

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – approval of mutual fund merger pursuant to paragraph 5.5(1)(b) of National Instrument 81-102 *Investment Funds* – approval required because merger does not meet the criteria for pre-approved reorganizations and transfers – merger will not be a “qualifying exchange” or a tax-deferred transaction under the *Income Tax Act* – merger to otherwise comply with pre-approval criteria, including securityholder vote and IRC approval – securityholders to be provided with timely and adequate disclosure regarding the merger.

Applicable Legislative Provisions

National Instrument 81-102 *Investment Funds*, paragraph 5.5(1)(b), subsection 5.6(1), and paragraph 5.7(1)(b)

Citation: Re NCM Asset Management Ltd., 2020 ABASC 159

Date: 20201013

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**)

and

NCM Entrepreneurs Class (the **Terminating Fund**)

and

NCM Small Companies Class (the **Continuing Fund**)

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 the Terminating Fund and the Continuing Fund (each a **Fund** and together, the **Funds**) for a decision under the securities legislation (the **Legislation**) of the Jurisdictions for approval (the **Approval Sought**), pursuant to paragraph 5.5(1)(b) of National Instrument 81-102 *Investment Funds* (**NI 81-102**), of the proposed merger of NCM Entrepreneurs Class into NCM Small Companies Class (the **Merger**).

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) the 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*, MI 11-102 and NI 81-102 have the same meaning if used in this decision, unless otherwise defined.

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 the investment fund manager of each of the Funds.
4. The Filer is not in default of securities legislation in any jurisdiction of Canada.

The Funds

5. Each Fund is a separate class of special shares of Norrep Opportunities Corp. (NOC), a mutual fund corporation incorporated under the laws of the Province of Alberta.
6. Shares of the Funds are currently distributed under a simplified prospectus, annual information form and fund facts, each dated May 20, 2020, as amended.
7. Each of the Funds is a reporting issuer under the securities legislation of each province of Canada, and is subject to the requirements of NI 81-102.
8. The Funds are not in default of securities legislation in any jurisdiction of Canada.
9. 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.

10. The net asset value for each series of shares of the Funds is generally calculated on a daily basis on each day that the Toronto Stock Exchange is open for trading (each, a **Business Day**) and shares of the Funds are generally redeemable on any Business Day.
11. The Continuing Fund has identical valuation procedures to those of the Terminating Fund.
12. The Terminating Fund and the Continuing Fund are, and are expected to continue to be at all material times, mutual fund corporations under the *Income Tax Act* (Canada) (the **Tax Act**) and, accordingly, shares of the Funds are “qualified investments” under the Tax Act for registered retirement savings plans, registered retirement income funds, deferred profit sharing plans, registered education savings plans, registered disability savings plans and tax free savings accounts.

Details of the Mergers

13. The Filer intends to merge NCM Entrepreneurs Class into NCM Small Companies Class.
14. Approval for the Merger is required because the Merger does not satisfy all of the criteria for pre-approved reorganizations and transfers set out in section 5.6 of NI 81-102 as the Merger will not be a “qualifying exchange” or a tax deferred transaction under the Tax Act.
15. Shareholders in the Terminating Fund will receive shares of the same series of the Continuing Fund as they currently own in the Terminating Fund.
16. Investors of each of the Funds will be asked to approve the Merger at meetings to be held concurrently on or about November 5, 2020.
17. As required by National Instrument 81-107 *Independent Review Committee for Investment Funds*, an Independent Review Committee (**IRC**) has been appointed for the Funds. The Filer presented the potential conflict of interest matters related to the proposed Merger to the IRC. The IRC reviewed the potential conflict of interest matters related to the proposed Merger and, on August 27, 2020, provided its positive recommendation, after determining that the proposed Merger, if implemented, would achieve a fair and reasonable result for each of the Funds.
18. The Filer does not consider the Merger to be a material change to the Continuing Fund. However, the Filer will seek approval for the Merger from the shareholders of the Continuing Fund as required pursuant to the *Business Corporations Act* (Alberta) (the **ABCA**). The sole common shareholder of NOC will also approve the Merger as required under the ABCA.
19. The board of directors of the Filer and NOC approved the proposed Merger on August 27, 2020 and a press release and material change report, which gave notice of the proposed Merger, was issued and filed on SEDAR on August 28, 2020. Related amendments to the simplified prospectus, annual information form and fund facts of the Funds were filed on SEDAR on September 4, 2020.

