

# 2007 BCSECCOM 698

November 16, 2007

## **Headnote**

### **Mutual Reliance Review System for Exemptive Relief Applications**

*Securities Act* s. 114(2) Takeover Bids – Exemption from the formal take over bid requirements in Part 13 of the Act - The applicant wants relief so unitholders of certain mutual funds can purchase more than 20% of the units of the fund without constituting a takeover bid - Units of the fund trade on an exchange; the units are “voting” and “equity securities”; no unitholder can control the fund because of the terms of the constating documents; no purchaser will exercise the votes attached to more than 20% of the outstanding units of the fund

*Securities Act* ss. 48 & 76 – Other – Exemption from registration and prospectus requirements for situations other than a corporate acquisition or reorganization; trades to business associates; debt settlements; or trades involving employee investment plans and consultants - The applicant wants relief from the registration requirement to disseminate sales communications relating to the distribution of securities of a mutual fund and from requirement that the prospectus for the fund contain a certificate of the underwriters - Units of the fund trade on an exchange; trades of the fund will be made through underwriters and designated brokers; neither the underwriters nor the designated brokers receive any fees or commissions in connection with the distribution of units of the fund

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 34, 48, 69, 76 and 114(2)

In the Matter of  
the Securities Legislation of  
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New  
Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador,  
Yukon, Northwest Territories and Nunavut  
(the “Jurisdictions”)

and

In the Matter of  
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of  
Claymore Investments, Inc.

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(the “Filer”)

## MRRS Decision Document

### **Background**

The local securities regulatory authority or regulator (the “Decision Maker”) in each of the Jurisdictions has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the “Legislation”) that:

1. the registration requirement of the Legislation does not apply to the Filer in connection with its dissemination of sales communications relating to the distribution of units (“Units”) of Claymore Premium Money Market ETF (the “Fund”);
2. in connection with the distribution of securities of the Fund pursuant to a prospectus, the Fund be exempt from the requirement that the prospectus contain a certificate of the underwriter or underwriters who are in a contractual relationship with the issuer whose securities are being offered; and
3. purchasers of units of the Fund be exempted from the requirements of the Legislation related to take-over bids, including the requirement to file a report of a take-over bid and the accompanying fee with each applicable Jurisdiction, (the “Take-over Bid Requirements”) in respect of take-over bids for the Fund.

Under the Mutual Reliance Review System for Exemptive Relief Applications:

1. the Ontario Securities Commission is the principal regulator for this application; and
2. this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

“Basket of Securities” means a group of securities determined by the Filer from time to time representing the constituents of the investment portfolio then held by the Fund.

“Designated Brokers” means registered brokers and dealers that enter into agreements with the Fund to perform certain duties in relation to the Fund.

“Prescribed Number of Units” means the number of Units of the Fund determined by the Filer from time to time for the purpose of subscription orders, exchanges, redemptions or for other purposes.

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“Underwriters” means registered brokers and dealers that have entered into underwriting agreements with the Fund and that subscribe for and purchase Units from the Fund, and “Underwriter” means any one of them.

“Unitholders” means beneficial and registered holders of Units.

Defined terms contained in National Instrument 14-101 – Definitions have the same meaning in this decision unless they are defined in this decision.

### **Representations**

This decision is based on the following facts represented by the Filer:

#### *Background*

1. The Fund is a mutual fund trust governed by the laws of Ontario and a reporting issuer under the laws of all of the Jurisdictions.
2. Claymore has applied to list the Units of the Fund on the Toronto Stock Exchange (“TSX”). Claymore will not file a final prospectus for the Fund until the TSX has conditionally approved the listing of Units.
3. Units issued by the Fund will not be index participation units within the meaning of National Instrument 81-102 – *Mutual Funds* (“NI 81-102”). The Fund will be generally described as an exchange-traded fund (“ETF”).
4. Claymore is the trustee and manager of the Fund and is a registered investment counsel and portfolio manager in Ontario and is registered as an investment adviser with the U.S. Securities and Exchange Commission under the Investment Advisers Act of 1940 (the “Advisers Act”). Claymore is a wholly-owned subsidiary of Claymore Group, Inc., a financial services and asset management company based in Lisle, Illinois. Claymore Group, Inc. and its U.S. affiliates include two investment advisers registered with the U.S. Securities and Exchange Commission under the Advisers Act and a broker-dealer registered with the National Association of Securities Dealers, Inc. under the United States Securities Exchange Act of 1934.
5. The Fund's investment objective is to maximize current income to the extent consistent with the preservation of capital and liquidity by investing in high-quality, short-term (one year or less) debt securities.

The net proceeds of the Fund's initial public offering will be invested in a diversified and actively managed portfolio consisting of high-quality, short-term (one year or less) debt securities, including treasury bills and promissory

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notes issued or guaranteed by Canadian governments or their agencies, bankers acceptances, and commercial paper (excluding asset-backed commercial paper) issued by Canadian chartered banks, loan companies, trust companies and corporations. Investments made by the Fund will be in the top two ratings categories of any of the approved credit rating organizations (as defined in NI 81-102).

