

2005 BCSECCOM 644

October 17, 2005

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, s. 4.5 – certification requirements - An issuer wants relief from the requirements in Parts 2 and 3 of MI 52-109 to file annual and interim certificates - An issuer of asset-backed securities has been exempted from filing interim and annual financial statements provided it files alternative information; the issuer wants to file modified certificates

Applicable British Columbia Provisions

Multilateral Instrument 52-109, Parts 2 & 3, s. 4.5

In the Matter of
the Securities Legislation
of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova
Scotia, New Brunswick 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 Falcon Trust/Fiducie Falcon
(the “Filer”)

MRRS Decision Document

Background

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 of the Jurisdictions (the “Legislation”) for an exemption from the requirements in Multilateral Instrument 52-109 – *Certification of Disclosure in Issuers' Annual and Interim Filings* (“MI 52-109”) to file interim certificates and annual certificates, subject to certain conditions (the “Requested Relief”).

Under the Mutual Reliance Review System for Exemptive Relief Applications:

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1. the Ontario Securities Commission is the principal regulator for this application; and
2. 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

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

1. The Filer is a special purpose vehicle created pursuant to a declaration of trust made as of July 10, 2002 under the laws of the Province of Ontario, the beneficiary of which is a charity registered under the *Income Tax Act* (Canada). The only security holders of the Filer are and will be the holders (the “Certificateholders”) of its asset-backed securities (the “Certificates”).
2. The head office of the Filer is located in Toronto, Ontario. The issuer trustee (the “Issuer Trustee”) is CIBC Mellon Trust Company, whose registered and principal office is located in Toronto, Ontario. The head office of Scotia Capital Inc., the administrative agent of the Filer, is also located in Toronto, Ontario.
3. The financial year-end of the Filer is December 31.
4. The Filer filed short form prospectuses (collectively, the “Prospectuses”) dated October 4, 2002 and January 12, 2004 with each of the Canadian provincial securities regulatory authorities for the issuance of approximately \$147,000,000 and \$172,645,950, respectively, aggregate principal amount of Commercial Mortgage Pass-Through Certificates, Series 2002-SMU and Series 2003-SMU, respectively (collectively, the “Issued Certificates”) and received receipts for the Prospectuses from each of the Canadian provincial securities regulatory authorities.
5. The Filer is a reporting issuer, or the equivalent, in each of the provinces of Canada that provides for a reporting issuer regime.
6. Pending this decision, the Filer has complied with the alternative filings as contemplated by this decision by filing an annual certificate for the fiscal year ended December 31, 2004 (the “2004 Fiscal Year”) in the form set out in Schedule “A” to this decision and interim certificates for the interim periods ended March 31, 2005 (the “2005 First Quarter”) and June 30, 2005

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(the “2005 Second Quarter”) in the form set out in Schedule “B” to this decision. Accordingly, the Filer has not filed an annual certificate for the 2004 Fiscal Year or interim certificates for the 2005 First Quarter or the 2005 Second Quarter in the forms of Form 52-109 FT1 or Form 52-109FT2, respectively, as specified in MI 52-109.

7. To the Filer’s knowledge, other than as set out in paragraph 6 above, it is currently not in default of any applicable requirement under the securities legislation thereunder.
8. The Filer is a “venture issuer” as defined in National Instrument 51-102 – *Continuous Disclosure Obligations* (“NI 51-102”).
9. As a special purpose vehicle, the Filer does not carry on any activities except in respect of the issuance of Certificates, the origination of commercial mortgages and the purchase and acquisition of assets in connection therewith (the “Securitized Assets”).
10. The Filer has no material assets or liabilities other than its rights and obligations arising from originating commercial mortgages and acquiring Securitized Assets in respect of the Issued Certificates.
11. Each particular series or class of Certificates, including each of the two series of Issued Certificates, will (and does, in the case of the two series of Issued Certificates) represent undivided co-ownership interests in a particular pool of Securitized Assets.
12. Certificateholders only have recourse to the particular pool of Securitized Assets securing their series and class of Certificates and do not have recourse to any assets of the Filer.
13. Pursuant to an MRRS decision document dated November 22, 2002 (the “2002 Decision”) and a decision document dated August 30, 2005 of the New Brunswick Securities Commission (together with the 2002 Decision, the “Previous Decisions”), the Filer is exempted, on certain terms and conditions, from the requirements of the securities legislation in the Jurisdictions concerning, *inter alia*, the preparation, filing and delivery of interim and annual financial statements (the “Financial Statements”).
14. Pursuant to Section 13.2 of NI 51-102, the Filer has delivered a notice dated May 28, 2004 to the Decision Makers stating that it intends to rely on the 2002 Decision to the same extent and on the same terms as contained therein.

