

2006 BCSECCOM 685

September 26, 2006

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 130 - Relief from certain self-dealing restrictions in Part 15 of the Act - Issuer wants relief from self-dealing requirements and conflict of interest reporting requirements in connection with mutual fund mergers - One of the funds that is merging is a non-redeemable investment fund; if both funds were conventional mutual funds, they would be able to rely on the exemption provided in NI 81-102; the self-dealing provisions only apply for a moment in time; the merger is required to be approved by unitholders of the terminating fund; unitholders of the terminating fund received an information circular for the unitholders meeting to approve the merger; the simplified prospectus and annual information form of the continuing fund was incorporated by reference in the information circular

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 127(1)(a) and 130

In the Matter of
the Securities Legislation of
Alberta, British Columbia, Saskatchewan, Ontario, New
Brunswick, Nova Scotia 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
Mavrix Balanced Income and
Growth Trust and Mavrix Canadian Income Trust Fund
(collectively, the “Funds”)

and

Mavrix Fund Management Inc.
(the “Filer”)

MRRS Decision Document

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Background

The local securities regulatory authority or regulator (the “Decision Maker”) in each of the Jurisdictions has received an application from the Filer, on behalf of the Funds for a decision under the securities legislation of the Jurisdictions (the “Legislation”) granting relief from the restriction in the Legislation which prohibits a portfolio manager, or in British Columbia, a mutual fund or a responsible person, from purchasing or selling the securities of any issuer from or to the account of a responsible person or any associate of a responsible person in connection with a proposed merger (the “Proposed Merger”) between Mavrix Balanced Income and Growth Trust (the “Trust”) and Mavrix Canadian Income Trust Fund (the “Mutual Fund”) (the “Requested Relief”).

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

Interpretation

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:

1. The Filer intends to merge the Trust and the Mutual Fund (the “Proposed Merger”), which will involve the transfer of the assets and liabilities of the Trust in exchange for Class A Units of the Mutual Fund (the “Mutual Fund Units”).
2. At the time the Proposed Merger is effected, the Filer will be the “portfolio manager” for the Funds for purposes of the Legislation. As portfolio manager, the Filer will be considered a “responsible person” for purposes of the Legislation.
3. The transfer of the investment portfolio of the Trust to the Mutual Fund by operation of the Proposed Merger may be considered a sale of securities caused by the Filer from the Trust to the account of an associate of the Filer, contrary to the Legislation.

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4. The Mutual Fund is an “associate” of the Filer due to the fact that the Filer is its trustee.
5. Each Fund was established pursuant to a Declaration of Trust under the laws of the Province of Ontario and the Filer is the trustee and manager of the Funds.
6. The Trust offered its units in all of the Provinces of Canada pursuant to a final prospectus dated October 26, 2004 and closed its initial public offering on November 23, 2004. It is a reporting issuer, or equivalent, in the Jurisdictions.
7. The Mutual Fund first offered its units in all of the Provinces of Canada on or about June 27, 2003 and continues to offer securities under a simplified prospectus. It is a reporting issuer, or equivalent, in the Jurisdictions.
8. Unitholders of the Trust will be asked to approve the Proposed Merger at a special meeting to be held on September 14, 2006 (the “Meeting”). In connection with the Meeting, the Filer sent the unitholders a management information circular dated July 27, 2006 and a related form of proxy (the “Meeting Materials”). Subject to unitholder approval, the Proposed Merger will occur on or about October 2, 2006 (the “Effective Date”).
9. It is anticipated that the following events will occur in order to give effect to the Proposed Merger:
 - (a) The Declaration of Trusts for the Funds will be amended as required in order to implement the Proposed Merger;
 - (b) The Trust will dispose of a portion of its securities to repay its loan facility;
 - (c) Prior to the Proposed Merger, the Trust and the Mutual Fund will make distributions of income and capital gains sufficient to ensure that neither will be liable for tax under Part 1 of the *Income Tax Act* (Canada) in the taxation year ending on the Effective Date;
 - (d) The Trust exchange ratio will be based upon the relative net asset value of the Funds as at the close of trading on the TSX on the day prior to the Effective Date;

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- (e) On the Effective Date, the Trust will transfer all of its assets to the Mutual Fund for consideration equal to the value of such assets on the day prior to the Effective Date (the “Purchase Price”);
 - (f) On the Effective Date, the Mutual Fund will satisfy the Purchase Price by assuming the Trust’s liabilities and by issuing to the Trust an appropriate number of Mutual Fund Units that has an aggregate value equal to the Purchase Price less the liabilities assumed.
 - (g) On the Effective Date, Trust units will be redeemed and the Filer will pay the redemption price thereof by delivering the Mutual Fund Units to the Trust unitholders with each Trust unitholder receiving its pro rata share of the Mutual Fund Units.
 - (h) All tax elections and tax returns in connection with the Proposed Merger will be prepared and filed by the Funds.
10. The Filer will file a press release and material change report to announce the merger.
11. The Proposed Merger has been proposed by the Filer, as trustee and manager of the Funds, to promote improved operational efficiencies and enhanced economic viability for the Funds. The Trust, with an initial size of \$36.7 million was small for a closed-end fund which resulted in the Trust’s fixed costs being spread over relatively fewer Trust Units. These economics were adversely impacted on the most recent annual redemption date when the Fund experienced redemptions aggregating to \$10.47 million or approximately 22% of the Units. As a consequence of the Proposed Merger, Trust unitholders will enjoy enhanced liquidity and the opportunity to receive net asset value of their Mutual Fund Units on the disposition of such units on a daily basis. The Filer anticipates that, by merging the Trust into the Mutual Fund and thereby providing the liquidity by way of redemption rather than through the facilities of a stock exchange, the significant redemptions which the Trust has experienced in the past will be avoided.
12. The Proposed Merger will increase the assets in the merged fund to approximately \$56.8 million (based on current valuations), thus enabling the unitholders of the Trust to hold an investment in an entity that has a significantly larger portfolio. The Declaration of Trust requires that any further issuance of Trust units be made for net proceeds of not less than net asset value, which is impractical given that Trust units trade on the TSX at a discount to net asset value and accordingly, the Trust is limited in its ability to increase its portfolio.

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13. It is intended that the Mutual Fund will continuously offer Mutual Fund Units for net asset value. Accordingly, the portfolio may be increased and this can be done without dilution to the existing Mutual Fund unitholders. The sale of additional Mutual Fund Units will benefit all unitholders of the Mutual Fund as an increase in the number of outstanding Mutual Fund Units will favourably affect the management expense ratio.
14. The Trust and Mutual Fund have similar investment strategies, are being managed similarly and their portfolios are substantially similar.
15. Trust unitholders will have the right to trade their Trust units over the TSX up to the close of business before the Effective Date.
16. If approved, the Proposed Merger will be effected on a qualifying exchange basis that provides a tax-deferred rollover to Trust unitholders. This will allow Trust unitholders to defer any capital gain on the exchange of their units until they sell or redeem the Mutual Fund Units.
17. No sales charges will be payable in connection with the acquisition by the Mutual Fund of the investment portfolio of the Trust and the Filer will bear all costs relating to effecting the Proposed Merger, not the Mutual Fund or the Trust.
18. In the opinion of the Filer, the Proposed Merger is in the best interest of the Trust, the Mutual Fund and their respective unitholders.
19. In the absence of this order, the Filer would be prohibited from purchasing and selling the securities of the Trust in connection with the Proposed Merger.

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 the Requested Relief is granted.

Harold P. Hands

Paul K. Bates