

# 2002 BCSECCOM 1060

## Headnote

Mutual Fund Dealer exempted from legislative requirements that it be a member of the MFDA - mutual fund dealer subject to certain terms and conditions

## Exemption Order

**Leith Wheeler Investment Counsel Ltd.**

**Section 48 of the *Securities Act*, R.S.B.C. 1996, c. 418**

## Background

Leith Wheeler Investment Counsel Ltd. has applied for an exemption from the requirement in section 6(2)(c)(ii)(A) of the *Securities Rules*, BC Reg. 194/97, to be a member of the Mutual Fund Dealers Association of Canada (MFDA).

## Representations

Leith Wheeler represents that:

1. it is registered under the Act as a mutual fund dealer and portfolio manager;
2. it is registered as an investment counsel and portfolio manager (or the equivalent) in Alberta, Ontario, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia and Yukon Territory and as a limited market dealer in Ontario;
3. its principal business activities are the administration and management of mutual funds and pooled funds established by it, and providing discretionary investment management services;
4. in respect of its discretionary investment management services, it manages fully-managed client accounts containing individual securities on a segregated account basis and also manages fully-managed client accounts containing only mutual fund and pooled fund securities;
5. its activities as a mutual fund dealer currently represent and will continue to represent activities that are limited and incidental to its principal business activities of managing mutual funds and providing discretionary investment management services;
6. it will comply with the terms and conditions set out in the attached Schedule "A";

## 2002 BCSECCOM 1060

7. it will provide prominent written notice to future clients, before they are accepted as a client, that:

*Leith Wheeler is not currently a member, and does not intend to become a member, of the Mutual Fund Dealers Association of Canada; consequently, clients of Leith Wheeler will not have available to them investor protection benefits that would otherwise derive from membership of Leith Wheeler in the MFDA, including coverage under any investor protection plan for clients of members of the MFDA.*

8. Upon the next general mailing to its account holders and in any event before March 31, 2003, the Registrant shall provide, to any client that was a client of the Registrant on the date of this Order, the prominent written notice referred to in paragraph 7 above.

### **Order**

Because it is not prejudicial to the public interest, the Executive Director orders under section 48 of the Act that Leith Wheeler is exempt from the requirement to be a member of the MFDA, provided that it complies with the terms and conditions set out in the attached Schedule "A".

December 27, 2002

Noreen Bent, Acting Director

# 2002 BCSECCOM 1060

## Schedule A

### Terms and Conditions

#### For Leith Wheeler Investment Counsel Ltd.

#### **Definitions**

1. For the purposes hereof, unless the context otherwise requires:

- (a) “Act” means, in British Columbia, the *Securities Act*, R.S.B.C. 1996, c. 418;
- (b) “Adviser” means an adviser as defined in the Act;
- (c) “Client Name Trade” means, for the Registrant, a trade to or on behalf of a person or company in securities of a mutual fund that is managed by the Registrant or an affiliate of the Registrant where, immediately before the trade, the person or company is shown on the records of the mutual fund or of another mutual fund managed by the Registrant or an affiliate of the Registrant as the holder of securities of such mutual fund, and the trade consists of:

- (A) a purchase by the person or company through the Registrant of securities of the mutual fund; or
- (B) a redemption by the person or company through the Registrant of securities of the mutual fund;

and where the person or company

- (C) is a client of the Registrant that was not solicited by the Registrant; or
  - (D) was an existing client of the Registrant on the Effective Date;
- (d) “Effective Date” means the date of the covering order;
  - (e) “Employee”, for the Registrant, means:
    - (A) an employee of the Registrant;

