

## 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**).<sup>1</sup> 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**).<sup>2</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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-mobilières/81-104/2021-01-28/2021-PDG-0003-decision-generale-opc-alternatif-fr.pdf>.

operating rules, during the transition phase of the AMF's transition plan for Québec mutual fund dealer membership in CIRO.<sup>3</sup> 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:

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 MFRI's who trade in securities of alternative mutual funds. However, very few of the existing MFRI's 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 Requirement 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 MFRI's 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

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<sup>3</sup> 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>.

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.<sup>4</sup> 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

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<sup>4</sup> 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.

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](http://www.osc.ca).

### **Adoption of the Repeal**

The Blanket Orders provide MFRI 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 MFRI 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*

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:

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