

## **Headnote**

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions -- Relief granted from the prospectus requirement to distributions that are steps in a proposed reorganization of a fund -- proposed reorganization intended to ensure fund will satisfy the definition of "real estate investment trust" for purposes of tax law -- proposed reorganization does not require unitholder approval and has been approved by the fund's trustees as being in the best interests of the fund -- proposed transaction does not change unitholders' ownership of the fund nor does it change the assets and liabilities of the fund on a consolidated basis -- fund unitholders are not making an investment decision in respect of the fund -- relief subject to certain conditions.

## **Applicable Legislative Provisions**

Securities Act, R.S.O. 1990, c. S.5, as am., ss. 53, 74(1).

**November 1, 2013**

**IN THE MATTER OF**

**THE SECURITIES LEGISLATION OF**

**ONTARIO**

**(the Jurisdiction)**

**AND**

**IN THE MATTER OF**

**THE PROCESS FOR EXEMPTIVE RELIEF**

**APPLICATIONS IN MULTIPLE JURISDICTIONS**

**AND**

**IN THE MATTER OF**

**CALLOWAY REAL ESTATE INVESTMENT TRUST**

**(the "Filer")**

**DECISION**

## **Background**

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) that the Prospectus Requirement shall not apply to the following distributions that are steps in the proposed reorganization (the **Proposed Transaction**) of the Filer:

(a) the distribution by the Filer to the unitholders of the Filer of units of MFT (the **MFT Units**);  
and

(b) the distribution by MFT of the units of the Filer (the **Filer Units**) to the Filer and unitholders of the Filer in satisfaction of the redemption price for the MFT Units.

(collectively, the **Exemption Sought**).

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

(a) the Ontario Securities Commission (the **OSC**) is the principal regulator for this application, and

(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 each of the other provinces and territories of Canada (together with Ontario, the **Jurisdictions**).

### **Interpretation**

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

In this decision, the following additional terms have the following meanings:

"**NI 41-101**" means National Instrument 41-101 -- *General Prospectus Requirements*;

"**OSA**" means the *Securities Act* (Ontario);

"**Prospectus Requirement**" means the provision of subsection 53(1) of the OSA, and the equivalent provisions of the securities legislation in the non-principal jurisdictions and the general prospectus requirements stipulated in NI 41-101, that prohibits a person or company from trading in a security unless the person or company satisfies the requirements of section 53 of the OSA and NI 41-101; and

"**Tax Act**" means the *Income Tax Act* (Canada).

### **Representations**

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

1. The Filer is a mutual fund trust within the meaning of the Tax Act which was established to, among other things, invest directly and indirectly in income producing rental properties in Canada and other investments.

2. The principal office of the Filer is located at 700 Applewood Crescent, Suite 200, Vaughan, Ontario.

3. The book value of the assets of the Filer on a consolidated basis under International Financial Reporting Standards (**IFRS**) as of June 30, 2013 was approximately \$6.84 billion. The assets of the Filer consist primarily of the directly or indirectly held beneficial interests in 117 commercial shopping mall properties located in Canada.

4. Under the terms of the amended and restated declaration of trust dated May 10, 2012 governing the Filer, as it may be further amended and restated from time to time (the **Declaration of Trust**), Filer may issue an unlimited number of Filer Units and special voting units of the Filer (the **Special Voting Units**).

5. All Filer Units are of the same class with equal rights and privileges. Each Filer Unit represents an equal fractional undivided beneficial interest in the Filer and all Filer Units participate pro rata in any distributions by the Filer and, in the event of termination or winding-up of the Filer, in the net assets of the Filer remaining after satisfaction of all liabilities. Each Filer Unit is redeemable at the option of the holder, is transferable, fully paid and non-assessable and entitles the holder thereof to one vote at all meetings of unitholders of the Filer for each Filer Unit held.

