



January 24, 2011

Via Electronic Mail: rule-comments@sec.gov

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-1090

Re: Security-Based Swap Data Repository Registration, Duties and Core Principles; File No. S7-35-10

Dear Ms. Murphy:

Managed Funds Association (“MFA”)¹ appreciates the opportunity to provide comments to the Securities and Exchange Commission (the “Commission”) on its proposed rule related to “Security-Based Swap Data Repository Registration, Duties and Core Principles” (the “Proposed Rule”)² under Title VII³ of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).⁴ MFA fully supports the objectives of the Dodd-Frank Act and the Proposed Rule to enhance transparency in the security-based swap (“SBS”) market.⁵ In addition, MFA strongly supports imposing privacy requirements on security-based swap data repositories (“SBSDRs”) as well as the requirement that an SBSDR confirm with both counterparties the accuracy of data submitted.⁶ However, we are concerned about the level of protection the Proposed Rule provides with respect to transaction information received by SBSDRs, the ability of SBSDRs to use such information for commercial purposes and the extent to which non-U.S. regulators may have access to such data.

¹ MFA is the voice of the global alternative investment industry. Its members are professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. Established in 1991, MFA is the primary source of information for policy makers and the media and the leading advocate for sound business practices and industry growth. MFA members include the vast majority of the largest hedge fund groups in the world managing a substantial portion of the approximately \$1.9 trillion invested in absolute return strategies. MFA is headquartered in Washington, D.C., with an office in New York.

² Security-Based Swap Data Repository Registration, Duties and Core Principles; Proposed Rule, 75 Fed. Reg. 77306, 77306 (proposed Dec. 10, 2010) (to be codified at 17 C.F.R. pts. 240 and 249) (the “Proposed Rule Release”).

³ Entitled “The Wall Street Transparency and Accountability Act”.

⁴ Pub. L. No. 111-203, § 701, 124 Stat. 1376 (2010).

⁵ *Id.* at 77307.

⁶ *Id.* at 77328.

In this comment letter, we recommend certain changes to the Proposed Rule that we believe are necessary to protect the information that market participants will provide to SBSDRs. Our hope is that this comment letter will comprise part of a continuing dialogue with the Commission as the SBS market evolves and during the regulatory implementation phase of the Dodd-Frank Act.

I. Privacy Obligations of SBSDRs

We agree with the Commission's concerns about privacy of SBS data,⁷ and as a result, we support the requirement of Proposed Rule 13n-9(b)(1) that an SBSDR "establish, maintain and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information the [SB]SDR receives."⁸ We believe such privacy protections will ensure that market participants utilize the services of registered SBSDRs with confidence.

However, we respectfully request that the Commission add additional safeguards to Section 13n-9(b)(2)(i)⁹ related to confidentiality of trading positions. MFA members invest heavily in their customized and proprietary investment strategies, which form the foundation of their businesses. Thus, disclosure of position level information could reveal such strategies to the market. To safeguard against disclosure of such positions, our members customarily enter into confidentiality agreements with SBS trading counterparties. Therefore, it is essential that the Commission ensure that the scope of information covered under the Proposed Rule and the SBSDR standard of care is consistent with terms generally requested for confidentiality agreements between SBS counterparties. Specifically, we recommend adding to the information covered under 13n-9(b): (i) information related to transactions of a market participant, including the size and volume of such transactions; (ii) the identity of each market participant; and (iii) the details of any master agreement (to the extent provided) governing the relevant SBS.

In addition, we respectfully request that the Commission further expand the requirements set forth in Section 13n-9(b)(iii) to include an SBSDR standard of care that obligates each SBSDR to have policies and procedures specifying that it will use any confidential information it receives solely for the purposes of fulfilling its regulatory obligations. Further, the Commission should require those SBSDR policies and procedures to limit access to confidential information exclusively to only directors, officers, employees, agents and representatives of the SBSDR (the "SBSDR Representatives") that need to know such information to fulfill regulatory obligations.

⁷ *Id.* at 77339 and 77307, respectively, where the Commission: (i) notes that "Proposed Rule 13n-9 is designed to ensure that an SBSDR has reasonable safeguards, policies and procedures in place to protect such [trade, trading strategy or nonpublic personal] information from being misused by the [SB]SDR or any person associated with the [SB]SDR"; and (ii) recognizes that "failure to maintain privacy of such [data maintained by the SBSDR] could lead to market abuse and subsequent loss of liquidity."

⁸ *Id.* at 77339.

⁹ *Id.* 13n-9(b)(2)(i) provides that an SBSDR is required to "establish and maintain safeguards, policies, and procedures reasonably designed to prevent misappropriation and misuse, directly or indirectly, of any confidential information received by the SBSDR, including but not limited to trade data, position data and any nonpublic personal information about a market participant or any of its customers."

Those policies and procedures should also have a mechanism in place for all SBSDR Representatives to be informed of, and required to follow, the SBSDR's policies and procedures related to privacy of information received. Lastly, we also suggest that the SBSDR and current and former SBSDR Representatives be liable for any breach of the SBSDR's privacy policies and procedures. We believe that requiring such robust SBSDR policies and procedures is consistent with current market practice and will ensure that SBSDRs and SBSDR Representatives appropriately protect SBS transaction information that they receive.

II. Regulator Access to Data Obtained and Maintained by SBSDRs

The Proposed Rule provides regulators with access to SBS transaction data so the "relevant authorities can access and analyze the data from secure, central locations to better monitor for systemic risk and potential market abuse."¹⁰ MFA supports giving regulators appropriate access to SBS data maintained by SBSDRs, however, we request that the Commission implement requirements that will ensure that only regulators acting within the scope of their authority have access to such SBS data.

