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## **Headnote**

Mutual Reliance Review System for Exemption Relief Application – National Instrument 81-105 s. 9.1 - Mutual Fund Sales Practices - A mutual fund dealer wants relief from the provision in ss. 7.1(1)(b) of the Instrument that prohibits a participating dealer from making certain payments to a “member of the organization” of the mutual fund. - A client who wishes to reinvest redemption proceeds from other products in the affiliated funds would be prejudiced by being denied the rebate they would otherwise have received. The filer's representatives have no equity interest in the filer or in any member of the organization of the affiliated funds. The filer has controls in place to prevent representatives from being potentially influenced to recommend unjustified switches to affiliated funds. The decision document contains conditions to address conflict of interest concerns.

National Instrument 81-105 s. 9.1 - Mutual Fund Sales Practices - A mutual fund dealer wants relief from ss. 8.2(4) of the Instrument which requires them to obtain clients’ written consent prior to trading in a related mutual fund after disclosing that they are a member of the organization of the mutual fund. - The filer will provide a disclosure document to clients with adequate information regarding ownership of the member of the organization of the mutual funds to address potential conflicts of interest; the filer will remind clients in the disclosure document that they may terminate their participation in the pre-authorized purchase plan at any time after receiving the disclosure.

## **Applicable British Columbia Provisions**

National Instrument 81-105 *Mutual Funds Sales Practices*, ss. 7.1(1)(b), 8.2(4) and 9.1

December 27, 2007

**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,  
Northwest Territories, Yukon and Nunavut  
(the Jurisdictions)**

**and**

**In the Matter of  
the Mutual Reliance Review System  
For Exemptive Relief Applications**

**and**

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**In the Matter of  
Berkshire Investment Group Inc. (BIG) and  
Berkshire Securities Inc. (BSI)  
(collectively, 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) for an exemption under section 9.1 of National Instrument 81-105 *Mutual Fund Sales Practices* (NI 81-105) exempting the Filers and their sales representatives from:

- (a) the prohibition against payment of certain rebates of redemption commissions or fees contained in subsection 7.1(1)(b) of NI 81-105 to the extent necessary to permit rebates of redemption commissions or fees to be paid by such sales representatives of the Filers to clients who purchase units of current or future mutual funds managed by an affiliate of the Filers following an early redemption of mutual fund securities of an unaffiliated mutual fund family (Commission Rebate Relief); and
- (b) the requirement that the Filers obtain written consent from clients prior to the completion of a trade in related mutual funds as required by subsection 8.2(4) of NI 81-105 (the Equity Interest Disclosure 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 NI 81-105 and 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 Filers:

1. BIG is registered with the Decision Makers (other than the Decision Maker in Nunavut) as a dealer in the category of mutual fund dealer (or equivalent). BIG is

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also registered as a limited market dealer in Ontario and Newfoundland and Labrador. BIG is a member of the Mutual Fund Dealers Association of Canada.

2. BSI is registered with the Decision Makers as a dealer in the category of investment dealer (or the equivalent). BSI is a member of the Investment Dealers Association of Canada.

### *Corporate Structure and Relationships*

3. As a result of the corporate acquisition and the relationships described below, the Filers are “members of the organization” (within the meaning of NI 81-105) of the mutual funds managed by Elliott & Page Limited (E & P), known as the “Manulife Mutual Funds”. The Filers may become in the future, “members of the organization” of other mutual funds, since the parent company or an affiliate of the Filers may establish or acquire interests in corporations that are managers of mutual funds (Future Affiliated Funds).
4. Effective August 31, 2007, The Manufacturers Life Insurance Company (Manulife), a public company listed on The Toronto Stock Exchange, acquired all of the securities of Berkshire-TWC Financial Group Inc. (BFGI). As a result of the acquisition, BIG and BSI became indirect wholly-owned subsidiaries of Manulife. E & P is also a wholly owned subsidiary of Manulife. Manulife is wholly owned by Manulife Financial Corporation, also a reporting issuer.
5. The Filers act as participating dealers (within the meaning of NI 81-105) in respect of the Manulife Mutual Funds as well as for mutual funds managed by unrelated fund managers.
6. The Filers act independently from E & P and have no connection with E & P, other than through their common ultimate parent company. The Filers are free to choose which mutual funds to recommend to their clients and consider recommending the Manulife Mutual Funds to their clients in the same way as they consider recommending other third party mutual funds. The Filers comply with their obligations at law and only recommend mutual funds that they believe would be suitable for their clients and in accordance with the clients’ investment objectives. E & P provides the Filers with the compensation described in the prospectus of the Manulife Mutual Funds in the same manner as E & P does for any participating dealer selling securities of the Manulife Mutual Funds to their clients.

### *The Commission Rebate Prohibition*

7. The prohibition in paragraph 7.1(1)(b) of NI 81-105 means that neither the Filers nor their sales representatives can reimburse their client for any fees or

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commissions incurred by those clients when they decide to switch into a Manulife Mutual Fund from another mutual fund. Section 7.1 allows the Filers and their sales representatives to pay commission rebates when the client decides to switch from one third party fund to another third party fund, provided the disclosure and consent procedure established in section 7.1 is followed. Payment of commission rebates by the Filers and by their sales representatives benefit the client so that the client does not incur costs in switching from one fund to another.

