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January 31, 2007

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 114(2) Issuer Bids - Exemption from the formal issuer bid requirements in Part 13 of the Act - General - An issuer wants to complete an issuer bid that meets some, but not all, of the conditions of the exemption set out in s. 99(c) of the Act (securities with a right for owner to require the issuer to redeem or repurchase) - Issuer is a trust; under a plan of the issuer, a unitholder can require that the trust repurchase a portion of that unitholder's units; the plan is available to all unitholders; the trust can suspend or terminate the plan in certain situations

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, s. 99(c), 114(2)

In the Matter of  
the Securities Legislation of  
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova  
Scotia, New Brunswick 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  
HTR Total Return Fund (Formerly Horizon Total Return Fund)  
(the Filer or the Trust)

## 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, pursuant to the securities legislation of the Jurisdictions (the Legislation), that the issuer bid requirements contained in the Legislation of the Jurisdictions (the Issuer Bid Requirements) shall not apply to the Filer in connection with the purchase or

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repurchase by the Filer of its own units (the Units) pursuant to the Filer's Distribution Withdrawal Plan (the Issuer Bid 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:

### **The Trust**

1. Middlefield TR Management Limited (the Manager) is a corporation incorporated under the laws of Ontario.
2. The Manager established the Trust under the laws of Ontario pursuant to a Declaration of Trust dated as of October 11, 2006 (the Declaration of Trust). The Manager is the trustee and manager of the Trust and is responsible for providing or arranging for the provision of administrative services to the Trust.
3. A preliminary long form prospectus dated August 31, 2006 was filed by the Trust with the securities regulatory authorities in each of the Jurisdictions on September 6, 2006. The Trust was granted a receipt for its final prospectus dated October 11, 2006 from the regulatory authorities in each of the Jurisdictions on October 12, 2006 (the Prospectus).
4. The Units are listed for trading on the Toronto Stock Exchange under the symbol HTR.UN.
5. The Trust's investment objectives are to: (i) enhance the initial value of the Units offered under the Prospectus through capital appreciation driven by the Portfolio (as defined below); and (ii) provide holders of Units (Unitholders) with the benefits of compound investment returns.
6. The Trust used virtually all of the net cash proceeds from its initial public offering of the Units pursuant to the Prospectus (the Offering) to pre-pay the

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Trust's purchase obligations under a forward purchase and sale agreement (the Forward Agreement) with a Canadian chartered bank (the Counterparty), pursuant to which the Trust will gain economic exposure to an actively-managed, broadly diversified investment portfolio of income producing equity securities (the Portfolio) comprised primarily of income trust securities and supplemented by common shares held by the HTR Fund, a trust formed under the laws of the Province of Ontario.

7. HSBC Trust Company (Canada) is the custodian of the assets of the Trust.

### **HTR Fund**

8. The Manager also is the manager and trustee of the HTR Fund.
9. Guardian Capital LP and Middlefield Capital Corporation act as investment advisors to the HTR Fund.
10. On the closing of the Offering, the Counterparty subscribed for units of the HTR Fund.
11. The HTR Fund used such subscription proceeds to acquire the Portfolio. The HTR Fund may borrow up to 25% of the total assets of the HTR Fund under a loan facility to, among other things, acquire additional securities for the Portfolio.

### **General Description of the Distribution Withdrawal Plan**

12. The Trust intends to adopt the Distribution Withdrawal Plan (the Plan) which will provide that, at the election of a Unitholder (a Participant), such Participant will be able to request that the Trust repurchase Units in exchange for cash payments from the Trust in accordance with the Plan.
13. A summary of the Plan is contained in the Prospectus.
14. MFL Management Limited (the Plan Agent) will be the plan agent under the Plan.
15. Administrative costs associated with the operation of the Plan will be borne by the Trust out of the assets of the Trust.
16. The terms of the Plan will be set out in a cash payment plan agency agreement (the Plan Agency Agreement) among the Trust, Manager and Plan Agent.

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### **Participation in the Plan**

17. Each Unitholder may become a Participant by notifying the Manager in writing of such Unitholder's request to participate in the Plan (the Enrolment Request).
18. Pursuant to such Enrolment Request, a Unitholder must (i) specify the number of Units that the Unitholder owns and which the Unitholder would like to have subject to the Plan (the Plan Units), and (ii) deposit the Plan Units with the Plan Agent, or for Units held through The Canadian Depository for Securities Limited or its nominee (CDS), such Plan Units will be segregated in an account of CDS.
19. Any number of Units owned by the Unitholder may be made subject to the Plan.
20. Participation in the Plan for any given month begins as of the last day of the month in which an Enrolment Request was properly received by the Manager. The last day of each month is a Cash Payment Determination Date. A Unitholder must provide an Enrolment Request and the other items referred to in paragraph 18 at least 10 business days before a Cash Payment Determination Date in order for participation in the Plan to commence as of that Cash Payment Determination Date.
21. A Participant will be unable to sell, trade, encumber, pledge, dispose of or take any other similar action with respect to such Plan Units until the Participant's participation in the Plan is terminated or such Units are withdrawn from the Plan.

### **Determination of Cash Payment**

22. The cash payment in each month is determined with reference to the monthly distributable income of the HTR Fund for such month (the Monthly Distributable Income), as determined by the Manager based on its estimate of distributable income received by the HTR Fund during such month, net of fees and expenses of the HTR Fund but without any deduction for tax.
23. The amount of a Cash Payment (as defined in paragraph 26) to be made by the Trust to a Participant in respect of a Cash Payment Determination Date will be based on the number of whole Plan Units held by the Participant that are to be repurchased by the Trust on the applicable Cash Payment Determination Date (the Applicable Units).

