

2010 BCSECCOM 453

July 28, 2010

Headnote

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions – Securities Act*, s. 88 – *Cease to be a reporting issuer* - The securities of the issuer are beneficially owned by more than 50 persons and are not traded through any exchange or market - The issuer is a mutual fund; the issuer will not be a reporting issuer in any jurisdiction; the issuer distributes its securities only to client accounts that are fully managed by the issuer's manager; the manager controls all trading in the issuer's securities

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, s. 88

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan,
Manitoba, Ontario and Nova Scotia
(the Jurisdictions)

and

In the Matter of
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of
Cumberland Private Wealth Management Inc. (CPWM) and
Cumberland Investment Management Inc. (CIMI)

and

In the Matter of
Cumberland Capital Appreciation Fund
Cumberland Income Fund
(Collectively, the Funds and, with CPWM and CIMI, the Filers)

Decision

Background

The securities regulatory authority or regulator in each of the Jurisdictions (the Decision Maker) has received an application from the Filers for a decision under

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the securities legislation of the Jurisdictions (the Legislation) that each Fund is not a reporting issuer in each Jurisdiction (the Exemptive Relief Sought).

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

- (a) the Ontario Securities Commission (the OSC) is the principal regulator for this application, and
- (b) the decision is the decision of the principal regulator and evidences the decision of each other Decision Maker.

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 Filers:

1. CPWM is a corporation organized under the *Business Corporations Act* (Ontario) (OBCA). Its head office is in Toronto, Ontario. CPWM is registered as an investment dealer in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador. CPWM is a member of the Investment Industry Regulatory Organization of Canada (IIROC). CPWM provide portfolio investment management services in accordance with the rules of IIROC.
2. CIMI is a corporation organized under the OBCA. It is not registered as a dealer or an adviser in any of the Jurisdictions. CIMI is proposing to apply for registration as an investment fund manager with the OSC in accordance with the requirements of National Instrument 31-103 *Registration Requirements and Exemptions*, unless CPWM is appointed investment fund manager of the Funds. In that case, CPWM would apply for registration as an investment fund manager.
3. CPWM and CIMI are “affiliates” as defined in National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106).
4. Each of the Funds is a reporting issuer in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia pursuant to a simplified prospectus dated July 17, 2009, prepared in accordance with the requirements of National Instrument 81-101 *Mutual Funds Prospectus Disclosure*.

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5. CIMI is the trustee of the Funds. CPWM is the portfolio adviser and distributor of the Funds. CIMI is the current investment fund manager of the Funds, and either CIMI or CPWM will be the investment fund manager of the Funds.
6. The Funds are not in default of securities legislation in the Jurisdictions.
7. CPWM provides discretionary investment management services (the Managed Services), primarily to high net worth individuals, institutions and foundations (individually, the Client and, collectively, the Clients) to each Client through a managed account (Managed Account).
8. Each Client enters into a discretionary investment management agreement (the Managed Account Agreement) with CPWM, whereby the Client appoints CPWM to provide the Managed Services. Based on the size of the assets of the Client and depending on the allocation of a Client's assets to a particular asset class, CPWM either manages the Client's assets on a segregated account basis or invests the Client's assets in one or more Funds.
9. CPWM sends each Client a quarterly statement showing current holdings and a summary of all transactions carried out in their Managed Account during the quarter. In addition, clients are provided with monthly or quarterly account statements (depending on account activity) as well as trade confirmations for each purchase or redemption of units of the Funds. The CPM is available to review and discuss with Clients all account statements and portfolio valuations.
10. The Funds are only distributed to Managed Account clients of CPWM and therefore are not widely distributed. All investors in the Funds are invested through a Managed Account with CPWM.
11. Each Fund pays or will pay all administration fees and expenses relating to its operation, including any management fees payable to the investment fund manager of the Fund and investment management fees or performance fees payable by the Fund to CPWM. Each Fund pays to the investment fund manager of that Fund a nominal fixed management fee (currently \$2,500). None of the Funds charges or will charge a commission to investors. Typically, CPWM receives investment management fees directly from investors in each of the Funds based upon a percentage of the value of the Clients Managed Account and no investment management fees are payable by the Fund to CPWM. The terms of these fees, as well as any investment management or performance fees payable by a Fund to CPWM, are detailed in

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each Client's Managed Account Agreement or in another agreement with the client.

