

Citation: 2018 BCSECCOM 3

**Headnote**

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* - 1996 *Securities Act*, s. 48 – Exemption from the conflict of interest restriction in s. 13.5(2)(b) of NI 31-103 *Registration Requirements and Exemptions* - An investment fund manager wants relief from the self-dealing restrictions in section 13.5(2)(b) of NI 31-103 for trades in portfolio securities between investment funds managed by the manager in order to execute a mutual fund reorganization - Inter-fund trades are consistent with the investment objective of the funds; funds without an Independent Review Committee (IRC) have constituted an equivalent entity; trades are referred to and approved by the fund’s IRC equivalent; the trades will occur at a price determined through an independent arms’ length valuation; the manager will cover the costs of the transaction; there will be no material adverse tax consequences

**Applicable Legislative Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, s. 48  
National Instrument 31-103 s. 13.5(2)(b)

December 27, 2017

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  
Nicola Wealth Management Ltd. (the Manager),  
and  
NWM Private Equity Limited Partnership (the Private Equity Fund)  
and  
NWM Private Debt Fund (the Private Debt Fund)  
(together, the Funds)  
(collectively, the Filers)

Decision

## **Background**

- ¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application (the Application) from the Filers for a decision under the securities legislation of the Jurisdictions (the Legislation) for an exemption from the prohibition in section 13.5(2)(b)(iii) of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) which prohibits 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 or sell a security from or to the investment portfolio of an investment fund for which a responsible person acts as an adviser, in order to permit the one-time purchase by the Private Debt Fund of illiquid securities of two investment funds managed by third parties (the Transferring Funds, defined below) (the Inter-Fund Trade) sold by the Private Equity Fund for cash at a price equal to the net asset value per security of each of the Transferring Funds calculated and reported to the Manager by each Transferring Fund's manager as of December 31, 2017 (the December 31 NAV) (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 Filers have provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in the provinces of Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, New Brunswick and Newfoundland and Labrador; 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 MI 11-102, National Instrument 14-101 *Definitions* and National Instrument 81-107 *Independent Review Committee for Investment Funds* (NI 81-107) have the same meaning if used in this decision, unless otherwise defined.

## **Representations**

- ¶ 3 This decision is based on the following facts represented by the Filers:
1. the Manager is a company existing under the laws of British Columbia with its head office in Vancouver, British Columbia and is not a reporting issuer in any jurisdiction of Canada;
  2. the Manager is registered as: (i) an investment fund manager in British Columbia, Saskatchewan, Ontario, Quebec and Newfoundland and Labrador; (ii) a portfolio manager in all jurisdictions of Canada, other than Prince Edward Island, Nunavut, the Northwest Territories and Yukon; and (iii) an exempt market dealer in in all

jurisdictions of Canada, other than Prince Edward Island, Nunavut, the Northwest Territories, and Yukon;

3. the Manager is the manager and portfolio manager for each of the Funds;
4. each of the Funds is a mutual fund established as a trust or partnership under the laws of British Columbia, Canada and is not a reporting issuer in any jurisdiction of Canada;
5. the securities of each of the Funds are distributed on a private placement basis under available prospectus exemptions; neither Fund is subject to National Instrument 81-102 *Investment Funds* (NI 81-102) or NI 81-107;
6. securities of each of the Funds are distributed solely to clients of the Manager under fully discretionary managed accounts under which the Manager makes investment decisions on behalf of the clients and advisory accounts under which the Manager provides investment advice to clients and clients make the final investment decision for themselves; securities of each of the Funds are also distributed to the NWM Core Portfolio Fund, which invests in a portfolio containing investment funds and limited partnerships managed by the Manager;
7. the Manager and each of the Funds are not in default of securities legislation in any jurisdiction of Canada;
8. the investment objective of the Private Equity Fund is to make private equity, mezzanine debt, and subordinated debt or similar asset classes investments and to hold and/or monetize those investments through a combination of the receipt of dividends, the redemption of securities, and the eventual divestment of the investments; the investment objective of the Private Debt Fund is to achieve a high level of current income and some capital appreciation, while emphasizing capital preservation;
9. the Manager seeks to permit the Inter-Fund Trade by the Private Equity Fund to the Private Debt Fund of (i) Crown Capital Fund IV, LP (the Crown Fund) limited partnership units; and (ii) THL Credit Direct Lending Fund III-B (Cayman) LP (the THL Fund) limited partnership interests (collectively, the Applicable Securities) (the Crown Fund and the THL fund, collectively, the Transferring Funds);
10. the Crown Fund is an Alberta limited partnership with the head office of its general partner, Crown Capital Fund IV Management Inc., located at Suite 4330, 77 King Street W, Toronto, ON, M5K 1H6; the THL Fund is a Cayman Islands exempted limited partnership with the head office of its general partner, THL Credit Direct Lending Fund III (Cayman) GP Ltd., located at c/o Maples Corporate Services Limited, P.O. Box 309, Uglan House, KY1-1104, Grand Cayman, Cayman Islands; the THL Fund is an off-shore feeder fund which invests in THL Credit Direct

