

Headnote

National Policy 11-203 – *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Relief granted from paragraph 2.6(1)(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, amounts that are owing to, but not yet been received by, the fund – Technical relief granted to mutual funds from Parts 9, 10 and 14 of NI 81-102 to facilitate the offering of exchange-traded series and conventional mutual fund series within same fund structure – Relief permitting funds to treat exchange-traded series in a manner consistent with treatment of other ETF securities in continuous distribution in connection with their compliance with Parts 9, 10 and 14 of NI 81-102 – Relief permitting funds to treat mutual fund series in a manner consistent with treatment of other conventional mutual fund securities in connection with their compliance with Parts 9, 10 and 14 of NI 81-102.

Applicable Legislative Provisions

National Instrument 81-102 *Mutual Funds*, paragraph 2.6(1)(a), Parts 9, 10, and 14, and section 19.1

Citation: Re NCM Asset Management Ltd., 2020 ABASC 65

Date: 20200514

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 **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 NCM Short Term Income Fund and NCM Core Global (collectively, the **Existing Funds**), and such other mutual funds as may be managed by the Filer or an affiliate of the Filer in the future that offer both ETF Securities (as defined below) and Mutual Fund Securities (as defined below) (the **Future Funds** and together with the Existing Funds, the **Funds**) for a decision under the securities legislation of the Jurisdictions (the **Legislation**) granting the following exemptions (collectively, the **Exemptions Sought**):

- (a) an exemption from subparagraph 2.6(1)(a)(i) of National Instrument 81-102 *Investment Funds (NI 81-102)* (the **Borrowing Restriction**) permitting each Fund to borrow cash from the custodian of the Fund (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 have not yet been received by, the Fund;
- (b) an exemption from the provisions of Parts 9, 10 and 14 of NI 81-102 (the **Sales and Redemptions Requirements**) permitting the Filer and each Fund to treat the ETF Securities and the Mutual Fund Securities (each as defined below) as if such securities were separate funds for purposes of compliance with the provisions of the Sales and Redemptions Requirements.

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 every jurisdiction of Canada other than Alberta and Ontario; 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

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

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 from time to time.

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

Basket of Securities means, in relation to the ETF Securities of a Fund, a group of securities or assets representing the constituents of the Fund.

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

ETF Securities means securities of an exchange-traded class or series of a Fund that are listed or will be listed on the TSX or another Marketplace and that will be distributed pursuant to a simplified prospectus prepared in accordance with NI 81-101 and Form 81-101F1.

Form 81-101F1 means Form 81-101F1 *Contents of Simplified Prospectus*.

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

Mutual Fund Securities means securities of a non-exchange-traded class or series of a Fund that are or will be distributed pursuant to a simplified prospectus prepared in accordance with NI 81-101 and Form 81-101F1.

NI 81-101 means National Instrument 81-101 *Mutual Fund Prospectus Disclosure*.

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

Prescribed Number of ETF Securities means, in relation to a Fund, the number of ETF Securities of the Fund 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 or Mutual Fund Securities of a Fund, as applicable.

TSX means the Toronto Stock Exchange.

Representations

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

The Filer

1. The Filer is a corporation continued under the federal laws of Canada with its head office in Calgary, Alberta.
2. The Filer is registered as an investment fund manager in Alberta, Newfoundland and Labrador, Ontario, and Québec, and a portfolio manager in Alberta and Ontario.
3. The Filer or an affiliate of the Filer is, or will be, the investment fund manager of each Fund.
4. The Filer is not in default of securities legislation in any jurisdiction of Canada.

The Funds

5. Each Fund is, or will be, a mutual fund structured as a trust or a corporation or a class thereof that is governed by the laws of a jurisdiction of Canada. Each Fund is, or will be, a reporting issuer in the jurisdictions of Canada in which its securities are distributed. Each Fund offers, or will offer, ETF Securities and Mutual Fund Securities.
6. Neither of the Existing Funds is in default of securities legislation in any jurisdiction of Canada.
7. Subject to any exemptions therefrom that have been, or may be, granted by the applicable securities regulatory authorities, each Fund is, or will be, subject to NI 81-102 and Securityholders will have the right to vote at a meeting of Securityholders in respect of matters prescribed by NI 81-102.
8. NCM Short Term Income Fund currently offers six series of Mutual Fund Securities, specifically Series A, Series A(H), Series F, Series F(H), Series I and Series R. NCM Core Global currently offers five series of Mutual Fund Securities, specifically Series A, Series F, Series R, Series Z and Series M. These Mutual Fund Securities are currently distributed under a simplified prospectus, annual information form and fund facts documents, each dated May 22, 2019, and amended by amendment no. 1 dated February 14, 2020.
9. On April 13, 2020, a preliminary and pro forma prospectus in respect of the Mutual Fund Securities and ETF Securities of the Existing Funds, as well as fund facts documents for each series of Mutual Fund Securities and ETF facts documents for each series of ETF Securities, was filed with the securities regulatory authorities in each jurisdiction of Canada.
10. The TSX has conditionally approved the listing of the ETF Securities of the Existing Funds on the TSX. The Filer will apply to list any ETF Securities of any Future Funds on the TSX or another Marketplace and will not file a final prospectus or amendment to a prospectus for any of the Future Funds in respect of the ETF Securities until the TSX or other applicable Marketplace has conditionally approved the listing of such ETF Securities.
11. Mutual Fund Securities may be subscribed for or purchased directly from a Fund through mutual fund dealers, investment dealers and their representatives that are registered under applicable securities legislation in the jurisdictions of Canada in which they are offered for sale.
12. ETF Securities will be distributed on a continuous basis in one or more of the jurisdictions of Canada under a simplified prospectus. ETF Securities may generally only be subscribed for or purchased directly from the Funds (**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 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 or another Marketplace.

