

## 2007 BCSECCOM 52

January 5, 2007

### Headnote

Mutual Reliance Review System for Exemptive Relief Applications - *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

*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

### 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, and Newfoundland and Labrador  
(the Jurisdictions)

and

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

and

In the Matter of  
Horizons Betapro ETFS  
(the Filer)

# 2007 BCSECCOM 52

## 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 (the Decision) under the securities legislation of the Jurisdictions (the Legislation) that:

1. the dealer registration requirement of the Legislation does not apply to BetaPro Management Inc. (BetaPro), the manager and trustee of the Filer, in connection with the dissemination of its sales communications by BetaPro relating to the distribution of class A units (Units) of the Horizons BetaPro S&P/TSX 60 Bull Plus ETF and the Horizons BetaPro S&P/TSX 60 Bear Plus ETF (each an Existing ETF) and such other exchange traded funds as BetaPro may establish in the future (each a Future ETF and together with the Existing ETFs, the ETFs or individually, an ETF);
2. in connection with the distribution of securities of the ETFs pursuant to a prospectus, the ETFs 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. exempting all holders of Units of an ETF 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 ETFs.

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**

Designated Broker means a registered broker or dealer that enters into an agreement with an ETF to perform certain duties in relation to the ETF.

Index means an index provided to BetaPro by a third party provider for use in connection with an ETF.

Prescribed Number of Units means, in relation to an ETF, the number of Units of the ETF determined by BetaPro from time to time for the purpose of subscription orders, exchanges, redemptions or for other purposes.

## 2007 BCSECCOM 52

Underwriter means a registered broker or dealer that has entered into an underwriting agreement with an ETF and that subscribes for and purchases Units of the ETF from the ETF.

Unitholder means a beneficial and registered holders of a Unit(s) of an ETF.

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

### **Representations**

This MRRS decision document is based on the following facts represented by BetaPro on behalf of the Filer:

### **Background**

1. The Existing ETFs are, and each of the Future ETFs will be, a mutual fund trust governed by the laws of Ontario and a reporting issuer under the laws of all of the Jurisdictions.
2. BetaPro is in the process of applying to list the Units of the Existing ETFs on The Toronto Stock Exchange (the TSX) and will apply to list the Units of each Future ETF on the TSX. BetaPro will not file a final prospectus for any ETF until the TSX has conditionally approved the listing of Units of such ETF.
3. Each Existing ETF is, and each Future ETF will be, a commodity pool as such term is defined in Section 1.1 of National Instrument 81-104 *Commodity Pools*, in that each Existing ETF has adopted, and each Future ETF will adopt, fundamental investment objectives that permit that ETF to use or invest in specified derivatives in a manner that is not permitted under National Instrument 81-102 *Mutual Funds* (NI 81-102).
4. Each Existing ETF's investment objective is, and each Future ETF's investment objective will be, to provide daily results, before fees, expenses, distributions, brokerage commissions and other transaction costs, that endeavour to correspond to a multiple or the inverse (opposite) multiple of the daily performance of an index, security, currency or commodity (each an Underlying Index).
5. In order to achieve its investment objective, each ETF may invest in equity securities and/or other financial instruments, including derivatives. Each ETF will employ leverage.

## 2007 BCSECCOM 52

6. BetaPro, a corporation incorporated under the laws of Canada, will act as the trustee and manager of each ETF.
7. Jove Investment Management Inc. (Jove), a corporation incorporated under the laws of Ontario, will act as the investment manager of each ETF. Jove is registered in the categories of investment counsel and portfolio manager under the *Securities Act* (Ontario) (OSA) and as a commodity trading counsel and as a commodity trading manager under the *Commodity Futures Act* (Ontario) (CFA).
8. Jove will retain ProFund Advisors LLC (ProFund), a limited liability company organized under the laws of the state of Maryland, or an affiliate of ProFund, to act as a sub-adviser on behalf of each ETF and to make and execute investment decisions on behalf of each ETF. ProFund or an affiliate of ProFund are or will be exempt from the registration requirements of the OSA and the CFA.
9. Each ETF will use specified derivatives to achieve its investment objective, which may involve establishing an account (each an Account) with a FCM in Canada and/or the United States. Each FCM will be regulated by an applicable security regulatory authority (e.g., the Commodity Futures Trading Commission in the United States) and will be subject to capital, insurance and periodic compliance reviews by such regulatory authority.
10. The Account of each ETF, which will be segregated, will consist of cash and/or securities as collateral for the specified derivative transactions of that ETF (Margin). An ETF's Margin, which allows the ETF to use leverage, is the minimum amount that must be deposited with a FCM to initiate trading in specified derivative transactions, or to maintain the FCM's open position in standardized futures, on behalf of the ETF.
11. Units of an ETF may only be subscribed for or purchased directly from the ETF by Underwriters or Designated Brokers and orders may only be placed for a Prescribed Number of Units (or an integral multiple thereof) of the ETF on any day when there is a trading session on the TSX. The Underwriters or Designated Brokers will deliver a copy of the prospectus of the ETFs to the first purchasers of Units of the ETFs in the secondary market.
12. Each ETF will appoint a Designated Broker(s) to perform certain functions which include standing in the market with a bid and ask price for Units of that ETF for the purpose of maintaining liquidity for Units of that ETF.