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15. For each offering of Certificates, the discrete pool of Securitized Assets will be deposited with a custodian pursuant to a servicing agreement or other custodial arrangement (each a “Servicing Agreement”) that the Filer will enter into which will govern the rights of Certificateholders and their respective entitlement to the Securitized Assets.
16. Each Servicing Agreement will also provide for the fulfilment of certain administrative functions relating to the Certificates, such as the maintenance of a register of holders of Certificates and the preparation of periodic reports (the “Reports”) to Certificateholders containing financial and other information in respect of the applicable pool of Securitized Assets and Certificates, by the master servicer (the “Master Servicer”), the special servicer (the “Special Servicer”) and the reporting agent (the “Reporting Agent”) for such pool of Securitized Assets.
17. Pursuant to the Servicing Agreement in respect of the Issued Certificates, respectively, and as contemplated in the Previous Decisions:
 - (a) the Master Servicer shall deliver annually statement of compliance signed by a senior officer of each applicable Master Servicer or other party acting in a similar capacity on behalf of the Filer for the applicable pool of Securitized Assets (the “Compliance Certificate”), certifying that the Master Servicer of such other party acting in a similar capacity has fulfilled all of its obligations under the related Servicing Agreement during the year or, if there has been a default in the fulfilment of any such obligation, specifying each such default and the status thereof; and
 - (b) the Master Servicer shall obtain annually an accountant’s report in form and content acceptable to the Decision Makers prepared by a firm of independent public or chartered accountants acceptable to the Decision Makers (the “Accountants’ Report”) respecting compliance by the Master Servicer or other party acting in a similar capacity on behalf of the Filer with minimum servicing standards identified in the Uniform Single Attestation Program (USAP) or such other servicing standard acceptable to the Decision Makers (in all material respects, except for such material exceptions or errors in records that, in the opinion of such firm, are required to be reported).
18. In accordance with the Previous Decisions, within 60 days of the end of each interim period (as defined in NI 51-102) of the Filer, the Filer or its duly appointed representative or agent will post on the applicable website or

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mail to Certificateholders who so request and will contemporaneously file through SEDAR management's decision and analysis ("MD&A") with respect to the applicable pool of Securitized Assets included in the Filer's Annual Information Form ("AIF") filed with the Decision Makers (as supplemented by any short form prospectuses filed by the Filer during the intervening period).

19. In accordance with the Previous Decisions, within 140 days of the end of each financial year of the Filer, the Filer or its duly appointed representative or agent will post on the applicable website or mail to Certificateholders who so request and will contemporaneously file through SEDAR:
 - (a) MD&A with respect to the applicable pool of Securitized Assets included in the Filer's AIF filed with the Decision Makers (as supplemented by any short form prospectuses filed by the Filer during the intervening period);
 - (b) the Compliance Certificate referenced in paragraph 17(a) above for the applicable pool of Assets, certifying that the Master Servicer or such other party acting in a similar capacity has fulfilled all of its obligations under the related Pooling and Servicing Agreement during the year or, if there has been a default, specifying each such default and the status thereof; and
 - (c) the Accountants' Report referenced in paragraph 17(b) above respecting compliance by the Master Servicer (or such other party acting in a similar capacity) with the Uniform Single Attestation Program (USAP) (except that the Master Servicer does not have to have in effect a fidelity bond and errors and omissions policy required under Article VII of the USAP so long as it maintains a minimum rating of "A" (or its equivalent) from prescribed rating organizations) or such other servicing standard acceptable to the Decision Makers.

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.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted, provided that:

1. the Filer is not required to prepare, file and deliver Financial Statements under the Legislation, whether pursuant to exemptive relief or otherwise;

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2. for each financial year of the Filer, within 140 days of the end of the financial year, the Filer or its duly appointed representative or agent will file through SEDAR an annual certificate in the form set out in Schedule “A” of this MRRS decision document and personally signed by a person who, at the time of filing of the annual certificate, is a senior officer of the Filer, a Servicer or an administrative agent of the Filer;
3. if the Filer voluntarily files an AIF for a financial year after it has filed the annual certificate referred to in paragraph 2 above for the financial year, the Filer will file through SEDAR a second annual certificate that:
 - (a) is in the form set out in Schedule “A” of this MRRS decision document;
 - (b) is personally signed by a person who, at the time of filing of the second annual certificate, is a senior officer of the same person or company of which the senior officer who signed the annual certificate referred to in paragraph 2 above is an officer; and
 - (c) certifies the AIF in addition to the other documents identified in the annual certificate;
4. for each interim period, within 60 days of the end of the interim period, the Filer or its duly appointed representative or agent will file through SEDAR an interim certificate in the form set out in Schedule “B” of this MRRS decision document and personally signed by a person who, at the time of filing of the interim certificate, is a senior officer of the Filer, a Servicer or an administrative agent of the Filer; and
5. the Requested Relief will cease to be effective in a Jurisdiction on the earlier of:
 - (a) June 1, 2008; and
 - (b) the date on which a rule regarding the continuous disclosure requirements for issuers of asset-backed securities comes into force in a Jurisdiction.

