Accounting Analysis of Affordability Fund Trust

ISSUE

How would the proposed Affordability Fund Trust (the Affordability Fund) be accounted for under Public Sector Accounting Board (PSAB) standards in the Province's consolidated financial statements?

RECOMMENDATION

Based on the terms and conditions of the executed Trust Declaration and the Transfer Payment Agreement, the Affordability Fund should be classified as a Trust under Administration and therefore not consolidated as part of the government reporting entity.

To further confirm the economic substance of the relationship between the Province and the Trust, OPCD also assessed relevant terms and conditions of the Trust Declaration and Transfer Payment Agreement in accordance with the control criteria in PS1300 and found that the overall preponderance of evidence indicated that the Trust is not controlled by the government. The results of the detailed analysis is in Appendix I which conclude that only two of PSAB's criteria of control are met, reflecting the Province's ability to (i) establish the mandate of the organization and (ii) the restricting the organization's investments.

With regards to the first criteria, although the Province established the Affordability Fund, it does not have the ability to amend the mandate of the Trust but has a protective right over the amendments.

Regarding the second control criteria noted, the government established the Affordability Fund to support the Ministry of Energy's rate reduction program. While the Trust documents restrict the nature of investments in which the Trust can invest to maintain liquidity and stewardship over the funds, it does not weigh heavily on the control assessment.

BACKGROUND

The Ministry of Energy plans to transfer $100M before March 31, 2017 to a recently formed, limited purpose Trust to establish a new Affordability Fund that will provide energy efficiency measures to electricity customers. Specifically, the Affordability Fund will provide assistance to customers who do not qualify for existing low income conservation programs (e.g. the existing Home Assistance Program (HAP) delivered by LDCs under the Conservation First Framework) and who have difficulty paying their electricity bills.

The Affordability Fund is intended to be available for distributions to beneficiaries who would be identified based on recommendations from Local Distribution Companies (LDCs) based on principles and indicative eligible measures listed in Annex A of the Declaration of Trust. Beneficiaries could include customers in frequent arrears or facing disconnection. Priority is expected to be given to homes which are primarily heated by electricity.

In order to provide funding to the Trust, the Ministry of Energy entered into a Transfer Payment Agreement (TPA) with the Trustee of the Trust (Computershare). Computershare will in the near future be replaced by an independent Board of Trustees which will be appointed based on the advice of an independent Advisory Committee. The Ministry of Energy expects to flow the approved funding ($100M) to the Trust account established by Computershare on March XX _, 2017.

Commented [OPCD1]: Come back to this

Commented [OPCD2]: To add disclosure requirements if not covered elsewhere in the document

Commented [OPCD3]: Has this document been signed by the Ministry of Energy – the copy we have is not signed – we'll need a signed copy for our files.

The Replacement Board of Trustees (to replace the Original Trustee, Computershare) is expected to be comprised of:

- [six] residents of Ontario who have expressed that they are willing to act as members of the Board of Trustees and who, individually and collectively, satisfy the following criteria (collectively, the "Selection Factors"):

  a) each member demonstrates an understanding of the electricity sector including the electricity distribution sector;
  b) each member demonstrates an expertise in conservation and low income programs;
  c) three of the identified individuals will be representatives from separate electricity distributors, two individuals will be representatives from separate social services agencies and one individual member, who will be a non-voting member, will be an employee or representative of the Government of Ontario; and
  d) it is expected that representation by the Government of Ontario will be non-controlling.

Commented [OPCD4]: When will the appointees be determined? Before the public accounts are released?

In accordance with the Trust Declaration, the Trust has engaged with Hydro One to provide administrative services and has the discretion to engage with other entities as service providers to assist with administering the Trust. It is expected that the Trust would consider using administrative services agreements to clearly document services and expectations in delegating its authority. The Trust would distribute funds to identified customers of LDCs across the province (including Hydro One's distribution division) at the discretion of the Trustees, based primarily on the recommendations of the applicable LDCs.

Commented [OPCD5]: What kind of administrative services?

Commented [OPCD6]: I thought they had moved to only identify what LDCs would receive the funds vs. specific customers?

The Declaration of Trust confers broad powers and discretion to the Trustee, to act in the best interest of the beneficiaries. The Trustees are expected to conduct themselves in good faith and have regard to guiding principles set out in the Declaration of Trust (and indicated by the Province in the TPA) in exercising their duties under the Trust Declaration and TPA in distributing funds to LDCs for the benefit of beneficiaries across the province.

The Trust Declaration will be subject to further modification by the Trustee, subject to the Province's protective right under the TPA to consent, where such consent is not to be unreasonably withheld or delayed. The input and involvement of LDCs across the province is anticipated and integral to the success of the Trust in meeting its purpose. The **Principles,** to be considered in the exercise of its discretion**,** are set out in both the Trust Declaration and the TPA.

In addition, a **Permitted Delegation Annex** forms part of the Declaration of Trust, which refers to an expectation that the Trust would rely on participating LDCs to assist with achieving the purpose of the Trust, including an expectation to (a) appoint, employ or retain Implementation Agents for the purpose of discharging its duties and obligations under the Declaration; and (b) enter into, perform, enforce and amend implementation agreements.

Without limiting the Trustee's discretion to negotiate and settle the terms and conditions of the above-mentioned implementation agreements, the Permitted Delegation Annex also outlines certain expected components for the Trust to consider for inclusion in the implementation agreements, recognizing that the ultimate agreements would be subject to negotiation between the Trust and individual Electricity Distributors and the acceptance and agreement of the applicable Electricity Distributor counterparty. The Annex is subject to the Trustee's overall discretion and the Trustees are not bound to use the guidance provided.

Commented [OPCD7]: LDC? If so, can we use that term throughout? Or use Electricity Distributor throughout?

ACCOUNTING ANALYSIS

In accordance with PS1300, the Affordability Fund can be considered a trust under administration and should therefore be excluded from the government reporting entity (ref. PS 1300.40). Exclusion from the government entity is appropriate where there is a legal trust, as with the Affordability Fund, and the property transferred by the Ministry of Energy is conveyed to the Trustee (Computershare) to be administered as directed by the Trust Declaration. The Original Trustee, and subsequently the Replacement Trustee Board hold title to the property for the benefit of the beneficiaries.

