May 4, 2012

Via Email

AIFMD Transposition
Financial Regulation and Markets
HM Government
1 Horse Guards Road
London
SW1A 2HQ


Dear Sir or Madam,

Managed Funds Association (“MFA”)\(^1\) welcomes the opportunity to provide responses to the 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 “Directive”), 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 Directive on non-EU AIFMs. In addition, we have engaged recently with both ESMA and the FSA in response to their respective discussion papers. We now welcome the opportunity to work with the HM Treasury in connection with the implementation of the Directive.

MFA would like to take the opportunity provided by the Discussion Paper to comment on a number of matters that MFA believes will assist the HM Treasury in making its policy decisions on the Directive. In particular, we would like to highlight the following key points which are discussed more fully in the Annex:

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\(^1\) The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and all other regions where MFA members are market participants.
(a) the full application of the Directive to all sub-threshold AIFMs would result in a disproportionate regulatory burden for such AIFMs and may unduly limit investor options in selecting AIFMs. MFA supports a flexible application of the Directive’s provisions differentiating between the types of AIF according to their size and structure;

(b) the Government should consider reviewing the existing definition of “collective investment scheme” in Section 235 of the Financial Services and Markets Act 2000 in the context of the implementation of the Directive; and

(c) MFA is strongly supportive of the Government’s intention not to impose additional requirements for third country managers or third country funds under the UK private placement regime.

We would be very happy to discuss our comments or any of the issues raised in the Discussion Paper with HM Treasury. If HM Treasury 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
ANNEX

MFA responses to the HM Treasury Discussion Paper:

“Policy Options for Implementing the Alternative Investment Fund Managers Directive”
OPTION 1 – FULL APPLICATION OF DIRECTIVE REQUIREMENTS TO ALL SMALLER AIFMS

Question 1: To what extent would a consistent approach of full application of Directive requirements across different types of AIFM benefit AIFMs, AIFs and investors in terms of investor understanding and reputation of the UK’s financial services regulatory regime?

MFA does not believe that the full application of the Directive to sub-threshold AIFMs is likely to benefit such AIFMs, AIFs or investors or enhance the reputation of the UK regulatory regime. We would note that a multiple-tier regime is likely to continue after the implementation of the Directive in any case, as, for example, fund management activities which are subject to the UCITS Directive will fall outside the scope of the Directive. Moreover (as noted in the Discussion Paper), portfolio management activities in the case of delegation of certain management functions to an investment firm by a self-managed AIF or by a third-country AIFM will be subject to MiFID.

Question 2: What would the impact be on the different types of AIFMs, AIFs and investors – including those that would be subject to greater regulation than at present? What are the likely costs and benefits?

Given the extremely broad definition of “AIF” and the many different types and sizes of investment fund structures that fall within the scope of the Directive’s framework, MFA considers that flexibility is important in the application of the Directive to AIFMs. As noted above, MFA is concerned that the proposed approach, which does not take into consideration the divergent AIF structures, is likely to be disproportionately costly and, ultimately, prohibitive for small AIFMs based in the UK. This in turn is likely to reduce investor choice of AIFMs and increase investor costs.

Question 3: What would be the likely impact on the AIF market of requiring full authorisation of all small AIFMs?

No additional comments.

Question 4: What other impact would this option have on different kinds of AIFs, AIFM, and on investors?

No comment.
OPTION 2 – APPLY A LIGHTER REGIME SELECTIVELY, DIFFERENTIATING BETWEEN AIFM

Question 5: What objective criteria should the Government use to differentiate between different regimes for small AIFMs? Should there be differentiation based upon AIF investment strategy, type of AIFM, type of AIF or type of investor? What would the justification be for the differentiation?

As a general matter, we believe that a review of the existing UK regulatory regime applicable to unregulated collective investment schemes should be undertaken in the context of the implementation of the Directive. In particular, the current definition of a collective investment scheme in Section 235 of the FSMA is much broader than the definition of “AIF” in the Directive. In this regard, there is a significant risk that the Directive (albeit in its “lighter” form) will be applied to a significantly broader range of structures and arrangements than in other EU Member States.

As noted above, MFA considers that an approach that differentiates between AIFMs is more appropriate in order to avoid (or at least mitigate) disproportionate burden and unnecessary costs that could ultimately limit investor choice among AIFMs. MFA considers that the regulatory requirements should take into consideration the size of the AIFM, its structure and the nature of its investor base (i.e., retail or professional).

Question 6: What should each regime entail and why? Which Directive requirements in particular should be applied or disapplied to each group?

