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

September 9, 2013

VIA EMAIL

Jennifer Jessup
Departmental Paperwork Clearance Officer
Department of Commerce, Room 6616
14th and Constitution Avenue NW
Washington, DC 20230

Re: Comment Requests; Direct Investment Surveys: BE–577, Quarterly Survey of U.S. Direct Investment Abroad: Transactions of U.S. Reporter With Foreign Affiliate; BE–11, Annual Survey of U.S. Direct Investment Abroad

Dear Ms. Jessup:

Managed Funds Association ("MFA")[1] appreciates the opportunity to provide comments to the Department of Commerce and the Bureau of Economic Analysis ("BEA") regarding the request for comments on the Direct Investment Surveys, BE-577 and BE-11 (the "Forms").[2] The notices request comment on: (i) whether the information is necessary for the proper performance of the functions of the BEA, including whether the information will have practical utility; (ii) the accuracy of the BEA's estimate of the burden of the collection of information; (iii) ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) ways to minimize the burden of the collection of information on respondents.

We appreciate the important role of the BEA and its data collection in understanding and analyzing the scope of foreign investments by U.S. companies, and we recognize the value of this information for various policy-making determinations. In our view, however, and as we further explain below, the structure of the existing reporting regime is not well-suited to the unique structure and operations of hedge funds, as compared to operating companies. As a consequence, hedge funds that are asked to file the Forms report information to the BEA that may not be representative of the types of investment flows that the Forms seek to measure, and the information often is burdensome to obtain. We respectfully recommend that the BEA consider

[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.

[2] 78 F.R. 40690 (July 8, 2013); 78 F.R. 41031 (July 9, 2013).

certain amendments to the Forms to improve the utility of the data and reduce the filing burden on hedge funds that are asked to file.

Hedge funds are private pools of investor capital that are managed by a separate entity, called an investment manager. Investors in hedge funds include taxable U.S. investors, tax exempt U.S. investors, and non-U.S. investors. In order to satisfy the requirements of each of these types of investors, and to provide the most favorable tax treatment for their investments, a U.S. fund manager generally will manage investor capital through both U.S.-domiciled funds and non-U.S.-domiciled funds.[3] The U.S. investment manager, or an affiliate of the manager, operates and controls each of the funds, and typically organizes them in structures that are appropriate to the needs of the manager and fund investors. A common arrangement for hedge fund managers is a "master-feeder" structure, whereby investors invest through one or more U.S. and non-U.S. feeder funds, and these feeder funds are themselves investors in a single master fund.[4] This type of structure is beneficial to a manager and investors because it allows the manager to manage a single portfolio of the master fund. Master-feeder and other structures often also include other entities referred to as special-purpose vehicles (SPVs). These SPVs are often non-U.S. legal entities that managers utilize primarily for tax and other reasons.

As a result of these common structures, U.S. hedge fund managers often control one or more non-U.S. hedge funds or SPVs, and therefore those asked to file may fall within the reporting requirements of the Forms.[5] However, there are significant differences between hedge funds and operating companies that make many of the questions on the Forms inappropriate for hedge funds.[6]

As noted above, hedge funds are private pools of investor capital that are controlled and operated by an investment manager. Hedge funds typically make investments in securities (or other instruments) issued by other companies, including operating companies. They generally do not engage in the types of activities that are common for operating companies, and which are the subject of many questions on the Forms. A hedge fund generally does not have employees, other than a board of directors (if organized as a corporation). Instead, generally all employees reside within the investment manager, or an affiliate of the manager, that controls the funds. Similarly, hedge funds do not have any sales of goods, do not have any physical plants, property or

---

[3] Typically, a U.S. fund is organized either as a limited partnership or limited liability company, and a non-U.S. fund is often organized as a corporation or similar entity.

[4] *See* Appendix for a representation of a master-feeder structure. *See also* Hedge Funds and Other Private Funds: Regulation and Compliance, Thomas P. Lemke, Gerald T. Lins, Kathryn L. Hoenig and Patricia S. Rube, 2012-2013 ed., §2:10.

[5] The Forms require a U.S. firm that owns, directly or indirectly, at least 10% of the voting securities of a foreign business enterprise (foreign affiliate) at the end of its most recent fiscal year to complete the Forms, unless the foreign affiliate is exempt. In addition, U.S. feeder funds may fall within the requirement as a result of their ownership of interests in a non-U.S. master fund.

[6] There are also some common traits between hedge funds and operating companies, including that many hedge funds prepare financial statements, receive interest income and dividends, and, for those organized in a non-U.S. jurisdiction as a corporation, are overseen by a board of directors.

equipment, and do not have research and development operations. Physical presence in a jurisdiction is instead due to the operations of the investment manager or its affiliates, which are generally located in the U.S. or certain non-U.S. jurisdictions.[7] Finally, unlike most operating companies, hedge funds in many non-U.S. jurisdictions are not subject to an entity-level income tax. Accordingly, many of the questions in the Forms are inappropriate for hedge funds, and responses may not be representative of the types of investment flows that the BEA Forms seek to measure.

Nevertheless, a hedge fund manager that is asked to complete the Forms must expend considerable time and effort, often with the assistance of legal counsel, to determine whether and/or how it should respond to each question. This process includes a threshold analysis of which funds or entities are subject to the reporting requirements, a determination of the type of information that is responsive to the question, and the collection of data. In some cases, the questions in the Forms are ambiguous in how they apply to a hedge fund structure, and managers apply a reasonable determination in completing the questions and document their determination.[8] The process is often complex and time-intensive, and made more so by the various organizational structures that some managers have developed over time in response to investor demands. Filing burdens for these managers that are asked to file are substantial, and large hedge fund managers must dedicate significant internal resources to the completion of the Forms.