Commented [OPCD8]: "Can be" implies a choice of something else – would "should be" more appropriate?

Commented [OPCD9]: Is there anything in the definition of a Trust under Administration in the CPA Handbook that implies that the funding to the trust has to come from outside the government.

I would have thought that this would be like the trust that was set up for the Spadina subway – just an unconsolidated trust.

Under the terms of the Trust Declaration, the Trust fulfills its fiduciary duty and the Province retains no unilateral authority to change the conditions set out in the Trust Declaration. Under PS1300, the assets and activities of Trusts under Administration would therefore be excluded from the government's consolidated financial statements.

Both the Trust Declaration and the Transfer Payment Agreement clearly, and consistently convey the ability of the Trust to act independently in exercising its discretion over entering into agreements with Implementation Agents, funding allocation decisions, and design of eligible measures. The extent to which the government can influence the decisions or activities of the Trust is restricted by the Principles Annex , the suggestions on elements of the administrative/implementation agreements that the Trust is expected to enter into with LDCs, and suggested considerations for eligible measures which might be covered by the program. In none of the documents is the Trust mandated to adopt the government's suggestions.

Control is defined as the ability of one party to govern the financial and operating policies of the other party. According to PS1300, financial and operating policies are principles and practices that determine how an organization conducts its activities which can impact the achievement of its mission and mandate. While the government has established the Trust's fundamental purpose, it has not restricted or limited the ability of the Trustees to make future decisions. Furthermore, the Trust has been established for the benefit of electricity customers. The government does not expect to derive a financial or non-financial benefit from the Trust, nor is the government exposed to the risk of any loss from the Trust.

A number of report-backs requirements are included in the Transfer Payment Agreement which are consistent with OPCD's Trust Guidance, and guidance on One-Time Transfers. In addition, the TPA includes certain audit rights and protective similar to those included in other transfer payment agreements. For example, the government will require the Trust to submit reports for information purposes on the nature and extent of its funding activities, and allow for audits at the discretion of the Province, to provide assurance that the funds have been used for the purposes intended. In accordance with PS1300, such reports are not considered evidence of control because the government's interest in the Trust extends to ensuring that that the Trust is achieving success in satisfying its fiduciary duty and achieving the purposes of the Trust which is to help the most vulnerable electricity customers.

In addition to considering PSAB guidance for Trusts under Administration, OPCD also undertook an assessment of government control over the Trust under PSAB's "indicators of control". In addition to its legal form as a Trust, OPCD considered the economic substance of the relationship between the government and the Trust. Relevant aspects and implications of the relationship were considered in determining whether or not the government controls the Trust. OPCD's Trust Guidance and One-Time Transfer Guidance developed in conjunction with the Office of the Auditor General are also attached as Appendices.

There are a total of 11 PSAB prescribed control indicators that provide evidence of control: 4 persuasive indicators of control and 7 other control indicators. It is the preponderance of evidence that would be considered in assessing whether a government controls an organization.

The following governing documents were reviewed in support of the analysis of the Province's control over the Affordability Fund Trust:

1. Trust Declaration, including related schedules
2. Transfer Payment Agreement
3. PSAB 1300 (esp. PS1300.40-.46)
4. OPCD Trust Guidance
5. OPCD Guidance on One-Time Transfers

Both the TPA and the Trust Declaration clearly reflect the government's intention not to interfere with the unfettered discretion of the Trustees in exercising their fiduciary duties on behalf of the beneficiaries. In particular, Schedule A, Section 1.1(g) (Interpretations) of the TPA includes the following:

> *it is intended that the transfer of the Funds to the Recipient will be a transfer made to a trust that is not controlled by the Province (as the term "control" is used in Government Reporting Entity at paragraphs PS 1300.07-.24), and so if a term or condition of the Agreement is determined to conflict with the requirements applicable to the Province recording the transfers to the Recipient of Funds contemplated hereunder as an expense incurred by the Province on the date of the transfer of Funds under the Agreement otherwise in connection with activities undertaken by the Province with such a non-controlled trust, then such term or condition shall be given a meaning and shall have an effect insofar as it is possible to interpret such term or condition in a manner that eliminates such conflict while preserving the other provisions of the Agreement and furthering the Purpose.*

Appendix I shows the detailed analysis of the Affordability Fund Trust based on a consideration of the of the PSAB indicators of control.

Commented [OPCD10]: Please include preparer and date and space for reviewer and date

APPENDIX I

Affordability Fund Trust
Indicators of Control Analysis
DRAFT

INDICATORS OF CONTROL	EVIDENCE OF CONTROL	CONTROL EXISTS?
Primary (more persuasive) indicators (CICA PS 1300.18):		
i. Government has the power to unilaterally appoint or remove a majority of the members of the governing body of the organization	• Original Trustee (Computershare) is the governing body of the Trust until the Replacement Board of Trustees is selected. As at March 31st, Trustee will hold funds transferred and government will not have power to remove Original Trustee nor have access to the funds transferred. • The government does not control the Original Trustee or the Advisory Committee, and will not control the Replacement Board of Trustees.	X
ii. Government has ongoing access to the assets of the organization, has the ability to direct the ongoing use of those assets, or has ongoing responsibility for losses	• The government does not have an on-going access to assets transferred to the Trust, and any future access will only be through protective clauses (termination/default for material breach). • At the Final Distribution Date, any excess funds will be distributed to a non-controlled Residual Beneficiary in accordance with clause 3.3 of the Trust Declaration. • The government does not have any exposure to losses. **Trust Declaration (sec. 4.2 extracts)** ***(c)Power to Own, Hold and Manage.*** Subject to section 4.2(d), the Trustee shall have the power to own, hold and manage the Assets in such manner as the Trustee, in its sole and absolute discretion, may consider appropriate or advisable. ***(e)Power to Dispose of Assets.*** The Trustee shall have the power to sell, convey, assign, transfer, exchange and in any other manner dispose of the Assets or any part or parts thereof free and clear of any and all trusts established under this Declaration, by public or private sale, for cash or on credit, with or without advertisement, and subject to such restrictions, stipulations, agreements and reservations as the Trustee in its sole and absolute discretion may consider appropriate or advisable, and to execute and deliver and perform any agreement, deed, conveyance, transfer or other document or instrument in connection with the foregoing. ***(o)Title to Assets.*** The Trustee shall have the power to cause all or any part of the Assets to be held by or registered, in its sole and absolute discretion, in the name of any Person.	X

Commented [OPCD11]: Please change to yes and no so there is no interpretation necessary

Commented [OPCD12]: Who provides direction to the trustee prior to the appointment of the permanent trustees/advisory board.

