

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*

Short Sale Collateral Relief - A mutual fund wants relief from the custodial requirement in subsection 6.1(1) of NI 81-102 to permit the fund to deposit portfolio assets exceeding 10% of the fund's NAV, or 25% of the fund's NAV if the mutual fund is an alternative mutual fund, with a single borrowing agent that is not the fund's custodian or sub-custodian - Prime brokers often retain short sale proceeds as collateral; the relief is needed to permit funds to deposit portfolio assets with a single prime broker; alternative mutual funds typically use strategies that more heavily use short selling.

Single Custodian Relief - An investment fund wants relief from the custodial requirement in subsection 6.1(1) of NI 81-102 to hold all portfolio assets with a single custodian - Each additional custodian satisfies the requirements of section 6.2 of NI 81-102; a single entity reconciles all the portfolio assets of the Fund and provides the Fund with valuation services; the Filer maintains such operational systems and processes in order to keep a proper reconciliation of all the portfolio assets that will move amongst the custodians; each additional custodian will act as custodian and securities lending agent only for the portion of portfolio assets of the Fund transferred to it.

Applicable Legislative Provisions

National Instrument 81-102 *Investment Funds*, subsection 6.1(1) and section 19.1.

November 30, 2023

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)

and

In the Matter of

Pender Bond Universe Fund, Pender Corporate Bond Fund,
Pender Small Cap Opportunities Fund, Pender Small/Mid Cap
Dividend Fund, Pender Strategic Growth And Income Fund,
Pender Value Fund, Pender Alternative Absolute Return Fund,
Pender Alternative Arbitrage Fund, Pender Alternative Arbitrage
Plus Fund, Pender Alternative Multi-Strategy Income Fund and
Pender Alternative Special Situations Fund
(the Existing Funds)

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 Funds and similarly structured investment funds managed by the Filer (the Future Funds and, collectively with the Existing Funds, the Funds) for a decision under the securities legislation of the Jurisdiction (the Legislation) that exempts:

- (i) a Fund from the requirement in subsection 6.1(1) of National Instrument 81-102 *Investment Funds* (NI 81-102), which provides that, except as provided in sections 6.8, 6.8.1 and 6.9 of NI 81-102, all portfolio assets of an investment fund must be held under the custodianship of one custodian that satisfies the requirement of section 6.2 of NI 81-102, to permit a Fund to deposit portfolio assets with a borrowing agent that is not the Fund's custodian or sub-custodian in connection with a short sale of securities, if the aggregate market value of the portfolio assets held by the borrowing agent after such deposit, excluding the aggregate market value of the proceeds from outstanding short sales of securities held by the borrowing agent, does not: (a) in the case of a Conventional Fund (as defined below) exceed 10% of NAV of the Conventional Fund at the time of deposit; and (b) in the case of an Alternative Fund, exceed 25% of the NAV of the Alternative Fund at the time of deposit (the Short Sale Collateral Relief); and
- (ii) a Fund from the requirement in subsection 6.1(1) of NI 81-102 solely to permit the Fund to appoint more than one custodian, each of which is qualified to be a custodian under section 6.2 of NI 81-102 and each of which is subject to all of the other requirements in Part 6 of NI 81-102 other than the prohibition against the Fund appointing more than one custodian in subsection 6.1(1) of NI 81-102 (the Custodian Relief, and together with the Short Sale Collateral Relief, 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 the 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 each of the other provinces and territories of Canada other than the Jurisdictions (and together with the Jurisdictions, the Applicable Jurisdictions); 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

- ¶ 2 Terms defined in National Instrument 14-101 *Definitions* have the same meaning if used in this decision, unless otherwise defined. In addition to the defined terms used in this decision, capitalized terms used herein have the following meanings:

Alternative Fund means a Fund that is an alternative mutual fund under NI 81-102;