MFA is concerned about the unintended consequences of specific rules or guidelines being set down with respect to each different type of small AIFM. Implementing the Directive’s requirements in an overly rigid manner that does not take account of an AIFM’s size, structure and the nature of investors could prevent many smaller AIFMs from being able to conduct their business. AIF investors want choices in deciding among AIFMs, including the ability to select smaller AIFMs. Therefore, we consider that flexibility is required in order to create a workable framework applicable to a variety of different types of small AIFMs. MFA is broadly supportive of the investor protection requirements set out in the Directive, and we believe that a proportional approach which allows smaller AIFMs appropriate flexibility in implementing the Directive’s requirements will provide strong investor protection rules while better ensuring that investors will continue to have options when selecting AIFMs.

Question 7: What would be the costs and benefits of each regime for different kinds of AIFs, AIFMs, and investors?

No additional comments.

Question 8: The Government welcomes views on the regulatory anomaly referred to in 2.16.

No additional comments.
Question 9: Your views are welcome on how/whether an appropriate investor protection regime should be maintained, in particular for retail investors. If the Government decides not to apply the full AIFM requirements to all small AIFMs, should it apply a lighter regime selectively rather than the de minimis AIFMD registration regime to all small AIFMs?

MFA is supportive of the proposal to fully exempt all sub-threshold AIFMs subject to the de minimis registration regime. Sub-threshold AIFMs should, however, be given the option to opt-in to the Directive regime and become fully authorised. Some investors want their investments managed by authorised AIFMs. Allowing sub-threshold AIMFs to opt-in to the Directive will better allow AIFMs to meet investor expectations.

As noted above, the investor base of a particular AIFM should be a significant consideration in deciding whether and how to apply the provisions of the Directive (including authorisation requirements).

PROPOSED REGULATIONS ON VENTURE CAPITAL FUNDS AND EUROPEAN SOCIAL ENTREPRENEURSHIP FUNDS

Question 10: The proposed Regulations have not yet been adopted, and their provisions are subject to change. However, if possible, it would be helpful to receive views on the extent to which venture capital funds, and social investment funds, are likely to benefit from the proposed Regulations.

No comment.

APPROVED PERSONS REGIME

Question 11: What are the costs and benefits of applying the approved persons regime to internally managed non-CIS companies? Do you consider the approved persons regime should be disapproved in the case of such companies?

No comment.

Question 12: Non-CIS companies listed on the Official List are subject to the additional protection of Listing Rules. Do you believe they should be treated differently in terms of application of the approved persons regime to unlisted companies? What would be the costs and benefits of this?

No comment.
MARKETING TO RETAIL

Question 13: Do you agree that the UK should retain its current restrictions on the types of domestic fund that may be marketed to retail investors? If you do not agree, which additional funds should be permitted to be marketed to retail investors and why?

As a general statement, MFA would note that an activity should be considered to be “marketing” under the Directive only when the activity is specific enough to relate to a particular AIF. It should be made clear that generic marketing of investment funds (e.g., a meeting in which an AIFM’s general investment strategy is discussed with a potential investor, including retail investors), should not be considered to be “marketing” for the purposes of the Directive, since no specific AIF units/shares are being marketed. In addition, the Government should consider reviewing its existing financial promotion regime in the context of marketing AIFs to ensure that an appropriate exemption is provided for marketing AIFs at the initiative of the investor (as provided under Article 4(1)(x) of the Directive). Allowing greater communication from AIFMs promotes greater transparency of the industry, which we believe is beneficial for policy makers, regulators and investors. We note that the U.S. Congress has recently enacted legislation to permit greater public communications by private funds, while still limiting sales of private funds to only sophisticated investors, which we believe promotes transparency while continuing to provide strong investor protections.

Although not specifically addressed in the Discussion Paper, the current definition of retail investors also includes high net worth individuals. MFA considers that such an approach is unduly restrictive since the marketing of AIFs to high net worth individuals is only permitted in very limited circumstances. The Government should consider modifying these rules in the context of high net worth individuals to allow these sophisticated investors greater flexibility in selecting investment opportunities. In any event, it is important that the exemptions set out in Section 4.12 of the FSA Conduct of Business Sourcebook should be retained with respect to AIFMs/AIFs subject to the Directive.

Question 14: What additional restrictions should they be subject to?

No comment.

Question 15: What would be the costs and benefits?

No comment.

PRIVATE PLACEMENT REGIME

Question 16: Do you agree that the Government should not impose additional private placement requirements for third country managers of third country funds?

MFA believes that the existing UK private placement regime is well defined and strongly supports the Government’s intention not to impose additional requirements for third country managers of third country funds.
Question 17: If you believe the Government should impose additional requirements, what should they be and why? What would be the costs and benefits of imposing additional requirements?

No comment.