

## Headnote

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Relief granted from section 5.9 of National Instrument 41-101 *General Prospectus Requirements* to permit exchange-traded mutual fund prospectus to omit an underwriter’s certificate – Relief granted from take-over bid requirements in National Instrument 62-104 *Take-Over Bids and Issuer Bids* for normal course purchases of securities on a marketplace – Relief granted to facilitate the offering of exchange-traded mutual funds.

## Applicable Legislative Provisions

National Instrument 41-101 *General Prospectus Requirements*, sections 5.9 and 19.1

National Instrument 62-104 *Take-Over Bids and Issuer Bids*, Part 2 and section 6.1

**Citation: Re Middlefield Limited, 2019 ABASC 14**

**Date: 20190118**

In the Matter of  
the Securities Legislation of  
Alberta and Ontario (the **Jurisdictions**)

and

In the Matter of  
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of  
Middlefield Limited (the **Filer**)

and

In the Matter of  
Middlefield Healthcare & Life Sciences ETF  
Middlefield Reit Indexplus ETF  
(the **Proposed ETFs**)

Decision

## Background

The securities regulatory authority or regulator in each of the Jurisdictions (each a **Decision Maker**) has received an application from the Filer on behalf of the Proposed ETFs and any additional exchange-traded mutual funds (the **Future ETFs**, and, together with the Proposed ETFs, the **ETFs** and individually, an **ETF**) established in the future for which the Filer may be the manager, for a decision under the securities legislation of the Jurisdictions (the **Legislation**) that:

- (a) exempts the Filer and each ETF from the requirement to include a certificate of an underwriter in an ETF's prospectus (the **Underwriter's Certificate Requirement**); and
- (b) exempts a person or company purchasing Listed Securities (as defined below) in the normal course through the facilities of the Toronto Stock Exchange (**TSX**) or another Marketplace (as defined below) from the Take-over Bid Requirements (as defined below)

(collectively, the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

- (a) the Alberta Securities Commission is the principal regulator for this application;
- (b) the Filer has provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in each of the provinces and territories of Canada (the **Offering Jurisdictions**), other than Ontario; and
- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

### **Interpretation**

Terms defined in National Instrument 14-101 *Definitions* or MI 11-102 have the same meaning if used in this decision, unless otherwise defined herein.

**Affiliate Dealer** means a registered dealer that is an affiliate of an Authorized Dealer or Designated Broker and that participates in the resale of Creation Units (as defined below) from time to time.

**Authorized Dealer** means a registered dealer that has entered, or intends to enter, into an agreement with the manager of an ETF authorizing the dealer to subscribe for, purchase and redeem Creation Units from one or more ETFs on a continuous basis from time to time.

**Basket of Securities** means a group of shares or other securities, including, but not limited to, one or more exchange-traded funds or securities, as determined by the Filer from time to time for the purpose of subscription orders, exchanges, redemptions or for other purposes.

**Designated Broker** means a registered dealer that has entered, or intends to enter, into an agreement with the manager of an ETF to perform certain duties in relation to the ETF, including the posting of a liquid two-way market for the trading of the ETF's Listed Securities on the TSX or another Marketplace.

**Form 41-101F2** means Form 41-101F2 *Information Required in an Investment Fund Prospectus*.

**Listed Securities** means a class or series of securities of an ETF distributed pursuant to a long form prospectus prepared pursuant to NI 41-101 and Form 41-101F2 that is listed on the TSX or another Marketplace.

**Marketplace** means a “marketplace” as defined in National Instrument 21-101 *Marketplace Operation* that is located in Canada.

**NI 41-101** means National Instrument 41-101 *General Prospectus Requirements*.

**NI 81-102** means National Instrument 81-102 *Investment Funds*.

**Other Dealer** means a registered investment dealer.

**Prescribed Number of Listed Securities** means the number of Listed Securities of an ETF determined by the Filer from time to time for the purpose of subscription orders, exchanges, redemptions or for other purposes.

**Securityholders** means beneficial or registered holders of Listed Securities or Unlisted Securities (as defined below), as applicable.

**Take-over Bid Requirements** means the requirements of National Instrument 62-104 *Take-Over Bids and Issuer Bids* relating to take-over bids, including the requirement to file a report of a take-over bid and to pay the accompanying fee, in each Jurisdiction.

**Unlisted Securities** means a class or series of securities of an ETF offered only on a private placement basis pursuant to available prospectus exemptions, including the accredited investor exemption, under securities laws.

## **Representations**

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

### *The Filer*

1. The Filer is a corporation incorporated under the *Business Corporations Act* (Alberta), with its head office located in Calgary, Alberta.
2. The Filer, which acts as manager and trustee for the ETFs, is registered as an investment fund manager in Alberta, Ontario, Québec and Newfoundland and Labrador. Middlefield Capital Corporation, which acts as investment advisor for the ETFs, is an affiliate of the Filer and is registered as an investment dealer in Alberta, Ontario and Nova Scotia.
3. The Filer will be the investment fund manager and trustee of the Proposed ETFs and an affiliate of the Filer will be the portfolio manager of the Proposed ETFs. The Filer will be the investment fund manager or trustee of the Future ETFs and the Filer, or an affiliate of the Filer, may be the portfolio manager of the Future ETFs.

