



September 23, 2011

Via ESMA Website

European Securities and Markets Authority
103 Rue de Grenelle
75007 Paris
France

Response to Public Consultation: ESMA’s draft technical advice to the European Commission (the “Commission”) on possible implementing measures of the Alternative Investment Fund Managers Directive (the “Directive”) in relation to supervision and third countries (the “Consultation Paper”)

Managed Funds Association (“MFA”)¹ welcomes the opportunity to provide comments to ESMA in response to its Consultation Paper.

MFA’s responses are set out in the Annex to this letter. References to page numbers in the attached Annex are to the relevant pages in the Consultation Paper.

Throughout the drafting process on the Directive, MFA engaged with EU policy makers in a thoughtful, constructive manner on a number of important issues, most notably the ability of third party managers and funds to market to EU investors. We welcome the opportunity to work with ESMA as it prepares to respond to the Commission’s request for technical advice as the Commission works to implement the Level 2 provisions of the Directive.

MFA would like to take the opportunity provided by the Consultation Paper to provide comments on a number of matters that MFA believe will assist ESMA in preparing final recommendations to the Commission that will better balance the need for effective regulation with the reality of existing market practices. Though there are many issues covered in this letter, MFA would like to highlight the following key points that it has raised in this letter:

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.

- (1) Delegation and Depositary – MFA is concerned by the references to “equivalence” in ESMA’s proposals; the practical effect may be that non-EU AIFMs will not be able to provide delegated management services to EU AIFMs, while non-EU institutions will not be able to be appointed as depositaries of non-EU AIFs.
- (2) Supervision – while MFA supports ESMA’s intention to follow the IOSCO MMoU model, MFA is concerned that not enough of a distinction is being made between cooperation agreements in the delegation, non-passport and passport contexts.
- (3) Member State of Reference – MFA is concerned that a test which relies upon the number of investors in a particular Member State will lead to uncertainty and constant changes in the Member State of Reference for a non-EU AIFM.

We would be very happy to discuss our comments or any of the issues raised in the Consultation Paper with ESMA. If ESMA has any comments or questions, please do not hesitate to contact Benjamin Allensworth or the undersigned at +1 (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell

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ANNEX

MFA RESPONSES TO ESMA CONSULTATION OF 23 AUGUST 2011
ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE

III. DELEGATION (Articles 20(1)(c), 20(1)(d) and 20(4))

Delegation of portfolio/risk management functions to third country undertakings (p. 7)

Question 1: Do you agree with the above proposal? If not, please give reasons.

MFA respectfully does not agree with the above proposal, in particular paragraph 5 of Box 1.

Although paragraph 5 refers to a third country undertaking being “deemed” to satisfy the requirement in Article 20(1)(c) where the third country is “equivalent”, the practical effect of that paragraph 5 is that an AIFM will not wish to take the risk of delegating to any third country which is not somehow “equivalent”.

That is, MFA is concerned that ESMA is, in effect, introducing an equivalence requirement where none exists under Article 20(1)(c). MFA believes that, as there is no requirement under the Directive for such a standard to be introduced, ESMA should not be recommending such a concept and MFA notes that the Commission’s request to ESMA for advice makes no reference to any equivalence standard. MFA strongly believes that, if the Directive had intended for an equivalence test in relation to delegation, it would have expressly provided for such a requirement.

MFA notes that, during the negotiations to agree the text of the third country provisions of the Directive, an equivalence test had been put forward but had specifically been rejected during the trilogue process among the Council, the Parliament and the Commission. The re-introduction of the equivalence standard at Level 2 would be contrary to the text of the Level 1 Directive and to the position negotiated and agreed between the Parliament and the Council. MFA further believes that the current proposal would greatly restrict the ability of delegation to third countries and would also lead to a high degree of uncertainty, as it is not clear how an AIFM is supposed to determine such equivalence. MFA urges ESMA to remove such an equivalence concept.

If, notwithstanding the above, some kind of equivalence standard is being introduced to assess a third country’s asset management regulatory regime, then, to the extent that regime provides for exemptions from authorisation, those exemptions should equally be available in respect of Article 20(1)(c). For example, if the United States’ investment adviser regulatory regime is considered to be equivalent to the EU regime, then all U.S. fund managers should be eligible to be delegates under Article 20(1)(c), even if a particular U.S. fund manager is eligible for an exemption from registration in the U.S.