Commented [OPCD13]: Please add the appropriate references to the source documents

Commented [OPCD14]: What does this mean?

INDICATORS OF CONTROL	EVIDENCE OF CONTROL	CONTROL EXISTS?
3. Government holds the majority of the voting shares or a "golden share" that confers the power to govern the financial and operating policies of the organization	"**Declaration of Trust**" means the declaration of trust made as of March 23, 2017, under which the Affordability Fund Trust was established, as such declaration of trust may be amended, restated, supplemented or otherwise modified from time to time with the consent of the Province in accordance with Section 20.2 (see below). **20.2 Declaration of Trust.** The Recipient covenants that it shall not amend, restate or terminate the Declaration of Trust without obtaining the written consent of the Province in respect of same, such consent not to be unreasonably withheld or delayed. **Note: The right of the Province to consent is a protective right only. It does not give the Province the right to make any changes.** **Trust Declaration:** **6.1Amendments** Subject to the requirements of the Transfer Payment Agreement, the Trustee shall have the power in its sole and absolute discretion from time to time without the approval of any Beneficiary or any court to amend, vary, supplement, replace or restate this Declaration in its entirety or any portion thereof; provided, however that it is expected that any amendment shall be consistent with the intent of the principles set forth in the Principles Annex and with the intended scope and effect of the permitted delegations and activities of any Implementation Agent pursuant to the Permitted Delegations Annex. Without in any way limiting the foregoing, any such amendments, variations, supplements, replacements or restatements **Principles Annex (In Trust Declaration):** The Trustee shall have regard to, but shall not be specifically bound by, the following principles in applying its discretion in relation to the administration of the Trust: Schedule A of the Declaration to which it refers lists 'Indicative Eligible Measures' for consideration by the Trustees. In addition, the Permitted Delegation Annex includes non-mandatory elements for consideration by the Trustees in the Implementation Agreements that the Trust may choose to enter into with LDCs (without limiting the Trustee's discretion to negotiate and settle the terms and conditions of such agreements). **Governance in the TPA.** The Recipient covenants that it will develop and maintain in writing until the Agreement is no longer in effect: a) decision-making mechanisms and procedures to enable the Recipient to hold, invest, manage, apply and distribute the Funds in accordance with the Declaration of Trust in	X

INDICATORS OF CONTROL	EVIDENCE OF CONTROL	CONTROL EXISTS?
	furtherance of the Purpose; and b) procedures to enable the preparation and delivery of all Reports required pursuant to Article 7.0. Section 5.8, Rules and Procedures of the Trust Declaration provides further expectations which are typical of a Trust and which do not reflect control by the Province.	
4. Government has the unilateral power to dissolve the organization and thereby access its assets and become responsible for its obligations	Only after the Final Distribution Date or in the event of default will the government have any power or rights in relation to the remaining funds in the Trust. Specific extracts are included below which demonstrate that the province would not have unilateral power to dissolve the organization and access its assets during the normal course of the Trust's existence. With regards to the control criteria's suggestion of dissolving the organization and accessing assets, it should be noted that there are expected to be no assets at the end of the Trust's existence that could be returned back to the Province. The termination of the Trust at the end of the program and following the Final Distribution Date will be an administrative undertaking by the Trustees. The only circumstance that assets might return to the province is contingent and under protective clauses (termination/default) which are not indicative of a unilateral right available to the Province to dissolve the Trust. **<u>Trust Declaration</u>** **7.1 Duration** Subject to sections 7.2 and 7.3, the Trust will continue in full force and effect so long as there are any Assets and until all of the debts, liabilities and obligations of the Trust have been paid and satisfied in full. **7.2 Termination and Distribution of Assets** The Trustee shall terminate the Trust and wind up its affairs as soon as practicable after the Final Distribution Date. In connection with the termination of the Trust, the Trustee shall identify the Residual Beneficiaries and distribute or cause to be distributed the remaining Assets, in cash or in kind or partly in each, to the Residual Beneficiaries, in each case in accordance with section 3.3. Despite the foregoing, the Trust will only be terminated and wound up after the Trustee, in its sole and absolute discretion, determines that all debts, liabilities and obligations of the Trust have been paid or otherwise adequately provided for and satisfied and upon receipt of such releases, indemnities and discharges as the Trustee, relying on the opinion of counsel, deems necessary for the protection of the Beneficiaries and for its own protection. **7.3 Distribution of Assets on Final Distribution Date**	X