Lending Fund III LLC, a Delaware limited liability company, via THL Credit Direct Lending Fund III-B Blocker LLC, a Delaware limited liability company;

11. the Crown Fund has approximately 97% of its investments in debt securities and approximately 3% in equities and warrants; the Crown Fund investments are focused on senior or subordinated debentures; as of September 30, 2017, the Crown Fund had investments in eight portfolio companies; the THL Fund has 100% of its portfolio in floating rate loans, approximately 89% of which are first lien loans; as of September 30, 2017, the THL Fund had investments in 17 portfolio companies;
12. section 13.5(2)(b)(iii) of NI 31-103 imposes a prohibition on the Inter-Fund Trade;
13. the Manager has determined that it is in the best interests of the Private Equity Fund to dispose of the Applicable Securities as the Private Equity Fund is reducing its private debt exposure and will use the proceeds from the Inter-Fund Trade towards additional private equity investments; the Applicable Securities are the most recent private debt investments acquired by the Private Equity Fund and the Manager views these securities as the most appropriate private debt investments for the Private Equity Fund to divest;
14. the Manager has determined that it is in the best interests of the Private Debt Fund to acquire the Applicable Securities as the Private Debt Fund recently launched and is seeking quality private debt investments with varying maturity dates to add to and diversify its investment portfolio; the Manager has identified, performed due diligence on and approved, the Applicable Securities as suitable private debt investments; the Manager applies a high approval threshold for private debt investments for the Funds which results in few investments being approved and sometimes significant periods of time elapsing before a suitable investment is identified;
15. the Manager has determined that it is appropriate for the Private Equity Fund to dispose of, and for the Private Debt Fund to acquire, the Applicable Securities directly, rather than from a third party, and that it would be in the best interests of the Funds to receive the Exemption Sought because:
  - (a) the Exemption Sought will result in cost and timing efficiencies in respect of the Inter-Fund Trade;
  - (b) the Applicable Securities do not trade on any secondary market and it may not be otherwise possible for the Private Equity Fund to sell, and the Private Debt Fund to acquire, the Applicable Securities; and
  - (c) the Applicable Securities are not readily obtained and if sold could not be easily replaced;
  - (d) the Inter-Fund Trade is consistent with the investment objectives of the Funds;

