# Alternative Investment Management Association (AIMA)

The Forum for Hedge Funds, Managed Futures and Managed Currencies

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Financial and Consumer Series Commission of New Brunswick
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Dear Sirs/Mesdames:

**Re: CSA Notice and Request for Comment**
**Proposed Amendments to National Instrument 45-106 Prospectus and Registration Exemptions Relating to the Accredited Investor and Minimum Amount Investment Prospectus Exemptions (the "Proposals")**

This letter is being written on behalf of the Canadian National Group ("AIMA Canada") of the Alternative Investment Management Association ("AIMA") and its members to provide our comments to you on the Proposals.

As the global hedge fund association, AIMA has over 1,400 corporate members (with over 7,000 individual contacts) worldwide, based in over 50 countries. Members include hedge fund managers, fund of hedge funds managers, prime brokers, legal and accounting firms, investors, fund administrators and independent fund directors. AIMA's manager members manage a combined $1.5 trillion in assets (as of March 2014). All AIMA members benefit from AIMA's active influence in policy development, its leadership in industry initiatives, including education and sound practice manuals and its excellent reputation with regulators worldwide.

AIMA is a dynamic organisation that reflects its members' interests and provides them with a vibrant global network. AIMA is committed to developing industry skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the industry's first and only specialised educational standard for alternative investment specialists. For further information, please visit AIMA's website, www.aima.org.

The majority of AIMA Canada's more than 110 members are managers of hedge funds and fund of funds. Most are small businesses with fewer than 20 employees and $50 million or less in assets under management. The majority of assets under management are from high net worth individuals and are typically invested in pooled funds managed by the member. Investments in these pooled funds are sold under exemptions from the prospectus requirements, mainly the accredited investor and minimum amount exemptions. Manager members also have multiple registrations with the securities regulatory authorities: as Portfolio Managers ("PMs"), Investment Fund Managers ("IFMs") and in many cases as Exempt Market Dealers ("EMDs"). AIMA Canada's membership also includes accountancy and law firms with practices focused on the alternative investments sector. As PMs our members may also act solely as advisors to clients, acting with discretionary responsibility over separately managed accounts held in custody at other financial institutions. For more information about AIMA Canada please visit our web site at www.canada.aima.org.



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*Summary and Overview*

We appreciate the purpose of the Proposals – investor protection – however we have concerns with certain of the amendments as proposed. Furthermore we have significant concerns with the proposed amendments to the exempt distribution reporting forms. We have two major areas of comment:

- Although we understand the legislative backdrop to the "other than Ontario" carve-outs, the effect of this Ontario-only approach to legislation and regulation makes NI 45-106 confusing and difficult to follow. Furthermore, if adopted, the changes to the exempt distribution reporting forms will represent a step back from the harmonization efforts of the CSA and, in our view, is contrary to the public interest.

- The increased complexity of the proposed forms for reporting exempt distributions will impose an additional administrative burden on Canadian issuers that are already finding it extremely difficult to cope with the amount and pace of regulatory change. The overreaching nature of the reporting requirement could also create a disincentive to foreign issuers to offer their securities to Canadian investors, contrary to the public interest.

Our comments on these issues are expanded upon below.

*Amendments to NI 45-106*

1. We applaud the addition of the financial asset test for individual accredited investors.

2. We applaud the removal of the investment fund carve-out from the definition of accredited investor for managed accounts in Ontario.

3. We applaud the addition of family trusts to the definition of accredited investor.

4. We are disappointed that further amendments were not made to eliminate local carve-outs of the other exemptions, with a view to harmonizing securities regulation across Canada.

5. We question the removal of the $150,000 exemption for individuals. We agree that there will be situations where an investment of $150,000 or more may not be suitable for a particular investor, but that will be true for individual accredited investors and for corporate and other entities (whether accredited investors or not). Rather than removing the exemption, we believe that the more appropriate regulatory response is through the compliance audit process.



