

April 16, 2024

**SUBMITTED VIA EMAIL**

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 Consumer 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, Newfoundland, and Labrador  
Office of the Superintendent of Securities, Northwest Territories  
Office of the Superintendent of Securities, Yukon  
Superintendent of Securities, Nunavut

**Attention:**

The Secretary  
Ontario Securities Commission  
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Dear Sirs / Mesdames:

**Re: CSA Notice and Request for Comment re: Proposed Amendments to National Instrument 81-102 *Investment Funds Pertaining To Crypto Assets (Proposed Amendments)***

We are pleased to provide the members of the Canadian Securities Administrators (the **CSA**) with comments on the above-noted Proposed Amendments to National Instrument 81-102 *Investment Funds (NI 81-102)* and proposed changes (**Proposed Changes**) to Companion Policy 81-102CP *Investment Funds (the Companion Policy)* relating to reporting issuer investment funds (**Public Crypto Assets Funds**) that invest directly or indirectly in crypto assets. The following viewpoints are those individual lawyers of Borden Ladner Gervais LLP (**BLG**) listed below. Our comments cannot be taken as the views of other lawyers at BLG or our clients.

We provide the following comments with the intention of assisting the CSA with considering certain gaps in, and making the necessary updates to, the Proposed Amendments and Proposed Changes. For ease of reference, we have set out our comments on the Proposed Amendments and the Proposed Changes in the order that they appear in NI 81-102 and the Companion Policy. Additionally, we have provided comments on certain related matters that are not addressed in the Proposed Amendments.

## **Proposed Amendments to NI 81-102**

### ***Restrictions on Investing in Crypto Assets***

While we acknowledge and recognize that the Proposed Amendments to section 2.3 of NI 81-102 are aimed at addressing the CSA's concerns with respect to a portfolio manager's ability to determine the suitability of a crypto asset as a portfolio holding of a Public Crypto Asset Fund, we believe that the limits on the crypto assets that Public Crypto Asset Funds can invest in – i.e., only in crypto assets that either trade on a recognized exchange or that are the underlying interest of a specified derivative that trades on a recognized exchange – are unnecessarily restrictive.

As the CSA is aware, no crypto asset trades on a recognized exchange, so the proposed limits restrict a Public Crypto Asset Fund's investments to only those crypto assets for which futures are offered on an exchange that is recognized in Canada. Currently, that is only Bitcoin and Ethereum. These restrictions stand in stark contrast with the much larger number of crypto assets that can be purchased by retail investors on the crypto asset trading platforms (CTPs) that are currently registered or that operate under a pre-registration undertaking in Canada. Therefore, while we appreciate the CSA's suitability concerns, we respectfully submit that investors may be better protected if they are able to gain exposure to crypto assets through a regulated investment product, with the advice of a registered portfolio manager who owes investors a fiduciary duty of care, such as a Public Crypto Asset Fund, rather than purchasing crypto assets directly through CTPs. Accordingly, we recommend that Public Crypto Asset Funds be permitted to invest in any of the crypto assets that are offered by one or more CTPs.

### ***Restrictions on the use of Crypto Assets in Securities Lending, Repurchase Transactions or Reverse Transactions***

While challenges currently exist, we encourage the CSA to further explore and consider whether the use of crypto assets in securities lending, repurchase transactions or reverse transactions may be possible as capabilities mature and the crypto asset market progresses and whether there is any role that these types of transactions can play for Public Crypto Asset Funds' investment strategies, including for diversification purposes.

## **Proposed Changes to the Companion Policy**

### ***Definition of Crypto Asset***

Based on our review of the Proposed Changes to section 2.01 of the Companion Policy, we believe that the statement in Companion Policy as to what is generally considered to be a crypto asset for purposes of the Proposed Amendments is much broader than the definition of crypto assets used by the CSA in the context of CTPs. In fact, the statement made in the Companion Policy includes digital assets that are also securities and/or derivatives. We are concerned that the use of the term "crypto asset" in a manner that is different from what the market is accustomed to may be misleading and may cause unnecessary confusion. We submit that the use of a different term, such as "digital asset", may address this concern. We also respectfully suggest that a statement should be included in the Companion Policy that makes it clear that any "crypto asset" that is a security and/or a derivative is subject to the same requirements as all other securities and/or derivatives.

### ***Custody Standard of Care***

While we generally support expanding guidance on meeting the standard of care requirement for custodians and sub-custodians responsible for the custody of crypto assets outlined in NI 81-102, we caution against being overly prescriptive on the specific technologies that may be used by such custodians and sub-custodians, such as multi-signature technology. Instead, we recommend that the CSA allow custodians and sub-custodians responsible for the custody of crypto to make operational decisions regarding the most

appropriate custodial solutions based on their unique circumstances. Therefore, we recommend that the custodial solutions be provided as a non-exhaustive list and for guidance purpose only. We also believe that this approach is consistent with the CSA's technology-neutral approach in other instruments (for example, with respect to National Instrument 31-103) and prevents technological updates necessitating applications for exemptive relief.

### **Other Matters**

Although the Proposed Amendments codify existing exemptive relief and other practices and policies of existing Public Crypto Asset Funds and their custodians, we note that the CSA does not address the following matters:

- *Staking* – The Proposed Amendments do not address the ability of Public Crypto Asset Funds to engage in the staking of crypto assets. Certain CTPs offer staking services, subject to the terms and conditions that have been imposed by the CSA. We also note that existing registered firms in Canada are permitted to engage in lending or staking activities as an investment strategy for private investment funds (that are not subject to NI 81-102) managed by such firms. We submit that Public Crypto Asset Funds should be permitted to engage in staking through one or more CTPs that offer staking services.
- *Value-referenced crypto assets* – The Proposed Amendments do not permit Public Crypto Asset Funds to purchase and hold value-referenced crypto assets. However, if the CSA's working group on value-referenced crypto assets permits CTPs to offer one or more value-reference crypto assets, then we submit that Public Crypto Assets Funds should be permitted to purchase, sell, use or hold any such value-reference crypto assets notwithstanding the fact that these value-referenced crypto assets will not meet the investment criteria set out in the Proposed Amendments.

We ask the CSA to provide commentary on whether Public Crypto Asset Funds may be permitted to engage in staking and to invest in and hold value-referenced crypto assets.

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Thank you for this opportunity to express our comments about the Proposed Amendments and Proposed Changes. We hope our comments will be considered positively by the CSA and as helpful with the implementation and adoption of the Proposed Amendments and Proposed Changes, with any updates required thereto.

If you have any questions or if we can be of any other assistance, please contact any of the lawyers indicated below.

Yours very truly,

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