MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

June 1, 2011

Via Email: Notice.Comments@irscounsel.treas.gov

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2011-39)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington D.C. 20044

Re: MFA Comments Notice 2011-39: Inclusion of Section 864(b) Guidance in 2011-12 Business Plan

Ladies and Gentlemen:

Managed Funds Association ("MFA")[1] appreciates the opportunity to respond to Notice 2011-39, Public Comment Invited on Recommendations for 2011-2012 Guidance Priority List. For the reasons discussed below, we respectfully request that guidance under section 864(b) of the Internal Revenue Code of 1986, as amended (the "Code") be included in the forthcoming 2011-12 Guidance Priority List. We note that this issue was first placed on the Guidance Priority List for 2006-07.

Section 864(b) of the Code provides safe harbors for proprietary trading in stock, securities, and commodities by passive non-U.S. investors, including private investment funds. These funds typically commit to their investors that they will not knowingly make investments that will fall outside these safe harbors. MFA continues to be concerned that the absence administrative guidance under section 864(b) of the Code concerning whether certain activities by otherwise passive non-U.S. investors, including (but not limited to) activities involving the acquisition of loans and other debt securities as well as the receipt of certain types of fees, will be treated as falling outside the safe harbors. In the experience of MFA members, uncertainty regarding the status of these types of investments has resulted, and will continue to result, in numerous economically desirable transactions not being consummated out of concern that they would expose investors to

[1] MFA is the voice of the global alternative investment industry. Its members are professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. Established in 1991, MFA is the primary source of information for policy makers and the media and the leading advocate for sound business practices and industry growth. MFA members include the vast majority of the largest hedge fund groups in the world who manage a substantial portion of the approximately $1.9 trillion invested in absolute return strategies. MFA is headquartered in Washington, D.C., with an office in New York.

unnecessary and serious tax risk, even though many believe that those transactions should properly be within the parameters of the safe harbors. This result is not in the interest of the United States and U.S. capital markets, which benefit from investments in the U.S. from sources around the world.

MFA and others, including professional organizations such as the New York City Bar have for several years encouraged the Department of the Treasury and Internal Revenue Service to provide such guidance, noting that its continuing absence has caused many non-U.S. investors to refrain from providing capital needed by U.S. businesses, including in cases involving nonperforming debt and bankruptcy proceedings where workout activities and perhaps new investment capital are required by those businesses. For example, in its letter of April 9, 2008 to Treasury and the Service, MFA formally requested that guidance be issued on certain issues arising under section 864(b) with respect to so-called distressed debt situations, noting that the guidance sought was consistent with a correct interpretation of current law.[2] As the New York City Bar noted in its earlier submission dated May 3, 2007, guidance is needed to provide "clarity and greater certainty" to non-U.S. passive investors.[3] That need is even greater today given the significant changes that have occurred in the U.S. credit markets in the aftermath of the financial crisis of 2008.

MFA believes that section 864(b) issues meet the criteria specified in Notice 2011-39, a fact that is underscored by the inclusion of these issues in the Priority Guidance Plan for prior years and the sheer volume of private sector commentary that the issues have engendered. Specifically, guidance under section 864(b) will resolve significant issues relevant to many taxpayers; will promote sound tax administration by providing objective guidance that will promote general uniformity of taxpayer practice; can, as prior submissions by MFA and others have shown, be drafted in a manner that can taxpayers can apply; will be readily administrable on a uniform basis by the Service as the guidance can be issued in the form of clear safe harbors that will leave only marginal transactions to be resolved on a case-by-case basis; and there is no doubt that guidance of the type requested will reduce the potential for burdens on, and controversy between, the Service and taxpayers.

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[2] Available at http://www.managedfunds.org/downloads/Distressed%20Debt%20Letter%20-%20Final.pdf.

[3] Available at http://www.abcny.org/pdf/report/Guidelines_US_Fed_Income_Tax050307.pdf.

MFA appreciates the opportunity to respond to Notice 2011-39 and provide its thoughts on issues to include in the 2011-2012 Guidance Priority List. We would be happy to meet with staff from Treasury and Service to work on the development of suitable guidance under section 864(b).

If you have any questions regarding any of these comments, or if we can provide further information with respect to these or other issues, please do not hesitate to contact Stuart J. Kaswell or me at (202) 730-2600.

Respectfully submitted,

/s/ Richard H. Baker

Richard H. Baker
President and CEO