## 2002 BCSECCOM 1060

- (B) an employee of an affiliated entity of the Registrant; or
  - (C) an individual that is engaged to provide, on a *bona fide* basis, consulting, technical, management or other services to the Registrant or to an affiliated entity of the Registrant, under a written contract between the Registrant or the affiliated entity and the individual or a consultant company or consultant partnership of the individual and, in the reasonable opinion of the Registrant, the individual spends or will spend a significant amount of time and attention on the affairs and business of the Registrant or an affiliated entity of the Registrant;
- (f) “Employee”, for a Service Provider, means an employee of the Service Provider or an affiliated entity of the Service Provider, provided that, at the relevant time, in the reasonable opinion of the Registrant, the employee spends or will spend, a significant amount of time and attention on the affairs and business of:
- (A) the Registrant or an affiliated entity of the Registrant; or
  - (B) a mutual fund managed by the Registrant or an affiliated entity of the Registrant;
- (g) “Executive”, for the Registrant, means a director, officer or partner of the Registrant or of an affiliated entity of the Registrant or a member of a board of governors relating to mutual funds managed by the Registrant or an affiliated entity of the Registrant;
- (h) “Executive”, for a Service Provider, means a director, officer or partner of the Service Provider or of an affiliated entity of the Service Provider;
- (i) “Exempt Trade”, for the Registrant, means:
- (i) a trade in securities of a mutual fund that is made between a person or company and an underwriter acting as purchaser or between or among underwriters;
  - (ii) a trade in securities of a mutual fund for which the Registrant would have available to it an exemption from the registration requirements of the Act; or

## 2002 BCSECCOM 1060

- (iii) a trade in securities of a mutual fund for which the Registrant has received a discretionary exemption from the registration requirements of the Act;
- (j) “Fund-on-Fund Trade” means a trade that consists of:
  - (i) a purchase, through the Registrant, of securities of a mutual fund that is made by another mutual fund;
  - (ii) a purchase, through the Registrant, of securities of a mutual fund that is made by a person or company where the person or company, an affiliated entity of the person or company, or another person or company is, or will become, the counterparty in a specified derivative or swap with another mutual fund; or
  - (iii) a sale, through the Registrant, of securities of a mutual fund that is made by another mutual fund where the party purchasing the securities is:
    - (A) a mutual fund managed by the Registrant or an affiliated entity of the Registrant; or
    - (B) a person or company that acquired the securities where the person or company, an affiliated entity of the person or company, or another person or company is, or was, the counterparty in a specified derivative or swap with another mutual fund;
- and where, in each case, at least one of the referenced mutual funds is a mutual fund that is managed by either the Registrant or an affiliated entity of the Registrant;
- (k) “In Furtherance Trade” means, for the Registrant, a trade by the Registrant that consists of any act, advertisement, or solicitation, directly or indirectly in furtherance of another trade in securities of a mutual fund, where the other trade consists of:
  - (i) a purchase or sale of securities of a mutual fund that is managed by the Registrant or an affiliated entity of the Registrant; or
  - (ii) a purchase or sale of securities of a mutual fund where the Registrant acts as the principal distributor of the mutual fund;

## 2002 BCSECCOM 1060

and where, in each case, the purchase or sale is made by or through another registered dealer if the Registrant is not otherwise permitted to make the purchase or sale pursuant to these terms and conditions;

- (l) “Managed Account” means, for the Registrant, an investment portfolio account of a client under which the Registrant, pursuant to a written agreement made between the Registrant and the client, makes investment decisions for the account and has full discretionary authority to trade in securities for the account without obtaining the client's specific consent to the trade;
- (m) “Managed Account Trade” means, for the Registrant, a trade to, or on behalf of a Managed Account of the Registrant, where the trade consists of a purchase or redemption, through the Registrant of securities of a mutual fund, that is made on behalf of the Managed Account;

where, in each case,

- (i) the Registrant is the portfolio adviser to the mutual fund;
- (ii) the mutual fund is managed by the Registrant or an affiliate of the Registrant; and
- (iii) either of:
  - (A) the mutual fund is prospectus-qualified in the jurisdiction where the trade occurs; or
  - (B) the trade is not subject to the registration and prospectus requirements of the Act;
- (n) “Mutual Fund Instrument” means National Instrument 81-102 Mutual Funds, as amended;
- (o) “Permitted Client” means a person or company that is a client of the Registrant, and that is, or was at the time the person or company became a client of the Registrant:
  - (i) an Executive or Employee of the Registrant;
  - (ii) a Related Party of an Executive or Employee of the Registrant;

