

2008 BCSECCOM 556

August 8, 2008

Headnote

Mutual Reliance Review System for Exemptive Relief Applications

National Instrument 51-102 *Continuous Disclosure Obligations*, s. 13.1 – Part 6 – Annual information form and Part 7 – Material change reports - General – An issuer wants relief from the requirements to file specific continuous disclosure documents - Issuer is a trust and formed to complete a plan of arrangement with a reporting issuer; the issuer's securities will be stapled to the reporting issuer's securities and will be listed and posted for trading as stapled units; the reporting issuer will file its annual information form, material change reports and press releases in place of the issuer's disclosure records; the issuer will file material change reports for any change that is material to it, but not to the reporting issuer

National Instrument 52-110 *Audit Committees*, s. 8.1 – Part 5 – Reporting Obligations - An issuer wants relief from certain requirements in NI 52-110 *Audit Committees* - Issuer is a trust and formed to complete a plan of arrangement with a reporting issuer; the issuer's securities will be stapled to the reporting issuer's securities and will be listed and posted for trading as stapled units; the issuer is exempt from certain continuous disclosure requirements, including the filing of an annual information form (AIF), provided it files the reporting issuer's continuous disclosure; the issuer will file the disclosure required in Form 52-110F1 in a separate stand-alone document instead of in an AIF; the reporting issuer is subject to the audit committee requirements

National Instrument 44-101 *Short Form Prospectus Distributions*, s. 8.1 – s. 2.2 – Basic qualification criteria - An issuer wants relief from the qualification criteria in NI 44-101 so it can file a short form prospectus - Issuer is a trust and formed to complete a plan of arrangement with a reporting issuer; the issuer's securities will be stapled to the reporting issuer's securities and will be listed and posted for trading as stapled units; the reporting issuer is eligible to file a short-form prospectus and may do a joint offering with the issuer; the issuer satisfies the criteria in section 2.2 of NI 44-101 other than the criteria relating to listing and posting for trading

Securities Act, s. 3.2(1) – Designation as a reporting issuer - An issuer wants to be designated as a reporting issuer - Issuer is a trust and formed to complete a plan of arrangement with a reporting issuer; the issuer's securities will be stapled to the reporting issuer's securities and will be listed and posted for trading as stapled units; but for the fact that the issuer's securities will not be posted for trading independently of the reporting issuer's securities, it would automatically become a reporting issuer

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Securities Act, ss. 48 and 76 – Employees and Consultants – exemption from registration and prospectus requirements for employees, consultants, past employees and similar persons - Trades by an issuer of its securities to employees, executive officers, trustees or consultants of a different issuer that is related, but not technically a “related entity”, to the issuer - Issuer is a trust and formed to complete a plan of arrangement with a reporting issuer; the issuer’s securities will be stapled to the reporting issuer’s securities and will be listed and posted for trading as stapled units; the reporting issuer’s employees will receive replacement options that are on the same terms and conditions as the original options, except that they will entitle the holder to acquire stapled units under the reorganization; first trades in stapled units acquired on exercise of the replacement options will be subject to the conditions in section 2.6(3) of NI 45-102

Securities Act, ss. 48 and 76 – Other – exemption from registration and prospectus requirements for situations other than a corporate acquisition or reorganization; trades to business associates; debt settlements; or trades involving investment plants and consultants - Trades by an issuer of its securities to its security holders in accordance with the terms and conditions of securities previously issued by another issuer - Issuer is a trust and formed to complete a plan of arrangement with a reporting issuer; the issuer’s securities will be stapled to the reporting issuer’s securities and will be listed and posted for trading as stapled units; unitholders will be entitled to acquire stapled units upon separation of the rights under the reporting issuer’s unitholder rights plan; first trades in stapled units acquired on exercise of the separation of the rights will be subject to the conditions in section 2.6(3) of NI 45-102

Applicable British Columbia Provisions

National Instrument 51-102, s. 13.1

National Instrument 52-110, s. 8.1

National Instrument 44-101, ss. 2.2(d), 2.2(e) and 8.1

Securities Act, R.S.B.C. 1996, c. 418, ss. 1(1), 3.2(1), 34(1)(a), 48, 61, 76, and 85