Further, given that Article 20 of the Directive itself does not impose an equivalence standard and neither requires nor empowers the Commission to make any assessment as to the status of third countries, MFA would urge ESMA to recommend that a mechanism be introduced to enable the Commission to consult with third country jurisdictions, particularly the United States, in order to develop a dialogue so as to ensure that

appropriate delegation can still take place. MFA is strongly of the view that, given the variety of regulatory regimes globally, “equivalence” cannot be taken to mean that a third country’s regime must have all or even substantially all of the same requirements contained in the Directive or in MiFID (in relation to portfolio management).

As a separate matter, MFA notes the apparent difference in treatment in respect of delegation of portfolio/risk management functions to third country undertakings. Article 20(1)(b) requires that the persons who effectively conduct the business of the delegate are of “sufficiently good repute and sufficiently experienced”. In ESMA’s explanatory text to Box 66 of its Consultation Paper dated 13 July 2011, ESMA stated:

“29. If the delegate is established in the EU and authorized for the purpose of the delegated tasks and if the criterion ‘good repute’ of the delegate has been reviewed by the relevant supervisory authority within the authorisation procedure, this criterion should be assumed as satisfied unless evident facts speak against it.”

MFA asks that the same treatment be given to non-EU delegates. That is, if the delegate is established in a third country and authorized for the purpose of the delegated tasks and if the criterion “good repute” of the delegate has been reviewed by the relevant supervisory authority within the relevant authorization procedure, the criterion in Article 20(1)(b) should be deemed to be satisfied.

Question 2: In particular, do you support the suggestion to use as a basis for the cooperation arrangements to be signed at EU level the IOSCO Multilateral Memorandum of Understanding of May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-Operation?

MFA recognizes and supports the need for regulators to have appropriate and coordinated oversight over market participants, including private fund managers and their delegates. It is important, however, to ensure that the regulation of private fund managers is accomplished in a way that is consistent with the G-20 commitment to international coordination and the principles of international comity.

In this regard, MFA welcomes ESMA’s proposal that the cooperation arrangements should be based on international standards and in particular the IOSCO MoU/MMoU. However, MFA urges ESMA to make clear in its recommendations that the relevant interested third country regulators will be consulted in the preparation of an MoU. That is, the process should mirror that taken in the IOSCO MMoU, in which IOSCO members agreed on the MMoU.

MFA would emphasise that Article 20 does not grant an EU competent authority supervisory jurisdiction over the relevant third country delegate. Article 20 makes it clear that the EU competent authority is responsible for supervising the AIFM – Article 20(1)(e) provides:

“the delegation must not prevent the effectiveness of supervision of the AIFM...”

Consistent with this concept, Article 20(3) of the Directive then provides that “[t]he AIFM’s liability towards the AIF and its investors shall not be affected by the fact that the AIFM has delegated functions to a third party...”

MFA is concerned that some of the proposals in Box 1 appear to suggest that the AIFM’s EU competent authority has supervisory jurisdiction over the third country delegate. In particular, MFA is concerned as to the suggestion in paragraph 4(c) of Box 1 that the EU competent authority should have the right to conduct onsite visits on the delegate. MFA agrees that onsite visits may be appropriate where the EU competent authority has direct supervisory authority over a third country undertaking (such as a third country AIFM which is authorised by an EU competent authority under the passport), however such onsite visits are wholly inappropriate where EU competent authority has no direct supervisory authority over the third country undertaking.

In this regard, MFA notes that the IOSCO Principles Regarding Cross-Border Supervisory Cooperation provide:

“For most arrangements, on-site visits will likely be to the premises of either Regulated Entities or Cross-Border Regulated Entities (i.e., dually regulated entities). Most regulators will not have the regulatory remit to conduct on-site visits of entities that are not registered with them.”

Next, MFA is concerned about the reference in paragraph 4(e) of Box 1 to the EU competent authority being entitled to “ensure that enforcement actions can be performed in cases of breach of regulations.” Again, this concept would be agreeable where the EU competent authority actually supervises the third country undertaking, but it is difficult to see how paragraph 4(e) is applicable where the third country undertaking is already assumed to be regulated in its own jurisdiction. Where the third country undertaking has breached its local regulations, that should be a matter of enforcement by its own regulator; it is not a matter for AIFM’s EU competent authority.

Finally, in relation to the provision of information under paragraphs 4(a) and (d), MFA submits that the EU competent authority should be receiving systemic risk information, rather than specific information about the day-to-day operations of the third country undertaking. In particular, MFA believes that, under paragraph 4(d), a third country regulator should be required to commit to report immediately to the relevant EU competent authority only a materially relevant breach of regulations, and not technical violations or violations that are otherwise unrelated to the provision of portfolio management services.