13. In addition to subscribing for and reselling their 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.
14. 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, a Basket of Securities and/or cash with a value equal to the net asset value of the ETF Securities subscribed for next determined following the receipt of the subscription order. In the discretion of the Filer, the Funds may also accept subscriptions for Creation Units in cash only, in securities other than Baskets of Securities and/or in a combination of cash and securities other than Baskets of Securities, in an amount equal to the net asset value of the ETF Securities subscribed for next determined following the receipt of the subscription order.
15. 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 a Fund for cash in an amount not to exceed a specified percentage of the net asset value of the Fund or such other amount established by the Filer.
16. Designated Brokers and Authorized Dealers will not receive any fees or commissions in connection with a subscription for Creation Units. On the issuance of Creation Units, the Filer or a Fund 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.
17. Each Fund will appoint a Designated Broker to perform certain other functions, which include standing in the market with a bid and ask price for its ETF Securities for the purpose of maintaining liquidity for the ETF Securities.
18. 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 will not be available for purchase directly from a Fund. Investors are generally expected to purchase and sell ETF Securities, directly or indirectly, through dealers executing trades through the facilities of the TSX or another Marketplace. ETF Securities may also be issued directly to Securityholders upon a reinvestment of distributions of income or capital gains.
19. 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 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 Baskets of Securities and/or cash at the discretion of the Filer. Securityholders may also redeem ETF Securities for cash at a redemption price equal to 95% of the closing price of the ETF Securities on the TSX or other Marketplace on the date of redemption, subject to a maximum redemption price of the applicable net asset value per ETF Security.

Borrowing Restriction

20. Subparagraph 2.6(1)(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, a Fund is not permitted under subparagraph 2.6(1)(a)(i) to borrow from its Custodian to fund distributions under its Distribution Policy (as defined below).
21. NCM Short Term Income Fund will make distributions on a monthly basis; and in each taxation year NCM Short Term Income Fund 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). Taxable dividends for NCM Core Global may be paid once a year, or at such frequency as the board of directors of NCM Core Portfolios Ltd. may determine in its discretion. Capital gains dividends for NCM Core Global, if any, are paid once a year, or at such frequency as the board of directors of NCM Core Portfolios Ltd. may determine in its discretion (collectively, the **Distribution Policy**).
22. Amounts included in the calculation of net income and net realized capital gains of a Fund for a taxation year that must be distributed in accordance with its Distribution Policy sometimes include amounts that are owing to but have not actually been received by the Fund from the issuers of securities held in the Fund's portfolio (**Issuers**).
23. While it is possible for a Fund 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 its 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) will impact the Fund's performance. The need to maintain assets in cash or dispose of and reacquire the same securities would preclude a portion of the net asset value of the Fund from being invested in accordance with its investment objective.
24. The Filer is of the view that it is in the interests of a Fund to have the ability to borrow cash from its 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 Fund from Issuers. While such borrowing will have a cost, the Filer expects that such costs will be less than the reduction to the Fund's performance if the Fund had to hold cash or to dispose of and reacquire securities in order to fund the distribution.

Sales and Redemptions Requirements

25. Parts 9, 10 and 14 of NI 81-102 do not contemplate both Mutual Fund Securities and ETF Securities being offered in a single fund structure. Accordingly, without the Exemption Sought in respect of the Sales and Redemptions Requirements, the Filer and the Funds would not be able to technically comply with those parts of NI 81-102.
26. The Exemption Sought will permit the Filer and the Funds to treat the ETF Securities and the Mutual Fund Securities as if such securities were separate funds for purposes of their compliance with the Sales and Redemptions Requirements. The Exemption Sought will enable each of the ETF Securities and Mutual Fund Securities to comply with the Sales and Redemptions Requirements as appropriate for the type of security being offered.

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.

1. The decision of the Decision Makers under the Legislation is that the Exemption Sought in respect of the Borrowing Restriction is granted, provided that each Fund will be in compliance with all of the following conditions:
 - (a) the borrowing by the Fund in respect of a distribution does not exceed the portion of the distribution that represents, in the aggregate, amounts that are payable to the Fund but have not been received by the Fund from the Issuers and, in any event, does not exceed five percent of the net assets of the Fund;
 - (b) the borrowing is not for a period longer than 45 days;
 - (c) 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;
 - (d) the Fund does not make any distribution to Securityholders where the distribution would impair the Fund's ability to repay any borrowing to fund distributions;
 - (e) the final prospectus or amendment thereto of the Fund discloses the potential borrowing, the purpose of the borrowing and the risks associated with the borrowing.
2. The decision of the Decision Makers under the Legislation is that the Exemption Sought in respect of the Sales and Redemptions Requirement is granted, provided that each Fund will be in compliance with both of the following conditions:
 - (a) with respect to its Mutual Fund Securities, the Fund complies with the provisions of Parts 9, 10 and 14 of NI 81-102 that apply to mutual funds that are not exchange-traded mutual funds;

- (b) with respect to its ETF Securities, the Fund complies with the provisions of Parts 9 and 10 of NI 81-102 that apply to exchange-traded mutual funds.

“original signed by”

Tom Graham, CPA, CA
Director, Corporate Finance
Alberta Securities Commission