# Alternative Investment Management Association (AIMA)

The Forum for Hedge Funds, Managed Futures and Managed Currencies

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New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

c/o John Stevenson, Secretary
Ontario Securities Commission
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Toronto, Ontario M5H 3S8

c/o Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22 étage
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Montreal, Québec
H4Z 1G3

- and -

Dear Sirs/Mesdames:

**Re: AIMA Canada's Comments on Proposed Amendments to National Instrument 31-103** *Registration Requirements and Exemptions* **and Companion Policy 31-103CP** *Registration Requirements and Exemptions*

This letter is being written on behalf of the Canadian chapter (**"AIMA Canada"**) of the Alternative Investment Management Association (**"AIMA"**) and its members to provide our comments to you on the Canadian Securities Administrators' (**"CSA"**) proposed amendments (the **"Proposed Amendments"**) to National Instrument 31-103 *Registration Requirements and Exemptions* (**"NI 31-103"**) and Companion Policy 31-103 *Registration Requirements and Exemptions* (the **"Companion Policy"**).

AIMA was established in 1990 as a direct result of the growing importance of alternative investments in global investment management. AIMA is a not-for-profit international educational and research body that represents practitioners in hedge fund, futures fund and currency fund management – whether managing money or providing a service such as prime brokerage, administration, legal or accounting. AIMA's global membership

comprises over 1,280 corporate members, throughout 49 countries, including many leading investment managers, professional advisers and institutional investors. AIMA's Canadian chapter, established in 2003, now has over 70 corporate members.

The objectives of AIMA are to provide an interactive and professional forum for our membership and act as a catalyst for the industry's future development, to be the pre-eminent voice of the industry to the wider financial community, institutional investors, the media, regulators, governments and other policy makers and to offer a centralized source of information on the industry's activities and influence, and to secure its place in the investment management community.

For more information about AIMA Canada and AIMA, please visit our web sites at www.aima-canada.org and www.aima.org.

This comment letter has been prepared by a working group of the members of AIMA Canada, comprised of managers of hedge funds, fund of funds and accountancy and law firms with practices focused on the alternative investments sector.

*Amendments relating to International Financial Reporting Standards (IFRS)*

Section 1.4 of the Proposed Amendments provides that fair value of a security must be determined in accordance with IFRS for purposes of the NI 31-103. We note that changes in accounting standards have in the past impacted this measure of fair value, and this can cause significant operational impacts to industry participants. Within National Instrument 81-106 – *Investment Fund Continuous Disclosure*, the calculation of fair value of a security is defined in section 14.2(1.2) and we submit that this definition should be appropriate for purposes of the requirements in NI 31-103 also.

*Proficiency Requirements for Chief Compliance Officers of Portfolio Managers and Investment Fund Managers*

We suggest that the qualifying examination for chief compliance officers offered by the Investment Industry Regulatory Association of Canada be considered as an alternative to the PDO Exam in sections 3.13 and 3.14 of the Proposed Amendments. In our opinion, this exam meets the objective of qualifying chief compliance officer in a more focused way as opposed to the more general PDO Exam.

*Client Notice Requirement – International Dealers and International Advisers*

The proposed amendments to sections 8.18(5) and 8.26(5) of the Proposed Amendments require a notification if a person "is relying" on the exemption. It is unclear from these amendments whether the notice is prospective or retrospective. It is our view that the language should be clarified.

*Investment Fund Manager Registration*

As mentioned in our previous correspondence with the CSA, managers of alternative investments (as well as many managers of other investment funds) often structure their investment funds as limited partnerships. Liability concerns surrounding limited partnership law in many Canadian jurisdictions have resulted in investment funds



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structured as limited partnerships being constituted with separate (but affiliated) general partners for each investment fund.

As a consequence of the guidance in section 7.3 of the Companion Policy, we believe market practice has been for the general partners of limited partnership investment funds to enter into a management agreements with an affiliated registered investment fund manager within the group. The general partners then do not register as investment fund managers. Based on discussions over the last year with CSA staff we understand that, notwithstanding this guidance, it is their view that in order for the general partner to avoid triggering the investment fund manager registration requirement, the delegation of the management of the investment fund by the general partner to a registered investment fund manager must be contained in the limited partnership agreement governing the investment fund. The same analysis applies to the trustees of investment funds structured as trusts. We would appreciate express confirmation that the delegation is sufficient if it is contained in a management agreement or other contract and is not required to be contained in the limited partnership agreement or trust declaration, as applicable.

