

18 September 2013

Aileen Chia (Ms)  
Deputy Director-General (Telecoms & Post)  
Infocomm Development Authority of Singapore  
10 Pasir Panjang Road  
#10-01 Mapletree Business City  
Singapore 117438

Dear Ms. Chia,

**Public Consultation on the Long Form Consolidation Application for the Acquisition of OpenNet Pte Ltd**

I write this paper in response to iDA's invitation to comment on the proposed acquisition of OpenNet Pte Ltd.

I do not seek to make a case in favour of or against the proposed Consolidation. This paper instead discusses a telecom regulatory issue of whether a trust beneficiary may acquire significant market power through its equitable ownership of hard-to-replace bottleneck trust assets. It also discusses a corollary issue of whether there is a valid presumption that a business trust beneficiary does not have effective control over a trust asset.

I hope my views will be useful to the iDA.

Yours sincerely,

Andrew Ngiam

## **INTRODUCTION**

The proposed Consolidation poses two academic questions: (i) whether a trust beneficiary can acquire significant market power through a business trust, and (ii) whether there is a valid presumption that a trust beneficiary does not have effective control over trust assets.

The first question is a question of fact and can be conclusively determined by adopting a fact-sensitive approach. To answer the second question, one must consider that a presumption is an inference of facts, drawn from the existence of other facts, and may be ascertained from the circumstances of the case. The above presumption may fail because:

- (i) a merger of the interests of the trust beneficiary and the trustee-manager may create a propensity for dominant operator conduct;
- (ii) the Business Trusts Act does not expressly prohibit trust beneficiaries from exercising influence over the trustee-manager or are trustee-managers prohibited from seeking directions from the trust beneficiaries;
- (iii) the presence of independent directors, or an absence, is not a conclusive factor in determining effective control; and
- (iv) assurances by a trust beneficiary to reduce its wholly-owned units in the business trust remains at best a mere assurance.

## **THE PROPOSED CONSOLIDATION**

OpenNet, CityNet, NetLink Trust and SingTel have jointly submitted a Long Form Consolidation Application to the iDA. The application is in relation to a proposed acquisition by CityNet of 100% of the issued share capital in OpenNet<sup>1</sup>. As trustee-manager of NetLink Trust, CityNet holds trust assets for the benefit of SingTel. Prior to the Consolidation, SingTel has a 30% stake in OpenNet but through NetLink Trust, will acquire the remaining 70% of OpenNet's shares from Axia NGNetworks Asia Pte Ltd, SPH Net Pte Ltd and SPT Net Pte Ltd. Post Consolidation, SingTel will have a 100% beneficial ownership in OpenNet.

In approving the proposed Consolidation, the iDA will have regard to the requirement that the acquisition of OpenNet by NetLink Trust must not substantially lessen competition in any telecommunications market in Singapore

---

<sup>1</sup> *iDA*, "Long Form Consolidation Application submitted by OpenNetPte Ltd, NetLink Trust, CityNet Infrastructure Management Pte Ltd and Singapore Telecommunications Limited", 28 August 2013

or harm the public interest<sup>2</sup>. In accordance with the rules for consolidation<sup>3</sup>, SingTel has proposed for an examination primarily by assessing the “horizontal” and “non-horizontal” impacts of the transaction on the telecommunications market<sup>4</sup>.

### **A DEEP ISSUE: WHETHER A TRUST BENEFICIARY CAN ACQUIRE SIGNIFICANT MARKET POWER THROUGH A BUSINESS TRUST?**

But a regulator must consider a deep issue of whether an operating company may exercise significant market power by acquiring a natural monopoly- the Next Generation National Broadband Network (“Next Gen NBN”), albeit through a business trust. As the owner and operator of Singapore’s Next Gen NBN, OpenNet exhibits characteristics of a natural monopoly. Regulators in such instances typically demand a true structural separation, if not operational separation, of the network from the operating company.

Prima facie, a business trust can effect structural separation. Under a structural separation, the elements of ownership and effective control of the Next Gen NBN are decoupled from its controlling entity, thereby preventing a merger of interests. And market place competition is promoted when the separated companies act independently of each other. Operational separation, a less invasive form of separation, decouples the control element but leaves the ownership element intact. An owner of an operationally separated Next Gen NBN will continue own the assets but must operationally separate to satisfy the requirement of no effective control.

