

## Headnote

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Relief granted from paragraph 2.6(a) of National Instrument 81-102 *Investment Funds* to allow an exchange-traded mutual fund to borrow from its custodian and, if necessary, provide a security interest to the custodian to fund the portion of any distributions payable under the fund's distribution policy that represents, in the aggregate, amounts that are owing to, but not yet been received by, the fund – Relief subject to terms and conditions as set out in the decision document.

## Applicable Legislative Provisions

National Instrument 81-102 *Investment Funds*, paragraph 2.6(a) and section 19.1

**Citation: Re SmartBe Wealth Inc., 2019 ABASC 7**

**Date: 20190111**

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  
SmartBe Wealth Inc. (the **Filer**)

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 SmartBe Global Value Momentum Trend Index ETF (the **Proposed ETF**) and such other exchange-traded mutual funds as may be managed by the Filer, or an affiliate of the Filer, in the future (the **Future ETFs**, and together with the **Proposed ETF**, the **ETFs** and each an **ETF**) for a decision under the securities legislation of the Jurisdictions (the **Legislation**) that permits each ETF to borrow cash from the custodian of the ETF (the **Custodian**) and, if required by the Custodian, to provide a security interest over any of its portfolio assets as a temporary measure to fund the portion of any distribution payable to Securityholders (as defined below) that represents, in the aggregate, amounts that are owing to, but not yet been received by, the ETF (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 re-sale 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, in relation to the Listed Securities of an ETF, a group of securities identified from time to time that collectively reflect the constituents of the portfolio of an ETF.

**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 NEO Exchange or another Marketplace.

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

**Listed Securities** means a 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 NEO Exchange or another Marketplace.

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

**NEO Exchange** means Aequitas NEO Exchange Inc.

**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 dealer that acts as authorized dealer or designated broker to exchange-traded funds that are not managed by the Filer.

**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.

**Unlisted Securities** means a 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 laws of the Province of Alberta, with its head office located in Calgary, Alberta.
2. The Filer is registered as an investment fund manager in Alberta and Ontario and as a portfolio manager and exempt market dealer in Alberta, Ontario and British Columbia.
3. The Filer will be the investment fund manager of the ETFs and will be the trustee of the ETFs where the ETF is a trust.
4. The Filer is not in default of securities legislation in any of the Offering Jurisdictions.

#### *The ETFs*

5. The Proposed ETF will be a mutual fund structured as a trust that is governed by the laws of a Jurisdiction. The Future ETFs will be either trusts or corporations or classes thereof governed by the laws of a Jurisdiction or the laws of Canada.
6. 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.
7. Each ETF may issue more than one series of securities, including, but not limited to Listed Securities and Unlisted Securities.
8. 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.
9. Because the Listed Securities will be distributed pursuant to a long form prospectus prepared pursuant to NI 41-101 and Form 41-101F2, each ETF will be a reporting issuer in the Offering Jurisdictions in which its securities are distributed.

10. The Listed Securities will be listed on the NEO Exchange or another Marketplace.
11. 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 a multiple thereof) on any day when there is a trading session on the NEO Exchange or other Marketplace. Authorized Dealers or Designated Brokers subscribe for Creation Units for the purpose of facilitating investor purchases of Listed Securities on the NEO Exchange or another Marketplace.
12. In addition to subscribing for and re-selling 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.
13. Each Designated Broker or Authorized Dealer that subscribes for Creation Units must deliver, in respect of each Prescribed Number of Listed Securities to be issued, payment consisting of, depending on the terms of the agreement with the Designated Broker or Authorized Dealer or at the Filer's discretion, a Basket of Securities and cash, cash only or a combination of securities and cash, in each case in an amount sufficient so that the value of the Basket of Securities and cash, cash or securities and cash delivered is equal to the net asset value of the Listed Securities subscribed for next determined following the receipt of the subscription order.
14. Upon notice given by the Filer from time to time and, in any event, not more than once quarterly, a Designated Broker may be contractually required to subscribe for Creation Units of an ETF for cash in an amount not to exceed a specified percentage of the net asset value of the ETF or such other amount established by the Filer.
15. The Designated Brokers and Authorized Dealers will not receive any fees or commissions in connection with the issuance of Creation Units to them. On the issuance of Creation Units, the Filer or the ETF may, at the Filer's discretion, charge a fee to a Designated Broker or an Authorized Dealer to offset the expenses incurred in issuing the Creation Units.
16. 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.
17. 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 NEO

Exchange or another Marketplace. Listed Securities may also be issued directly to Securityholders upon a reinvestment of distributions of income or capital gains.

