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VIA E-MAIL

June 20, 2007

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Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marches financiers
New Brunswick Securities Commission
Register of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Register of Securities, Northwest Territories
Register of Securities, Yukon Territory
Register of Securities, Nunavut

c/o Mr. John Stevenson
Secretary
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Dear Sirs / Mesdames:

Re: Comments on Proposed National Instrument 31-103 – *Registration Requirements*

INTRODUCTION

The Futures Industry Association ("**FIA**") is pleased to provide this comment letter to the Canadian Securities Administrators ("**CSA**") with respect to Proposed National Instrument 31-103 – *Registration Requirements* ("**NI 31-103**").

FIA is a principal spokesman for the commodity futures and options industry. Our regular membership is comprised of approximately 40 of the largest futures commission merchants ("**FCMs**") in the United States. Among our approximately 150 associate members are representatives of virtually all other segments of the futures industry, both national and international, including US and international exchanges, banks, legal and accounting firms, introducing brokers, commodity trading advisors ("**CTAs**"), commodity pool operators ("**CPOs**") and other market participants, and information and equipment providers. Reflecting the scope and diversity of our membership, FIA estimates that our members are responsible for more than 90 percent of all customer transactions executed on US contract markets.

BACKGROUND

FIA strongly supports the regulatory initiative of the CSA to address the fragmentation of the Canadian provincial and territorial registration requirements for both domestic and international industry participants. In particular, FIA would note that the regulation of futures activities in Canada varies significantly from province to province and is largely based on outdated and inconsistent statutes, regulations and rules. In the Final Report dated January 2007 of the Ontario Commodity Futures Act Advisory Committee ("**Ontario CFA Committee**")[1], the Ontario CFA Committee stated the following about the current state of the *Commodity Futures Act* (Ontario) ("**CFA**") that was adopted in 1978:

> *"Put very simply, the types of transactions, the nature of the market and trading practices have evolved far beyond what they were in 1978 and the current CFA no longer adequately addresses today's market." (p. 11)*

The Ontario CFA Committee further stated:

> *"The CFA has become so outdated that reforming it through amendments to the regulatory scheme of the CFA and its existing provisions is not practical." (p. 15)*

We understand that the same description generally applies to the regulation of futures in most of the other Canadian provinces and territories.

The comments in this letter relate primarily to the Canadian regulation of non-Canadian FCMs and CTAs participating in the Canadian market. The Canadian regulatory environment will have a direct impact on how Canadian investors will be able to access the services and products of non-Canadian FCMs and CTAs.

FIA would also note that we are not aware of any major regulatory or enforcement problems with US and international futures firms that are being addressed by the CSA in NI 31-103.

The principal recommendation in this letter is that the CSA introduce registration exemptions for non-Canadian FCMs and CTAs who limit their activities to trading or advising institutional and high net worth investors similar to the existing "accredited investors" exemption contained in National Instrument 45-106 – *Prospectus and Registration Exemption* ("**NI 45-106**"). FIA submits that there should be reasonable exemptions for all products (futures, securities, derivatives, funds etc.) that are traded by institutional and high net worth investors.

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[1] Final report of the Ontario Commodity Futures Act Advisory Committee dated January 2007 to the Honourable Gerry Phillips, Minister of Government Services and Minister Responsible for Securities Regulation.

FIA submits that the fragmented and inconsistent rules in Canada with respect to futures prevent Canadian investors in some provinces from accessing the operational and financial solutions and expertise that non-Canadian firms can provide to Canadian investors. The practical effect of this legislative framework is that in some provinces non-Canadian futures firms are effectively shut out of the Canadian marketplace notwithstanding the fact that the US system permits Canadian futures firms to access US clients (discussed below).

As a general approach, FIA supports the following recommendation of the Ontario CFA Committee:

> *"**Committee Recommendation:***
> *Given the nature of the market, regulation in Ontario must be compatible (although not necessarily harmonized) with other Canadian regulatory regimes and, importantly, with the regulatory regime in the United States, and, to the extent feasible, other global markets in which Ontario participants take part. A fundamental principle of the new legislation should be to avoid unnecessary duplication of regulation between jurisdictions." (p. 16)*

FIA would also generally support the recent statements by Canada's Federal Minister of Finance in the Canadian Federal Budget dated March 19, 2007. In the "Canadian Capital Markets Initiative," the Minister indicated that Canada would pursue "free trade in securities" with the US and other G7 countries.[2]

For your information, FIA submitted a comment letter to the Ontario CFA Committee. FIA also submitted a comment letter to the Autorité des marchés financiers ("**AMF**") on the AMF's report entitled *Regulation of Derivatives Markets in Quebec* (May 1, 2006). The above-referenced comment letters supported the general positions stated in this letter and are attached hereto as Appendix "A" and "B", respectively.

