

Annex D-1

Proposed Amendments to National Instrument 81-102 *Investment Funds*

1. *National Instrument 81-102 Investment Funds is amended by this Instrument.*
2. *Section 1.1 is amended*
 - (a) *by repealing the definition of “acceptable clearing corporation”,*
 - (b) *in the definition of “clearing corporation” by replacing “options or standardized futures” with “specified derivatives”,*
 - (c) *by repealing the definition of “fixed portfolio ETF”,*
 - (d) *in the definition of “illiquid asset” by replacing “mutual fund” with “investment fund” in paragraph (a) and by replacing “a mutual fund, the resale of which is prohibited by a representation, undertaking or agreement by the mutual fund or by the predecessor in title of the mutual fund” with “an investment fund” in paragraph (b);*
 - (e) *by repealing the definition of “Joint Regulatory Financial Questionnaire and Report”,*
 - (f) *by repealing the definition of “permitted gold certificate”,*
 - (g) *in the definition of “physical commodity” by adding “electricity, water,” before “precious stone”,*
 - (h) *in the definition of “public quotation” by replacing “mutual fund” with “investment fund”,*
 - (i) *in the definition of “restricted security” by replacing “mutual fund” with “investment fund” and by replacing “mutual fund’s” with “investment fund’s”, and*
 - (j) *by adding the following definitions:*

“alternative fund” means a mutual fund that has adopted fundamental investment objectives that permit it to invest in asset classes or adopt investment strategies that are otherwise prohibited but for prescribed exemptions from Part 2 of this Instrument;

“cleared specified derivative” means a specified derivative that is cleared through a clearing corporation that is any of the following:

- (a) registered with the Securities and Exchange Commission;
- (b) registered with the US Commodity Futures Trading Commission;

(c) authorized by the European Securities and Markets Authority; or

(d) a regulated clearing agency;

“fixed portfolio investment fund” means an exchange traded mutual fund not in continuous distribution or a non-redeemable investment fund that

(a) has fundamental investment objectives which include holding and maintaining a fixed portfolio of publicly traded equity securities of one or more issuers the names of which are disclosed in its prospectus, and

(b) trades the securities referred to in paragraph (a) only in the circumstances disclosed in its prospectus;

“non-redeemable investment fund” has the same meaning ascribed to that term in National Instrument 81-106 *Investment Fund Continuous Disclosure*;

“permitted precious metals” means gold, silver, platinum and palladium;

“permitted precious metal certificate” means a certificate representing a permitted precious metal if the permitted precious metal is

(a) available for delivery in Canada, free of charge, to or to the order of the holder of the certificate,

(b) in the case of a certificate representing gold, of a minimum fineness of 995 parts per 1000,

(c) in the case of a certificate representing a permitted precious metal other than gold, of a minimum fineness of 999 parts per 1000,

(d) held in Canada,

(e) in the form of either bars or wafers, and

(f) if not purchased from a bank listed in Schedule, I, II or III of the *Bank Act* (Canada), fully insured against loss and bankruptcy by an insurance company licensed under the laws of Canada or a jurisdiction;

“precious metals fund” means a mutual fund, other than an alternative fund, that has adopted a fundamental investment objective to invest primarily in one or more permitted precious metals; **and**

“regulated clearing agency” has the meaning ascribed to that term in National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*;

3. **Subsection 1.2(3) is amended in paragraph (a) by replacing “sections 2.12 to 2.17;” with “section 2.6.1 and sections 2.7 to 2.17;”.**

4. **Section 2.1 is amended**

(a) **in subsection (1) by adding “other than an alternative fund” after “mutual fund”, by replacing “index participation units” with “an index participation unit”, by replacing “percent” with “%” and by adding “one” after “any”,**

(b) **by adding the following subsection:**

(1.1) An alternative fund or a non-redeemable investment fund must not purchase a security of an issuer, enter into a specified derivatives transaction or purchase an index participation unit if, immediately after the transaction, more than 20% of its net asset value would be invested in securities of any one issuer.,

(c) **in subsection (2) by replacing “Subsection (1) does” with “Subsections (1) and (1.1) do”, by replacing “a mutual fund” with “an investment fund” wherever it occurs, and by replacing “fixed portfolio ETF” with “fixed portfolio investment fund”,**

(d) **in subsection (3) by replacing “a mutual fund’s” with “an investment fund’s” and by replacing “the mutual fund” with “the investment fund” wherever it occurs, and**

(e) **in subsection (4) by replacing “mutual fund” with “investment fund” and by replacing “percent” with “%”.**

5. **Section 2.3 is amended**

(a) **in paragraph 1(d) by replacing “gold certificate” with “precious metals certificate” wherever it occurs,**

(b) **by replacing paragraph 1(e) with the following:**

(e) purchase permitted precious metals, a permitted precious metal certificate or a specified derivative the underlying interest of which 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 precious metal certificates and specified derivatives the underlying interest of which is a physical commodity;.