For these reasons, we recommend that the BEA consider modifying the Forms in a manner that would better take into account the operating structure of hedge funds, and the types of information that the Forms are designed to collect. In particular, we recommend that the BEA consider stating that the definition of foreign affiliate for purposes of the Forms would not include an investment fund (or SPV)[9] that is domiciled in a non-U.S. jurisdiction and that is controlled by a U.S. investment manager, such as through a master-feeder fund arrangement, as long as the non-U.S. fund (or SPV) itself does not have any employees or carry on business activities other than as a participant in investments.

In the alternative, we recommend that the BEA consider requiring investment funds to report categories of activity for which the data will be meaningful, such as the identity and location of a non-U.S. fund, the nature of ownership or control interest, the valuation of the ownership interest, and income returned to the non-U.S. fund. In addition, the BEA should consider recognizing and acknowledging in the Instructions that to the extent investment managers are required to report information for non-U.S. funds, it is expected that many of the categories of activity described in the Forms will be "Not Applicable" to this structure.

---

[7] Generally, any non-U.S. operations of the investment manager or an affiliate are not located in the jurisdiction in which a non-U.S. fund is domiciled.

[8] For example, it is not clear what constitutes "voting stock" or "an equivalent interest." Some entities are formed as limited liability companies which do not have any voting stock. In a limited partnership, it is not clear whether a limited partner holds any "voting stock" or "an equivalent interest," if a general partner has the exclusive right to manage and control the affairs of the partnership.

[9] SPVs are often entities owned by the master fund in the master-feeder structure. SPVs do not typically have employees or conduct business activities. As a result, similar to investment funds, information relating to SPVs may not be representative of the types of investment flows that the Forms seek to measure.

We also recommend that the BEA consider modifying the reporting requirement for an investment fund that owns more than 10% of the voting interests in an operating company. In many cases, the manager of an investment fund does not have all of the information required to complete the Forms, since hedge fund managers often receive only high-level information sufficient for them to track their investment in a foreign entity. As a consequence, completing the Forms requires managers to collect data that they may not otherwise hold in the ordinary course of business and have no other business reason to collect. Accordingly, we recommend that the BEA consider requiring such investment funds to report categories of activity for which the data will be meaningful, such as the identity and location of a foreign operating company, the nature of ownership or control interest, and the valuation of the ownership interest.

Finally, we respectfully request that the BEA make permanent, by incorporating into the "Who Must File" section of the Forms, its statement that "Entities required to report will be contacted individually by BEA. Entities not contacted by BEA have no reporting responsibilities."[10] We believe this will provide helpful clarity to market participants.

* * * * * * *

We would be happy to further discuss any of the above information with you or your colleagues. If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact Matthew Newell, Associate General Counsel, or the undersigned at (202) 730-2600.

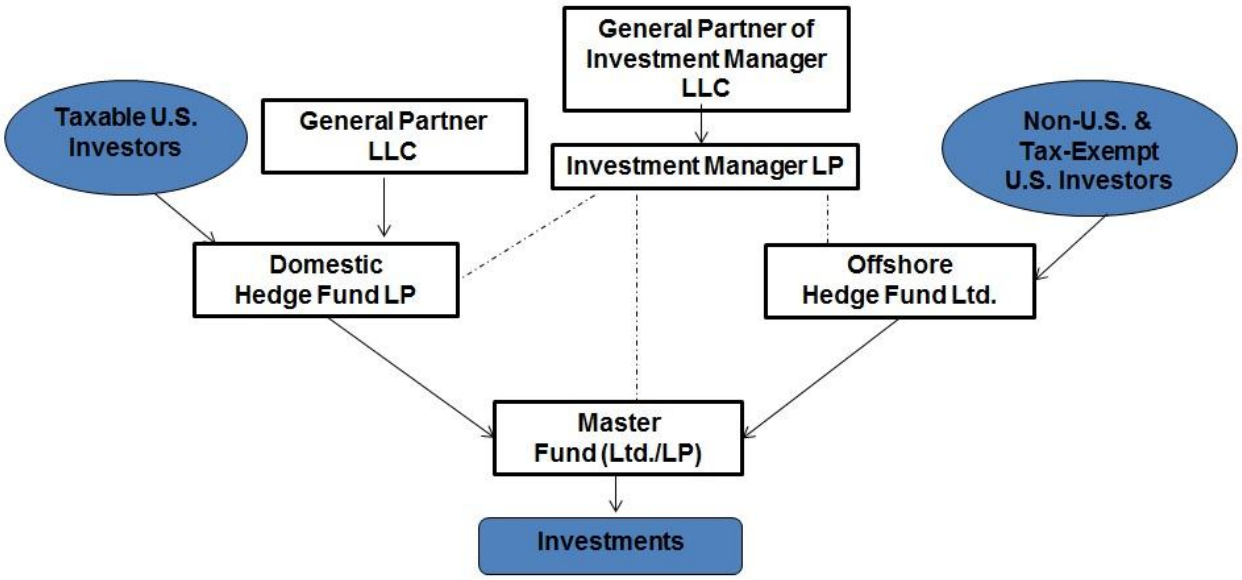
Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President & Managing Director,
General Counsel

[10] 78 F.R. 9032 (Feb. 7, 2013).

Appendix


General Partner of Investment Manager LLC
Taxable U.S. Investors
General Partner LLC
Investment Manager LP
Non-U.S. & Tax-Exempt U.S. Investors
Domestic Hedge Fund LP
Offshore Hedge Fund Ltd.
Master Fund (Ltd./LP)
Investments