IV. DEPOSITARY (Article 21(6))

MFA General Comment on Third Country Depositaries

MFA is generally concerned with ESMA's approach (discussed in detail below), which could have the practical effect of preventing third country depositaries from providing depositary services to non-EU AIFs. Article 21(5)(b) of the Directive provides that, for non-EU AIFs, the depositary may be established: (i) in the third country where the AIF is established; (ii) in the home Member State of the AIFM managing the AIF; or (iii) in the Member State of reference of the AIFM managing the AIF.

While MFA appreciates that ESMA is bound by the text of the Directive, MFA would like to communicate its view that the concept of placing the depositary in the third country where the AIF is established appears to be a curious one. In the case of U.S. hedge fund managers, for example, it is common for the manager to establish two AIFs – one in the U.S. (*e.g.* Delaware) and one in an offshore jurisdiction (*e.g.* the Cayman Islands). The AIF's domicile is simply a function of structuring; it is the manager who sponsors and of course manages the AIF. So it would seem to be more sensible to locate the depositary in the home jurisdiction of the manager (AIFM) rather than the AIF.

MFA believes that, if the practical effect of ESMA's proposals is to limit the situations where non-EU depositaries may be used, then there will be a concentration of risk in a few EU financial institutions, which is undesirable from the AIF investors' perspective and is likely to lead to an increase in systemic risk. At the same time such rules could be seen to be protectionist in effect, and inconsistent with the G20 commitment to coordination, avoiding barriers to entry, and promoting international comity.

MFA thus hopes that, regardless of the outcome of the proposals discussed below, ESMA (and the European Commission) will monitor carefully the third country depositary arrangements as they take effect, in the context of reviewing and assessing the efficacy of the passport regime in future.

Assessment of third country depositary frameworks (p. 10)

Question 3: Do you agree with the above proposal? If not, please give reasons.

MFA respectfully does not agree with the above proposal. The proposal is in excess of the requirements of the Directive itself and imposes regulatory burdens that will, in effect, exclude third country institutions from being able to provide depositary services under the Directive.

MFA refers ESMA to the provisions of Article 21(6) of the Directive, which states that the third country depositary must be “subject to effective prudential regulation, including minimum capital requirements, and supervision which have *the same effect* as Union law and are effectively enforced”. (Emphasis added)

There is no suggestion in the Directive that the third country's depositary regulatory framework must be "equivalent" and feature the specific requirements of Article 21(8) to (15) of the Directive, as proposed by ESMA. If "equivalence" had been intended in Article 21(6) of the Directive, then that specific term would have been used. MFA notes that, in relation to guarantees for additional own funds, Article 9(6) of the Directive provides that such guarantees can be provided by third country institutions which are "subject to prudential rules considered by the competent authorities as *equivalent* to those laid down in Union law." (Emphasis added). By contrast, Article 21(6) uses the words "the same effect" rather than "equivalence."

In addition, the term "equivalence" is specifically used in other financial services directives (e.g. MiFID, UCITS IV, Solvency II and the Banking Consolidation Directive). For example, in Recital (40) and Article 50(1)(f) of the UCITS IV Directive, where considering the prudential requirements for third country credit institutions with which a UCITS fund makes deposits, the term "equivalent" is specifically used. If the intention of the Parliament and the Council in agreeing to the Directive had been to require the standard of "equivalence" in respect of delegation to third country depositaries (or third country sub-custodians), the Directive would specifically have referred to this standard.

Given the fairly unique requirements introduced by Article 21(8) to (15) of the Directive, in particular the strict liability standard introduced by Article 21(12), it is unlikely any third country would be able to meet the strict equivalence standard effectively suggested by ESMA. The effect of this standard would be to create a barrier to entry for any third country depositary wishing to provide services to non-EU AIFs, to the detriment of investors in non-EU AIFs. In this regard MFA disagrees with the Commission's request for advice, which refers to such an equivalence concept, as this was not contemplated under the Directive.

Question 4: Do you have an alternative proposal on the equivalence criteria to be used instead of those suggested in point b above [i.e. "The regulatory framework should set out criteria for the eligibility to act as depositary equivalent to those for access to the business of a credit institution or investment firm in the EU]?