Proposed Rule 13n-4 provides that an SBSDR shall, on a confidential basis, upon request and after notifying the Commission of the request, make available all data obtained by the SBSDR, including individual counterparty trade and position data to "any other person that the Commission determines to be appropriate, including, but not limited to: (A) foreign financial supervisors (including foreign futures authorities); (B) foreign central banks; and (C) foreign ministries."¹¹ While we appreciate the underlying intent in supporting globally coordinated oversight, we are concerned that "any other person the Commission determines to be appropriate" is vague and could result in the SBSDR providing access to persons without proper authority.

We are additionally concerned with the unfettered ability of foreign financial supervisors, foreign central banks and foreign ministries to receive SBS information. To limit the risk of an SBSDR disclosing information to any other person or any regulator (acting beyond its authority, we suggest the Commission modify the Proposed Rule to take an approach consistent with the Commodity Futures Trading Commission's ("CFTC") similar proposed rule.¹² CFTC Proposed

¹⁰ *Id.*

¹¹ *Id.* at 77368.

¹² Swap Data Repositories; Proposed Rule, 75 Fed. Reg. 80898, 80931 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pt. 49) ("CFTC Proposed Rule Release"). We note that the Commission's statutory authority to share information with foreign regulators generally requires that the Commission remain involved in such information sharing and that the Commission verify the foreign authority's purpose in seeking information. We would prefer that the Commission remain similarly involved in facilitating foreign regulator access to SBSDR information.

Section 21(a)(2) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), grants the Commission the power to conduct investigations and compel production of information on behalf of foreign securities authorities who request investigative assistance, provided that the foreign authority is conducting an investigation which it deems necessary to identify a violation of securities laws it enforces. Additionally, Section 24(c) of the Exchange Act grants the Commission authority, upon a showing of need, to provide non-public information to foreign persons subject to assurances of confidentiality. The Proposed Rule, as drafted, does not

Rule 49.17(d) requires any regulator requesting access to data obtained and maintained by a swap data repository (“SDR”) to first file a request for access with the SDR, certify the statutory authority for such request and detail the basis for such request.¹³ The SDR then must promptly notify the CFTC of such request and the SDR is subsequently only permitted to provide information to the regulator that is clearly within the scope of the regulator’s authority.¹⁴ In addition, prior to receipt of any data from an SDR, the regulator must execute a confidentiality and indemnification agreement with the SDR.¹⁵

We believe that adopting this approach would strike the appropriate balance between coordinating with all regulators to monitor systemic risk and ensuring that a market participant’s proprietary and confidential information is not disclosed unnecessarily. We believe this approach is also consistent with Congress’s intent in enacting the Dodd-Frank Act.¹⁶ Moreover, since the Commission and the CFTC share similar rationales for providing non-U.S. regulators access to information, the Commission should endeavor to adopt similar procedures to control regulator requests for SBS information.

III. Commercial Use by SBSDRs

The Commission is not, at this time, proposing to preclude an SBSDR or its affiliates from using the transaction data it receives for commercial purposes.¹⁷ MFA disagrees with this omission and believes that the Commission should restrict SBSDRs from using SBS data for commercial use. Such a restriction is consistent with CFTC Proposed Rule Section 49.17(g), which restricts an SDR from using swap information it receives for commercial use,¹⁸ and we believe that the Commission should impose a parallel restriction. Since the markets have historically not used SBSDRs, we have difficulty speculating about the types of commercial uses an SBSDR or its affiliates may pursue.¹⁹ However, given our concerns about maintaining privacy and confidentiality, we request that the Commission restrict commercial use of reported

require a foreign authority to make any showing of need before accessing SBSDR data. Moreover, it permits direct access to such data without mandating that the Commission act as an intermediary in the process.

¹³ CFTC Proposed Rule Release at 80931.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Proposed Rule Release at 77344 acknowledges this intent when it states, “Title VII requires the SEC to consult and coordinate, to the extent possible, with the CFTC for the purposes of assuring regulatory consistency and comparability, to the extent possible.”

¹⁷ *Id.* at 77322. Despite the fact that the Commission does not prohibit commercial use, the Commission nevertheless recognizes that owners of an SBSDR may be interested in maximizing the potential commercial value of the information reported to it. The Commission also recognizes that such commercial use may conflict with the statutory objective of protecting data privacy and providing fair and open access to data maintained by an SBSDR.

¹⁸ CFTC Proposed Rule Release at 80932.

¹⁹ We recognize that an SBSDR may want to use transaction data for purposes of marketing. Such commercial use by an SBSDR would not be unreasonable; provided, that the Commission permits the SBSDR to use only *aggregated* transaction data.

SBS data by an SBSDR or its affiliates to avoid potential misuse or misappropriation of material non-public information, transaction information and intellectual property.

IV. Dispute Resolution Policies for SBSDRs

MFA supports Proposed Rule Section 13n-5(6), which mandates that each SBSDR establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of transaction data and positions recorded in the SBSDR.²⁰ We also support the requirement in Section 13n-4(b) that each SBSDR confirm with both counterparties the accuracy of the information reported to the SBSDR. We believe it is important that SBSDRs maintain and disclose accurate data; thus, we believe that both measures are key steps towards that effort.

MFA appreciates the opportunity to comment on the Commission's Proposed Rule. If the Commission or its staff has questions, please do not hesitate to call Carlotta King or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

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

cc: The Hon. Mary Schapiro, Chairman
The Hon. Kathleen L. Casey, Commissioner
The Hon. Elisse B. Walter, Commissioner
The Hon. Luis A. Aguilar, Commissioner
The Hon. Troy A. Paredes, Commissioner

²⁰ Proposed Rule Release at 77369.