

Headnote

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Relief granted to facilitate the offering of exchange-traded series and conventional mutual fund series within same fund structure – relief granted to exchange-traded series of conventional mutual funds for continuous distribution of securities – relief to permit funds’ prospectus to not include an underwriter’s certificate – relief from take-over bid requirements for normal course purchases of securities on the TSX – relief granted from the requirement to prepare and file a long form prospectus for exchange-traded series provided that a simplified prospectus is prepared and filed – exchange-traded series and mutual fund series referable to same portfolio and have substantially identical disclosure – relief permitting all series of funds to be disclosed in same prospectus – disclosure otherwise required in long form prospectus for exchange-traded series and not contemplated by simplified prospectus form will be disclosed in prospectus under relevant headings – National Instrument 41-101 *General Prospectus Requirements*, National Instrument 62-104 *Take-Over Bids and Issuer Bids*.

Applicable Legislative Provisions

National Instrument 41-101 *General Prospectus Requirements*, subsection 3.1(2), and sections 5.9 and 19.1

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

Citation: Re NCM Asset Management Ltd., 2020 ABASC 66

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 the requirement to prepare and file a long form prospectus for the ETF Securities (as defined below) in the form prescribed by Form 41-101F2 *Information Required in an Investment Fund Prospectus* (**Form 41-101F2**) and such requirement, the **ETF Prospectus Form Requirement**), provided that each Fund files a simplified prospectus for the ETF Securities in the form prescribed by Form 81-101F1 *Contents of Simplified Prospectus* (**Form 81-101F1**) and an annual information form in the form prescribed by Form 81-101F2 *Contents of Annual Information Form* (**Form 81-101F2**) in accordance with the provisions of National Instrument 81-101 *Mutual Fund Prospectus Disclosure* (**NI 81-101**) for the ETF Securities;
- (b) an exemption from the requirement to include a certificate of an underwriter in a Fund's prospectus in respect of each class or series of ETF Securities (the **Underwriter's Certificate Requirement**);
- (c) an exemption from the Take-over Bid Requirements (as defined below) for a person or company purchasing ETF Securities in the normal course through the facilities of the TSX (as defined below) or another Marketplace (as defined below).

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 Facts means a prescribed summary disclosure document required pursuant to NI 41-101, in the form prescribed by Form 41-101F4, in respect of one or more classes or series of ETF Securities being distributed under a prospectus.

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 41-101F4 means Form 41-101F4 *Information Required in an ETF Facts Document*.

Fund Facts means a prescribed summary disclosure document required pursuant to NI 81-101 in respect of one or more classes or series of Mutual Fund Securities being distributed under a 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 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 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.

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 of Canada in which the take-over bid is made.

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, 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 for each series of Mutual Fund Securities and ETF Facts 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.

ETF Prospectus Form Requirement

20. The Filer believes it is more efficient and expedient to include all of the series of each Fund, including the Mutual Fund Securities and ETF Securities, in one prospectus document instead of two different prospectus documents and that this presentation will assist in providing full, true and plain disclosure of all material facts relating to all classes and series of securities of a Fund. The Filer will file ETF Facts in the form prescribed by Form 41-101F4 in respect of each class or series of ETF Securities, and will continue to file Fund Facts in the form prescribed by Form 81-101F3 *Contents of Fund Facts Document* in respect of each class or series of Mutual Fund Securities.
21. The Filer will ensure that any additional disclosure included in the simplified prospectus and annual information form relating to the ETF Securities will not interfere with an investor's ability to differentiate between the Mutual Fund Securities and the ETF Securities and their respective attributes.
22. The Funds will comply with the provisions of NI 81-101 when filing any prospectus or amendment thereto.

Underwriter's Certificate Requirement

23. 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.
24. The Filer will generally conduct its own marketing, advertising and promotion of the Funds to the extent permitted by its registrations.
25. Authorized Dealers and Designated Brokers will not be involved in the preparation of a Fund's prospectus, will not perform any review or any independent due diligence to the content of a Fund's prospectus, and will not incur any marketing costs or receive any underwriting fees or commissions from the Funds 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. Furthermore, the Authorized Dealers will change from time to time. Accordingly, it is not practical to provide an underwriter's certificate in the prospectus of the Funds.

Take-over Bid Requirements

26. As equity securities that will trade on the TSX or another Marketplace, it is possible for a person or company to acquire a number of ETF Securities that will trigger the Take-over Bid Requirements. However, the application of the Take-over Bid Requirements is unnecessary or impractical due to the following:
 - (a) in respect of NCM Short Term Income Fund, it will not be possible for one or more Securityholders to exercise control or direction over the Fund because the constating documents of the Fund provide that there can be no changes made to the Fund which do not have the support of the Filer;
 - (b) in respect of NCM Core Global, it will not be possible for one or more Securityholders to exercise control or direction over the Fund because the Fund is a class of non-voting shares of NCM Core Portfolios Ltd. (which only has those voting rights available under corporate law and those prescribed by NI 81-102, which for greater certainty does not include the right to vote in connection with the election of directors of NCM Core Portfolios Ltd.) and because Norrep Investment Management Group Inc., an affiliate of the Filer, owns all of the common shares of NCM Core Portfolios Ltd. (which are the only class of shares of NCM Core Portfolios Ltd. that have voting rights attached to them in all circumstances);
 - (c) it will be difficult for purchasers of ETF Securities of a Fund to monitor compliance with the Take-over Bid Requirements because the number of outstanding ETF Securities of the Fund will frequently change due to the ongoing issuance and redemption of ETF Securities by such Fund;

- (d) 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 class or series net asset value of the ETF Securities.
27. The application of the Take-over Bid Requirements to the Funds would have an adverse impact upon the liquidity of the ETF Securities because they could cause Designated Brokers and other large Securityholders to cease trading ETF 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 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.

1. The decision of the Decision Makers under the Legislation is that the Exemption Sought in respect of the ETF Prospectus Form Requirement is granted, provided that
 - (a) the Filer files a simplified prospectus and annual information form in respect of the ETF Securities in accordance with the requirements of NI 81-101, Form 81-101F1 and Form 81-101F2, other than the requirements pertaining to the filing of a Fund Facts;
 - (b) the Filer includes disclosure required pursuant to Form 41-101F2 (that is not contemplated by Form 81-101F1 or Form 81-101F2) in respect of the ETF Securities in each Fund's simplified prospectus and/or annual information form, as applicable; and
 - (c) the Filer includes disclosure regarding this decision under the heading "Additional Information" and "Exemptions and Approvals" in each Fund's simplified prospectus and annual information form, respectively.
2. The decision of the Decision Makers under the Legislation is that the Exemptions Sought in respect of the Underwriter's Certificate Requirement and the Take-over Bid Requirements are granted.

"original signed by"

Timothy Robson

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Alberta Securities Commission