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July 7, 2008

Headnote

Mutual Reliance Review System for Exemptive Relief Applications – Securities Act s. 114(2) Take-Over Bids - Exemption from the formal take-over bid requirements in MI 62-104 - General - An offeror wants relief from all take over bid requirements - The existence and terms of the liquidity option will be disclosed in the OM of each fund; all purchasers will have the right to participate in the liquidity option on the same terms; all purchases under the liquidity option will be at a discount to the net asset value of the fund represented by the units

Applicable British Columbia Provisions

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

Multilateral Instrument 62-104 ss. 4.3 and 6.1

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Manitoba, Saskatchewan, Ontario, Quebec, Nova
Scotia, Prince Edward Island, New Brunswick, Newfoundland and Labrador and
the Northwest Territories
(the Jurisdictions)

and

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

and

In the Matter of
KC GenPar Inc. (KGP)
NYLCAP Select Manager Canada Fund, L.P. (NSMCF)
NYLCAP Select Manager Canada Feeder Fund, L.P. (NSMCFF)
Newbury Secondary Fund L.P. (NSF)
(the Filers)

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 Filers for a decision under the securities legislation of the Jurisdictions (the Legislation) that the formal

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take-over bid requirements in the Legislation (collectively, the Take-Over Bid Provisions) shall not apply to purchases of limited partnership units of NSMCF or NSMCFF (the Units) by NSF pursuant to the proposed Liquidity Option (as defined below) of the Funds (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. As used in this decision “published market” means, as to any class of securities, any market on which such securities are traded if the prices at which they have been traded on that market are regularly published in a newspaper or business or financial publication of general and regular paid circulation.

Representations

This Decision is based on the following facts represented by the Filers:

1. KGP is a corporation continued and existing under the *Canada Business Corporations Act*. KGP has an office in Ontario.
2. Each of NSMCF and NSMCFF (together, the Funds) is or will be a limited partnership formed under the laws of the Province of Ontario.
3. The Funds will offer Units by private placement to accredited investors across Canada.
4. The investment objective of the Funds is to invest directly or indirectly as a limited partner in NYLCAP Select Manager Cayman Fund, L.P., a foreign-based private equity fund of funds (the Cayman Fund). The Cayman Fund is a feeder fund serving as a limited partner in NYLCAP Select Manager Fund, L.P., a Delaware limited partnership (the Bottom Fund). NSMCFF is to be a limited partner of NSMCF, NSMCF is to be a limited partner of the Cayman Fund and the Cayman Fund is to be a limited partner of the Bottom Fund.
5. Neither of the Funds is or is anticipated to be a reporting issuer and there will be no published market for the Units.

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6. The minimum investment in NSMCFF will be US\$150,000, which is to be paid in full on closing. The minimum investment in NSMCF will be US\$250,000, which is to be paid as and when called for by KGP as the general partner of the Funds.
7. NSF is a private investment fund formed under the laws of Delaware that acquires limited partnership interests in established leveraged buyout, venture capital and mezzanine funds, primarily in secondary transactions. NSF is not in the business of creating a market for restricted securities.
8. As an added benefit for limited partners of the Funds (Limited Partners), whose Units will be restricted securities and would otherwise be highly illiquid, Limited Partners will be provided with a liquidity option pursuant to which NSF will agree to purchase Units from Limited Partners starting on the second anniversary of the initial closing of the applicable Fund and continuing for approximately ten years, subject to extension by agreement of NSF and KGP (the Liquidity Option).
9. The existence and terms of the Liquidity Option will be disclosed in the offering memorandum of each Fund (each, an OM).
10. The principal terms of the Liquidity Option are as follows:
 - (a) Limited Partners wishing to have the benefit of the Liquidity Option will be required to “opt in” to the Liquidity Option by checking the appropriate box on their subscription agreement and paying the Liquidity Fee (as defined below).

Fee:
 - (b) In consideration for providing the Liquidity Option, each participating Limited Partner will be required to pay to its respective Fund, which in turn, will pay to NSF, an annual fee (the Liquidity Fee) in respect of such Limited Partner equal to: the product of (x) such Limited Partner’s commitment, subject to reduction of the portion of the commitment to be applied in the calculation as set out below, multiplied by (y) 0.10%. The aggregate annual Liquidity Fee payable by the Funds to NSF is the aggregate of such annual Liquidity Fees payable by all participating Limited Partners. Once a participating Limited Partner sells its Units to NSF, or defaults in its obligation to pay the Liquidity Fee, its investment will no longer be included in calculating the aggregate annual Liquidity Fee payable by the Funds. The obligation of a participating Limited

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Partner to pay the Liquidity Fee is an additional obligation of the Limited Partner, who will also be obligated to pay the full amount of the Limited Partner's investment (that is initially, US\$1,000 per Unit).