In a business trust, the legal and equitable ownership of the Next Gen NBN are decoupled and are vested in separate entities- the trustee-manager holds the legal title while the trust beneficiary holds the equitable title. As a variant of structural separation, a business trust has the same ability to decouple the elements of ownership and effective control of the Next Gen NBN. The trustee-manager possesses legal ownership and retains the day-to-day control of the trust assets but must apply the trust asset for the benefit of the beneficiary, the equitable owner. A trust is therefore a perfect vehicle to facilitate complex arrangements regarding property<sup>5</sup>.

---

<sup>2</sup> IDA, *Code of Practice for Competition in the Provision of Telecommunication Services 2012*, 10.4.6.7 (a)

<sup>3</sup> *Ibid* s.10.3.6

<sup>4</sup> *Singapore Telecommunications Pte. Ltd*, “Long Form Consolidation Application, NetLink Trust Acquisition of 100% of the Issued and Paid-Up Capital in OpenNet Pte Ltd”, 22 August 2013

<sup>5</sup> Robert Pearce, John Stevens, *The Law of Trusts and Equitable Obligations*, 4<sup>th</sup> ed. (New York: Oxford University Press, 2006), at 100.

## **SINGAPORE'S NEXT GENERATION NATIONAL BROADBAND NETWORK IS A NATURAL MONOPOLY**

The Next Gen NBN is a natural monopoly. A natural monopoly is a persistent situation where because of the fundamental cost structure of the industry, the market is best served by a single supplier of services. Dr. Lee Boon Yang, the Minister for Information, Communications and the Arts (as he then was) declared that “*Singapore’s small size makes the eventual operating company a natural monopoly. Structural separation will ensure fair competition and that we get the best value for the government’s money*”<sup>6</sup>. In 2009, OpenNet was issued a licence by the iDA to install, operate and maintain the passive infrastructure and systems of Next Gen NBN and provide “Layer 1” connectivity services and other ancillary services. As precondition for the licence award, OpenNet must structurally separate from the downstream operators to ensure consistency with the policy objective of effective open access<sup>7</sup>.

The Next Gen NBN is the wired network of the Next Generation National Information Communications Infrastructure. And is envisaged under the Intelligent Nation 2015 master plan to provide nationwide ultra-high speed broadband access of 1Gbps and beyond to all homes, schools, and businesses<sup>8</sup>. Currently there are eight OpCos taking fibre-based services over the Next Gen NBN at the wholesale level from OpenNet and more than 20 RSPs providing fibre-based services at the retail level to residential and business customers<sup>9</sup>. Further, the Next Gen NBN is also expected to render obsolete the legacy telecommunication networks.

## **CAN A TRUST BENEFICIARY EXERT SIGNIFICANT MARKET POWER THROUGH A TRUST ASSET?**

As remedies to address competition concerns, structural and operational separations are premised on a presumption that a vertically-integrated operator can and will exercise its significant market power acquired by its effective control of the Next Gen NBN. This is the cornerstone of ex-ante regulations.

---

<sup>6</sup> Victoria Ho, “Singapore Opens Broadband Tender”, *Bloomberg BusinessWeek*, (12 December 2007) <<http://www.businessweek.com/stories/2007-12-12/singapore-opens-broadband-tenderbusinessweek-business-news-stock-market-and-financial-advice>>

<sup>7</sup> Dr. Lee Boon Yang, Minister for information, Communications and the Arts, “The Launch of Next Generational National Broadband Network Request-For-Proposal”, *Esplanade Room, Ministry of Information, Communications and the Arts*, 11 December 2007

<sup>8</sup> IDA, “Realising the iN2015 Vision, Singapore: An Intelligent Nation, a Global City, Powered by Infocomm”, 2010, at page 7 <<http://www.ida.gov.sg/~media/Files/Infocomm%20Landscape/iN2015/Reports/realisingthevisionin2015.pdf>>.

<sup>9</sup> *Supra* note 1 at 11

It is trite knowledge that a firm can obtain significant market power by acquiring or controlling difficult to replicate bottleneck facilities<sup>10</sup>. But the answer is less than obvious if the proposed take-over assets were injected into a business trust. A regulator must consider whether a trust beneficiary may exercise effective control over the Next Gen NBN. This is crucial as the operator will have complete beneficial ownership in Singapore's Next Gen NBN. And it is from this network that all competitive service providers require non-discriminatory network access, interconnection and wholesale services. This is possibly the first time an issue of such nature is put forth for a regulator's consideration. The proposed Consolidation may be a landmark case and a decision by a Singapore regulator will set a precedence in Singapore and also serve as an example to other jurisdictions.

