

CSA Notice and Request for Comment Proposed Amendments to National Instrument 81-102 *Investment Funds* pertaining to crypto assets

January 18, 2024

Introduction

The Canadian Securities Administrators (the **CSA** or **we**) are publishing, for a 90-day comment period, proposed amendments (the **Proposed Amendments**) to National Instrument 81-102 *Investment Funds* (**NI 81-102**) and proposed changes (the **CP Changes**) to Companion Policy 81-102CP *Investment Funds* (**81-102CP**) (collectively referred to as the **Proposed Amendments and CP Changes**). The Proposed Amendments and CP Changes pertain to reporting issuer investment funds that seek to invest directly or indirectly in crypto assets (**Public Crypto Asset Funds**).

Substance and Purpose

The Proposed Amendments and CP Changes are intended to provide greater regulatory clarity with respect to certain key operational matters regarding these investments, such as:

- Criteria regarding the types of crypto assets that Public Crypto Asset Funds are permitted to purchase, use or hold;
- Restrictions on investing in crypto assets by Public Crypto Asset Funds or other types of reporting issuer investment funds; and
- Requirements concerning custody of crypto assets held on behalf of a Public Crypto Asset Fund.

The Proposed Amendments and CP Changes will codify practises of existing Public Crypto Asset Funds, developed mainly through the prospectus review process, as well as codifying exemptive relief previously granted to existing Public Crypto Asset Funds. The Proposed Amendments and CP Changes will provide investment fund managers greater regulatory clarity concerning investments in crypto assets. We think this can facilitate new product development in the space while also ensuring that appropriate risk mitigation measures are built directly into the investment fund regulatory framework.

Background

The Proposed Amendments are a key phase of the CSA's implementation of a regulatory framework for Public Crypto Asset Funds (the **Project**). The Project's objective is to review existing requirements, provide guidance, and then implement a regulatory framework relating to Public Crypto Asset Funds that ensures adequate investor protection and mitigates potential risks while providing greater regulatory clarity for product development and management. The Project is a recognition by the CSA that the existing regulatory framework in NI 81-102 needs to be adapted to properly account for the unique aspects of crypto assets as an investment product for publicly distributed investment funds.

The Project is being carried out in three phases.

Phase 1 – CSA Staff Notice

Phase 1 of the Project entailed communicating information to stakeholders on areas we believe required greater guidance regarding CSA staff expectations, and new developments relating to Public Crypto Asset Funds. Phase 1 was completed with the publication of CSA Staff Notice 81-336 *Guidance on Crypto Asset Investment Funds that are Reporting Issuers* (the **Staff Notice**) on July 6, 2023.¹

The Staff Notice provided guidance to stakeholders and outlined CSA staff's views and expectations regarding the operations of Public Crypto Asset Funds within the current framework of NI 81-102, including:

- Providing an overview of the Public Crypto Asset Funds market and clarifying the application of existing securities regulatory requirements to them;
- Discussing key findings from previous reviews conducted by CSA staff, and
- Communicating CSA staff expectations for stakeholders with respect to various matters related to Public Crypto Asset Funds, including key considerations for investing in crypto assets, expectations regarding custody of crypto assets on behalf of Public Crypto Asset Funds, issues concerning staking and other similar yield-generating activities, and reminding registrants of their know-your-product, know-your-client and suitability obligations concerning these types of funds.

Phase 2 – The Proposed Amendments

The Proposed Amendments and CP Changes are part of the second phase of the Project. As discussed in greater detail below, the purpose of this phase of the Project is to build on the guidance in the Staff Notice by focusing on targeted amendments that reflect priority issues regarding

¹ See CSA Staff Notice 81-336 *Guidance on Crypto Asset Investment Funds that are Reporting Issuers*, available at <https://www.osc.ca/en/securities-law/instruments-rules-policies/8/81-336/csa-staff-notice-81-336-guidance-crypto-asset-investment-funds-are-reporting-issuers>.

investment funds investing in crypto assets. This phase seeks to codify policies and practises of existing Public Crypto Asset Funds, many of which were developed and adopted through the prospectus review process and were also cited in the Staff Notice. Also, where appropriate, the Proposed Amendments seek to codify routinely granted exemptive relief for these products.

Phase 3 – Consultation Paper and Possible Future Amendments

Phase 3 of the Project will involve a public consultation concerning a broader and more comprehensive regulatory framework for funds investing in crypto assets.