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24. The number of Applicable Units is calculated as:
- (a) the number of Units held by a Participant during such month that are subject to the Plan, multiplied by a fraction, the numerator of which is equal to the applicable Monthly Distributable Income and the denominator of which is the total number of Units outstanding as at the Cash Payment Determination Date; divided by
  - (b) the net asset value (NAV) per Unit (determined in accordance with the Declaration of Trust) as of the applicable Cash Payment Determination Date.
25. The number of Applicable Units will be rounded down to the nearest whole Unit. If the Participant has fewer Units that are subject to the Plan than the number of Applicable Units, then the number of “Applicable Units” will be such lesser number of Plan Units.
26. The Trust will automatically repurchase as of the applicable Cash Payment Determination Date the number of Applicable Units of each Participant and each Participant will then receive, on or before the 10<sup>th</sup> business day following the applicable Cash Payment Determination Date (a Cash Payment Date), a cash payment (a Cash Payment) from the Trust calculated as:
- (a) the number of Applicable Units, multiplied by
  - (b) the NAV per Unit as at the Cash Payment Determination Date.

### **Termination of Participation**

27. The Plan Agent will terminate the participation of a Participant in the Plan upon the Manager receiving written notice from or on behalf of the Participant of its desire to terminate its participation.
28. Upon receipt of such notice, the Manager will promptly notify the Plan Agent.
29. If notice of termination is received by the Manager after a Cash Payment Date and no later than 10 business days before the next Cash Payment Determination Date, termination of such Participant’s participation in the Plan will have effect beginning with such Cash Payment Determination Date.
30. Participation will automatically terminate if the Participant has no more Units that are subject to the Plan or if the number of Units of the Participant that are subject to the Plan are, in the sole discretion of the Manager, no longer

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reasonably capable of being repurchased pursuant to the Plan. For example, this may occur if the number of Units of a Participant that are subject to the Plan result in the number of Applicable Units, determined in accordance with paragraph 24 above, being a number which is less than 1.

### **Amendments, Suspension or Termination of the Plan**

31. The Manager may amend or modify the Plan and/or the Plan Agency Agreement at any time in its sole discretion, provided that if in the Manager's reasonable opinion the amendment or modification is material to Participants, then at least thirty (30) days' prior written notice thereof shall be given to Participants and to the Plan Agent by the Trust issuing a press release or by publishing an advertisement in at least one major daily newspaper of general and regular paid circulation in Canada, containing a summary description of the amendment or modification, or in any other manner the Manager determines appropriate.
32. The Manager may, in its sole discretion and on behalf of the Trust, suspend the Plan:
  - (a) for the whole or part of a period during which normal trading is suspended on one or more stock exchanges, options exchanges or futures exchanges on which more than 50% of the portfolio (by value) of the HTR Fund is listed and traded;
  - (b) for any period during which the Manager determines that conditions exist which render impractical the sale of any of the assets of the Trust or the HTR Fund or which impair the ability of the Manager to determine the value of the assets of the Trust or the HTR Fund; or
  - (c) when Monthly Distributable Income in a specific month is less than or equal to \$0.05 per Unit.
33. The Trust or the Manager will provide written notice to the Participants and the Plan Agent of any suspension of the Plan, which notice shall be given by the Trust issuing a press release or by publishing an advertisement in at least one major daily newspaper of general and regular paid circulation in Canada. So long as the circumstances described above which give rise to the suspension continue to exist, the suspension of the Plan may last for:
  - (a) a period of up to 120 days; or

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- (b) a period exceeding 120 days upon additional prior written notice to the Participants and the Plan Agent, which notice shall be given by the Trust issuing a press release or by publishing an advertisement in at least one major daily newspaper of general and regular paid circulation in Canada.
34. The Manager also has the right to terminate the Plan, on behalf of the Trust, in its sole discretion upon not less than thirty (30) days' prior written notice to the Participants and the Plan Agent, which notice shall be given by the Trust issuing a press release or by publishing an advertisement in at least one major daily newspaper of general and regular paid circulation in Canada. The Trust shall also disclose that the Plan has been terminated in the Trust's next annual information form which the Trust files under applicable securities laws subsequent to the date of termination of the Plan.

### **Issuer Bid**

35. The purchase or repurchase of Units by the Trust from Participants pursuant to the Plan will constitute an issuer bid pursuant to the Legislation. Unless the Issuer Bid Relief is granted, the Filer will be subject to the Issuer Bid Requirements.
36. Participation in the Plan is voluntary and is open for participation by all Unitholders.
37. The Plan will offer each Participant the same consideration for each Unit purchased or repurchased by the Trust in respect of any month in accordance with the mechanics described in the Plan. Each Participant will receive a Cash Payment based upon the number of Applicable Units repurchased and the relevant NAV per Unit.
38. The Applicable Units repurchased from a Participant in respect of any month will be calculated in accordance with the set formula outlined in paragraph 24 above.

### **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 Issuer Bid Relief is granted provided that the following conditions are met:

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- (a) the Trust mails a copy of the Plan to its Unitholders prior to the Plan coming into force and advises Unitholders in that mailing that details of the Plan are also available on SEDAR and the Manager's website;
- (b) the Trust posts the details of the Plan on SEDAR and the Manager's website;
- (c) the Trust discloses a description of the Plan in its next annual information form (AIF) and any subsequent AIF the Trust files prior to termination of the Plan; and
- (d) if the Plan is terminated, the Trust will disclose that the Plan has been terminated in the next AIF filed by the Trust subsequent to the date of termination.

Carol A. Perry  
Commissioner  
Ontario Securities Commission

David L. Knight  
Commissioner  
Ontario Securities Commission