



January 29, 2021

Via Web Portal

European Commission
Rue de la Loi, 200
1049 Brussels
Belgium

Re: **MFA Comments on Consultation on the Review of the Alternative Investment Fund Managers Directive**

Dear Messrs. Bassi and Gentner:

Managed Funds Association (“MFA”)¹ welcomes the opportunity to provide comments to the European Commission on its consultation document on the review of the Alternative Investment Fund Managers Directive (“AIFMD”). MFA members include European fund managers (“EU AIFMs”), as well as non-European fund managers (“non-EU AIFMs”), including many U.S.-headquartered managers, who provide valuable services to EU professional investors and invest in EU capital markets. As the European Commission (the “Commission”) conducts its review of the AIFMD, **we believe the most critical guiding principle should be to ensure that the AIFMD continues to operate as a regulatory framework that provides EU professional investors, such as pension funds and insurance companies, with access to the global market for asset managers.** Unduly curtailing that access will harm EU pension funds and their underlying beneficiaries, and would slow the development of the EU capital markets.

This guiding principle of ensuring that EU professional investors retain access to the global market for asset managers is consistent with the goals and principles of the capital markets union (the “CMU”), which MFA strongly supports. We understand that the text of the AIFMD calls for a review of the Directive; however, **we encourage the Commission and EU policymakers to avoid significant changes to the AIFMD, which has functioned well as a Directive.** Instead, we strongly recommend a narrow focus on only those specific issues that are clearly identified as needing amendment. We believe that a broad set of amendments to the AIFMD is likely to increase uncertainty and compliance burdens, which could limit EU investor choices in selecting managers.

As discussed in more detail in our response to the consultation’s questionnaire, we believe the AIFMD review should:

- **Make no changes to the rules for national private placement regimes**

¹ MFA represents the global alternative investment industry and its investors by advocating for public policies that foster efficient, transparent, fair capital markets, and competitive tax and regulatory structures. MFA supports member business strategy and growth via proprietary access to subject matter experts, peer-to-peer networking, and best practices. MFA’s more than 140 member firms collectively manage nearly \$1.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, London, Brussels, and Asia, supporting a global policy environment that fosters growth in the alternative investment industry.

("NPPRs"). The NPPRs in many EU member states have functioned appropriately, according to AIFMD Article 42, to allow non-EU AIFMs to market to professional investors in those jurisdictions while requiring non-EU AIFMs to be authorized and supervised by the relevant national competent authority.

- **Preserve the well-established and well-regulated approach to delegation of portfolio management** to non-EU AIFMs and avoid imposing new burdens that would make delegation overly costly or burdensome, depriving EU investors of access to global investing talent and strategies.
- **Address systemic risk issues by incorporating the work already done by the International Organization of Securities Commissions ("IOSCO")** with robust EU participation. Specifically, IOSCO recommended assessing leverage on an asset-class-by-asset-class basis and by long and short exposures. IOSCO also recommended considering systemic risk of leverage by analyzing AIFs' leverage in the context of the broader markets in which funds operate, comparing AIFs' activities to leverage of all other market participants, and not simply against other AIFs.
- AIFs and UCITS are different products with distinctive investors and should not be subject to identical rules. While MFA supports efforts to avoid duplicative or inconsistent rules, it is also important **to avoid a one-size-fits-all approach to consideration of increased harmonization of the AIFMD and the retail focused UCITS Directive.**
- Address technical issues that require amendments or clarification through supervisory guidance or the Commission's Delegated Regulation.

Respectfully submitted,

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Managed Funds Association

The Voice of the Global Alternative Investment Industry

Washington, D.C. | New York



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ANNEX

The following sets out additional commentary in relation to certain questions that have been answered by MFA in the Commission's questionnaire but for which no additional text box was made available by the Commission's web portal. In support of its responses to such questions, MFA wishes to set out its reasoning.

The numbering below corresponds to the numbering used in the Commission's questionnaire.

**Public consultation on the review of the
Alternative Investment Fund Managers Directive (AIFMD)**

II. Investor protection

- **Question 38.** Are there any additional disclosures that AIFMs could be obliged to make on an interim basis to the investors other than those required in the annual report?

<input type="checkbox"/>	Yes
<input checked="" type="checkbox"/>	No
<input type="checkbox"/>	Don't know / no opinion / not relevant

MFA RESPONSE

In practice, MFA members will generally have more frequent contact with investors, either on a monthly or quarterly basis, including by way of investor newsletters that update investors on the activities of the fund and provide interim performance information. Further, professional investors have the sophistication to determine whether they need additional information in connection with their investments and to request such information directly from AIFMs. As such, we do not believe there is a need for any additional disclosure requirements.

