

2007 BCSECCOM 269

May 16, 2007

Headnote

1996 Securities Act s. 48 Dealer Suitability - Exemption from the know your client and suitability requirements for registered dealers - A registered mutual fund dealer (the Filer) seeks relief from suitability rules for trading by the Filer and its registered representatives in mutual fund securities, employer stock and GICs to Capital Accumulation Plans and Participants in the Plans. - The Filer is a record keeper. The plan sponsor is responsible for the suitability of the plans based on the information on the employee. The Filer works with the plan sponsor to provide the Participants with general investment information and facilitates the administration of the Capital Accumulation Plans.

Applicable Legislative Provisions

Exemption from s. 48(1)(b) of the Securities Rules

Relief sought under s. 48 of the Securities Act

**In the Matter of
the Securities Legislation of British Columbia, Alberta,
Saskatchewan, Ontario, New Brunswick, Nova Scotia,
Prince Edward Island and
Newfoundland and Labrador (the Jurisdictions)**

and

**In the Matter of
The Mutual Reliance Review System
for Exemptive Relief Applications**

and

**In the Matter of
Fidelity Retirement Services Company of Canada Limited
(the Filer)**

MRRS Decision Document

2007 BCSECCOM 269

Background

¶ 1 The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filer for a decision under the securities legislation (the Legislation) in each Jurisdiction exempting:

- (i) the Filer, as a registered mutual fund dealer; and
- (ii) the individuals that are registered to trade on behalf of the Filer (each, a Registered Representative)

from Suitability Obligations (as defined below) where the Filer, and the Registered Representative acting on behalf of the Filer, effects a trade that consists of a purchase or redemption of mutual fund securities by a Participant (as defined below) under a Fidelity Group Plan (as defined below).

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

Interpretation

¶ 2 In this decision:

- (a) defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are otherwise defined in this decision;
- (b) “CAP Exemption” means the proposed exemption from the dealer registration requirement to be established through an amendment to NI 45-106, which was published for comment under the CSA Notice, as set out in the attached Appendix;
- (c) “CAP Guidelines” means the *Guidelines for Capital Accumulation Plans* dated May 28, 2004 released by The Joint Forum of Financial Market Regulators;
- (d) “capital accumulation plan” shall have the meaning given to that term in the CAP Exemption, except that, in the representations to this decision, the use of this term, and other terms that are defined in the CAP Exemption by reference to a “capital accumulation plan” does not necessarily incorporate from the

2007 BCSECCOM 269

corresponding definition of the CAP Exemption the requirement that the subject investment or savings plan be “tax assisted”;

- (e) “CSA Notice” means the CSA Request For Comment – Amendments to National Instrument 45-106 *Prospectus and Registration Exemptions* and Adoption of Local Prospectus and Registration Exemptions for Certain Capital Accumulation Plans, dated October 21, 2005;¹
- (f) “employer stock” means securities issued by a person or company that is the plan sponsor of a Fidelity Group Plan;
- (g) “Fidelity Group Plan” means a capital accumulation plan that is an employer-sponsored group retirement and savings plan for which the Filer acts as record-keeper;
- (h) “GICs” means a guaranteed investment certificate or other evidence of deposit issued by a Canadian financial institution which is not included within the definition of a “security” for the purposes of the applicable Legislation;
- (i) “FICL” means “Fidelity Investments Canada Limited”;
- (j) “member” has the same meaning as the CAP Exemption;
- (k) “MFDA” means the Mutual Fund Dealers Association of Canada;
- (l) “mutual fund securities” means shares or units of a mutual fund, which, for greater certainty, shall include shares or units of a single-stock mutual fund;
- (m) “NI 45-106” means National Instrument 45-106 *Prospectus and Registration Exemptions*;
- (n) “Participant” means a member who participates in a Fidelity Group Plan as permitted by the applicable plan sponsor;
- (o) “plan sponsor” has the same meaning as the CAP Exemption;
- (p) “single-stock mutual fund” means, in the case of a Fidelity Group Plan, mutual fund securities of a mutual fund that invests solely in common stock of an employer plan sponsor, which may be distributed to Participants under the Plan pursuant to discretionary exemptions from prospectus requirement in the Legislation of a Jurisdiction obtained by the Filer and/or FICL; and