*Dealer Registration Exemption – Trades through or to a Registered Dealer*

We find the guidance contained in section 8.5 of the Companion Policy (which we recognize as currently contained in a similar form in CSA Staff Notice 31-313 – *NI 31-103 Registration Requirements and Exemptions – Frequently Asked Questions as of December 18, 2009*), to be confusing, particularly when it is applied to trading in prospectus–exempt securities to Canadians. We note that while the phrase "jitney" may be meaningful to investment dealers, it is not meaningful to entities in the business of trading in the exempt market and suggest that the phrase not be used without definition.

It is not clear to us when the exemption may be relied upon. The only example provided, "...where an individual trades through their account with an investment dealer or a company issues its own securities through an investment dealer..." is, in our view, unlikely to trigger the "in the business" dealer registration requirement in the first instance in any event.

In order to give meaning to the exemption from dealer registration in section 8.5(a) of NI-31-103, the entity relying on the exemption must have undertaken some activity in Canada that triggered the dealer registration requirement in the first place. It is unclear what that activity could be other than, as suggested in the last paragraph of the proposed guidance, the act of contacting a registered dealer in Canada to secure its services for the transaction. It is our view that the mere act of contacting a registered dealer in Canada does not constitute a trade or act in furtherance of a trade if the unregistered entity has not had any contact with potential purchasers (which, as the guidance indicates, it is prohibited from doing).

In our view, the circumstance where a person or company conducts dealing activity for which they are not registered or exempt from registration and then directs that the execution of those trades be carried out by a registered dealer (where the purchaser of securities is or will be a client of the registered dealer), which is not permitted by the guidance, both provides appropriate protection to investors and fosters fair and efficient



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capital markets. Prohibiting such dealing activity, in our view, will result in a fewer non-Canadian investment opportunities being made available to Canadians.

We urge the staff of the CSA to re-consider its' views of this activity and the proposed guidance.

*CSA Staff Notice 31-317(Revised) – Reporting Obligations Related to Terrorist Financing for Registrants, Exempt International Dealers and Exempt International Advisers (the "Revised Notice")*

The Revised Notice clarifies that staff of the CSA expects exempt dealers and exempt advisers (as defined in the Revised Notice) that engage in the business of dealing in securities or providing portfolio management or investment counselling services in a Canadian jurisdiction to comply with any applicable federal provisions relating to terrorist financing and United Nations sanctions.

We seek further guidance on CSA staff's view of when the obligation to make the monthly filing prescribed by section 83.11 of the *Criminal Code* and other legislation arises and when it ceases to apply in circumstances where an exempt dealer or exempt adviser does not carry on business in Canada on a regular and continuing basis. Some non-Canadian dealers and advisers operate in Canada on a sporadic basis (for example, a dealer may only carry on dealing business in Canada during the offering stage of an investment fund and thereafter cease to carry on business in Canada until the investment fund is opened to new subscriptions or a new investment fund is launched).

In order to rely on the applicable exemption from registration, exempt dealers and exempt advisers are required to file a Form 31-103F2. We would appreciate clarification on whether CSA staff is of the view that the obligation to make the filing prescribed by section 83.11 of the *Criminal Code* commences when the Form 31-103F2 is filed or whether it commences when the exempt dealer or exempt adviser engages in the business of dealing or advising in Canada. Similarly, we would appreciate clarification on whether it is CSA staff's view that the obligation to make the filing ceases on December 1 in a year the exempt dealer or exempt adviser does not make the filing referenced in sections 8.18(5) and 8.26(5) of the Proposed Amendments or whether it ceases to apply when the exempt dealer or exempt adviser ceases to engage in the business of dealing or advising in Canada.

We also understand that it is the view of CSA staff that the obligation in section 83.11 of the Criminal *Code* to determine whether a client of an exempt dealer or exempt adviser is a "designated person" only applies to the Canadian clients of the exempt dealer or exempt adviser. We would appreciate additional clarity on this point.

*Excess Working Capital Calculation*

We suggest that item (e)(ii) of Schedule 1 for Form 31-103F1 be conformed to agree to the list of designated stock exchanges as issued by the federal Department of Finance to determine qualifying securities for registered retirement savings plans purposes. In our opinion this will ensure a consistency in the recognition of international securities as being appropriate investments.



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*Conclusion*

We appreciate the opportunity to provide the CSA with our views on the Proposed Amendments. Please do not hesitate to contact the members of AIMA set out below with any comments or questions you might have. We would appreciate the opportunity to meet with you in order to discuss our comments.

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Yours truly,
**ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION**

By:

Ian Pember
On behalf of AIMA Canada and the Legal & Finance Committee

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