III. International relations

- **Question 49.** Do you believe that national private placement regimes create an uneven playing field between EU and non-EU AIFMs?

<input type="checkbox"/>	Yes
<input checked="" type="checkbox"/>	No
<input type="checkbox"/>	Don't know / no opinion / not relevant

MFA RESPONSE

MFA's membership includes the most significant U.S. headquartered investment management groups with global operations, many of whom have marketed AIFs to EU investors under the AIFMD national private placement regimes provided for by Article 42 of AIFMD.

MFA does not agree that Article 42 of AIFMD creates an uneven playing field as between non-EU AIFMs and EU AIFMs (i.e. to the advantage of non-EU AIFMs).

Although the national private placement regimes that function properly impose only a subset of the requirements of AIFMD on non-EU AIFMs, non-EU AIFMs are not able to access an EU wide passport to market their AIFs. Accordingly, non-EU AIFMs must make applications in each Member State where they wish

to market their fund and make individual Annex IV filings in each Member State. Many EU member states have created NPPRs under Article 42 that both allow professional investors in those jurisdictions to access the global market for asset managers and also ensure that authorization and supervision mechanisms protect the market.

Where a number of Member States have chosen to 'gold-plate' the requirements of Article 42, this creates a differential level of compliance when non-EU AIFMs are seeking to market to EU investors and adds further friction.

Non-EU AIFMs are generally subject to authorization and ongoing compliance requirements in their home jurisdiction. In the U.S., investment advisers are required to register with the Securities and Exchange Commission and comply with the requirements of the U.S. Investment Advisers Act of 1940. Accordingly, investors in non-EU AIFs managed by non-EU AIFMs will benefit from the domestic investor protection legislation that applies to the AIFM.

More broadly, when considering the rules for distribution of investment funds globally as the relevant 'playing field', it is clear that EU AIFMs are not at a disadvantage to non-EU AIFMs. As an example, an EU AIFM is able to market their fund to investors in the U.S. meeting a "qualified purchaser" test, without being subject to any substantial compliance requirements as would apply to a U.S. AIFM marketing an AIF in the EU.

MFA notes that in December 2018 the KPMG Report on the Operation of AIFMD stated that respondents to KPMG's survey observed that it has been of "EU added value that national private placement regimes (NPPRs) are permitted to operate".

The Commission should encourage NPPRs to be operable for non-EU AIFMs, and not gold-plated. The overarching goal is a workable framework that will allow non-EU AIFMs to offer their AIFs to the broadest range of EU investors.

- **Question 50.** Are the delegation rules sufficiently clear to prevent creation of letter-box entities in the EU?

<input checked="" type="checkbox"/>	Yes
<input type="checkbox"/>	No
<input type="checkbox"/>	Don't know / no opinion / not relevant

MFA RESPONSE

MFA considers that the existing AIFMD 'Level 2' provisions on delegation in Commission Delegated Regulation (EU) No 231/2013 (AIFMR) are sufficient to enable delegation to function effectively and provide sufficient clarity to market participants and EU NCAs to assess the proper limits of delegation when considering the risk of the creation of letter box entities.

Article 82 of AIFMR already provides for circumstances in which an AIFM will be considered to have delegated the performance of its functions to such an extent that it will be considered to be a letter-box entity. Accordingly, delegating AIFMs are well aware of the need to perform appropriate due diligence on the proposed delegate to ensure that the delegation arrangements will comply with the requirements of AIFMD/AIFMR.

MFA notes that ESMA's 2017 Opinion on *General principles to support supervisory convergence in the context of the United Kingdom withdrawing from the European Union* sets out considerations for NCAs in relation to the supervision of delegation by AIFMs in the context of Brexit. The recommendations in ESMA's Opinion are set out within the bounds of the existing rules and demonstrate that delegation arrangements can be monitored effectively by NCAs without requiring changes to AIFMD. ESMA's Opinion has subsequently been followed by further specific guidance in the form of the Luxembourg CSSF Circular 18/698 and the Central Bank of Ireland Fund Management Companies Guidance.

- **Question 51.** Are the delegation rules under the AIFMD/AIFMR appropriate to ensure effective risk management?

<input checked="" type="checkbox"/>	Yes
<input type="checkbox"/>	No
<input type="checkbox"/>	Don't know / no opinion / not relevant

MFA RESPONSE

MFA considers that the delegation rules do facilitate effective risk management. In particular, the AIFMD/AIFMR rules make clear that the AIFM is responsible for risks arising from the delegation structure and in circumstances where risk management for the AIF is itself delegated, AIFMD/AIFMR contains clear provisions on the type of entities that can perform such functions (or otherwise requires approval by the AIFM's competent authority). In the context of non-EU delegates, such delegates must be authorised or registered for the purpose of asset management and effectively supervised by a competent authority in those countries.

