

Headnote

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Relief granted from the self-dealing provision in s.4.2(1) of National Instrument 81-102 *Investment Funds* to permit transfer of illiquid assets from one fund to another managed and advised by the same manager – one fund not a reporting issuer – relief subject to conditions including independent valuation and requirement for independent review committee approval

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Relief from subparagraphs 13.5(2)(b)(ii) and (iii) of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* to permit transfer of illiquid assets from one fund to another managed and advised by the same manager – one fund not a reporting issuer – relief subject to conditions including independent valuation and requirement for independent review committee approval

Applicable Legislative Provisions

National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, subparagraphs 13.5(2)(b)(ii)–(iii) and section 15.1

National Instrument 81-105 *Investment Funds*, subsections 4.2(1) and 4.3(1) and section 19.1

National Instrument 81-107 *Independent Review Committee for Investment Funds*, subsection 6.1(2)

Citation: Re Priviti Capital Corporation, 2020 ABASC 52

Date: 20200424

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
Priviti Capital Corporation (the **Filer**)

Decision

Background

The securities regulatory authority or regulator in each of the Jurisdictions (each a **Decision Maker**) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the **Legislation**) for the following exemptions (collectively, the **Exemptions Sought**):

- (a) an exemption (the **NI 81-102 Relief**) from the prohibition in subsection 4.2(1) of National Instrument 81-102 *Investment Funds (NI 81-102)*, which prohibits an investment fund from purchasing or selling a security from or to, *inter alia*, an affiliate of the manager or portfolio adviser of the fund, to permit Priviti Oil & Gas Opportunities Limited Partnership 2013 (the **Expiring Fund**) to sell the Illiquid Assets (as defined below) to Priviti Oil & Gas Opportunities Limited Partnership 2014 (the **2014 Fund** and collectively with the Expiring Fund, the **Funds**);
- (b) an exemption (the **NI 31-103 Relief**) from the prohibition in subparagraphs 13.5(2)(b)(ii) and 13.5(2)(b)(iii) of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103)* which prohibit 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 a responsible person, an associate of the registered adviser or an investment fund for which the registered adviser acts as an adviser, in order to permit the Expiring Fund to sell the Illiquid Assets to the 2014 Fund and the 2014 Fund to purchase the Illiquid Assets from the Expiring Fund.

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 each province in 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, NI 81-102, and NI 31-103 have the same meaning if used in this decision, unless otherwise defined herein.

Representations

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

1. The Filer is a corporation incorporated under the laws of Alberta with its head office in Calgary, Alberta.
2. The Filer is registered as a restricted portfolio manager in Alberta and an investment fund manager in Alberta, Ontario, Quebec, and Newfoundland and Labrador.
3. The Filer is not in default of applicable securities laws.
4. The Funds are investment funds formed as limited partnerships under the laws of Alberta. The Funds are not in default of applicable securities laws.

5. Priviti Oil & Gas Opportunities 2013 General Partner Corp., a corporation incorporated under the laws of the Province of Alberta, is the general partner of the Expiring Fund (the **Expiring Fund GP**) and Priviti Oil & Gas Opportunities 2014 General Partner Corp., a corporation incorporated under the laws of the Province of Alberta, is the general partner of the 2014 Fund (collectively with the Expiring Fund GP, the **General Partners**). The Filer is the sole shareholder of each General Partner.
6. The General Partners have retained the Filer to act as the investment fund manager and portfolio manager for each of the Funds.
7. The Expiring Fund is a reporting issuer under applicable securities laws in each of the provinces of Canada and is subject to NI 81-102. The investment objectives of the Expiring Fund are to invest in a portfolio of securities of private and public companies that operate in the Canadian oil and gas sector to provide the opportunity for capital appreciation and to distribute to unitholders cash proceeds realized on periodic liquidity events.
8. The 2014 Fund is not a reporting issuer under applicable securities laws and is not subject to NI 81-102. The investment objectives of the 2014 Fund are the same as the Expiring Fund. Pursuant to the terms of the 2014 Fund's limited partnership agreement, its term, as extended by a maximum of two one-year extensions, will expire on December 9, 2021.
9. Pursuant to the terms of the Expiring Fund's limited partnership agreement, the Expiring Fund's original term has been extended by the maximum permitted two one-year periods and its extended term will expire on June 28, 2020 (the **Term**). The Filer has been liquidating and will continue to liquidate the Expiring Fund's existing portfolio securities in an orderly manner, subject to market conditions, and has been distributing and will distribute the proceeds of the sale of the Expiring Fund's assets to its unitholders.
10. The Filer anticipates certain of the Expiring Fund's assets, the equity securities of two private issuers (collectively the **Private Issuers**) that are not traded on any exchange, may be difficult to sell prior to the expiry of the Term given that there is not a strong secondary or "grey" market for such securities as they are "illiquid assets" as defined in NI 81-102 (the **Illiquid Assets**).
11. Rather than trying to extend the Term to allow for the sale of the Illiquid Assets by holding a special meeting of the Expiring Fund's unitholders or the Filer selling the Illiquid Assets to a third party at a price below their value due to an illiquid market (both of which options the Filer does not believe are in the best interests of the Expiring Fund unitholders) it is proposed that the Expiring Fund sell the Illiquid Assets to the 2014 Fund at a fair value based on an independent quote of the fair value of the Illiquid Assets obtained from an independent and experienced broker (the **Trade**).