INDICATORS OF CONTROL	EVIDENCE OF CONTROL	CONTROL EXISTS?
	If the Trust holds Assets on the Final Distribution Date, the Trustee shall pay or provide reserves for the payment, and otherwise shall satisfy, all debts, liabilities and obligations of the Trust and shall provide or arrange to provide such investigations, audits, releases, indemnities and discharges as the Trustee, relying on the opinion of counsel, deems necessary for the protection of the Beneficiaries and for its own protection. Thereafter, any remaining Assets shall be paid to the Residual Beneficiaries in accordance with section 3.3. **<u>TPA References</u>** **11 EVENT OF DEFAULT, CORRECTIVE ACTION AND TERMINATION FOR DEFAULT** **11.1 Events of Default.** An Event of Default will occur if: a) the Recipient fails to perform or observe any covenant in this Agreement and such failure has and continues to have a material adverse effect on the Province and remains unremedied during any Notice period applicable under section 11.2 after the earlier of (i) actual knowledge thereof by the Recipient, or (ii) receipt by the Recipient of Notice thereof from the Province; b) any representation or warranty made by the Recipient in the Agreement shall prove to have been incorrect in any material respect when made or deemed made, and, if capable of remedy, continues to be incorrect in any material respect during any Notice period applicable under section 11.2 after the earlier to occur of (i) the actual knowledge thereof by the Recipient or (ii) receipt by the Recipient of Notice thereof from the Province; c) it is determined that the Recipient has breached its Standard of Care (within the meaning given in and context of the Declaration of Trust) in discharging its material duties under the Declaration of Trust, with the result that all or a significant part of the Funds have not been or are not being applied in furtherance of the Purpose or are being applied in a manner that is directly contrary or without regard to the Purpose, and, if such breach is capable of remedy, it continues and remains unremedied during any Notice Period applicable under section 11.2 after the earlier of (i) actual knowledge thereof by the Recipient, or (ii) receipt by the Recipient of Notice thereof from the Province; d) an insolvency event shall have occurred and be continuing with respect to the Recipient. **11.2 Consequences of Events of Default and Corrective Action.** If an Event of Default occurs, the Province may, at any time, take one or more of the following actions: (a) provide the Recipient with Notice allowing the Recipient an opportunity to remedy the Event of	

Commented [OPCD15]: What are the covenants in the agreement?

INDICATORS OF CONTROL	EVIDENCE OF CONTROL	CONTROL EXISTS?
	Default during a specified Notice Period; (b) seek an order of specific performance, including an order that the Recipient pursue its available remedies against third parties; (c) require, by Notice of demand, that the Recipient transfer to the Province (without any need for compensation, indemnity or consideration to the Recipient or any Beneficiary or other third party) any and all Assets remaining in the possession or under the control of the Recipient that can reasonably be traced or attributed to the Funds after first providing for the completion and performance by the Recipient of any unperformed contractual obligations of the Recipient undertaken in compliance with the Declaration of Trust on or prior to transfer; and (d) terminate the Agreement, including immediately, without liability, penalty or costs to the Province upon giving Notice to the Recipient. The transfer of Funds in accordance with the Agreement is made by the Province with the expressed intention and reservation that the transferred Funds shall be returned to the Province and the entitlements of the Recipient in remaining Funds shall thereby be revoked with reversion thereof to the Province in the circumstances contemplated in Section 11.2(c). **11.3 Opportunity to Remedy.** If, in accordance with section 11.2, the Province provides the Recipient with an opportunity to remedy the Event of Default, the Province will provide Notice to the Recipient of: (a) the particulars of the Event of Default; and (b) the length of time within which the Recipient may cure such Event of Default without the Province pursuing any other remedy (the “Notice Period”). No right to access assets following Final Date of Distribution: **<u>Declaration of Trust</u>** 3.3Distributions to Residual Beneficiaries Prior to the Final Distribution Date, the Trustee shall identify the Residual Beneficiary, or if more than one the Residual Beneficiaries and their respective allocations, by consulting with and having regard to the recommendations of the Ontario Energy Board, based on those charitable organizations which provide support services for Low Income Energy Assistance Program Emergency Financial Assistance (LEAP EFA) and the Ontario Electricity Support Program (OESP) or other charities that OEB may identify as relating	

Commented [OPCD16]: Is Residual Beneficiary defined?

INDICATORS OF CONTROL	EVIDENCE OF CONTROL	CONTROL EXISTS?
	to the Purpose. Following the Final Distribution Date, the Trustee shall, subject to compliance with section 7.3 and completion of a final audit, distribute all remaining Assets (including capital or income) to the Residual Beneficiaries, in each case in the amounts and to the extent determined by the Trustee in its discretion hereunder (having consulted with and having had regard to the recommendations of the Ontario Energy Board as aforesaid) and to the exclusion of the other Beneficiaries.	
5. Provide significant input into the appointment of members of the governing body of the organization by appointing a majority of those members from a list of nominees provided by others or being otherwise involved in the appointment or removal of a significant number of members	The Original Trustee will establish the Trust and will not be controlled by the Province. In accordance with the Trust Declaration and the TPA, the government will not control the Original Trustee, and will not have a controlling interest in either the Advisory Committee nor the Replacement Trustee Board. The process for Replacement of the Original Trustee by the Replacement Board of Trustees is described in section 5.7 of the Trust Declaration. Although the Original Trustee (Computershare) may have been selected by the Province, and the Advisory Committee members were listed on the Trust Declaration, neither the Original Trustee nor the Advisory Committee will be controlled by the Province. It is relevant to note that PSAB also provides the following guidance with regards to government involvement in appointing governing bodies: PS1300.20 For each indicator that applies in a particular circumstance, the degree of government influence would determine its importance as evidence of control. In weighing the evidence, it would be necessary to consider the indicators collectively as well as individually. For example, where an organization is governed by a publicly elected board, this is not necessarily, in and of itself, sufficient evidence to conclude that the government does not control the organization. Similarly, where a government appoints a majority of the members of the governing body of an organization, this is not necessarily, in and of itself, sufficient evidence that the government controls the organization.	X -
6. Appoint or remove the CEO or other key personnel	Right does not exist. N/A	X
7. Establish or amend the mission or mandate of the organization	Through an agreement with the Trustee (Computershare), it is the entity as settlor and as Trustee which has established the trust. Once established, the Province's Role, under section 4.4 of the TPA is limited to providing funds to the Trust. For greater clarity, the Province's role under the Agreement is limited to providing Funds to the Trust and the Province is not responsible for carrying out or overseeing the terms of the Declaration of Trust.	✓

