

Headnote

National Policy 11-203 *Process for Exemptive Relief in Multiple Jurisdictions* – Plan Sponsors, CAP members, and named service provider exempted from the dealer registration and prospectus requirements in the Legislation in respect of trades in securities of mutual funds to tax-assisted and non-tax assisted savings plans (which act as "overflow" savings plans connected to tax-assisted capital accumulation plans serviced by the same provider), subject to certain terms and conditions – contributions to non-tax assisted savings plans limited by reference to specified limits in the *Income Tax Act* (Canada)

Applicable Alberta Statutory Provisions

Securities Act, R.S.A., 2000, c.S-4, section 144

Citation: Re Solium Capital Inc., 2017 ABASC 125

Date: 20170725

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
Solium Capital Inc. (the **Filer**)

Decision

Background

Revocation of Prior Relief

The securities regulatory authority or regulator in Ontario has received an application from the Filer on behalf of the Filer (including its respective directors, officers, representatives and employees acting on its behalf), any Plan Sponsor (as defined herein) and any Fund (as defined herein), under the securities legislation of the Applicable Jurisdictions (as defined herein) for a ruling that the Prior Relief (as defined herein) be revoked (the **Revocation Relief**).

Dealer Registration and Prospectus Relief

The securities regulatory authority or regulator in each of the Jurisdictions (the **Dual Exemption Decision Makers**) has received an application from the Filer for a decision, on behalf of the Filer (including its respective directors, officers, representatives and employees acting on its behalf), any Plan Sponsor (as defined herein) and any Fund (as defined herein), under the securities legislation of the Jurisdictions (the **Legislation**) that:

- (a) the dealer registration requirements contained in the Legislation shall not apply to the Filer (including its directors, officers, representatives and employees acting on its behalf) or any Plan Sponsor of a CAP (as defined herein) or a Non-Tax-

Assisted Plan (as defined herein) that uses the services of the Filer in respect of its CAP or Non-Tax-Assisted Plan for trades in the securities of the Funds to a CAP or a Non-Tax-Assisted Plan sponsored by a Plan Sponsor, subject to certain terms and conditions (the **Dealer Registration Relief**); and

- (b) the prospectus requirements contained in the Legislation shall not apply in respect of the distribution of securities of Funds to CAPs or Non-Tax-Assisted Plans sponsored by the Plan Sponsor for which the Filer provides services (the **Prospectus Relief**, and together with the Dealer Registration Relief, the **Dual Exemptive Relief**).

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

- (a) the Ontario Securities Commission is the principal regulator in respect of the Revocation Relief;
- (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 of the jurisdictions of Ontario, Québec, Newfoundland and Labrador, the Yukon Territory and Nunavut (the **Applicable Jurisdictions**) in respect of the Revocation Relief;
- (c) the Alberta Securities Commission is the principal regulator in respect of the Dual Exemptive Relief;
- (d) the Filer has provided notice that subsection 4.7(1) of MI 11-102 is intended to be relied upon in (i) each of the Applicable Jurisdictions in respect of CAPs; and (ii) each of the provinces and territories of Canada in respect of Non-Tax-Assisted Plans;
- (e) the decision in respect of the Revocation Relief is the decision of the securities regulatory authority or regulator in Ontario; and
- (f) the decision in respect of the Dual Exemptive Relief is the decision of the Alberta Securities Commission and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* or MI 11-102 have the same meaning if used in this decision unless otherwise defined herein.

In this decision:

- (a) **CAP** has the meaning given to the term "capital accumulation plan" in section 1.1 of the CAP Guidelines, namely, a tax-assisted investment or savings plan that permits the members of the plan to make investment decisions among two or more options offered within the plan. The term CAP includes a defined

contribution registered pension plan (**DCPP**), a group registered retirement savings plan (**RRSP**), a group registered education savings plan, a group tax-free savings plan, and a deferred profit sharing plan (**DPSP**), and in Québec and Manitoba, includes a simplified pension plan;