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec,
New Brunswick, Newfoundland and Labrador, Nova Scotia,
Prince Edward Island, Northwest Territories, Nunavut and Yukon
(the “Jurisdictions”)

and

In the Matter of

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the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of
H&R Real Estate Investment Trust
on its own behalf and on behalf of H&R Finance Trust

MRRS Decision Document

Background

The local securities regulatory authority or regulator (the “Decision Maker” and, collectively, the “Decision Makers”) in each of the Jurisdictions has received an application (the “Application”) from H&R Real Estate Investment Trust (the “Trust”) and H&R Finance Trust (“H&R Finance”) (the Trust and H&R Finance each a “Filer” and, collectively, the “Filers”), the new trust that will result from the reorganization of the Trust (the “Reorganization”) by way of a plan of arrangement under the *Business Corporations Act* (Alberta), for a decision under the securities legislation of the Jurisdictions (the “Legislation”) that:

- H&R Finance be a reporting issuer (a “Reporting Issuer”) except in Quebec, the Northwest Territories and Nunavut, where such relief is not applicable;
- H&R Finance be exempted from the requirements contained in Parts 6 and 7 of NI 51-102 *Continuous Disclosure Obligations* (“NI 51-102”) except in the Northwest Territories, where NI 51-102 has been adopted as a policy only (collectively, the “Specified Continuous Disclosure Requirements”);
- pursuant to section 8.1 of National Instrument 52-110 *Audit Committees* (“NI 52-110”), H&R Finance be exempted from the requirements set out in Part 5 of NI 52-110 (the “Audit Committee Requirements”);
- H&R Finance be exempted from the dealer registration and prospectus requirements in respect of a (i) trade of a unit of H&R Finance to an employee, executive officer, trustee or consultant of the Trust (“Trust Employees”), and (ii) a trade of a unit of H&R Finance to unitholders of H&R Finance in connection with the exercise of rights issued pursuant to the Unitholder Rights Plan of the Trust, except in Quebec (the “Dealer Registration and Prospectus Requirements”);

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- H&R Finance be exempted from the requirements contained in subparagraphs (d)(ii) and (e) of section 2.2 of NI 44-101 *Short Form Prospectus Distributions* (“NI 44-101”) (“Specified Basic Qualification Criteria ”); and
- the Trust be exempted from the requirement to have its units listed and posted for trading on a short form eligible exchange, as contained in subparagraph (e) of section 2.2 of NI 44-101 (“Criteria Relating to Listing and Posting for Trading”),

in each case provided that certain conditions are satisfied.

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

Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined in this decision.

Representations

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

1. The Trust is a reporting issuer in all provinces of Canada and the units of the Trust are listed and posted for trading on the Toronto Stock Exchange (the “TSX”). There are approximately 143.8 million units of the Trust outstanding, and using a unit price of \$18, the market capitalization of the Trust is approximately \$2.6 billion.
2. The Trust holds 100% of the outstanding shares of H&R REIT (U.S.) Holdings Inc. (“H&R US”). Legal title to each of the Trust’s properties located in the United States is held by a separate legal entity which is 100% owned, directly or indirectly, by H&R US. For the twelve months ended December 31, 2007, H&R US indirectly held income properties with an aggregate net book value of approximately \$1.12 billion, and had net property operating income of approximately \$7.9 million.

