

2005 BCSECCOM 112

January 7, 2005

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 171 - Revocation and replacement of existing order - 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. 171, s. 114(2)

In the Matter of
the Securities Legislation
of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, 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 iUnits Canadian Bond Broad Market Index Fund (the “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 Fund and Barclays Global Investors Canada Limited, as trustee of the Fund (“Barclays”), for a decision under the securities legislation of the Jurisdictions (the “Legislation”): (i) revoking and replacing a MRRS decision dated December 18, 2002 as it relates to the Fund (the “Existing Decision”) and (ii) exempting all unitholders of the Fund 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 Fund.

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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

Defined terms contained in National Instrument 14-101 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 Fund:

1. The Fund is a trust established under the laws of Ontario. Barclays is the trustee of the Fund. Barclays' head office is located in Toronto, Ontario.
2. Barclays is registered in all of the Jurisdictions, except Quebec, as a portfolio manager and investment counsel (or the equivalent categories of registration) under the securities legislation of such Jurisdictions. Barclays is currently registered in Quebec as a non-resident adviser. Barclays is also registered as a Commodity Trading Manager and Limited Market Dealer in Ontario and as a Limited Market Dealer in Newfoundland and Labrador.
3. The Fund is a mutual fund within the meaning of the *Securities Act* (Ontario) and is a reporting issuer under the securities legislation of each Jurisdiction, where such term is applicable.
4. The units of the Fund are listed and posted for trading on the Toronto Stock Exchange (the "TSX").
5. At a special meeting on December 15, 2004, unitholders of the Fund approved a change to the investment objective of the Fund and certain related matters. The new investment objective of the Fund is to replicate, to the extent possible, the return of the *Scotia Capital Universe Bond Index*TM (the "SC Universe Bond Index") by investing in a regularly rebalanced portfolio of bonds that closely matches the characteristics of the SC Universe Bond Index. Unitholders also approved certain related amendments to the Fund's declaration of trust, including changing the name of the Fund and amendments to the provisions relating to the trustee fee, exchanges and redemptions of units, and subscriptions for units. The units of the Fund are "index participation units".

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6. The prior investment objective of the Fund was to replicate, to the extent possible, the return of a bond issued by the Government of Canada with a ten year term to maturity. In order to achieve that objective, the Fund invested in the Government of Canada bond selected by Barclays with a remaining term to maturity of ten years.
7. An Amended and Restated Final Prospectus, dated December 15, 2004, for the Fund was filed in each of the Jurisdictions to reflect the changes described in paragraph 5.
8. Pursuant to the Existing Decision, the Fund (then named iUnits Government of Canada 10 Year Bond Fund) was granted an exemption from the Take-over Bid Requirements. The Fund continues to require this relief in order to conduct its activities.
9. The units of the Fund may only be subscribed for or purchased directly from the Fund by:
 - (a) registered dealers or brokers who have entered into an underwriting agreement with the Fund (the “Underwriters”); and
 - (b) registered dealers or brokers who have entered into a designated broker agreement with the Fund (the “Designated Brokers”).

Subscription or purchase orders may be placed by an Underwriter or Designated Broker only for units in the prescribed number determined by Barclays from time to time (the “Prescribed Number”) or any integral multiple thereof on any day on which there is a trading session of the TSX and the SC Universe Bond Index is calculated (a “Trading Day”).

10. Every subscription or purchase order for the Prescribed Number of units of the Fund must be paid for by delivery of, in Barclays discretion:
 - (a) one Basket of Bonds and cash in an amount sufficient so that the value of the Basket of Bonds and the cash received is equal to the net asset value of the units next determined following the receipt of the subscription order;
or
 - (b) cash in an amount equal to the net asset value of the units next determined following the receipt of the subscription order; or
 - (c) a combination of bonds and cash, as determined by Barclays, in an amount sufficient so that the value of the bonds and cash received is equal to the

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net asset value of the units next determined following the receipt of the subscription order.

(The term “Basket of Bonds” means a group of bonds in specified principal amounts as Barclays may determine in its discretion from time to time.)

