

Ms Mary L. Schapiro
Chairman
Securities and Exchange
Commission
100 F Street, NE
Washington, DC 20549

Rulemakings on Registration of non-resident Swap Data Repositories

Dear Chairman,

I take the opportunity of the public consultations on your proposed rulemakings to raise some concerns ESMA has on the proposed rules applicable to non-resident Swap Data Repositories (SDRs). Although this is not a formal contribution to your consultations, I would like to raise your attention to those issues that have a direct impact on our co-operation in this field.

In the case of non-resident SDRs, our concerns stem from the fact that in the proposed rulemakings on SDRs we have not identified any reference to equivalency of regulatory regimes or cooperation with the authorities of the country of establishment of the non-resident SDRs.

According to our reading, non-resident SDRs are actually subject to a stricter regime than the resident ones, as they need to provide a legal opinion certifying that they can provide the SEC with prompt access to their books and records and that they can be subject to onsite inspections and examinations by the SEC.

We understand that, as such, according to Sections 728 and 763 of the Dodd-Frank Act on Swap Data Repositories no exemption or special regime can be applied to non-resident SDRs that are registered with a foreign competent authority and that once they are registered with the SEC they become subject to your authority and your on-site inspections and examinations. However, we are aware of the fact that you are currently considering the ways to structure these requirements to take into account the supervision exercised by the foreign competent authorities. In our view, if the foreign supervision were not taken into account, your rulemakings would seem to force a non-resident SDR to be subject to multiple regimes and to the jurisdiction of several authorities. This would in practice be very challenging for regulated entities and would significantly raise the costs for both the industry and supervisors. Moreover, this system would raise concerns about the possibility for the SEC to carry out on-site inspections on entities based in Europe that are supervised by European authorities.

We believe that it would be preferable to aim at cooperating with foreign authorities to ensure the application and enforcement of equivalent rules and to guarantee access to the information needed for



regulatory purposes and not necessarily to all data and records held by a non-resident SDR. A regime of this kind is delineated in the European Commission's proposal for a Regulation on OTC derivatives, central counterparties and trade repositories, according to which trade repositories (EU terminology for SDRs) from a third country can be recognised as equivalent by ESMA if the following conditions are met: i) the trade repository is authorised and subject to effective supervision in a third country; ii) the European Commission has determined the third country regime as equivalent; iii) the European Union has entered into an international agreement with that third country regarding the mutual access and exchange of information that is relevant for the exercise of the duties of competent authorities; iv) cooperation arrangements between ESMA and the relevant competent authorities in the third countries have been established to ensure immediate and continuous access to the relevant information and to specify the mechanism for exchanging information and the procedure for coordinating the supervisory activities.

Against this background, we strongly encourage you to consider a different regime than the one described in your proposed rulemakings. Accordingly, you may want to contemplate a regime where non-resident SDRs can register with the SEC if the laws and regulations in a foreign jurisdiction are equivalent to the US ones and if a Memorandum of Understanding (MoU) between the SEC and the relevant foreign authorities has been signed. That MoU would ensure access to all the information you would need for exercising your duties and would define the supervisory activities conducted on the non-resident SDRs, e.g. with common on-site inspections. This regime would have the following advantages: i) facilitating cooperation among authorities from different jurisdictions; ii) ensuring the mutual recognition of swap data repositories; iii) establishing convergent regulatory and supervisory regimes which is necessary in a global market such as the OTC derivatives one.

We would also like to raise your attention to the provision on confidentiality and indemnification agreement in the Dodd-Frank Act. According to this provision, a foreign regulator would need to agree to indemnify an SDR and the SEC for any expenses arising from a litigation related to the sharing of information held by the SDR that is necessary for the exercise of the duties of the foreign regulator. We believe that ensuring confidentiality is essential for exchanging information among regulators and such indemnification agreement undermines the key principle of trust according to which exchange of information should occur. We would, therefore, recommend that your rulemakings help streamlining this principle for an efficient exchange of information between our authorities.

As outlined in my letter to Chairman Gensler (ESMA/2011/4) copied to you, we have some concerns on the new rules on registration of FBOTs proposed by the CFTC. Although as far as we are aware the SEC is not proposing any new rulemaking in this respect, we would like to suggest that any measures in respect of securities futures products and securities should avoid extraterritorial application to the extent possible and be replaced by effective co-operation between the home and host regulatory authorities (as proposed in the letter to the CFTC with regards to swaps). This is important in order to promote market efficiency,



innovation and fair competition in a globalised market and avoid unnecessary duplication of rules and controls.

Finally, we have not identified any similar new requirements with regards to the recognition of foreign derivatives clearing organisations (DCOs). We therefore expect that the recognition of those will be based on equivalence with internationally adopted standards and that the practical implementation of the recognition process will avoid double regulation and supervision of DCOs, also to ensure that the contracts cleared by them would be considered for the mandatory clearing of securities-based swaps.

I look forward to our continued co-operation in this field.

With my best regards,

Carlos Tavares
Vice-Chairman of ESMA

A handwritten signature in black ink, appearing to read 'Carlos Tavares', with a long horizontal flourish underneath.

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Chairman
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