- (c) The Liquidity Fee will be payable commencing on the Funds' initial closings, and shall be calculated and payable on such date and each one-year anniversary thereafter.
- (d) Any Limited Partner that does not elect to participate in the Liquidity Option at closing will not have the opportunity thereafter to do so without obtaining NSF's and KGP's consent.
- (e) The Liquidity Fee will be reduced as follows: (i) on the fifth anniversary of the final closing of the relevant Fund (the Final Closing), the Liquidity Fee will be reduced by an amount equal to 10% of the commitment of such participating Limited Partner, and (ii) on each anniversary thereafter to and including the eleventh anniversary of the Final Closing, the Liquidity Fee will be further reduced by an amount equal to 10% of such commitment.
- (f) Any participating Limited Partner that defaults in paying the Liquidity Fee when due in a timely manner will automatically lose its right to sell its Units to NSF pursuant to the Liquidity Option and surrender any amounts paid by it with respect to the Liquidity Fee.

Term:

- (g) A participating Limited Partner may require NSF to purchase such Limited Partner's Units at any time commencing on the earlier of (i) the second anniversary of the Final Closing and (ii) any such time when the purchase price is greater than zero and the obligations of NSF to make such purchase will terminate on the earlier of the twelfth anniversary of the Final Closing and January 1, 2020.

Purchase Price:

- (h) At the request of any Limited Partner electing in its subscription documents to the Fund to participate in the opportunity to take advantage of this Liquidity Option, NSF will provide a written offer to purchase such Limited Partner's Units at a US dollar price of 90% of a Limited Partner's Exposure, less its Remaining Commitment. "Exposure" means, in respect of a Unit, the net asset value (NAV) of the Unit plus such Limited Partner's Remaining Commitment. "Remaining Commitment" means the Limited Partner's original capital commitment to the Fund less capital

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contribution drawdowns by the relevant Fund. In the one year periods from the eighth, ninth, tenth and eleventh anniversaries of the Final Closing, the purchase price will be calculated as set forth above, except that rather than applying the 90% amount, 85%, 80%, 75% and 70% will be applied respectively. The purchase price paid for the Units will be adjusted upward on a dollar-for-dollar basis to account for any capital contributions made by the selling Limited Partner between signing of the definitive sale agreement and the closing of the sale, and reduced downward on a dollar-for-dollar basis for any distributions made by the respective Fund to the selling Limited Partner between signing of the definitive sale agreement and closing of the sale.

Obligation to Purchase:

- (i) NSF's obligation to purchase Units of the Funds will be capped at an aggregate purchase price of US\$50 million. To reduce the likelihood that the Units subject to the Liquidity Option exceeds NSF's obligation to purchase Units, the Funds will not accept elections to participate in the Liquidity Option for more Units than the number of Units having an aggregate NAV of US\$50 million.
- (j) In the event that Limited Partners subscribing for Units having an aggregate NAV of more than US\$50 million elect in their subscription documents to participate in the Liquidity Option, a prorated fraction of the Units of each electing Limited Partner will be accepted into the Liquidity Option at the initial closings of the Funds, such that the aggregate NAV of the Units subject to the Liquidity Option will initially equal US\$50 million. If at the initial closings Limited Partners electing to participate in the Liquidity Option hold Units with an aggregate NAV of less than US\$50 million of Units and one or more subsequent closings of the Funds occur, Limited Partners who subscribe for Units at a subsequent closing may elect in their subscription documents to participate in the Liquidity Option to the extent that the aggregate NAV of Units subject to the Liquidity Option is less than US\$50 million, and participation in the Liquidity Option at any subsequent closing would be prorated as to that remaining availability only among those Limited Partners whose subscriptions are accepted at the particular subsequent closings. Notwithstanding any pro rata entitlement to exercise under the Liquidity Option, NSF's obligation will be to only purchase Units having an aggregate purchase price of US\$50 million which may affect the number of Units that NSF is obligated to purchase depending on any increase or decrease in NAV of the Units.

