

2008 BCSECCOM 453

July 4, 2008

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 - A mutual fund manager wants relief from section 127(1)(b) of the Act so that it can sell the securities of an issuer to the account of responsible person - The purchase or sale is consistent with, or is necessary to meet, the investment objectives of the fund; the IRC of the fund has approved the transaction which involves a perceived or actual conflict of interest for the fund manager; the fund manager and the IRC follow any standing instructions that the IRC provides in connection with the transactions; the fund's continuous disclosure materials provide disclosure to fund investors about the transactions with related parties; and the fund keeps the written records required by NI 81-107

Applicable British Columbia Provisions

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

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan, Ontario, Québec,
New Brunswick, Nova Scotia and Newfoundland and Labrador
(the "Jurisdictions")

and

In the Matter of
the Mutual Reliance Review System for Exemptive Relief Applications
("MRRS")

and

In the Matter of
National Bank Securities Inc.
(the "Applicant")

and

In the Matter of
the Omega High Dividend Fund and
the Omega Preferred Equity Fund
(each, a "Fund" and collectively, the "Funds")

2008 BCSECCOM 453

MRRS Decision Document

Background

The local securities regulatory authority or regulator (the “Decision Maker”) in each of the Jurisdictions has received an application (the “Application”) from the Applicant on behalf of each of the Funds for a decision under the securities legislation (the “Legislation”) of the Jurisdictions that ING Investment Management, Inc. (“ING Investment Management”) and its affiliates (each, an “ING Affiliate” and collectively with ING Investment Management, “ING”) be exempt, under the Legislation of the Provinces of British Columbia, Alberta, Saskatchewan, Ontario, Québec, New Brunswick, Nova Scotia and Newfoundland and Labrador, from the conflict of interest provisions contained in the Legislation that prohibit among other things transfers of securities between a mutual fund and its portfolio manager, in connection with the purchase and redemption of Fund units, whereby payment for the purchase of units or the redemption of units by ING may be satisfied by transferring securities that meet the investment criteria of a Fund from ING to the Fund or from the Fund to ING, as the case may be (an “In-Species Transfer”) (the “Requested Relief”).

Under the MRRS:

- (i) the principal regulator for the Application is the Autorité des marchés financiers (the “Autorité”); and
- (ii) this MRRS Decision Document evidences the decision of each of the Decision Makers.

Interpretation

Defined terms contained in *National Instrument 14-101 respecting Definitions* and *National Instrument 81-102 respecting Mutual Funds* (“NI 81-102”) have the same meaning in this MRRS Decision Document unless they are otherwise defined in this MRRS Decision Document.

Representations

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

1. The Applicant is the manager of the Funds. ING Investment Management is the portfolio manager of the Funds. Each of the Funds is an open-ended mutual fund trust established under the laws of Ontario. Each of the Funds is a reporting issuer in the Jurisdictions.

2008 BCSECCOM 453

2. Each of the Funds is qualified for distribution in each of the provinces and territories of Canada under a simplified prospectus and annual information form dated May 16, 2008.
3. ING has made initial investments in the Funds. It is expected that ING will make further investments, which may be significant, in each of the Funds and may purchase or redeem units of each Fund from time to time. It is proposed that payment for any future purchase or redemption of units of the Funds by ING may be satisfied by an In-Species Transfer.
4. In-Species Transfers in connection with the purchase of units of a Fund are in the best interests of both existing unitholders of a Fund and ING because brokerage fees are eliminated on both sides of the transfer. ING is spared the cost of brokerage fees to liquidate its existing portfolio of securities to free up cash to buy the units of a Fund and is also spared the cost of its pro rata share of brokerage fees paid by the Fund to purchase the same securities with the cash received from the new investor. The existing unitholders of a Fund are spared the cost of their pro rata share of brokerage commissions paid by the Fund to purchase the same securities with the cash investment.
5. In-Species Transfers in connection with the redemption of units of a Fund spare the Fund (and thus the continuing unitholders) significant brokerage fees that would be associated with liquidating securities in order to fund the redemption proceeds. ING may receive payment for a redemption of units in a Fund in the form of an In-Species Transfer or in cash.
6. ING will not receive any compensation in respect of an In-Species Transfer.
7. The price at which In-Species Transfers occur is determined on the same basis as NI 81-102 requires in respect of such transactions. The In-Species Transfers will be completed in accordance with the applicable requirements of subsections 9.4(2) and 10.4(3) of NI 81-102.
8. An independent review committee ("IRC") was established for the Funds and is fully operational. The IRC complies with applicable securities legislation, including *National Instrument 81-107 respecting Independent Review Committee for Investment Funds* ("NI 81-107").
9. The Applicant and ING have established and follow written policies and procedures with respect to In-Species Transfers to or from a Fund in payment of the purchase price or redemption price for the issuance or redemption of units of the Fund. The written policies and procedures have been reviewed and approved by the IRC and will include, among other requirements, that ING

2008 BCSECCOM 453

prepare a proposed list of securities to be included in the In-Species Transfer for review and approval by the Applicant as manager of the Fund.

10. The IRC has globally reviewed and approved the relationship between the Applicant and ING Investment Management and their respective roles in respect of the Funds, including the following matters: (i) the entering into of an *O Series* account agreement between the manager and ING Investment Management, (ii) the fact that In-Species Transfers will consist of ING Investment Management's own assets or assets of ING Affiliates that it manages.
11. The IRC will review and approve, by way of standing instruction, the In-Species Transfers to be completed in connection with the purchase or redemption of units of the Funds by ING in accordance with subsection 5.2(2) of NI 81-107 and, if applicable, section 5.4 of NI 81-107.
12. The proposed investment by ING and the possible In-Species Transfers have been disclosed in the simplified prospectus and the annual information form of the Funds, and will continue to be so disclosed for as long as In-Species Transfers may be effected.

Decision

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Makers 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 on the conditions that:

- (a) the provisions of sections 5.2 and 5.4 of NI 81-107 dealing with matters that require the approval of the IRC apply to the In-Species Transfers;
- (b) the In-Species Transfers are consistent with, or are necessary to meet, the investment objective of the Fund;
- (c) the Applicant, as manager of the Fund, complies with section 5.1 of NI 81-107;
- (d) the IRC of the Fund has approved the In-Species Transfers in accordance with subsection 5.2(2) of NI 81-107;

2008 BCSECCOM 453

- (e) the Applicant, as manager of the Fund, and the IRC of the Fund comply with section 5.4 of NI 81-107 for any standing instructions provided by the IRC in connection with the In-Species Transfers;
- (f) the bid and ask price of the security included in an In-Species Transfer is readily available;
- (g) the Fund receives no consideration and the only cost for the trade is the nominal cost incurred by the Fund to print or otherwise display the trade;
- (h) the transaction is subject to market integrity requirements (as defined in NI 81-107);
- (i) the Fund keeps the written records required by subparagraph 6.1(2)(g) of NI 81-107; and
- (j) in case of an In-Species Transfer from ING to the Fund, securities representing not less than 95% of the value of the securities included in the In-Species Transfer are transferred at the current market price of the security (as defined in NI 81-107).

Superintendant
Mario Albert
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