Under the Telecoms Competition Code, the iDA will deny a Consolidation Application where it determines that the Consolidation is likely to result in a substantial lessening of competition in any telecommunication market or harm the public interest<sup>11</sup>. The iDA is also empowered to approve the Consolidation Application, subject to conditions designed to reduce any anti-competitive harm or effects<sup>12</sup>. SingTel has proposed the approval of the Consolidation to rest solely on assessing the likely "horizontal" and "non-horizontal" effects of the transaction in the telecommunication market. If so, the outcome of this exercise may be positive for the applicants as the proposed consolidation is not expected to result in any negative change to existing relevant market concentration levels.

### **STRUCTURAL SEPARATION REMEDY AND THE PRESUMPTION OF SIGNIFICANT MARKET POWER**

In a true structural separation, a regulator may validly presume at the outset that the significant market power concerns are adequately addressed. Here the vertically-integrated operator physically restructures its Next Gen NBN into another company, thereby effectively delinking its competitive downstream activities from its non-competitive upstream activities. Structural separation also completely restricts information flows between the separated entities. Functional separation, on the other hand, is a less invasive remedy. While it does not demand actual separation of ownership of the Next Gen NBN, it is characterized by heavy self-regulation, strict internal governance arrangements and regulator-imposed monitoring requirements.

---

<sup>10</sup> *Supra* note 2 at s2.3(a), s.2.2.1(a), s.2.2.1(b)

<sup>11</sup> *Supra* note 2 at 10.3.6.7(a)

<sup>12</sup> *Ibid* at 10.

The iDA regards the absence of effective control as a necessary condition for structural separation. To effect structural separation, the iDA requires a licensee (acting alone or in concert with its associates)

- (i) not to have effective control of any other telecommunications or broadcasting licensee;
- (ii) not to be under the effective control of any other telecommunication or broadcasting licensee; or
- (iii) not to be under the effective control of the same Controlling Entity as any other telecommunications or broadcasting licensee<sup>13</sup>.

In interpreting what effective control is in relation to a business trust, the iDA looks to sub section 10.1.1(p) of the Telecom Competition Code<sup>14</sup> as follows:

*“Effective Control” means... the ability to cause the Trustee-Manager of the Designated Business Trust to take, or to refrain from taking, a major decision regarding the management or operations of the Designated Business Trust.”*

In its explanatory notes<sup>15</sup>, the iDA introduced the phrase “...and without limitation” includes the situation where such ability – (i) is exercisable by the Controlling Entity through direct or indirect voting power in the Controlled Entity; or (ii) is exercisable on the basis of rights acquired via contracts, agreements or any other arrangements entered into between the Controlling Entity and the Controlled Entity”.

The iDA defines effective control as having the ability to cause, or to refrain from making a major decision regarding the management or operations of the business trust. It is noteworthy that the iDA adopts a holistic approach in assessing if there is effective control. By introducing the phrase “*without limitation*”, the iDA may make a finding of effective control if the factual matrix takes the considerations beyond mere direct or indirect voting power or the basis of rights via contractual agreements. Such an approach is indicative of iDA’s inclination towards “*substance over form*”.

---

<sup>13</sup> *Supra* note 1 at 17

<sup>14</sup> *Supra* note 2

<sup>15</sup> *Supra* note 1 at 17, footnote 6

## USING BUSINESS TRUSTS TO EFFECT THE REMEDY OF STRUCTURAL SEPARATION

Business trusts can effect structural separation. But it is a pseudo remedy and is flawed in a fundamental aspect – a business trust makes this presumption at the outset: that an operator, the trust beneficiary, is denied significant market power for lack of legal ownership in the trust asset. This presumption may turn out false if the interests of the trustee-manager and single beneficiary merge in the case of a business trust with a single 100% unitholder<sup>16</sup>.

Under the Business Trusts Act (Cap 31A), unitholders are prohibited from engaging in day-to-day control of the trust property<sup>17</sup>. But they are not strictly prohibited from giving directions in respect of the management to the trustee-manager. Further, they also have the right to be consulted by the trustee-manager. As such, unitholders with controlling stakes and through the voting rights attached to the units of the business trust, may be in a position to exercise considerable influence, if not de-facto control, over the trustee-manager.