(c) **in paragraph 1(g) by adding “or” immediately after “;”,**

(d) **by repealing paragraph 1(h),**

(e) **by adding the following subsections:**

- (1.1) Paragraphs 1(d), (e), (f) and (g) do not apply to an alternative fund.
- (1.2) The restriction in paragraph 1(e) does not apply to a precious metals fund with respect to purchasing permitted precious metals, a permitted precious metal certificate or a specified derivative the underlying interest of which is one or more permitted precious metals., **and**

(f) by adding the following subsections:

- (3) In determining an investment fund's compliance with the restrictions contained in this section, for each long position in a specified derivative that is held by the investment fund for purposes other than hedging and for each index participation unit or underlying investment fund held by the investment fund, the investment fund must consider that it holds directly the underlying interest of that specified derivative or its proportionate share of the securities held by the issuer of the index participation unit or underlying investment fund, as applicable.
- (4) Despite subsection (3), in the determination referred to in subsection (3) the investment fund must not include a security or instrument that is a component of, but that represents less than 10% of
 - (a) a stock or bond index that is the underlying interest of a specified derivative, or
 - (b) the securities held by the issuer of an index participation unit..

6. Section 2.4 is amended

(a) by replacing "percent" with "%" wherever it occurs, and

(b) by adding the following subsections:

- (4) A non-redeemable investment fund must not purchase an illiquid asset if, immediately after the purchase, more than 20% of its net asset value would be made up of illiquid assets.
- (5) A non-redeemable investment fund must not have invested, for a period of 90 days or more, more than 25% of its net asset value in illiquid assets.
- (6) If more than 25% of the net asset value of a non-redeemable investment fund is made up of illiquid assets, the non-redeemable fund must, as quickly as commercially reasonable, take all necessary steps to reduce the percentage of its net asset value made up of illiquid assets to 25% or less.

7. Subsection 2.5(2) is amended

(a) by replacing paragraph (a) with the following:

- (a) if the investment fund is a mutual fund other than an alternative fund, either of the following apply:
 - (i) the other investment fund is a mutual fund, other than an alternative fund, that is subject to this Instrument;
 - (ii) the other investment fund is an alternative fund or a non-redeemable investment fund that is subject to this Instrument, provided that the mutual fund must not purchase securities of the alternative fund or non-redeemable investment fund if, immediately after the purchase, more than 10% of its net asset value would be made up of securities of alternative funds and non-redeemable investment funds;

(b) in paragraph (a.1) by adding “an alternative fund or” before “a non-redeemable investment fund” wherever it occurs,

(c) by replacing paragraph (c) with the following:

- (c) the other investment fund is a reporting issuer in a jurisdiction,, ***and***

(d) by repealing paragraph (c.1).

8. Subsection 2.5(3) is amended by replacing “,(c) and (c.1)” with “and (c)”.

9. Section 2.6 is amended

(a) by renumbering it as subsection 2.6(1),

(b) in paragraph (a) by deleting “in the case of a mutual fund,”,

(c) in subparagraph (a)(i) replacing “mutual fund” with “investment fund” wherever it occurs, and by replacing “five percent” with “5%”,

(d) in subparagraph (a)(ii) and subparagraph (a)(iii) by replacing “mutual fund” with “investment fund” wherever it occurs,

(e) in subparagraph (a)(iv) by adding “or a non-redeemable investment fund” after “continuous distribution”,

(f) in paragraphs (b) and (c) by deleting “in the case of a mutual fund,”, and

(g) by adding the following subsection:

- (2) An alternative fund or a non-redeemable investment fund may borrow cash in excess of the limits set out in subsection (1) provided that each of the following applies:
- (a) the alternative fund or non-redeemable investment fund may only borrow from an entity described in section 6.2;
 - (b) if the lender is an affiliate of the investment fund manager of the alternative fund or non-redeemable investment fund, the independent review committee must approve the applicable borrowing agreement under subsection 5.2(1) of NI 81-107;
 - (c) the borrowing agreement entered into is in accordance with normal industry practice and on standard commercial terms for the type of transaction;
 - (d) the total value of cash borrowed must not exceed 50% of the alternative fund or non-redeemable investment fund's net asset value..