Many FIA members are affected by NI 31-103 because they broker or wish to broker transactions in commodity futures contracts, commodity futures options and securities for, and also provide related services and expertise to, Canadian clients. NI 31-103 has a direct impact on the futures trading activities that are permitted to be undertaken in the provinces of British Columbia, Alberta, Saskatchewan and Nova Scotia because of the legislation and rules in those provinces. In addition, NI 31-103 will be very important to the regulation of all types of futures and derivatives in Ontario and Quebec because it will set an important precedent when drafting any new futures or derivatives legislation in Ontario and Quebec. In fact, the Ontario CFA Committee stated the following in their Final Report:

> *"The Committee believes that the recommendations of the Registration Reform Project will be relevant to the consideration of requirements for regulation of intermediaries, including core principles related to integrity, proficiency and financial solvency for market intermediaries."(p.51)*
>
> *"Further study of the appropriate registration requirements for CF contracts and OTC contracts markets should be undertaken once the Registration Reform Project is complete." (p. 57)*

In our view, the goals of a regulatory initiative such as NI 31-103 should include:

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[2] Department of Finance Canada – Budget 2007 (March 19, 2007) – "*Creating a Canadian Advantage in Global Capital Markets*" (p. 29).

- providing institutional and high net worth investors with rational access to international products and markets, including through reasonable registration exemptions for non-Canadian FCMs and CTAs from countries with comparable regulatory schemes;
- providing more trading opportunities and choices for Canadian customers;
- facilitating the use of electronic trading platforms;
- promoting competition among FCMs, CTAs and exchanges world-wide; and
- fostering international regulatory cooperation.

As an example, FIA would highlight the US rules applicable to Canadian FCMs that trade foreign futures contracts and options for US clients. Other international jurisdictions do not have the type of restrictions proposed by NI 31-103 or provide relief similar to the US rules. FCMs and CTAs are not always required to make local filings.

US REGULATION OF CANADIAN FUTURES FIRMS TRADING WITH OR ADVISING US CLIENTS

Part 30 of the Commodity Futures Trading Commission ("CFTC") rules governs the offer and sale of foreign futures and options contracts to customers located in the US and permits a person to petition the CFTC for an exemption from applicable CFTC rules. A petition for exemption is typically filed on behalf of persons located and doing business outside the US that seek to do business with US customers by a governmental agency responsible for implementing and enforcing the foreign regulatory program, or a self-regulatory organization of which such persons are members. If the CFTC determines that compliance with the foreign jurisdiction's regulatory program would offer comparable protection to persons located in the US and there is an information-sharing agreement between the CFTC and the firm's home country regulator, the CFTC will issue an order to the foreign regulator granting general relief. Individual firms seeking confirmation of that relief must then make certain filings set forth in the order issued to the foreign regulator.[3] These representations are made in writing to the National Futures Association, and also includes consent to the jurisdiction of the US courts and the CFTC with respect to its dealings with US customers. Non-US persons acting in a manner similar to CTAs and CPOs must provide US customers with specified risk disclosures.

Both the Montreal Exchange[4] and the Winnipeg Commodity Exchange[5] have received orders from the CFTC and therefore, members of those exchanges are eligible to obtain 30.10 exemption.

GENERAL COMMENTS ON NI 31-103

FIA urges the CSA to recommend an approach that would permit non-Canadian FCMs to trade futures and options for institutional and high net worth investors on an exempt basis. The two principal reasons

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[3] For more information with respect to the Rule 30.10 application process, and the representations and conditions required therein. Please also refer to 62 Fed. Reg. 47792 (September 11, 1997) and Appendix A to Part 30. For a list of foreign government agencies and SROs that have received CFTC orders under Rule 30.10, please refer to the Backgrounder titled "Regulatory and Self-Regulatory Authorities That Have Received Exemptive Relief Under CFTC Rule 30.10.

[4] See, 54 Fed. Reg. 11179 (March 17, 1989) 62 Fed. Reg. 8875 (February 27, 1997)

[5] See, 66 Fed. Reg. 27859 (May 21, 2001)

for this approach are these types of clients do not need regulatory protection, and firms are generally subject to extensive regulation in their home countries or exempt from registration based on satisfying certain conditions. FIA recommends that non-Canadian FCMs and CTAs be exempt from the requirement to register as dealers and/or advisers, as applicable, in Canada if such FCMs and CTAs limit their activities to trading for or advising institutional and high net worth investors. FIA believes that the legal exemptions should be based on the type of person that trades or is advised rather than the type or nature of the products themselves.