6. Special Voting Units entitle the holder of an exchangeable security to such number of votes at meetings of unitholders as is equal to the number of Filer Units into which such exchangeable security (other than an exchangeable security owned by the Filer or any subsidiary of the Filer) is then exchangeable or convertible for. For greater certainty, holders of Special Voting Units are not entitled, by virtue of their holding of Special Voting Units, to distributions of any nature whatsoever from the Filer nor do they have any beneficial interest in any assets of the Filer on termination or winding-up of the Filer. Special Voting Units are not transferable without consent of the Filer and are automatically redeemed and cancelled upon the exercise or conversion of such exchangeable security. Special Voting Units are not listed on any stock exchange.

7. The Filer Units are traded on the Toronto Stock Exchange (**TSX**) under the symbol CWT.UN. The closing trading price of the Filer Units on the TSX on September 13, 2013 was \$24.69, representing a market capitalization for the Filer of approximately \$2,840,341,304 at that date.

8. The Filer Units are widely held by the public other than Mitchell Goldhar (the **Investor**), who owns more than 10% of the Filer Units and Special Voting Units. To the knowledge of the trustees of the Filer, no other person beneficially owns, directly or indirectly, or exercises control or direction over, more than 10% of the issued and outstanding Filer Units.

9. The Investor beneficially owns or controls a number of the outstanding Filer Units which, together with the securities he beneficially owns or controls which are exchangeable at his option for Filer Units at no additional consideration and the associated Special Voting Units, represent approximately a 20.88% voting interest in the Filer. Provided that the Investor owns more than 20% of the Filer Units, the Investor is entitled to be issued additional Special Voting Units such that the Investor controls 25% of the voting rights in the Filer. The Investor is being treated identically to all other unitholders in the Proposed Transaction.

10. The Filer owns all of the issued and outstanding units of Calloway Holdings Trust (**Sub Trust**), an unincorporated open-ended trust established under the laws of the Province of Alberta.

11. Sub Trust qualifies as a "unit trust" pursuant to paragraph 108(2)(a) of the Tax Act and was formed to, among other things, invest in securities of other entities. It currently owns securities of Calloway GP Inc. (**GP Inc.**), Calloway LP II Inc. (**GP II Inc.**), Calloway GP III Inc. (**GP III**

**Inc.**), Calloway Limited Partnership (**LP**), Calloway Limited Partnership II (**LP II**) and Calloway Limited Partnership III (**LP III**).

12. Sub Trust has at least one trustee who is resident in Canada.

13. Under the terms of the declaration of trust of Sub Trust, Sub Trust may issue an unlimited number of units of Sub Trust (the **Trust Units**). Each Trust Unit represents an equal undivided beneficial interest in any distribution by Sub Trust, whether of income, net realized capital gains or other amounts, and in the event of termination or winding-up of Sub Trust, in the net assets of Sub Trust remaining after satisfaction of all liabilities. Each Trust Unit is redeemable at the option of the holder and entitles the holder thereof to one vote at all meetings of holders of Trust Units.

14. The book value of the assets of Sub Trust on a consolidated basis under IFRS as of June 30, 2013 was approximately \$1.95 billion. Sub Trust currently owns cash, all of the issued and outstanding Class A units of LP (the **LP Class A Units**), Class A units of LP II (the **LP II Class A Units**) and Class A units of LP III (the **LP III Class A Units**) and all of the issued and outstanding shares of GP Inc., GP II Inc. and GP III Inc.

15. Each of LP, LP II and LP III have limited partners in addition to Sub Trust; however, such limited partners own a different class of limited partnership units than Sub Trust (the other limited partners own Class B, C, D or E units, as applicable).

16. Each of LP, LP II and LP III holds a portfolio of assets that consists principally of real property.

17. The Proposed Transaction is being undertaken in order to ensure that the Filer continues to qualify as a "real estate investment trust" under the Tax Act. The steps of the Proposed Transaction are set out in Paragraphs 12 to 25 below.