Summary of Proposed Amendments

The following is a description of the Proposed Amendments and CP Changes.

Proposed Amendments to NI 81-102

(i) Part 1 - Definitions

“alternative mutual fund”

We are proposing to amend the definition of “alternative mutual fund” to also include a mutual fund that invests in crypto assets. This change is consistent with alternative mutual funds being permitted to have greater exposure to certain alternative asset classes or investment strategies compared to other types of mutual funds. This is also consistent with how Public Crypto Asset Funds currently offered in Canada as mutual funds are currently structured.

(ii) Part 2 - Investments

Section 2.3 – Restrictions Concerning Types of Investments

Restrictions on investing in crypto assets

We are proposing to amend the investment restrictions in section 2.3 to permit only alternative mutual funds and non-redeemable investment funds to buy, sell, hold or use crypto assets directly. This restriction would also apply to investing indirectly in crypto assets through specified derivatives. Mutual funds, other than alternative mutual funds, will only be permitted to invest in crypto assets by investing in underlying alternative mutual funds or non-redeemable funds that invest in crypto assets, subject to the fund of fund restrictions in subsection 2.5(2) of NI 81-102.

Additionally, we are proposing to limit the types of crypto assets that alternative mutual funds and non-redeemable investment funds can invest in. Specifically, we are proposing to restrict investment funds subject to NI 81-102 to investing only in crypto assets that are listed for trading on, or are the underlying interest for a specified derivative where that specified derivative trades on, an exchange that has been recognized by a securities regulatory authority in Canada. This proposed requirement reflects the concerns raised in the Staff Notice about determining the suitability of a crypto asset as a portfolio holding of a Public Crypto Asset Fund, such as market

integrity and price discovery.²

As an additional restriction, Public Crypto Asset Funds would be prohibited from buying or holding crypto assets that are not fungible. Non-fungible assets, such as collectibles, may have characteristics that are incompatible with investment fund products offered to retail investors. For example, the non-fungibility of an asset generally creates additional liquidity and valuation risks, and the current regulatory framework may not have the parameters needed to mitigate these risks. Additionally, the markets for non-fungible crypto assets may have heightened risks regarding liquidity and valuation. Nonetheless, we welcome submissions regarding whether there are circumstances where it would be appropriate to allow investment funds to invest in crypto assets that are not fungible and whether there are specific regulatory parameters that should be outlined in the regulatory framework for investment funds to allow for this.

Section 2.12 – Securities Loans, Section 2.13 – Repurchase Transactions, and Section 2.14 – Reverse Repurchase Transactions

We are proposing to prohibit the use of crypto assets in securities lending, repurchase transactions or reverse transactions, as the loaned securities, transferred securities or collateral posted in connection with these transactions, as applicable. While we believe that the market characteristics of most crypto assets make them impractical for these types of transactions in an investment fund, we think it is important to remove any regulatory ambiguity.

Section 2.18 – Money Market Funds

We are proposing to clarify that a “money market fund” as defined in section 2.18 cannot buy or hold crypto assets. This is consistent with restrictions in section 2.18 of NI 81-102 that prohibit money market funds from engaging in activities or holding assets that are associated with alternative mutual funds and is intended to eliminate any regulatory ambiguity.

(iii) Part 6 – Custodianship of Portfolio Assets

We are proposing to include provisions specifically applicable to custodians and sub-custodians that hold crypto assets on behalf of an investment fund (a **Crypto Custodian**). These provisions primarily codify practises and policies in existing Public Crypto Asset Funds concerning custody, which act to mitigate some of the unique risks associated with funds holding these assets in their portfolios and are consistent with, and include:

² In the Staff Notice, CSA staff expressed their view that the presence of a regulated futures market for a crypto asset provides support for the proper valuation of a Public Crypto Asset Fund that invests in that crypto asset, along with other operational benefits. CSA staff generally consider that the presence of a regulated futures market for a particular crypto asset offers an additional regulated market facility which provides a liquid market and promotes greater price discovery towards valuing fund assets and for disposing of the crypto asset to satisfy redemption requests. It may also better support the ability of authorized dealers and market makers to properly carry out their market making duties in respect to Public Crypto Asset Funds. CSA staff also noted that the presence of a regulated futures market for a given crypto asset generally correlates with institutional support for that particular crypto asset.