- (b) **CAP Guidelines** means the *Guidelines for Capital Accumulation Plans* published in May 2004 by the Joint Forum of Financial Market Regulators;
- (c) **Fund** means a mutual fund as defined in section 1(jj) of the *Securities Act* (Alberta), whether offered by prospectus or pursuant to prospectus exemptions in the Legislation, and which in both cases comply with Part 2 of National Instrument 81-102 *Investment Funds (NI 81-102)* and which, for greater certainty, includes an exchange-traded fund that is a reporting issuer;
- (d) **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
 - (i) his or her spouse;
 - (ii) 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
 - (iii) his or her holding entity, or a holding entity of his or her spouse
 that has assets in a CAP or Non-Tax-Assisted Plan, and includes a person that is eligible to participate in a CAP or Non-Tax-Assisted Plan;
- (e) **Non-Tax-Assisted Plan** means an investment or savings plan that meets the definition of CAP in the CAP Guidelines and that is administered in accordance with the CAP Guidelines, but for the fact that it is an investment or savings plan that is non-tax-assisted;
- (f) **Plan** means, depending on the context in which it is used, a CAP, a Non-Tax-Assisted Plan, or both; and
- (g) **Plan Sponsor** means any employer, trustee, trade union or association or a combination of them that establishes a Plan and uses the services of the Filer in respect of such Plan, and includes the Filer to the extent that the Plan Sponsor has delegated some or all of its responsibilities to the Filer.

Representations

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

1. The Filer was incorporated under the laws of Alberta.
2. The head and principal office of the Filer is located in Calgary, Alberta.

3. The Filer is a reporting issuer in each province of Canada, except Québec, and is listed on the Toronto Stock Exchange with the trading symbol "SUM".
4. The Filer is not in default of securities legislation in any jurisdiction of Canada.
5. The Filer's principal business is acting as a service provider providing web-based recordkeeping and administrative services to issuers in connection with equity-based incentive plans sponsored by such issuers. The Filer administers the following equity-based incentive plans:
 - (a) grant-based plans, such as employee stock option plans, performance share plans, restricted share unit plans and other types of grant-based plans;
 - (b) tax-assisted investment or savings plans, such as employee profit sharing plans, RRSPs, DPSPs, non-registered savings plans and employee benefit plans; and
 - (c) other types of non-tax-assisted contributory savings plans that enable employees and other plan participants to allocate a portion of their income into the issuer's sponsored plan, whereby the issuer at its discretion, and guided by the terms and conditions of the plan text, may match a portion of the employee's or the other plan participant's contribution based on a defined formula.
6. The Filer assists Plan Sponsors in initial Plan design and implementation. The investment choices for the Members of the Plans may include Funds. The investment choices for the Plans may also be segregated funds managed by insurance companies. Where the investment choices are Funds, the Funds will comply with Part 2 of NI 81-102 in respect of their investment restrictions and practices.
7. The services that the Filer provides to Plan Sponsors include recordkeeping of Member data, transaction processing in respect of Member accounts, provision of Member statements as required under pension standards legislation, and the applicable recordkeeping agreement and processing changes to Member accounts such as termination, death, retirement or a change in marital status. The Filer allows Members to call for information about a Plan through its call centre and facilitates access to a variety of self-help tools that allow Members to make investment decisions regarding their investments held through the Plans.
8. The Filer does not engage in discretionary decision-making with respect to any Plan or Member account and does not select investments for the Plans or provide investment advice to Members. The Filer does not manage or administer any of the Funds, nor does it provide custodial services for the Plans or the Funds.
9. Members make initial investment decisions to invest in Funds chosen by the Plan Sponsor and subsequent changes to those investment decisions, with or without the assistance of a registrant selected by the Member. The Plan Sponsor may establish a default option if the Member fails to make an investment decision. Plan Sponsors may facilitate access to a registrant for advice to Members. Member instructions are transmitted to the Filer either online through the Filer's proprietary "Shareworks"

platform or by telephone through the Filer's call centre. The Filer processes the trades in the Funds as instructed and establishes and maintains the records reflecting the interest of each Member or Plan Sponsor, as the case may be, in each Fund and for each Plan.