10. Paragraph 2.6.1(1) is amended

(a) by replacing “A mutual fund” with “An investment fund”,

(b) in subparagraph (b)(i) by replacing “mutual fund” with “investment fund”, and

(c) by replacing paragraph (c) with the following:

- (c) at the time the investment fund sells the security short,
 - (i) the investment fund has borrowed or arranged to borrow from a borrowing agent the security that is to be sold under the short sale,
 - (ii) if the investment fund is a mutual fund other than an alternative fund, the aggregate market value of all securities of the issuer of the securities sold short by the mutual fund does not exceed 5% of the net asset value of the mutual fund,
 - (iii) if the investment fund is a mutual fund other than an alternative fund, the aggregate market value of all securities sold short by the mutual fund does not exceed 20% of the net asset value of the mutual fund,
 - (iv) if the investment fund is an alternative fund or a non-redeemable investment fund, the aggregate market value of all securities of the issuer of the securities sold short by the investment fund does not exceed 10% of the net asset value of the investment fund; and
 - (v) if the investment fund is an alternative fund or a non-redeemable investment fund, the aggregate market value of all securities sold short by

the investment fund does not exceed 50% of the net asset value of the investment fund..

11. Subsection 2.6.1(2) is amended by adding “other than an alternative fund” before “that sells securities short”.

12. Subsection 2.6.1(3) is amended by adding “other than an alternative fund” before “must not use the cash”.

13. The Instrument is amended by adding the following section:

2.6.2 Total Borrowing and Short Selling

- (1) Despite sections 2.6 and 2.6.1, an investment fund must not borrow cash or sell securities short, if immediately after entering into a cash borrowing or short selling transaction, the aggregate value of cash borrowed combined with the aggregate market value of all securities sold short by the investment fund would exceed 50% of the investment fund’s net asset value.
- (2) Despite sections 2.6 and 2.6.1, if the aggregate value of cash borrowed combined with the aggregate market value of all securities sold short by the investment fund exceeds 50% of the investment fund’s net asset value, the investment fund must, as quickly as is commercially reasonable, take all necessary steps to reduce the aggregate value of cash borrowed combined with the aggregate market value of securities sold short to 50% or less of the investment fund’s net asset value..

14. Section 2.7 is amended

(a) in subsection (1) by replacing “A mutual fund” with “An investment fund”, by replacing “.” with “;” in paragraph (c) and by adding the following paragraph:

(d) the option, debt-like security, swap or contract is a cleared specified derivative.,

(b) in subsection (2) by replacing “a mutual fund” with “an investment fund” and “the mutual fund” with “the investment fund”,

(c) in subsection (3) by replacing “a mutual fund” with “an investment fund”,

(d) in subsection (4) by replacing “a mutual fund” with “an investment fund”, by adding “other than for positions in cleared specified derivatives,”, after “specified derivatives positions”, by deleting “ other than an acceptable clearing corporation or a clearing corporation that clears and settles transactions made on a futures exchange listed in Appendix A,”, by replacing “percent” with “%” and by replacing “the mutual fund” with “the investment fund”,

(e) in subsection (5) by replacing “a mutual fund” with “an investment fund” and by replacing “mutual fund” with “investment fund” wherever it occurs, and

(f) by adding the following subsection:

- (6) Subsections (1), (2) and (3) do not apply to an alternative fund or a non-redeemable investment fund..

15. Section 2.8 is amended by adding the following subsection:

- (0.1) This section does not apply to an alternative fund..

