2nd Floor
36-38 Botolph Lane
London EC3R 8DE.

FIA-europe.org
T +44 (0)20 7929 0081
F +44 (0)20 7621 0223

11th September 2015

Stephen Hanks
Markets Policy
The Financial Conduct Authority
25 North Colonnade
London
E14 5HS

Dear Stephen,

MiFID II - Third-country Firms Engaged in Dealing Exclusively on Own Account or Providing Services/Performing Investment Activities outside the EU to Clients outside the EU when Accessing European Markets through Direct Membership or DEA

This letter presents the views of FIA Europe, FIA EPTA, FIA PTG and their members[1] in relation to the application of the authorisation requirements in MiFID II to third-country firms engaged in either dealing exclusively on own account or providing services/performing activities outside the EU to clients outside the EU when accessing European trading venues through direct membership / participation or through direct electronic access (DEA) arrangements.

We believe it is clear that authorisation and registration requirements set out in MiFID II and MiFIR do not apply to such firms[2] for the following, cumulative reasons

[1] The European Principal Traders Association (FIA EPTA) is affiliated with the Futures Industry Association ("FIA") and is comprised of more than 25 EU-based proprietary trading firms that deal on own account on trading venues across Europe and worldwide. The FIA Principal Traders Group (FIA PTG) is an association of more than 25 US-based firms that trade their own capital on exchanges worldwide. FIA EPTA and FIA PTG members engage in manual, automated and hybrid methods of trading and are active in a variety of asset classes, such as equities, foreign exchange, commodity derivatives and fixed income. Members of FIA EPTA and FIA PTG are a critical source of liquidity in the on-venue markets, allowing those who use the markets to manage their business risks to enter and exit the markets efficiently. FIA EPTA and FIA PTG advocate for open access to markets, transparency, and data-driven policy.
FIA Europe, formerly the Futures and Options Association (FOA), represents some 175 firms involved in the exchange-traded and centrally-cleared derivatives markets – including banks, brokers, commodity firms, exchanges, CCPS, vendors, law firms and consultants. FIA Europe works with its members to maintain constructive dialogue with government and regulatory authorities and deliver high standards of industry practice.

[2] This is consistent with a MiFID1 Q&A published by the European Commission in which it confirmed that third-country firms do not fall within the scope of the authorisation requirements; only persons established in the EU fall within scope.

1) A third country firm is not an 'investment firm'

Article 4(1)(1) of MiFID II defines an investment firm as "any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis". On its face, as is the case in MiFID, this definition is not restricted by any territorial application; it is therefore, by itself, not restricted to persons established in the EU.

However, other provisions in the directive make clear that the definition of investment firm is limited to firms within the Union. In particular, Article (4)(1)(57) defines a third country firm as "a firm that would be a credit institution providing investment services or performing investment activities *or an investment firm **if** its head office or registered office were located within the Union"* [Emphasis added]. This definition is mutually exclusive with the definition of investment firm. As such, a third country firm cannot be an investment firm within the meaning of the Directive.

Various scope provisions (under Article 1(1) and 1(2) of MiFID II and Article 1 of MiFIR) refer separately to "investment firms" and "third-country firms providing investment services or performing investment activities through the establishment of a branch in the Union," reinforcing the conclusion that a third-country firm is a different legal concept to an investment firm.

Therefore, MiFID II provisions applying to investment firms, without express reference to third-country firms, do not by definition apply to third-country firms.

2) The authorisation requirements under Article 5 MiFID II require authorisation to be granted by the "home Member State competent authority."

Third-country firms do not have a home Member State[3] and therefore cannot fall within the scope of the authorisation requirement set out in Article 5(1) of MiFID II.

3) Two aspects of third-country firm provision of services in the Union are expressly addressed in MiFID II / MiFIR but neither would apply where the third-country firm is solely providing services or performing investment activities outside the EU to clients outside the EU or is engaged in dealing exclusively on own account.