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3. From time to time, the Trust has made advances to H&R US, which advances are evidenced by notes which bear interest at a rate of 12%. As at December 31, 2007, the principal amount of such notes owed to the Trust was approximately US\$174 million.
4. It is proposed that the Trust, among other things, will establish H&R Finance and will subscribe for that number of H&R Finance units as is equal to the number of Trust units then issued and outstanding for an aggregate cash subscription price of approximately US\$127.5 million (the "Subscription Proceeds").
5. The Trust will make a distribution to its unitholders of one H&R Finance unit per Trust unit. Consequently, each unitholder of the Trust would become a unitholder of H&R Finance and will hold the same number of units of the Trust and H&R Finance.
6. It is proposed that at the conclusion of the Reorganization each unit of the Trust would be stapled to a unit of H&R Finance (a "Stapled Unit"), and that the two securities will trade together as a Stapled Unit on the TSX.
7. The Trust will transfer a portion of the notes referred to in paragraph 3 above (the "Existing Loans") to H&R Finance in consideration for cash of approximately US\$125 million, being the outstanding principal of the Existing Loans. The Existing Loans will then be consolidated and refinanced under a new note indenture (the "Subordinated Debt"). It is intended that the material terms of the Subordinated Debt (including the interest rate) will be consistent with market terms. There will be no guarantee of the Subordinated Debt by the Trust. The expected remaining balance of the Subscription Proceeds is expected to be used to reimburse the Trust for the payment of expenses incurred in the course of establishing H&R Finance and issuing units of H&R Finance.
8. The units of the Trust and the units of H&R Finance will only become "uncoupled": (a) in the event that unitholders of the Trust vote in favour of the uncoupling of Trust units and H&R Finance units such that the two securities will trade separately, or (b) at the sole discretion of the trustees of H&R Finance, but only in the event of the bankruptcy, insolvency, winding-up or reorganization (under an applicable law relating to insolvency) of the Trust or H&R US or the taking of corporate action by the Trust or H&R US in furtherance of any such action or the admitting in writing by the Trust or H&R US of its inability to pay its debts as they become due.

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9. Since H&R Finance will have a legally enforceable claim to current interest payments on the Subordinated Debt and, ultimately, to repayment of the principal amount at maturity, management of the Trust believes that the combined value of the stapled securities will likely be enhanced (that is, the value of units of H&R Finance is expected to exceed the corresponding decline in the value of the Trust's equity), which will permit the Trust to raise capital in the future more easily. The resulting structure is also expected to be more tax-efficient. H&R Finance will be structured for United States tax purposes with the objective that United States withholding taxes and certain limitations on the deductibility of interest in the United States would not apply to the interest paid by H&R US to H&R Finance.
10. It is proposed that H&R Finance will be established as an open-ended trust pursuant to a declaration of trust governed by the laws of Ontario.
11. H&R Finance will have four trustees, one of whom will be appointed by the Trust, and three of whom will be elected by unitholders and be independent of management of H&R Finance and the Trust. It is expected that H&R Finance will share common management with the Trust.
12. Under the H&R Finance declaration of trust, the undertaking of H&R Finance will be restricted to:
 - (a) engaging in the Reorganization and investing in the Subordinated Debt;
 - (b) temporarily holding cash in short-term interest bearing accounts, short-term government debt or short-term investment grade corporate debt, in a manner that permits H&R Finance to continue to qualify as a "fixed investment trust" under the Internal Revenue Code of 1986, as amended, and the applicable United States Treasury Regulations, for the purposes of paying the expenses of H&R Finance, paying amounts payable by H&R Finance in connection with the redemption of any H&R Finance units, and making distributions to H&R Finance unitholders;
 - (c) repurchasing and redeeming H&R Finance units;
 - (d) issuing additional H&R Finance units for cash; and
 - (e) undertaking such other usual and customary actions necessary for the conduct of the activities of H&R Finance in the ordinary course, as shall be approved by its trustees from time to time.