A regulator is cognizant that implicit in an approval of the Consolidation is an endorsement of the presumption that a trust beneficiary does not have effective control over a trust asset. And that this presumption in itself, without more, is deemed sufficient to meet the higher standards typically required by regulators elsewhere in regulating Next Gen NBNs.

### **The BUSINESS TRUSTS ACT (CAP 31A)**

In considering if a business trust can properly effect structural separation, one must examine the Business Trusts Act, and in particular, the provisions that may address the issue of dominant licensee conduct. Further, it is also instructive to discover Parliament’s intention behind enacting the Act.

In Singapore, Business Trusts are regulated under The Business Trusts Act (Cap. 31A). Business Trusts are primarily business enterprises structured as trusts and the Act sets up a regulatory framework to “*to enable the unitholders to participate or receive profits, income or other payments or returns arising from*

---

<sup>16</sup> The Business Trusts Act (Cap. 31A, 2005 Rev. Ed. Sing.), s2.: Unitholder means a person who holds units or a share in the beneficial ownership in the trust property of the business trust

<sup>17</sup> **Ibid** at s.2 :“business trust” means- (a)a trust that is established in respect of any property that has the following characteristics: (ii) the unitholders of the trust do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions in respect of such management;

*the management of the property or management or operation of a business*<sup>18</sup>. Further, as explained in the Parliamentary debates, the Business Trusts Act was “*formulated with two objectives in mind: (i) to safeguard the rights of the investors or unitholders in the business trust; and (ii) to establish the duties and accountability of the trustee- manager of a business trust and its directors*”<sup>19</sup>.

As its regulator, the Monetary Authority of Singapore is responsible for approving the applications for registration of the business trust<sup>20</sup>; has the power to refuse the registration of business trust if it is not satisfied with any of the requirements under sections 4(2) and 4(4); to require the trustee-manager to establish an audit committee<sup>21</sup>; to issue directions to trustee-manager<sup>22</sup>; and to issue codes, guidelines and no-action letters<sup>23</sup>.

The Business Trusts Act however is silent on the issue of a business trust as a telecommunications regulation remedy. For a business trust to succeed as a structural separation remedy, the Act must effectively prevent a unitholder from engaging in any form of anti-competitive conduct through the trust asset. As explained above, the Business Trusts Act does not expressly prohibit a unitholder’s right to give directions to the trustee-manager or the right to be consulted by the trustee-manager. As such unitholders with controlling stakes are nevertheless able to exercise considerable influence, if not de-facto control, over the trustee-manager.

One may argue that a trustee-manger is duty-bound to a higher standard of care and therefore will not avail itself to further a unitholder’s wrongful conduct.

Indeed, the Act states the duties of trustee-manager as follows:

***Duties of trustee-manager***

***10.***

*—(1) The trustee-manager of a registered business trust shall at all times act honestly and exercise reasonable diligence in the discharge of its duties as a trustee-manager in accordance with this Act and the trust deed of the registered business trust.*

*(2) The trustee-manager of a registered business trust shall —*

---

<sup>18</sup> *Supra* note 16

<sup>19</sup> Singapore, Parliament, *Business Trust Bills*, No. 78 (1<sup>st</sup> September 2004) at 362 (Tharman Shanmugaratnam)

<sup>20</sup> *Supra* note 16 s.3(1)

<sup>21</sup> *Ibid* s.15(1)

<sup>22</sup> *Ibid* s. 26

<sup>23</sup> *Ibid* s.98



*(a) act in the best interests of all the unitholders of the registered business trust as a whole; and*

*(b) give priority to the interests of all the unitholders of the registered business trust as a whole over its own interests in the event of a conflict between the interests of all the unitholders as a whole and its own interests.*

*(3) The trustee-manager of a registered business trust shall not make improper use of any information acquired by virtue of its position as trustee-manager to gain, directly or indirectly, an advantage for itself or for any other person to the detriment of the unitholders of the registered business trust.*

Section 10 of the Act enumerates the Common Law position regarding the duties of a trustee to act honestly and exercise reasonable diligence in exercising its powers; to act in the best interest of all unitholders; to give priority to the interests of the unitholders over its own in event of a conflict; and also not to engage in self-dealing. It is however less instructive in instances where the interests of the trustee-manager and the interests of the unitholders may merge as in the case of a single 100% unitholder of a business trust.