[3] The "home Member State" is defined in Article 4(1)(55) of MiFID II as:
"(a) in the case of investment firms:
(i) if the investment firm is a natural person, the Member State in which its head office is situated;
(ii) if the investment firm is a legal person, the Member State in which its registered office is situated;
(iii) if the investment firm has, under its national law, no registered office, the Member State in which its head office is situated;"

Article 39 of MiFID II sets out certain conditions for a Member State's authorisation of a branch, which apply where a Member State chooses to require third-country firms to establish a local branch in order to "provide investment services or perform investment activities with or without any ancillary services" *to retail and/or elective professional clients in its territory*. [Emphasis added]

Article 46(1) of MiFIR sets out a requirement for certain third-country firms to register with ESMA. Subject to an equivalence assessment being undertaken by the European Commission, Article 46(1) of MiFIR provides that a third-country firm may provide investment services or perform investment activities with or without any ancillary services *to eligible counterparties and to professional clients* within the meaning of Section I of Annex II to Recast MiFID (i.e. per se professional clients) established throughout the Union without the establishment of a branch where it is registered in the register of third-country firms kept by ESMA. [Emphasis added.]

Both of these provisions apply only where services are provided to or activities are performed with or for a relevant client in the EU. In each case, there must therefore be a client in Europe to whom services are provided or for whom activities are performed.

Therefore, a third-country firm which is solely providing services or performing activities outside the EU to clients outside the EU would not fall within the scope of the registration requirements set out in MiFIR (as noted above, a third-country firm would never be subject to MiFID II authorisation requirements).

Likewise, where there is no obvious client established in the EU, as in the case of a third-country firm engaged in dealing exclusively on own account whose only nexus with the EU is the fact that it is a DEA user or direct participant / member of an EU trading venue, such a third-country firm would also fall outside scope of these provisions.

4) Prior to an equivalence decision taken by the Commission in respect of the effective equivalence of a third-country jurisdiction, Member States' national regimes will apply to third-country firms, and so it will be for each Member State to determine authorisation requirements applicable to third-country firms.

It is important to note, from a policy perspective, this does not mean third country firms will be unsupervised. Overseas firms that are direct members of EU trading venues would be subject to the same organisational requirements as EU investment firms because trading venues' obligations under MiFID II will require them to ensure that all members meet the same level of systems and controls. Likewise, for those third-country firms accessing EU markets indirectly, DEA providers will serve as a gateway, ensuring clients' compliance with EU standards and safeguarding a level playing field.

We therefore support the UK government's proposal to retain its existing regime going forward[4], which would preserve the ability of third country firms, engaged in either dealing exclusively on own account or providing services/performing activities outside the EU to clients outside the EU, and that access European trading venues through direct membership / participation or through direct electronic access (DEA) arrangements, to continue to do so without establishment and authorisation of a branch or registration with ESMA.

The status of third country firms remains an area of substantial uncertainty under MiFID II. Our members would need clarity well in advance of the Directive's implementation deadlines if third-country firms are required to be authorised. Given the rapidly approaching implementation deadlines, this would impose great demands on firms as well as the NCAs reviewing authorisation applications.

In light of the arguments set out in this letter, as well as the UK government's stated position, we take the view that no change is required for third-country firms to continue accessing UK markets as of January 3, 2017 and plan to advise our members accordingly. Should you disagree with this view, we respectfully request prompt clarification.

Yours sincerely,

FIA European Principal Traders Association
Johannah Ladd
Secretary General

FIA Principal Traders Group
Mary Ann Burns
Executive Vice President, Industry Relations and Chief Operating Officer FIA

FIA Europe
Simon Puleston Jones
CEO

[4] HM Treasury, Transposition of the Markets in Financial Instruments Directive II, March 2015: "The government is minded not to exercise the discretion to apply the MiFID II regime specified at Article 39 MiFID II" but rather "maintain its current third country regime," p. 11-12.