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13. If the Trust wishes to raise capital post-Reorganization, by the terms of the declaration of trust creating H&R Finance and a support agreement to be entered into between the Trust and H&R Finance (the “Support Agreement”), the trustees of H&R Finance will be required to issue the same number of units of H&R Finance as the number of units of the Trust to be issued in connection with the financing.
14. The net proceeds of any offering of Stapled Units will be allocated first to units of H&R Finance for a subscription price equal to the fair market value of such units on the effective date of issuance of such units (as determined by H&R Finance in consultation with the Trust), with the remainder of the net proceeds of the offering allocated to the subscription for units of the Trust.
15. Given that it is proposed that post-Reorganization each unit of the Trust would be stapled to a unit of H&R Finance, the Reorganization will necessitate amendments to the Trust’s 2007 amended and restated declaration of trust (the “Declaration of Trust”). In particular, and without limiting the generality of the foregoing, amendments to the Declaration of Trust will be necessary to address the form of Trust unit certificate, the transfer of Trust units, take-over bids for Trust units and the right of redemption of the Trust’s unitholders.
16. Consequential amendments would also be required in connection with the Trust’s Unit Option Plan, Distribution Reinvestment Plan and Unitholder Rights Plan to contemplate Stapled Units. On a going forward basis, provided the securities remain stapled, a unit of the Trust will only be issued, transferred or redeemed together with a unit of H&R Finance, except for distributions of units of the Trust which are immediately followed by a consolidation of outstanding units of the Trust such that an equal number of units of H&R Finance and units of the Trust are outstanding immediately following such consolidation.
17. Given that each unit of the Trust must be stapled to a unit of H&R Finance, upon exercise by a Trust Employee of an option to acquire Stapled Units, units of both the Trust and H&R Finance must be issued. Each Trust Employee will, upon such an exercise, simultaneously be issued a unit of the Trust by the Trust and a unit of H&R Finance by H&R Finance, which units will upon issuance be stapled together as a Stapled Unit. The exercise price for the Stapled Unit will be paid entirely to the Trust, and the Trust will, pursuant to the Support Agreement, pay H&R Finance an amount equal to the fair market value of the units of H&R Finance so issued.
18. The Unitholder Rights Plan will provide that, upon separation of the rights pursuant to such plan, unitholders (other than certain designated unitholders)

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will be entitled to acquire additional Stapled Units for a subscription price equal to 50% of the current trading price of the Stapled Units. Pursuant to a support agreement to be entered into between the Trust and H&R Finance, upon separation of such rights the Trust will have the right to require H&R Finance to issue H&R Finance Units to unitholders exercising such rights in consideration for payment by the Trust to H&R Finance of an amount equal to the fair market value of such H&R Finance units at such time.

19. Together with and supplemental to the financial statements and the management's discussion and analysis that each of the Trust and H&R Finance is required to file on SEDAR pursuant to Part 5 of NI 51-102, each of the Trust and H&R Finance will file on SEDAR as an "other document" supplemental income statements and balance sheets of the Trust and H&R Finance prepared on a combined basis ("Combined Financial Statements"), together with management's discussion and analysis of the Combined Financial Statements.
20. In the event the Trust chooses to proceed with the proposed Reorganization, disclosure of the proposed Reorganization and issuance and distribution of units of H&R Finance will be made in the proxy circular for the special meeting of the Trust's unitholders, which is expected to be held on or about September 19, 2008.
21. The Trust will only proceed with the proposed Reorganization provided that it receives the affirmative vote of at least two-thirds of the votes of unitholders of the Trust.
22. The Trust is not in default of any of the requirements contained in the Legislation.

The Decision

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.

1. The decision of the Decision Makers under the Legislation is that:
 - a. the Specified Continuous Disclosure Requirements shall not apply to H&R Finance, provided that and for so long as:
 - (i) each H&R Finance unit is stapled to a unit of the Trust and trades as a Stapled Unit;

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- (ii) the Trust is a reporting issuer in a designated Canadian jurisdiction (as defined in section 13.4 of NI 51-102) and is an electronic filer under National Instrument 13-101 *System for Electronic Document Analysis and Retrieval* (SEDAR) that has filed all documents it is required to file under NI 51-102 and complies with NI 51-102;
 - (iii) H&R Finance does not issue any units that are not stapled to units of the Trust, except for distributions of units of H&R Finance which are immediately followed by a consolidation of outstanding units of H&R Finance such that an equal number of units of H&R Finance and units of the Trust are outstanding immediately following such consolidation;
 - (iv) H&R Finance files a notice under its SEDAR profile indicating that it is relying on the annual information form and material change reports filed by the Trust and directing readers to refer to the Trust's SEDAR profile;
 - (v) the Trust complies with the requirements of the Legislation and the TSX in respect of making disclosure of material information on a timely basis and immediately issues and files a news release that discloses any material changes in its affairs;
 - (vi) H&R Finance continues to have minimal or no assets, operations, revenues or cash flows other than those related to the issuance, administration and repayment of the Stapled Units and investment in indebtedness issued by H&R US; and
 - (vii) H&R Finance complies with the requirements of the Legislation to issue a press release and file a report with the Jurisdictions upon the occurrence of a material change in respect of the affairs of H&R Finance that is not also a material change in the affairs of the Trust.
- b. The Audit Committee Requirements shall not apply to H&R Finance so long as H&R Finance is exempt from or otherwise not subject to the Specified Continuous Disclosure Requirements and provided that:
- (i) each H&R Finance unit is stapled to a unit of the Trust and trades as a Stapled Unit;
 - (ii) H&R Finance discloses the audit committee information described in Form 52-110F1 in a stand-alone document filed in electronic format under its SEDAR profile;