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6. We question why there continues to be a different exempt distribution reporting regime in British Columbia. We believe that this is counter-productive and confusing. We further believe that this only creates an additional administrative hardship (and therefore a greater financial burden) on issuers who must report in multiple jurisdictions (including British Columbia) that is not justified by regulatory needs of the individual members of the CSA. We encourage the CSA to continue to work together to establish a completely harmonized regulatory reporting regime.

*FORM 45-106F1*

7. We query why in Item 7 issuers are required to disclose "Each Canadian and foreign jurisdiction where purchasers reside". Form 45-106F1 is a report of distributions made under the prospectus exemptions specified in section 6.1 of NI 45-106. Sales made in foreign jurisdictions are made pursuant to the securities laws of those jurisdictions. Please see our point 10 below.

8. Schedule 1 requires that all applicable categories of accredited investor be disclosed. As only one category is required to rely on the exemption, we query whether this now imposes a greater duty on issuers to determine all applicable categories which apply to a single accredited investor. We believe that this would create an unnecessary and unjustifiable administrative hardship on issuers.

9. Please confirm that issuers are not required to obtain a telephone number and an email address from all investors for the sole purpose of completing Column 1 of Schedule 1. We note that Form 45-106F6 clearly states that, if the purchaser refuses to provide a telephone number or an email address, the response "not provided" is acceptable.

10. We have a number of concerns with Instruction 2.2 of Schedule 1:

    a. To state in a distribution reporting form that "In most Canadian jurisdictions, a 'distribution' also occurs if the issuer of the securities is located in the jurisdiction" creates confusion and uncertainty. Based on fundamental "trade analysis" in securities law, the trade (distribution) typically, but not always, occurs where the purchaser resides, however this is a matter that must be considered on a case-by-case basis and in consideration of the published positions of each of the local securities regulators in the context in which it is being considered. If the purpose of Form 45-106F1 is to collect information regarding distributions to



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purchasers resident in each local jurisdiction, then the Instrument and the Form should explicitly state so and require that information. To introduce the concept in this form, that a distribution (trade) takes place in multiple jurisdictions, an issue that is an often debated by securities law professionals, serves to unnecessarily complicate the reporting process and will lead to confusion and inconsistent reporting among issuers.

b. We believe that reporting distributions in both the jurisdiction of the issuer and the purchaser will have the effect of skewing the information that the CSA is collecting, as it will result in double-counting of certain sales. Reporting of individual sales to purchasers who reside in a local jurisdiction is one thing, and requires individualized information. Reporting of sales by an issuer that resides in a jurisdiction, regardless of where the purchasers reside, could be reported on a gross basis and provide the regulators what they require – a better understanding of capital raising in their jurisdiction - without the need to provide duplicative information respecting individual purchasers residing in other jurisdictions.

c. It would be helpful for the Form to specify which jurisdictions require reporting of distributions made by issuers that reside in the jurisdiction, rather than force issuers to hire securities counsel to analyze the local laws in order to make that determination.

d. To require the reporting of the same distribution in two local jurisdictions could also result in duplication of fees payable by issuers. Please clarify that this is not the case.

e. Finally, we are concerned that by requiring the reporting of all sales by an issuer regardless of where the purchaser resides, and to require detailed individual information on investors who reside outside the local jurisdiction (and in particular outside Canada), will result in the extra-territorial application of a local rule. It may provide a disincentive for foreign investors to acquire securities of Canadian issuers, which is not in the best interest of Canadian issuers. And it may provide yet another disincentive for foreign issuers, who may already be reluctant to become subject to a patchwork securities law regime in Canada, to offer their securities in Canada thereby depriving Canadian investors from access to securities that might otherwise be suitable for them (and indeed might be in their best interest).

*FORM 45-106F6*

11. We repeat our comments in points 6 to 9 above. We would also like to reiterate our frustration with the separate reporting regimes in the local jurisdictions in Canada.