8. Neither the Filers, nor any sales representative of the Filers, are or will be subject to quotas (whether express or implied) in respect of selling the Manulife Mutual Funds. Non of the Filers or E & P or any other member of the respective organizations, provide any incentive (whether express or implied) to any sales representative of the Filers or to the Filers to encourage those sales representatives or the Filers to recommend to clients the Manulife Mutual Funds over third-party managed mutual funds.

### *The Equity Interest Disclosure Requirement*

9. As of August 31, 2007, Manulife owns, directly or indirectly, all of BIG, BSI and E & P. Prior to August 31, 2007, BIG and BSI were not under the ownership and control of Manulife and as such, section 8.2 of NI 81-105 did not apply to the Filers or their sales representatives in respect of Manulife.
10. The Manulife Mutual Funds will comply with the disclosure obligations that apply to them as required by subsection 8.2(1) and (2) of NI 81-105. In this way, all clients of a Filer will have access to complete information about the relationships between the relevant parties.
11. As part of the account opening process of the Filers, any person opening an account after August 31, 2007 will be required to provide written consent for trades in Manulife Mutual Funds prior to any trade of such funds being completed, as required by subsection 8.2(4).
12. Prior to August 31, 2007, the Filers have a combined total of approximately 175,000 clients. A significant number of these clients trade in mutual funds.
13. Certain existing clients of the Filers have preauthorized purchase plans which instruct the Filers to buy Manulife Mutual Funds for the clients at a pre-determined amount and frequency. Without the requested relief, the Filers would be forced to suspend these plans until such time as they receive the necessary written consent from these existing clients.
14. The Filers have developed a procedure for obtaining written consent prior to completion of trades in Manulife Mutual Funds on an "as needed" basis for all

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existing clients who wish to purchase Manulife Mutual Funds. However, the Filers are concerned that the procedure will create a disincentive for many of their clients and sales representatives from trading in Manulife Mutual Funds.

15. The Filers have considered alternatives to the “as needed” approach, such as re-documenting all existing client’s accounts. This would involve a mail-out to all clients, tracking whether or not a client has executed a consent form and following up with all clients who failed to return the form prior to any such client trading in Manulife Mutual Funds. The printing and mailing costs for this approach, without consideration given to the staff resources and time, amount to an estimated \$110,000.

### **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:

1. The Commission Rebate Relief is granted provided that
  - (a) The cost of such rebate will be borne by the sales representative, and no direct or indirect reimbursement or other compensation will be payable by a Filer or any other member of the organization of the Manulife Mutual Funds or Future Affiliated Funds to the sales representative.
  - (b) The sales representatives and the Filers will comply with the provisions of clause 7.1(1)(a) of NI 81-105.
  - (c) The Filers will comply with the disclosure and consent provisions of Part 8 of NI 81-105 (modified by the Equity Interest Disclosure Relief).
  - (d) The clients of a Filer will be advised by the sales representative, in advance, that any rebate proposed to be made available by a sales representative in connection with the purchase of units of Manulife Mutual Funds or Affiliated Future Funds:
    - (a) will be available to the client regardless of whether the redemption proceeds are invested in a Manulife Mutual Fund, an Affiliated Future Fund or a third party fund (to the maximum of the commission earned by the sales representative on the purchase); and
    - (b) will not be conditional upon the purchase of units of a Manulife Mutual Fund or an Affiliated Future Fund.

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- (e) A Filer's sales representatives are not, and shall not be in the future, subject to quotas (express or implied) in respect of the distribution of the Manulife Mutual Funds and Future Affiliated Funds and shall continue to be entitled to offer competing third party funds to their clients.
  - (f) Except as permitted by NI 81-105, neither a Filer nor any of its affiliates shall provide any incentive (express or implied) to any sales representative for recommending the Manulife Mutual Funds or Future Affiliated Funds over third party funds.
  - (g) The amount of the rebate that is borne by a sales representative shall be determined by the sales representative and the client.
  - (h) This decision shall cease to be operative with respect to a Decision Maker following the entry into force of a rule of that Decision Maker which replaces or amends section 7.1 of NI 81-105.
2. The Equity Interest Disclosure Relief is granted with respect to trades in the Manulife Mutual Funds provided that:
- (a) If investors are clients of the Filers prior to August 31, 2007, written consent for trades concerning Manulife Mutual Funds will not be required and disclosure of the relationships between the Filers, the Manulife Mutual Funds, Manulife and other members of the organization of the Manulife Mutual Funds will be mailed to existing clients.
  - (b) The Filers will comply with subsection 8.2(4) in relation to any clients who become clients after August 31, 2007.

*"Robert L. Shirriff"*

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Commissioner

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*"Margot C. Howard"*

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Commissioner

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Ontario Securities Commission