INDICATORS OF CONTROL	EVIDENCE OF CONTROL	CONTROL EXISTS?
8. Approve the business plans or budgets for the organization and require amendments, either on a net or line-by-line basis	Right does not exist. No intention or documentation demonstrating that province would manage/influence the Trust on a line by line basis. **TPA 4.4 Province's Role Limited to Providing Funds.** For greater clarity, the Province's role under the Agreement is limited to providing Funds to the Recipient and the Province is not responsible for carrying out or overseeing the terms of the Declaration of Trust.	X
9. Establish borrowing or investment limits or restrict the organization's investments	Trust Declaration, Section 1.1 Definitions (j) "***Eligible Investments***" means (i) a deposit receipt, note, certificate or instrument issued, guaranteed or endorsed by a bank listed in Schedule I to the *Bank Act* (Canada), which provides that the principal and any interest shall be fully paid no later than one year after the day the investment was made, or (ii) a deposit account at a bank listed in Schedule I to the *Bank Act* (Canada). ***4.2*** (a) ***Power to Own, Hold and Manage.*** Subject to section 4.2(d), the Trustee shall have the power to own, hold and manage the Assets in such manner as the Trustee, in its sole and absolute discretion, may consider appropriate or advisable. (b) ***Power to Invest in Eligible Investments.*** The Trustee shall have the power to invest the Assets only in Eligible Investments, and to change such Eligible Investments at any time and from time to time, all as the Trustee, in its sole and absolute discretion, may consider appropriate or advisable, but always having regard to the Trustee's expectations regarding the timing of payments to be made to the Beneficiaries hereunder. If an investment of Assets in Eligible Investments would not be authorized under the applicable trust laws of Ontario, the Trustee shall nevertheless be permitted to make an investment of the Assets in such Eligible Investments. The Trustee will have no liability for the diminution in the value of any investment in Eligible Investments made hereunder. *Although some restrictions, given the need for liquidity for the funds and envisioned short term nature of the program, it is unlikely that the Trust would have contemplated investing the funds in any different types of instruments as designated in the Trust docs.*	✓
10. Restrict the revenue-generating capacity of the organization, notably the sources of revenue	There are no revenue generating restrictions in the Trust documents; however, there are references indicating that the Funds are expected to be used for not for profit purposes. It should also be noted that the nature of a Trust is not to generate revenue or make a profit, but to fulfil a fiduciary duty on behalf of the beneficiaries. No explicit restriction mentioned in the Trust Declaration or TPA related to other activities of the trust; however,	X

INDICATORS OF CONTROL	EVIDENCE OF CONTROL	CONTROL EXISTS?
	expectation that funds provided by the province will not be used for profitable purposes by the LDCs.	
11. Establish or amend the policies that the organization uses to manage, such as those relating to accounting, personnel, compensation, collective bargaining or deployment of resources	The Trust Declaration and the TPA are not intended to interfere with the discretion of the Trust to establish or amend its own financial and operating policies. However, the Province does provide non-compulsory Principles which are expected to be considered by the Trustee in executing its administration of the Trust. In addition to the guiding Principles, the Trust Declaration includes a Permitted Delegation Annex, which provides that the Trustee will be permitted, and is expected to seek to delegate its powers and duties to LDCs. These sections are descriptions of matters that would typically be expected in an Implementation Agreement (without limiting the discretion of the trustee to negotiate and settle the terms and conditions of such agreements). **Section 4.2 of the Declaration lists the Enumerated Powers of the Declaration, including:** The Trustee shall have the following specific powers and authorities: a) *Transfer Payment Agreement.* b) *Contracts and Undertakings.* c) *Power to Own, Hold and Manage. .* d) *Power to Invest in Eligible Investments.* e) *Power to Dispose of Assets.* f) *Power to Apply Assets and Proceeds to Make Distributions to Beneficiaries.* g) *Power to Delegate and to Appoint Agents, etc.* h) *Power to Operate Accounts.* i) *Power to Collect, etc.* j) *Power to Obtain Insurance.* k) *Power to Pay Trustee's Fees.* l) *Power to Pay Taxes.* m) *Power to Appoint Auditors.* n) *Form of Accounts.* o) *Title to Assets.* p) *Delegation of Discretion.* q) *Additional Powers.* None of the above noted powers are restrictive or suggest that the government is controlling the activities of the Trust. The TPA Extract includes the following reference which does not conflict the non-controlled nature of the Trust and/or are consistent with OPCD's guidance on One-Time Transfer Payments or Trust Guidance reviewed previously with the Office of the Auditor General: 4.2 The Trustee is expected to conduct its activities in a manner that complies in all material respects with the Transfer Payment Agreement, including to:	X

Commented [OPCD17]: I would suggest that this factor is not applicable.

INDICATORS OF CONTROL	EVIDENCE OF CONTROL	CONTROL EXISTS?
	i. act prudently and in furtherance of the Purpose; ii. report not less frequently than annually the results of its activities for information purposes to the Province in connection with the Program; iii. comply with the Province's request for any independent verification or audit if determined to be necessary or appropriate by the Province; iv. return Assets that have not been distributed if it is determined that the Trustee has breached its Standard of Care in discharging its material duties under the Declaration, and has not cured such material breach despite having been given a reasonable opportunity by the Province to do so in light of the circumstances of such material breach, with the result that all or a significant part of the Assets have not been or are not being applied and distributed in furtherance of the Purpose or are being applied and distributed in a manner that is directly contrary or without regard to the Purpose. **5.0 RECIPIENT'S ACQUISITION OF GOODS OR SERVICES, AND DISPOSAL OF ASSETS (TPA)** **5.1 Acquisition.** If the Recipient acquires goods, services, or both with or by applying the proceeds of the Funds, it is expected to do so through a process that promotes the best value for money and to take reasonable steps to ensure that its Administrative Services Agents and Implementation Agents also follow a process that promotes the best value for money when acquiring goods and services with or by applying the proceeds of the Funds. **Both the TPA and the Trust Declaration include a PRINCIPLES ANNEX** The Trustee is expected to have regard to the Principles, but shall not be specifically bound by the principles in applying its discretion in relation to the administration of the Trust.	

Appendix II

Extract from PS1300

TRUSTS UNDER ADMINISTRATION

.40 *Trusts administered by a government or government organization should be excluded from the government reporting entity.* [JUNE 1996]

.41 Trusts are defined as property that has been conveyed or assigned to a trustee to be administered as directed by agreement or statute. In a trust relationship, the trustee holds title to property for the benefit of, and stands in a fiduciary relationship to, the beneficiary.

