MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

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Via Electronic Mail: brigaglianoj@sec.gov

James A. Brigagliano
Deputy Director, Division of Trading & Markets
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Managed Funds Association Comments on Section 929X of the Dodd-Frank Act

Dear Mr. Brigagliano:

Managed Funds Association ("MFA")[1] appreciates the opportunity to provide comments to the staff of the Securities and Exchange Commission (the "SEC") regarding the short sale disclosure provisions in in Section 929X(a) of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the "Dodd-Frank Act"). As we discussed during our January 5, 2011 meeting with staff from the SEC's Division of Trading & Markets we believe that the plain language of Section 929X and the legislative history to that Section clearly indicate Congress's intention to require a public report disclosing aggregate information about short sales, not information about individual short sales or short positions.

Statutory Language

The starting point for implementing statutory requirements is, of course, the statutory language itself. The relevant language in Section 929X provides:

> The Commission shall prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any failures to

[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 who manage 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.

> deliver the security following the end of the reporting period. At a minimum, such public disclosure shall occur every month.

A plain reading of the language in Section 929X(a) requires the SEC to issue rules providing for aggregate public disclosure of short sales, not disclosure of individual market participants' short sales. The legislative history with respect to this provision, as discussed in detail below, further evidences a clear Congressional intention to move away from a requirement to publicly disclose information about individual short sales and instead to require public disclosure of aggregate (*i.e.*, not individualized) disclosure of short sales.

Legislative History

The language that eventually became codified as Section 929X of the Dodd-Frank Bill originated in a bill proposed in October of 2009 by Majority Leader Steny Hoyer. That proposed bill contained the following provision:

> The Securities and Exchange Commission shall require brokers to publish daily information regarding the identity of short sellers, the companies whose shares are being sold short, the number of shares that are sold short, and new fails to deliver. Brokers must disclose in customer account agreements that lending shares for short selling may result in the loss of voting rights if the shares are on loan on the record date for a corporate election and the substitute dividend payments might be taxed at higher rates than normal dividends.

Majority Leader Hoyer subsequently amended his proposed legislation to require large money managers to report their individual short sales to the SEC, though such reports were exempted from Freedom of Information Act ("FOIA") requests. The amended legislation also required the SEC to publish aggregate short sale information publicly. The relevant portion of Majority Leader Hoyer's revised legislation provided:

> Section 13(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(f)) is amended by redesignating paragraphs (2), (3), (4) and (5) as (3), (4), (5) and (6) respectively and inserting after paragraph (1) the following:
>
> "(2) A. Every institutional investment manager that effects a short sale of an equity security shall also file a report on a daily basis with the Commission in such form as the Commission, by rule, may prescribe. Such report shall include, as applicable, the name of the institutional investment manager, the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, aggregate fair market value of each security, and any failures to deliver the security. For purposes of section 552 of title 5, United States Code, this subparagraph

> shall be considered a statute described in subsection (b)(3)(B) of such section.
>
> B. The Commission shall prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any failures to deliver the security following the end of the reporting period. At a minimum, such public disclosure shall occur every three months."

This proposed language set out a clear framework for short sale reporting. It required private, individualized reporting by institutional money managers with that information being protected from FOIA requests. We believe that the revised language modified Section 13(f) of the Securities Exchange Act of 1934 (the "Exchange Act") for two primary reasons. First, because Section 13(f) applies to all institutional money managers, amending that section of the Exchange Act would ensure that the SEC received information from a wide variety of market participants without imposing a reporting burden on individual investors. In addition, we believe the bill amended Section 13(f) of the Exchange Act to include short sale reporting by institutional money managers, on a private basis, because 13(f) already requires money managers to report their long positions.

The revised short sale disclosure bill also required the SEC publicly to report aggregate short sale information. Reading these two provisions together, the intent of the legislation was clear; the SEC would privately collect individual short sale positions and then aggregate short sale information and publish it publicly. Reading the second paragraph to require public reporting of individual short positions would render meaningless the FOIA exemption in the first paragraph, as there would be no reason to provide a FOIA exemption for publicly available information.

House Financial Services Committee Chairman Barney Frank included a modified version of Majority Leader Hoyer's language in his manager's amendment to H.R. 4173.[2] The following language was added to the end of new paragraph (2)(A) to provide even stronger confidentiality protections regarding the individualized reporting to the SEC:

> The information contained in reports of an institutional investment manager filed with the Commission pursuant to this section, shall be subject to the same non-disclosure and confidentiality protection provided under section 204(b)(8) of the Investment Advisers Act of 1940.

Section 7422 of H.R. 4173, as passed by the House, included this revised version of the provision, which clearly provided for two different reporting regimes. Paragraph (2)(A) of Section 7422 required private, individualized reporting to the SEC on a

[2] H.R. 4173 was the House version of the bill that, as amended, ultimately became the Dodd-Frank Act.

confidential basis and paragraph (2)(B) required public, aggregate and anonymous reporting by the SEC.

The version of the bill passed by the Senate prior to the House-Senate conference did not contain an analogous provision to Section 7422. The only provision in the Senate bill relevant to short selling was Section 415, which called for an SEC study and a report to Congress with any recommendations for market improvements.

During the House-Senate conference, House leaders proposed amending the Senate bill by including the text in Section 7422 in the final conference report. The Senate accepted the House amendment, with one change, which deleted paragraph (2)A. from the text. As a result of the agreement in conference, the paragraph requiring private, daily reporting on a confidential basis was deleted from Section 929X, but the paragraph on public, aggregate reporting by the SEC was retained. There is no indication that the Senate proposal to delete the paragraph requiring daily, private reporting to the SEC was intended to affect the clear meaning of the paragraph requiring public, aggregate reporting by the SEC.

Some may suggest that because Section 929X amends Section 13(f) of the Exchange Act this somehow indicates a Congressional intent to require individualized disclosure of short sales. As noted, we appreciate that Section 13(f) of the Exchange Act generally requires institutional investment managers to make public disclosure of long positions of certain equities. We also understand that the exchanges and the Financial Industry Regulatory Authority ("FINRA") currently report aggregate short positions, leading some to question why Congress would enact a provision that reflected current practice. We do not think it is unusual for Congress to codify an existing practice, to ensure that it continues. Moreover, while FINRA and the exchanges currently make public certain reports with aggregate short positions, we are unaware of any publicly available report that contains comprehensive, market-wide, aggregate short sale information (*i.e.,* a report that aggregates short sale information by security across all exchanges, over-the-counter transactions, and so-called "arranged" stock lending). As such, Section 929X could be interpreted to require a new, market-wide public report on the aggregate number of short sales of a security.

As outlined above, our review of the sequence of events leaves little doubt that Congress was well aware of the changes to the scope of this provision and that it sought to require aggregate reporting and not individualized reporting. In our view, trying to interpret Section 929X as an extension of the existing individualized reporting provision for long positions ignores both the specific statutory language and the evolution of the provision. Finally, we believe that it was clear intention of Congress to require aggregate reporting and not individualized reporting of short positions.

Conclusion

MFA appreciates the opportunity to share its views on the implementation of Section 929X of the Dodd-Frank Act. Based on the language in Section 929X of the Dodd-Frank Act and the legislative history to that Section, we believe that it is clear that Congress considered then expressly rejected a requirement for individualized public reporting of short sale information.

If you have any questions regarding any of these comments, or if we can provide further information with respect to these or other regulatory issues, please do not hesitate to contact Stuart J. Kaswell or me at (202) 730-2600.

Respectfully submitted,

/s/ Richard H. Baker

Richard H. Baker
President and CEO