FIA encourages the CSA to recommend exemptions for trading for or advising sophisticated institutional or high net worth investors in Canada without requiring dealers and advisers to register or file documentation with the CSA. It is FIA's view that such filings are not necessary to protect such investors and present an unnecessary additional layer of administrative requirements.

SPECIFIC COMMENTS ON NI 31-103

FIA notes that section 1.2 of the Companion Policy to NI 31-103 states that:

> *"[s]ecurities legislation in British Columbia, Alberta and Saskatchewan includes provisions governing persons that deal or advise in exchange contracts. For the purposes of those section of NI 31-1-3 whose application is equivalent to both securities and exchange contracts, reference to the term "security" or "securities" is deemed to include "exchange contract" or "exchange contracts". In some cases, the registration requirements of dealing or advising in exchange contracts are distinct from those concerning securities. Accordingly, persons should consult local securities legislation for additional provision governing persons that deal or advise in exchange contracts."*

FIA submits the CSA should make a much clearer statement concerning the registration requirement of FCMs and CTAs who wish to trade for or advise on exchange contracts with residents of British Columbia, Alberta and Saskatchewan. It is unclear whether the "international dealer exemption" and "international portfolio manager exemption" in sections 9.13 and 9.14, respectively, are intended to provide FCMs and CTAs with a dealer and/or portfolio manager exemption when trading for permitted clients in British Columbia, Alberta and Saskatchewan. FIA submits that those exemptions should apply in the case of a non-Canadian FCM or CTA providing trading or advising services in those jurisdictions. Also, the "solicitation" restriction in section 9.14 should be eliminated as this becomes very difficult to monitor or comply with in the Canada/US market and, more importantly, institutional and high net worth clients wish to be routinely contacted with trading ideas, opportunities and solutions.

As discussed, above, FIA believes that the lists of "permitted international dealer clients" and "international portfolio manager clients" contained in sections 9.13 and 9.14 of NI 31-103 are too limited and should cover all products, including securities, futures and options. FIA submits that institutional and high net worth clients should be able to have access to the services and products of non-Canadian FCMs and CTAs. FIA submits that such exemptions should be available without administrative filings in each province or territory. If the CSA is to require filings then FIA proposes that this should be one "national" filing.

FIA also believes that CPOs should not be required to register in Canada merely because Canadian investors purchase units of their commodity pools. Under NI 31-103, CPOs may be required to register as dealers, portfolio managers and/or investment fund managers.

Last, FIA also encourages the CSA to implement reasonable "transitional" and "grandfathering" provisions in the next draft of NI 31-103 to ensure that the market is not disrupted and that Canadian investors are not disadvantaged.

FIA appreciates the opportunity to comment on the important issues raised by NI 31-103. Should you have any questions or comments, do not hesitate to contact FIA. The Executive Committee of our Law and Compliance Division would be pleased to work with you as you continue to address the registration requirements in Canada for domestic and international firms.

Respectfully,

"John M. Damgard"

John M. Damgard
President

APPENDIX "A"

Futures Industry Association
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BY COURIER AND EMAIL August 25, 2006

Ontario Commodity Futures Act
Advisory Committee
c/o Davies Ward Phillips & Vineberg LLP
Suite 4400, 1 First Canadian Place
Toronto, Ontario M5X 1B1

Attention: Ms. Carol Pennycook, Chair

Dear Sirs/Mesdames:

Re: Review of Ontario's Commodity Futures Act

The Futures Industry Association ("**FIA**") is pleased to provide this comment letter to the Ontario Commodity Futures Act Advisory Committee (the "**Committee**") with respect to the Committee's Interim Report to Minister Gerry Phillips, Minister of Government Services and Minister responsible for securities regulation dated May 25, 2006 ("**Report**").

The FIA is a principal spokesman for the commodity futures and options industry. Our regular membership is comprised of approximately 40 of the largest futures commission merchants ("**FCMs**") in the United States. Among our approximately 150 associate members are representatives of virtually all other segments of the futures industry, both national and international, including US and international exchanges, banks, legal and accounting firms, introducing brokers, commodity trading advisors ("**CTAs**"), commodity pool operators and other market participants, and information and equipment providers.

The FIA supports the initiative of the Committee to address the regulation of derivatives and futures in Ontario as regulatory certainty in the derivatives and futures markets is crucial to the efficient operation of these markets in Ontario for both domestic and international industry participants.

