December 7, 2017

Olivier Guersent
Director General
DG FISMA
European Commission
2 Rue de Spa
1049 Brussels, Belgium

Re: Managed Funds Association Comments on ESA Review

Dear Mr. Guersent:

Managed Funds Association ("MFA")[1] appreciates the opportunity to provide comments in response to the European Commission's (the "Commission") proposed regulation to amend various European regulations establishing European Supervisory Authorities ("ESAs"). While the proposed regulation covers a wide range of issues with respect to the various ESAs, our comments are narrowly focused on a few specific provisions in the proposed regulation that we believe could impact alternative fund managers, including U.S.-based managers. In particular, MFA encourages the Commission to consider amendments to the proposed regulation with respect to the following issues:

- Coordination on delegation and outsourcing of activities as well as of risk transfers;
- Annual third country equivalence review and confidential report by relevant ESAs; and
- Expanding the European Securities and Markets Authority's ("ESMA") temporary intervention powers under the Markets in Financial Instruments Regulation ("MiFIR") to the marketing of alternative investment funds ("AIF")

[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 many other regions where MFA members are market participants.

and undertakings for collective investment in transferable securities ("UCITS") by their managers.

We believe that our suggested amendments to these provisions, set out below, would minimize regulatory and market uncertainty while remaining consistent with the underlying policy objectives of the proposed regulation and the Commission's Capital Markets Union.

Coordination on delegation and outsourcing of activities as well as of risk transfers

We understand the Commission's goal of promoting consistency in the application of the UCITS Directive and the Alternative Investment Fund Managers Directive ("AIFMD") by various national competent authorities ("NCAs"). We also understand the Commission's goal of preventing letter-box entities in the EU, in accordance with existing delegation requirements. We believe that the best way to accomplish these goals, without creating unintended disruption to the EU's asset management industry and EU investors, is for NCAs to apply the existing delegation rules under the AIFMD and the UCITS Directive in a coordinated fashion, but not to add an additional layer of regulatory approval of asset manager authorizations or delegation arrangements.

Delegation of portfolio management or risk management is an important tool to provide EU investors access to high quality asset managers who are not located in the EU. EU investors would not be able to achieve their desired investment objectives if they had limited access, or lost access, to non-EU asset managers that provide those investors with specialized investment strategies or risk management expertise, such as those focusing on investments in non-EU jurisdictions.

We are examining the possible burdens associated with the proposed additional level of regulatory review and how they could adversely impact existing asset management structures, such as platform structures that allow EU-based asset managers to provide their investors with access to a range of non-EU sub-managers under the supervision of the EU manager. To the extent that EU requirements unduly limit the authority to delegate portfolio management functions to non-EU asset managers, we believe that UCITS and AIF products would be harmed. Accordingly, we believe that such restrictions ultimately will negatively affect the vitality of the EU asset management industry and impair the quality of asset management services available to investors. Portfolio and risk management delegation, subject to appropriate oversight by the primary manager as already required under the AIFMD and the UCITS Directive, have successfully provided valuable benefits to EU investors and we are unaware of any significant regulatory or investor protection concerns that have arisen because of the existing delegation structures.

With respect to regulatory oversight of delegation arrangements, and overall authorization and supervision of EU asset managers, we believe that NCAs are best suited to make these determinations. NCAs' supervisory and oversight responsibilities make them best situated to have the relevant information and ongoing supervisory relationship to apply the delegation rules on a case-by-case basis. Providing an additional layer of regulatory oversight in that process by giving ESAs responsibility for conducting direct assessments and providing opinions on individual authorization or delegation determinations by an NCA will add unnecessary inefficiency into the regulatory approval process for asset managers, which can already be a time-consuming process. We also note that a new ongoing oversight and authorization responsibility for ESAs would require significant additional resources that would, at best, have ESAs replicate functions that are already being effectively fulfilled by NCAs.

