

B.1.2 Multilateral CSA Notice – Repeal of National Instrument 81-104 Alternative Mutual Funds



Multilateral CSA Notice
Repeal of
National Instrument 81-104 *Alternative Mutual Funds*

August 31, 2023

Introduction

The Canadian Securities Administrators (**CSA**), except the Autorité des marchés financiers (**AMF**), (the **Participating Jurisdictions** or **we**) are repealing National Instrument 81-104 *Alternative Mutual Funds* (**NI 81-104**) in its entirety (the **Repeal**).

As a result of prior policy work aimed at modernizing investment fund regulation, most operational aspects of NI 81-104 have been migrated to National Instrument 81-102 *Investment Funds* (**NI 81-102**). Part 4 of NI 81-104, which is focused on proficiency requirements (the **Proficiency Requirements**) for mutual fund restricted individuals (**MFRIs**) for the distribution of alternative mutual funds (as defined in NI 81-102), is the only remaining element.

CSA members issued harmonized blanket orders (the **Blanket Orders**) to provide additional proficiency course options as the course options prescribed by the Proficiency Requirements pre-date the introduction of the alternative mutual funds regime and do not address the specific differences between conventional mutual funds and alternative mutual funds. The Blanket Orders have been codified by Policy No. 11 *Proficiency Standards for the Sale of Alternative Mutual Funds* (**Policy No. 11**) of the Mutual Fund Dealers Association of Canada (**MFDA**). As of January 1, 2023, Policy No. 11 is known as Interim Mutual Fund Dealer Rule 1000 *Proficiency Standards for the Sale of Alternative Mutual Funds* (**Rule 1000**) of the Canadian Investment Regulatory Organization (**CIRO**).¹ Given the overlap between Rule 1000 and the Proficiency Requirements set out in Part 4 of NI 81-104, we have determined that NI 81-104 is no longer necessary.

The AMF is not proposing to repeal NI 81-104 and will continue to rely on its local blanket order (**AMF Blanket Order**).² It is appropriate for the Proficiency Requirements to remain applicable in Québec as CIRO has issued a decision exempting all mutual fund dealers registered in Québec as of January 1, 2023 from the application of its rules for their activities in Québec, except for its operating rules, during the transition phase of the AMF's transition plan for Québec mutual fund dealer membership in CIRO.³ The AMF will consider repealing NI 81-104 and revoking the AMF Blanket Order following the start of the permanent phase of the AMF's transition plan for Québec mutual fund dealer membership, as it is anticipated that mutual fund dealers registered in Québec will be subject to equivalent requirements provided by CIRO rules at that time.

The British Columbia Securities Commission (**BCSC**) anticipates that the Repeal will be effected through an Order in Council of the government of British Columbia (**BC**), and would be effective at the same time as the Repeal in the other CSA jurisdictions, except Québec as discussed above.

In some jurisdictions, ministerial approvals are required for the implementation of the Repeal. Provided all ministerial approvals are obtained, the Repeal will come into force on January 29, 2024.

Except in BC, the text of the Repeal is contained in Annex B of this Notice and will also be available on the websites of the following Participating Jurisdictions:

¹ As of January 1, 2023, CIRO is the national self-regulatory organization that oversees all investment dealers, mutual fund dealers and trading activity on Canada's debt and equity marketplaces. CIRO is carrying on the regulatory functions of the Investment Industry Regulatory Organization of Canada and the MFDA.

² Décision n° 2021-PDG-0003 Décision générale relative à des dispenses de certaines obligations prévues au Règlement 81-104 sur les organismes de placement collectif alternatifs issued on January 27, 2021. Available (in French only) at <https://lautorite.qc.ca/fileadmin/lautorite/reglementation/valeurs-mobilieres/81-104/2021-01-28/2021-PDG-0003-decision-generale-opc-alternatif-fr.pdf>.

³ AMF Notice of publication - Regulation to amend Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations – Amendments relating to the transition for Québec mutual fund dealers to the new SRO, November 24, 2022 available at <https://lautorite.qc.ca/fileadmin/lautorite/reglementation/valeurs-mobilieres/31-103/2022-11-24/2022nov24-31-103-avis-publication-nouvel-oar-en.pdf>.

www.asc.ca
www.fcaa.gov.sk.ca
www.mbsecurities.ca
www.osc.ca
www.fcnb.ca
nssc.novascotia.ca

In BC, because the Repeal is anticipated to be made through an Order in Council, the BCSC would publish any Order in Council at the time it becomes effective.