Cash Borrowing Limits means the limits specified in (a) section 2.6(2)(c) of NI 81-102, which restricts an alternative mutual fund or non-redeemable investment fund from borrowing cash if the value of cash borrowed, when aggregated with the value of all outstanding borrowing by the fund, exceeds 50% of the fund's NAV; and (b) section 2.6.2 of NI 81-102, which restricts an alternative mutual fund or non-redeemable investment fund from borrowing cash if, immediately after entering into a cash borrowing or short selling transaction, the aggregate value of cash borrowed combined with the aggregate market value of all securities sold short by the fund (the "Combined Aggregate Value") would exceed 50% of the fund's NAV and which requires an alternative mutual fund or non-redeemable investment fund, if the Combined Aggregate Value exceeds 50% of the fund's NAV, as quickly as commercially reasonably, to take all steps necessary to reduce the Combined Aggregate Value to 50% or less of the fund's NAV;

Conventional Fund means a Fund that is not an alternative mutual fund under NI 81-102;

NAV means net asset value;

Prime Broker means any entity that acts as a lender or borrowing agent, as the case may be, to one or more investment funds, whether the investment fund is an Alternative Fund or a Conventional Fund;

Prospectus means a simplified prospectus of a Fund prepared in accordance with Form 81-101F1 *Contents of Simplified Prospectus* as amended from time to time or a prospectus of a Fund prepared in accordance with Form 41-101F2 *Information Required in an Investment Fund Prospectus*, as amended from time to time;

Securities Lending Agreements means agreements which effect securities lending, repurchase or reverse repurchase transactions between a Fund, as lender of the securities, third-party borrowers and the fund's securities lending agent;

Short Sale Limits means the limits specified in (a) section 2.6.1(1)(c)(v), which restricts an alternative mutual fund or non-redeemable investment fund from selling a security short, if at the time, the aggregate market value of all securities sold short by the fund exceeds 50% of the fund's NAV; and (b) section 2.6.2 of NI 81-102, which restricts an alternative mutual fund or non-redeemable investment fund from selling securities short if, immediately after entering into a cash borrowing or short selling transaction, the Combined Aggregate Value would exceed 50% of the fund's NAV and which requires an alternative mutual fund or non-redeemable investment fund, if the Combined Aggregate Value exceeds 50% of the fund's NAV, as quickly as commercially reasonably, to take all steps necessary to reduce the Combined Aggregate Value to 50% or less of the fund's NAV; and

Short Sale Collateral Limits means the limits specified in subparagraph 6.8.1(1)(a) (for Conventional Funds) and subparagraph 6.8.1(1)(b) (for Alternative Funds) of NI 81-102 on the deposit of portfolio assets by a Fund with a borrowing agent (that is not the custodian or

a sub-custodian of the Fund) as security in connection with a short sale of securities.

Representations

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

The Filer

1. the Filer is a corporation incorporated under the *Business Corporations Act* (British Columbia) on November 18, 2002, under the name 658761 BC Ltd.; the Filer changed its name to PenderFund Capital Management Ltd. In April 2003; the head office of the Filer is in Vancouver, British Columbia;
2. the Filer is the investment fund manager of each of the Existing Funds and will be the investment fund manager of the Future Funds;
3. the Filer is the portfolio manager of the Existing Funds and will be the portfolio manager of the Future Funds;
4. the Filer is registered as an investment fund manager in British Columbia, Newfoundland and Labrador, Ontario and Québec; the Filer is also registered as a portfolio manager in British Columbia and Ontario, and as an exempt market dealer in Alberta, British Columbia, Manitoba, Ontario and Québec;
5. the Filer is not in default of applicable securities legislation in any of the Applicable Jurisdictions;
6. the Filer has previously applied for and been granted relief with respect to the Short Sale Limits and Cash Borrowing Limits in respect of the Alternative Funds on June 30, 2022 (the Previously Granted Relief);