In our view, the goals of such a regulatory initiative should include:

- to provide institutional investors with rational access to international products and markets, including through reasonable registration exemptions for non-Canadian FCMs and CTAs;

- to provide more trading opportunities for customers;

- to facilitate innovative electronic trading techniques;
- to promote competition among exchanges world-wide; and
- to foster international regulatory cooperation.

The FIA comments relate primarily to the regulation of non-Canadian FCMs and CTAs and exemptions from such requirements, and the regulation of non-Canadian exchanges and the accessibility of non-Canadian exchange-traded futures and options for Ontario investors.

For the reasons set forth below, the FIA submits that:

(a) there should not be a registration requirement on non-Canadian FCMs that trade with or CTAs that advise "accredited investors";

(b) Ontario investors should have access to products that trade on regulated international (non-Canadian) markets without the need for the exchanges to register or the products to be qualified in Ontario;

(c) as a general matter, a "core principles" approach to regulation is the preferred approach, especially relating to the self-certification of new products; and

(d) the Committee's recommended approach to defining derivatives (i.e., a generic definition restricted to exchange traded contracts and products) is appropriate.

REGISTRATION REQUIREMENTS FOR DEALERS AND ADVISERS

In the Report, the Committee requested comments on how intermediaries should be regulated.

The FIA strongly urges the Committee to recommend an approach that would permit non-Canadian FCMs to trade futures and options with institutional investors on an exempt basis. FIA recommends that non-Canadian FCMs and CTAs be exempt from the requirement to register as dealers or advisers in Ontario if such FCMs and CTAs limit their activities to trading with or advising "accredited investors" as defined in National Instrument 45-106 – *Prospectus and Registration Exemptions* ("**NI 45-106**"). The FIA believes that the legal exemptions should be based on the type of person that trades or is advised on such products rather than the products themselves.

The FIA understands that Canadian-resident persons or companies desiring to trade or advise in Ontario with respect to commodity futures are presently required to comply with licensing, proficiency and compliance requirements of the Investment Dealers Association of Canada ("**IDA**") and the Ontario Securities Commission ("**OSC**").

The FIA understands that under the current regulatory regime in Ontario, non-Canadian FCMs and CTAs are required to register as dealers or advisers in Ontario under the Commodity Futures Act ("**CFA**") if dealing or advising with respect to commodity futures, or under the Ontario Securities Act (the "**OSA**") if dealing or advising with respect to securities, unless they obtain an exemption from such requirements. The FIA understands that the CFA currently provides

limited statutory exemptions from the registration requirement for trades in a contract by a "hedger" through a dealer and unsolicited trades in contracts on exchanges situated outside Ontario. However, the practical effect of the current rules is that there is no method for non-Canadian FCMs dealing in commodity futures under the CFA to register in Ontario without establishing an office in Ontario.

The FIA encourages the Committee to recommend exemptions for trading with or advising institutional investors in Ontario without requiring dealers and advisers to register or file documentation with the OSC. It is the FIA's view that such filings are not necessary to protect investors in the institutional market and present an unnecessary additional layer of administrative requirements.

Furthermore, the FIA supports the harmonization of the registration regime across Canada for both domestic and non-Canadian firms. The current regulatory framework in Canada applicable to non-Canadian dealers and advisers is fragmented and the inconsistent provincial requirements add to the regulatory burdens and costs for international firms wishing to participate in the Ontario and Canadian markets.

REGULATION OF FOREIGN EXCHANGES

In the Report, the Committee requested comments on the regulation of exchanges. The FIA notes that the Committee recommends that foreign-based exchanges be regulated under the new legislation by requiring exchanges that carry on business in Ontario to be recognized or exempt from recognition by the OSC.

However, the FIA also notes that, in connection with the Committee's consideration of the appropriate regulation of alternative trading systems with respect to derivatives, OSC staff has recommended a concept of marketplaces similar to that in National Instrument 21-101 – *Marketplace Operation* ("**NI 21-101**"). Pursuant to NI 21-101 the OSC requires foreign-based exchanges to file an application (made on Form 21-101A1) in accordance with the requirements set out in NI 21-101. Such requirements are substantive and, in the FIA's view, an impediment to non-Canadian exchanges doing business in Ontario. The FIA believes that substantive review and filing requirements are unnecessary and burdensome as these entities are subject to regulation in their home jurisdictions. Thus, the FIA does not believe that additional review and oversight by the OSC would provide additional investor protection.