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- (k) The Fund will notify NSF if Limited Partners holding Units having an aggregate NAV of more than US\$50 million Units elect in their subscription documents to participate in the Liquidity Option with a view to the possibility of the Liquidity Option being extended by NSF above an aggregate purchase price of US\$50 million, but there is no assurance that there would be any such extension.
- (l) The Liquidity Option is the obligation of NSF. Neither the Funds, KGP, nor any Person, other than NSF, is under any obligation in connection with the Liquidity Option and none of them is responsible for, or has any obligations to the Limited Partners electing to participate in the Liquidity Option in the event of the failure of NSF to provide such liquidity. Neither the Funds, KGP, nor any other Person makes any representation or warranty with respect to the creditworthiness of NSF and/or its ability to fulfill its obligations to provide such liquidity to the Limited Partners.

Expenses:

- (m) A Limited Partner will be responsible for its own expenses incurred in connection with a sale to NSF pursuant to the Liquidity Option.

Timing:

- (n) The closing of the sale of Units on the exercise of the Liquidity Option will not occur until NAV is finally determined, which could be as long as 190 days following the execution of the purchase and sale agreement, a form of which has been approved by KGP and NSF.
11. Participation in the Liquidity Option is voluntary. The entitlement to participate in the Liquidity Option will be offered to all Limited Partners whose subscriptions are accepted at the initial closings of the Funds on equal terms. As the Liquidity Option is of limited size, the availability of the entitlement to participate in Liquidity Option for Limited Partners whose subscriptions are accepted at subsequent closings will depend on the extent to which Limited Partners whose subscriptions were accepted at the prior closings for the Funds elected to participate in the Liquidity Option, but the then remaining availability of the Liquidity Option will be offered to all Limited Partners whose subscriptions are accepted at the subsequent closing for the Fund on equal terms.
 12. At such time as there remains 25% of NSF's obligation to purchase Units under the Liquidity Option KGP will deliver a notice to each participating

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Limited Partner setting out the Units' net asset value and the amount of capacity remaining for purchase under the Liquidity Option.

13. In the event of more than one closing in respect of the sale of Units of the Funds, prospective Limited Partners will be provided with notice of the Units' net asset value and the amount of capacity remaining for purchase under the Liquidity Option as at the time of such subsequent closing.
14. NSF has indicated that it intends to hold the purchased Units until dissolution of the respective Fund. Consequently, as a result of such purchase, NSF will be obligated as a Limited Partner to make capital contributions to and be entitled to receive distributions from the Funds with respect to such Units.
15. While there is no direct relationship between NSF and the Funds an affiliate of the Cayman Fund's investment manager is an investor in NSF. Notwithstanding this relationship, the terms of the Liquidity Option reflect arms' length negotiations and bona fide terms and conditions.
16. The exercise of the Liquidity Option by a number of Limited Partners could result in NSF acquiring 20% or more of the outstanding Units of a particular Fund and as a result the making available of the Liquidity Option would be a take-over bid for the purposes of the Take-Over Bid Provisions.
17. Legislation in many of the Jurisdictions provides an exemption from the Take-Over Bid Provisions with respect to non-reporting issuers if:
 - (a) the offeree issuer is not a reporting issuer,
 - (b) there is not a published market in respect of the securities that are the subject of the bid, and
 - (c) the number of holders of securities of that class is not more than fifty, exclusive of holders who are in the employment of the offeree issuer or any affiliate of the offeree issuer, and exclusive of holders who were formerly in the employment of the offeree issuer or an affiliate of the offeree issuer and who while in employment were, and have continued after that employment to be, security holders of the offeree issuer.

While neither of the Funds will be reporting issuers and there will be no published market in respect of the Units, as there is no restriction on the number of Limited Partners in either of the Funds, there is no assurance that either of the Funds will have fewer than fifty security holders, and for this

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reason the Non-Reporting Issuer Exemption will likely not be available in respect of the Liquidity Option.

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 provided that:

- (a) the principal terms of the Liquidity Option are as described above and such terms are not amended or extended other than as contemplated in paragraphs 8 and 10(k) above,
- (b) the features of the Liquidity Option will be fully disclosed in the OM of the respective Fund,
- (c) there continues to be no published market for Units,
- (d) neither of the Funds is or becomes a reporting issuer, and
- (e) each Limited Partner is an accredited investor at the time of its purchase of Units.

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