The Funds

7. each of the Funds is, or will be, organized as a trust established under the laws of the Province of British Columbia or one or more of the Applicable Jurisdictions;
8. each of the Funds is, or will be, an open-end public Alternative Fund or Conventional Fund governed by NI 81-102;
9. the securities of each Fund are, or will be, qualified for distribution in one or more of the Applicable Jurisdictions under a Prospectus prepared and filed in accordance with the securities legislation of such Applicable Jurisdictions;
10. the Existing Funds are not in default of securities legislation of any Applicable Jurisdictions;

Reasons for the Exemption Sought

Short Sale Collateral Relief

11. as part of its investment strategies, each Fund that engages in short sales of securities is permitted to grant a security interest in favour of and to deposit pledged portfolio assets with its Prime Broker; if a Fund engages as its Prime Broker an entity that is not its custodian or

sub-custodian, then a Conventional Fund may only deliver to its Prime Broker portfolio assets having a market value, in the aggregate, of not more than 10% of the NAV of the Conventional Fund at the time of deposit and an Alternative Fund may only deliver to its Prime Broker portfolio assets having a market value, in the aggregate, of not more than 25% of the NAV of the Alternative Fund at the time of deposit;

12. a Prime Broker may not wish to act as the borrowing agent for a Conventional Fund that wants to short sell securities having an aggregate market value of up to 10% of the Conventional Fund's NAV if the Prime Broker is only permitted to hold, as security for such transactions, portfolio assets having an aggregate market value that is not in excess of 10% of the NAV of the Conventional Fund; this issue is even greater in the context of an Alternative Fund as a counterparty may not act as the Prime Broker for an Alternative Fund that wants to sell securities short that have an aggregate market value of up to 50% of the Alternative Fund's NAV (or more under the Previously Granted Relief) if the Prime Broker is only permitted to hold, as security for such transactions, portfolio assets having an aggregate market value that is not in excess of 25% of the NAV of the Alternative Fund;
13. as a result of the Short Sale Collateral Limits, the Funds are required to engage numerous Prime Brokers in order to fully utilize the ability of the Funds to engage in short selling of securities; managing and overseeing relationships with multiple Prime Brokers introduces unnecessary operational and administrative complexities and additional potential costs to a Fund;
14. Prime Brokers that are qualified to act as a custodian or sub-custodian under NI 81-102 are not widely appointed as custodians or sub-custodians under NI 81-102 as it can be both operationally challenging and costly to appoint them to act in such capacity;
15. given the typical collateral requirements that Prime Brokers impose on their customers who engage in the short sale of securities, if the Short Sale Collateral Limits apply, the Funds would need to retain multiple Prime Brokers in order to sell short securities to the extent permitted under Section 2.6.1 of NI 81-102 and under the Previously Granted Relief; this would result in inefficiencies for the Funds and would increase their costs of operations;
16. the Filer does not believe that there should be any policy reason to differentiate between its Alternative Funds and its Conventional Funds to the extent that these Funds also engage in the short selling of securities;

Custodian Relief

17. the custodian of the assets of the Conventional Funds and Pender Alternative Multi-Strategy Income Fund is CIBC Mellon Trust Company, and the custodian of the assets of the other Alternative Funds is the Bank of Nova Scotia; each of the custodians is independent of the Filer;
18. the Filer would like the flexibility for each Fund to engage an additional custodian that is qualified to act as a custodian under subsection 6.2(3) of NI 81-102, which may include engaging a Prime Broker that satisfies such requirements (each, an Additional Custodian); the ability to appoint a Prime Broker to act as an Additional Custodian will increase operational efficiency and reduce execution risk and costs for a Fund as it will avoid the need to transfer the Fund's portfolio assets from a third-party custodian to the Prime Broker to effect transactions conducted by the Fund through the Prime Broker; the Filer and any

Additional Custodian would be subject to all requirements applicable to custodians under Part 6 of NI 81-102, excluding the prohibition against the appointment of more than one custodian;

