March 23, 2012

Via ESMA Website

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

Re: ESMA Discussion Paper “Key concepts of the Alternative Investment Fund Managers Directive and types of AIFM” (23 February 2012)

Dear Sir or Madam:

Managed Funds Association (“MFA”)\(^1\) welcomes the opportunity to provide responses to ESMA’s Discussion Paper; MFA’s responses are set out in the Annex to this letter.

Throughout the drafting process on the Alternative Investment Fund Managers Directive (the “AIFMD”), MFA engaged with EU policy makers in what we hope was a thoughtful, constructive manner on a number of important issues, most notably in relation to the effect of the AIFMD on non-EU AIFMs. We welcome the opportunity to continue to work with ESMA during the Level 2 process.

We would be very happy to discuss our comments or any of the issues raised in the Discussion 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
Executive Vice President &
Managing Director, General Counsel

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\(^1\) 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 $2.0 trillion invested in absolute return strategies. MFA is headquartered in Washington D.C., with an office in New York.
ANNEX

MFA responses to ESMA Discussion Paper:

“Key concepts of the Alternative Investment Fund Managers Directive and types of AIFM”
III. Definition of AIFM

We note that ESMA has not asked specific questions in this section of the Discussion Paper. However, MFA would like to take this opportunity to provide its thoughts on the issues raised by ESMA in this section.

As a general matter MFA agrees with ESMA’s proposal that no authorisation as an AIFM under the AIFMD is required when the performance of either the portfolio management or the risk management function is done under a delegation arrangement with an AIFM in accordance with Article 20 of the AIFMD.

However, MFA notes that the “AIFM” concept relates both to EU as well as non-EU AIFMs. In the case of a non-EU AIFM which is not itself authorised under the AIFMD, the delegation arrangements would not specifically be in accordance with Article 20 of the AIFMD. This would be the case where, for example, a US AIFM appoints an EU-based entity – typically authorised as a MiFID firm – as its delegate for the purpose of carrying on portfolio management activities in relation to an AIF managed by that US AIFM. The EU delegate does not typically have any contractual relationship with the AIF; its sole client is the US AIFM. In such circumstances, in accordance with ESMA’s proposal, the EU delegate should be authorised as a MiFID firm rather than an AIFMD firm. MFA agrees with ESMA that the key issue is that the delegation by the non-EU AIFM should not be to “to such an extent that the AIFM becomes, in essence, a letter-box entity and can no longer be considered to be the manager of the AIF.”

MFA also notes that Article 5(1) of the AIFMD requires that an AIF have a single AIFM. Assuming the actual AIFM (regardless of domicile) is not a letter-box entity, that AIFM would be the “single AIFM” for the relevant AIF. It does not matter that the AIFM may not be in the EU and may thus not be delegating in accordance with Article 20 of the AIFMD. So long as the non-EU AIFM is not a letter-box entity, an EU delegate of that non-EU AIFM would be a MiFID firm rather than an AIFMD firm.

Accordingly, ESMA should make clear that its approach on delegates of AIFMs includes situations where the AIFM is a non-EU AIFM.

IV. Definition of AIF

IV. 2. Vehicles which are not AIFMs or AIFs or are exempted from AIFMD

Question 1: Do you see merit in clarifying further the notion of family office vehicles? If yes, please clarify what you believe the notion of ‘investing the private wealth of investors without raising external capital’ should cover.

No comment.
Question 2: Do you see merit in clarifying the terms ‘insurance contracts’ and ‘joint ventures’? If yes, please provide suggestions.

No comment.

Question 3: Do you see merit in elaborating further on the characteristics of holding companies, based on the definition provided by Article 4(1)(o) of the AIFMD? If yes, please provide suggestions.

No comment.

Question 4: Do you see merit in clarifying further the notion of any of the other exclusions and exemptions mentioned above in this section? If yes, please explain which other exclusions and exemptions should be further clarified and provide suggestions.

No comment.

IV. 4. Proposed criteria to identify an AIF

Question 5: Do you agree with the orientations set out above on the content of the criteria extracted from the definition of AIF?

No comment.

Question 6: Do you have any alternative/additional suggestions on the content of these criteria?

No comment.

Question 7: Do you agree with the orientations set out above on the notion of raising capital? If not, please provide explanations and an alternative solution.

No comment.

Question 8: Do you consider that any co-investment of the manager should be taken into account when determining whether or not an entity raises capital from a number of investors?

No comment.

Question 9: Do you agree with the analysis on the ownership of the underlying assets in an AIF? Do other ownership structures exist in your jurisdiction?

No comment.
Question 10: Do you agree with the analysis on the absence of any investor discretion or control of the underlying assets in an AIF? If not, please explain why.

   No comment.

IV. 5. Proposed criteria to determine the application of the AIFMD to certain types of AIF

Question 11: Do you agree with the proposed definition of open-ended funds in paragraph 41? In particular, do you agree that funds offering the ability to repurchase or redeem their units at less than an annual frequency should be considered as closed-ended?

   Given the significance of the terms “open-ended” and “closed-ended” in other EU contexts (e.g. the Prospectus Directive) as well as local Member State regulation, MFA is encouraged by ESMA’s statement that its proposal for a definition of “closed-ended” is relevant only in the context of the AIFMD and is without prejudice to equivalent definitions in other pieces of EU legislation.

   That said, MFA feels that there is some benefit to considering how Member State regulators have looked at the issue of what may be considered to be “open-ended” or “closed-ended” in the investment funds context. In this regard, MFA notes that under the UK open-ended investment company regime, the UK Financial Services Authority (FSA) considers that six months would be too long to be a reasonable period for an open-ended scheme. Chapter 9.11 (Frequently Asked Questions) of the FSA Perimeter Guidance Manual provides a Q&A in relation to the definition of “open-ended investment company”.² To the question (Q8):

   “Would a body corporate holding out redemption or repurchase of its shares or securities every six months be an open-ended investment company?”

   the FSA answers:

   “In the FSA’s view a period of six months would generally be too long to be a reasonable period for a liquid securities fund. A shorter period affording more scope for an investor to take advantage of any profits caused by fluctuations in the market would be more likely to be a reasonable period for the purpose of the realisation of the investment.”

   MFA believes that six months would be an appropriate threshold to consider whether an AIF is open- or closed-ended, rather than one year as proposed by ESMA.

Question 12: Do you see merit in clarifying further the other concepts mentioned in paragraph 37 above? If so, please provide suggestions.

MFA does not see merit in clarifying further the other concepts mentioned in paragraph 37. Given the extremely broad definition of “AIF” and the many different types of investment fund structures which come within the AIFMD framework, MFA is concerned about the unintended consequences of specific rules or guidelines being set down in relation to those concepts. MFA believes that flexibility is important in order for those concepts to be workable in the context of different AIF structures. Specifically in respect of the concept of “significant size” in the context of Article 13 of the AIFMD on remuneration, MFA will review ESMA’s proposed guidelines on remuneration when they are published, and provide comments then.

VI. Treatment of UCITS management companies

Question 13: Do you agree with the above analysis? If not, please provide explanations.

MFA agrees with ESMA’s analysis.

VII. Treatment of MiFID firms and Credit Institutions

Question 14: Do you agree with the above analysis? If not, please provide explanations.

MFA agrees with ESMA’s analysis. As noted in our comments on section III (Definition of AIFM) above, so long as the non-EU AIFM is not a letter-box entity, an EU delegate of that non-EU AIFM would be a MiFID firm rather than an AIFMD firm.