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- (iii) H&R Finance includes a cross-reference to the stand-alone document described in b(ii) above in each management information circular in which, pursuant to section 5.2 of NI 52-110, H&R Finance would otherwise be required to provide a cross-reference to certain information as described in section 5.1 of NI 52-110; and
 - (iv) the Trust satisfies and continues to satisfy the requirements set out in NI 52-110.
- c. The Specified Basic Qualification Criteria shall not apply to H&R Finance provided that H&R Finance is exempt from or otherwise not subject to the Specified Continuous Disclosure Requirements and provided that:
 - (i) H&R Finance satisfies the criteria in section 2.2 of NI 44-101 except for the requirements in subsections 2.2(d)(ii) and 2.2(e) and other than the Criteria Relating to Listing and Posting for Trading;
 - (ii) H&R Finance does not issue any units that are not stapled to units of the Trust, except for distributions of units of H&R Finance which are immediately followed by a consolidation of outstanding units of H&R Finance such that an equal number of units of H&R Finance and units of the Trust are outstanding immediately following such consolidation;
 - (iii) each H&R Finance unit is stapled to a unit of the Trust and trades as a Stapled Unit; and
 - (iv) each Stapled Unit is listed and posted for trading on a short form eligible exchange (as defined in NI 44-101).
- d. The Criteria Relating to Listing and Posting for Trading shall not apply to the Trust provided that:
 - (i) each Stapled Unit is listed and posted for trading on a short form eligible exchange (as defined in NI 44-101);
 - (ii) each H&R Finance unit is stapled to a unit of the Trust and trades as a Stapled Unit; and
 - (iii) H&R Finance does not issue any units that are not stapled to units of the Trust, except for distributions of units of H&R Finance which are

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immediately followed by a consolidation of outstanding units of H&R Finance such that an equal number of units of H&R Finance and units of the Trust are outstanding immediately following such consolidation.

DATED: August 8, 2008.

Jo-Anne Matear
Assistant Manager, Corporate Finance

- e. The decision of the Decision Makers other than the Decision Makers in the Quebec, Northwest Territories and Nunavut, under the Legislation is that H&R Finance is designated as a Reporting Issuer in each of the Jurisdictions.
- f. The further decision of the Decision Makers under the Legislation is that the Dealer Registration and Prospectus Requirements in respect of (i) trades of units of H&R Finance to Trust Employees and (ii) trades of units of H&R Finance to unitholders of H&R Finance in connection with the exercise of rights pursuant to the Unitholder Rights Plan of the Trust shall not apply to trades of securities of H&R Finance, except in Quebec, provided that the first trade of any security acquired as a result of this exemption shall be deemed to be a distribution under the Legislation of the Jurisdiction where the trade takes place unless the conditions in section 2.6(3) of National Instrument 45-102 *Resale of Securities* as they would apply to the Trust are satisfied.
- g. The Dealer Registration and Prospectus Requirements relief terminates immediately if H&R Finance issues units of H&R Finance that will not be stapled to units of the Trust or if previously issued Stapled Units cease to be stapled.

DATED: August 8, 2008.

Carol S. Perry
Commissioner
Ontario Securities Commission

Wendell S. Wigle
Commissioner
Ontario Securities Commission