A trustee-manager entrusted with a Next Gen NBN may also mistakenly execute decisions furthering the interests of the single 100% unitholder but nevertheless may have competition consequences. For a trustee-manager to function effectively as an internal “competition regulator”, one must make a bold assumption that a trustee-manager is sufficiently skilled to recognize actions that may have competition implications, and upon recognition, to refuse directions from the single 100% unitholder.

## **THE ROLE OF INDEPENDENT DIRECTORS**

Having considered the trustee-manager, we must consider the independent directors. A company (in this case, a business trust) is “*literally sans teeth, sans eyes, sans taste, sans everything and has neither a physical brain nor limbs to function on its own. It is therefore at company meetings that the company’s organs plan and allocate tasks*”<sup>24</sup>. We must consider if the presence of independent directors are adequate grounds to make a finding of no effective control. On this issue, the iDA has determined that an acquiring party may obtain effective control over a business trust through a transaction where, for example,

---

<sup>24</sup> Tan Cheng Han, SC, ed., *Walter Woon on Company Law*, 3<sup>rd</sup> ed. (Sweet and Maxwell Asia, 2005) at 191

the transaction confers on the acquiring party the powers to appoint a majority of the board of directors of the trustee-manager... or to veto certain management or major operating decisions of the designated business trust...<sup>25</sup>.

A finding of an absence of effective control on the basis that an acquiring party can but will not appoint a majority of the board of directors is fatally flawed in itself. A finding of effective control is self-evident if an acquiring party appoints a majority of the board of directors of the trustee-manager. But the reverse is not necessarily true. An acquiring party could choose to appoint a minority of the board while retaining effective control through its voting rights attached to its wholly-owned unitholdings.

It is noteworthy that NASDAQ determines effective control on the basis of voting powers which is broader measure of effective control. NASDAQ's Marketplace Rule 4200 requires that independent directors constitute the majority of a company's board of director. But it will waive that requirement specifically in the context of a controlled company under Rule 4350(C)(5) as follows:

*“ A Controlled Company is exempt from the requirements of this Rule ...A Controlled Company is a company of which more than 50% of the voting power is held by an individual, a group or another company”.*

It is opined that NASDAQ regards independent directors as *“a protection for shareholders specifically against management, not against other shareholders. A shareholder who controls a company does not need an external rulemaker to protect him from a management team that he has the power to appoint”*<sup>26</sup>.

The iDA makes a determination of effective control (or its absence) according to the factual matrix of each case. The use of the word “may” suggests that a presence or absence of a majority of independent directors is not conclusive in determining a finding of effective control. The approach taken is another indication of iDA's preference towards *“substance over form”*.

The Singapore Exchange Listing Rules require listed companies to disclose their corporate practices and give explanations for deviations from the Corporate Governance Code (“Code”) in their annual reports. Adherence to the Code is merely indicative of an organisation's commitment to high standards of corporate governance. It may be helpful but certainly not conclusive as grounds to determine an absence of effective control.

---

<sup>25</sup> *Supra* note 2 at 10.4.6.2 (b)

<sup>26</sup> Donald C. Clarke, *“Three Concepts of the Independent Director”* (2007) 32 Del. J. Corp.L. 94

One may ask who are independent directors? Independent directors are identified in the negative in the Code<sup>27</sup>. They are someone who does not have a relationship, or could be reasonably perceived to have a relationship, with the company as follows:

- *a director being employed by the company or any of its related companies for the current or any of the past three financial years;*
- *a director who has an immediate family member who is, or has been in any of the past three financial years, employed by the company or any of its related corporations and whose remuneration is determined by the remuneration committee; or*
- *a director, or an immediate family member, accepting any significant compensation from the company or any of its related companies for the provision of services, for the current or immediate financial year, other than compensation for board services;*
- *a director:*
  - (i) who, in the current or immediate past financial year, is or was; or*
  - (ii) whose immediate family, in the current or past financial year, is or was,*

*a 10% shareholder of, or a partner in (with 10% or more stake), or an executive officer of, or a director of, any organization to which the company or any of its subsidiaries made, or from which the company or any of its subsidiaries received, significant payments or material services in the current or immediate past financial year. As a guide, payments aggregated over any financial year in excess of S\$200,000 should generally be deemed significant;*
- *a director who is a 10% shareholder or an immediate family member of a 10% shareholder of the company; or*
- *a director who is or has been associated with a 10% shareholder of the company, in the current or immediate past financial year.*

An independent director is someone who does not belong to any of the above categories.