Substance and Purpose

The Proficiency Requirements apply to MFRIs who trade in securities of alternative mutual funds. However, very few of the existing MFRIs meet the Proficiency Requirements and the existing course options contain little material on alternative mutual funds. The Blanket Orders offer a temporary exemption from the Proficiency Requirements by providing additional course options to satisfy the Proficiency Requirements for trades in alternative mutual fund securities. However, as the Blanket Orders have been codified by Rule 1000, NI 81-104 is no longer necessary in the Participating Jurisdictions.

The Repeal of the Proficiency Requirements will allow MFRIs to continue to be able to rely on the appropriate course options to meet the proficiency requirements to distribute alternative mutual fund securities pursuant to Rule 1000. As the Proficiency Requirements created a regulatory burden for MFRIs and limited retail investor access to alternative investment strategies, the Repeal will also result in regulatory burden reduction.

The purpose of the Repeal, together with Rule 1000, is to modernize the Proficiency Requirements by providing robust dealer proficiency standards applicable to MFRIs who distribute alternative mutual funds. Providing MFRIs with additional proficiency course options that offer updated and relevant information on alternative mutual funds helps facilitate access to alternative investment strategies for retail investors, while also maintaining investor protection. As a result, retail investors may be able to benefit from additional portfolio diversification opportunities through better access to alternative investment strategies.

Background

The Repeal is the final step of the CSA's Modernization of Investment Fund Product Regulation Project (the **Modernization Project**) relating to the establishment of a regulatory framework for alternative mutual funds.

The mandate of the Modernization Project has been to review the parameters of product regulation that apply to publicly offered investment funds (both mutual funds and non-redeemable investment funds) and to consider whether our current regulatory approach sufficiently addresses product and market developments in the Canadian investment fund industry, and whether it continues to adequately protect investors.

Introduction of Alternative Mutual Funds

On March 27, 2013, the CSA first published a Notice and Request for Comment, which outlined a proposed regulatory framework for alternative mutual funds (the **Proposed Alternative Funds Framework**), including, a series of questions that focused on the broad parameters for such a regulatory framework (the **Framework Consultation Questions**).

On June 25, 2013, CSA Staff Notice 11-324 *Extension of Comment Period* was published to advise that the CSA had decided to consider the Proposed Alternative Funds Framework at a later date, in conjunction with certain investment restrictions for non-redeemable investment funds that we considered to be interrelated with the Proposed Alternative Funds Framework.

On February 12, 2015, CSA Staff Notice 81-326 *Update on an Alternative Funds Framework for Investment Funds* was published to summarize some of the feedback we received in connection with the Framework Consultation Questions.

On September 22, 2016, the CSA published proposed amendments (the **Proposed Amendments**) to codify a number of the parameters and proposals set out in the Proposed Alternative Funds Framework, as well as commentary we received in connection with those proposals. The Proposed Amendments contemplated the repeal of NI 81-104.

On October 4, 2018, the CSA published final amendments (**Alternative Mutual Fund Amendments**) to NI 81-102 that introduced a new category of mutual funds known as "alternative mutual funds" which invest in physical commodities or specified derivatives, and borrow or engage in short selling, in a manner not otherwise permitted for conventional mutual funds under NI 81-102. The Alternative Mutual Fund Amendments moved most of the regulatory framework applicable to commodity pools out of NI 81-104 and into NI 81-102 and renamed these funds as "alternative mutual funds". These amendments aimed to provide retail investors with greater access to alternative investment strategies, while maintaining appropriate protections.

The CSA retained the Proficiency Requirements, with the acknowledgement that alternative mutual funds can be more complex than other types of mutual funds and that additional proficiency may be needed for mutual funds dealers selling these products.

The Proficiency Requirements are the only remaining part in NI 81-104 and the CSA indicated that once the Proficiency Requirements were replaced, the CSA intended to repeal NI 81-104.