¹ In (2005), 28 OSCB 861 *et seq.*

(q) “Suitability Obligation” means, for any trade under a Fidelity Group Plan effected by the Filer or a Registered Representative acting on behalf of the Filer, that consists of a purchase or redemption by a Participant of mutual fund securities, the requirement in the Legislation to make enquiries of the Participant, as are appropriate, to determine:

- (i) the general investment needs and objectives of the Participant; and
- (ii) the suitability of the proposed purchase or redemption of the mutual fund securities for the Participant.

Representations

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

1. the Filer is a corporation incorporated under the laws of Ontario; the head office of the Filer is in Toronto, Ontario;
2. the Filer is registered under the Legislation of each Jurisdiction as a dealer in the category of “mutual fund dealer” (or the equivalent);
3. the Filer is a member of the MFDA;
4. the Filer is a wholly-owned subsidiary of FICL, a corporation amalgamated under the laws of Ontario;
5. the Filer’s principal business is acting as record keeper for Fidelity Group Plans, and, in the course of so acting, the Filer may effect a trade that consists of a purchase or redemption by a Participant in a Fidelity Group Plan of one of the following: mutual fund securities, employer stock or GICs;
6. for each Fidelity Group Plan, the plan sponsor (which is generally an employer), will choose from a slate of investment options the specific investment options to be made available to Participants in their particular Plan; the investment options available to the Participant in a Fidelity Group Plan may, depending upon the plan sponsor of the Plan, include: (i) mutual fund securities of mutual funds managed by FICL or another manager; (ii) employer stock or mutual fund securities of single-stock mutual funds; and (iii) GICs; a Participant in a Fidelity Group Plan chooses which available investment options he or she wishes to purchase, with his or her payroll and/or lump sum contributions, on the basis of the material provided to the Participant by the Filer, which will, in the case of any mutual fund securities of publicly-offered mutual funds, include the simplified prospectus or other

2007 BCSECCOM 269

mandated point of sale disclosure document for the fund; in many cases, the employer plan sponsor of a Fidelity Group Plan will make a matching contribution towards the purchase of a Participant's investment;

7. in order to become a Participant in a Fidelity Group Plan, the Participant must, in addition to qualifying under the rules of the Plan, provide the Filer with information as to the identity of the Participant, including: name, address, social insurance number, employment status and spousal information; presently, Participants also provide the Filer with information sufficient to permit the Filer to satisfy its Suitability Obligations in respect of any purchase or redemption of mutual fund securities by a Participant under a Fidelity Group Plan;
8. Participants in a Fidelity Group Plan transmit their investment choices to the Filer, who acts as an order-taker, akin to the services provided by a discount broker, to execute the order; purchase orders are executed on behalf of a Participant only after the Filer has received the corresponding purchase funds;
9. in connection with their activities under any Fidelity Group Plan, neither the Filer nor any of its Registered Representatives presently provides investment advice or recommendations to any Participant concerning the Participant's acquisition or disposition of any investment through the Fidelity Group Plan; the Filer's purchase of mutual fund securities, employer stock or GICs on behalf of a Participant in a Fidelity Group Plan are, for the most part, automatic purchases, and the Filer acts as an order-taker carrying out instructions of the Participant (with respect to the Participant's contribution and any employer contributions);
10. Participants are not induced to purchase any mutual fund securities, employer stock or GICs under a Fidelity Group Plan by expectation of employment or continued employment;
11. for all of the Fidelity Group Plans, neither the potential slate of investment options that may be made available to a Participant under the Plan, nor the services provided by the Filer, depends upon whether the Fidelity Group Plan is or is not a capital accumulation plan that is a tax-assisted plan;
12. over the years, FICL and the Filer have obtained various exemptive relief decisions to allow them to trade employer stock to Participants in Fidelity Group Plans, which, depending upon the Jurisdiction, have expressly, or implicitly, included an exemption from the otherwise applicable Suitability Obligations related to these trades;