18. 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 NEO Exchange or other Marketplace, through a registered dealer, subject only to customary brokerage commissions. A Securityholder that holds a Prescribed Number of Listed Securities or multiple thereof may exchange such Listed Securities for, at the discretion of the Filer, Baskets of Securities or other securities and/or cash. Securityholders may also redeem Listed Securities for cash at a redemption price equal to 95% of the closing price of the Listed Securities on the NEO Exchange or other Marketplace on the date of redemption, subject to a maximum redemption price of the applicable net asset value per Listed Security.
19. Holders of Unlisted Securities may redeem such securities in any number for cash at a redemption price per Unlisted Security equal to the net asset value per Unlisted Security on the effective day of redemption.

#### *Borrowing Requirement*

20. Section 2.6(a)(i) of NI 81-102 prevents a mutual fund from borrowing cash or providing a security interest over its portfolio assets unless the transaction is a temporary measure to accommodate redemption requests or to settle portfolio transactions and does not exceed five percent of the net assets of the mutual fund. As a result, an ETF is not permitted under section 2.6(a)(i) to borrow from the Custodian to fund distributions under the Distribution Policy (as defined below).
21. Each ETF will make distributions at such frequency as the Filer may, at its discretion, determine appropriate, and, in each taxation year, will distribute sufficient net income and net realized capital gains so that it will not be liable to pay income tax under Part I of the *Income Tax Act* (Canada) (collectively, the **Distribution Policy**).
22. Amounts included in the calculation of net income and net realized capital gains of an ETF for a taxation year that must be distributed in accordance with the Distribution Policy sometimes include amounts that are owing to but have not actually been received by the ETF from the issuers of securities held in the ETF's portfolio (**Issuers**).
23. While it is possible for an ETF to maintain a portion of its assets in cash or to dispose of securities in order to obtain any cash necessary to make a distribution in accordance with the Distribution Policy, maintaining such a cash position or making such a disposition (which would generally be followed, when the cash is actually received from the Issuers, by an acquisition of the same securities) impacts the ETF's performance. Maintaining assets in cash or disposing of securities means that a portion of the net asset value of the ETF is not invested in accordance with its investment objective.
24. The Filer is of the view that it is in the interests of an ETF to have the ability to borrow cash from the Custodian and, if required by the Custodian, to provide a security interest over its portfolio assets as a temporary measure to fund the portion of any distribution payable to

Securityholders that represents, in the aggregate, amounts that are owing to, but have not yet been received by, the ETF from the Issuers. While such borrowing will have a cost, the Filer expects that such cost will be less than the reduction in the ETF's performance if the ETF had to hold cash instead of securities in order to fund the distribution.

**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, provided that the Filer will be in compliance with the following conditions:

1. the borrowing by an ETF in respect of a distribution does not exceed the portion of the distribution that represents, in the aggregate, amounts that are payable to the ETF but have not been received by the ETF from the Issuers and, in any event, does not exceed five percent of the net assets of the ETF;
2. the borrowing is not for a period longer than 45 days;
3. any security interest in respect of the borrowing is consistent with industry practice for the type of borrowing and is only in respect of amounts owing as a result of the borrowing;
4. an ETF does not make any distribution to Securityholders where the distribution would impair the ETF's ability to repay any borrowing to fund distributions; and
5. the final prospectus of the ETFs discloses the potential borrowing, the purpose of the borrowing and the risks associated with the borrowing.

"original signed by"

Tom Graham

Director, Corporate Finance

Alberta Securities Commission