## 2007 BCSECCOM 52

13. The net asset value per Unit of each ETF will be calculated and published on each day on which there is a trading session on the TSX.
14. Neither the Underwriters nor the Designated Brokers will have usually undertaken a due diligence investigation in relation to the ETFs or will receive any fees or commissions in connection with the issuance of Units of an ETF to them. BetaPro may, at its discretion, charge an administration fee on the issuance of Units of an ETF to Underwriters or Designated Brokers.
15. Except as described in paragraphs 11 through 14 above, Units of an ETF may not be purchased directly from the ETF. Investors are generally expected to purchase Units of an ETF through the facilities of the TSX. However, Units of an ETF may be issued directly to Unitholders of the ETF upon the reinvestment of distributions of income or capital gains.
16. Unitholders of an ETF that wish to dispose of their Units of the ETF may generally do so by selling their Units of the ETF on the TSX, through a registered broker or dealer, subject only to customary brokerage commissions. Unitholders of an ETF may also redeem their Units of the ETF for cash at a redemption price equal to 95% of the closing price of the Units of the ETF on the TSX on the effective date of redemption.
17. As trustee and manager, BetaPro will be entitled to receive a fixed annual fee from each ETF. Such annual fee will be calculated as a fixed percentage of the net asset value of each ETF. BetaPro will be responsible for the payment of all expenses of the ETFs, except for the management fee, brokerage expenses and commissions, income taxes and withholding taxes and extraordinary expenses.
18. No investment dealer will act as a principal distributor of an ETF in connection with the distribution of Units of the ETF. The Underwriters will not receive any commission or other payment from the ETFs. As a result, BetaPro will be the only entity desiring to foster market awareness and promote trading in Units of the ETFs through the dissemination of sales communications.
19. Because Underwriters will not receive any remuneration for distributing Units of the ETFs, and because Underwriters will change from time to time, it is not practical to require an underwriters' certificate in the prospectus of the ETFs.
20. Unitholders of an ETF will have the right to vote at a meeting of Unitholders of the ETF prior to any change in the fundamental investment objective of the

## 2007 BCSECCOM 52

ETF, any change to their voting rights and prior to any increase in the amount of fees payable by the ETF.

21. Although Units of an ETF will trade on the TSX and the acquisition of Units of the ETF can therefore be subject to the Take-Over Bid Requirements:
  - (a) it will not be possible for one or more Unitholders of the ETF to exercise control or direction over the ETF as the master declaration of trust governing the ETF will ensure that there can be no changes made to the ETF which do not have the support of BetaPro;
  - (b) it will be difficult for purchasers of Units of the ETF to monitor compliance with Take-Over Bid Requirements because the number of outstanding Units of the ETF will always be in flux as a result of the ongoing issuance and redemption of Units by the ETF; and
  - (c) the way in which Units of the ETF will be priced deters anyone from either seeking to acquire control, or offering to pay a control premium, for outstanding Units of the ETF because pricing of a Unit of the ETF will be dependent upon, and will generally represent a prescribed percentage of, the level of the applicable Underlying Index, appropriately leveraged.
22. The application of the Take-Over Bid Requirements to an ETF would have an adverse impact upon liquidity of a Unit of the ETF because they could cause Underwriters, Designated Brokers and other large Unitholders of the ETF to cease trading Units of the ETF once prescribed take-over bid thresholds are reached. This, in turn, could serve to provide conventional mutual funds with a competitive advantage over an ETF.

### **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 dealer registration requirement of the Legislation does not apply to BetaPro in connection with its dissemination of sales communications relating to the distribution of Units of the ETF, provided BetaPro complies with Part 15 of NI 81-102;
2. in connection with the distribution of Units of an ETF pursuant to a prospectus or any renewal prospectus, the ETF is exempt from the requirement of the

## **2007 BCSECCOM 52**

Legislation that the prospectus or renewal prospectus contain a certificate of the Underwriters; and

3. except with respect to Prince Edward Island, the purchase of Units of an ETF by a person or company (a Purchaser) in the normal course through the facilities of the TSX is exempt from the Take-Over Bid Requirements for so long as the ETFs remain exchange traded funds and provided that, prior to making any take-over bid for Units of an ETF that is not otherwise exempt from the Take-Over Bid Requirements, the Purchaser, and any person or company acting jointly or in concert with the Purchaser (a Concert Party), provides the Filer with an undertaking not to exercise any votes attached to the Units of the ETF held by the Purchaser and any Concert Party which represent more than 20% of the votes attached to all outstanding Units of the ETF.

Susan Wolburgh Jenah  
Vice-Chair  
Ontario Securities Commission

Wendell S. Wigle  
Commissioner  
Ontario Securities Commission