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

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

Manal Corwin
Deputy Assistant Secretary for International Tax Affairs
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Honorable Douglas Shulman
Commissioner
Internal Revenue Service
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20224

Re: MFA Comments Notice 2011-34

Dear Deputy Assistant Secretary Corwin and Commissioner Shulman:

Managed Funds Association ("MFA")[1] appreciates the opportunity to respond to Notice 2011-34, (the "Notice")[2], which provides guidance for public comment on priority issues arising in connection with the implementation of information reporting, withholding and documentation requirements of sections 1471-1474 of the Internal Revenue Code of 1986, as amended (the "Code").[3] These provisions were enacted under the Foreign Account Tax Compliance ("FATCA") section 501 of the Hiring Incentives to Restore Employment Act of 2010[4] and generally will take effect with respect to certain payments made after December 31, 2012. This letter supplements MFA's November 1,

[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.

[2] 2011-19 I.R.B. 765 (May 9, 2011).

[3] Except as otherwise specifically stated, all references in this letter to "section" and "sections" are to sections of the Code.

[4] Public Law 111-147 (March 18, 2010).

2010 letter to the Department of the Treasury (the "Treasury") and the Internal Revenue Service (the "Service") in response to Notice 2010-60, which provided preliminary guidance with respect to implementation of FATCA.

MFA supports the broad anti-tax evasion objectives underlying FATCA and we encourage the Treasury and the Service to establish an appropriate regime under which the information needed for U.S. tax enforcement purposes is obtained in a manner that does not impose unnecessary administrative burdens, particularly on those foreign financial institutions ("FFIs") that present little or no opportunity for U.S. taxpayers to evade their U.S. tax obligations.

Further, there are important differences in structure and operations between pooled investment funds and other types of financial institutions that we believe are important for the Treasury and the Service to take into account in developing rules to implement FATCA. While we appreciate that the Treasury and the Service included guidance in the Notice that is tailored for pooled investment funds, we believe the guidance provided in the Notice does not fully address issues relevant to pooled investment funds that are likely to be deemed FFIs and we encourage the Treasury and the Service to consider providing additional guidance with respect to the issues discussed below.

Passthru Payments

In the Notice, the Treasury and the Service expressed concern that a narrow definition of passthru payments could result in structures being unfairly used by foreign investors to avoid withholding or having to enter into FFI agreements. While we understand this concern, we believe that the manner in which the Notice would deem payments attributable to withholdable payments is overly broad and could have the unintended consequence of discouraging investment in the United States by foreign investors with limited exposure to the United States. Investment in U.S. capital markets by non-U.S. investors is crucial to the health and stability of our capital markets and our economy. As such, we encourage the Treasury and the Service to adopt a more narrowly tailored definition of passthru payments that achieves the Congressional objective in enacting FATCA, but minimizes the potential unintended consequence of discouraging foreign investment in the United States.

We are also concerned that the asset-based methodology to calculate the passthru payment percentage proposed in the Notice could lead to over-withholding or double counting by investment funds. Further, because investment funds invest in a wide variety of assets and in a number of jurisdictions, we are concerned that the asset test will be difficult to implement for investment funds. These concerns are magnified in the context of multi-tiered fund structures, including funds-of-funds. Accordingly, we encourage the Treasury and the Service to amend the proposed guidance to permit investment fund FFIs to use any reasonable method of attributing a payment to a withholdable payment as long as the fund can document its method and that method is used consistently by the fund.

We further encourage the Treasury and the Service to permit investment fund FFIs to exclude *de minimis* amounts that may be attributable to withholdable payments as part of the methodology they use to calculate their passthru payments. Allowing funds to exclude investments of *de minimis* amounts would not present significant risks of tax evasion, but would reduce the administrative burdens for funds.

Deemed Compliant Investment Funds

As noted above, we appreciate the Treasury and the Service providing guidance regarding how investment funds can become deemed compliant FFIs for purposes of FATCA. We are concerned, however, that the conditions set out in the Notice[5] are overly restrictive and we encourage the Treasury and the Service to consider modifying the conditions that a deemed compliant investment fund must meet. Specifically, the first two conditions with respect to the types of investors that are permitted in a deemed compliant investment fund are too restrictive in the absence of further guidance from Treasury under section 1471(f)(4). Many investors in offshore funds, including U.S. tax exempt entities and accounts (including pension plans, endowments and foundations) and non-U.S. natural persons, are not entities specifically identified in section 1471(f) and have not yet been identified by the Treasury under 1471(f)(4) as persons that pose a low risk of tax evasion. Though these classes of persons have not yet been identified by the Treasury pursuant to section 1471(f)(4), we believe that these investors meet the statutory standard of persons that present a low risk of tax evasion. Without including such persons as eligible investors in deemed compliant investment funds, many investment funds would not be able to be deemed compliant FFIs under section 1471(b).

Further, with respect to the types of FFIs that would be permitted investors under the Notice, it is important for the Treasury and the Service to provide additional guidance regarding how funds should determine whether such an investor is an eligible FFI. We encourage the Treasury and the Service to develop guidance that would allow investment funds to rely on either a certification that the investment fund obtains from non-U.S. entity investors or create an official government form that such investors could complete and provide to the investment fund.

Request for Clarification

In addition to the two areas discussed above, we encourage the Treasury and the Service to provide further guidance with respect to two important process related issues.

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[5] The Notice proposes that a fund would be deemed compliant if it meets the following requirements:
(1) all holders of record of direct interests in the fund (*e.g.*, the holders of its units or global certificates) are participating FFIs or deemed-compliant FFIs holding on behalf of other investors, or entities described in section 1471(f);
(2) the fund prohibits the subscription for or acquisition of any interests in the fund by any person that is not a participating FFI, a deemed-compliant FFI, or an entity described in section 1471(f); and
(3) the fund certifies that any passthru payment percentages that it calculates and publishes will be done in accordance with Section II of the Notice [regarding passthru payments].

First, because offshore hedge funds do not typically have employees, guidance is needed as to which entities and persons acting on behalf of a fund have responsibilities for carrying out the compliance responsibilities of a fund that is an FFI. Given differences in structure and delegation of responsibilities in the investment fund industry, we believe that FFI funds should be able to designate which entity or person has responsibility for specific aspects of the fund's FATCA compliance. Even with such delegation, of course, the FFI fund will continue to have ultimate responsibility for its FATCA compliance.

Second, we encourage the Treasury and the Service to provide guidance that investment fund FFIs with a common asset manager or agent will be allowed to centralize their FATCA compliance obligations under a single agreement with the asset manager or agent. In considering this issue, it is important to recognize that investment funds, even when managed by the same adviser, are legally distinct entities which often have different investors and can engage in entirely distinct trading activities in different assets and markets. Any losses at one fund are borne exclusively by the investors in and counterparties to that fund and do not subject other funds managed by the same adviser directly to losses. Notwithstanding this structure, we believe that it would efficient for both market participants and regulators to allow for this centralized option. It should also be noted that the entity responsible for the compliance function should not be required to be an FFI individually. For example, many funds are commonly managed by U.S. resident entities, which should be permitted to have responsibility for the compliance function.

Conclusion

MFA appreciates the opportunity to provide comments on the Notice and the application of FATCA to FFI investment funds. As the Treasury and the Service are aware, investment funds are different in significant ways from banks and other types of financial institutions. In light of these key differences, we encourage the Treasury and the Service to provide additional guidance as discussed above regarding the application of FATCA to investment funds.

MFA and its members would welcome an opportunity to meet with staff from the Treasury and the Service to discuss these and any other issues in connection with implementation of FATCA. 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