

## Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – approval of mutual fund mergers pursuant to paragraph 5.5(1)(b) of National Instrument 81-102 *Investment Funds* – approval required because mergers do not meet the criteria for pre-approved reorganizations and transfers – the fundamental investment objectives of the terminating funds and the continuing funds are not substantially similar, one continuing fund does not have a substantially similar fee structure to its respective terminating fund, the mergers cannot be completed on a tax-deferred basis and the portfolio assets of the terminating funds are not acceptable to the portfolio manager of the continuing funds because the assets are not consistent with the continuing fund’s investment objectives – securityholders are provided with timely and adequate disclosure regarding the mergers.

## Applicable Legislative Provisions

National Instrument 81-102 *Investment Funds*, paragraph 5.5(1)(b) and subsection 19.1

**Citation: Re NCM Asset Management Ltd., 2018 ABASC 170**

**Date: 20181030**

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  
NCM Asset Management Ltd. (the **Manager**)

and

NCM High Income Fund (**HIF**), NCM Tactical Opportunities Fund (**TO**), and NCM Premium Growth Class (**PG**) (each, a **Terminating Fund**)

and

NCM Conservative Income Portfolio (**CIP**), NCM Growth and Income Portfolio (**GIP**), and  
NCM Balanced Income Portfolio (**BIP**)  
(each, a **Continuing Fund**, and together with the Terminating Funds, the **Funds**)

## Decision

## Background

The securities regulatory authority or regulator in each of the Jurisdictions (each a **Decision Maker**) has received an application from the Manager and the Funds (collectively, the **Filers**) for a decision under the securities legislation (the **Legislation**) of the Jurisdictions approving (the **Requested Approval**) the proposed mergers of HIF with CIP, TO with GIP and PG with BIP

(each, a **Proposed Merger**) pursuant to paragraph 5.5(1)(b) of National Instrument 81-102 *Investment Funds (NI 81-102)*.

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 Filers have provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System (MI 11-102)* is intended to be relied upon in British Columbia, Saskatchewan, Manitoba, Québec, New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island; and
- (c) this decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

### **Interpretation**

Unless otherwise defined herein, terms defined in National Instrument 14-101 *Definitions*, MI 11-102, National Instrument 81-101 *Investment Funds (NI 81-101)*, and NI 81-102 have the same meaning if used in this decision.

### **Representations**

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

#### ***The Manager and the Funds***

1. The Manager is a corporation continued under the federal laws of Canada with its head office in Calgary, Alberta. The Manager is registered as an investment fund manager in Alberta, Newfoundland and Labrador, Ontario and Québec, and as a portfolio manager in Alberta and Ontario. The Manager acts as investment fund manager and portfolio manager of each Fund.
2. HIF is a trust formed under the laws of the Province of Alberta. TO is a separate class of special shares of NCM Opportunities Corp. (**NOC**), a mutual fund corporation amalgamated under the laws of the Province of Alberta. PG is a separate class of special shares of NCM Core Portfolios Ltd. (**NCP**), a mutual fund corporation incorporated under the laws of the Province of Alberta.
3. Each Continuing Fund is an open-end trust formed under the laws of the Province of Alberta.
4. Each Fund is a reporting issuer in each of the provinces of Canada and is subject to the requirements of NI 81-101 and NI 81-102. Securities of each Fund are currently offered for sale in each of the provinces of Canada under a simplified prospectus, annual information form, and fund facts document dated August 27, 2018.
5. None of the Filers are in default of securities legislation in any jurisdiction of Canada.

6. Each Fund follows the standard investment restrictions and practices in NI 81-102, except pursuant to the terms of any exemptive relief that has been previously obtained.
7. The net asset value for each series of securities of each Fund is calculated on a daily basis on each day that the Toronto Stock Exchange is open for trading (each, a **Business Day**) and securities of each Fund are generally redeemable on any Business Day.

