

Headnote

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Relief from the conflict of interest restrictions in the *Securities Act* (Alberta) and the self-dealing prohibitions in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* to permit fund-on-fund structures involving pooled funds under common management subject to conditions

Applicable Legislative Provisions

- *Securities Act* (Alberta), R.S.A. 2000, c.S-4, sections 185(2)(b) and 185(2)(c).
- National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, paragraph 13.5(2)(a) and 15.1

Citation: Re NCM Asset Management Ltd., 2020 ABASC 72

Date: 20200526

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. (**NCM**)

and

The Top Funds (as defined below)

Decision

Background

The securities regulatory authority or regulator in each of the Jurisdictions (each a **Decision Maker**) has received an application from NCM, on behalf of NCM and its affiliates (collectively, the **Filer**), Kipling Canadian Enhanced Dividend Fund, Kipling Strategic Income Fund, Kipling Global Enhanced Growth Fund, Kipling Global Enhanced Dividend Fund, NCM Market Neutral Income Fund and NCM Canadian Enhanced Equity Fund (collectively, the **Initial Top Funds**) and any future mutual fund that is not or will not be a reporting issuer, and that is, or will be, managed by the Filer (the **Future Top Funds**, and together with the Initial Top Funds, the **Top Funds**), for a decision under the securities legislation of the Jurisdictions (the **Legislation**) in respect of the Fund-on-Fund Structure (as defined below) exempting the Filer and the Top Funds from:

- (a) the restriction in the Legislation that prohibits a mutual fund from knowingly making an investment in any person or company in which the mutual fund, alone or together with one or more related mutual funds, is a substantial securityholder,
- (b) the restriction in the Legislation that prohibits a mutual fund from knowingly making an investment in an issuer in which:
 - (i) any officer or director of the mutual fund, its management company or distribution company or an associate of them, or
 - (ii) any person or company who is a substantial securityholder of the mutual fund, its management company or its distribution company,has a significant interest (collectively, the **Related Issuer Relief**), and
- (c) the restrictions contained in subsection 13.5(2)(a) of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) which prohibit a registered adviser from knowingly causing an investment portfolio managed by it, including an investment fund for which it acts as an adviser, to purchase a security of an issuer in which a responsible person or an associate of a responsible person is a partner, officer or director, unless (i) this fact is disclosed to the client, and (ii) the written consent of the client to the purchase is obtained before the purchase (the **Consent Relief**, and together with the Related Issuer Relief, the **Requested Relief**),

to permit the Filer to cause the Top Funds to invest in the Underlying Funds (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 section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in every province and territory of Canada other than the Jurisdictions (together with the Jurisdictions, the **Offering Jurisdictions**), and
- (c) this decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority of regulator in Ontario.

Interpretation

Unless otherwise defined herein, terms in this decision have the respective meanings given to them in National Instrument 14-101 *Definitions*.

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 is not a reporting issuer in any jurisdiction of Canada and is not in default of securities legislation in any Offering Jurisdiction.

Top Funds

4. Each Initial Top Fund is organized under the laws of Alberta as a trust. Each Future Top Fund will be organized under the laws of Alberta or Ontario as a trust or a class of shares of a corporation.
5. Each Top Fund is or will be a “mutual fund” for the purposes of the Legislation.
6. None of the Initial Top Funds is in default of securities legislation in any Offering Jurisdiction.
7. None of the Top Funds is, or has plans to become, a reporting issuer in any Offering Jurisdiction.
8. The Filer is the investment fund manager of Kipling Canadian Enhanced Dividend Fund, Kipling Strategic Income Fund, Kipling Global Enhanced Growth Fund and Kipling Global Enhanced Dividend Fund. The Filer is, or will be, the portfolio manager of each Top Fund. A third party is the trustee of the Initial Top Funds. The Filer or a third party will act as trustee of each Future Top Fund.
9. Securities of the Initial Top Funds and each Future Top Fund are, or will be, offered on a private placement basis to qualified investors pursuant to available exemptions from the prospectus requirements under Canadian securities legislation. Each investor is, or will be, responsible for making its own investment decisions regarding its purchases and redemptions of securities of a Top Fund.
10. Kipling Canadian Enhanced Dividend Fund is an investment trust established by the Filer on October 1, 2015 and is governed by the laws of Alberta. Kipling Global Enhanced Dividend Fund and Kipling Global Enhanced Growth Fund are each an investment trust established by the Filer on October 1, 2014 and governed by the laws of Alberta. Kipling Strategic Income Fund is an investment trust established by the Filer on August 5, 2016.