*FORM 45-106F9*

12. The statement that "I acknowledge that this a risky investment. I could lose all of the $__ I invest" is true of all investments that are not insured or otherwise protected, overstates the risk for many investment funds and could inappropriately discourage investment solely because the investment is not made pursuant to a prospectus.

13. The statement that "I understand that I may never be able to sell these securities" should not have to be made (as it would be inaccurate) by investment funds that are redeemable on demand. We suggest that, where appropriate, investment funds be permitted to amend this sentence to read "I understand that I may never be able to sell these securities other than pursuant to redemption rights offered by the [Fund]".

14. The statement that "I may not be provided with ongoing information from the issuer I invest in" should not have to be made (as it would be inaccurate) by investment funds that are subject to NI 81-106 or are otherwise required by their constating documents to provide regular financial reports.

15. Please clarify that only those individuals who fit into the specified categories of accredited investor enumerated in Box 2 are required to receive this form.

16. Regarding instruction 1, it would be helpful for certain issuers to include this form as a schedule to the subscription agreement to ensure that it is delivered to the prospective purchaser and completed. A general review of the subscription document will determine whether it has been completed and the appropriate exemption can be relied on. We recommend that instruction 1 contemplate and permit this delivery mechanism.

17. Regarding instruction 2, investment funds are often sold by IIROC dealers through FundSERV, so there is no direct interface between the issuer and the purchaser. Completed subscription materials (which will include this



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Form) must be forwarded by the selling dealer to the issuer for review and only then can the issuer satisfy itself that the Form has been properly completed and signed by the purchaser and the subscription can be accepted. Of course if the investment fund manager is the dealer of record then there would be a direct interface and this process can be completed immediately. Please clarify that it is only the selling dealer, and not the issuer, that is responsible for signing Box 5. Please also confirm that a fully signed copy of this Form need only be provided to the purchaser after the subscription has been accepted.

*Companion Policy to NI 45-106*

18. We are concerned with the potential effect of section 1.9 and the statement that "it will not be sufficient to accept standard representations in a subscription agreement or an initial beside a category on the Form 45-106F9 Risk Acknowledgement Form for Individual Accredited Investors unless the person relying on the exemption has taken reasonable steps to verify the representation." Section 1.9 seems to blur the roles of the issuer and the selling dealer. If an issuer has no direct interface with a purchaser of securities, it will be difficult for the issuer to take any of the steps outlined in section 1.9. We believe that this represents a significant departure from the previous administrative position of the CSA that a duly executed certificate can be relied on unless there is any reason to doubt its veracity. We understand that in compliance audits, the CSA frequently found instances where, for example, the accredited investor certificate was inconsistent with KYC or other information that had been collected. However only the selling dealer would have that information. Requiring an issuer to request, from an investor purporting to rely on one of the net worth categories of accredited investor, financial or bank statements verifying that assertion will be met with considerable resistance from investors. It is likely that the selling dealer will have already collected any such necessary verification during the course of conducting KYC due diligence. We strongly oppose any such requirement to duplicate information and documentation collection. We feel that any such requirement will further inhibit capital-raising in Canada.

*Conclusion*

In summary, our principal concern is the additional administrative burden arising from the increased reporting requirements in the Proposals, which is exacerbated by the confusion created by the forms and the inconsistent reporting requirements across Canada.

We would like to particularly encourage the CSA to further harmonize securities



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regulation in Canada and to simplify regulatory reporting, rather than to create additional jurisdiction-specific rules and reporting requirements. We understand the objective of the CSA, to protect investors, however we feel that overregulating capital-raising in Canada will simply stifle capital-raising, create insurmountable barriers to entry for new issuers, will limit investment choice for Canadian investors and will limit the ability of Canadian issuers to raise capital outside of Canada.

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 that you might have.

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Yours truly,

ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION

By:

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