CSA Blanket Orders

On January 28, 2021, the CSA issued the Blanket Orders to provide additional proficiency course options to address two issues.⁴ First, to better align proficiency requirements with information on alternative mutual funds, and second, to ensure MFRIs seeking to distribute alternative mutual fund securities have the education, training and experience that is necessary to understand the structure, features and risks of any alternative mutual fund that they may wish to recommend to a client, to support investor protection.

Policy No. 11 (now, Rule 1000)

On November 25, 2021, the MFDA published for comment Policy No. 11 to establish proficiency requirements for the distribution of alternative mutual funds by MFDA Members and Approved Persons. The accompanying MFDA notice indicated that the CSA intended to repeal NI 81-104 when more appropriate proficiency requirements for the distribution of alternative mutual funds are put in place.

Policy No. 11 (now, Rule 1000 of CIRO), which took effect on July 21, 2022, adopted proficiency requirements that are consistent with the Blanket Orders. Policy No. 11 differs from the Blanket Orders in that the proficiency requirements for the distribution of alternative mutual funds sold pursuant to a prospectus are also extended to the distribution of alternative mutual funds sold on a prospectus-exempt basis.

Summary of Written Comments Received by the CSA on the Proposed Amendments

On October 4, 2018, the CSA published a summary of the comments and responses together with the Alternative Mutual Fund Amendments. Annex A provides a reproduction of the excerpts from the summary of comments and responses relating to “Part 4 - Proficiency and Supervisory Requirements” of NI 81-104.

Commenters expressed support for the proposal to repeal Part 4 of NI 81-104, while noting that the CSA should engage with the MFDA to review how the Proficiency Requirements may need to be reconsidered in respect of alternative mutual funds. In response to the comments, the CSA issued the Blanket Orders to provide additional proficiency course options for the distribution of alternative mutual funds and subsequently, the MFDA adopted Rule 1000, which codified the Blanket Orders.

Copies of the comment letters are posted on the website of the Ontario Securities Commission at www.osc.ca.

Adoption of the Repeal

The Blanket Orders provide MFRIs with additional proficiency options for distributing alternative mutual funds. Additional proficiency requirements support appropriate know your product and suitability assessments of alternative mutual funds by MFRIs for their clients. Rule 1000 codifies the Blanket Orders.

Part 4 of NI 81-104 sets out the Proficiency Requirements, but as Part 4 of NI 81-104 is the only remaining part of NI 81-104, and the Proficiency Requirements are now replaced with Rule 1000, NI 81-104 is unnecessary. Therefore, the Participating Jurisdictions are repealing NI 81-104.

Effective Date

The Repeal will come into force on January 29, 2024.

Content of Annexes

The text of the Repeal is contained in Annex B to this Notice and is available on the websites of members of the Participating Jurisdictions.

Annex A: Excerpts from the Summary of Comments and Responses on the CSA Notice and Request for Comment, Modernization of Investment Fund Product Regulation – Alternative Funds re Part 4 of NI 81-104 *Alternative Mutual Funds*

⁴ In Ontario, the blanket relief was issued by Ontario Instrument 81-506 *Temporary Exemptions from National Instrument 81-104 Alternative Mutual Funds* (the **OSC Blanket Order**) with an expiry date of July 28, 2022. On February 24, 2022, the OSC published OSC Rule 81-507 *Extension to Ontario Instrument 81-506 Temporary Exemptions from National Instrument 81-104 Alternative Mutual Funds* to cause the relief provided in the OSC Blanket Order to be in force for an additional 18-month period from July 29, 2022 to January 29, 2024.

B.1: Notices

Annex B: Repeal of National Instrument 81-104 *Alternative Mutual Funds*

Annex C: Local Matters

Questions

Please refer your questions to any of the following:

British Columbia Securities Commission

Noreen Bent
Chief, Corporate Finance Legal Services
British Columbia Securities Commission
Tel: 604-899-6741
Email: nbent@bcsc.bc.ca

Alberta Securities Commission

Jan Bagh
Senior Legal Counsel, Corporate Finance
Alberta Securities Commission
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Senior Legal Counsel, Investment Funds
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Financial and Consumer Affairs Authority of Saskatchewan

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Director, Corporate Finance
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Financial and Consumer Affairs Authority of Saskatchewan
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Manitoba Securities Commission