We believe a more beneficial role for ESMA would be to focus on harmonizing applicable regulatory standards and coordination in application of those standards. For example, we appreciate the efforts of the Commission and ESMA in providing guidance on the application of the MiFID II inducements regime in the context of delegation arrangements. This approach would help achieve the desired policy goal of regulatory convergence, without creating regulatory inefficiencies that could have important adverse effects on EU investors, including higher costs or limited ability to access non-EU asset managers that EU investors want to retain. Accordingly, we encourage the Commission to consider revising Article 31a of the proposed regulation to focus ESA responsibilities on promoting harmonization of standards and coordination in application of those standards with respect to delegation. We further encourage the Commission to remove those provisions in Article 31a of the proposed regulation that would require NCAs to report to an ESA regarding authorizations involving delegation arrangements as well as those provisions that give ESAs responsibility for directly assessing and opining on specific authorization or delegation arrangements that have already been subject to review and assessment by the relevant NCA.

<u>Annual third country equivalence review and confidential report by relevant ESAs</u>

MFA recognizes the Commission's policy goal of conducting reviews of Commission equivalence determinations to identify whether there have been material changes in third country regulatory frameworks or material market developments. We understand the importance of reviewing equivalence decisions to determine whether there have been material changes in third country regulation or markets; however, we believe that an annual review would be impractical, if not impossible, given the number of third countries that would need to be reviewed and the scope of regulations and market issues.

We also believe the potential for equivalence decisions to be changed on an annual basis introduces significant uncertainty into the market, making it difficult for market participants to make significant business decisions that could be subject to sudden and frequent changes in their regulatory status.

Accordingly, we believe the Commission should consider a different frequency for such reviews. For example, ESMA (and other ESAs) could develop a rotational system of third country reviews so that third countries would all be reviewed on an appropriate cycle, but each country would not be subject to a new review every year.

We also are concerned about the confidential nature of the equivalence review process. We believe that the equivalence review process, both during the assessment phase as well as the final report, should be open and transparent by providing the public and third country regulators the opportunity to provide comment and input on ESMA's (or other

ESA's) determinations. We believe that public input on prior reviews of third countries has proven beneficial to the review process. We encourage the Commission to revise Article 33 to remove the references to confidentiality in the reports the ESAs are required to provide the Commission regarding third country regulatory and market developments. We also encourage the Commission to adopt an open and transparent process with respect to the equivalence review and determination process.

Expanding ESMA's temporary intervention powers under MiFIR to the marketing of AIFs and UCITS by their managers

We understand that the proposal would expand ESMA's existing intervention powers across directives; however, we believe that intervening in the marketing of investment funds, particularly with respect to open-end investment funds, presents additional risks and should not be adopted by the Commission. Open-end investment funds manage their liquidity risks through a variety of risk management tools, including the ability to receive new investments from investors on an ongoing basis. A sudden and unplanned inability to do so could create liquidity problems for a fund, causing it to take less favorable measures, for example, having to liquidate assets to fund investor redemptions. We believe this result would be detrimental to investors, not provide additional protection for investors.

We also do not believe that the marketing of an individual AIF or UCITS fund could create the type of systemic risk that the intervention power contemplates and is, therefore, unnecessary for that reason. Moreover, regulators and international bodies such as the Financial Stability Board and the International Organization of Securities Commissions have been reviewing the potential for systemic risks arising from asset management activities, but have not yet concluded that such risks exist or how to address those risks if they do exist. We believe it would be premature for the Commission to adopt new rules based on systemic risk concerns before regulators have identified whether there are in fact such concerns and whether new rules are necessary to address any identified concern. We also believe that subjecting the marketing of AIFs and UCITS, which is already governed under the AIFMD and UCITS Directive, respectively, to MiFIR would create unnecessary confusion and regulatory overlap. Accordingly, we encourage the Commission to remove this provision from the proposed regulation.

If you have any questions regarding any of the issues discussed above, or if we can provide further information with respect to the proposed regulation, please do not hesitate to contact Benjamin Allensworth or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell

Executive Vice-President and Managing Director, General Counsel

/s/ Michael Pedroni

Michael Pedroni

Executive Vice-President and Managing Director, International Affairs