Furthermore, the FIA notes that OSC Staff also supports a core principles approach to the regulation of exchanges, and that OSC staff has recommended an approach similar to that described in OSC Staff Notice 21-702 "*Regulatory Approach to Foreign Based Stock Exchanges*" ("**21-702**") with respect to securities exchanges. The FIA notes that 21-702 proposes that foreign-based stock exchanges be recognized or exempted from recognition, and at the time of application for recognition or exemption from recognition the foreign-based stock exchange must establish it meets criteria substantially the same as a resident Canadian exchange would be required to meet pursuant to NI 21-101. Such criteria includes information about corporate governance structure, details about access, rules and rulemaking, systems and technology, financial viability, clearing and settlement, among other details. The FIA believes that such

recognition or exemption from recognition requirements are unnecessary as such exchanges are regulated in their home jurisdiction.

The FIA notes that the Committee recommends that the proposed new derivatives legislation should provide guidance on what it means to carry on business in Ontario. In particular, the FIA urges the OSC to make clear in the proposed new derivatives legislation that the fact that derivatives contracts listed on a non-Canadian exchange may be sold in Ontario to Ontario residents through Canadian dealers or advisers that are subject to registration and oversight in Ontario, or through FCMs and CTAs that are otherwise exempt from the registration requirement, does not result in the conclusion that the non-Canadian exchange itself is carrying on business in Ontario which would require it to be recognized or registered. Furthermore, the FIA submits that the OSC should also make clear that futures and options products that trade on a non-Canadian exchange are not required to be reviewed, accepted or approved by the OSC prior to their trading in Ontario.

We encourage the Committee to review the regulation of non-Canadian exchanges in light of changes in the electronic trading landscape. In particular, we would encourage the Committee to review concepts such as "carrying on business in Ontario" and "jurisdiction" with a view to the reality of today's electronic marketplaces. Historically, under U.S. rules, an exchange's location was determined by looking at the location of the exchange's trading floor as well as where it was legally-organized, its self-regulation was conducted or managed and its government regulation was authorized. As electronic trading systems have largely supplanted trading floors world-wide, linking an exchange's location to where its orders are matched is now more of a challenge. However, many international (non-Canadian) exchanges are legally organized and incorporated outside of Canada, are managed by self-regulators outside of Canada and are subject to meaningful government regulatory regimes outside of Canada. In these circumstances, FIA believes these exchanges should not be regulated by the OSC in addition to the home jurisdiction so long as customers trade on these markets through, or as authorized by, regulated or exempt intermediaries.

Consistent with this view, the FIA believes that the OSC should recognize home country regulation and not regulate based on factors such as Canadian customer volume, exchange server placement, or the "nationalizing" of particular futures contracts. Each of these factors could disadvantage Canadian customers, decrease exchange competition and add substantial costs. FIA submits that it is not necessary for the OSC to separately regulate non-Canadian exchanges that are regulated by foreign regulators, even if such regulations differ from those of the OSC.

The FIA notes that in British Columbia, Alberta, Saskatchewan and certain other provinces, foreign exchanges and clearing houses are recognized by order or other document without the need to provide, for example, financial statements, rules and contract specifications. Such entities are granted recognition based upon the regulatory approval status in their home jurisdictions. The FIA believes that it is unnecessary for the OSC to conduct an extensive and prolonged review of such entities as they are regulated in their home jurisdiction. We urge the OSC to recognize such entities as a matter of course based upon standing in their home jurisdiction. It is our understanding that no foreign-based exchange has applied under NI 21-101 for approval as an exchange in Canada to date although ICE Futures has applied to the OSC for an exemption from recognition as a stock exchange and registration as a commodity futures

exchange and such application has become the subject of a "Notice and Request for Comments – ICE Futures' Application for Exemption from Recognition and Registration as an Exchange" – (2006) 29 OSCB – July 21, 2006.

In addition, the OSC should clarify when a foreign exchange or clearing house is conducting business or operating a market in Ontario. Such entities are confronted with regulatory uncertainty in Ontario because there is no clear guidance as to when they are subject to regulation.

"CORE PRINCIPLES" REGULATORY APPROACH

As a general matter, the FIA supports a regulatory approach based on "core principles", especially with respect to the self-certification of new products. The FIA understands that the principles-based regulation is becoming increasingly accepted by regulators and market growth and innovation by market participants require a regulatory process that is able to keep pace with these changes.

It is the FIA's view that regulatory principles should be framed so as to be adaptable to the evolution of the markets and such flexibility is needed to allow for innovation without the delays inherent in regulatory amendments.