It is a question of fact if independent directors can provide a check to effective control by an acquiring party. A regulator must consider a multitude of factors

---

<sup>27</sup> Code of Corporate Governance 2012, s2.3(a)- (f)

such as the voting powers of independent directors at board meetings, who appoints them and who can remove them. The issue of voting rights at board meetings is particularly crucial. The will of the minority non-independent directors may trump the will of the majority independent directors simply because one party (the non-independent directors) has voting rights and the other (the independent directors) does not.

## **INTERPRETING BEST ENDEAVOUR CLAUSES**

A business trust can effect the remedy of structural separation if a unitholder is unable to exercise effective control over the trust-manager. This may be achieved if the unitholder's stake is sufficiently reduced. A commitment to do all that is necessary is a "best endeavours" clause and is a subject of much ambiguity in other jurisdictions. Courts in Singapore however do not equate "best endeavours" clauses as imperative clauses, and rightly so, to balance the interest of all parties. In *Group Exklusive Pte Ltd v Diethelm Singapore Pte Ltd* [2003] 4 SLR @ 582, the High Court held that a "best endeavours" clause is satisfied if all reasonable steps were taken by a prudent and determined man, acting in his own interests. In *BR Energy (M) Sdn Bhd v KS Energy Services Ltd* [2013] 2 SLR 1154, the High Court held that phrases such as "reasonable endeavor", "all reasonable endeavours" and "best endeavours" were various formulations of non-absolute obligations. This is a balanced approach as it allows for factors such as commercial realities, business opportunities and unforeseen circumstances to be taken into consideration.

## **THE IDA CAN REGULATE BUSINESS TRUSTS**

The Business Trusts Act addresses the rights of the investors or unitholders in the business trusts and Parliament did not enact it to take the place of existing competition and telecom regulatory laws. The Business Trusts Act does not, and rightly so, address competition regulation matters. Parliament has vested the powers of telecom competition regulation in the iDA, and business trusts in relation to telecommunication businesses, can be governed under the Telecommunications Act<sup>28</sup>. This power is expressed in the Telecommunications Competition Code<sup>29</sup>.

---

<sup>28</sup> *The Telecommunications Act* (Cap 323, 2000 Rev. Ed. Sing.) s. 32(C), (D), (E).

<sup>29</sup> *Supra* note 2 s. 10.1(a)

## CONCLUSION

The proposed Consolidation poses a telecom regulatory question of whether a trust beneficiary may acquire significant market power through its beneficial ownership of a hard-to-replace, bottleneck trust asset. It also poses a corollary question of whether there is a valid presumption that a business trust beneficiary does not have effective control over a trust asset.

The issue of whether a trust beneficiary can acquire significant market power through a business trust is a question of fact and can be conclusively determined through adopting a fact-sensitive approach.

A presumption is in essence, an inference of facts, drawn from the existence of other facts. As it derives its existence from other facts, the strength of its presumption must vary according to the circumstances of the case. The presumption that a trust beneficiary does not have effective control over the trust assets may fail because:

- (i) a merger of the interests of the trust beneficiary and the trustee-manager may create a propensity for dominant operator conduct;
- (ii) the Business Trusts Act does not expressly prohibit trust beneficiaries from exercising influence over the trustee-manager or are trustee-managers prohibited from seeking direction from the trust beneficiaries;
- (iii) the presence of independent directors, or an absence, is not a conclusive factor in determining effective control; and
- (iv) assurances by a trust beneficiary to reduce its wholly-owned unitholders in the business trust remains at best a mere assurance as it is manifestly unjust to equate a best endeavour's clause to an imperative mandate.

A business trust wholly-owned by a single unitholder does not achieve the equivalence of a true structural separation. Because of the merger of the interests between the trustee-manager and the single unitholder, a regulator should not disregard a propensity for dominant operator conduct. Using a business trust to effect structural separation is at best an operational separation for the reasons stated above. Operational separation indicators may be applied to this trust together with compliance oversight by a regulator's monitoring board. This satisfies the jurisprudence maxim: *Where the reason is the same, the rule should be the same.*

-END-