For the reasons stated above, MFA considers that the "equivalence" requirement in Box 2 exceeds the scope of the Directive. Accordingly, MFA considers that the criteria in point b. of Box 2 should be replaced with the following:

- (a) in relation to the requirement for "effective prudential regulation, including minimum capital requirements" under Article 21(6), any third country which is a Basel Committee member country or which otherwise applies the Basel framework should be deemed to satisfy this requirement. This should apply even where the capital requirements for third country investment firms may not be based directly on the Basel framework; for example, U.S. broker/dealers (which may provide custody services) are subject to a strict "net capital" requirement which is not based directly on the Basel framework but is nonetheless a

- requirement imposed in the context of a country that implements the Basel capital adequacy principles; and
- (b) in relation to the requirement for “supervision which have the same effect as Union law”, an AIFM should be able to rely on the assessment of the third country regulator that its regulatory regime is of a supervisory standard which is to the same effect as EU law. For example, the third country regulator could make available on its website its justification for determining that its supervisory framework is to “the same effect” as EU law.

If, notwithstanding the discussion above, ESMA were to decide to recommend to the Commission that an equivalence standard be introduced in respect of delegation to third country depositaries, then our comments on the issue of “equivalence” in the section on Delegation apply equally here. In this context, given that Article 21 of the Directive itself does not impose an equivalence standard and neither requires nor empowers the Commission to make any assessment as to the status of third countries, MFA would urge ESMA to recommend that a mechanism be introduced to enable the Commission to consult with third country jurisdictions, particularly the United States, in order to develop a dialogue so as to ensure that the appointment of depositaries outside the EU can in fact be achieved. Many U.S. AIFMs currently use U.S. based prime brokers for their AIFs, and it would be damaging for the stable operation of these AIFs (and thus damaging for AIF investors) if they could not continue to use a U.S. based depositary.

In this regard we would refer ESMA to the finding of the EU Banking Advisory Committee (“BAC”) in 2004 on the question of whether the consolidated supervision arrangements of the United States regulators are likely to achieve the objectives of consolidated supervision. The BAC found that: “... we are of the view that, on balance, there is broad equivalence in the US supervisory approaches...”² The BAC’s assessment covered the supervisory jurisdiction of the U.S. bank regulators as well as the U.S. Securities and Exchange Commission and Self Regulatory Organizations (SROs).

This was followed by the Committee of European Banking Supervisors (now European Banking Authority) finding in 2008, on the same issue as that covered by the BAC, that: “All five supervisory authorities (Fed, OCC, OTS, NYSBD and the SEC) were found to be equivalent notwithstanding limited caveats...”³

² *General guidance from the Banking Advisory Committee to EU supervisors: the extent to which the supervisory regime in the United States of America is likely to meet the objectives of consolidated supervision in Chapter 3 of Directive 2000/12/EC*, available at http://ec.europa.eu/internal_market/financial-conglomerates/docs/guidance-usa-final-060704_en.pdf

³ *IWCFC and CEBS advice to the EU Commission on whether the supervisory arrangements of relevant US supervisors are likely to achieve the objectives of consolidated and supplementary supervision as set out in Directives 2002/87/EC, 2006/48/EC and 2002/49/EC*, available at <http://eba.europa.eu/getdoc/0b1397cd-a57a-4eb3-badc-5fc715aeaa68/USAdviceonEquivalence.aspx>

V. SUPERVISION

V.I Co-operation between EU and third country authorities for the purposes of Article 34(1), 36(1) and 42(1) of the AIFMD (p.13)

Question 5: Do you agree with the above proposal? If not, please give reasons.

Question 6: In particular, do you support the suggestion to use as a basis for the cooperation arrangements to be signed at EU level the IOSCO Multilateral Memorandum of Understanding of May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-Operation?

MFA Combined Response to Questions 5 and 6

Please see our response to Question 2 (above), which applies equally in the context of ESMA's proposals on cooperation arrangements in this section.

As a general comment, MFA notes the reference in paragraph 12 on page 15 of the Consultation Paper to "written agreements necessary for the purposes of co-operation under the Directive may be based on a template established by ESMA at EU level". We are unsure whether or how that is intended to be different from the centrally negotiated MMoUs referred to in paragraph 4 of the same section of the Consultation Paper.

