon the jurisdictions of the investors involved.

- (a) The purchase and sale of the Debt Units and the Additional Debt Units, respectively, for which orders have been received, shall be completed at the Closing Time and the Over-Allotment Closing Time, respectively, at the offices of [] or at such other place as the Agents and the REIT may agree. Prior to the Closing Time, and the Over-Allotment Closing Time, respectively, the REIT shall arrange for [] to effect an instant deposit of the Debentures and Warrants underlying the Debt Units or Additional Debt Units, as applicable, to or for the account of the Agents with [] on the Closing Date to such instant deposit number as the Agents shall advise against payment of the aggregate purchase price for the Debt Units or Additional Debt Units, as applicable. No certificates evidencing the Debt Units will be issued to Purchasers, except in limited circumstances (including in respect of any Debt Units sold in the United States pursuant to Schedule "A"), and registration will be made with the depository services of [].

- (b) The Agents may exercise the Over-Allotment Option, in whole or in part, at any time up to 5:00 p.m. (Toronto time) on the 30th day following the Closing Date (for these purposes, the Closing Date shall not be counted) by delivery of a written notice (an "**Over-Allotment Notice**") to the REIT specifying the number of Additional Debt Units in respect of which the Over-Allotment Option is being exercised and the date for delivery of the Debentures and Warrants comprising the Additional Debt Units (the "**Over-Allotment Closing Date**"); provided, however, that the Over-Allotment Closing Date shall not be:
- (i) earlier than the later of (i) the Closing Date or (ii) three Business Days after the date on which the Over-Allotment Notice is delivered to the REIT; or
 - (ii) later than five Business Days after the date on which the Over-Allotment Notice is delivered to the REIT.

As has been the case for both the public debt and public equity issue, the combined debt and equity transaction will also involve specific triggering circumstances which will allow the agent to terminate the transaction. The determination in the syndicated deal, whether multiple agents or a selling syndicate will be the involvement of parties other than the lead agent in the making of the determination to terminate. Issues around indemnity, and cost recovery, also need to be considered. In many instances the lead agent will take the sole responsibility, and have the sole right, as to termination and will be the sole party able to recover costs and expenses. This may not be universally applicable, particularly where there are multiple agents, and in those circumstances at least the direct agent group, participating in the transaction, will frequently have a say. Extension to a broader selling syndicate may be suitable in some circumstances.

Termination Events. In addition to any other remedies which may be available to the Agents, any Agent shall be entitled, at its sole option, to terminate and cancel, without any liability on the part of the Agent, all of its obligation under this Agreement and the obligations of any Purchaser in relation to the Offering, by written notice to that effect given to the REIT at any time prior to the Closing Time, if:

- (a) the Agent is not satisfied, in its sole discretion, with its due diligence review and investigations respecting the REIT, its business and operations;
- (b) there should be discovered any material fact which existed as of the date hereof but which has not been publicly disclosed which, in the sole opinion of the Agent, has or would be expected to have a significant adverse effect on the market price or value of the securities of the REIT;
- (c) there is, in the sole opinion of the Agent, a material change or a change in any material fact or new material fact shall arise which would be expected to have a significant adverse effect on the business, affairs, cash flows or profitability of the REIT or on the market price or the value of the securities of the REIT;
- (d) the state of the Canadian, United States or international financial markets is such that, in the sole opinion of the Agent, it would be unprofitable to offer or continue to offer the Debt Units for sale;
- (e) there should develop, occur or come into effect any event of any nature, including without limitation, terrorism, accident, or new or change in governmental law or regulation or other condition or financial occurrence of national or international consequence, which, in the sole opinion of the Agent, acting reasonably, has or would be expected to have a significant adverse effect on the financial markets generally or the business, affairs, operations or profitability of the REIT or the market price or value of the securities of the REIT;

- (f) any inquiry, action, suit, proceeding or investigation (whether formal or informal) (including matters of regulatory transgression or unlawful conduct), is commenced, announced or threatened in relation to the REIT or any one of the officers or trustees of the REIT or any of its principal unitholders which, in the sole opinion of the Agent, acting reasonably, has or would be expected to have a significant adverse effect on the market price or value of the securities of the REIT;
- (g) any order to cease trading in securities of the REIT is made or threatened by a securities regulatory authority; or
- (h) the REIT is in breach of any material term, condition or covenant of this Agreement or any material representation or warranty given by the REIT in the Agreement becomes or is false.

