

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* (NI 81-102), s. 19.1 - Exemption from requirements of past performance data in sales communications in Part 15 of NI 81-102 - - Before becoming a reporting issuer, the fund did not deviate from NI 81-102 investment restrictions and its past performance is reflective of how the fund would have performed as a reporting fund; the fund's prior cost expenses are not materially different from a reporting fund; the fund discloses in the sales communications, fund facts document and MRFP that the past performance data is from a period when the fund was not a reporting issuer and that its expenses would have been higher had it been a reporting issuer; the manager posts on its website and makes available to investors the financial statements of the fund for all periods for which it is using the past performance.

National Instrument 81-101 *Mutual Fund Prospectus Disclosure* (NI 81-101), s. 6.1 - Exemption from the fund facts form requirement in order to include past performance data - Before becoming a reporting issuer, the fund did not deviate from NI 81-102 investment restrictions and its past performance is reflective of how the fund would have performed as a reporting fund; the fund's prior cost expenses are not materially different from a reporting fund; the fund discloses in the sales communications, fund facts document and MRFP that the past performance data is from a period when the fund was not a reporting issuer and that its expenses would have been higher had it been a reporting issuer; the manager posts on its website and makes available to investors the financial statements of the fund for all periods for which it is using the past performance.

National Instrument 81-106 *Investment Fund Continuous Disclosure* (NI 81-106), s. 17.1 - Exemption from the MRFP form requirement in order to include past performance data - Before becoming a reporting issuer, the fund did not materially deviate from NI 81-102 investment restrictions and its past performance is reflective of how the fund would have performed as a reporting fund; the fund's prior cost expenses are not materially different from a reporting fund; the fund discloses in the sales communications, fund facts document and MRFP that the past performance data is from a period when the fund was not a reporting issuer and that its expenses would have been higher had it been a reporting issuer; the manager posts on its website and makes available to investors the financial statements of the fund for all periods for which it is using the past performance.

Exemption from requirements to calculate risk ratings – An alternative mutual fund wants relief to be able to use its past performance data to calculate its investment risk rating in its simplified prospectus - The fund has been operating for more than 10 years; before becoming a reporting issuer, the fund did not deviate from NI 81-102 investment restrictions; the fund will be managed substantially similar in the period after becoming a reporting issuer as it was becoming a reporting issuer.

Exemption from Purchase and Redemption Requirements - An investment fund wants relief from the purchase and redemption restrictions in NI 81-102 to permit consolidated processing of purchase and redemption orders - The fund's purchase and redemption orders are consolidated into monthly orders; the fund's simplified prospectus and fund facts will describe the purchase/redemption structure

Exemption from Custodial Requirements for Short Sale Collateral - An alternative 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 25% of the fund's NAV 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

Applicable Legislative Provisions

National Instrument 81-101 *Mutual Fund Prospectus Disclosure* sections 2.1 and 6.1

National Instrument 81-102 *Investment Funds*, sections 6.1, 15.3, 15.6, 15.8, 15.1.1, and 19.1.

National Instrument 81-106 *Investment Fund Continuous Disclosure* sections 4.4 and 17.1

September 26, 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
Fulcra Asset Management Inc.
(the Filer)

and

In the Matter of
the Fulcra Credit Opportunities Fund
(the FCO Fund)

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 Fulcra Credit Opportunities Fund (the FCO Fund) and each other alternative mutual fund established in the future and managed by the Filer or an affiliate of the Filer (each, a Future Fund and, together with the FCO Fund, the Funds, where a Fund shall mean any one of the Funds) for a decision under the securities legislation of the Jurisdictions (the Legislation) for the following relief:

In respect of the FCO Fund, exempting the FCO Fund from:

- (a) sections 15.3(2), 15.3(4)(c), 15.6(1)(a)(i), 15.6(1)(d), 15.8(2)(a.1), and 15.8(3)(a.1) of National Instrument 81-102 – *Investment Funds* (NI 81-102) to permit the FCO Fund to include performance data in sales communications notwithstanding that: (i) the performance data will relate to a period prior to the FCO Fund offering its securities under a simplified prospectus; and (ii) the FCO Fund has not distributed its securities under a prospectus for 12 consecutive months;
- (b) section 15.1.1(a) of NI 81-102 and Items 2 and 4 of Appendix F - *Investment Risk Classification Methodology* to NI 81-102 (Appendix F) to permit the FCO Fund to include its past performance data in determining its investment risk level in accordance with Appendix F;
- (c) section 15.1.1(b) of NI 81-102 and Item 4(2)(a) and Instruction (1) of Item 4 of Form 81-101F3 - *Contents of Fund Facts Document* (Form 81-101F3) to permit the FCO Fund to disclose its investment risk level as determined by including its past performance data in accordance with Appendix F;
- (d) Item 10(b) of Part B of Form 81-101F1 - *Contents of Simplified Prospectus* (Form 81-101F1) to permit the FCO Fund to use its past performance data to calculate its investment risk rating in its simplified prospectus;
- (e) section 2.1 of National Instrument 81-101 – *Mutual Fund Prospectus Disclosure* (NI 81-101) for the purposes of the relief requested from Form 81-101F1 and Form 81-101F3;
- (f) items 5(2), 5(3), and 5(4), and Instruction (1) of Part I of Form 81-101F3 in respect of the requirement to comply with Sections 15.3(2), 15.3(4)(c), 15.6(1)(a)(i), 15.6(1)(d), 15.8(2)(a.1), and 15.8(3)(a.1) of NI 81-102 to permit the FCO Fund to include in its fund facts documents past performance data of the FCO Fund even though: (i) the performance data relates to a period prior to the FCO Fund offering its securities under a simplified prospectus; and (ii) the FCO Fund has not distributed its securities under a simplified prospectus for 12 consecutive months;
- (g) section 4.4 of National Instrument 81-106 – *Investment Fund Continuous Disclosure* (NI 81-106) for the purposes of the relief requested from Form 81-106F1 - *Contents of Annual and Interim Management Report of Fund Performance* (Form 81-106F1); and
- (h) items 3.1(7) and 4.1(1) in respect of the requirement to comply with Sections 15.3(2) and 15.3(4)(c) of NI 81-102, 4.1(2), 4.2(1), 4.3(1), and 4.3(2) of Part B of Form 81-106F1 and Items 3(1) and 4 of Part C of Form 81-106F1 to permit the FCO Fund to include in its annual and interim management reports of fund performance (individually, an MRFP and, collectively, the MRFPs) past performance data and financial highlights despite such performance data and financial highlights relating to a period prior to the FCO Fund offering its securities under a simplified prospectus.

(collectively, the Past Performance Relief)

- (i) section 9.3(1) in order to permit the FCO Fund to process purchase orders for its units, as described in its simplified prospectus and fund facts documents, on a monthly basis at their class net asset value per unit calculated as at the last Valuation Date (as defined

below) of the calendar month in which the purchase order for such units is received or deemed to be received (the Purchase Relief); and

- (j) section 10.3(1) in order to permit the FCO Fund to process redemption orders for its units, as described in its simplified prospectus and fund facts documents on at least 20 business days' prior written notice, on a monthly basis, redeeming such units at their class net asset value per unit as at the time the redemption order is processed, which shall be the next Valuation Date after such 20 business day notice period that falls on the last day of a calendar month (the Redemption Relief).

In respect of each Fund, exempting each Fund from:

- (k) the requirement in subsection 6.1(1) of NI 81-102 that, except as provided, all portfolio assets of a Fund be held under the custodianship of one qualified custodian, to permit each 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 exceed 25% of the net asset value (NAV) of the Fund at the time of deposit (the Short Sale Collateral Relief).

(the Past Performance Relief, the Purchase Relief, the Redemption Relief, and the Short Sale Collateral Relief, collectively, the Exemption Sought).

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

- (a) the British Columbia Securities Commission (BCSC) is the principal regulator for the 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 each of the other provinces and territories of Canada other than the Jurisdictions; and
- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory or regulator in Ontario.

Interpretation

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

Representations

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

The Filer and the FCO Fund

1. the Filer is a corporation organized under the laws of British Columbia with a head office in Vancouver, British Columbia;

2. the Filer is registered as an investment fund manager, exempt market dealer, and portfolio manager in British Columbia and Ontario;
3. the Filer initially launched the Fulcra Credit Opportunities Fund Limited Partnership (the Limited Partnership), a limited partnership established under the laws of British Columbia, on July 1, 2009 (the Inception Date);
4. the Filer initially launched the FCO Fund, an open-end investment fund established as a trust under the laws of British Columbia, on April 26, 2011 pursuant to a master trust agreement, as amended, restated, and/or supplemented from time to time;
5. effective April 29, 2011, the assets of the Limited Partnership were transferred to the FCO Fund and its limited partners received units of the FCO Fund in exchange for their limited partnership units of the Limited Partnership, and the Limited Partnership was wound up;
6. the investment objective of the Limited Partnership was the same as the investment objective of the FCO Fund;
7. each Fund is, or will be, an alternative mutual fund to which NI 81-102 applies;
8. the Filer is the manager, portfolio advisor, and promoter of the FCO Fund; Computershare Trust Company of Canada is the trustee of the FCO Fund;
9. the Filer or an affiliate thereof will be the promoter and manager of each Future Fund; and
10. the Filer and the FCO Fund are not in default of securities legislation in any Canadian jurisdiction.