11. In addition to the Initial Top Funds, each Top Fund may also invest in units of one or more Underlying Funds (as defined below), which investment or investments will be consistent with the Top Fund's investment objectives and strategies.
12. The investment objective of Kipling Canadian Enhanced Dividend Fund is to provide shareholders with regular monthly income and long-term capital appreciation.
13. The investment objective of Kipling Global Enhanced Dividend Fund is to provide consistent long-term capital appreciation while outperforming on a risk-adjusted basis. The investment management team will construct an investment strategy that will be long the most attractive stocks and short the most unattractive stocks based on a proprietary security ranking system. Specifically, the Fund will be long quality companies in the midst of fundamental positive changes with reasonable valuations and strong free cash flow profiles while being short companies in the midst of negative fundamental changes, that have high valuations and little to no yield support.
14. The investment objective of Kipling Global Enhanced Growth Fund is to provide consistent long-term capital appreciation while outperforming on a risk-adjusted basis. The investment management team will construct an investment strategy that will be long the most attractive stocks and short the most unattractive stocks based on a proprietary security ranking system. Specifically, the Fund will primarily be long quality companies in the midst of fundamental positive changes with reasonable valuations and strong free cash flow profiles while being short companies in the midst of negative fundamental changes.
15. The investment objective of Kipling Strategic Income Fund is to provide unitholders with a steady income while preserving capital and mitigating risk exposure.

Underlying Funds

16. Any underlying fund that is, or will be, managed by the Filer and that is, or will be, invested in by a Top Fund (the **Underlying Funds**) will be sold to investors either pursuant to a prospectus qualified in one or more of the Offering Jurisdictions or pursuant to an available exemption from the prospectus requirement under Canadian securities legislation.
17. The existing prospectus qualified mutual funds of the Underlying Funds and their investment objectives are set out in the NCM Funds Simplified Prospectus, currently dated May 22, 2019.
18. None of the existing Underlying Funds is in default of the securities legislation of any Offering Jurisdiction.
19. Each Underlying Fund is, or will be, structured as a limited partnership, a trust or a corporation governed by the laws of a jurisdiction of Canada. Each Underlying Fund is, or will be, a "mutual fund" as defined in securities legislation of the Offering Jurisdictions in which the Top Funds and the Underlying Funds are distributed.
20. The Filer is, or will be, the investment fund manager and portfolio manager of each of the Underlying Funds.

Fund-on-Fund Structure

21. The Initial Top Funds allow, and Future Top Funds will allow, investors in the Top Funds to obtain indirect exposure to the investment portfolio of Underlying Funds and their investment strategies through direct investments by the Top Funds in securities of the Underlying Funds (the **Fund-on-Fund Structure**).
22. The Fund-on-Fund Structure permits the Filer to manage a single portfolio of assets for both a Top Fund and each Underlying Fund that the Top Fund holds in a single investment vehicle structure.
23. Managing a single pool of assets provides economies of scale, allows the Top Funds to achieve their investment objectives in a cost-efficient manner and is not detrimental to the interest of other securityholders of an Underlying Fund.
24. An investment in an Underlying Fund by a Top Fund is, or will be, effected at an objective price. In the case of an Underlying Fund that is not a reporting issuer, the Filer's policies and procedures provide that an objective price, for this purpose, is the net asset value (NAV) of that Underlying Fund. In the case of an Underlying Fund that is a reporting issuer, the objective price is the NAV of the applicable securities.
25. The portfolio of each Underlying Fund consists, or will consist, primarily of publicly traded securities, debt instruments and derivatives. No Underlying Fund holds, or will hold, more than 10% of its NAV in "illiquid assets" (as defined in National Instrument 81-102 *Investment Funds* (NI 81-102)).
26. The amounts invested, from time to time, in an Underlying Fund by one or more of the Top Funds or other related investment funds may exceed 20% of the outstanding voting securities of that Underlying Fund. Accordingly, each Top Fund could, either alone or together with one or more funds managed by the Filer, become a substantial securityholder of an Underlying Fund.
27. In all cases, the Filer manages, or will manage, the liquidity of each Top Fund having regard to the redemption features of the corresponding Underlying Fund(s) to ensure that it can meet redemption requests from investors of the Top Funds.
28. In addition, the Fund-on-Fund structure may result in a Top Fund investing in an Underlying Fund (i) in which an officer or director of the Top Fund, of the Filer or of any associate of them, has a significant interest, and/or (ii) where a person or company who is a substantial securityholder of the Top Fund or the Filer, has a significant interest.
29. The Top Funds and Underlying Funds subject to National Instrument 81-106 *Investment Fund Continuous Disclosure* (NI 81-106) will prepare annual audited financial statements and interim unaudited financial statements in accordance with NI 81-106 and will otherwise comply with the requirements of NI 81-106 applicable to them.
30. In the absence of the Related Issuer Relief, the Top Funds would be constrained by the investment restrictions in Canadian securities legislation in terms of the degree to which

they could implement the Fund-on-Fund Structure. Specifically, the Top Funds would be prohibited from: (i) becoming substantial securityholders of the Underlying Funds, either alone or together with related investment funds; and (ii) a Top Fund investing in an Underlying Fund in which an officer or director of the Top Fund's management company has a significant interest and/or a Top Fund investing in an Underlying Fund in which a person or company who is a substantial securityholder of the Top Fund or the Top Fund's management company, has a significant interest.