DEFINITION OF "DERIVATIVES"

The FIA supports the Committee's recommended approach to defining "derivatives" (i.e., a generic definition restricted to exchange traded contracts and products). The FIA agrees that the definition should not be an "extended" or "all-inclusive" definition so as to avoid regulatory overlap and uncertainty and cover only those products and investors that the OSC intends to regulate under any new derivatives legislation. Furthermore, the recommended approach will provide flexibility from a regulatory standpoint and will facilitate the introduction of new products and would be generally consistent with a core principles approach.

Should you have any questions or comments, do not hesitate to contact the FIA. The Executive Committee of our Law and Compliance Division would be pleased to work with you as you continue to address the regulation of derivatives markets and intermediaries.

Respectfully,

"John M. Damgard"

John M. Damgard
President

APPENDIX "B"

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BY COURIER AND EMAIL August 25, 2006

Autorité des marchés financiers
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Montréal (Québec) H4Z 1G3

Attention: Ms. Anne-Marie Beaudoin, Director, Secretariat

Dear Sirs/Mesdames:

Re: Regulation of Derivatives Markets in Québec

The Futures Industry Association ("**FIA**") is pleased to provide this comment letter to the Autorité des marchés financiers ("**AMF**") with respect to the AMF's report entitled *Regulation of Derivatives Markets in Québec* dated May 1, 2006 ("**Report**").

The FIA is a principal spokesman for the commodity futures and options industry. Our regular membership is comprised of approximately 40 of the largest futures commission merchants ("**FCMs**") in the United States. Among our approximately 150 associate members are representatives of virtually all other segments of the futures industry, both national and international, including US and international exchanges, banks, legal and accounting firms, introducing brokers, commodity trading advisors ("**CTAs**"), commodity pool operators and other market participants, and information and equipment providers.

The FIA supports the AMF's recent initiative to address the regulation of derivatives and futures in Québec as regulatory certainty in the derivatives and futures markets is crucial to the efficient operation of these markets in Québec for both domestic and international industry participants.

In our view, the goals of such a regulatory initiative should include:

- to provide institutional investors with rational access to international products and markets, including through reasonable registration exemptions for non-Canadian FCMs and CTAs;
- to provide more trading opportunities for customers;
- to facilitate innovative electronic trading techniques;
- to promote competition among exchanges world-wide; and

- to foster international regulatory cooperation.

The FIA comments relate primarily to the AMF's proposed regulation of non-Canadian FCMs and CTAs and exemptions from such requirements; the proposed requirements applicable to non-Canadian exchanges and the accessibility of non-Canadian exchange-traded futures and options for Québec investors; and, the proposed regulation of associations that regulate their members.

For the reasons set forth below, the FIA submits that:

(a) the AMF should not impose a registration requirement on non-Canadian FCMs that trade only with "accredited investors" and should broaden the list of exempt clients for CTAs;

(b) Québec investors should have access to products that trade on regulated international (non-Canadian) markets without the need for the exchanges to register or the products to be qualified in Québec;

(c) the AMF should not impose recognition or authorization requirements on international (non-Canadian) associations that regulate the activities of their members in international markets;

(d) as a general matter, a "core principles" approach to regulation is the preferred approach, especially relating to the self-certification of new products; and

(e) the AMF should adopt a "definitional" approach to derivatives, rather than specifying particular products; however, this approach must be limited to avoid regulatory overlap and uncertainty.

In particular, the FIA strongly urges the AMF to maintain the status quo with respect to non-Canadian FCMs that trade futures and options with Québec institutional investors. The FIA is not aware of any regulatory problems that have arisen in Québec under the existing institutional exemptions.

REGISTRATION REQUIREMENTS FOR DEALERS AND ADVISERS

The FIA urges the AMF to maintain the registration exemptions available to non-Canadian FCMs and CTAs that desire to trade, advise or provide access to international derivatives markets to Québec accredited investors.

The FIA understands that Canadian-resident persons or companies desiring to trade or advise with respect to derivatives are presently required to comply with licensing, proficiency and compliance requirements of the Investment Dealers Association of Canada ("**IDA**") and the Bourse de Montréal ("**MX**"). The FIA notes that the AMF recommends maintaining the current registration regime for dealers and advisers who desire to trade or advise with respect to derivatives, which regime does not permit the registration of non-Canadian dealers or advisers.

