

Citation: 2012 BCSECCOM 497

**Headnote**

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203  
*Process for Exemptive Relief Applications in Multiple Jurisdictions*

National Instrument 51-102, s. 13.1 *Continuous Disclosure Obligations* - BAR -  
An issuer requires relief from the requirement to include certain financial statements in a business acquisition report – The issuer is a real estate investment trust that acquired individual real estate properties; the issuer has been unable to obtain the information needed to prepare the required financial statements; the BAR will contain sufficient alternative information about the significant acquisition, which is consistent with industry practices and standards in real estate acquisitions

**Applicable Legislative Provisions**

National Instrument 51-102, ss. 8.4 and 13.1 *Continuous Disclosure Obligations*

December 20, 2012

In the Matter of  
the Securities Legislation of  
British Columbia and Ontario

and

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

and

In the Matter of  
Sunstone U.S. Opportunity (No.4) Realty Trust and  
Sunstone (No.4) Limited Partnership  
(the Filer)

Decision

**Background**

- ¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (the Decision Maker) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) exempting the Filer from the requirements in section 8.4 of National Instrument 51-102 *Continuous*

*Disclosure Obligations* (NI 51-102) to include certain financial statements in a business acquisition report (BAR) (the Exemption Sought).

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

- (a) the British Columbia Securities Commission is the principal regulator for this application;
- (b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador; and
- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

### **Interpretation**

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

### **Representations**

- ¶ 3 This decision is based on the following facts represented by the Filer:
- 1. Sunstone U.S. Opportunity (No.4) Realty Trust (the Trust) is an unincorporated, open-ended real estate investment trust formed pursuant to a Declaration of Trust dated February 11, 2011, under and governed by the laws of British Columbia;
  - 2. Sunstone (No.4) Limited Partnership (the LP) is a limited partnership formed pursuant to and governed by the laws of Nevada and created by a Limited Partnership Agreement dated February 9, 2011;
  - 3. the Filer's head office is located at Suite 910 – 925 West Georgia Street, Vancouver, British Columbia V6C 3L2;
  - 4. the Filer's financial year end is December 31;
  - 5. on July 26, 2011, the Filer acquired Embassy Suites Dallas Fort Worth (Embassy Suites) located in Irving, Texas, for \$22,295,000 from Felcor Lodging Trust Incorporated (Felcor); the Filer financed the acquisition of Embassy Suites through a combination of new mortgage financing of approximately \$20,200,000 and cash on hand;

6. the Filer is a venture issuer; the purchase price of Embassy Suites was \$22,295,000; the Filer's consolidated assets as of June 30, 2011 were \$44,104,502; the Filer's interest in Embassy Suites exceeds 40% of its consolidated assets as at June 30, 2011; accordingly, the acquisition of Embassy Suites is a significant acquisition of the Filer under section 8.3(4)(a) of NI 51-102, requiring the Filer to file a BAR under section 8.2 of NI 51-102;
7. under Section 8.4 of NI 51-102, the BAR must include:
  - (a) annual financial statements for the significant acquisition for its two most recently completed financial years prior to the acquisition; the financial statements for the most recently completed financial year prior to the acquisition must be audited;
  - (b) unaudited interim financial statements for the significant acquisition for its most recently completed interim period and the comparable period in the preceding year; and
  - (c) pro forma financial statements of the Filer giving effect to the significant acquisition;
8. Felcor is a reporting company in the United States; Felcor's Annual Report on Form 10-K, available at [www.sec.gov](http://www.sec.gov), provides as follows:
  - (a) Felcor is a corporation operating as a real estate investment trust;
  - (b) Felcor's business is conducted as one reportable segment: hospitality;
  - (c) Felcor's total assets were \$2,359,435,000 as at December 31, 2010;
  - (d) Felcor's hotel revenue and total operating costs were \$925,137,000 and \$1,065,851,000, respectively, for the year ended December 31, 2010; and
  - (e) Embassy Suites represents one of 82 hotels in which Felcor held an ownership interest as of December 31, 2010;
9. the Filer requested the requisite financial information for Embassy Suites in order to prepare the financial statements required under section 8.4 of NI 51-102; the Filer was advised that Felcor does not operate its hotels as a stand-alone business or division of its operations, and does not maintain separate financial records for Embassy Suites; accordingly, the Filer is unable to

prepare the financial statements required under section 8.4 of NI 51-102 for inclusion in the BAR;