10. The Filer, the Plan Sponsors and the Funds trade or will trade with the Plans or the Members in accordance with the conditions set out in proposed amendments to National Instrument 45-106 *Prospectus Exemptions* related to CAPs, which were published by the Canadian Securities Administrators on October 21, 2005 (the **Proposed CAP Exemption**) and adopted in the form of a blanket exemption in all jurisdictions of Canada, other than in the Applicable Jurisdictions (the **CAP Blanket Exemption**). The Proposed CAP Exemption and the CAP Blanket Exemption contemplate both dealer registration and prospectus exemptions, where required.
11. The Filer previously obtained discretionary exemptive relief (the **Prior Relief**) on June 29, 2010 with respect to CAPs from the Applicable Jurisdictions on terms that are similar to the CAP Blanket Exemption. The Filer has applied to the securities regulatory authority or regulator in Ontario as principal regulator on behalf of the Applicable Jurisdictions that the Prior Relief be revoked and new Dealer Registration Relief and Prospectus Relief be granted which include Non-Tax-Assisted Plans.
12. As Plan Sponsors will typically approach consultants, such as the Filer, for assistance with respect to securities regulatory issues (when the investment choices are Funds), the Filer is seeking an exemption on behalf of itself, the Plan Sponsors and the Funds, as applicable, from the dealer registration and prospectus requirements, including the obligation to deliver a prospectus, fund facts document, summary disclosure document, or ETF facts document, where required, provided the conditions as described in this decision are met.
13. The Filer may be requested by a Plan Sponsor to provide services to a Non-Tax-Assisted Plan established by the Plan Sponsor for the benefit of Members. These Non-Tax-Assisted Plans are not CAPs as defined in the CAP Guidelines, the Proposed CAP Exemption, the CAP Blanket Exemption or the Prior Relief, since they are not "tax-assisted" under applicable legislation. Non-Tax-Assisted Plans are intended as non-registered employee savings plans to which excess contributions of Members that cannot be invested in a CAP because of legislative limits for such CAP investments will be invested on behalf of the Members.
14. Non-Tax-Assisted Plans are established in conjunction with CAPs because Canadian tax legislation imposes a limit on the amounts that may be contributed to a CAP. The benefit formula under a Plan Sponsor's benefit program sometimes results in contributions that exceed that tax limit. A Plan Sponsor may establish a Non-Tax-Assisted Plan to allow for those excess contributions to be invested in the same manner as the tax-assisted contributions. These excess contributions to Non-Tax-Assisted Plans are not expected to be significant.

15. Non-Tax-Assisted Plans will operate in the same manner as CAPs in terms of the relationship between Members and Plan Sponsors, and the duties, rights and responsibilities of Members and Plan Sponsors. The only significant difference between the two types of Plans is the tax-assisted nature of one and not the other.
16. Each Member of a Plan Sponsor's Non-Tax-Assisted Plan that is administered by the Filer will also be a member of the Plan Sponsor's CAP.
17. The Filer will administer the Non-Tax-Assisted Plans in accordance with the CAP Guidelines and in a similar manner to the related CAPs for the applicable Members. The Filer will administer only those Non-Tax-Assisted Plans which originate out of a Plan Sponsor's CAPs for which the Filer provides services.

Decision

The securities regulatory authority or regulator in each of the Jurisdictions is satisfied that the decision meets the test set out in the Legislation for the relevant securities regulatory authority or regulator to make the decision.

Revocation Relief

The decision of the securities regulatory authority or regulator in Ontario under the Legislation is that the Revocation Relief is granted.

Dealer Registration and Prospectus Relief

The decision of the Dual Exemption Decision Makers under the Legislation is set out below.