In addition, as all delegation arrangements must be notified to the NCA of the AIFM any structural defects in the risk management arrangements would be apparent to the AIFM's competent authority. NCAs are responsible for ensuring that they are able to undertake effective supervision of such structures.

- **Question 52.** Should the AIFMD/AIFMR delegation rules, and in particular Article 82 of the Commission Delegated Regulation (EU) No 231/2013, be complemented?

<input type="checkbox"/>	Yes
<input checked="" type="checkbox"/>	No
<input type="checkbox"/>	Don't know / no opinion / not relevant

MFA RESPONSE

As noted above, MFA considers that the existing delegation regime operates effectively in relation to non-EU delegates and has enabled EU investors to benefit from a broader range of expertise and investment strategies than might otherwise be available to EU investors. Further, we are unaware of any significant regulatory or investor protection concerns that have arisen because of the existing delegation structures. Additional requirements on delegation arrangements would create a significant risk of limiting EU investor choice in selecting managers by making delegation arrangements uneconomical.

MFA recognizes the concerns expressed by ESMA (in its 2017 Opinion and in its 2020 Letter to the Commission) in relation to delegation to UK firms following the end of the Transition Period between the EU and the UK; however MFA is concerned at the potential for considerations relating to Brexit to disproportionately impact the AIFMD provisions on delegation to the detriment of existing non-EU delegation structures, including many existing delegation arrangements between EU AIFMs and U.S. investment advisors as delegates.

The introduction of additional quantitative criteria or the requirement that certain core functions must always be performed internally may not be consistent with existing delegation structures. Significant restructuring of existing arrangements may be unattractive to non-EU delegates who may choose to exit the arrangement rather than continue to act as a delegate.

The introduction of additional quantitative criteria or the requirement that certain core functions must always be performed internally may also cause delegation structures to operate less efficiently or less effectively, particularly if the list of core functions includes functions that are currently typically performed by delegates rather than the delegating AIFM. In addition, the variety of strategies and business models that are operated by AIFMs and their delegates is likely to make the calibration of appropriate quantitative limits difficult to achieve. Principles based provisions are therefore more appropriate in this context.

As noted above, ESMA's 2017 Opinion demonstrates how the existing delegation rules allow NCAs to exercise appropriate oversight in relation to delegation to non-EU firms.

MFA notes that one of ESMA's apparent concerns with delegation is the extent to which management fees may be paid to delegates rather than the AIFM, resulting in a loss of revenue to the EU bloc. However, this seems unlikely to be

the case in respect of delegation structures relating to existing non-EU firms. Such delegation structures are often established specifically to enable EU investors to access strategies and expertise of non-EU delegates and which may not otherwise be available in the EU. In other words, the non-EU delegates receive management fees for the performance of a service which may not otherwise be available from an EU competitor. Restricting delegation as a means to artificially increase EU management fee revenues would risk the creation of additional costs that would be detrimental to end investors.

- **Question 54.** Do you consider that a consistent enforcement of the delegation rules throughout the EU should be improved?

<input type="checkbox"/>	Yes
<input checked="" type="checkbox"/>	No
<input type="checkbox"/>	Don't know / no opinion / not relevant

MFA RESPONSE

The delegation regime, as set out in AIFMD/AIFMR and as supplemented by ESMA's 2017 opinion and NCA guidance already provide for a robust framework that is subject to oversight by NCAs.

MFA notes that the primary locations of AIFMs delegating to non-EU delegates are Ireland and Luxembourg, where there are developed funds formation markets and local service providers with relevant expertise. Ireland and Luxembourg are therefore important gateways through which EU investors are able to access the strategies and expertise of non-EU asset managers.

Although MFA is supportive of a consistent application and enforcement of the delegation rules, MFA would caution against an approach that would have a detrimental impact on the ability of Irish or Lux AIFMs to facilitate delegation structures involving non-EU asset managers.

At the present time, MFA does not consider that any changes to AIFMD/AIFMR are required in this regard.

Section VII – Miscellaneous

- **Question 101.** Should the UCITS and AIFM regulatory frameworks be merged into a single EU rulebook?

MFA RESPONSE

MFA supports efforts to avoid duplicative or inconsistent rules. AIFs and UCITS are different products offered to distinct groups of investors and, therefore, we believe that they should not be subject to identical rules. Accordingly, we

encourage the Commission not to propose a one-size-fits-all approach as it considers whether there are specific areas where increased harmonization of the AIFMD and UCITS would improve investor protections.