16. the Filer proposes to conduct the Inter-Fund Trade at the December 31 NAV for securities of each of the Transferring Funds;
17. the Manager will retain an accounting firm registered with the Canadian Public Accountability Board and the valuation services of which are provided by professionals who are members in good standing of the Canadian Institute of Chartered Business Valuators (the Independent Valuator) to opine as to whether the December 31 NAV for securities of each of the Transferring Funds is within the price range of fair market value for securities of each Transferring Funds; the Independent Valuator is not an auditor of the Funds or the Manager and is not related to the Manager;
18. the Manager, as manager of each Fund, will establish an independent review committee (IRC) in respect of each Fund to review and provide its approval for the Inter-Fund Trade;
19. the Inter-Fund Trade will take place as follows: (a) the Funds will enter into a securities purchase agreement (the Purchase Agreement) effective January 1, 2018 12:01am pursuant to which the Private Equity Fund will sell, and the Private Debt Fund will purchase, the Applicable Securities at a price equal to the December 31 NAV for each Transferring Fund; (b) the Purchase Agreement will contain the following closing conditions: (i) the Independent Valuator confirms that the December 31 NAV is a value that is within the price range of its valuation opinion for securities of each of the Transferring Funds; (ii) the Manager refers the Inter-Fund Trade to the IRC of the Funds in the manner contemplated by section 5.1 of NI 81-107 and the IRC approves the Inter-Fund Trade;
20. the IRC of the Funds will be composed by the Manager in accordance with section 3.7 of NI 81-107 and the IRC will comply with the standard of care set out in section 3.9 of NI 81-107; the IRC of the Funds will not approve the Inter-Fund Trade unless it has made the determination set out in subsection 5.2(2) of NI 81-107; members of the IRC will comply with subsection 3.9(1) of NI 81-107;
21. the Manager cannot rely on the exemption from the trading prohibition codified under subsection 6.1(4) of NI 81-107 because neither Fund is a reporting issuer, there are no bid and ask prices of the Applicable Securities readily available, and the transaction is not able to be executed at the current market price of the security (as defined in 6.1(1)(a) of NI 81-107) and would not meet the market integrity requirements (as defined in 6.1(1)(b) of NI 81-107);
22. the Manager considers that it would be in the best interests of the Funds if the Inter-Fund Trade could be effective immediately following a valuation day of the Crown Fund and THL Fund at a price equal to the net asset value (NAV) per security of the Applicable Securities posted by the managers of each of the Transferring Funds on such valuation day because:

- (a) the Applicable Securities are not traded on any exchange or secondary market and therefore there is no posted market price or bid and ask prices;
  - (b) the NAV of the Applicable Securities is calculated by managers of each of the Transferring Funds who are independent third parties from the Manager;
  - (c) each of the Transferring Funds have independent third party auditors that review the NAV calculation methodologies used by the managers of each of the Transferring Funds;
  - (d) the Crown Fund is an open-ended fund that accepts subscriptions based on NAV; the THL Fund is a closed end fund; the Transferring Funds each calculate NAV quarterly;
  - (e) the Manager has reviewed the NAV calculation methodologies of the managers of each of the Transferring Funds and determined that such methodologies are appropriate for the underlying assets of each of the Transferring Funds;
  - (f) the Manager will retain an independent third party valuator to provide an opinion on whether or not the valuator considers the NAV of securities for each of the Transferring Funds to be fair market value and will provide the opinion to the IRC for consideration in its approval process for the Inter-Fund Trade;
23. if the IRC of a Fund becomes aware that the Manager did not comply with the terms of this decision, or a condition imposed by securities legislation or the IRC in its approval, the IRC of the Fund will, as soon as practicable, notify in writing the securities regulatory authority or regulator in the jurisdiction which is the Fund's principal regulator;
24. the Inter-Fund Trade will not cause a material adverse tax consequence to either of the Funds or to securityholders of the Funds;
25. the Manager has determined that it will be in the best interests of the Funds to obtain the Exemption Sought; and
26. absent the Exemption Sought, neither the Funds, nor the Manager, on their behalf, will be permitted to engage in Inter-Fund Trade.

### **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:

- (a) the Independent Valuator provides an opinion to the Manager that the December 31 NAV of securities of each of the Transferring Funds is within the range of fair market value for securities of each of the Transferring Funds;
- (b) for the IRC approval process in (d), the Manager provides the report of the Independent Valuator to the IRC and makes available the Independent Valuator to the IRC at their request;
- (c) the Inter-Fund Trade is consistent with the investment objectives of each Fund;
- (d) the IRC established for the Funds approves the inter-fund trades in accordance with section 5.2 of NI 81-107;
- (e) the Applicable Securities are transferred at a price equal to the December 31 NAV for each Transferring Fund;
- (f) each of the Funds keeps written records of the Inter-Fund Trade reflecting details of the Applicable Securities sold by the Private Equity Fund to the Private Debt Fund, and the value assigned to such securities, for five years after the end of the financial year in which the Inter-Fund Trade takes place, the most recent two financial years in a reasonably accessible place; and
- (g) the Manager does not receive any compensation in respect of the Inter-Fund Trade.

Nigel P. Cave  
Vice Chair  
British Columbia Securities Commission