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

February 1, 2013

Via *FSA Website*

Investment Funds Team
Conduct Business Unit
Financial Services Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

Re: FSA Consultation Paper CP12/32: *Implementation of the Alternative Investment Fund Managers Directive: Part 1* (November 2012) (the "Consultation Paper")

Dear Sir or Madam:

Managed Funds Association ("**MFA**")[1] welcomes the opportunity to provide responses to the Consultation Paper; MFA's responses to the FSA's questions are set out in the Annex to this letter. Please note that we have only responded to certain questions in the Consultation Paper.

While there are several issues covered in our responses, MFA would like to highlight the following key points:

- Transitional provisions – the transitional provisions should apply equally to existing UK/EU AIFMs as well as to existing non-EU AIFMs; there should be a level playing field among all existing AIFMs, regardless of domicile.

- Depositaries – the drafting of FUND 3.11.30R appears to be inconsistent with Article 36(1) of the AIFMD.

- Scope – an EU delegate of a non-EU AIFM should not be required to be authorised under the AIFMD.

[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, the Americas, Australia and all other regions where MFA members are market participants.

- Remuneration – AIFMs (who by definition carry on portfolio management activities) should be subject to no more onerous remuneration requirements than MiFID portfolio management firms. Both should be treated as "level 3" firms for the purposes of the Remuneration Code.

We would be very happy to discuss our comments or any of the issues raised in the Consultation Paper with the FSA. If the FSA 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 FSA Consultation Paper CP12/32:

"Implementation of the Alternative Investment Fund Managers Directive: Part 1"

General MFA Comments

Transitionals

MFA understands that, as noted at paragraph 2.40 of the Consultation Paper, under the AIFMD transitional provisions, an AIFM managing AIFs before 22 July 2013 does not need to apply for authorisation, nor be subject to the AIFMD, until 22 July 2014 (at the latest).

MFA notes that non-EU AIFMs are not mentioned in that Transitionals section. MFA urges the FSA to clarify that the transitional provisions in the AIFMD apply equally to non-EU AIFMs. MFA notes that Article 61(1) of the AIFMD provides:

> "AIFMs performing activities under this Directive before 22 July 2013 shall take all necessary measures to comply with national law stemming from this Directive and shall submit an application for authorisation within 1 year of that date."

It is clear that Article 61(1) seeks to make a distinction generally between entities that already perform AIFM activities prior to 22 July 2013, on the one hand, and entities that start performing AIFM activities from 22 July 2013 onwards, on the other hand.

The reference in Article 61(1) is to: "AIFMs performing activities under this Directive before 22 July 2013". The term "AIFMs" would include both EU as well as non-EU AIFMs. It is important to note that the "activities" being performed would include managing AIFs and/or marketing AIFs, since Article 2(1) of the AIFMD identifies each such activity separately. Accordingly, a non-EU AIFM which markets AIFs before 22 July 2013 would be an "AIFM performing activities under this Directive before 22 July 2013".

The rest of Article 61(1) refers to such an AIFM being required to:

(i) take "all necessary measures" to comply with the AIFMD; and
(ii) apply for authorization,

within one year of 22 July 2013 (*i.e.* 22 July 2014).

The second item above (applying for authorization) does not apply to a non-EU AIFM. However, the first item (taking all necessary measures) does. So we respectfully suggest that the correct legal interpretation of Article 61(1) must be that an existing AIFM (whether EU or non-EU) must take "all necessary measures" to comply with the AIFMD within one year of 22 July 2014.

Any other interpretation would create an unlevel playing field between existing EU-AIFMs and existing non-EU AIFMs. Such EU AIFMs would not have to comply with any provisions of the AIFMD until 22 July 2014, while non-EU AIFMs would have to comply with certain provisions of the AIFMD (to the extent they market AIFs in the EU). For example, until a UK AIFM becomes authorized as an AIFM, in marketing its AIFs it would not need to comply with Articles 22 to 24 of the AIFMD as implemented in the UK; presumably it would market

under the existing UK financial promotion regime (see discussion below), which does not impose any disclosure or transparency requirements. In contrast, a US AIFM would need to comply with Articles 22 to 24, which would include fairly onerous reporting to the FSA.

Finally, it would be helpful if the FSA could clarify the status of existing AIFMs managing EU AIFs who delay the application process, in terms of how they would market their AIFs during the transitional period but before receiving authorisation. Clearly the marketing passport under the AIFMD is not available during that period, since the passport is available only to *authorised* EU AIFMs. However, the AIFMD national private placement regime likewise applies only to *authorised* EU AIFMs (Articles 34 to 36). MFA assumes that, during the one-year transitional period the EU AIFM may continue to market under the existing UK financial promotion regime, but it would be helpful if the FSA could confirm that point.

Depositaries (FUND 3.11.30R)

Draft FUND 3.11.30R provides:

"**3.11.30 R** An AIFM of a non-EEA AIF which is marketed in the United Kingdom must:

(1) ensure that the duties referred to in FUND 3.11.17R, FUND 3.11.18R, FUND 3.11.20R and FUND 3.11.22R are carried out in relation to that AIF:

(a) by **a single depositary** which meets the criteria set out in FUND 3.11.9R, or where applicable FUND 3.11.11R, where any of the duties are carried out in the United Kingdom; or

(b) by **one or more entities** which are not established in the United Kingdom;

(2) not perform the duties referred to in (1) itself; and

(3) provide the FCA with information about the identity of those entities responsible for carrying out the duties referred to in (1).