1. The Dealer Registration Relief is granted provided that:
 - (a) the Plan Sponsor, other than the Filer, selects the Funds that Members will be able to invest in under the Plans;
 - (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 select a Fund;
 - (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 Plan, and unless that information has previously been provided, the Plan Sponsor provides the Member with the following information about each Fund the Member may invest in:
 - (i) the name of the Fund;
 - (ii) the name of the manager of the Fund and its portfolio adviser;
 - (iii) the fundamental investment objective of the Fund;
 - (iv) the investment strategies of the Fund or the types of investments the Fund may hold;

- (v) a description of the risks associated with investing in the Fund;
 - (vi) where a Member can obtain more information about each Fund's portfolio holdings; and
 - (vii) where a Member can obtain more information generally about each Fund, including any continuous disclosure;
- (d) the Plan Sponsor provides Members with a description and amount of any fees, expenses and penalties relating to the Plan, as the case may be, that are borne by Members, including:
- (i) any costs that must be paid when a 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;
 - (iii) the management fees paid by the Funds;
 - (iv) the operating expenses paid by the Funds;
 - (v) recordkeeping 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 the Filer,
- which fees, expenses and penalties may be disclosed 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 Fund the Members may invest in, including:
- (i) the name of the Fund for which the performance is being reported;
 - (ii) the performance of the Fund, including historical performance for one, three, five and ten years if available;
 - (iii) a performance calculation that is net of investment management fees and Fund expenses;

- (iv) the method used to calculate the 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 Fund, and corresponding performance information for that index; and
 - (vi) a statement that past performance of the 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 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 Plan;
 - (h) the Plan Sponsor must provide the information required by paragraphs (b), (c), (d) and (g) prior to the Member making an investment decision under the Plan;
 - (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;
 - (j) the maximum amount that may be contributed in respect of a Member to a Non-Tax-Assisted Plan in a given year is limited to any positive difference between:
 - (i) the maximum amount contributable for that year to the applicable CAP under its terms; and
 - (ii) the maximum dollar limit provided in the *Income Tax Act* (Canada) (the **ITA**) for the applicable CAP,

provided that this maximum amount that may be contributed in respect of a Member to the Non-Tax-Assisted Plan in a given year shall not exceed an amount equal to the "money purchase limit", as defined in the ITA, for the year.

In this paragraph (j), the amount determined under subparagraph (i) shall be no more than 18% of the Member's "earned income" as defined in the ITA.

In this paragraph (j), the "maximum dollar limit" means each of the following:

- A. the "money purchase limit" as defined in the ITA (in the case where the applicable CAP is a DCPD);
 - B. the "RRSP dollar limit" as defined in the ITA (in the case where the applicable CAP is an RRSP);
 - C. one-half of the "money purchase limit" (in the case where the applicable CAP is a DPSP); and
 - D. any applicable maximum fixed dollar contribution prescribed under the ITA (in the case of any other type of CAP).
2. The Prospectus Relief is granted provided that:
- (a) the conditions set forth in paragraph 1 above are met;
 - (b) each of the Funds complies with Part 2 of NI 81-102; and
 - (c) where a Member chooses to invest in a Fund offered by prospectus selected by the Plan Sponsor as an investment option for a Non-Tax-Assisted Plan, one or more of the following, as applicable, will be made available upon demand to the Member:
 - (i) the current prospectus of the Fund;
 - (ii) fund facts document; or
 - (iii) a summary disclosure document or ETF facts document for an exchange-traded mutual fund.
3. Before a Fund first relies on this decision, the Fund must file a notice in the form found in Appendix C of the Proposed CAP Exemption in each jurisdiction in which the Fund expects to distribute its securities.
4. This decision, as it relates to the Dealer Registration Relief, will terminate upon the earlier of the coming into force in securities legislation of a registration exemption for trades in a security of a mutual fund to a CAP and 90 days after a Dual Exemption Decision Maker publishes notice to the effect that it does not propose to create such an exemption.

5. This decision, as it relates to the Prospectus Relief, will terminate upon the earlier of the coming into force in securities legislation of a prospectus exemption for the distribution of a security of a mutual fund to a CAP and 90 days after a Dual Exemption Decision Maker publishes notice to the effect that it does not propose to create such an exemption.

Dealer Registration and Prospectus Relief

“original signed by”

Stan Magidson
Chair & CEO
Alberta Securities Commission

“original signed by”

Tom Cotter
Vice Chair
Alberta Securities Commission

Revocation Relief

“original signed by”

William Furlong
Commissioner
Ontario Securities Commission

“original signed by”

Mark Sandler
Commissioner
Ontario Securities Commission