The need for confidentiality

Separately, MFA wishes to stress the need for a strong confidentiality framework in relation to information that a third country regulator may pass to the EU Member State regulator(s) or that an AIFM may report directly to an EU Member State regulator under the relevant provisions of the Directive. MFA is concerned that, in the ongoing reporting and exchanging of information for the purpose of systemic risk oversight (which is expressed in very broad terms), sensitive proprietary information of third country managers may be made public, even if on an inadvertent basis. In this regard, we would ask that ESMA advise the Commission to take appropriate steps to ensure that such confidentiality be maintained. In support of this, MFA directs ESMA to the provisions of Article 102(3) of the UCITS IV Directive, which states that:

"Member States may conclude cooperation agreements providing for exchange of information with the competent authorities of third countries, or with authorities or bodies of third countries...only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those referred to in this Article."

An almost identical provision is contained in Article 63 of MiFID. MFA notes the reference in Clause 11 (*Confidentiality*) of the IOSCO MMoU to the requirement of the relevant regulators to keep information confidential and urges ESMA to build in strict confidentiality requirements in the relevant MMoU negotiated for purposes of the Directive.

In addition, MFA asks that consideration be given to the freedom of information regimes in various countries. Information should only be sent to jurisdictions whose freedom of information regimes have protections (i.e. restrictions on access to information) at least as adequate as the jurisdiction from which the information is sent.

Submission of systemic risk information

Separately, in the interests of information efficiency, to the extent an EU Member State regulator is receiving systemic risk information from the third country regulator (i.e. obtained by the third country regulator from the non-EU AIFM⁴), there should not be any need for the non-EU AIFM to provide that same information to the EU Member State regulator under Article 24 (Reporting obligations to competent authorities).

Enforcement assistance

In relation to the assistance of third country regulators with enforcement, paragraph 2 of Box 3 states that the third country regulator should “assist the EU competent authorities where it is necessary to enforce EU legislation and national implementing legislation breached by the entity established in the third country.” ESMA should make clear that there is no obligation on the third country regulator actually to monitor and enforce EU or Member State legislation; the third country regulator’s duties should only be to providing assistance to an EU Member State regulator where that EU Member State regulator wishes to take enforcement action against a particular third country AIFM/AIF.

Data protection

Paragraph 7 of the Explanatory Text for Box 3 states, in relation to compliance with Article 52 of the AIFMD:

“This includes additional confirmation of the ability of the relevant local authority to meet adequate standards concerning the treatment of information that can be classified as personal information. The transfer of data may only be permitted under the conditions set out in Article 52 of the Directive.”
(Emphasis added)

While MFA does not object to the second sentence in the quotation above, on the basis that this second sentence is an expression of what is required by Article 52 of the AIFMD, MFA is concerned with the first sentence. The first sentence appears to require that, in order for a third country regulator to be able to enter into a cooperation agreement, the relevant third country ensures an “adequate” level of data protection within the meaning of the EU Data Protection Directive.

As ESMA will be aware, the United States is not considered by the European Commission to provide an adequate level of data protection when compared with EU

⁴ For example, systemic risk information submitted by U.S. registered investment advisers to the U.S. authorities under Form PF.

data protection laws. The Cayman Islands, where many AIFs are domiciled, is likewise not deemed to provide an adequate level of data protection. Thus the imposition of a condition to entry into cooperation agreements that adequate levels of data protection are present will result in the U.S. and the Cayman Islands' competent authorities (and those of many other jurisdictions globally) not being able to enter into the cooperation arrangements contemplated in this section.

MFA is of the view that, when Article 52 of the AIFMD refers to the Data Protection Directive, it is merely restating the existing law as set out in the Data Protection Directive. That is, the requirements of the Data Protection Directive exist regardless of Article 52 of the AIFMD. Therefore any kind of cooperation agreement – including those currently in place for example between the UK FSA and the U.S. SEC – would be subject to the standards required under the Data Protection Directive for the transfer of personal data from within the EU to outside the EU.

MFA thus asks that ESMA delete that sentence in paragraph 7. This will make clear that, even if a third country does not have standards which are “adequate” within the meaning of the Data Protection Directive, data transfers to third country regulators may nonetheless take place provided the relevant derogations in Article 26 of the Data Protection Directive are available.

Third country guidelines

Finally, MFA notes that ESMA has not provided guidelines, which the Directive states are to be adopted by ESMA. We note that ESMA has committed to adopt such guidelines by the time the Commission will complete the process for the issuance of Level 2 measures. We ask that ESMA ensure that any such guidelines are subject to public consultation before they are finalised.

