
# THE NOVEL EXEMPTIVE RELIEF CHRONICLES PUBLIC MUTUAL FUNDS PERMITTED TO INVEST LIMITED AMOUNTS IN PRIVATE POOLED FUNDS

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**Categories:** Insights, Publications

Welcome to the first edition of "The Novel Exemptive Relief Chronicles" where we will review unique and interesting exemptive relief orders issued from time to time by members of the Canadian Securities Administrators (the "**CSA**") to participants in Canada's investment funds and asset management industry.

As a result of significant amendments made to National Instrument 81-102 – *Investment Funds* ("**NI 81-102**") that came into force on January 3, 2019 permitting the offering of *alternative mutual funds* in Canada, Canadian publicly offered mutual funds are now permitted to invest up to 10% of their Net Asset Value ("**NAV**") in alternative mutual funds and non-redeemable investment funds (each, an "**Underlying Fund**") provided, among other requirements, that the Underlying Fund is: (i) a reporting issuer in at least one Canadian province or territory; and (ii) subject to NI 81-102.

The Ontario Securities Commission (the "**OSC**") has recently granted *exemptive relief* (the "**Relief**") to a large Canadian asset manager (the "**Filer**") to permit certain of its public mutual funds (each, a "**Top Fund**") to invest up to 10%[1] of their respective NAV in certain Underlying Funds that are privately offered Canadian investment funds managed by the Filer. The Relief is particularly noteworthy due to the fact that the Underlying Funds are **not reporting issuers** in any jurisdiction of Canada nor are they subject to NI 81-102.

In addition to the underlying premise of the Relief that both the Top Funds and the Underlying Funds be managed by the same entity, the Relief is conditional on the Underlying Funds operating in compliance with Part 2 [*Investments*], Part 4 [*Conflicts of Interest*] and Part 6 [*Custodianship of Portfolio Assets*] of NI 81-102 as well as Part 14 [*Calculation of Net Asset Value*] of National Instrument 81-106 – *Investment Fund Continuous Disclosure* ("**NI 81-106**"), as such provisions are applicable to alternative mutual funds.

The Relief appears to signal that the OSC (and by extension, the CSA) may be willing to consider foregoing the formalities associated with an Underlying Fund becoming a reporting issuer in Canada for certain public "fund-on-fund" structures as long as the Underlying Fund is operated in compliance with certain key provisions of NI 81-102 and NI 81-106. However, as the Relief is premised on the fact that the Top Fund and Underlying Fund are

managed by the same entity, it is currently unclear if the OSC and the CSA would grant similar relief in situations where the Top Fund and Underlying Fund are not under common management.

Investment Fund Managers that are interested in using private pooled funds under their management as Underlying Funds for their publicly offered mutual funds may wish to consider pursuing an order similar to the Relief in lieu of incurring the time and expense of converting these private funds into reporting issuers. In so doing, the manager will need to be confident that the proposed Underlying Fund can be comfortably operated in accordance with the requirements of NI 81-102 and NI 81-106 noted above.

Please contact a member of McMillan's Investment Funds and Asset Management Group if you have any questions with respect to the Relief or any of the above information.

by Michael Burns and Hari Marcovici.

[1] In aggregate with their holdings of alternative mutual funds and non-redeemable investment funds[ps2id id='1' target='/]

**A Cautionary Note**