



Alternative Investment Management Association (AIMA)

The Forum for Hedge Funds, Managed Futures and Managed Currencies

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www.aima-canada.org

January 12, 2011

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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
20 Queen Street West, Suite 1903 Box 55
Toronto, Ontario M5H 3S8

c/o Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22 étage
C.P. 246, tour de la Bourse
Montreal, Québec
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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* relating to the Registration of International and Certain Domestic Investment Fund Managers

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**") relating to Registration of

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International and Certain Domestic Investment Fund Managers.

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 1200 corporate member firms (with over 5,000 individual contacts) in more than 40 countries, including many leading investment managers, professional advisers and institutional investors. AIMA's Canadian national group, established in 2003, now has over 70 corporate members.

The principal aims 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 globally, 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 and fund of funds, and accountancy and law firms with practices focused on the alternative investments sector.

Comments

It has long been AIMA's position to support the requirement for hedge fund managers to be authorised and regulated. Indeed, during the negotiations surrounding the European Alternative Investment Fund Manager Directive, AIMA argued against there being a minimum threshold based on AUM, below which a manager would not need to be authorised.

However, such registration requirements should be appropriate and proportionate. In general, we do not agree with the requirements for investment fund manager (“IFM”) registration set out in the Proposed Amendments in two major respects:

1. The proposed requirement for a Canadian resident IFM to register in provinces or territories where it solicits investors (as defined) is contrary to the CSA's stated position that it will not “look through” a fund. It also does not benefit Canadian capital market participants as the IFM would already be registered as a dealer in a province or territory where it actively solicits investors. Requiring an IFM registration would be duplicative and impose additional unwarranted costs.
2. The proposed requirement could potentially limit the international investment

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choices for major institutional investors as offshore fund managers could be required to register as an IFM solely due to accepting an investment in excess of \$50 million. Given this requirement offshore fund managers may eschew accepting Canadian investors.

We have expanded below on these and other issues.

It is our view that the exemptions in sections 8.29.1 and 8.29.2 of the Proposed Amendments can only be operative in circumstances where the IFM registration requirement is triggered. Based on the definition of “investment fund manager” in the *Securities Act* (Ontario) (and similar definitions in other Canadian jurisdictions), the IFM registration requirement will only be triggered in jurisdictions in which an IFM directs the business, operations or affairs of an investment fund.

We do not believe that the definition of IFM supports the position that the jurisdictions in which investors in an investment fund are resident triggers the requirement to register as an IFM in those jurisdictions. In addition, we had understood that the “flow-through test” previously applied by some CSA jurisdictions, in the context of advisers to funds, to assert that an adviser to a fund was advising the security holders of a fund and therefore needed to be registered as an adviser in the jurisdictions in which the security holders are resident, was abandoned with the implementation of NI 31-103, and note in particular Comment 94 of the CSA’s response to comments published on February 29, 2008 (the “Responses to Comments”), which states:

“The commenters suggest that the CSA should clarify that non-Canadian advisers and investment fund managers of investment funds are not required to register in Canada merely because units of an investment fund are purchased by Canadian investors...”

In response to this comment, the CSA stated, “We agree that the flow-through analysis should not be applied to investment fund managers...”

As well, in the Response to Comments, the CSA considered the issue of services provided from outside of Canada, stating in the response to Comment 543 of the Responses to Comments, in the context of comments on international advisers:

“If the investment fund manager does not direct a fund from within a Canadian jurisdiction, neither the investment fund manager nor a foreign adviser [sic] the fund would be required to register (although dealers distributing units of the fund in Canada would be required to register in the appropriate category).”

The comment in the proposed companion policy that “an investment fund manager that does not have a physical place of business in a jurisdiction will also need to register in that jurisdiction if the investment fund has security holders resident in that jurisdiction”, re-institutes the “flow-through test”. We urge the CSA to re-consider this approach, as it is

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inconsistent with the definition of “investment fund manager” in applicable legislation, as well as the CSA’s prior guidance on this issue.

We are further of the view that solicitation of investors does not and should not trigger the IFM registration requirement.

We recognize that there is very little jurisprudence or guidance on what activities constitute a person or company being an IFM, but believe that marketing activities do not constitute directing the business, operations or affairs of an investment fund. In particular, we do not think that that solicitation alone in a jurisdiction would constitute acting as an IFM in that jurisdiction. We agree with the Response to Comment 543 above that marketing activities may trigger the dealer registration requirement, independent of the IFM registration requirement as such activities fall squarely within the business customarily undertaken by dealers. We also note that many Canadian investors with substantial portfolios, including private and public pension funds and other institutional investors, routinely make investments in excess of \$50 million in a non-Canadian investment fund. Faced with the requirement that there must be an IFM registration in a Canadian jurisdiction as a prerequisite to accepting a large subscription from a Canadian investor, it is our view that the advisers and administrators to non-Canadian investment funds will choose not to accept Canadian subscribers for their funds. We believe the result will be a substantial decline in investment opportunities for these Canadian investors.

It is also our view that Canadian resident IFMs should be required to register as such only in the jurisdiction(s) in which they carry on that activity. We do not see the benefit to any Canadian capital markets participant of requiring an IFM to register in provinces or territories other than the provinces and territories within which the IFM directs the business, operations or affairs of an investment fund. These IFM’s will already be registered as an IFM in the jurisdiction in which they carry on business as such. They will also be registered as advisers in the jurisdictions, if any, in which the investment fund is registered, and as dealers in all Canadian jurisdictions in which they directly solicit investors. We believe that these registrations provide adequate and appropriate protections for Canadian investors. Contrary to the statement made in the Notice published by the CSA, we believe that there will be substantial costs imposed on capital markets participants by the Proposed Amendments with very little benefit.

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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