The FIA understands that under the current regulatory regime in Québec, non-Canadian FCMs are not required to register as dealers in Québec if such FCMs limit their trading activity to

trading with "accredited investors" as defined in National Instrument 45-106 – *Prospectus and Registration Exemptions* ("**NI 45-106**"). In addition, non-Canadian CTAs are not required to register as advisers if their advising activities are limited to advising those Québec investors enumerated in Section 194.2 of the Securities Regulation (R.R.Q., 1981, c. V-1.1, r. 1). We recommend that the AMF retain the exemption for FCMs and broaden the exemption for CTAs to advise accredited investors. In particular, we support the AMF's intention, "... to propose legal exemptions based on the type of person that trades in such products rather than the products themselves..."[1]

We note that the AMF states in the Report that the preferred approach with respect to an extended definition of "derivatives" is based on the Australian rules. In Australia, certain foreign financial service providers are granted relief from licensing requirements; however, such relief is based on requirements to make certain filings and submit documentation to the Australian authorities. It is the FIA's view that such filings are not necessary to protect investors in the institutional market and present an unnecessary additional layer of administrative requirements. The FIA encourages the AMF to maintain exemptions for trading with or advising institutional investors in Québec without requiring dealers and advisers to register or file documentation with the AMF.

Furthermore, the FIA recommends that the AMF work towards harmonizing the registration regime across Canada for both domestic and non-Canadian firms. The current regulatory framework in Canada applicable to non-Canadian dealers and advisers is fragmented and with inconsistent provincial requirements which add to the regulatory burdens and costs for international firms wishing to participate in the Québec and Canadian markets.

REGULATION OF FOREIGN EXCHANGES

The FIA understands that the proposed Derivatives Act would govern "regulated entities" entities such as exchanges, clearing houses and membership associations. The FIA understands that the AMF is prepared to authorize foreign-based exchanges in accordance with *Proposed Policy Statement Respecting the Authorization of Foreign-Based Exchanges*[2] ("**Policy Statement**").

The AMF recommends that "[r]ecognition or authorization of derivatives exchanges and clearing houses should be a legal requirement"[3]. Specifically, the AMF recommends that the proposed Derivatives Act contain a provision, similar to one in the *Securities Act* (Québec) ("**QSA**") that, "[n]o legal person, partnership or other entity may carry on derivatives trading or clearing activities in Québec without the authorization of the [AMF]."[4]

Pursuant to the Policy Statement, the AMF proposes to require foreign-based exchanges to file an application (made on Form 21-101A1) in accordance with the requirements set out in NI 21-101[5]. Such requirements are substantive and, in the FIA's view, an impediment to non-Canadian

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[1] Report at p. 31.
[2] *Supplément à la Section valeurs Mobilières du Bulletin de l'Autorité des marchés financiers*, 2004-11-19, Volume 1, No. 42.
[3] Report at p. 39
[4] Report at p. 40.
[5] Policy Statement, p. 2.

exchanges doing business in Québec. Furthermore, the AMF proposes to impose certain conditions of compliance on an applicant such as, filing annual reports and financial statements; updating material amendments to the laws or regulations governing its activities; updating amendments to internal by-laws; advising on changes in its right to operate; and, providing notice of any situation that could impact its financial ability[6]. The Policy Statement also sets out other requirements applicable to applicants.

The FIA believes that such substantive review and filing requirements are unnecessary and burdensome as these entities are subject to regulation in their home jurisdictions. Thus, the FIA does not believe that additional review and oversight by the AMF would provide additional investor protection.

We understand that the application of the proposed provision is limited to trading and clearing activities conducted "in Québec", however, it is unclear whether such requirement will be applicable to non-Canadian exchanges, clearing houses and associations. In particular, the FIA urges the AMF to make clear in the proposed Derivatives Act that the fact that derivatives contracts listed on a non-Canadian exchange may be sold in Québec to Québec residents through Canadian dealers or advisers that are subject to registration and oversight in Québec, or through FCMs and CTAs that are otherwise exempt from the registration requirement, does not result in the conclusion that the non-Canadian exchange itself is carrying on trading activities in Québec which would require it to be recognized or authorized under Section 169 of the QSA. Furthermore, the FIA submits that the AMF should also make clear that futures and options products that trade on a non-Canadian exchange are not required to be reviewed, accepted or approved by the AMF prior to their trading in Québec.

We encourage the AMF to review the regulation of non-Canadian exchanges in light of changes in the electronic trading landscape. In particular, we would encourage the AMF to review concepts such as "carrying on business in Québec" and "jurisdiction" with a view to the reality of today's electronic marketplaces. Historically, under U.S. rules, an exchange's location was determined by looking at the location of the exchange's trading floor as well as where it was legally-organized, its self-regulation was conducted or managed and its government regulation was authorized. As electronic trading systems have largely supplanted trading floors world-wide, linking an exchange's location to where its orders are matched is now more of a challenge. However, many international (non-Canadian) exchanges are legally organized and incorporated outside of Canada, are managed by self-regulators outside of Canada and are subject to meaningful government regulatory regimes outside of Canada. In these circumstances, FIA believes these exchanges should not be regulated by the AMF in addition to the home jurisdiction so long as customers trade on these markets through, or as authorized by, regulated or exempt intermediaries.