### ***The Proposed Mergers***

8. Upon receipt of this approval, the following steps will be carried out to effect the Proposed Mergers:
  - (a) Each of HIF, TO and PG will liquidate their investment portfolios by converting portfolio investments into cash or cash equivalent instruments.
  - (b) HIF, TO or PG, as applicable, may declare, pay, and automatically reinvest distributions or ordinary dividends or capital gains dividends to securityholders of the applicable Terminating Fund in a manner determined by the Manager to be fair and equitable.
  - (c) The value of the portfolio and other assets and liabilities of each Terminating Fund will be determined at the close of business on the Business Day immediately preceding the effective date of termination (the **Effective Date**) in accordance with the constating documents of the Terminating Fund.
  - (d) On the Effective Date, each Continuing Fund will acquire all or substantially all of the assets and assume all or substantially all of the liabilities attributed to the applicable Terminating Fund from such Terminating Fund in exchange for the issuance by the Continuing Fund to the Terminating Fund of securities of the Continuing Fund having an aggregate net asset value equal to the value of the assets and liabilities so transferred or assumed.
  - (e) Immediately following such transfer and assumption, such Terminating Fund will redeem the securities of the Terminating Fund at their net asset value and distribute securities of the corresponding series of the applicable Continuing Fund in payment of the redemption proceeds on a series by series basis, such that the securityholders of the Terminating Fund will become securityholders of the Continuing Fund following such redemption and distribution, and the assets and liabilities attributable to the Terminating Fund will be included in the portfolio of the Continuing Fund.
  - (f) The securities of each Continuing Fund received by the applicable Terminating Fund, as applicable, will have an aggregate net asset value equal to the value of the portfolio assets that the Continuing Fund is so acquiring, less the assumed liabilities.
  - (g) As soon as reasonably possible following the applicable Effective Date, each Terminating Fund will be terminated.

9. Upon completion of each Proposed Merger, except as set out herein, the fee structures, valuation procedures, investment fund manager, and portfolio manager in respect of each Continuing Fund will be identical, in all material respects, to those in respect of the applicable Terminating Fund. Further, upon completion of each Proposed Merger, securityholders of each Terminating Fund will receive the equivalent value of the corresponding series of securities of the respective Continuing Fund with comparable rights and privileges as the series of securities of the Terminating Fund they previously held. Except for the MG Series of PG, the management fee of each series of each Continuing Fund will be the same as or lower than that of the corresponding series of its respective Terminating Fund.
10. The following are the only material differences between each Terminating Fund and its respective Continuing Fund:
  - (a) Each of TO and PG is a class of shares of a mutual fund corporation, whereas its corresponding Continuing Fund will be an open-end trust.
  - (b) Except for the MG Series of PG, the management fee of each series of each Continuing Fund will be the same as or lower than that of the corresponding series of its respective Terminating Fund; the MG Series of PG is today available only to investors who acquire shares through BMO Nesbitt Burns Inc. and maintain a minimum investment in PG, and this arrangement will be discontinued upon the completion of the Proposed Mergers.
  - (c) TO may pay a performance fee to the Manager; no performance fee is payable in respect of any other Fund, including GIP, the Continuing Fund of TO.
  - (d) Each Terminating Fund has different investment objectives and investment strategies from its corresponding Continuing Fund.
11. As required by National Instrument 81-107 *Independent Review Committee for Investment Funds*, the Manager presented the terms of the Proposed Mergers to the Independent Review Committee (**IRC**) of the Terminating Funds for its review. The IRC reviewed the potential conflict of interest matters related to the Proposed Mergers and determined that the Proposed Mergers, if implemented, would achieve a fair and reasonable result for each of the Terminating Funds.
12. Disclosure relating to the Proposed Mergers are contained in the simplified prospectus, annual information form, and fund facts document of the Funds filed on August 27, 2018.
13. A special meeting of securityholders of each Terminating Fund was held on October 18, 2018 to vote on the applicable Proposed Merger, as required pursuant to paragraph 5.1(1)(f) of NI 81-102 and pursuant to the Terminating Fund's constating documents and the *Business Corporations Act* (Alberta). The Proposed Mergers were approved.
14. The management information circular dated September 14, 2018 (the **Circular**) in respect of the special meetings contained a description of the Proposed Mergers and of the Continuing Funds, a summary of the IRC's determination, the related Canadian federal