In similar manner to the immediately prior comment, participation by selling syndicate members in the release from duties and responsibilities needs to be considered. It is necessary to consider whether any agent responsibilities to the selling syndicate need to be preserved, and whether the selling syndicate should obtain a similar release if there has been no direct obligation on the part of the issuer.

Exercise of Termination Right. If this Agreement is terminated by an Agent, there shall be no further liability on the part of such Agent or of the REIT to the Agent, except in respect of any liability which may have arisen or may thereafter arise which remain in full force and effect. The right of the Agents to terminate their obligations under this Agreement is in addition to such other remedies as it may have in respect of any default, act or failure to act of the REIT in respect of any of the matters contemplated by this Agreement.

In the public transaction the issuer provides an indemnity, the scope and nature of the indemnity that follows is reasonably balanced, but provides a thorough outline of an indemnity in favour of the agent. The issue for the syndicated transaction will be the extent of the indemnity as to participants other than a direct or lead agent. Where there are multiple agents, regardless of the designation as lead, or otherwise, it would be usual to extend the indemnity to all of the active agents particularly those who directly interface with the issuer or the purchasers, this will depend on the nature of the participation, the timing of the involvement, and the nature and extent of the agreement of the selling syndicate take responsibility for and participate in the issuance.

Indemnity and Contribution.

- (a) The REIT hereby agrees to indemnify and hold the Agents, each of the Selling Firms (to the extent the REIT has consented in writing to such Selling Firm being part of any selling group) and each of their respective affiliates (referred to in this Section collectively, as the "**Agents**") and the directors, officers, partners, employees and shareholders of the Agents (hereinafter referred to as the "**Personnel**", and together with the Agents, the "**Indemnified Parties**") harmless from and against any and all expenses, losses (other than loss of profits), claims, actions, damages or liabilities, whether joint or several (including the aggregate amount paid in reasonable settlement of any actions, suits, proceedings or claims) (each a "**Claim**" and collectively, the "**Claims**"), and the reasonable fees and expenses of its counsel that may be incurred in advising with respect to and/or defending any Claim that may be made against the Agents, to which the Agents and/or their Personnel may become subject or otherwise involved in any capacity under any statute or common law or otherwise insofar as such expenses, losses, claims, damages, liabilities or actions arise out of or are based, directly or indirectly, upon the performance of professional services rendered to the REIT by the Agents and their Personnel hereunder or otherwise in connection with the matters referred to in this Agreement including, without limitation, in any way caused by, or arising directly or indirectly from, or in consequence or caused by or arising directly or indirectly from or in consequence of:

- (i) a material breach of, or default under, any term, condition, covenant or agreement of the REIT made or contained herein or in any other document of the REIT delivered pursuant hereto or made by the REIT in connection with the sale of the Debt Units;
- (ii) a breach of any representation or warranty of the REIT made or contained herein or in any other document of the REIT delivered pursuant hereto or in connection with the sale of the Debt Units being or being alleged to be untrue, false or misleading;
- (iii) any negligence or wilful misconduct by the REIT relating to or connected with the sale by the REIT of the Debt Units;
- (iv) **any omission or alleged omission to state in any of the Final Prospectus, Supplementary Material or U.S. Private Placement Memorandum (including, for greater certainty, the Documents Incorporated by Reference) or in any certificate of the REIT delivered under this Agreement or pursuant to this Agreement any fact (except facts relating solely to the Agents), required to be stated in such document or necessary to make any statement in such document not misleading in light of the circumstances under which it was made;**
- (v) **any order made or enquiry, investigation or proceedings commenced or threatened by any securities regulator or other competent authority, not based upon the activities or alleged activities of the Agents, based upon any untrue, false or misleading statement or omission or alleged untrue, false or misleading statement or omission or any misrepresentation or alleged misrepresentation made by the REIT; or**
- (vi) **the non-compliance or alleged non-compliance by the REIT with any of the Securities Laws relating to or connected with the sale by the REIT of the Debt Units, including the REIT's non-compliance with any statutory requirement to make any document available for inspection,**

provided that, in the event and to the extent that a court of competent jurisdiction in a final judgment from which no appeal can be made or a regulatory authority in a final ruling from which no appeal can be made shall determine that the liabilities, claims, actions, suits, proceedings, losses, costs, damages or expenses resulted from a material breach of the Agreement by the Agents or from breach of applicable laws by the Agents or the Personnel or from the negligence, wilful misconduct or fraudulent act of the Agents or the Personnel, this indemnity shall not apply to such Indemnified Parties and such Indemnified Party shall reimburse to the REIT any funds advanced by the REIT in respect of such claim.