10. it is impracticable to prepare “carve-out” financial statements for Embassy Suites because Felcor’s business is conducted as one reportable segment and Felcor did not maintain separate financial records for Embassy Suites;
11. in lieu of the financial statements required by section 8.4 of NI 51-102 , the Filer will include in the BAR for Embassy Suites the following alternate financial and other disclosure:
  - (a) an audited statement of assets acquired and liabilities assumed as of the date of acquisition;
  - (b) the appraisal (the Appraisal) dated June 8, 2011, prepared by CB Richard Ellis (the Appraiser) addressed to Wells Fargo Retechs, the Filer’s mortgage lender; and
  - (c) a property condition report (the PCR) dated March 28, 2011, as revised June 16, 2011, prepared by Eckland Consultants Inc. addressed to Felcor;(collectively, (a) to (c) are referred to as the Alternate Disclosure);
12. the Filer formed its decision to purchase the property based, in part, on the information contained in the Appraisal and the PCR; the Appraisal contains additional information about Embassy Suites, including capital improvements, operating history, operating forecast, and comparables; the PCR contains additional information about Embassy Suites, including an assessment of the condition of the property, the general physical condition of improvements on the property, and physical deficiencies and issues identified with costs;
13. the reported analyses, opinions, and conclusions were developed, and the Appraisal was prepared, in conformance with the Appraiser’s interpretation of the guidelines and recommendations set forth in the Uniform Standards of Professional Appraisal Practice of the Appraisal Institute, a global association of professional real estate appraisers, the requirements of the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute, and the U.S. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and Title XI Regulations; in addition, the signatories on the Appraisal have completed the requirements of the continuing education program of the Appraisal Institute and The Texas Appraiser Licensing and Certification Act;

14. the Filer's due diligence process also included the retention of Maverick Management Ltd. (Maverick), a division of the O'Neill group, as well as a consultant, Mr. Carl Johnson, to assist with financial and other due diligence on Embassy Suites; the O'Neill Group has a long and successful history of hotel management and Mr. Johnson is an experienced hotel controller and familiar with the Dallas-Fort Worth area; Mr. Johnson assisted the Filer with completing the financial due diligence on Embassy Suites and examined major areas of the hotel's operations, including but not limited to accounting, staffing, oversight over mechanical and maintenance items, marketing and promotion, insurance, and overall impressions; in addition to the Appraisal and PCR, the Filer based its decision to acquire Embassy Suites on:
- (a) the information and review of other detailed reports received by it and Maverick; and
  - (b) the Filer's examinations of the property and records, including but not limited to invoices, ledgers, receivables reports, operating and expense reports, payables reports, tax information, revenue reports, taxes, insurance, and employee information;
15. apart from the requirement to include the financial statements required under section 8.4 of NI 51-102 for the acquisition of Embassy Suites, the Filer is otherwise able to prepare and file the BAR in accordance with NI 51-102, which will include the Alternate Disclosure described above;
16. other than the failure to file the BAR and a business acquisition report for the acquisition of an interest in Grand Parkway, located in Katy, Texas, the Filer is not in default of any requirement of Canadian securities laws; and
17. the Filer acknowledges that any right of action available to any person, company, or securities regulatory authority against the Filer for failure to file the BAR by the filing deadline of November 9, 2011, is not terminated or altered as a result of this decision.

### **Decision**

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

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted with respect to the BAR for Embassy Suites, provided the BAR includes the Alternate Disclosure and otherwise complies with applicable BAR requirements.

Peter Brady  
Director, Corporate Finance  
British Columbia Securities Commission