income tax considerations for each Terminating Fund and its securityholders, and a description of the material differences between being a shareholder of a corporation and being a unitholder of a trust. The Circular also included the most recently filed fund facts document of each Continuing Fund and disclosed that securityholders of each Terminating Fund may obtain, at no cost, the applicable Continuing Fund's current simplified prospectus, annual information form, and fund facts document by contacting the Manager or by accessing the website of the Manager or SEDAR. The Circular provided sufficient information to securityholders to permit them to make an informed decision about the Proposed Mergers.

15. Securities of each Continuing Fund received by securityholders of the applicable Terminating Fund as a result of the applicable Proposed Merger will be deemed to have been purchased under the front end sales charge option (without payment of any sales charge). As a result, any securityholders in a Terminating Fund whose securities were subject to a deferred sale commission (**DSC**) will receive securities in the Continuing Fund which have no DSC.
16. Securityholders of each Terminating Fund will continue to have the right to redeem their securities or exchange their securities for securities of any other mutual funds in the NCM family of mutual funds or to redeem their securities for cash at any time up to the close of business on the Business Day immediately before the Effective Date. Securityholders of a Terminating Fund who switch their securities for securities of other mutual funds for which the Manager is the manager will not incur any charges. Securityholders of a Terminating Fund who redeem their securities may be subject to redemption charges.
17. None of the costs and expenses associated with any of the Proposed Mergers will be borne by the Funds. All such costs will be borne by the Manager. There are no charges payable by securityholders of any Terminating Fund who acquire securities of a Continuing Fund as a result of a Proposed Merger. Securityholders of the Terminating Funds will continue to have the right to redeem or switch into another mutual fund in the NCM Group of Funds at any time up to the close of business on the Business Day prior to the Proposed Mergers occurring.
18. No sales charges will be payable in connection with the acquisition by a Continuing Fund of the investment portfolio of the applicable Terminating Fund. The Proposed Mergers are planned to take place on or about October 31, 2018 (the **Merger Date**). As soon as reasonably possible following its Merger Date, the Terminating Fund will be terminated in accordance with its constating documents.
19. The Filers have complied, or will comply, with Part 11 of NI 81-106 in connection with the making of the decision to proceed with each Proposed Merger.

### **Reasons for Requested Approval**

20. The investment objectives of each Terminating Fund are not substantially similar to the investment objectives of its corresponding Continuing Fund, as required by subparagraph 5.6(1)(a)(ii) of NI 81-102, because (a) each Continuing Fund is designed to be a fund of funds while each Terminating Fund was established to make direct investments; and (b) in

the case of the TO merger with GIP, the Terminating Fund's investment objectives are to produce cash distributions and the potential for long term capital appreciation by investing primarily in corporate debt securities and other similar investments, whereas the Continuing Fund's investment objectives are to provide investors with long term capital appreciation by investing in underlying funds in a diversified portfolio consisting primarily of fixed-income securities and to a lesser extent equity securities, together with some current income; and (c) in the case of the PG merger with BIP, the Terminating Fund's investment objectives are to provide investors with dividend income and potential for long term capital appreciation, whereas the Continuing Fund's investment objectives are to provide investors with a balance of income and long term capital appreciation.