.42 To meet the definition in paragraph PS 1300.41, the property conveyed or assigned to the government or government organization acting as a trustee, must be provided to fulfill a particular objective of the donor of the property conveyed or assigned. The government or government organization would merely administer the terms and conditions embodied in the agreement and has no unilateral authority to change the conditions set out in the trust indenture. For this reason, the assets and activities of the trust are excluded from the government's reporting entity.

Commented [OPCD18]: I don't think this is the circumstance of this trust

.43 A government or government organization acts as trustee when it administers trusts on behalf of the beneficiaries specified in the agreement or statute. As trustee, the government is accountable to third parties for the use and disposition of trust assets and for the funds derived from those trust activities. Trust assets are not owned by the Crown in right of Canada, a province or territory, or by a local government, and should not be included in the government reporting entity.

.44 *Government financial statements should disclose, in a note or schedule, a description of trusts under administration by a government or government organization, and a summary of trust balances.* [JUNE 1996]

.45 To acknowledge and report on the magnitude of trusts administered by a government or government organization, a note or schedule to government financial statements would describe the trust assets under administration and would set out a summary of trust balances.

.46 Often the term "trusts" is applied to assets earmarked as a result of a government policy decision when no trust liability exists. Such assets are special funds that comprise part of the government reporting entity and would be consolidated.

Appendix III

ACCOUNTING CONSIDERATIONS FOR GOVERNMENT-FUNDED TRUSTS

Commented [OPCD19]: Please document the source of this guidance – e.g. was it agreed to by the AG – if so, when.

Purpose:

The purpose of this guidance is to explore accounting-related considerations related to government-funded trusts which are established by the government to fund a specific purpose or activity. This guidance deals specifically with the difference between controlled and non-controlled trusts, the introduction of accountability provisions which can now be reflected in trust agreements, and key timing considerations for trusts contemplated towards year-end. It is important that these factors be taken into account when establishing a trust, in order to achieve the intended fiscal impact and appropriate accountability over the use of public funds.

Introduction:

Trusts are usually established by way of trust declaration or trust agreement, and are one of several means by which the government can direct funding to support key policy initiatives. Simply stated, trustees hold title to property for the benefit of, and stand in a fiduciary relationship to the beneficiaries. Trustees are accountable to third parties (beneficiaries) for the use and disposition of trust assets and for the funds derived from those trust activities. The trust itself is not a separate legal entity. The trustees carry out the activities of the trust in the name of the trustees.

Generally, direct year-end transfers are the preferred alternative over trusts where the province wants to retain ultimate decision-making authority regarding amounts to be transferred to recipients. Direct transfers are more appropriate where the identity of eligible transfer payment recipients is known and the amounts to be transferred to each recipient can be or has been determined.

Year-end transfers to a trust might be considered where the province desires to delegate to third parties ultimate decision-making authority regarding allocation of amounts amongst eligible beneficiaries.

A trust must be valid for legal purposes in order to be recognized for accounting purposes. Key requirements for a trust to be valid include: an intention to create a trust (‘certainty of intention’), certainty of subject-matter of the trust (“certainty of subject matter”) and the objects of the trust must be certain (‘certainty of objects”). There are generally two different types of trust, a trust in which the objects are the “beneficiaries” and trust in which the objects are a “purpose” (e.g. for charitable purposes). Where a trust is under serious consideration, it is imperative that ministries seek legal advice to ensure that the contemplated trust will be valid.

Trustees are obligated to follow the terms of the trust declaration or trust agreement which will usually detail the powers and duties of the trustees including the number of trustees and how decisions will be made by the trustees.

Controlled versus Non-Controlled Government-Funded Trusts

From an accounting perspective, it is important to distinguish whether the design and governance of a particular trust results in the trust being controlled by the Province for accounting purposes. Control stems from the nature of the relationship between the government and the trust. Financial and operating policies are principles that determine how an organization conducts its activities. The ability to govern these policies is an important element of government control.

The means by which a trust is established, the government’s representation among the trustees, the government’s involvement in the trust’s governance processes and ability to impact trustee discretion in decision-making are but some of the factors to be considered in assessing whether a trust is ‘controlled’ or ‘not controlled’ by the government.

In establishing a trust, it is important to achieve the intended relationship between the province and the trust in order to achieve the intended fiscal impact.

Non-Controlled Trusts:

Where trusts are not controlled by the Province, they are excluded from the government reporting entity. For non-controlled trusts, the following accounting would apply to trust funding:

- Where funds provided to the "trust" are unconditional, the Province would record a transfer payment expense for any transfers approved in the current period (and flowed by finalization of public accounts).

- Where funds provided to the "trust" are conditional (i.e. upon the trust completing some specific task or result), the Province would initially record funding to the trust as a prepaid expense until the conditions are met at which time the Province would record a transfer payment expense, with the corresponding credit to prepaid expense. This may occur over a number of fiscal years.

Commented [OPCD20]: I don't think you would ever get to prepaid accounting now under 3410 – may want to clarify that – assuming this document preceded the current 3410.

In determining whether a trust is controlled, there are a variety of ways that a government might be perceived to be governing the financial and operating policies of a trust. These include:
- Eliminating or significantly limiting the ability of the trustees to make future decisions
- Directing the financial and operating policies of the trust
- Overruling, modifying or vetoing the financial and operating policies established by the trust.

Specific factors that should be considered in establishing a non-controlled trust include:
- Government representation in the trustees (should be in a minority position), and non-government trustees should be nominated by non-government sources
- Government influence over day-to-day trust governance and trustee discretion to make decisions (e.g. selection of eligibility criteria, selection of recipients).
- degree of influence over how funds are disbursed (i.e. the Declaration of Trust can provide general guidelines but not be overly prescriptive)
- the government's power to unilaterally appoint or remove the majority of trustees
- the government's on-going access to the trust's assets, or right to direct decisions regarding the flow of those assets to specific beneficiaries
- the government's unilateral power to dissolve the trust, except under specified circumstances as stipulated by the trust agreement (i.e. corrective action)
- the government's ability to establish or amend the policies used by the trust to manage accounting, personnel, deployment of resources, etc.