11. The units of the Fund may also be issued directly from time to time and, in any event, not more than once every quarter, to one or more Designated Brokers, pursuant to a designated broker agreement which obliges each Designated Broker, upon notice given by Barclays, to make a cash subscription for units in an amount not to exceed 0.15% of the net asset value of the Fund. Designated Brokers perform certain functions which include standing in the market with a bid and ask price for the Fund’s units for the purpose of maintaining market liquidity for the units.
12. Except as described in paragraphs 10 and 11 above, units of the Fund may not be purchased directly from the Fund. However, the Fund may issue additional units to unitholders to the extent that the Fund has not distributed the full amount of its net income in any year.
13. While unitholders who wish to dispose of their units may generally do so by selling their units on the TSX, unitholders may also on any Trading Day:
 - (a) exchange units in the Prescribed Number or an integral multiple of the Prescribed Number of units for bonds and cash. The exchange price will generally be payable by the delivery of Baskets of Bonds (constituted as most recently published prior to the receipt of the exchange request) and cash; provided that in the case of exchange requests in excess of two times the Prescribed Number, Barclays, in its discretion, may make payment of the exchange price by delivering to the unitholders, to the extent practicable, a pro rata portion of the aggregate principal amount of each of the bonds held by the Fund or such other amounts of bonds as Barclays shall determine, together with cash. Barclays may charge, at its discretion, an administrative fee of up to 0.05% of the exchange proceeds to offset certain transaction costs associated with the exchange; or
 - (b) redeem any number of units of each Fund for cash at a redemption price per unit equal to 95% of the closing price of the units on the TSX on the effective day of redemption
14. As units of the Fund are both voting and equity securities for purposes of the Take-over Bid Requirements, anyone acquiring beneficial ownership of, or the power to exercise control or direction over, 10% or more of the outstanding

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units of the Fund would be required to comply with the early warning press release and reporting requirements, as well as the further acquisition restrictions, imposed by the Legislation (the “Early Warning Requirements”) but for section 3.3 of National Instrument 62-103 which provides that the Early Warning Requirements do not apply in respect of the ownership or control of securities issued by a mutual fund that is governed by National Instrument 81-102.

15. There is no exemption from the Take-over Bid Requirements for conventional mutual funds that is comparable to the exemption from the Early Warning Requirements in section 3.3 of National Instrument 62-103 (in Quebec, the exemption from Early Warning Requirements was granted pursuant to discretionary relief orders) because the securities of conventional mutual funds are typically subject to the Take-over Bid Requirements because acquisitions of units of conventional mutual funds are made from treasury.
16. Although units of the Fund trade on the TSX and the acquisition of such units can therefore become subject to the Take-over Bid Requirements,
 - (a) it is not possible for one or more Fund unitholders to exercise control or direction over the Fund as the declaration of trust of the Fund generally ensures that there can be no changes made to the Fund which do not have the support of the trustee of the Fund;
 - (b) it is difficult for purchasers of units of the Fund to monitor compliance with Take-over Bid Requirements because the number of outstanding units is always in flux as a result of the ongoing issuance and redemption of units by the Fund; and
 - (c) the way in which Fund units are priced deters anyone from either seeking to acquire control, or offering to pay a control premium, for outstanding units because unit pricing is dependent upon the value of the underlying bonds held by the Fund and the level of the SC Universe Bond Index.
17. The application of the Take-over Bid Requirements to the Fund can have an adverse impact upon Fund unit liquidity because they can cause both the Designated Brokers and hedgers to cease trading Fund units once prescribed take-over bid thresholds are reached and this, in turn, can serve to provide conventional mutual funds with a competitive advantage over the Fund.

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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 pursuant to the Legislation is that: (i) the Existing Decision is revoked and replaced as of, and from, the date of this decision and (ii) the purchase of the units of the Fund 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 Fund remains an exchange traded fund provided that, prior to making any take-over bid for the units of the Fund 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 Barclays, as trustee and manager of the Fund, with an undertaking not to exercise any votes attached to units of the Fund held by the Unit Purchaser and any Concert Party which represent more than 20% of the votes attached to all outstanding units of the Fund.

Paul Moore
Vice Chair
Ontario Securities Commission

H. Lorne Murphy
Commissioner
Ontario Securities Commission