12. It will be neither practical nor economical to make a distribution “in kind” of portions of the Illiquid Assets to unitholders of the Expiring Fund since unitholders will have difficulty finding a market, if any, for the Illiquid Assets. Further, any “in kind” distribution would result in very small “odd lot” share positions of the Private Issuers, thus increasing the difficulty for holders of such position to find a market for such securities. In addition, many of the unitholders in the Expiring Fund have held their interest in the Expiring Fund for approximately seven years and have indicated to the Filer in informal conversations regarding the Trade that they do not want to receive an “in kind” distribution.
13. The 2014 Fund unitholders will receive disclosure that the 2014 Fund has purchased the Illiquid Assets from the Expiring Fund and a description of the conflicts of interest related to the Trade. The Filer will also disclose how the fair value of the Illiquid Assets was determined.
14. The Filer is a responsible person for the purpose of paragraph 13.5(2)(b) of NI 31-103 and, absent the NI 31-103 Relief, is prohibited from effecting the Trade.
15. The 2014 Fund is an affiliate of the Filer for the purposes of subsection 4.2(1) of NI 81-102, and absent the NI 81-102 Relief, the Expiring Fund is prohibited from effecting the Trade under this section.
16. The exception in subsection 4.3(1) of NI 81-102, which permits certain inter-fund trades of securities for which public quotations are available, is not available for the Trade as public quotations are not available for the Illiquid Assets.
17. The Filer cannot rely on the exception in section 6.1 of National Instrument 81-107 *Independent Review Committee for Investment Funds (NI 81-107)* for the Trade because, among other things, the 2014 Fund does not have an independent review committee pursuant to NI 81-107 and is not a reporting issuer.
18. The Trade will be consistent with the investment objectives of the Funds.
19. The decision to sell the Illiquid Assets on behalf of the Expiring Fund to the 2014 Fund has been made based on the judgment of responsible persons uninfluenced by considerations other than the best interests of the Funds.
20. The Expiring Fund has established an independent review committee (the **IRC**) in accordance with section 3.7 of NI 81-107 which is subject to all of the provisions of section 3.9 of NI 81-107. The 2014 Fund will engage the IRC solely in respect of the Trade in compliance with NI 81-107 as if the 2014 Fund were a reporting issuer subject to NI 81-107. The IRC will oversee the Trade for both the Expiring Fund and the 2014 Fund after making separate determinations for each Fund in respect of the Trade as provided under paragraphs 5.2(2)(a), (b), (c) and (d) of NI 81-107.
21. The Filer will receive no remuneration with respect to any purchase or sale of the Illiquid Assets between the Funds.

22. With respect to the delivery of Illiquid Assets, the only expenses which will be incurred by the Expiring Fund will be nominal administrative charges levied by the custodian and/or record keeper of the Expiring Fund for recording the trades.
23. For each purchase or sale of Illiquid Assets between the Funds, each of the Funds will keep written records in the financial year of the respective Fund. These records will reflect details of the securities received or delivered by the respective Fund and the value assigned to such securities. These records will be retained for five years after the end of the financial year in which the trade occurred, and for the most recent two years, these records will be kept in a reasonably accessible place.
24. The Expiring Fund provides annual audited financial statements and unaudited financial statements as at December 31 and June 30 to its unitholders in accordance with applicable securities laws. The 2014 Fund provides audited annual financial statements and unaudited quarterly financial statements to its unitholders. Unitholders of both Funds have received audited financial statements for the year ended December 31, 2019.

Decision

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 Exemptions Sought are granted, provided that the following conditions are satisfied:

- (a) The Illiquid Assets are securities of private companies that are not traded on an exchange, and are sold by the Expiring Fund to the 2014 Fund at fair value based on an independent quote of the fair value of the Illiquid Assets obtained from an independent broker.
- (b) The Filer will refer the Trade to the IRC for review. The IRC will oversee the Trade for both Funds after making the determinations for each Fund provided under paragraphs 5.2(2)(a), (b), (c) and (d) of NI 81-107. The IRC of the Funds will be composed in accordance with section 3.7 of NI 81-107 and will be subject to all of the provisions set out in section 3.9 of NI 81-107.
- (c) The Filer will receive no remuneration with respect to any purchase or sale of Illiquid Assets between the Funds.
- (d) With respect to the delivery of Illiquid Assets, the only expenses which will be incurred by the Expiring Fund will be nominal administrative charges levied by the custodian and/or record keeper of the Expiring Fund for recording the trades.
- (e) The Funds will keep written records of the transactions reflecting the details of the portfolio securities delivered by the Expiring Fund to the 2014 Fund and the value assigned to such securities for five years after the end of the financial year in which

the trade occurred, and for the most recent two years, these records will be kept in a reasonably accessible place.

“original signed by”

Tom Graham, CPA, CA
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Alberta Securities Commission