The Past Performance Relief

11. since the Inception Date, units of the FCO Fund have been offered to investors on a private placement basis in accordance with National Instrument 45-106 – *Prospectus Exemptions* in one or more Jurisdictions other than Ontario and in accordance with the *Securities Act* (Ontario) in Ontario;
12. the FCO Fund intends to offer units of the FCO Fund to the public in one or more Jurisdictions pursuant to a simplified prospectus and fund facts documents (the Public Offering); the FCO Fund filed a preliminary simplified prospectus and preliminary fund facts documents with the securities regulator or regulatory authority in one or more Jurisdictions on or about August 29, 2023, and expects to file a final simplified prospectus and final fund facts documents as soon as practicable thereafter; upon issuance of a receipt for the final simplified prospectus, the FCO Fund will become a reporting issuer in the applicable Jurisdictions, and will become subject to the requirements of NI 81-102 and NI 81-106;
13. since the Inception Date, the FCO Fund has prepared audited annual financial statements and unaudited interim financial statements in accordance with NI 81-106;
14. since the Inception Date, the FCO Fund has complied with the investment restrictions and practices contained in NI 81-102 applicable to alternative mutual funds;

15. the FCO Fund will be managed substantially similarly after it becomes a reporting issuer as it was prior to becoming a reporting issuer; as a result of the FCO Fund becoming a reporting issuer:
 - (a) the FCO Fund's investment objective will not change;
 - (b) the management fees and performance fees charged to the classes of the FCO Fund offered under the Public Offering will not change;
 - (c) the day-to-day administration of the FCO Fund will not change, other than to comply with the additional regulatory requirements associated with being a reporting issuer (none of which will impact the portfolio management of the FCO Fund) and to provide additional features that are available to investors of mutual funds managed by the Filer, as described in the FCO Fund's simplified prospectus and fund facts documents; and
 - (d) the management expense ratio of the FCO Fund is not expected to increase by more than 0.10%, which the Filer considers to be an immaterial amount.
16. the Filer proposes to present the performance data of the FCO Fund for the time period since the Inception Date in sales communications pertaining to the FCO Fund; without the Exemption Sought, sales communications pertaining to the FCO Fund cannot include performance data of the FCO Fund that relate to a period prior to it becoming a reporting issuer, and the FCO Fund cannot provide performance data in its sales communications until the FCO Fund has distributed securities under a simplified prospectus for at least 12 consecutive months;
17. as a reporting issuer, the FCO Fund will be required under NI 81-101 to prepare and file fund facts documents;
18. the Filer proposes to use the FCO Fund's past performance data to determine its investment risk level and to disclose that investment risk level in the simplified prospectus and the fund facts documents for each class of the FCO Fund; without the Exemption Sought, the Filer, in determining and disclosing the FCO Fund's investment risk level in the simplified prospectus and the fund facts documents for each class of the FCO Fund, cannot use performance data of the FCO Fund that relates to a period prior to the FCO Fund becoming a reporting issuer;
19. the Filer proposes to include in the fund facts documents for each class of the FCO Fund past performance data in the disclosure required by Items 5(2), 5(3) and 5(4) under the sub-headings Year-by-year returns, Best and worst 3-month returns and Average return, respectively, related to periods prior to the FCO Fund becoming a reporting issuer; without the Exemption Sought, the fund facts documents for each class of the FCO Fund cannot include performance data of the FCO Fund that relate to a period prior to it becoming a reporting issuer;
20. as a reporting issuer, the FCO Fund will be required under NI 81-106 to prepare and send MRFPs to all holders of its securities on an annual and interim basis; without the Exemption Sought, the MRFPs of the FCO Fund cannot include financial highlights and performance data of the FCO Fund that relate to a period prior to it becoming a reporting issuer;
21. the performance data and other financial data of the FCO Fund for the time period before it became a reporting issuer is significant and meaningful information for existing and

prospective investors in the FCO Fund;