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B.1: Notices

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ANNEX A

EXCERPTS FROM THE

SUMMARY OF COMMENTS AND RESPONSES ON THE

CSA NOTICE AND REQUEST FOR COMMENT

MODERNIZATION OF INVESTMENT FUND PRODUCT REGULATION –

ALTERNATIVE FUNDS

RE: PART 4 OF NI 81-104 ALTERNATIVE MUTUAL FUNDS

On October 4, 2018, the CSA published final amendments to National Instrument 81-102 *Investment Funds* (**NI 81-102**) that introduced a new category of mutual funds known as “alternative mutual funds”. The following is a reproduction of the excerpts from the summary of comments and responses relating to “Part 4 - Proficiency and Supervisory Requirements” of National Instrument 81-104 *Alternative Mutual Funds*.

Table of Contents	
Part	Title
Part I	Background
Part II	Part 4 – Proficiency and Supervisory Requirements
Part III	List of Commenters
Part I – Background	
<p>On September 22, 2016, the Canadian Securities Administrators (CSA) published for comment proposals to repeal National Instrument 81-104 <i>Commodity Pools</i>, (NI 81-104) and to amend NI 81-102, National Instrument 41-101 <i>General Prospectus Requirements</i>, National Instrument 81-101 <i>Mutual Fund Prospectus Disclosure</i>, National Instrument 81-106 <i>Investment Fund Continuous Disclosure</i>, and National Instrument 81-107 <i>Independent Review Committee for Investment Funds</i> (the Proposed Amendments). The Proposed Amendments represent the final phase of the CSA’s ongoing policy work to modernize investment fund product regulation and are aimed at developing a more comprehensive regulatory framework for mutual funds that seek to make use of more “alternative” investment strategies (alternative mutual funds). We received submissions from 41 commenters in respect of the Proposed Amendments. The name of each commenter is listed in Part III of this Summary of Comments. We wish to thank all of those who took the time to comment.</p>	
Part II – Part 4 – Proficiency and Supervisory Requirements	
Comments	Responses
<p>There was support for our proposal to repeal the proficiency requirements for mutual fund dealers dealing in commodity pools from Part 4 of NI 81-104, and to engage with the Mutual Fund Dealers Association (MFDA) regarding reviewing how existing proficiency requirements may need to be reconsidered in respect alternative funds.</p>	<p>We have reconsidered our initial proposal on mutual fund dealer proficiency for alternative mutual funds and decided to retain those provisions within NI 81-104. We recognize that any consideration of revisions to these proficiency standards should be conducted as part of a larger review of overall dealer proficiency requirements which would be beyond the scope of this Project.</p>

Part II – Part 4 – Proficiency and Supervisory Requirements	
Comments	Responses
<p>A number of these commenters added that they do not believe that the Proposed Amendments for alternative funds represent a significant departure from conventional mutual funds in terms of complexity, in that many of the same strategies can be employed by both types of products — the difference relates primarily to the extent these strategies can be used. They recommend we take a principles based approach to any additional proficiency requirements, consistent with general registrant proficiency requirements in National Instrument 31-103 <i>Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103)</i>.</p>	<p>Please see our response above.</p>
<p>A different commenter suggested the proficiency for selling alternative funds should be the same as for selling hedge funds as they are equally complex.</p>	<p>Please see our response above.</p>
<p>One commenter expressed concern that any proposed changes in proficiency requirements not create increased confusion or burden for investors, noting that in some cases, an investor may have to deal with multiple dealers in the same firm with respect to different investment funds in their account with that firm.</p>	<p>Please see our response above.</p>
<p>Others agreed that proficiency is best dealt with through the MFDA. These commenters added that the current proficiency requirements under NI 81-104 have been a significant impediment to distribution by mutual fund dealers and that establishing unnecessarily strict proficiency requirements again would result in the same issue.</p>	<p>Please see our response above.</p>
<p>One commenter recommended specific proficiency requirements for trading in alternative funds. It added that if the CSA decides to raise the base level for mutual fund dealers then it should recommend a refresher course for all existing dealers as well to level the playing field. This commenter suggests that any additional proficiency courses and content be validated in collaboration with the MFDA, the CSA and any applicable proficiency course providers to ensure consistency and has offered to participate in that process.</p>	<p>Please see our response above. We welcome any input in this area.</p>
<p>Two commenters expressed concern that similar issues that have arisen in the past with the mis-selling of certain products by dealers due to inadequate training can occur again with alternative funds. They believe specific training is required for dealing representatives with evidence of</p>	<p>The concerns are noted. Please see our response above regarding the mutual fund dealer proficiency standards for alternative mutual funds.</p>