20. Pursuant to a decision dated November 7, 2016 (the **Decision**), the Filer has obtained an exemption from the requirement in paragraph 12.2(2)(a) of National Instrument 81-106 *Investment Fund Continuous Disclosure* to send an information circular (the **Circular**) and proxy-related materials to the securityholders of the Terminating Fund which instead allows the Terminating Fund to make use of a notice-and-access process. The notice-and-access document prescribed by the Decision, the form of proxy and the fund facts document relating to the relevant series of the Continuing Fund will be mailed to shareholders of the Funds on or about October 6, 2020 and will be filed via SEDAR.
21. The Circular will include all of the following information:
- (a) a description of the proposed Merger including the steps that will be taken to effect the Merger;
 - (b) a comparison of the Terminating Fund and the Continuing Fund including the differences between the investment objectives of the Terminating Fund and the Continuing Fund;
 - (c) the tax implications of the Merger;
 - (d) a summary of the IRC's determination;
 - (e) a statement that shareholders who redeem their shares will be subject to the same redemption charges to which their shares of the Terminating Fund were subject prior to the Merger except that any deferred sales charges applicable to shares of the Terminating Fund will be waived;
 - (f) disclosure that shareholders of the Funds may obtain in respect of the Continuing Fund, at no cost, the most recent annual and interim financial statements, the current simplified prospectus, annual information form, the fund facts and the most recent management report on fund performance that are currently available and that have been made public by contacting the Filer or by accessing the website of the Filer or by accessing SEDAR.

Accordingly, shareholders of the Funds will have an opportunity to consider such information prior to voting on the Merger.

22. The Filer will pay all costs and expenses associated with the Merger. These costs consist mainly of legal, proxy solicitation, printing, mailing and regulatory fees and brokerage charges associated with the merger-related trades.
23. No sales charges will be payable in connection with the acquisition by the Continuing Fund of the investment portfolio of the Terminating Fund.
24. Subject to receipt of the requisite shareholder approvals and the Approval Sought, it is anticipated that the Merger will be implemented as soon as practicable after the special meetings and in any event by November 9, 2020 (the **Merger Date**).

25. If the requisite shareholder approval is not received for the Merger it will not proceed.
26. Shareholders of the Terminating Fund will continue to have the right to switch to another mutual fund managed by the Filer or to redeem shares of the Terminating Fund for cash at any time up to the close of business on the business day immediately prior to the Merger Date.
27. Prior to the Merger Date, the portfolio assets of the Terminating Fund to be acquired by the Continuing Fund will be acceptable to the portfolio adviser of the Continuing Fund and will be consistent with the investment objective and strategies of the Continuing Fund.
28. Following the Mergers, the Continuing Fund will continue as a publicly offered open-end mutual fund and the Terminating Fund will be wound-up and terminated as soon as reasonably possible.

Merger Steps

29. The proposed Merger will be structured as follows:
 - (a) Prior to the Merger Date, if required, the Terminating Fund will sell any securities in its portfolio that do not meet the investment objectives and investment strategies of the Continuing Fund. As a result, the Terminating Fund may hold cash for a period of time prior to the Merger being effected, which it is permitted to do in accordance with its investment objectives.
 - (b) Prior to the Merger Date, NOC may pay a capital gains dividend on shares of the Terminating Fund where determined to be fair and equitable.
 - (c) The articles of incorporation of NOC will be amended to exchange all of the outstanding special shares of the Terminating Fund for special shares of the same series of the Continuing Fund. Pursuant to that exchange, each investor of the Terminating Fund will receive special shares of the same series of the Continuing Fund with a value equal to the value of their special shares in the Terminating Fund as determined on the Merger Date. After this step is complete, shareholders of the Terminating Fund will become shareholders of the Continuing Fund.
 - (d) On the Merger Date, the net assets attributable to the Terminating Fund (being its investment portfolio and other assets, including cash and liabilities) will be included in the portfolio of assets attributable to the Continuing Fund.
 - (e) As soon as reasonably possible following the Merger, the articles of incorporation of NOC will be amended to terminate NCM Entrepreneurs Class.
30. The Filer believes the Merger will be beneficial to the shareholders of the Funds for the following reasons:
 - (a) Shareholders of the Continuing Fund are expected to benefit from increased economies of scale and lower operating expenses as part of larger combined Continuing Fund.

- (b) The Continuing Fund is expected to attract more assets as marketing efforts will be concentrated on fewer funds, rather than multiple funds with similar investment mandates. The ability to attract assets in the Continuing Fund will benefit investors by helping to ensure that the Continuing Fund remains a viable, long-term, attractive investment vehicle for existing and potential investors.
- (c) The Continuing Fund will have a greater level of assets and will enable the Filer to focus its sales efforts on the growth of the Continuing Fund which in turn is expected to allow for increased portfolio diversification opportunities, lower volatility and greater liquidity of investments.
- (d) The administrative and regulatory costs of operating the Terminating Fund as a stand-alone mutual fund are expected to increase if the Terminating Fund continues its current growth trajectory.
- (e) The Continuing Fund, as a result of its increased size, will benefit from a more significant profile in the marketplace.
- (f) The Merger will reduce the duplication of administrative and regulatory costs involved in operating the Terminating Fund and the Continuing Fund as separate investment funds.
- (g) Reducing the number of NCM funds will provide investors with a more streamlined range of products that will make it easier for investors to select a suitable mutual fund based on their risk tolerance and investment objectives as the Merger will eliminate funds with similar and over-lapping investment objectives and strategies.
- (h) Management fees and performance fees of the Continuing Fund will remain the same.

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 under the Legislation is that the Approval Sought is granted, provided that the Filer obtains the prior approval of the shareholders of the Terminating Fund and the Continuing Fund at special meetings held for that purpose.

“original signed by”

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Alberta Securities Commission