The Purchase Relief and Redemption Relief

22. the FCO Fund's NAV will be calculated at the close of regular trading, normally 4:00 p.m. (Eastern time) on each day the Toronto Stock Exchange is open (a Valuation Date);
23. the Filer will calculate the NAV for the FCO Fund on a daily basis in order to meet its obligations under NI 81-106 regarding the use of derivatives, including the obligation to daily mark-to-market the value of its derivatives;
24. subsections 9.3(1) and 10.3(1) of NI 81-102 require that the purchase price and redemption price of a security of a mutual fund to which a purchase order and redemption order pertains, respectively, be the net asset value per security next determined after receipt by the mutual fund of the purchase order and redemption order, respectively;
25. as will be described in the FCO Fund's simplified prospectus and fund facts documents, the FCO Fund will:
 - (a) process purchase orders monthly; subscriptions received by the Filer by 1:00 p.m. (Pacific Standard time) on the last business day of each month will be processed on that business day at the class net asset value per unit calculated on that day; and
 - (b) process redemption orders for its units on at least 20 business days' prior written notice, on a monthly basis, redeeming such units at their class net asset value per unit as at the time the redemption order is processed, which shall be the next Valuation Date after such 20 business day notice period that falls on the last business day of a calendar month.
26. the FCO Fund will pay the redemption proceeds for units that are the subject of a redemption order no later than 5 business days after the date on which the redemption price is processed;
27. the Filer has structured its mutual fund operations so that it can consolidate all purchase orders into one efficient monthly processing transaction and all redemption orders into one efficient monthly transaction; the Filer has determined that effecting such purchases and redemptions on a monthly basis strikes the best balance between the needs of a unitholder to invest or access its assets in a timely and orderly manner, and the need to minimize the impact of such transactions on other unitholders in the FCO Fund;
28. the Filer believes that monthly redemptions will mitigate the cost of excessive portfolio turnovers due to lower transaction costs in the form of brokerage commissions and the bid-ask spread; further, it has determined that monthly redemptions will protect the FCO Fund from having to reduce positions at less than ideal times during potentially challenging market conditions; this will ensure that all unitholders of the FCO Fund will be treated fairly in instances where the FCO Fund is not able to unwind its portfolio holdings in an orderly manner to honour the redemption requests at the time;

The Short Sale Collateral Relief

29. as part of its investment strategies, each Fund is or will be 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 the 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 Fund at the time of deposit;
30. a prime broker may not wish to act as the borrowing agent for a Fund that has the ability to sell securities short that have an aggregate market value of up to 50% of the 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 25% of the NAV of the Fund;
31. 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; and
32. 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; managing and overseeing relationships with multiple prime brokers introduces unnecessary operational and administrative complexities and additional costs of operation for the Funds.

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 Makers under the Legislation is that the Exemption Sought is granted provided that:

In respect of the Past Performance Relief:

- (a) any sales communication, fund facts document, and MRFP that contains performance data of units of the FCO Fund relating to a period prior to when the FCO Fund was a reporting issuer discloses:
 - (i) that the FCO Fund was not a reporting issuer during such period;
 - (ii) that the expenses of the FCO Fund would have been higher during such period had the FCO Fund been subject to the additional regulatory requirements applicable to a reporting issuer;
 - (iii) the Filer obtained exemptive relief on behalf of the FCO Fund to permit the disclosure of performance data of the units of the FCO Fund relating to a period prior to when the FCO Fund was a reporting issuer; and
 - (iv) with respect to any MRFP, that the financial statements of the FCO Fund for such period are posted on the FCO Fund's website and are available to investors upon

request.

- (b) the Filer posts the annual financial statements of the FCO Fund since the Inception Date on the FCO Fund's designated website and makes those financial statements available to investors upon request;

In respect of the Purchase Relief:

- (c) the FCO Fund processes, and discloses in its simplified prospectus and in the Quick Facts section of its fund facts that it processes, purchase orders for its units on a monthly basis at their class net asset value per unit calculated as at the last Valuation Date of the calendar month in which the purchase order for such units is received (the Purchase Processing Frequency);
- (d) the FCO Fund discloses in the Who should invest in the Fund section of the Part B of its simplified prospectus and in the Who is this Fund for section of its fund facts, the Purchase Processing Frequency and that the Fund is only suitable for investors who can accept the Purchase Processing Frequency;

In respect of the Redemption Relief:

- (e) the FCO Fund processes, and discloses in its simplified prospectus and in the Quick Facts section of its fund facts that it processes, redemption orders for its units (the Redemption Processing Frequency) on at least 20 business days' prior written notice, on a monthly basis, redeeming such units at their class net asset value per unit as at the time the redemption order is processed, which shall be the next Valuation Date after such 20 business day notice period that falls on the last business day of a calendar month;
- (f) the FCO Fund discloses in the Who should invest in the Fund section of the Part B of its simplified prospectus and in the Who is this Fund for section of its fund facts, the Redemption Processing Frequency and that the FCO Fund is only suitable for investors who can accept the Redemption Processing Frequency; and

In respect of the Short Sale Collateral Relief:

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

John Hinze
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