18. All amounts owed by Sub Trust to LP, LP II, LP III or the Filer or amounts owed by LP, LP II, LP III or the Filer to Sub Trust (the **Intercompany Amounts**) will be satisfied in full by the payment of cash, or alternatively, by the issuance of additional securities (Trust Units, LP Class A Units, LP II Class A Units or LP III Class A Units, as applicable), having a fair market value equal to the Intercompany Amount at issue. Following such payment or issuance, all Intercompany Amounts will be settled and extinguished.

19. A Canadian resident third party settlor will settle a trust to be formed under the laws of the Province of Alberta (**MFT**) with a nominal cash contribution in exchange for one MFT Unit.

20. The Filer will subscribe for MFT Units for nominal cash consideration. The initial MFT Unit that will be issued to the third party settlor, as described in Paragraph 19, will be repurchased by MFT for an amount equal to the cash received from the third party settlor such that the Filer will be the sole unitholder of MFT.

21. Pursuant to the declaration of trust of MFT, MFT will be authorized to issue an unlimited number of MFT Units with the following terms and conditions:

- (a) Each MFT Unit will represent an equal undivided interest in MFT;
- (b) Each MFT Unit will participate pro-rata in any distributions;
- (c) Each MFT Unit will participate pro-rata in the net assets of MFT in the event of termination or winding-up of MFT;
- (d) Each MFT Unit will entitle the holder thereof to one vote at all meetings of holders of MFT Units;
- (e) Each MFT Unit will be redeemable at the option of MFT for any amount equal to the fair market value of the MFT Unit. The redemption price will be payable in cash or Filer Units; and
- (f) Each MFT Unit will be redeemable at the option of the holder at fair market value. The redemption price will be payable in cash or Filer Units.

22. The declaration of trust of MFT will provided that the only undertaking of MFT will be activities described in paragraph 132(6)(b) of the Tax Act and its terms will be substantially the same as the terms of the declaration of trust of SubTrust. The trustee of MFT will be an individual resident in Canada and will not be a director of any of GP Inc. GP II Inc. or GP III Inc.

23. Pursuant to an agreement to be entered into between Sub Trust and MFT, immediately prior to the point in time at which the transfer of assets described in Paragraph 27 will occur (the **Transfer Time**), Sub Trust will transfer all of the cash, LP Class A Units, LP II Class A Units, LP III Class A Units and the shares of GP Inc., GP II Inc. and GP III Inc. it owns to MFT for no consideration.

24. Following the transfer described in Paragraph 23, the Filer will own all of the Trust Units and all of the MFT Units and will continue to indirectly hold all of the cash that was previously held by Sub Trust, the issued and outstanding LP Class A Units, LP II Class A Units, LP III Class A Units and all of the issued and outstanding shares of GP Inc., GP II Inc. and GP III Inc. by reason of its ownership of all of the MFT Units. Sub-Trust will then be wound-up.

25. The Filer will distribute a certain number of its MFT Units acquired in Paragraph 20 to all of the unitholders of the Filer on a pro-rata basis as a distribution of capital so that MFT can qualify as a mutual fund trust for purposes of the Tax Act. MFT will remain as a subsidiary of the Filer after such distribution until its winding up described in Paragraph 31 below. It is expected that less than 3% of the MFT Units will be distributed to unitholders of the Filer and that the MFT Units distributed per Filer Unit will represent a value of less than \$0.70 per outstanding Filer Unit.

26. The provisions in the Declaration of Trust in respect of the consolidation of Filer Units will be amended to provide for the immediate consolidation in Paragraph 30 of Filer Units issued in connection with the Reorganization under paragraph 28. The trustees are authorized to make such amendment to the Declaration of Trust.