[**Note:** article 36(1)(a) of AIFMD]" (Emphasis added)

It appears to us that FUND 3.11.30 R is, in part, inconsistent with Article 36(1) of the AIFMD. The reference in sub-paragraph (a) (which deals with UK entities performing those functions) to "a *single* depositary which meets the criteria…" is inconsistent with Article 36(1) of the AIFMD, which clearly refers to "*one or more* entities" who are appointed to carry out those functions.

We note that sub-paragraph (b), which deals with *non*-UK entities performing those functions, refers correctly to "one or more entities which are not established in the United Kingdom." Paragraph 9.41 of the Consultation Paper notes that: "The AIFM must ensure that

one or more firms carry out the essential depositary functions…" Also, in Discussion Paper DP12/1, the FSA stated that:

> "A non-EU AIF marketed in the UK and managed by a UK AIFM is *not required under Article 36 to have a single depositary* to carry on all three of the primary depositary functions. In this instance, *the requirement for a single depositary is removed but the AIFM must ensure that one or more persons* are appointed to carry on these functions." (Emphasis added; see para 7.20 at page 69). (Emphasis added)

We would encourage the FSA to review the drafting of FUND 3.11.30R with a view to making it consistent with the AIFMD. One possible consequence of the current drafting is that AIFMs will seek to avoid using UK institutions to carry out those duties, since so much more flexibility would be afforded by using non-UK institutions to carry out those duties.

MFA Responses to Questions Posed in the Consultation Paper

Q1: Although we will return to this issue in a later consultation, once ESMA has completed its work on types of AIFM, do you have any concerns or questions regarding our approach to AIFMD scope described in this chapter?

MFA agrees generally with the FSA's approach to AIFMD scope as described in the relevant chapter of the Consultation. However, it would be helpful for the FSA to clarify the scope of the AIFMD as it relates to EU delegates of non-EU AIFMs.

MFA is of the view that EU-based delegates of non-EU AIFMs should not themselves be considered to be AIFMs which are required to become authorised under the AIFMD. For example, a US AIFM could appoint an EU-based entity – typically an affiliate authorised as a MiFID firm – as its delegate for the purpose of carrying on certain portfolio management activities in relation to an AIF managed by that US AIFM. Typically, the EU delegate's sole client is the US AIFM. In such circumstances the EU delegate should be considered to be a MiFID firm providing individual portfolio management services to its US parent/AIFM. Several US-based MFA members have such arrangements; it should be noted that these US managers are substantial, SEC-registered investment advisers performing portfolio and risk management for their hedge funds/AIFs. Such a US manager might then delegate some portfolio management activities, under a sub-management agreement, to a UK subsidiary which is authorised as a MiFID firm. MFA believes that, in such an example, the US manager is the "AIFM" in relation to the AIF and, since under Article 5(1) of the AIFMD each AIF can only have one AIFM, the UK subsidiary/sub-manager is not an AIFM but is a MiFID firm performing individual portfolio management services.

Q3: Do you agree that we should treat an AIFM that also undertakes MiFID services as a BIPRU limited licence firm (subject to the additional requirements of the Directive)?

MFA notes that Article 9 (*Initial capital and own funds*) of the AIFMD applies the minimum capital standards of the AIFMD to all AIFMs. It does not make any distinction between AIFMs who are subject to the restriction in Article 6(2) on carrying on other activities,

on the one hand, and AIFMs who are not subject to the Article 6(2) restriction as a result of Member States exercising the derogation in Article 6(4), on the other.

If a firm is authorised as an AIFM under the AIFMD, then it does not seem appropriate that it should additionally be subject to capital requirements as a BIPRU limited licence firm; those requirements are derived from the Capital Requirements Directive, which does not apply to AIFMs. We note also that AIFMs will in fact be subject to higher capital requirements under the AIFMD than under MiFID, as a result of the additional own funds/PII requirements. AIFMs should therefore not be subject to further capital requirements when they are not contemplated by the AIFMD.

Q7: Do you agree with our proposal for aligning the existing requirements under the FSA Remuneration Code with the new AIFMD remuneration rules? Do you have any specific concerns regarding:

- ***Our proposed treatment of AIFMs which are part of a banking group?***
- ***AIFMs doing MiFID investment business?***

MFA agrees with the proposal at paragraph 7.78 of the Consultation Paper that, where an AIFM investment firm complies with the AIFMD's remuneration rules, that compliance will satisfy the requirements of the Remuneration Code. However, MFA reserves further comment until the ESMA guidelines on remuneration are finalised. In particular, MFA is of the view that AIFMs (who by definition carry on portfolio management activities) should be subject to no more onerous remuneration requirements than MiFID portfolio management firms, otherwise there would be an unlevel playing field. Both should be treated as "level 3" firms for the purposes of the Remuneration Code.

Q17: Do you agree that EEA credit institutions should be allowed to act as depositary to UK AIFs? If you expect to be an AIFM of UK AIFs from 2013, would you consider using such a firm as depositary?

Although MFA's members generally do not manage UK AIFs, we believe that it is beneficial to keep the flexibility afforded by the AIFMD to allow EEA credit institutions to act as depositaries until July 2017.