6. Units may only be subscribed for or purchased directly from the Fund by Underwriters or Designated Brokers and orders may only be placed for Units in the Prescribed Number of Units (or an integral multiple thereof) on any day when there is a trading session on the TSX.
7. The Fund will appoint Designated Brokers to perform certain functions which include standing in the market with a bid and ask price for Units of the Fund for the purpose of maintaining liquidity for the Units.
8. Each Underwriter or Designated Broker that subscribes for Units must deliver, in respect of each Prescribed Number of Units to be issued, a Basket of Securities and cash in an amount sufficient so that the value of the Basket of Securities and cash delivered is equal to the net asset value of the Units subscribed for next determined following the receipt of the subscription order. In the discretion of Claymore, the Fund may also accept subscriptions for Units in cash only, in securities other than Baskets of Securities and/or in a combination of cash and securities other than Baskets of Securities, in an amount equal to the net asset value of the Units next determined following the receipt of the subscription order.
9. The net asset value per Unit of the Fund will be calculated and published daily and the investment portfolio of the Fund will be made available daily on Claymore's website.
10. Upon notice given by Claymore from time to time and, in any event, not more than once quarterly, a Designated Broker will subscribe for Units in cash in an amount not to exceed 0.3% of the net asset value of the Fund, or such other amount established by Claymore and disclosed in the prospectus of the Fund, next determined following delivery of the notice of subscription to that Designated Broker.
11. Neither the Underwriters nor the Designated Brokers will receive any fees or commissions in connection with the issuance of Units to them. Claymore may, at its discretion, charge an administration fee on the issuance of Units to the Designated Brokers or Underwriters.

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12. Except as described in paragraphs 6 through 10 above, Units may not be purchased directly from the Fund. Investors are generally expected to purchase Units through the facilities of the TSX. However, Units may be issued directly to Unitholders upon the reinvestment of distributions of income or capital gains and in accordance with the distribution reinvestment plan of the Fund, if such plan is implemented.
13. Unitholders that wish to dispose of their Units may generally do so by selling their Units on the TSX, through a registered broker or dealer, subject only to customary brokerage commissions. A Unitholder that holds a Prescribed Number of Units or an integral multiple thereof may exchange such Units for Baskets of Securities and cash; Unitholders may also redeem their Units for cash at a redemption price equal to 95% of the closing price of the Units on the TSX on the date of redemption.
14. As manager, Claymore receives a fixed annual fee from the Fund. Such annual fee is calculated as a fixed percentage of the net asset value of the Fund. As manager, Claymore is responsible for all costs and expenses of the Fund except the management fee, any expenses related to the implementation and on-going operation of an independent review committee under National Instrument 81-107, brokerage expenses and commissions, income taxes and withholding taxes and extraordinary expenses. These costs and expenses include any service fee and fees payable to service providers retained by Claymore.
15. No investment dealers will act as principal distributors for the Fund in connection with the distribution of Units. The Underwriters will not receive any commission or other payment from the Fund or Claymore. As a result, Claymore will be the only entity desiring to foster market awareness and promote trading in the Units through the dissemination of sales communications.
16. Because Underwriters will not receive any remuneration for distributing Units, and because Underwriters will change from time to time, it is not practical to require an underwriters' certificate in the prospectus of the Fund.
17. Unitholders will have the right to vote at a meeting of Unitholders in respect of the Fund in certain circumstances, including prior to any change in the fundamental investment objective of the Fund, any change to their voting rights and prior to any increase in the amount of fees payable by the Fund.
18. Although Units trade on the TSX and the acquisition of Units can therefore be subject to the Take-over Bid Requirements:

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- (a) It will not be possible for one or more Unitholders to exercise control or direction over the Fund as the declaration of trust in respect of the Fund will ensure that there can be no changes made to the Fund which do not have the support of Claymore and will ensure that a Unitholder cannot exercise the votes attached to Units which represent 20% or more of the votes attached to all outstanding Units;
- (b) It will be difficult for purchasers of Units to monitor compliance with the Take-over Bid Requirements because the number of outstanding Units will always be in flux as a result of the ongoing issuance and redemption of Units by the Fund; and
- (c) The way in which Units will be priced deters anyone from either seeking to acquire control of, or offering to pay a control premium for, outstanding Units because Unit pricing will be dependent upon the performance of the portfolio of the Fund as a whole.

### **Decision**

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

The decision of the Decision Makers under the Legislation is that:

1. the registration requirement of the Legislation does not apply to the Filer in connection with its dissemination of sales communications relating to the distribution of Units of the Fund, provided the Filer complies with Part 15 of NI 81-102;
2. in connection with the distribution of Units of the Fund pursuant to a prospectus or any renewal prospectus, the Fund is exempt from the requirement of the Legislation that the prospectus or renewal prospectus contain a certificate of the Underwriters; and
3. the purchase of Units by a person or company in the normal course through the facilities of the TSX is exempt from the Take-over Bid Requirements from the time the Fund becomes and for so long as the Fund remains an ETF.

Wendell S. Wigle  
Commissioner  
Ontario Securities Commission

Carol S. Perry  
Commissioner  
Ontario Securities Commission