13. the CAP Guidelines set out the expectations of the regulators, including the Decision Makers, concerning the operation of capital accumulation plans that are tax assisted investment or savings plans; the CAP Guidelines and the CAP Exemption do not require that members of the relevant capital accumulation plan be provided with investment advice, or that any suitability analysis be performed; instead, they require that members be provided with investment education and the tools to make investment decisions, which the Filer provides to Participants in any Fidelity Group Plan on behalf of the plan sponsor of the Plan; the Filer, as record-keeper of the Fidelity Group Plans, complies with the CAP Guidelines for all of its Fidelity Group Plans regardless of whether they are tax assisted; the Filer will treat any non-tax assisted Fidelity Group Plans as if the CAP Guidelines were applicable to them; and
14. as contemplated in the CSA Notice, in each of the Jurisdictions, other than Ontario and Quebec, the CAP Exemption has now been adopted in the form of a blanket exemption from the dealer registration requirement and the prospectus requirement, with the Appendix setting out the text of the blanket exemption; in Ontario and Quebec, the CSA Notice contemplates that the CAP Exemption will not be adopted in the form of a blanket exemption, but will, instead, be used as a template of standard conditions and terms of relief for applicants who apply for an exemption from the dealer registration requirement or prospectus requirement in the Legislation of these Jurisdictions.

Decision

- ¶ 4 Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

The decision of the Decision Makers under the Legislation of each Jurisdiction is that:

- (i) the Filer, as a registered mutual fund dealer; and
- (ii) any Registered Representative acting on behalf of the Filer;

are exempt from Suitability Obligations for any trade, effected by the Filer or the Registered Representative, that consists of a purchase or redemption by a Participant of mutual fund securities under a Fidelity Group Plan, as described above, provided that:

- A. the trade is made in accordance with the requirements that would, if the Filer and the Registered Representative were not registered to make the trade, have

2007 BCSECCOM 269

to be satisfied in order for the trade to be exempt from the dealer registration requirement pursuant to the CAP Exemption, if the CAP Exemption were in force in the Jurisdiction, except for any requirements established through the definition of a capital accumulation plan in the CAP Exemption that the subject investment or savings plan be “tax assisted”;

- B. the Participant has previously received notice from the Filer informing the Participant that for any trade effected by the Filer that consists of a purchase or redemption by the Participant of mutual fund securities under the Fidelity Group Plan, where the Filer has not provided investment advice or recommendations to the Participant in respect of the particular trade, the Filer will not make, and is not obliged by law to make, any inquiries of the Participant to determine:
 - i) the general investment needs and objectives of the Participant; or
 - ii) the suitability of the trade for the Participant;
- C. neither the Filer nor the Registered Representative has provided any investment advice or recommendations to the Participant in respect of the trade; and
- D. this decision shall terminate three years after the date of its approval, unless earlier renewed.

David M. Gilkes
Manager
Registrant Regulation

2007 BCSECCOM 269

Appendix A -- Registration and Prospectus Exemption for Certain Capital Accumulation Plans

Part 1 – Definitions

"*capital accumulation plan*" means a tax assisted investment or savings plan, including a defined contribution registered pension plan, a group registered retirement savings plan, a group registered education savings plan, or a deferred profit sharing plan, established by a plan sponsor that permits a member to make investment decisions among two or more investment options offered within the plan and in Québec and Manitoba, includes a simplified pension plan.

"*member*" means a current or former employee of an employer, or a person who belongs, or did belong to a trade union or association; or

- (a) his or her spouse;
- (b) a trustee, custodian or administrator who is acting on his or her behalf, or for his or her benefit, or on behalf of, or for the benefit of, his or her spouse; or
- (c) his or her holding entity, or a holding entity of his or her spouse;

that has assets in a capital accumulation plan, and includes a person that is eligible to participate in a capital accumulation plan.

"*plan sponsor*" means an employer, trustee, trade union or association or a combination of them that establishes a capital accumulation plan, and includes a service provider to the extent that the plan sponsor has delegated its responsibilities to the service provider.

"*service provider*" means a person or company that provides services to a plan sponsor to design, establish, or operate a capital accumulation plan.