27. Also at the Transfer Time:

(a) MFT will transfer all of the cash, LP Class A Units, LP II Class A Units, LP III Class A Units and the shares of GP Inc., GP II Inc. and GP III Inc. it acquired in Paragraph 20 to the Filer; and

(b) as consideration for the transfer, the Filer will issue Filer Units to MFT having an aggregate fair market value equal to the aggregate fair market value of the assets transferred to the Filer. At the Transfer Time, MFT will have no material outstanding liabilities and the only material assets of MFT will be cash, all of the issued and outstanding LP Class A Units, LP II Class A Units, LP Class III A Units and all of the issues and outstanding shares of GP Inc., GP II Inc. and GP III Inc.

28. Immediately after the Transfer Time, MFT will redeem all of the issued and outstanding MFT Units held by the Filer and the unitholders of the Filer, except for one MFT Unit which the Filer will continue to hold until the winding-up of MFT described in Paragraph 31. MFT will satisfy the redemption price for such MFT Units by transferring the Filer Units acquired in Paragraph 27 to the Filer and unitholders of the Filer. No consideration other than the Filer Units will be received by the Filer or the unitholders of the Filer on the redemption of the MFT Units. The Filer Units that will be received by the Filer upon the redemption of the MFT Units will be cancelled upon receipt.

29. The MFT Units and the Filer Units issuable in the Proposed Transaction will not be posted for trading on any stock exchange.

30. Immediately after the transactions described in Paragraph 28, pursuant to the terms of the Declaration of Trust, the outstanding Filer Units held by the unitholders of the Filer will be consolidated on a basis such that the number of Filer Units outstanding following such consolidation will be equal to the number of Filer Units outstanding immediately before the Proposed Transaction. The unitholders of the Filer will not receive, and shall not be entitled to receive, any proceeds as a consequence of the consolidation.

31. Subsequent to the filing of the necessary elections under the Tax Act in respect of the Proposed Transaction, MFT will be wound up. The one MFT Unit held by the Filer will be cancelled on the wind-up for no consideration.

32. The Proposed Transaction does not require the approval of unitholders of the Filer.

33. The Proposed Transaction has been approved by the trustees of the Filer as being in the best interest of the unitholders of the Filer.

34. The Proposed Transaction does not change the unitholders' ownership of the Filer nor does it change the assets or liabilities of the Filer on a consolidated basis.

35. There will not be any Canadian tax payable by unitholders of the Filer in respect to the Proposed Transaction other than the immaterial amount of withholding tax that will be payable by non-resident unitholders of the Filer on the distribution of MFT Units. The Filer will pay and remit to the Receiver General, on behalf of each unitholder of the Filer that is non-resident, an amount equal to the amount required by the Tax Act to be withheld on behalf of non-resident unitholders of the Filer.

36. The Proposed Transaction will be described to unitholders of the Filer through a press release but is not anticipated to be reflected in a material change report as the Proposed Transaction does not constitute a material change.

### **Decision**

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:

(a) The MFT Units that are distributed by the Filer to the unitholders of the Filer in the Proposed Transaction shall be immediately redeemed by MFT in accordance with the terms of the MFT Units in exchange for Filer Units then held by MFT;

(b) The Filer Units that are issued to unitholders of the Fund as a result of the redemption of the MFT Units are immediately consolidated without payment of consideration such that the number of Filer Units to be held by each unitholder of the Filer immediately after the Proposed Transaction will be equal to the number of Filer Units held immediately before the Proposed Transaction;

(c) The total number of Filer Units outstanding before and after the Proposed Transaction shall be the same so that the Proposed Transaction does not change the unitholders' ownership of the Filer; and

(d) The MFT Units and the Filer Units to be issued will not be posted for trading on any stock exchange and each of the MFT Units and Filer Units to be issued as part of the Proposed Transaction will only be outstanding for a moment in time, and in any event not beyond one day.

"Deborah Leckman"

Commissioner

Ontario Securities Commission

"Judith Robertson"

Commissioner

Ontario Securities Commission