31. In the absence of the Consent Relief, each Top Fund would be precluded from investing in one or more Underlying Funds unless the specific fact is disclosed to securityholders of the Top Fund and the written consent of the securityholders of the Top Fund to the investment is obtained prior to the purchase, since an officer and/or director of the Filer, who may be considered a responsible person (as per section 13.5 of NI 31-103) or an associate of a responsible person, may also be a partner, officer and/or director of the applicable Underlying Fund.
32. The Fund-on-Fund Structure represents the business judgment of responsible persons uninfluenced by considerations other than the best interests of the investors in the Top Funds.

Decision

Each Decision Maker, considering that it would not be prejudicial to the public interest, orders that the Requested Relief is granted, provided that:

- (a) securities of a Top Fund are distributed in Canada solely pursuant to exemptions from the prospectus requirement under Canadian securities legislation;
- (b) the investment by a Top Fund in an Underlying Fund is compatible with the fundamental investment objectives of the Top Fund;
- (c) an investment in an Underlying Fund by a Top Fund will be effected at an objective price, calculated in accordance with section 14.2 of NI 81-106;
- (d) a Top Fund will not invest in an Underlying Fund unless the Underlying Fund complies with the provisions of NI 81-106 that apply to a "mutual fund in Ontario" as defined in the *Securities Act* (Ontario);
- (e) no Top Fund will purchase or hold a security of an Underlying Fund unless at the time of purchasing securities of the Underlying Fund, the Underlying Fund holds no more than 10% of its NAV in securities of other mutual funds unless the Underlying Fund:

- (i) is a clone fund (as defined in NI 81-102);
 - (ii) purchases or holds securities of a “money market fund” (as defined in NI 81-102); or
 - (iii) purchases or holds securities that are “index participation units” (as defined in NI 81-102) issued by an investment fund;
- (f) no management fees or incentive fees are payable by a Top Fund that, to a reasonable person, would duplicate a fee payable by an Underlying Fund for the same service;
- (g) no sales fees or redemption fees are payable by a Top Fund in relation to its purchases or redemptions of securities of an Underlying Fund that, to a reasonable person, would duplicate a fee payable by an investor in the Top Fund other than brokerage fees incurred for the purchase or sale of an index participation unit issued by an investment fund;
- (h) the Filer does not cause the securities of an Underlying Fund held by a Top Fund to be voted at any meeting of the holders of such securities, except that the Filer may arrange for the securities the Top Fund holds of an Underlying Fund to be voted by the beneficial owners of the securities of the Top Fund who are not the Filer or an officer, director or substantial securityholder of the Filer;
- (i) when purchasing and/or redeeming securities of an Underlying Fund, the Filer shall, as investment fund manager of the applicable Top Fund and Underlying Fund, act honestly, in good faith and in the best interests of the Top Fund and the Underlying Fund, respectively, and shall exercise the care and diligence that a reasonably prudent person would exercise in comparable circumstances;
- (j) the offering memorandum, where available, or the statement of investment policies and procedures, relationship disclosure documents or other similar document of a Top Fund, will be provided to investors in a Top Fund prior to the time of investment, and will disclose:
 - (i) that the Filer is the investment fund manager and portfolio manager of both the Top Fund and the Underlying Funds;
 - (ii) that the Top Fund may invest all, or substantially all, of its assets in securities of Underlying Funds;
 - (iii) the fees, expenses and any performance or special incentive distributions payable by the Underlying Funds in which a Top Fund invests;
 - (iv) the process or criteria used to select the Underlying Funds, if applicable;

- (v) for each officer, director and/or substantial securityholder of the Filer, or of a Top Fund, that has a significant interest in an applicable Underlying Fund, and for the officers and directors and substantial securityholders who together in aggregate hold a significant interest in an applicable Underlying Fund, the approximate amount of the significant interest they hold, on an aggregate basis, expressed as a percentage of the applicable Underlying Fund's NAV, and the potential conflicts of interest which may arise from such relationship;
 - (vi) that investors are entitled to receive from the Filer, on request and free of charge, a copy of the prospectus, offering memorandum, statement of investment policies and procedures or other similar disclosure document of the Underlying Funds, if available; and
 - (vii) that investors are entitled to receive from the Filer, on request and free of charge, the annual audited financial statements and interim financial reports relating to each Underlying Fund in which the Top Fund invests.
- (k) the Filer shall annually inform investors in a Top Fund of their right to receive from the Filer, as applicable, on request and free of charge, a copy of the offering memorandum, statement of investment policies and procedures or other similar disclosure document of each Underlying Fund, if available, and the annual audited financial statements and interim financial reports relating to each Underlying Fund in which the Top Fund invests.

"original signed by"

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