

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* -National Instrument 81-102 *Investment Funds*, s. 19.1 – Sales communications - An investment fund manager seeks relief to permit the use of certain fund ratings and rankings in sales communications - The rating systems are objective, transparent and quantitative measures of performance; the ratings or rankings reflect a period of time relevant to an investment decision; the disclosure on the rankings ensures that investors clearly understand what the ranking measures and recognizes, as well as the relevant period of performance upon which the ranking is based.

Applicable Legislative Provisions

National Instrument 81-102 *Investment Funds*, ss. 15.3(c) and (f), 19.1

May 2, 2025

In the Matter of
the Securities Legislation of
British Columbia and Ontario
(the Jurisdictions)

and

In the Matter of
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of
PenderFund Capital Management Ltd.
(the Filer)

Decision

Background

¶1 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 existing investment funds and future investment funds of which the Filer is or becomes the investment fund manager that are available for sale to retail investors and to which National Instrument 81-102 *Investment Funds* (NI 81-102) applies (each, a Fund and collectively, the Funds) for a decision under the securities legislation of the Jurisdictions (the Legislation) for an exemption from the requirements set out in paragraphs 15.3(4)(c) and 15.3(4)(f) of NI 81-102, which provide that a sales communication must not refer to a performance rating or ranking of a mutual fund or asset allocation service unless:

- (a) the rating or ranking is provided for each period for which standard performance data is required to be given, except the period since the inception of the mutual fund; and
- (b) the rating or ranking is to the same calendar month end that is:

- (i) not more than 45 days before the date of the appearance or use of the advertisement in which it is included, and
- (ii) not more than three months before the date of first publication of any other sales communication in which it is included,

in order to permit the FundGrade A+ Awards, FundGrade Ratings, Lipper Awards and Lipper Leader Ratings (each as defined below) to be referenced in sales communications relating to the Funds (the Exemption Sought).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

- (a) the British Columbia 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* is intended to be relied upon in Alberta, Manitoba, Québec and Newfoundland and Labrador; and
- (c) the decision is a decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

- ¶2 Terms defined in NI 81-102, National Instrument 14-101 – *Definitions* and MI 11-102 have the same meaning in this decision, unless otherwise defined.

Representations

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

The Filer and the Funds

1. the Filer is a corporation that was incorporated under the laws of British Columbia on May 28, 2003 with its head office located in Vancouver, British Columbia;
2. the Filer is registered as: (i) an investment fund manager in British Columbia, Ontario, Québec and Newfoundland and Labrador; (ii) a portfolio manager in British Columbia and Ontario; and (iii) an exempt market dealer in British Columbia, Alberta, Manitoba, Ontario and Québec;
3. the Filer is, or will be, the investment fund manager, portfolio manager and trustee of each Fund;
4. each Fund is, or will be, an open-ended trust established under the laws of the Province of British Columbia;
5. each Fund is, or will be, governed by the applicable provisions of NI 81-102, subject to any exemptions therefrom that have been, or may in the future be, granted by the securities regulatory authorities;
6. securities of the Funds are, or will be, offered pursuant to one or more simplified prospectuses, as the same may be amended or renewed from time to time;

7. each Fund is, or will be, a reporting issuer in one or more of the Jurisdictions;
8. neither the Filer nor any of the existing Funds are in default of securities legislation in any of the Jurisdictions;

Fundata FundGrade A+ Awards Program

9. the Filer wishes to include in sales communications of the Funds references to the FundGrade Ratings and references to the FundGrade A+ Awards (each as defined below) where such Funds have received a FundGrade A+ Award;
10. Fundata Canada Inc. (Fundata) is not a member of the Funds' organization; Fundata is a "mutual fund rating entity" as that term is defined in NI 81-102; Fundata is a leader in supplying mutual fund information, analytical tools, and commentary; Fundata's fund data and analysis, fund awards designations and ratings information provide valuable insight to advisors, media and individual investors;
11. one of Fundata's programs is the FundGrade A+ Awards program; this program highlights investment funds that have excelled in delivering consistently strong risk-adjusted performance relative to their peers; the FundGrade A+ Awards designate award-winning funds in most individual fund classifications for the previous calendar year, and the awards are announced in January of each year; the categories for fund classification used by Fundata are those maintained by the Canadian Investment Funds Standards Committee (CIFSC) (or a successor to CIFSC), a Canadian organization that is independent of Fundata;
12. the FundGrade A+ Awards are based on a proprietary rating methodology developed by Fundata known as the FundGrade Rating system; the FundGrade Rating system evaluates investment funds based on their risk-adjusted performance measured by three well-known and widely used metrics: the Sharpe Ratio, the Information Ratio, and the Sortino Ratio; the ratios are calculated for the two through ten-year periods for each fund; when there is more than one eligible series of a fund, an average ratio is taken for each period; the ratios are ranked across all time periods and an overall score is calculated by equally weighting the yearly rankings;
13. the FundGrade Ratings are letter grades for each investment fund and are determined each month; the FundGrade Ratings for each month are released on the seventh business day of the following month; the top 10% of investment funds earn an A Grade; the next 20% of investment funds earn a B Grade; the next 40% of investment funds earn a C Grade; the next 20% of investment funds receive a D Grade; and the lowest 10% of investment funds receive an E Grade; because the overall score of an investment fund is calculated by equally weighting the periodic rankings, to receive an A Grade, a fund must show consistently high scores for all ratios across all time periods;
14. Fundata calculates a grade using only the retail series of units of each fund; the institutional series or fee-based series of any fund are not included in the calculation; a fund must have at least two years of history to be included in the calculation; once a letter grade is calculated for a fund, it is then applied to all related series of units of that fund;
15. at the end of each calendar year, Fundata calculates a "Fund GPA" for each fund based on the full year's performance; the Fund GPA is calculated by converting each month's