## 2002 BCSECCOM 1060

- (iii) a Service Provider or an affiliated entity of a Service Provider;
- (iv) an Executive or Employee of a Service Provider; or
- (v) a Related Party of an Executive or Employee of a Service Provider;
- (p) “Permitted Client Trade” means, for the Registrant, a trade to a person who is a Permitted Client or who represents to the Registrant that he or she is a person included in the definition of Permitted Client, in securities of a mutual fund that is managed by the Registrant or an affiliate of the Registrant, and the trade consists of a purchase or redemption by the person through the Registrant of securities of the mutual fund;
- (q) “Registered Plan” means a registered pension plan, deferred profit sharing plan, registered retirement savings plan, registered retirement income fund, registered education savings plan or other deferred income plan registered under the *Income Tax Act* (Canada);
- (r) “Registrant” means Leith Wheeler Investment Counsel Ltd.;
- (s) “Related Party”, for a person, means another person who is:
  - (i) the spouse of the person;
  - (ii) the issue of:
    - (A) the person,
    - (B) the spouse of the person, or
    - (C) the spouse of any person that is the issue of a person referred to in subparagraphs (A) or (B) above;
  - (iii) the parent, grandparent or sibling of the person, or the spouse of any of them;
  - (iv) the issue of any person referred to in paragraph (iii) above; or
  - (v) a Registered Plan established by, or for the exclusive benefit of, one, some or all of the foregoing;

## 2002 BCSECCOM 1060

- (vi) a trust where one or more of the trustees is a person referred to above and the beneficiaries of the trust are restricted to one, some, or all of the foregoing;
  - (vii) a corporation where all the issued and outstanding shares of the corporation are owned by one, some, or all of the foregoing;
  - (t) “Securities”, for a mutual fund, means shares or units of the mutual fund;
  - (u) “Seed Capital Trade” means a trade in securities of a mutual fund made to a person or company referred to in any of subparagraphs 3.1(1)(a)(i) to 3.1(1)(a)(iii) of the Mutual Fund Instrument;
  - (v) “Service Provider” means:
    - (i) a person or company that provides or has provided professional, consulting, technical, management or other services to the Registrant or an affiliated entity of the Registrant;
    - (ii) an Adviser to a mutual fund that is managed by the Registrant or an affiliated entity of the Registrant; or
    - (iii) a person or company that provides or has provided professional, consulting, technical, management or other services to a mutual fund that is managed by the Registrant or an affiliated entity of the Registrant.
2. For the purposes hereof, a person or company is considered to be an "affiliated entity" of another person or company if the person or company would be an affiliated entity of that other person or company for the purposes of British Columbia Instrument 45-507 Trades to Employees, Executives and Consultants.
3. For the purposes hereof:
- (a) “issue” and “sibling” includes any person having such relationship through adoption, whether legally or in fact;
  - (b) “parent” and “grandparent” includes a parent or grandparent through adoption, whether legally or in fact;
  - (c) “registered dealer” means a person or company that is registered under the Act as a dealer in a category that permits the person or company to act as dealer for the subject trade; and



## 2002 BCSECCOM 1060

- (d) “spouse”, for an Employee or Executive, means a person who, at the relevant time, is the spouse of the Employee or Executive.

4. Any terms that are not specifically defined above shall, unless the context otherwise requires, have the meaning:

- (a) specifically ascribed to such term in the Mutual Fund Instrument; or
- (b) if no meaning is specifically ascribed to such term in the Mutual Fund Instrument, the same meaning the term would have for the purposes of the Act.

### **Restricted Registration**

#### **Permitted Activities**

5. The registration of the Registrant as a mutual fund dealer under the Act shall be for the purposes only of trading by the Registrant in securities of a mutual fund where the trade consists of:

- (a) a Client Name Trade;
- (b) an Exempt Trade;
- (c) a Fund-on-Fund Trade;
- (d) an In Furtherance Trade;
- (e) a Managed Account Trade;
- (f) a Permitted Client Trade; or
- (g) a Seed Capital Trade;

provided that, in the case of all trades that are only referred to in clauses (a) or (f), the trades are limited and incidental to the principal business of the Registrant.