Consistent with this view, the FIA believes that the AMF should recognize home country regulation and not regulate based on factors such as Canadian customer volume, exchange server placement, or the "nationalizing" of particular futures contracts. Each of these factors could disadvantage Canadian customers, decrease exchange competition and add substantial costs.

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[6] Policy Statement, p. 6.

FIA submits that it is not necessary for the AMF to separately regulate non-Canadian exchanges that are regulated by foreign regulators, even if such regulations differ from those of the AMF.

The FIA notes that in British Columbia, Alberta, Saskatchewan and certain other provinces, foreign exchanges and clearing houses are recognized by order or other document without the need to provide, for example, financial statements, rules and contract specifications. Such entities are granted recognition based upon the regulatory approval status in their home jurisdictions. The FIA believes that it is unnecessary for the AMF to conduct an extensive and prolonged review of such entities as they are regulated in their home jurisdiction. We urge the AMF to recognize such entities as a matter of course based upon standing in their home jurisdiction. It is our understanding that no foreign-based exchange has applied under NI 21-101 for approval as an exchange in Canada to date although ICE Futures has applied to the Ontario Securities Commission for an exemption from recognition as a stock exchange and registration as a commodity futures exchange and such application has become the subject of a "Notice and Request for Comment – ICE Futures' Application for Exemption from Recognition and Registration as an Exchange" – (2006) 29 OSCB – July 21, 2006.

In addition, the AMF should clarify when a foreign exchange or clearing house is conducting business or operating a market in Québec. Such entities are confronted with regulatory uncertainty in Québec because there is no clear guidance as to when they are subject to regulation.

REGULATION OF FOREIGN "ASSOCIATIONS"

The FIA believes that the AMF's reference to "membership associations" in the definition of "regulated entities" in the Report is vague and appears to include foreign SROs such as the National Association of Securities Dealers ("**NASD**"), the National Futures Association ("**NFA**") and other such international associations. Furthermore, it appears that the AMF proposes to regulate such SROs. The FIA submits that there is no need for the AMF to regulate these SROs in Québec since they are subject to government oversight in their home jurisdiction.

"CORE PRINCIPLES" REGULATORY APPROACH

As a general matter, the FIA supports a regulatory approach based on "core principles", especially with respect to the self-certification of new products. As noted by the AMF in the Report, principles-based regulation is becoming increasingly accepted by regulators and market growth and innovation by market participants require a regulatory process that is able to keep pace with these changes.

The FIA agrees with the AMF that regulatory principles should be framed so as to be adaptable to the evolution of the markets and such flexibility is needed to allow for innovation without the delays inherent in regulatory amendments.[7]

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[7] Report at pp. 26-27.

DEFINITION OF "DERIVATIVES"

The FIA supports the approach of defining "derivatives" by describing the features of a derivative rather than compiling a detailed list of such instruments; however, the FIA is concerned that such definition not be an "extended" or "all-inclusive" definition so as to avoid regulatory overlap and uncertainty and cover only those products and investors that the AMF intends to regulate under any new derivatives legislation.

The FIA supports the "definitional" approach because it will provide flexibility from a regulatory standpoint and will facilitate the introduction of new products and would be generally consistent with a core principles approach.

The FIA submits that the AMF should consider a narrower definition of derivatives to clearly avoid regulatory uncertainty associated with overlapping securities, banking or other regulations and to avoid, for example, "prospectus" issues in the futures markets.

PUBLIC AVAILABILITY OF COMMENT LETTERS

We are aware that the AMF may, but does not systematically publish comment letters on its website in response to AMF requests for comments. We would note that this appears contrary to the general practice of most regulators and, in connection with the Report, our view is that it is important for the AMF to publish all submissions (other than submissions expressly made on a confidential basis) so that the FIA's position is available as a matter of public record and the FIA has the opportunity to understand and review the comments expressed by other commenters. The FIA is of the view that the publication of submissions is important to an open and transparent legislative process.

Should you have any questions or comments, do not hesitate to contact the FIA. The Executive Committee of our Law and Compliance Division would be pleased to work with you as you continue to address the regulation of derivatives markets and intermediaries.

Respectfully,

"John M. Damgard"

John M. Damgard
President