FundGrade Rating letter grade into a numerical score; each A Grade is assigned a grade of 4.0; each B Grade is assigned a grade of 3.0; each C Grade is assigned a grade of 2.0; each D Grade is assigned a grade of 1.0; and each E Grade is assigned a grade of 0; the total of the grades for each fund is divided by 12 to arrive at the Fund's GPA for the year; any fund earning a Fund GPA of 3.5 or greater earns a FundGrade A+ Award;

16. when a fund is awarded a FundGrade A+ Award, Fundata will permit such fund to make reference to the award in its sales communications;

Lipper Leader Ratings and Lipper Awards

17. the Filer also wishes to include in sales communications of the Funds references to Lipper Leader Ratings (which are performance ratings or rankings for investment funds issued by Lipper (as defined below) and include the Lipper Ratings for Consistent Return, Lipper Ratings for Total Return, Lipper Ratings for Preservation and the Lipper Ratings for Expense, which are described in further detail below) and Lipper Awards (as described below) where such Funds have received a Lipper Award;
18. Lipper, Inc. (Lipper) is not a member of the Funds' organization; Lipper is a "mutual fund rating entity" as that term is defined in NI 81-102; Lipper is part of the London Stock Exchange Group (LSEG) and is a global leader in supplying mutual fund information, analytical tools, and commentary; Lipper's fund data and analysis, fund awards designations and ratings information provide valuable insight to advisors, media and individual investors;
19. one of Lipper's programs is the Lipper Fund Awards from the LSEG program (the Lipper Awards); this program recognizes investment funds that have excelled in delivering consistently strong risk-adjusted performance relative to peers and also recognizes fund families with high average scores for all investment funds within a particular asset class or overall; currently, the Lipper Awards take place in approximately 24 countries;
20. in Canada, the Lipper Awards include the Lipper Fund Awards and Lipper ETF Awards (which were awarded for the first time in Canada in 2014); for the Lipper Fund Awards and the Lipper ETF Awards, Lipper designates award-winning funds in several individual fund classifications for three, five and ten-year periods;
21. the categories for fund classification used by Lipper for the Lipper Awards in respect of Canadian funds are those maintained by CIFSC (or a successor to the CIFSC), a Canadian organization that is independent of Lipper; only those CIFSC groups of ten or more unique funds will claim a Lipper Fund Award, and only those CIFSC groups of five or more unique ETFs (each of whom have a minimum of three or five years of performance history, as applicable) will claim a Lipper ETF Award;
22. the Lipper Awards are based on a proprietary rating methodology prepared by Lipper, known as the Lipper Leader Rating System; the Lipper Leader Rating System is a toolkit that uses investor-centred criteria to deliver a simple, clear description of a fund's success in meeting certain goals, such as preserving capital, lowering expenses or building wealth; Lipper Ratings provide an instant measure of a fund's success against a specific set of key metrics and can be useful to investors in identifying funds that meet particular characteristics;

