

Headnote

ASC Policy 12-601 *Applications to the ASC* – subadviser relief – the Filer, an adviser registered in Alberta, wishes to obtain the advising services of a specific foreign adviser, not registered in Alberta, for the benefit of its Alberta clients – the Alberta registered adviser and the foreign adviser will enter into an agreement regarding the services to be provided; the Alberta registered adviser will enter into an agreement with each of its clients under which it agrees to accept responsibility for losses resulting from inappropriate advice provided by the foreign adviser– sections 75(1)(b) and 213 of the *Securities Act* (Alberta).

Applicable Legislative Provisions

Securities Act (Alberta) ss.75(1)(b) and 21

**Citation: CWM Investment Counsel Inc and Whitley Energy Capital Partners, LP, Re,
2009 ABASC 512**

Date: 20091014

ALBERTA SECURITIES COMMISSION

ORDER

**CWM Investment Counsel Inc.
and
Whitley Energy Capital Partners, LP**

Background

CWM Investment Counsel Inc. (the **Filer**) has applied to the Alberta Securities Commission (the **Commission**) for an order under section 213 of the *Securities Act* (Alberta) (the **Act**) for an exemption from the registration requirement in section 75 of the Act to permit Whitley Energy Capital Partners, LP (the **Subadviser**) to provide advice to the Filer for the benefit of the Filer's Alberta investment fund clients without requiring the Subadviser to register in Alberta (the **Requested Relief**).

Interpretation

Terms defined in National Instrument 14-101 *Definitions* have the same meaning if used in this decision, unless otherwise defined.

Representations

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

1. The Filer is incorporated under the laws of Alberta and the Filer's head office is located in Alberta.
2. The Filer is registered under Part 5 of the Act as portfolio manager.

3. The Filer provides portfolio management and investment counsel services to clients who are individuals, trusts, corporations and investment funds resident in Alberta and other jurisdictions where the Filer is registered or otherwise qualified to provide such services.
4. The Subadviser is based in Houston, Texas.
5. The Subadviser is registered or otherwise qualified to provide portfolio management services under the United States *Investment Advisors Act of 1940* (the **1940 Act**).
6. The Filer intends to offer the portfolio management services of the Subadviser to one or more investment funds for which the Filer acts as portfolio adviser (the **Investment Funds**) whose investment objectives include exposure to capital markets or market segments in which the Subadviser has experience and expertise.
7. Each Investment Fund will enter into an investment management agreement (an **IMA**) with the Filer under which:
 - (a) the Investment Fund grants full discretionary authority to the Filer to make investment decisions to trade in securities on behalf of the Investment Fund without obtaining the specific consent of the Investment Fund to individual trades; and
 - (b) authorizes the Filer to delegate is discretionary authority over all or a portion of the Investment Fund assets to the Subadviser.
8. The Subadviser will exercise discretionary authority over the assets of the Investment Funds that wish to have an exposure to capital markets or market segments in which the Subadviser has experience and expertise. The exercise of discretionary authority will be consistent with the investment objectives and strategies of the Investment Funds.
9. The Filer will enter into an agreement with the Subadviser which will set out the obligations and duties of each party in connection with the portfolio management services provided to the Investment Funds.
10. The Filer will agree under the IMA to be responsible (the **Assumed Obligations**) for any loss that arises out of the failure of the Subadviser:
 - (a) to exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the Filer and the Filer's Investment Fund clients for whose benefit the investment advice is, or portfolio management services are, to be provided; or
 - (b) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.
11. The Filer will not be relieved by the Investment Funds from the Assumed Obligations.

12. The Filer will send to each Investment Fund all documents that are required to be sent to the Investment Funds under securities legislation and under the agreements between the Filer and the Investment Funds.
13. The Subadviser would be considered to be acting as an “adviser” under the Legislation and, in the absence of the registration relief or an existing exemption, would be required to be registered as an adviser under the Act.
14. The Act does not contain an exemption from the adviser registration requirement that would be available to the Subadviser for its provision of portfolio management services to the Investment Funds.
15. The Filer is not in default of any of its obligations under applicable securities legislation.

Decision

The Commission orders under section 213 of the Act that the Requested Relief is granted provided that:

- (a) the obligations and duties of the Subadviser are set out in a written agreement with the Filer;
- (b) the Filer contractually agrees with each Investment Fund that the Filer will be responsible for the Assumed Obligations;
- (c) the Filer cannot be relieved of the Assumed Obligations by the Investment Funds;
- (d) the Subadviser maintains its registration as an adviser under the 1940 Act;
- (e) the Subadviser will have no direct contact with the Investment Funds, investors therein, the managers of the Investment Funds or any affiliate of such managers without a duly registered advising representative of the Filer being present at all times, either in person or by telephone; and
- (f) the Filer maintains its good standing under securities legislation.

“original signed by”

Glenda A. Campbell, QC
Alberta Securities Commission

“original signed by”

Stephen R. Murison
Alberta Securities Commission