21. The management fee for Series A of BIP will not be equal to or lower than the management fee for Series MG of PG.
22. The Proposed Mergers are intended to be completed on a taxable basis and will not be a "qualifying exchange" or other form of tax-deferred transaction and so will not satisfy the requirement under paragraph 5.6(1)(b) of NI 81-102. However, except for a small proportion of securityholders that will realize a capital gain, securityholders of each Terminating Fund are generally not expected to be materially affected by the disposition of their securities pursuant to the applicable Proposed Mergers at their fair market value because they will either realize a capital loss or they hold their securities in a registered plan.
23. Prior to each Proposed Merger, the Terminating Fund will liquidate its portfolio assets, which will cause the Terminating Fund to realize income, losses, capital gains or capital losses. If a Terminating Fund has insufficient losses or expenses to offset such amounts, HIF, or NCP, in respect of PG, or NOC, in respect of TO, as applicable, may declare, pay, and automatically reinvest distributions or capital gains dividends to securityholders of such Terminating Fund, with the aim of ensuring that any tax liabilities attributed to such Terminating Fund are borne by the securityholders of the Terminating Fund.
24. The portfolio sub-advisor of the Continuing Funds has been provided with a copy of the current investment portfolios of the Terminating Funds and has determined that substantially all of the portfolio securities of the Terminating Funds are not acceptable to it, if such securities were to be transferred to the Continuing Funds.
25. Each Proposed Merger satisfies all of the criteria for pre-approved reorganizations and transfers set forth in subsection 5.6(1) of NI 81-102, except as follows:
  - (a) A reasonable person would not consider each Terminating Fund to have substantially similar fundamental investment objectives as its respective Continuing Fund, as contemplated by subparagraph 5.6(1)(a)(ii) of NI 81-102.
  - (b) A reasonable person would not consider PG to have a substantially similar fee structure as BIP, due to the difference in fees between the terminating Series MG and the continuing Series A, as contemplated by subparagraph 5.6(1)(a)(ii) of NI 81-102.

- (c) Each Proposed Merger will not be a “qualifying exchange” within the meaning of section 132.2 of the ITA or a tax-deferred transaction under section 85(1), 85.1(1), 86(1), or 87(1) of the ITA, as required by paragraph 5.6(1)(b) of NI 81-102.
  - (d) The portfolio assets of each Terminating Fund to be acquired by its respective Continuing Fund as part of the transaction are not currently acceptable to the portfolio adviser of such Continuing Fund and are not currently consistent with such Continuing Fund’s fundamental investment objectives, as contemplated by subparagraph 5.6(1)(d)(ii) of NI 81-102.
26. Section 5.6 of NI 81-102 is not available in these circumstances for the reasons set out above. Therefore, in accordance with paragraph 5.5(1)(b) of NI 81-102, the Filers applied, pursuant to section 5.7 of NI 81-102, for approval in order to effect each Proposed Merger as described above.

### **Benefits of the Mergers**

27. The anticipated benefits to securityholders of the Proposed Mergers are as follows:
- (a) The Manager believes each Continuing Fund will have greater appeal to prospective investors and will have the benefit of a more significant profile in the marketplace. The Continuing Funds each have a significant fixed income component, which the Manager believes will attract more investors and hence increase the asset base of the Continuing Funds allowing such Continuing Funds to realize economies of scale. The Manager will be able to concentrate its marketing efforts by streamlining its platform. The ability to attract assets in the Continuing Funds will benefit investors by helping to ensure that the Continuing Funds remain viable, long-term, and attractive investment vehicles for existing and potential investors.
  - (b) It is expected that each of the Continuing Funds will be able to attract a larger amount of assets under management than its corresponding Terminating Fund, which will allow the Continuing Fund’s portfolio managers to achieve increased efficiencies and flexibility. On the other hand, administrative and regulatory costs of operating the Terminating Funds as stand-alone mutual funds are expected to increase if the Terminating Funds continue their current growth trajectories.
  - (c) The Proposed Mergers will allow the Manager to provide investors with a more streamlined, single solution range of products that the Manager believes will make it easier for investors to understand and to select a suitable mutual fund based on their risk tolerance and investment objectives.
  - (d) Except for the MG Series of PG, which will be continued into the A Series of BIP, the Continuing Funds will have the same, or lower, fees than the Terminating Funds.
  - (e) It is expected that increased asset bases in each of the Continuing Funds will likely result in a lower expense ratio.

- (f) The investment objectives of the Continuing Funds are broader and more conservative than those of the applicable Terminating Funds.

**Decision**

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

The decision of the Decision Makers is that the Requested Approval is granted.

*“original signed by”* \_\_\_\_\_  
Timothy Robson  
Manager, Legal  
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