



February 27, 2013

Via e-mail

AIFMD Transposition Consultation
Financial Regulation and Markets
HM Treasury
1st Floor Red 1
1 Horse Guards Road
London SW1A 2HQ

Re: HM Treasury Consultation Paper: *Transposition of the Alternative Investment Fund Managers Directive (January 2013)* (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 HM Treasury’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 our response to the consultation is set out in the Annex hereto, 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.
- Marketing – MFA supports HM Treasury’s decision not to impose additional access requirements on non-EU managers of AIFs.

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 organisation 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 organisations, 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.

We would be very happy to discuss our comments or any of the issues raised in the Consultation 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 HM Treasury Consultation Paper:
“Transposition of the Alternative Investment Fund Managers Directive”**

General MFA Comments

Transitional provisions (Section 6 of the Consultation Paper)

MFA respectfully suggests that 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. Section 6.1 of the Consultation Paper states that “managers are required to apply for authorisation within one year of the Directive coming into effect”; this is a reflection of the transitional provisions contained in Article 6(1) of the AIFMD.

MFA notes that non-EU AIFMs are not mentioned in the transitional provisions set out in Part 9 of the draft Alternative Investment Fund Managers Regulations 2013 (the “Regulations”). Regulation 68(1) provides that: “a **UK AIFM** falls within this paragraph if it carries on the activity of managing an AIF immediately before 22nd July 2013.” (Emphasis added) Regulation 68(3) goes on to provide that: “Part 8 does not apply in respect of an AIF managed by an AIFM falling within paragraph (1) until the relevant date”. Significantly (as discussed further below), Part 8 contains the provisions relation to marketing of AIFs.

MFA believes that HM Treasury’s proposed approach results in a narrowing of the intention of Article 61(1) of the AIFMD, and urges HM Treasury to clarify that the transitional provisions (and therefore Part 9 of the Regulations) 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 (we note in this respect the use of the neutral term “managers” in Section 6.1 of the Consultation Paper). 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 authorisation,

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

The second item above (applying for authorisation) 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) beginning 22 July 2013. For example, until a UK AIFM becomes authorised 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. This is because, as noted above, Part 8 of the Regulation (which contains the provisions relating to the marketing of AIFs) does not apply. This would mean that a UK AIFM would market under the existing UK financial promotion regime, which does not impose the disclosure or transparency requirements contained in Articles 22 to 24 of the AIFMD. In contrast, a non-EU AIFM would need to comply with Articles 22 to 24 beginning 22 July 2013. That clearly would not be an equitable outcome.

MFA Responses to Questions Posed in the Consultation Paper

Q27: The Regulations have been prepared consistently with the Government’s “copy out” approach. Do Respondents have comments to that approach?

MFA supports the UK Government’s aim of (generally) reproducing the provisions of the AIFMD with no unnecessary gold plating, given that the AIFMD represents a comprehensive regime of regulation. However, in this respect we would refer you to our views above of HM Treasury’s proposed approach to implementing the transitional provisions of the AIFMD.

MFA supports HM Treasury’s intention not to impose any requirements beyond those set out in the AIFMD with respect to marketing in the UK. We particularly support the decision not to impose additional requirements on non-EU fund managers marketing funds to UK investors. We feel that the current “private placement” regime in the UK works well and ensures that professional investors in the UK can access not only domestic and EU opportunities, but also opportunities offered by fund managers based outside of the EU.

Finally, we agree with HM Treasury’s approach to the regulation of “sub-threshold” AIFMs, particularly with respect to the Treasury’s decision not to subject sub-threshold AIFMs to Level 2 provisions relating to the AIFMD transparency requirements (given that such transparency requirements will impose significant ongoing costs).