

9. Section 13.18 of NI 31-103 prohibits registered individuals in their client-facing relationships from, among other things, using titles or designations that could reasonably be expected to deceive or mislead existing and prospective clients. Paragraph 13.18(2)(b) of NI 31-103 specifically prohibits the use of corporate officer titles by registered individuals who interact with clients unless the individuals have been appointed to those corporate offices by their sponsoring firms pursuant to applicable corporate law.
10. There would be significant operational and human resources challenges for the Filer to comply with the prohibition in paragraph 13.18(2)(b). In addition, the Titles are widely used and recognized throughout the institutional segment of the financial services industry within Canada and globally, and being unable to use the Titles has the potential to put the Filer and its Registered Individuals at a competitive disadvantage as compared to non-Canadian firms that are not subject to the prohibition and who compete for the same institutional clients.
11. Given their nature and sophistication, the use of the Titles by the Registered Individuals would not be expected to deceive or mislead existing and prospective Clients.
12. For the reasons provided above, it would not be prejudicial to the public interest to grant the Exemption Sought.

#### Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted, provided that, when using the Titles, the Filer and its Registered Individuals interact only with existing and prospective clients that are exclusively non-individual "institutional clients" as defined in IIROC Rule 1201.

This decision will terminate six months, or such other transition period as may be provided by law, after the coming into force of any amendment to NI 31-103 or other applicable securities law that affects the ability of the Registered Individuals to use the Titles in the circumstances described in this decision.

"Debra Foubert"  
Director, Compliance and Registrant Regulation  
Ontario Securities Commission

OSC File #: 2021/0662

#### 2.1.7 Mulvihill Capital Management Inc. et al.

##### Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – relief from requirement in section 59 of the Securities Act (Ontario) to provide an underwriter's certificate in respect of an ETF prospectus – relief from take-over bid requirements of NI 62-104 in respect of normal-course purchases of securities of an ETF.

##### Applicable Legislative Provisions

Securities Act (Ontario) – R.S.O. 1990, c. S.5, as am., ss. 59(1) and 147.  
National Instrument 62-104 Take-Over Bids and Issuer Bids, Part 2 and s. 6.1.

January 25, 2022

**IN THE MATTER OF  
THE SECURITIES LEGISLATION OF  
ONTARIO  
(the Jurisdiction)**

AND

**IN THE MATTER OF  
THE PROCESS FOR EXEMPTIVE RELIEF  
APPLICATIONS  
IN MULTIPLE JURISDICTIONS**

AND

**IN THE MATTER OF  
MULVIHILL CAPITAL MANAGEMENT INC.  
(the Filer)  
AND  
MULVIHILL ENHANCED YIELD CANADIAN BANK ETF  
AND  
MULVIHILL PREMIUM YIELD PLUS ETF  
(the Proposed ETFs)**

**DECISION**

##### Background

The principal regulator in the Jurisdiction has received an application from the Filer on behalf of the Proposed ETFs and any additional exchange-traded mutual funds established and managed by the Filer or an affiliate of the Filer in the future (the **Future ETFs**, and together with the Proposed ETFs, the **ETFs**) for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) that exempts:

- (a) the Filer and each ETF from the requirement to include a certificate of the underwriter(s) in an ETF's prospectus (the **Underwriter's Certificate Requirement**) (the **Underwriter's Certificate Relief**); and

- (b) a person or company purchasing ETF Securities (as defined below) in the normal course through the facilities of the Toronto Stock Exchange (the **TSX**), the Neo Exchange Inc. (**Neo**) or another Marketplace (as defined below) from the Take-Over Bid Requirements (as defined below) (the **Take-Over Bid Relief**)

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

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

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 – *Passport System (MI 11-102)* is intended to be relied upon in all of the provinces and territories of Canada other than the Jurisdiction (together with the Jurisdiction, the **Jurisdictions**).

### Interpretation

Terms defined in MI 11-102, National Instrument 14-101 *Definitions (NI 14-101)*, National Instrument 41-101 *General Prospectus Requirements (NI 41-101)* and National Instrument 81-102 *Investment Funds (NI 81-102)* have the same meaning if used in this decision unless otherwise defined herein. The following terms used in this decision have the following meanings:

**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** means, in relation to the ETF Securities, assets or a group of securities representing the constituents of the 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 Securities on the TSX, Neo or another Marketplace.

**ETF Security** means a listed security of an ETF.

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

**Other Dealer** means a registered dealer that is not an Authorized Dealer, Designated Broker or Affiliate Dealer.

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

**Prospectus Delivery Requirement** means the requirement that a dealer, not acting as agent of the purchaser, who receives an order or subscription for a security offered in a distribution to which the prospectus requirement of the Legislation applies, send or deliver to the purchaser or its agent, unless the dealer has previously done so, the latest prospectus and any amendment either before entering into an agreement of purchase and sale resulting from the order or subscription, or not later than midnight on the second business day after entering into that agreement.

**Securityholders** means beneficial or registered holders of ETF Securities.

**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.

### 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 Canada, with its head office located at 121 King Street West, Suite 2600, Toronto, Ontario.
2. The Filer is registered as (a) an adviser in the category of portfolio manager under the securities legislation of each of the Provinces of Canada, (b) a dealer in the category of exempt market dealer and an investment fund manager in the Provinces of Ontario, Québec and Newfoundland and Labrador and (c) a dealer in the category of mutual fund dealer in the Provinces of Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Ontario, Prince Edward Island and Saskatchewan.
3. The Filer, or an affiliate of the Filer, will be the investment fund manager of the ETFs. The Filer will apply to list the ETF Securities on the TSX, Neo or another Marketplace.
4. The Filer and the Proposed ETFs are not in default of securities legislation in any of the Jurisdictions.