- (a) a requirement, under section 6.5.1, for a Crypto Custodian to keep crypto assets in offline storage (usually referred to as “cold wallet” storage), except as needed to facilitate purchases and sales or other portfolio transactions in the fund. This is consistent with what is considered best practices of custody of crypto assets when they are not needed to facilitate transactions,
- (b) a requirement, under subsection 6.6(3.1), for a Crypto Custodian to maintain insurance regarding crypto assets it custodies for an investment fund that a reasonably prudent person would maintain. Recognising that commercial practises may vary and that there may be a need for flexibility, we are not proposing to require a specific type of insurance or minimum dollar amount to meet this standard, and
- (c) amendments to section 6.7 that would require a Crypto Custodian to obtain, on an annual basis, a report prepared by a public accountant assessing the Crypto Custodian’s internal management and controls relating to security, availability, processing integrity, confidentiality and privacy controls. An example of this would be a Service Organization Control (SOC) report prepared in accordance with the American Institute of Chartered Public Accountants although that will not be prescribed under the Proposed Amendments. The Crypto Custodian would be required to deliver that report to the fund. The annual compliance report to be prepared by a fund’s Crypto Custodian under subsection 6.7(2) would also include a requirement to confirm that it provided the report.

(iv) Part 9 – Sale of Securities of a Mutual Fund

We are proposing to codify exemptive relief that has been granted to existing Public Crypto Asset Funds that permit them to accept crypto assets as subscription proceeds under subsection 9.4(2). The relief was granted primarily to facilitate the functioning of exchange-traded mutual funds (ETFs), by allowing their designated brokers and other market makers to exchange crypto assets (specifically bitcoin or ether, in the case of the exemptive relief orders) they hold for “creation units” of the ETFs. Such arrangements are typical for ETFs that hold traditional assets. The exemptive relief addresses a technical issue in the existing provision which only allows a mutual fund to accept securities as subscription proceeds in lieu of cash. Paragraph 9.4(2)(c) would clarify that a mutual fund can accept crypto assets that are not securities as subscription proceeds under similar conditions, namely that:

- The mutual fund is permitted to purchase the applicable crypto asset, the crypto asset is acceptable to the fund’s portfolio advisor and it is consistent with the fund’s investment objectives, and
- The value of the crypto asset accepted as subscription proceeds is at least equal to the issue price of the securities of the mutual fund for which they are payment with the value calculated as if the crypto asset was a portfolio asset of the fund.

This will permit future Public Crypto Asset Funds that are ETFs to facilitate similar market making functions without the need for exemptive relief.

Proposed Changes to 81-102CP

Section 2.01 – Guidance on “Crypto Assets”

We are proposing to add guidance relating to what we will generally consider to be crypto assets for the purposes of investment funds regulation. We believe the proposed guidance is consistent with terminology used in prior CSA publications and with the general understanding of what constitutes a crypto asset by market participants.

Section 3.3.01 – Investing in crypto assets

We are proposing to add section 3.3.01 which will provide guidance clarifying that the proposed requirement that funds only invest in crypto assets that are either listed for trading, or are the underlying interest in specified derivatives that are listed for trading, on a “recognized exchange” is not intended to restrict funds to only acquire crypto assets through a recognized exchange. In other words, funds can continue to acquire crypto assets from sources such as crypto asset trading platforms so long as the crypto asset the fund invests in meets the necessary criteria set out in subsection 2.3(1.3) of NI 81-102.

Section 8.1 - Custody Standard of Care

We are proposing to add subsection 8.1(2) which will expand on the guidance for meeting the standard of care requirement set out in section 6.6 of NI 81-102 in the context of Crypto Custodians. It includes guidance on what could be considered best practises for Crypto Custodians and primarily reflects current practices of Crypto Custodians of existing Public Crypto Asset Fund, which were also described in the Staff Notice. The guidance provided in this section includes:

- ensuring the Crypto Custodian has the requisite expertise to custody crypto assets;
- the use of segregated wallets or omnibus wallets visible on the blockchain, so long as the books and records of the Crypto Custodian confirm the fund’s ownership of the crypto assets;
- the use of multi-signature technology to limit the risk of a single point failure;
- the use of strong passwords, multi-factor authentication and encryption of client information to limit the risk of hacking, and
- the maintenance of robust cyber and physical security practices to ensure greater security of the crypto assets.