4. The Filer is not in default of securities legislation in any of the Offering Jurisdictions.

*The ETFs*

5. Each of the Proposed ETFs currently are non-redeemable investment funds structured as trusts that are governed by the laws of the Province of Alberta.
6. Each of the Proposed ETFs is not in default of securities legislation in any of the Offering Jurisdictions.
7. The Proposed ETFs received unitholder approval for the proposed conversions at a special meeting of the holders of units of the Proposed ETFs held on December 10, 2018.
8. Each Proposed ETF will be converted to an exchange-traded mutual fund structured as a trust that is governed by the laws of the Province of Alberta. The Future ETFs will be either trusts or corporations or classes thereof governed by the laws of a Jurisdiction. Each ETF will be a reporting issuer in the Offering Jurisdiction(s) in which its securities are distributed.
9. Subject to any exemptions that have been, or may be, granted by the applicable securities regulatory authorities, each ETF will be an open-ended mutual fund subject to NI 81-102, and Securityholders of each ETF will have the right to vote at a meeting of Securityholders in respect of matters prescribed by NI 81-102.
10. Each ETF may issue more than one class or series of securities, including, but not limited to Listed Securities and Unlisted Securities.
11. The Listed Securities will be listed on the TSX or another Marketplace.
12. The Filer has filed, or will file, a long form prospectus prepared in accordance with NI 41-101 in respect of the Listed Securities, subject to any exemptions that may be granted by the applicable securities regulatory authorities.
13. Listed Securities will be distributed on a continuous basis in one or more of the Offering Jurisdictions under a prospectus. Listed Securities may generally only be subscribed for or purchased directly from the ETFs (**Creation Units**) by Authorized Dealers or Designated Brokers. Generally, subscriptions or purchases may only be placed for a Prescribed Number of Listed Securities (or an integral multiple thereof) on any day when there is a trading session on the TSX or other Marketplace. Authorized Dealers or Designated Brokers subscribe for Creation Units for the purpose of facilitating investor purchases of Listed Securities on the TSX or another Marketplace.
14. In addition to subscribing for and reselling Creation Units, Authorized Dealers, Designated Brokers and Affiliate Dealers will also generally be engaged in purchasing and selling Listed Securities of the same class or series as the Creation Units in the secondary market. Other Dealers may also be engaged in purchasing and selling Listed Securities of the same

class or series as the Creation Units in the secondary market despite not being an Authorized Dealer, Designated Broker or Affiliate Dealer.

15. Each ETF will appoint a Designated Broker to perform certain other functions, which include standing in the market with a bid and ask price for Listed Securities for the purpose of maintaining liquidity for the Listed Securities.
16. Except for Authorized Dealer and Designated Broker subscriptions for Creation Units, as described above, and other distributions that are exempt from the prospectus requirement under the Legislation, Listed Securities generally will not be available for purchase directly from an ETF. Investors are generally expected to purchase and sell Listed Securities, directly or indirectly, through dealers executing trades through the facilities of the TSX or another Marketplace. Listed Securities may also be issued directly to Securityholders upon a reinvestment of distributions of income or capital gains.
17. Securityholders that are not Designated Brokers or Authorized Dealers that wish to dispose of their Listed Securities may generally do so by selling their Listed Securities on the TSX or other Marketplace, through a registered dealer, subject only to customary brokerage commissions. A Securityholder that holds a Prescribed Number of Listed Securities or integral multiple thereof may exchange such Listed Securities for Baskets of Securities and/or cash at the discretion of the Filer. Securityholders may also redeem Listed Securities for cash at a redemption price equal to the lesser of: (i) 95% of the closing price of the Listed Securities on the TSX or such other Marketplace on which the Listed Securities are primarily traded; and (ii) the net asset value per Listed Security, in each case calculated as of the effective day of the redemption and in each case less any costs associated with the redemption.

#### *Underwriter's Certificate Requirement*

18. Authorized Dealers and Designated Brokers will not provide the same services in connection with a distribution of Creation Units as would typically be provided by an underwriter in a conventional underwriting.
19. The Filer will generally conduct its own marketing, advertising and promotion of the ETFs to the extent permitted by its registrations.
20. Authorized Dealers and Designated Brokers will not be involved in the preparation of an ETF's prospectus, will not perform any review or any independent due diligence as to the content of an ETF's prospectus, and will not incur any marketing costs or receive any underwriting fees or commissions from the ETFs or the Filer in connection with the distribution of Listed Securities. The Authorized Dealers and Designated Brokers generally seek to profit from their ability to create and redeem Listed Securities by engaging in arbitrage trading to capture spreads between the trading prices of Listed Securities and their underlying securities and by making markets for their clients to facilitate client trading in Listed Securities.

*Take-over Bid Requirements*

21. As equity securities that will trade on the TSX or another Marketplace, it is possible for a person or company to acquire a percentage of the outstanding Listed Securities that will trigger the Take-over Bid Requirements. However:
- (a) it will be difficult for one or more Securityholders to exercise control or direction over an ETF, as the master declaration of trust of each ETF will provide that in order to have the trustee of an ETF call a meeting of Securityholders of such ETF, Securityholders of such ETF will be required to present the trustee of such ETF with a written request of the Securityholders of such ETF holding in the aggregate not less than 25% of the applicable Listed Securities then outstanding;
  - (b) it will be difficult for purchasers of Listed Securities to monitor compliance with the Take-over Bid Requirements because the number of outstanding Listed Securities will always be in flux as a result of the ongoing issuance and redemption of Listed Securities by each ETF; and
  - (c) the way in which the Listed Securities will be priced deters anyone from either seeking to acquire control, or offering to pay a control premium for outstanding Listed Securities because pricing for each Listed Security will generally reflect the net asset value of the Listed Securities.
22. The application of the Take-over Bid Requirements to the ETFs would have an adverse impact on the liquidity of the Listed Securities, because they could cause Designated Brokers and other large Securityholders to cease trading Listed Securities once a Securityholder has reached the prescribed threshold at which the Take-over Bid Requirements would apply. This, in turn, could serve to provide conventional mutual funds with a competitive advantage over the ETFs.

**Decision**

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted.

*“original signed by”*

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Timothy Robson

Manager, Legal

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Alberta Securities Commission