In some cases, it may be advantageous for ministries to provide administrative support to trusts. In these cases it is important that the extent of such support is not so pervasive as to influence or direct the day-to-day financial or operating policies of the trust, otherwise the trust will be deemed controlled and will be subject to consolidation in the government reporting entity.

Controlled Trusts:

If the Province controls the trust (for example, through its power to appoint a majority of the trustees on the board of trustees), the Province would be deemed to have control of the trust, resulting in the trust being accounted for in the same manner as other organizations controlled by the province (i.e. on a consolidated basis). As a result, the Province's contribution to the trust would not be expensed when it is transferred, but rather over time as the funds are disbursed to trust beneficiaries.

Accountability Related Considerations:

The Auditor General has confirmed that the new accountability provisions developed for one-time transfers can also be applied to trusts without impacting the expense treatment of any transfers to non-controlled trusts.

These new accountability provisions will enable the government and the Legislature to:

- obtain assurance that a trust is spending public funds prudently and for the purposes intended and to take corrective action if it is not;
- ensure ministerial accountability to the Legislative Assembly for the trust's activities; and
- ensure that the province is able to take corrective action where warranted and as stipulated under terms of the trust agreement.

It should also be noted that the Auditor General's Act now allows the Province's Legislative Auditor to conduct special audits of any person or organization receiving transfers from the government, including trusts.

To enhance accountability controls over government transfers to non-controlled trusts, Ministries can consider incorporating some or all of the following accountability provisions as part of their trust agreement/declaration without impacting the accounting treatment of the trust.

The inclusion of any of these provisions should not result in a trust being assessed as 'controlled'. Note that the key determinant in identifying appropriate provisions for any individual trust is a ministry's assessment of the **risk** associated with a particular trust, as per the Transfer Payment Directive.

1. **Description of intended use of trust funds**;
    - specific purpose(s) for which the funds are to be used;
    - description of intended recipients and related eligibility criteria*; and,
    - the nature of eligible expenditures relevant to the transfers.

    *Note: avoid *overly prescriptive* eligibility criteria which would effectively eliminate or significantly limit the trustees' discretion to make funding decisions.

2. **Requirement for information**
    - Information to be provided by the trust at a future date (e.g. requirement for trustees to advise the government of trustee-developed performance criteria, and provide annual assessments against those criteria)

3. **Report-back requirement for Public Accountability**
    - information to be provided by the trust at a future date with respect to the stewardship and payment of transfer funds (e.g. audited financial statements, audited list of recipients and amounts funded).

4. **Right to independent verification/audit**
    - The Province reserves the right to audit any transfer payment recipients. The trust agreement should make reference to this fact.

5. **Right to take corrective action**
    - Where stipulated under the trust agreement, the Province reserves the right to re-direct unused funds where results of a trust assessment (where required by the trust agreement) indicate original purpose of the trust is not being achieved, or if there remain unused funds at the end of the trust term.
    - Province may also reserve the right to extend the term of the trust agreement, where funds remain at the end of the trust period.

To qualify for in-year expense treatment, the non-controlled trusts must satisfy the following:

- the decision to establish the trust must have been approved by Treasury Board/Management Board of Cabinet and ratified by Cabinet by March 31st;
- the ministry providing the transfer must have approved appropriations and spending authority by March 31st;
- Trustees must have been identified and signed the trust declaration or agreement to establish a valid trust by March 31st ;
- the trust must be set up and ready to receive funds, and a nominal amount transferred to the trust by March 31$^{s;t}$; and,
- the government should have communicated publicly (e.g. in the Budget document) the pending or final establishment of the trust.

In addition, all remaining funds beyond those initially transferred at March 31st should be transferred to the trust by June 30th.

Appendix II (continued)

Trusts
Questions and Answers on Trust Guidance

Question: *Where a trust is announced in the Budget document, must the trust be established by March 31st, or could such a trust be established shortly thereafter without impacting the expensing of transfers to the trust in 2007-08?*

Answer: *A trust would have to be established prior to the end of a fiscal period in order to satisfy the recognition criteria for government transfers. If the intended recipient for a government transfer does not exist at March 31st, the province cannot record a payable owing to it under existing accounting standards.*

Question*: Does the transfer of funds to a non-controlled trust need to occur by March 31st or before the date of Public Accounts finalization?*

Answer: *Consistent with the new requirements for one-time transfers, as long as the trust is established by March 31st, the transfer is authorized and a reasonable estimate of the amount can be made, cash payments can be made after year-end.*

Question: *Can beneficiaries of a non-controlled trust include consolidated entities provided that the ultimate selection of recipients is at the discretion of the Trustees?*

Answer: *Any amounts provided to a trust which are in turn be provided to an organization inside the government reporting entity should not be expensed at the time of the transfer to the trust. Any amount that is flowed to a trust with the intention of subsequently flowing the funds to a consolidated entity should not be recorded as an expense to the government.*

Commented [OPCD21]: Can we address this in the analysis – is it the case that funds will flow from the Trust to Hydro One and then to customers? If so, how long will Hydro One hold the funds?

Question: *Can a Ministry provide administrative support to a trust without compromising the non-controlled status of the trust?*

Answer: *The government can provide administrative support as long as the extent of government administrative support is not so pervasive so that the government is in substance establishing and managing the trust's policies in the areas of accounting, personnel, compensation, collective bargaining or deployment of resources. Where such administrative support is assessed as pervasive, it could impair the trust's non-controlled trust and the trust will be consolidated onto the province's financial statements.*

Can the following clauses appear in a trust agreement for a non-controlled trust to ensure adequate accountability over public funds without impacting the expense treatment of such trusts?

Question*: Specific description of purpose of the trust (possibly including nominal allocation among various objectives)*
Answer: Yes.