We are also proposing to add subsection 8.1(4) which will clarify the CSA’s expectations regarding the proposed requirement in subsection 6.6(3.1) for Crypto Custodians to obtain insurance with respect to crypto assets in its custody. It clarifies that this requirement is not intended to prescribe a minimum amount of insurance but rather sets out a “reasonably prudent”

standard for determining whether the insurance is sufficient, taking into account different factors. It also reminds investment fund managers of their obligations to understand the material terms and conditions of such insurance, consistent with their fiduciary obligations to the investment fund.

Section 8.3

We are proposing to add subsection 8.3(2), which addresses the requirement that a Crypto Custodian obtain an assurance report of its processes relating to security and other measures pertaining to its custody obligations. It clarifies that the CSA will consider a Crypto Custodian obtaining a SOC-2 Type 2 Report, prepared in accordance with the framework developed by the American Institute of Chartered Public Accountants (a **SOC-2 Type 2**), to be the type of report that is contemplated for the purposes of complying with the requirements in section 6.7 of NI 81-102.

(v) Transition/Coming into Force

Subject to the nature of comments we receive on the Proposed Amendments, as well as any applicable regulatory requirements, we are proposing that, if approved, the Proposed Amendments would come into force approximately 90 days after the final publication date.

Local Matters

Annex C is being published in any local jurisdiction that is making related changes to local securities laws, including local notices or other policy instruments in that jurisdiction. It also includes any additional information that is relevant to that jurisdiction only.

Request for Comments

We are soliciting comments on the Proposed Amendments and CP Changes. While we welcome comments on any aspect of the Proposed Amendments and CP Changes, we have also identified specific issues for which we seek comment, which we have listed below:

Guidance on “crypto asset”

1. We are seeking feedback as to whether the guidance in the CP Changes provides sufficient clarity in understanding the type of assets that will be considered crypto assets for the purpose of NI 81-102.

Restrictions on investing in crypto assets

2. The Proposed Amendments contemplate restricting publicly distributed investment funds to only holding fungible crypto assets. We are seeking feedback on whether this is a reasonable restriction in light of the risks that are generally associated with holding non-fungible crypto assets in an investment context. If not, please be specific as to why you think the scope of permitted crypto assets should be expanded to include non-fungible crypto assets and what

investor protection measures are appropriate for Public Crypto Asset Funds to hold these types of assets.

3. The Proposed Amendments also contemplate restricting publicly distributed investment funds to holding crypto assets that trade on, or are reference assets for specified derivatives that trade on, a “recognized exchange”. This reflects market integrity concerns with certain crypto asset markets and is intended to limit funds to holding those crypto assets for which spot prices can be derived through regulated sources that reflect institutional support and promote price discovery, which is not dissimilar to how more traditional fund portfolio assets trade. We are seeking feedback as to whether this is a reasonable qualifying criterion. If not, please provide feedback on what criteria may be more appropriate for determining when a crypto asset should be deemed an appropriate investment for an investment fund directed at retail investors.

Custody

4. The Proposed Amendments include a requirement that custodians or sub-custodians that hold crypto assets on behalf of an investment fund obtain an annual assurance report prepared by a public accountant that assesses the design and effectiveness of various internal controls and policies concerning their obligations to custody crypto assets. The CP Changes clarify that obtaining a SOC-2 Type 2 will be considered to comply with the requirement, without prescribing that specific report. We are seeking feedback regarding other assurance reports that may be comparable to a SOC-2 Type 2 that we should also consider sufficient for complying with this requirement. We are also seeking feedback regarding the appropriate scope of any reporting to be provided under this requirement.

Broader Consultation

5. We are seeking comments on other issues or considerations relating to investment funds that invest in crypto assets that the CSA should also be considering. This feedback will help inform the broader consultations for the third phase of the Project.

Please submit your comments in writing, by email, on or before **April 17, 2024**.

Please address your submission to the CSA as follows:

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

Please send your comments only to the addresses below. Your comments will be forwarded to the other CSA members.

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We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period. All comments will be posted on the websites of the Ontario Securities Commission, the Autorité des marchés financiers, the Alberta Securities Commission and the British Columbia Securities Commission. Therefore, submissions should not include personal information directly in comments to be published. It is important you state on whose behalf you are making the submissions.

Questions

Please refer your questions to any of the following CSA staff:

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Contents of Annexes

The text of the Proposed Amendments is contained in the following annexes to this Notice and is available on the websites of members of the CSA:

Annex A – Proposed Amendments to National Instrument 81-102 *Investment Funds*

Annex B – Proposed Changes to Companion Policy 81-102CP *Investment Funds*

Annex C – Local Matters