



## UPDATE TO INVESTORS – 30 March 2020

### HALIFAX INVESTMENT SERVICES PTY LTD (IN LIQUIDATION) (HALIFAX AU)

### HALIFAX NEW ZEALAND LTD (IN LIQUIDATION) (HALIFAX NZ)

#### Closing out open positions / realising outstanding investments

Further to our update on 13 March 2020, we provide the following additional information as to the Liquidators' decision to refrain from closing out or realising any outstanding investments until the Courts have determined that issue in conjunction with all other issues at the final hearing (subject to advice or directions from the Courts in the near future that the Liquidators are justified in proceeding in that way).

The Liquidators have made this decision having regard to the following:

- A number of issues raised by investors in December 2019 in response to the November 2019 Investor Notice have, on careful consideration by the Liquidators of those issues, meant that the practical reality is that **all** issues which have been raised for consideration by the Courts (including an expeditious closing out or realising all outstanding investments) will need to be dealt with **together** at the final hearing.
- In particular:
  - a number of investors expressed the desire that the ultimate distribution to them should at least partly be by way of an *in specie* distribution of assets in which they have invested (that is, a transfer to them of the asset itself in which they invested; or part of it);
  - others raised concerns about immediate crystallisation of capital gains tax liabilities and other tax liabilities;
  - a number of investors asserted that their investments were traceable and therefore should not be regarded as being caught up in the commingling of the funds.
- If all outstanding investments were realised prior to all the other issues to be dealt with by the Courts at the final hearing, the Liquidators and Halifax AU would be prevented from making an *in specie* distribution of any investments and this may have a number of adverse consequences for many investors.
- If investors were to receive an *in specie* distribution, then (without this being interpreted as tax advice by the Liquidators, **which they are unable to provide**) investors may not (to the extent of that distribution) incur a capital gains tax liability (or other tax liability), at least in the short term, in respect of that asset transferred. However, if outstanding investments are realised now, then the *in specie* distribution which a number of investors have sought will become impossible and a capital gains tax (or other tax) liability may be immediately crystallised on the part of many investors, possibly even before distributions have been made to investors.
- Further, other benefits, apart from tax benefits, may flow from an *in specie* distribution and those benefits could potentially be lost if realisation of all investments were to occur in the near future.
- In addition, an *in specie* distribution also has the capacity to substantially to reduce costs that would be incurred on a realisation of the entire fund, ie divestment costs payable when an investment is realised (eg brokerage and commission) and reinvestment costs if the investor wished to re-acquire the same investment. The possibility of that saving would disappear if the entire fund were to be realised in advance of the final hearing.



- If all outstanding investments were realised before the Courts had made their determinations in respect of the traceability of investments by those investors who asserted that their investments were traceable, those investors would be precluded from obtaining an *in specie* distribution of those investments which were traceable.
- Importantly, the Liquidators have sought directions from the Court as to whether "pooling" orders should be made in the external administrations of Halifax AU and Halifax NZ (that is, liquidating the entire fund and paying a proportion of the liquidated fund to each investor). If the Court ultimately gave a direction that "pooling" should *not* occur, the realisation of all outstanding investments in advance of that Court direction would frustrate what would otherwise have been that outcome.
- There has been significant opposition, in response to the November 2019 Investor Notice, to the closing out of outstanding investments (in much greater numbers by percentage than those who supported closing out).
- The Liquidators believe that they do not have the immediate power to realise all of the investments in the overall fund in the absence of orders by the Courts in the nature of judicial advice or directions.
- If a process was undertaken to realise all outstanding investments in advance of the final hearing that process may not be completed much, if at all, before the hearing. It is a process which would overall take some months.
- There will be costs associated with the investment platforms even once the outstanding investments are realised, even though those costs would be reduced.
- The timing of the realisation of outstanding investments will not affect the length of the Liquidation.
- The total value of all investments is still (taking the figures at 17 March 2020) well in excess of the figure as at the appointment date despite the recent large downturn in the stock market.

The Liquidators have, in making their decision, taken into account the points made by those who support realising all outstanding investments now. However, the Liquidators have formed the view that, in the context of the complex Applications which are before the Courts, that course simply does not appear to be feasible in light of all the factors set out above. In particular, the essence of the decision reached by the Liquidators is that it is not feasible to split apart the various issues which the Courts have to determine at the final hearing.

Nothing the Liquidators have said above should be taken to represent their view as to what the Courts should decide. The Liquidators are not, for example, saying that an *in specie* distribution is necessarily the right approach for the Courts to adopt. For example, apart from the apparent benefits of an *in specie* distribution referred to by investors (summarised above), there would be a number of practical difficulties associated with an *in specie* distribution. It is important to note that at the hearing the Liquidators are required to adopt an essentially neutral stance, whilst doing everything they can (including bringing to the attention of the Courts all relevant points and putting before the Courts relevant evidence) to assist the Courts to resolve the Applications in a way which is fair and just.

The Liquidators have now finalised formal documents for an application to the Courts that they give judicial advice or directions in relation to the Liquidators' decision to refrain from realising outstanding investments (subject to obtaining the judicial advice or directions) until the Courts determine all matters at the final hearing. The application for judicial advice may or may not be heard by the Courts as soon as 3 April.

The Liquidators remind all investors that it is open to them to close out their positions should they deem this to be appropriate (although investors' ultimate individual entitlements to the overall fund and the manner in which cash or other assets will be distributed will be determined by the Courts). However, it is not the role of the Liquidators to provide investment advice and nothing in this update should be construed as such.



As noted above, the Liquidators believe that they do not have the power to realise all of the outstanding investments in the overall fund without specific orders from the Courts in the nature of judicial advice or directions. The first step in that process was seeking the views of investors, which were obtained in December 2019. It has become clear to the Liquidators, in the light of responses by investors, that the question of realising all outstanding investments is tied up with a number of other issues which have to be dealt with at the final hearing.

And, as also noted above, investors must understand that realising all outstanding investments is a process which cannot happen immediately – it is a process which in practice will ultimately take a number of months.

#### **Progress towards final hearing**

The Liquidators are hopeful that the Courts may agree that the final hearing on all issues can be as soon as the end of this year. There has already been discussion before the Courts about that possibility and the Liquidators propose asking the Courts at the next Case Management Hearing to allocate hearing dates at that time.

To put that in context, this matter is concerned with trust funds held in two different countries.

The formulation of the issues for the determination by the Courts, and the appointment of representatives to represent groups of investors affected by those issues, has happened extremely quickly, that having already occurred in February this year.

The Liquidators have also progressed various key workstreams:

- analysis of funds flow;
- consideration of the feasibility of tracing;
- analysis of financial records to seek to determine when the deficiency in trust funds first occurred;
- consideration of a wide range of other issues – many of which are complex – raised by investors in response to the November 2019 Investor Notice, including tax issues and the question of the feasibility of realisation of all outstanding investments.

#### **Further information**

For further information in relation to the next Case Management Hearing please see the following link which will be updated at approximately 4.30pm AEDT on 2 April 2020: <https://www.fedcourt.gov.au/court-calendar/daily-court-lists/nsw>

Please visit the links to the following websites for a copy of all correspondence issued to investors:

- **Halifax Australia:** <https://www.ferrierhodgson.com/au/creditors/halifax-investment-services-pty-ltd>

- **Halifax New Zealand:** <https://www.ferrierhodgson.com/au/creditors/halifax-new-zealand-limited>

#### **Enquiries**

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