23. in Canada, the Lipper Leader Rating System includes Lipper Ratings for Consistent Return (reflecting funds' historical risk-adjusted returns relative to funds in the same classification), Lipper Ratings for Total Return (reflecting funds' historical total return performance relative to funds in the same classification), Lipper Ratings for Preservation (reflecting funds' historical loss avoidance relative to other funds in the same classification) and Lipper Ratings for Expense (reflecting funds' expense minimization relative to funds with similar load structures); in each case, the categories for fund classification used by Lipper for the Lipper Leader Ratings are those maintained by CIFSC (or a successor to CIFSC); Lipper Leader Ratings are measured monthly over 36, 60 and 120-month periods, and an overall rating is also measured, which is an unweighted average of the previous three periods; the highest 20% of funds in each category are named Lipper Leaders for that particular rating and receive a score of 5, the next 20% receive a score of 4, the middle 20% are scored 3, the next 20% are scored 2 and the lowest 20% are scored 1;
24. the Lipper Awards, awarded annually in Canada, are based on the Lipper Ratings for Consistent Return measure, which, as generally described above, is a risk-adjusted mutual fund return performance measure used by Lipper that considers both short and long-term risk-adjusted performance relative to fund classification, together with a measure of a fund's consistency; in respect of the Lipper Awards for Canada, the Lipper Ratings for Consistent Return are measured over the 36, 60 and 120-month periods ending at the end of July of each year; as noted above, the highest 20% of funds in each classification are named Lipper Leaders for Consistent Return, and the highest Lipper Leader for Consistent Return in each applicable fund classification over these periods wins a Lipper Award;

FundGrade Ratings and FundGrade A+ Awards

25. the FundGrade Ratings fall within the definition of "performance data" under NI 81-102, as they constitute "a rating, ranking, quotation, discussion or analysis regarding an aspect of the investment performance of an investment fund", given that the FundGrade Ratings are based on performance measures calculated by Fundata; the FundGrade A+ Awards may be considered to be "overall ratings or rankings", given that the awards are based on the FundGrade Ratings as described above; therefore, references to FundGrade Ratings and FundGrade A+ Awards in sales communications relating to the Funds need to meet the applicable requirements in Part 15 of NI 81-102;
26. paragraph 15.3(4)(c) of NI 81-102 imposes a "matching" requirement for performance ratings or rankings that are included in sales communications for mutual funds; if a performance rating or ranking is referred to in a sales communication, it must be provided for, or "match", each period for which standard performance data is required to be given for the Fund, except for the period since the inception of the Fund (i.e., for one, three, five and ten-year periods, as applicable);
27. while FundGrade Ratings are based on calculations for a minimum of two years through to a maximum of ten years, and the FundGrade A+ Awards are based on a yearly average of monthly FundGrade Ratings, specific ratings for the three, five and ten-year periods within the two to ten-year measurement period are not given; this means that a sales communication referencing FundGrade Ratings cannot comply with the "matching" requirement contained in paragraph 15.3(4)(c) of NI 81-102;
28. the exemption in subsection 15.3(4.1) of NI 81-102 for references to overall ratings or rankings of funds cannot be relied upon to reference the FundGrade A+ Awards in sales

communications for the Funds because it is available only if a sales communication “otherwise complies” with the requirements of subsection 15.3(4) of NI 81-102; as noted above, sales communications referencing the FundGrade A+ Awards cannot comply with the “matching” requirement in subsection 15.3(4) because the underlying FundGrade Ratings are not available for the three, five and ten-year periods within the two to ten-year measurement period for the FundGrade Ratings, rendering the exemption in subsection 15.3(4.1) unavailable;

29. paragraph 15.3(4)(f) of NI 81-102 imposes certain restrictions on disclosure in sales communications; this paragraph provides that in order for a rating or ranking such as a FundGrade A+ Award to be used in an advertisement, the advertisement must be published within 45 days of the calendar month end to which the rating or ranking applies; further, in order for the rating or ranking to be used in any other sales communication, the rating or ranking must be published within three months of the calendar month end to which the rating or ranking applies;
30. because the evaluation of Funds for the FundGrade A+ Awards will be based on data aggregated until the end of December in any given year and the results will be published in January of the following year, by the time a Fund receives a FundGrade A+ Award in January, paragraph 15.3(4)(f) of NI 81-102 will only allow the FundGrade A+ Award to be used in an advertisement until the middle of February of that year and in other sales communications until the end of March of that year;

Lipper Leader Ratings and Lipper Awards

31. the Lipper Leader Ratings are performance ratings or rankings under NI 81-102 and Lipper Awards may be considered to be performance ratings or rankings under NI 81-102 given that the awards are based on the Lipper Leader Ratings as described above; therefore, references to Lipper Leader Ratings and Lipper Awards in sales communications relating to the Funds need to meet the applicable requirements in Part 15 of NI 81-102;
32. in Canada and elsewhere, Lipper Leader Ratings are calculated only for 36, 60 and 120-month periods and are not calculated for a one-year period; this means that a sales communication referencing a Lipper Leader Rating cannot comply with the “matching” requirement contained in paragraph 15.3(4)(c) of NI 81-102 because a rating is not available for the one-year period;
33. in addition, a sales communication referencing the overall Lipper Leader Ratings and the Lipper Awards, which are based on the Lipper Leader Ratings, must disclose the corresponding Lipper Leader Rating for each period for which standard performance data is required to be given; as noted above, because a rating for the one-year period is not available for the Lipper Leader Ratings, sales communications referencing the overall Lipper Leader Ratings or Lipper Awards also cannot comply with the “matching” requirement contained in paragraph 15.3(4)(c) of NI 81-102;
34. the exemption in subsection 15.3(4.1) of NI 81-102 for references to overall ratings or rankings of funds cannot be relied upon to reference the overall Lipper Leader Ratings or Lipper Awards in sales communications for the Funds because subsection 15.3(4.1) of NI 81-102 is available only if a sales communication otherwise complies with the requirements of subsection 15.3(4) of NI 81-102; as noted above, sales communications referencing the overall Lipper Leader Ratings or Lipper Awards cannot comply with the “matching”

