

MSC Notice 2001-37

NOTICE OF POLICY

MSC POLICY 81-602

**USE OF AFTER-TAX CREDIT PERFORMANCE DATA BY
LABOUR-SPONSORED INVESTMENT FUNDS**

Notice of Policy

The Commission has adopted MSC Policy 81-602, Use of After-Tax Credit Performance Data by Labour-Sponsored Investment Funds (the “Policy”), as policy in Manitoba, effective November 30, 2001.

Background

After-tax credit performance data or “ATCPD” is performance data for time periods after which shareholders of a LSIF can redeem their shares without re-payment of tax credits that takes into account such tax credits. At issue has been whether or not use of ATCPD, to illustrate the return earned by an investor who has held an investment in a LSIF for a prescribed period of time, is appropriate.

Substance and Purpose of the Policy

The substance and purpose of the Policy is to address concerns about the use of ATCPD by providing guidance for the use of ATCPD by LSIFs in the province of Manitoba.

Summary of the Policy

The Policy permits LSIFs to use ATCPD in shareholder communications only, subject to certain conditions. The Policy prohibits the use of ATCPD in other forms of sales communications.

Prior Publication and Public Comment

On August 7th, the Manitoba Securities Commission published Notice 2001-24 (the “Notice”) requesting comments on the appropriate use of ATCPD by LSIFs. The Notice suggested three potential solutions:

1. Prohibit the use of ATCPD in any fashion (the “first solution”).
2. Permit the use of ATCPD in shareholder communications only, subject to certain conditions. Prohibit the use of ATCPD in more broadly based advertisements, brochures and other forms of sales communications (the “second solution”).

3. Permit the use of ATCPD in shareholder communications and all forms of sales communications (the “third solution”).

The second solution is the informal policy adopted by staff of the Securities Commissions of Alberta, Saskatchewan, Ontario and Nova Scotia.

The comment period ended on October 7, 2001. Staff received submissions from four parties:

- Aikins, MacAulay & Thorvaldson (on behalf of ENSIS Growth Fund Inc.)
- Fillmore Riley (on behalf of Crocus Investment Fund)
- The Investment Funds Institute of Canada
- Working Ventures Investment Services Inc.

One commentator expressed support for the first solution or, if the use of ATCPD was allowed, the second solution. The other commentators expressed support for the third solution, and one of these commentators also indicated that it supported the second solution if the third solution was not adopted. The comments are summarized as follows:

(a) Comments in support of the first and second solution:

In support of the first solution, one commentator suggested that the use of ATCPD could be misleading. It may, among other things, result in a one-time tax credit being double counted, as it will on one hand be referred to as a “30% tax credit” and on the other and be utilized to artificially inflate fund performance figures. However the same commentator suggested that if the Commission permitted the use of ATCPD, it should use the second solution which should: (1) be brought in immediately; (2) be strictly enforced; (3) use a narrow definition of “shareholder communications” which limits such communications to annual reports and shareholder newsletters; and (4) limit dissemination of “shareholder communications” to mailings directly to shareholders.

(b) Comments in support of the third solution:

Some commentators advised the Commission that a demand exists for ATCPD from the investing public, shareholders, prospective investors, and investment advisors. There is also interest in this information by other experts and the media. In addition, comments were made that allowing LSIFs to provide this information, rather than leaving it to investors or investment advisors to calculate, would decrease the possibility for inaccuracies and ensure all necessary explanation of the data is provided consistently.

It was submitted that use of ATCPD is appropriate because of the difference between the tax structures of LSIFs and RRSPs. The tax credit resulting from the LSIF structure is a tangible reduction in the cost of the investment, whereas RRSP tax credits are only a deferral of income tax. It is therefore appropriate for investors to be told what the performance of their investment is, and will be, after receipt of the tax advantage inherent

in the LSIF structure. ATCPD is also valuable to allow investors to compare the effective rates of return on LSIFs with returns on other investments.

Comments were made that inclusion of ATCPD with actual performance data was necessary to ensure advertising for LSIFs is not misleading. If only actual performance data is provided, an investor will not know the impact of tax credits on his or her potential rate of return, and will be unable to make an informed decision on purchasing shares in a LSIF (particularly when comparing to an investment in a mutual fund). It was suggested that advertising of both actual performance data and ATCPD should be permitted for 1, 3, 5, and 10 year periods, and since inception, as set out in National Instrument 81-102, as well as for the most recently completed hold periods. Rather than restricting ATCPD, the Commission should also set out in its policy appropriate disclosure and explanations that must be included in advertising to differentiate between actual performance data and ATCPD.

It was submitted that the prohibition of ATCPD would be contrary to the general theory underlying National Instrument 81-102 which is that, if standard performance data is provided, any other performance data may also be provided. The other performance data must also be presented in a fair and balanced manner and not be misleading.

c) Commission Response

The Commission reviewed the comments received on this matter. It determined that the first solution was not acceptable as in its view ATCPD does have some value for existing shareholders for the time period after which shareholders can redeem their shares without penalty. However, it did not find the submissions supporting the third solution compelling enough to overcome its concerns that ATCPD, if used broadly in sales communications, may be misleading for prospective shareholders. These prospective shareholders may take the information to represent what they may expect as future performance of the LSIF, notwithstanding disclosures and explanations. The Commission also noted that adopting the second solution would create uniformity with the approaches taken in some other jurisdictions.

Based on the foregoing, the Commission adopted the second solution as its policy. In doing so, the Commission saw merit in defining the term “shareholder communication” and requiring such communications to be delivered directly to shareholders.

Text of the Policy

The text of the Policy follows.

Date of Notice

November 22, 2001

Questions may be referred to:

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Attention: R. B. Bouchard
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