Erez Blumberger
Assistant Manager, Corporate Finance
Ontario Securities Commission

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SCHEDULE "A"

CERTIFICATION OF ANNUAL FILINGS FOR ISSUERS OF ASSET-BACKED SECURITIES

I, *<identify (i) the certifying individual, (ii) his or her position in relation to the issuer and (iii) the name of the issuer>*, certify that:

1. I have reviewed the following documents of *<identify issuer>* (the issuer):
 - (a) the servicer reports for each month in the financial year ended *<insert financial year end>* (the servicer reports);
 - (b) annual MD&A in respect of the issuer's pool(s) of assets for the financial year ended *<insert the relevant date>* (the annual MD&A);
 - (c) AIF for the financial year ended *<insert the relevant date>* (the AIF); [if applicable] and
 - (d) each annual statement of compliance regarding fulfillment of the obligations of the servicer(s) under the related servicing agreement(s) for the financial year ended *<insert the relevant date>* (the annual compliance certificate(s)),

(the servicer reports, the annual MD&A, the AIF [if applicable] and the annual compliance certificate(s) are together the annual filings);
2. Based on my knowledge, the annual filings, taken as a whole, do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make the statements not misleading in light of the circumstances under which they were made, with respect to the periods covered by the annual filings;
3. Based on my knowledge, all of the distribution, servicing and other information and all of the reports on assessment of compliance with servicing criteria for asset-backed securities and the annual accountant's report respecting compliance by the servicer(s) with servicing criteria for asset-backed securities required to be filed under the decision(s) *<identify the decision(s)>* as of the date of this certificate, other than material change reports and press releases, have been filed with the securities regulatory authorities through SEDAR;
4. Option #1 *<use this alternative if a servicer is providing the certificate>*

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I am responsible for reviewing the activities performed by the servicer(s) and based on my knowledge and the compliance review(s) conducted in preparing the annual compliance certificate(s), and except as disclosed in the annual filings, the servicer(s) [has/have] fulfilled [its/their] obligations under the servicing agreement(s); and

Option #2 *<use this alternative if the Issuer or the administrative agent is providing the certificate>*

Based on my knowledge and the annual compliance certificate(s), and except as disclosed in the annual filings, the servicer(s) [has/have] fulfilled [its/their] obligations under the servicing agreement(s); and

5. The annual filings disclose all material instances of noncompliance with the servicing criteria based on the [servicer's/servicers'] assessment of compliance with such criteria.

[In giving the certifications above, I have reasonably relied on information provided to me by the following unaffiliated parties *<insert name of issuer, servicer, sub-servicer, co-servicer, administrative agent, reporting agent or trustee >.*]

Date: *<insert date of filing>*

[Signature]

[Title]

< indicate the capacity in which the certifying officer is providing the certificate >

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SCHEDULE "B"

CERTIFICATION OF INTERIM FILINGS FOR ISSUERS OF ASSET-BACKED SECURITIES

I, *<identify (i) the certifying individual, (ii) his or her position in relation to the issuer and (iii) the name of the issuer>*, certify that:

1. I have reviewed the following documents of *<identify issuer>* (the issuer):
 - (a) the servicer reports for each month in the interim period ended *<insert relevant date>* (the servicer reports); and
 - (b) interim MD&A in respect of the issuer's pool(s) of assets for the interim period ended *<insert the relevant date>* (the interim MD&A),

(the servicer reports and the interim MD&A are together the interim filings);
2. Based on my knowledge, the interim filings, taken as a whole, do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make the statements not misleading in light of the circumstances under which they were made, with respect to the periods covered by the interim filings; and
3. Based on my knowledge, all of the distribution, servicing and other information required to be filed under the decision(s) *<identify the decision(s)>* as of the date of this certificate, other than material change reports and press releases, have been filed with the securities regulatory authorities through SEDAR.

[In giving the certifications above, I have reasonably relied on information provided to me by the following unaffiliated parties *<insert name of issuer, servicer, sub-servicer, co-servicer, administrative agent, reporting agent or trustee >*.]

Date: *<insert date of filing>*

[Signature]

[Title]

< indicate the capacity in which the certifying officer is providing the certificate >