#### *The ETFs*

5. Each ETF will be an open-ended exchange-traded mutual fund. The Proposed ETFs are, and it is expected that some Future ETFs will be, alternative mutual funds (as defined in NI 81-102). Each Proposed ETF will be structured as a trust that is governed by the laws of the Province of Ontario. The Future ETFs will be either trusts or

corporations or classes thereof governed by the laws of a Jurisdiction.

6. Subject to any exemptions that may be granted by the applicable securities regulatory authorities, each ETF will be subject to NI 81-102 and Securityholders of each ETF will have the right to vote at a meeting of Securityholders of the ETF in respect of matters prescribed by NI 81-102.
7. Each ETF will be a reporting issuer in the Jurisdictions in which its securities are distributed.
8. ETF Securities will be (subject to satisfying the listing requirements of the applicable exchange) listed on the TSX, Neo or another Marketplace.
9. The Filer has filed or will file a long form prospectus in respect of each of the ETFs which will be prepared and filed in accordance with NI 41-101, subject to any exemptions that may be granted by the applicable securities regulatory authorities.
10. ETF Securities will be distributed on a continuous basis in one or more of the Jurisdictions under a prospectus. ETF 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 ETF Securities (or a multiple thereof) on any day when there is a trading session on the TSX, Neo or other Marketplace. Authorized Dealers or Designated Brokers subscribe for Creation Units for the purpose of facilitating investor purchases of ETF Securities on the TSX, Neo or another Marketplace.
11. 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 ETF 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 ETF 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.
12. Each Designated Broker or Authorized Dealer that subscribes for Creation Units must deliver, in respect of each Prescribed Number of ETF Securities to be issued, cash or a Basket equal to the net asset value (**NAV**) of the ETF Securities subscribed for next determined following the receipt of the subscription order.
13. 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 an ETF may, in 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.

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 NAV of the ETF or such other amount established by the Filer.
15. Each ETF will appoint, at any given time, a Designated Broker to perform certain other functions, which include standing in the market with a bid and ask price for ETF Securities for the purpose of maintaining liquidity for the ETF 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 Delivery Requirement under the Legislation, ETF Securities generally will not be able to be purchased directly from an ETF. Investors are generally expected to purchase and sell ETF Securities, directly or indirectly, through dealers executing trades through the facilities of the TSX, Neo or another Marketplace. ETF 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 ETF Securities may generally do so by selling their ETF Securities on the TSX or Neo, as applicable, or other Marketplace, through a registered dealer, subject only to customary brokerage commissions. A Securityholder that holds a Prescribed Number of ETF Securities or multiple thereof may exchange such ETF Securities for cash and/or Baskets in the discretion of the Filer. Securityholders may also redeem ETF Securities for cash at a redemption price equal to the lesser of (a) 95% of the closing price for the ETF Securities on the TSX, Neo or other Marketplace on the date of redemption; and (b) the NAV per ETF Security.

**Reasons for the Exemption Sought**

*Underwriter's Certificate Relief*

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.
20. The 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 ETF Securities. The Authorized Dealers and Designated Brokers generally seek to profit from their ability to create and redeem ETF Securities by engaging in arbitrage trading to capture spreads between the trading prices of ETF Securities and their underlying securities and by making markets for their clients to facilitate client trading in ETF Securities.

21. In addition, neither the Filer nor the ETFs will pay any fees or commissions to the Designated Brokers and Authorized Dealers. As the Designated Brokers and Authorized Dealers will not receive any remuneration in connection with distributing ETF Securities and as the Authorized Dealers will change from time to time, it is not practical to provide an underwriters' certificate in the prospectus of the ETFs.

*Take-Over Bid Relief*

22. As equity securities that will trade on the TSX, Neo or another Marketplace, it is possible for a person or company to acquire such number of ETF Securities so as to trigger the application of 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 constating documents of each ETF will provide that there can be no changes made to such ETF which do not have the support of the Filer;
- (b) it will be difficult for purchasers of ETF Securities to monitor compliance with the Take-Over Bid Requirements because the number of outstanding ETF Securities will always be in flux as a result of the ongoing issuance and redemption of ETF Securities by each ETF; and
- (c) the way in which the ETF Securities will be priced deters anyone from either seeking to acquire control or offering to pay a control premium for outstanding ETF Securities because pricing for each ETF Security will generally reflect the NAV of the ETF Securities.

23. The application of the Take-Over Bid Requirements to the ETFs would have an adverse impact on the liquidity of the ETF Securities because they could cause the Designated Brokers and other large Securityholders to cease trading ETF Securities once the 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**

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision. The decision of the principal regulator is that the Exemption Sought as to:

**The Underwriter's Certificate Relief is granted:**

"Frances Kordyback"  
Commissioner  
Ontario Securities Commission

"Cathy Singer"  
Commissioner  
Ontario Securities Commission

**The Take-Over Bid Relief is granted:**

"Darren McKall"  
Manager, Investment Funds and Structured Products  
Branch  
Ontario Securities Commission

Application File #: 2021/0605