- (b) If for any reason, the foregoing **indemnification is unavailable to the Indemnified Parties or insufficient to hold them harmless, then the REIT shall contribute to the amount paid or payable by the Indemnified Parties as a result of such expense, loss, claim, damage or liability in such proportion as is appropriate to reflect not only the relative benefits received by the REIT on the one hand and the Agents on the other hand but also the relative fault of the REIT and the Agents, as well as any relevant equitable considerations; provided that the REIT shall, in any event, contribute to the amount paid or payable by the Indemnified Parties as a result of such expense, loss, claim, damage or liability, any excess of such amount over the amount of the fees actually received by the Agents pursuant to this Agreement. The rights to contribution provided in this Section shall be in addition to and not in derogation of any other right to contribution which the Indemnified Parties may have by statute or otherwise at law.**

- (c) **Promptly after receipt of notice of the commencement of any legal proceeding against the Agents (or any of them) or any of their Personnel or after receipt of notice of the commencement of any investigation, which is based, directly or indirectly, upon any matter in respect of which indemnification may be sought from the REIT, the Agents will notify the REIT in writing of the commencement thereof and, throughout the course thereof, will provide copies of all relevant documentation to the REIT, will keep the REIT advised of the progress thereof and will discuss with the REIT all significant actions proposed. The omission so to notify the REIT shall not relieve the REIT of any liability which the REIT may have to the Agents except only to the extent that any such delay in giving or failure to give notice as herein required materially prejudices the defence of such action, suit, proceeding, claim or investigation or results in any material increase in the liability which the REIT would otherwise have under this Section had the Agents not so delayed in giving or failed to give the notice required hereunder.**
- (d) **Notwithstanding that the REIT will undertake the investigation and defence of any Claim, the Indemnified Parties will have the right to employ one separate counsel in each applicable jurisdiction with respect to such Claim and participate in the defence thereof, but the fees and expenses of such counsel will be at the expense of the Indemnified Parties unless:**
- (i) employment of such counsel has been authorized in writing by the REIT;
 - (ii) the REIT has not assumed the defence of the action within a reasonable period of time after receiving notice of the claim;
 - (iii) the named parties to any such claim include the REIT, and any of the Indemnified Parties, and the Indemnified Parties shall have been advised by counsel to the Indemnified Parties that there may be a conflict of interest between the REIT and any Indemnified Party; or
 - (iv) there are one or more defences available to the Indemnified Parties which are different from or in addition to those available to the REIT, as the case may be;
- in which case such fees and expenses of such counsel to the Indemnified Parties will be for the account of the REIT. The rights accorded to the Indemnified Parties hereunder shall be in addition to any rights the Indemnified Parties may have at common law or otherwise.
- (e) The REIT shall be entitled, at its own expense, to participate in and, to the extent it may wish to do so, assume the defence of any suit brought to enforce a claim under this Section, provided such defence is conducted by experienced and competent counsel. Upon the REIT notifying the Agents in writing of its election to assume the defence and retaining counsel, the REIT shall not be liable to the Agents for any legal expenses subsequently incurred by the Agents in connection with such defence. If such defence is assumed by the REIT, the REIT throughout the course thereof will provide copies of all relevant documentation to the Agents, will keep the Agents advised of the progress thereof and will discuss with the Agents all significant actions proposed.
- (f) No admission of liability and no settlement of any action, suit, proceeding, claim or investigation shall be made without the consent of the Agents affected. No admission of liability shall be made and the REIT shall not be liable for any settlement of any action, suit, proceeding, claim or investigation made without its consent.
- (g) With respect to any Indemnified Party who is not a party to this Agreement, the Agents shall obtain and hold the rights and benefits of this section in trust for and on behalf of such Indemnified Party.

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