Part II – Part 4 – Proficiency and Supervisory Requirements	
Comments	Responses
successful completion of the training being retained in personnel records. These commenters added that deficiencies in the "know your client" process could be harmful for investors investing in alternative funds. They also believe that the current suitability standard is inadequate and that a fiduciary or "best interest" standard should be applied to dealers. They added that they do not expect these products to be sold on a "DSC" basis. They also took note of the concurrent work the CSA is engaged in regarding the relationship between dealers and clients, notably under CSA Consultation Paper 33-404 which may address some of these concerns.	As the commenter notes, the CSA is currently working on initiatives that are intended to address some of these concerns and issues.

Part III – List of Commenters

AGF Investments Inc.
Alternative Investment Management Association (AIMA)
Arrow Capital Management Inc.
AUM Law Professional Corporation
Aviva Investors Canada Inc.
BlackRock Asset Management Canada Limited
BMO Capital Markets and BMO Global Asset Management
Borden Ladner Gervais LLP
Brompton Funds Limited
Canadian Advocacy Council for Canadian CFA Institute Societies
The Canadian Foundation for Advancement of Investor Rights (FAIR)
Canadian Imperial Bank of Commerce
Canadian Securities Institute, The (CSI)
East Coast Fund Management Inc.
First Asset Investment Management Inc.
Jeffrey L. Glass and Darrin R. Renton
Hedge Fund Standards Board
Invesco Canada Ltd.
The Investment Funds Institute of Canada (IFIC)
Investors Group Inc.
Irwin, White & Jennings (on behalf of Growthworks Capital Ltd.)
Kenmar Associates
Lawrence Park Asset Management Ltd.
Lightwater Partners Ltd.
Lysander Funds Limited
Mackenzie Financial Corporations
Manulife Asset Management Limited
McCarthy Tétrault LLP
McMillan LLP
Morgan Meighen & Associates Limited
Picton Mahoney Asset Managements
Portfolio Management Association of Canada (PMAC)
RBC Capital Markets
RBC Global Asset Management Inc.
RP Investment Advisors
Stikeman Elliott LLP (Financial Products and Services Group)
Sun Life Global Investments (Canada) Inc.
TD Securities Inc.
Tim McElvaine
Vision Capital Corporation
Wildeboer Dellece LLP

ANNEX B

REPEAL OF

NATIONAL INSTRUMENT 81-104 ALTERNATIVE MUTUAL FUNDS

1. ***National Instrument 81-104 Alternative Mutual Funds is repealed by this Instrument.***
2. (a) This Instrument comes into force on January 29, 2024.
- (b) In Saskatchewan, despite subsection 2(a), if this Instrument is filed with the Registrar of Regulations after January 29, 2024, this Instrument comes into force on the day on which it is filed with the Registrar of Regulations.

ANNEX C

LOCAL MATTERS

Delivery of Repeal to Minister

Ministerial approval is required for the implementation of the repeal (the **Repeal**) of National Instrument 81-104 *Alternative Mutual Funds (NI 81-104)*. The Repeal, as well as other required materials, have been delivered to the Minister of Finance on or about August 31, 2023. The Minister may approve or reject the Repeal or return the Repeal for further consideration. If the Minister approves the Repeal or does not take any further action, the Repeal will come into force in Ontario on January 29, 2024.

Authority for Repeal

Subparagraph 143(1)2(i) of the *Securities Act (Ontario)* (the **Act**) provides the Ontario Securities Commission (the **Commission**) with the authority to make the Repeal. In addition, paragraph 143.2(5)(b) of the Act permits the Commission to make the Repeal without publishing the Repeal for comment, as the Repeal removes the proficiency requirements in NI 81-104 and is not likely to have a substantial effect on the interests of investors or mutual fund restricted individuals, who are subject to Interim Mutual Fund Dealer Rule 1000 *Proficiency Standards for the Sale of Alternative Mutual Funds* of the Canadian Investment Regulatory Organization.