requirement in subsection 15.3(4) of NI 81-102 because the underlying Lipper Leader Ratings are not available for the one-year period, rendering the exemption in subsection 15.3(4.1) of NI 81-102 unavailable;

35. paragraph 15.3(4)(f) of NI 81-102 imposes certain restrictions on disclosure in sales communications; the paragraph provides that in order for a rating or ranking such as a Lipper Award to be used in an advertisement, the advertisement must be published within 45 days of the calendar month end to which the rating or ranking applies; further, for the rating or ranking to be used in any other sales communication, the rating or ranking must be published within three months of the calendar month end to which the rating or ranking applies;
36. because the evaluation of funds for the Lipper Awards will be based on data aggregated until the end of July in any given year and the results will be published in November of that year, by the time a fund receives an award in November, paragraph 15.3(4)(f) of NI 81-102 will prohibit it from publishing news of the award altogether;
37. the Exemption Sought is required for the FundGrade Ratings, FundGrade A+ Awards, Lipper Leader Ratings and Lipper Awards to be referenced in sales communications relating to the Funds;
38. the FundGrade A+ Awards, FundGrade Ratings, Lipper Leader Ratings and Lipper Awards are important tools for investors, as they provide them with context when evaluating investment choices; and
39. the FundGrade A+ Awards, FundGrade Ratings, Lipper Leader Ratings and Lipper Awards provide an objective, transparent and quantitative measure of performance that is based on the expertise of Fundata or Lipper, as applicable, in fund analysis and alleviates any concern that references to them may be misleading and therefore, contrary to paragraph 15.2(1)(a) of NI 81-102.

Decision

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

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted provided that:

- (a) the sales communication that refers to the FundGrade A+ Awards, FundGrade Ratings, Lipper Awards or Lipper Leader Ratings complies with Part 15 of NI 81-102 other than as set out herein and contains the following disclosure in at least 10-point type:
 - (i) the name of the category for which the Fund has received the award or rating;
 - (ii) the number of mutual funds in the category for the applicable period;
 - (iii) the name of Fundata or Lipper, as applicable;
 - (iv) the length of period and ending date, or, the first day of the period and ending date on which the FundGrade A+ Award, FundGrade Rating, Lipper Award or Lipper Leader Rating is based;

- (v) a statement that FundGrade Ratings or Lipper Leader Ratings are subject to change every month;
 - (vi) in the case of a FundGrade A+ Award or Lipper Award, a brief overview of the FundGrade A+ Award or Lipper Award, as applicable;
 - (vii) in the case of a FundGrade Rating (other than FundGrade Ratings referenced in connection with a FundGrade A+ Award) or a Lipper Leader Rating (other than Lipper Leader Ratings referenced in connection with a Lipper Award), a brief overview of the FundGrade Rating or Lipper Leader Rating, as applicable;
 - (viii) where Lipper Awards are referenced, the corresponding Lipper Leader Rating that the Lipper Award is derived from is presented for each period for which standard performance data is required other than the one-year and since inception periods;
 - (ix) where a Lipper Leader Rating is referenced, the Lipper Leader Ratings are presented for each period for which standard performance data is required other than the one-year and since inception periods;
 - (x) disclosure of the meaning of the FundGrade Ratings from A to E (e.g. rating of A indicates a fund is in the top 10% of its category) or Lipper Leader Ratings from 1 to 5 (e.g. rating of 5 indicates a fund is in the top 20% of its category), as applicable; and
 - (xi) reference to Funddata's website for greater detail on the FundGrade A+ Awards and the FundGrade Ratings or reference to Lipper's website for greater detail on the Lipper Awards and Lipper Leader Ratings, which includes the rating methodology prepared by Funddata or Lipper, as applicable;
- (b) the FundGrade A+ Awards and Lipper Awards being referenced must not have been awarded more than 365 days before the date of the sales communication; and
- (c) the FundGrade A+ Awards, FundGrade Ratings, Lipper Awards and Lipper Leader Ratings being referenced are calculated based on comparisons of performance of mutual funds within a specified category established by the CIFSC (or a successor to the CIFSC).

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