19. Prime Brokers are not widely appointed as sub-custodians under NI 81-102 as it can be operationally challenging for both the current custodian and the Filer to appoint them to act in such capacity;
20. an Additional Custodian may also be appointed as a securities lending agent of the Funds, and in such circumstances, would provide the Funds with the opportunity to enter into a greater number of Securities Lending Agreements than would be the case with a single custodian and would therefore have the potential to increase revenues to the Funds from securities lending activities;
21. if the Custodian Relief is granted, an Additional Custodian's responsibility for the custody of a Fund's assets will apply only to the assets held by the Additional Custodian on behalf of the Fund (the Relevant Assets); the custodial arrangements between a Fund and an Additional Custodian will comply with the requirements of Part 6 of NI 81-102 other than subsection 6.1(1);
22. the Filer submits that the appointment of an Additional Custodian would provide additional flexibility to the Funds regarding the short sale of securities under section 6.8.1 as the Funds would be able to deposit the Relevant Assets of the applicable Fund as security for short sales with a Prime Broker that is an Additional Custodian without being subject to the Short Sale Collateral Limits;
23. the custodian of a Fund may act as custodian and securities lending agent for other third-party investment funds that have similar investment objectives, strategies, and investment portfolios to the Funds (the Other Funds);
24. as securities lending agent for the Funds and the Other Funds, the custodian will typically pool all portfolio securities of the Funds and the Other Funds that are made available for Securities Lending Agreements; consequently, only a relatively small portion of the total number of such securities lent by the custodian may be owned by the Funds, and accordingly, only a portion of the securities lending revenues generated from such transactions would be payable to the Funds;
25. any Additional Custodian will meet the requirements of NI 81-102 to act as a custodian for an investment fund and will have experience acting as custodian of the assets of public investment funds governed by NI 81-102; as a custodian of the Relevant Assets, an Additional Custodian will comply with the standard of care applicable to qualified custodians under section 6.6 of NI 81-102, will hold the Relevant Assets in the name of the applicable Fund in accordance with section 6.5 of NI 81-102, and will include the provisions prescribed in section 6.4 of NI 81-102 in its custody agreement with the Filer and the Funds; each Additional Custodian will complete the review and provide compliance reports to the Filer as contemplated in section 6.7 of NI 81-102;
26. the ability to terminate an Additional Custodian as custodian of the Relevant Assets of a Fund at any time without cause on written notice will ensure that the Filer maintains ultimate control over all of the portfolio assets of the Funds and can restore all assets to the custody of the custodian at any time if the Filer considers it to be in the best interests of the Funds

and their respective unitholders to do so;

27. the appointment of an Additional Custodian should have no impact on the safety of the portfolio assets of the Funds while enhancing the Funds' ability to engage in the short selling of securities under section 6.8.1 of NI 81-102 and to enter into additional Securities Lending Agreements; and
28. disclosure regarding the particulars of the appointment of any Additional Custodian of the Funds with respect to the Relevant Assets will be included in the next Prospectus filed with respect to the applicable Funds after such appointment is made.

Decision

- ¶ 4 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 Maker under the Legislation is that the Exemption Sought is granted provided that

In respect of the Short Sale Collateral Relief:

1. each Fund otherwise complies with subsections 6.8.1(2) and (3) of NI 81-102;

In respect of the Custodian Relief:

2. a Fund may appoint one or more Additional Custodians if:
 - (a) a single entity reconciles all the portfolio assets of the Fund and provides the Fund with valuation and unitholder recordkeeping services and completes daily reconciliations among the custodians before striking a daily NAV;
 - (b) the Filer maintains such operational systems and processes, as between two or more custodians and the single entity referred to in part (a) above, in order to keep a proper reconciliation of all the portfolio assets that will move among the custodians, as appropriate; and
 - (c) each Additional Custodian acts as a custodian and securities lending agent only for the portion of portfolio assets of the Fund transferred to it.

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