V.II Co-operation arrangements between EU and non-EU competent authorities as required by Articles 35(2), 37(7)(d) and 39(2)(a) of AIFMD (p.16)

Question 7: Do you agree with the above proposal? If not, please give reasons.

In respect of the cooperation arrangements, please see our responses to the previous section (V.I) above (including the cross-reference to our response to Question 2). The only difference to our responses relate to the cross-referenced response to Question 2 in relation to on-site visits. MFA acknowledges that on-site visits may be a feature of a cooperation agreement for a non-EU AIFM which is registered/authorised directly by an EU competent authority (being that of the non-EU AIFM's Member State of reference) i.e. operating under the passport arrangements.

MFA notes ESMA's comment that the provisions relating to third country passports (in particular, regarding supervision of non-EU AIFMs and non-EU AIFs under the passport) will be finalised at a later date. MFA looks forward to engaging on these important issues for its members in a future consultation.

V.III Co-operation and exchange of information between EU competent authorities (p.18)

Question 8: Do you agree with the above proposal? If not, please give reasons.

MFA supports the exchange of information among regulators under appropriate circumstances and with the necessary confidentiality protections (see our responses to Question 5 and 6 above). However, MFA believes that it is important for the industry to know what is being proposed for the system to exchange secure information, so MFA would encourage ESMA to consult publicly on its proposals.

V.IV Member State of reference: authorisation of non-EU AIFMs – Opt-in (Articles 37(4)) (p.19)

Question 9: Do you have any suggestions on possible further criteria to identify the Member State of reference?

It is not entirely clear to MFA what ESMA intends by saying that the Member State of reference should be “the Member State where the AIFM intends to target investors by promoting and offering, including third party distributors, most of the AIFs.”

If ESMA means that the Member State of reference is where there is the majority of investors (by number or value of investment) for the AIFs that an AIFM manages, then MFA disagrees with that approach. The investor base in the EU for such AIFMs is likely to change over time, resulting in a change of that non-EU AIFM’s Member State of reference and thus a change in authorisation, legal representative, depositary, etc. That is a highly inefficient outcome from a regulatory perspective, as well as unduly burdensome and disruptive from the non-EU AIFM’s perspective.

Article 37(4) of the Directive specifically refers to “the Member State where the AIFM intends to develop effective marketing”. In order to give greater certainty to non-EU AIFMs intending to market in the EU, MFA suggests the following as a possible starting point (which should be adjusted in special cases):

- Where the non-EU AIFM has an affiliate in an EU Member State which is already subject to regulation (*e.g.* under MiFID), the Member State of reference of the non-EU AIFM should be the Member State of that regulated affiliate.
- Where the non-EU AIFM has an affiliate in an EU Member State which is not subject to regulation, then provided that affiliate is involved in developing the marketing process, the Member State of reference of the non-EU AIFM should be the Member State of that affiliate.
- Where the non-EU AIFM does not have affiliates in any EU Member State, but has appointed an EU distribution agent to carry out the marketing of the non-EU

AIFM's AIFs in the EU, then the Member State of reference of the non-EU AIFM should be the Member State of that distribution agent.

- Where the non-EU AIFM does not have affiliates in any EU Member State, and has no EU distribution agent, then ESMA could consider the approach taken in the Prospectus Directive in respect of a non-EU issuer's home Member State. Under the Prospectus Directive, a non-EU issuer's home Member State is the state where the first offer of securities (or the first application to trading on regulated EU market) is made.

The approach suggested above would provide certainty to non-EU AIFMs from the outset of its marketing activities in the EU and would avoid the inefficiencies of having to move between jurisdictions depending on where the majority of investors are located.

Finally, as a technical matter, MFA notes that there is an inconsistency between what is stated in Article 37(4)(h) and the proposed wording in paragraph 1 in Box 5 of ESMA's proposals. We believe paragraph 1 in Box 5 should be amended so that it states: "...taking into account the Member State in which the AIFM intends to develop most effective marketing for most of its AIFs pursuant to Article 37(4)(h)", in order to match the provisions of Article 37(4)(h).

Question 10: Do you think that any implementing measures are necessary in the context of Member State of reference given the relatively comprehensive framework in the AIFMD itself?

MFA has no particular comment on this question, but supports ESMA's suggestion that ESMA facilitate the agreement between the competent authorities.

Question 11: Do you agree with the proposed time period for competent authorities identified as potential authorities of reference to contact each other and ESMA?

MFA has no particular comment on this question, but supports ESMA's suggestion that ESMA facilitate the agreement between the competent authorities.