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British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumers Services Commission, New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities Service Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut
(the CSA)

Email: comments@osc.gov.on.ca
E-mail: consultation-en-cours@lautorite.qc.ca

Dear CSA:

Re: CSA Notice and Request for Comment – Proposed Amendments to National Instrument 81-102 Investment Funds (NI 81-102) Pertaining to Crypto Assets (the Proposed Amendments)

We refer to the Proposed Amendments published by the CSA on January 18, 2024. Terms defined in the Proposed Amendments or NI 81-102 have the same meanings when used in this letter.

Background to our comments

Fasken Martineau DuMoulin LLP (**Fasken**) is a leading Canadian law firm that provides advice to investment fund managers, portfolio advisers, dealers and service providers across Canada. Currently, 14 partners at Fasken devote a substantial portion of their practice to advising clients on structuring, offering and managing investment fund products and related services, and are supported by further partners with expertise in specific fields including tax, derivatives and financial institution regulation. Fasken is one of the largest Canadian legal practices in the investment products and wealth management area. Our client base includes managers of retail mutual funds, exchange-traded funds, alternative mutual funds, closed-end funds, hedge funds, pooled funds, segregated funds, private equity funds and separately managed account services. We regularly assist clients with developing innovative investment products including, where necessary, obtaining novel discretionary relief under Canadian securities legislation and advance tax rulings to accommodate those products.

Our comments below are based mainly on our experience advising clients in the investment funds industry. Our comments below reflect the views of the authors of this letter and certain other individual members of



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our firm that participated in the preparation of this letter. Our comments do not necessarily reflect the views of our firm or of our clients, and are submitted without prejudice to any position that may in the future be taken by our firm on its own behalf or on behalf of any client.

Indirect investments in crypto assets using specified derivatives

We note that the Proposed Amendments propose to add a new paragraph (j) to subsection 2.3(1) of NI 81-102 that would prohibit mutual funds that are not alternative mutual funds from entering into a specified derivative, the underlying interest of which is a crypto asset. We believe that this proposed restriction is unnecessary and inconsistent with other recent amendments to NI 81-102 made by the CSA.

Prior to January 3, 2019, paragraph 2.3(1)(j) of NI 81-102 prohibited a mutual fund from entering into a specified derivative, the underlying interest of which was a physical commodity (other than gold). The concern previously expressed by the CSA was that these specified derivatives could result in the mutual fund obtaining physical possession of the physical commodity without custodian arrangements that could accommodate such a holding. However, on January 3, 2019, this restriction was removed. In the CSA Notice of Amendments: Modernization of Investment Fund Product Regulation – Alternative Mutual Funds dated October 4, 2018, the CSA stated:

Conventional mutual funds will also now be permitted under section 2.3 to obtain indirect exposure to any physical commodity (as that term is defined in NI 81-102) through the use of specified derivatives (as that term is defined in NI 81-102).¹

We believe this amendment reflected an awareness by the CSA that mutual funds can avoid receiving physical delivery of the underlying interests of these specified derivatives either through the types of specified derivatives used (such as swaps and cash-settled forward contracts) or by closing out exposure through standardized futures by purchasing offsetting standardized futures prior to maturity. Concerns regarding the volatility of exposure to physical commodities was addressed by adding such physical commodities to the 10% limit in paragraph 2.3(1)(e) of NI 81-102.

We submit that the same principles should apply to exposure to crypto assets through specified derivatives. As with physical commodities, mutual funds that are not alternative mutual funds can avoid receiving delivery of crypto assets through the types of specified derivatives used by the mutual fund. Possible concerns regarding the volatility of crypto assets can be addressed by adding crypto assets to the 10% limit in paragraph 2.3(1)(e). Indirect exposure to crypto assets through investments in alternative mutual funds similarly would be addressed by the existing look-through provision in subsection 2.3(3).

Accordingly, we suggest that proposed paragraph 2.3(1)(j) instead state the following:

purchase, sell, use or hold a crypto asset ~~or a specified derivative of which the underlying interest is a crypto asset;~~

Similarly, we suggest that paragraph 2.3(1)(e) instead state the following as a result of the Proposed Amendments:

purchase a permitted precious metal, a permitted precious metal certificate, or a specified derivative of which the underlying interest is a physical commodity if, immediately after the purchase, more than 10% of the mutual fund's net asset value would be made up of permitted precious metals, permitted

¹ (2018), 41 OSCB #40 (Supp-2) at page 3.

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precious metal certificates, or specified derivatives of which the underlying interests are physical commodities or crypto assets;

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Please do not hesitate to contact any of the undersigned if you have questions regarding our comments above.

Yours truly,

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