

# 2006 BCSECCOM 152

February 14, 2006

## **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

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, s. 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. (the “Filer”)

and

In the Matter of ClaymorETF FTSE RAFI Canadian Index Fund

## 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”) exempting all holders (“Unitholders”) of units (“Units”) of

ClaymorETF FTSE RAFI Canadian Index Fund, an exchange traded mutual fund (the “Existing Fund”), and any additional exchange-traded funds that the Filer may establish that have the investment objective of replicating, to the extent possible, the returns of an index, net of expenses (the “Future Funds” and together with the Existing Fund, the “Funds”), 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 Funds.

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, in relation to a particular Fund, a group of securities determined by the Filer from time to time representing the constituents of the applicable index, in approximately the same weightings as such constituents are weighted in such index, based on each security’s sale price at the last valuation time.

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

“index” means an index provided to the Filer by a third party provider for use in connection with a Fund.

“Prescribed Number of Units” means, in relation to a Fund, 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.

“Underwriters” means registered brokers and dealers that have entered into underwriting agreements with the Funds and that subscribe for and purchase Units from the Funds, 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 Existing Fund is, and it is expected that each of the Future Funds 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. The Filer has applied to list the Units of the Existing Fund on the Toronto Stock Exchange (the “TSX”) and will apply to list the Units of each of the Future Funds on the TSX. The Filer will not file a final prospectus for any Fund until the TSX has conditionally approved the listing of Units of such Fund.
3. Units issued by the Funds will be index participation units within the meaning of National Instrument 81-102 – Mutual Funds. The Funds will be generally described as exchange traded funds (“ETFs”).
4. The Filer is, or will be, the trustee and manager of the Funds 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. The Filer is a wholly-owned subsidiary of Claymore Group LLC, a financial services and asset management company based in the Chicago, Illinois area. Claymore Group LLC and its affiliates include two investment advisers registered with the U.S. Securities Exchange Commission under the Investment Advisers Act of 1940 and a broker-dealer registered with the U.S. National Association of Securities Dealers.
5. The investment objective of each Fund is, or will be, to replicate the performance of an index, net of expenses. The investment objective and applicable index for each Fund, as well as its investment strategy, will be disclosed on an ongoing basis in the prospectus of each Fund.
6. Units may only be subscribed for or purchased directly from the Funds 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 Funds will appoint Designated Brokers to perform certain functions which include standing in the market with a bid and ask price for Units of each 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

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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 the Filer, the Funds 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 each Fund will be calculated and published daily.
10. Upon notice given by the Filer 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 Existing Fund, or such other amount established by the Filer in respect of each Future Fund and disclosed in the prospectus of such Future 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. The Filer may, at its discretion, charge an administration fee on the issuance of Units to the Designated Brokers or Underwriters.
12. Except as described in paragraphs 6 through 10 above, Units may not be purchased directly from the Funds. 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 to be established by each Fund, as disclosed in the preliminary prospectus for the Existing Fund and as will be disclosed in the prospectus of each Future Fund.
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 trustee and manager, the Filer will be entitled to receive a fixed annual fee from each Fund. Such annual fee will be calculated as a fixed percentage of the net asset value of each Fund. The Filer will be responsible for the payment

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of all expenses of the Funds, except for the management fee, any administration fee payable by Designated Brokers or Underwriters in connection with the issuance of Units, any redemption fees payable by Unitholders upon the redemption of a Prescribed Number of Units, any withholding taxes and any income taxes and any extraordinary expenses.

15. Unitholders holding at least the Prescribed Number of Units of a Fund will be entitled to vote the applicable portion of the securities of constituent issuers of the applicable index held by such Fund. Unitholders holding less than a Prescribed Number of Units will have no rights to vote the securities of constituent issuers of the applicable index.
16. Unitholders will have the right to vote at a meeting of Unitholders in respect of a Fund prior to any change in the fundamental investment objectives of such Fund, any change to their voting rights and prior to any increase in the amount of fees payable by a Fund.
17. Although Units will trade on the TSX and the acquisition of Units can therefore be subject to the Take-over Bid Requirements:
  - (a) it will not be possible for one or more Unitholders to exercise control or direction over a Fund as the Declaration of Trust in respect of each Fund will ensure that there can be no changes made to the Fund which do not have the support of the Filer;
  - (b) it will be difficult for purchasers of Units to monitor compliance with 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 Funds; and
  - (c) the way in which Units will be priced deters anyone from either seeking to acquire control, or offering to pay a control premium, for outstanding Units because Unit pricing will be dependent upon, and will generally represent a prescribed percentage of, the level of the applicable index.
18. The application of the Take-over Bid Requirements to the Funds would have an adverse impact upon Unit liquidity because they could cause Designated Brokers and other large Unitholders to cease trading Units once prescribed take-over bid thresholds are reached. This, in turn, could serve to provide conventional mutual funds with a competitive advantage over the Funds.

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### **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 purchase of Units by a person or company (a “Unit Purchaser”) in the normal course through the facilities of the TSX is exempt from the Take-over Bid Requirements for so long as the Funds remain ETFs provided that, prior to making any take-over bid for Units that is not otherwise exempt from the Take-over Bid Requirements, the Unit Purchaser, and any person or company acting jointly or in concert with the Unit Purchaser (a “Concert Party”), provide the Filer with an undertaking not to exercise any votes attached to the Units held by the Unit Purchaser and any Concert Party which represent more than 20% of the votes attached to all outstanding Units.

Paul Moore  
Vice Chair

Wendell S. Wigle  
Commissioner