Part 2 -- Exemptions

2.1 the dealer registration requirement does not apply to a trade by a person or company in a security of a mutual fund to a capital accumulation plan, or to a member of a capital accumulation plan as part of the member's participation in the capital accumulation plan, if the following conditions are met:

- (a) the plan sponsor selects the mutual funds that members will be able to invest in under the capital accumulation plan;

2007 BCSECCOM 269

- (b) the plan sponsor establishes a policy, and provides members with a copy of the policy and any amendments to it, describing what happens if a member does not make an investment decision;
- (c) in addition to any other information that the plan sponsor believes is reasonably necessary for a member to make an investment decision within the capital accumulation plan, and unless that information has previously been provided, the plan sponsor provides the member with the following information about each mutual fund the member may invest in;
 - (i) the name of the mutual fund;
 - (ii) the name of the manager of the mutual fund and its portfolio adviser;
 - (iii) the fundamental investment objective of the mutual fund;
 - (iv) the investment strategies of the mutual fund or the types of investments the mutual fund may hold;
 - (v) a description of the risks associated with investing in the mutual fund;
 - (vi) where a member can obtain more information about each mutual fund's portfolio holdings;
 - (vii) where a member can obtain more information generally about each mutual fund, including any continuous disclosure; and
 - (viii) whether the mutual fund is considered foreign property for income tax purposes, and if so, a summary of the implications of that status for a member who invested in that mutual fund;
- (d) the plan sponsor provides members with a description and amount of any fees, expenses and penalties relating to the capital accumulation plan that are borne by the members, including:
 - (i) any costs that must be paid when the mutual fund is bought or sold;
 - (ii) costs associated with accessing or using any of the investment information, decision-making tools or investment advice provided by the plan sponsor;

2007 BCSECCOM 269

- (iii) mutual fund management fees;
- (iv) mutual fund operating expenses;
- (v) record keeping fees;
- (vi) any costs for transferring among investment options, including penalties, book and market value adjustments and tax consequences;
- (vii) account fees; and
- (viii) fees for services provided by service providers

provided that the plan sponsor may disclose the fees, penalties and expenses on an aggregate basis, if the plan sponsor discloses the nature of the fees, expenses and penalties, and the aggregated fees do not include fees that arise because of a choice that is specific to a particular member;

- (e) the plan sponsor has within the past year, provided the members with performance information about each mutual fund the members may invest in, including;
 - (i) the name of the mutual fund for which the performance is being reported;
 - (ii) the performance of the mutual fund, including historical performance for one, three, five and 10 years if available;
 - (iii) a performance calculation that is net of investment management fees and mutual fund expenses;
 - (iv) the method used to calculate the mutual fund's performance return calculation, and information about where a member could obtain a more detailed explanation of that method;
 - (v) the name and description of a broad-based securities market index, selected in accordance with National Instrument 81-106 *Investment Fund Continuous Disclosure*, for the mutual fund, and corresponding performance information for that index; and

2007 BCSECCOM 269

- (vi) a statement that past performance of the mutual fund is not necessarily an indication of future performance;
 - (f) the plan sponsor has, within the past year, informed members if there were any changes in the choice of mutual funds that members could invest in and where there was a change, provided information about what members needed to do to change their investment decision, or make a new investment;
 - (g) the plan sponsor provides members with investment decision-making tools that the plan sponsor reasonably believes are sufficient to assist them in making an investment decision within the capital accumulation plan;
 - (h) the plan sponsor must provide the information required by paragraphs 2.1(b), (c), (d) and (g) prior to the member making an investment decision under the capital accumulation plan; and
 - (i) if the plan sponsor makes investment advice from a registrant available to members, the plan sponsor must provide members with information about how they can contact the registrant;
- 2.2 the prospectus requirement does not apply to a distribution of a security of a mutual fund in the circumstances set out in section 2.1, if
- (a) the conditions in section 2.1 have been complied with; and
 - (b) the mutual fund complies with Part 2 of National Instrument 81-102 *Mutual Funds*.

Part 3 -- Filing Requirements

- 3.1 Before the first time a mutual fund relies on the exemption in section 2.2, the mutual fund must file a notice in the form found in Appendix A in each jurisdiction in which the mutual fund expects to distribute its securities.