16. The Instrument is amended by adding the following section:

2.9.1 Leverage

- (1) An investment fund’s aggregate gross exposure must not exceed 3 times the investment fund’s net asset value.
- (2) For the purposes of subsection (1), an investment fund’s aggregate gross exposure must be calculated as the sum of the following, divided by the investment fund’s net asset value:
 - (a) the aggregate value of the investment fund’s indebtedness under any borrowing agreements entered into pursuant to section 2.6;
 - (b) the aggregate market value of all securities sold short by the investment fund pursuant to section 2.6.1;
 - (c) the aggregate notional amount of the investment’s fund’s specified derivatives positions.
- (3) In determining an investment fund’s compliance with the restriction contained in this section, the investment fund must also include in its calculation its proportionate shares of securities of any underlying investment funds for which a similar calculation is required.
- (4) An investment fund must determine its compliance with the restriction contained in this section as of the close of business of each day on which the investment fund calculates a net asset value.
- (5) If the investment fund’s aggregate gross exposure as determined in subsection (2) exceeds 3 times the investment fund’s net asset value, the investment fund must, as quickly as is commercially reasonable, take all necessary steps to reduce the aggregate gross exposure to 3 times the investment fund’s net asset value or less.

17. Section 2.11 is amended by adding the following subsection:

(0.1) This section does not apply to an alternative fund..

18. Subsection 6.8(1) is amended by adding “Borrowing,” before “Derivatives” in the heading, by replacing “clearing corporation options, options on futures or standardized futures” with “cleared specified derivatives” and by replacing “percent” with “%”.

19. Subsection 6.8(2) is amended

(a) by replacing “clearing corporation options, options or futures or standardized futures” with “cleared specified derivatives”,

(b) in paragraph (a) by deleting “in the case of standardized futures and options on futures,” and by deleting “, in the case of clearing corporation options”, and

(c) in paragraph (c) by replacing “percent” with “%”.

20. Section 6.8 is amended by adding the following subsection:

(3.1) An investment fund may deposit with its lender, portfolio assets over which it has granted a security interest in connection with a borrowing agreement entered into pursuant to section 2.6..

21. Subsection 6.8(4) is amended by replacing “or (3)” with “,(3) or (3.1)”.

22. Subsection 6.8(5) is amended by adding “borrowing,” before “securities lending”.

23. Section 7.1 is amended

(a) by renumbering it as subsection 7.1(1),

(b) by adding “other than an alternative fund” after “A mutual fund”, and

(c) by adding the following subsection:

(2) An alternative fund must not pay, or enter into arrangements that would require it to pay, and securities of an alternative fund must not be sold on the basis that an investor would be required to pay, a fee that is determined by the performance of the alternative fund unless

(a) the payment of the fee is based on the cumulative total return of the alternative fund for the period that began immediately after the last period for which the performance fee was paid, and

(b) the method of calculating the fee is described in the alternative fund’s prospectus..

24. Section 9.1.1 is amended in paragraph (b) by adding “short” before “position”.

25. Section 10.1 is amended by adding the following subsection immediately after subsection (2):

- (2.1) If disclosed in its prospectus, an alternative fund may include, as part of the requirements established in subsection (2), a provision that securityholders of the alternative fund will not have the right to redeem their securities for a period up to 6 months after the date on which the receipt is issued for the initial prospectus of the alternative fund..

26. Section 10.3 is amended by adding the following subsection:

- (5) Despite subsection (1) an alternative fund may implement a policy providing that a person or company making a redemption order for securities of the alternative fund will receive the net asset value for those securities determined, as provided in the policy, on the first or 2nd business day after the date of receipt by the alternative fund of the redemption order..

27. Subsection 10.4(1.1) is amended by adding “an alternative fund or” after “Despite subsection (1),”.

28. Subsection 15.13(2) is amended by replacing “a commodity pool” with “an alternative fund” wherever it occurs and by replacing “National Instrument 81-104 Commodity Pool” with “this Instrument”.

29. The Instrument is amended by repealing Appendix A – Futures Exchanges for the Purpose of Subsection 2.7(4) – Derivative Counterparty Exposure Limits.

30. (1) Subject to subsections (2) and (3), this Instrument comes into force on •.

(2) If a non-redeemable investment fund or alternative fund has filed a prospectus before •, then this Instrument will not apply to that non-redeemable investment fund or alternative fund until the date that is 6 months from the date referred to in subsection (1).

(3) A mutual fund that is a commodity pool under National Instrument 81-104 *Commodity Pools* and has filed a prospectus before the date of this Instrument will be deemed to be an alternative fund for the purposes of subsection (2).