12. Where CPWM invests on behalf of a Managed Account in a Fund to which CPWM will charge an investment management fee or performance fee, the necessary steps will be taken to ensure that there will be no duplication of fees between a Managed Account and the Funds.
13. Each of the Funds is a reporting issuer in all Jurisdictions as a result of having filed a prospectus in the Jurisdictions.
14. The Funds currently distribute their units to Managed Account Clients in the Jurisdictions pursuant to a simplified prospectus dated July 17, 2009 (the Prospectus), prepared pursuant to National Instrument 81-101 *Mutual Fund Prospectus Disclosure*.
15. Absent an exemption, the Funds are prohibited in Ontario from distributing, and CPWM is effectively prohibited from investing in, units of the Funds for the Managed Accounts in Ontario, in circumstances where the individual Client who is the beneficial owner of the Managed Account is not otherwise qualified as a "accredited investor", is not a Secondary Managed Account as defined in an order of the OSC dated May 18, 2007 or does not otherwise use the \$150,000 minimum investment exemption available under NI 45-106.
16. Pursuant to an order of the Ontario Securities Commission dated July 13, 2010 (the Ontario Decision), CPWM is now permitted to distribute units of the Funds under an exemption from the prospectus requirements to Managed Account Clients in Ontario in circumstances where the Client is not an "accredited investor", is not a Secondary Managed Account as defined in an order of the OSC dated May 18, 2007 and does not invest a minimum of \$150,000 in each Fund.
17. As a result of the Ontario Decision, CIMI will not renew the Prospectus and instead proposes to distribute units of the Funds to its Managed Account Clients pursuant to exemptions from the prospectus requirement.
18. Investors in the Funds are only comprised of, and will in the future only be comprised of, persons from the following categories:
 - (a) investors who qualify as "accredited investors", as defined in NI 45-106, other than pursuant to paragraph (q) of the definition;

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- (b) investors outside of Ontario, who have entered into a Managed Account Agreement with CPWM, making CPWM the accredited investor on behalf of the Client's Managed Account pursuant to paragraph (q) of the "accredited investor" definition in NI 45-106; and
 - (c) investors in Ontario, who have entered into a Managed Account Agreement with CPWM, where CPWM is relying on the Ontario Decision.
19. Each of the Funds has more than 51 unitholders in total in Canada. In addition, each of the Funds has 15 or more unitholders in one or more jurisdictions in Canada.
20. The only reason that the Funds are not eligible for relief pursuant to CSA Staff Notice 12-307 *Application for a Decision that an Issuer is not a Reporting Issuer* is because of the number of unitholders in each Fund.
21. CPWM will send a notice to all unitholders of the Funds, advising that the Funds have applied for and received a decision that the Funds have ceased to be reporting issuers and explaining the implications of such fact. As there are no redemption charges payable by unitholders in the Funds, Clients will be permitted to instruct CPWM if they no longer wish to be invested in the Funds and there will be no fees associated with such change.
22. The financial statements of the Funds will be prepared and delivered to unitholders in accordance with the requirements of National Instrument 81-106 *Investment Fund Continuous Disclosure* (NI 81-106). The Funds intend to rely on the filing exemption set out in section 2.11 of NI 81-106.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Makers to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemptive Relief Sought is granted.

Kevin J. Kelly
Commissioner
Ontario Securities Commission

The Honourable James D. Carnwath Q.C.
Commissioner
Ontario Securities Commission