Question: *Can the trust agreement include a specific description of the intended groups of beneficiaries and detailed eligibility criteria.*

Answer: *Specificity should be applied cautiously, so as not to limit the discretion of the trustees in their subsequent grant making processes. For the trust to be considered 'not controlled' it should not be seen as 'establishing the trust's fundamental purpose and eliminating or significantly limiting the ability of the trust to make future decisions by predetermining the financial and operating policies of the trust.*

Question: *Can trustees stipulate that funding is to be provided to beneficiaries on a cost-sharing basis?*
Answer: *Yes.*

Question: *Can the trust agreement include a requirement for a trust to report back to the province on trustee-established performance criteria and results, audit of financial statements, audited recipients and amounts, confirmation that trustees communicated to beneficiaries the intended purpose of the funding, etc.*
Answer: *Yes.*

Question*: Requirement for Trust to publicly post communications on existence, availability of funds, eligibility criteria, recipients and amounts granted to each recipient.*
Answer: *Yes*

Question: *Inclusion of a 'suggested' drawdown schedule over a period of years, with discretion left to Trustees as to actual results.*
Answer: *The inclusion of a drawdown schedule is not suggested for one-time, up-front transfers.*

Question: *Trust agreement can suggest accountability provisions which might be attached by Trustees to beneficiary payments (e.g. specific purpose of funding, requirement for report-back, right to audit, corrective actions).*
Answer: *Yes*

Question: *Trust agreement to reserve the province's right to re-direct any unspent funds to specified parties (e.g. non-consolidated entities or another non-controlled trust) at the end of the trust term, or alternatively to extend the term of the trust where unspent funds remain.*
Answer: *Yes*

Question*: Can the trust agreement include the requirement for evaluations of the trust at certain times (e.g. years 3, 7, 10 of the trust agreement), with the right for the government to decide either to terminate the trust (corrective action) based on the results of the assessment, or extend the trust beyond the initial term as per the agreement.*
Answer: *Yes.*

Question: *Trust agreement can require Trustees to request as part of the funding process that beneficiaries acknowledge receipt of government funding in their public communications on specific projects.*
Answer: *Yes.*

Appendix IV

ACCOUNTING TREATMENT FOR ONE-TIME TRANSFERS WITH ENHANCED ACCOUNTABILITY PROVISIONS

Commented [OPCD22]: Please document source of information

Purpose:

The purpose of this guidance is to identify the nature of the accountability provisions which may be associated with one-time transfer payments that qualify for immediate expense treatment in the current period.

Definition of One-time transfers:

One-time transfers are defined as lump-sum operating or capital transfers that

- are not advancing currently planned future transfer payments under an existing on-going program, or
- are not identified as being intended to be spent in specified future periods or over a specified period of time.

Background:

Transfer payments are a means by which the government works with third parties to deliver public services. Transfer payment recipients must be held responsible by the government to deliver the provincially-funded services and be accountable for the funds they receive. Consistent with the *Transfer Payment Accountability Directive, August, 2007*, a risk-based approach is to be followed in designing the appropriate accountability and reporting mechanisms for specific funding agreements.

The current *PSAB Handbook Section 3410, Government Transfers requires that a government transfer should be recognized by a transferring government as an expense in the period the transfer is authorized and all eligibility criteria have been met by the recipient.*

To recognize a liability and expense as at year-end:

- the government must create a valid expectation of the recipient by year-end, leaving the government little or no discretion to avoid but to settle its obligation;
- no significant, contingent actions should be outstanding which if unfulfilled by year end might cause the transfer not to occur.

It is understood that the intention of negotiating a transfer payment agreement following the government's commitment to the recipient is to work out the administrative details of the arrangement, not to change any key elements of the government's commitment. As such, any correspondence which indicates that funds will not be flowed until a TPA is signed should make clear that the nature of additional details to be negotiated is logistical and administrative in nature (bank account info, reporting requirements, etc.)

The government should not suggest or direct the recipients to use the funding for future periods.

To enhance accountability controls over one-time transfers accountability provisions one through five below are required for one-time transfers.

1. **Description of intended use of one-time transfer funds**;
   - specific purpose(s) for which the funds are to be used; and,
   - the nature of eligible expenditures relevant to the transfers.

2. **Report-back requirement for Public Accountability**
   - Periodic reporting on the use of transfer funds, service deliverables, outputs or outcomes achieved.

3. **Right to independent verification/audit**
   - at the discretion of the Province to verify/audit information submitted by the recipient is complete and accurate, and that funds were used for purposes intended.

4. **Right to recover funds (corrective action)**
   - If the funds were not used, or will not be used, for the intended purpose(s), specified services were not delivered, or intended outputs were not achieved, the Province has the right at a future date to recover funds transferred.

5. **Requirement for information** (*this item optional*)
   - information to be provided by the recipient at a future date with respect to the use of transfer funds, service deliverables, outputs or outcomes achieved.

To qualify for in-year expense treatment, the transfers must satisfy the following:

- be approved by Treasury Board / Management Board of Cabinet and then ratified by Cabinet by March 31st;
- the ministry providing the transfer must have approved appropriations and spending authority by March 31st;
- the recipients must be eligible to receive the grant by March 31st (i.e. eligibility criteria have been met prior to March 31st), and the intent to make the transfer payment must be communicated to the recipients by March 31st;
- In addition, funding details including accountability provisions must be communicated to the recipients, and the transfer payments must be made to the recipients prior to the finalization of the Public Accounts (currently June 30th);
- Where funds are flowed to recipients by March 31st, all eligibility criteria are assumed met for accounting purposes[1], and all amounts flowed are recorded as an expense, even where conditions might exist which remain unmet at March 31st.

[1] PS 3410, Government Transfers, states that “no matter how a transfer term is identified in legislation, regulations, by-laws or a transfer agreement (i.e., as an eligibility criterion or a stipulation), the crucial characteristic that distinguishes the substance of these two types of transfer terms is when they are required to be or are met by a recipient. If a term is required to be and is met before the transfer is provided, it is an eligibility criterion for the purposes of this Section. If a transfer term is met after the transfer is provided, it is a stipulation for the purposes of this Section”.