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**Via Agency Website**

February 22, 2011

David A. Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581

RE: Swap Data Repositories (RIN 3038-AD20)

Dear Mr. Stawick:

The Depository Trust & Clearing Corporation (“DTCC”) appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (“CFTC” or the “Commission”) on its proposed new rules under the Commodity Exchange Act (“CEA”) governing the swap data repository (“SDR”) registration process, duties, and core principles (the “Proposed Rule” or “Proposed Regulation”).<sup>1</sup> Imposing requirements on swap data repositories would promote safety and soundness for all U.S. markets by bringing increased transparency and oversight to over-the-counter (“OTC”) swap markets, an important component of the reforms sought by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).<sup>2</sup>

**Summary of Response**

DTCC supports the Commission’s efforts to establish a comprehensive new framework for the regulation of swaps, including the implementation of registration, duties, and core principles for SDRs. Key points from DTCC’s response are highlighted below.

All swaps, whether cleared or uncleared, must, by statute, be reported to swap data repositories.<sup>3</sup> The primary purposes of this mandate are to provide regulators with complete transparency into the previously unregulated swap markets and to assure public dissemination of swap information as required by statute or as determined by regulators to be otherwise necessary for efficient and fair functioning of markets (subject to

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<sup>1</sup> See Swap Data Repositories, 75 Fed. Reg. 80,898 (December 23, 2010).

<sup>2</sup> Public Law 111-203, 124 Stat. 1376 (2010).

<sup>3</sup> See CEA Section 2(a)(13)(G) (“Each swap (whether cleared or uncleared) shall be reported to a registered swap data repository.”).

confidentiality considerations set forth in the Dodd-Frank Act and applicable regulations). These requirements make SDRs unique among the various parts of the market infrastructure for swaps contemplated by the Dodd-Frank Act in that all counterparties to all swap transactions will have the details of each of their transactions reported to an SDR.

The mandatory reporting regime creates an unintended opportunity for the SDR to improperly commercialize the information received. As an aggregator and collector of swap data supporting regulatory oversight and supervisory functions, as well as regulator-mandated public reporting, it is critical that an SDR's public utility function is separated from potential commercial uses of the received data. The principle of user control over the data for non-regulatory purposes must also be scrupulously honored, and care should be taken to assure that SDRs maintain an arms-length and non-discriminatory relationship with other parts of the market infrastructure (*i.e.*, clearing, confirmation, and execution facilities) and that these other parts of the infrastructure maintain similar relationships with SDRs. It is important, however, that SDRs themselves be allowed to enter into partnerships or coordinated programs in order to better provide aggregate views of data to regulators, to better assure that global regulatory requirements are met, or to promote other public purposes. Such opportunities should include participants' use of their data, as held in repositories, in a manner which makes swap markets more cost efficient and less risky.

Related specific points deserving of more detailed consideration include:

- While DTCC generally supports allowing third party service providers to assist reporting parties in fulfilling their reporting obligations, DTCC believes that SDRs should possess the sole responsibility for meeting the Commission's real-time public reporting requirements. DTCC respectfully suggests that the Commission not authorize unregulated, non-SDRs to serve the function of a real-time public disseminator, a core function of registered SDRs. The compliance function inherent in real-time public reporting (*e.g.*, managing block trade exemptions and tracking whether reporting entities are meeting their reporting requirements), requires entities performing this function be subject to Commission oversight. Such regulatory oversight is necessary to ensure the accuracy and completeness of disseminated data. DTCC notes that the SEC has, in its proposed rules, provided for such oversight by requiring that public disseminators of real-time pricing be registered security-based SDRs.<sup>4</sup> In general, as discussed in further detail below, DTCC advocates for harmonization of the SEC and the CFTC proposed rules and, with respect to the regulatory oversight of real-time public reporting entities, DTCC respectfully suggests the CFTC adopt the approach proposed by the SEC.

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<sup>4</sup> See Regulation SBSR, Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75,208, 75,284 (December 2, 2010).

- In order to assure that non-regulatory uses of mandatorily reported data remain in the hands of the counterparties, SDRs should be “user-governed.” This should include a board of directors that is broadly representative of market participants and that incorporates voting safeguards designed to prevent non-regulatory uses of data of a particular class of market participants that are objectionable to that class. In addition, no communication of data (other than to, or as required by, applicable regulators) that could have the result of disclosing the actual positions, specific business, or trading activity of a counterparty should be permitted without the consent of that counterparty.
- SDRs should not engage in the commercialization of data reported to them and should demonstrate strict impartiality in making data available to, or receiving data from, other providers, including affiliates of SDRs. Such practices will lead to a more cost efficient and less risky swap market and are best achieved by following objective, public standards and assuring that dealings with affiliates (other than cooperating regulated repositories) and competitors of affiliates are subject to oversight by members of the SDR’s board of directors who are not engaged in the governance or oversight of either the affiliates or their competitors. These same objective standards should be used for other providers, such as clearing, confirmation, and execution providers, in their dealings with SDRs. Vertical bundling of services by SDRs or by entities who, under the Proposed Rules, are obligated to report to SDRs would undercut the public purpose of SDRs.
- SDR fee structures should reflect an at-cost operating budget. Further, since even smaller, non-reporting counterparties will legitimately want to interact with SDRs, if only to verify what has been reported, SDRs should have the flexibility to facilitate such access by not charging, or charging only nominal amounts, for such interaction.

Additional points discussed by DTCC include the following:

- DTCC currently relies upon the direction provided by the OTC Derivatives Regulators’ Forum (“ODRF”), whose membership includes the CFTC and the Securities and Exchange Commission (“SEC”). DTCC’s Trade Information Warehouse (the “Warehouse” or “TIW”) has followed the ODRF’s guidance, recognizing that broad agreement among global regulators is difficult to achieve. DTCC is committed to complying with the policies adopted by the regulators and working with the Commission in this regard. DTCC urges the CFTC, in its regulation of SDRs, to aim for global regulatory comity both as it has already been agreed to by the ODRF and as it may be further agreed to by such other international bodies as the Committee on Payment and Settlement Systems (“CPSS”) and the International Organization of Securities Commission (“IOSCO”).

- DTCC supports the Commission in requiring robust operational capabilities of an SDR and specifically recommends that SDR infrastructure should operate on a 24/6 basis, given the global nature of where products are traded. SDRs should also process transactions in real-time and maintain multiple levels of operational redundancy. Given the importance of SDRs to the regulatory and systemic risk oversight of the financial markets and the critical role they will play in providing market transparency, a lack of robust resiliency and redundancy in operations should disqualify an entity from registering as an SDR. Also paramount to service provision is a strong ability to maintain information security. Assessment of these core capabilities should form part of any registration process, including a temporary registration process.
- DTCC recommends that appropriate transitional arrangements be made to avoid market disruption by the implementation of the Proposed Rule. The TIW is a centralized global repository for trade reporting and post-trade processing of OTC credit derivatives contracts, operated by DTCC's wholly-owned subsidiary, The Warehouse Trust Company LLC. The TIW is an integral part of the credit default swap ("CDS") market. Limitations to its operation could introduce significant operational risks to market participants. DTCC recommends that the final rules be subject to a phase-in period to allow an adequate period for existing service providers like the TIW to make necessary changes to their service offerings. In the alternative, DTCC requests the Commission provide specific transitional arrangements for existing infrastructures.
- To avoid creating conflicts between standards, as well as unnecessary costs, the Commission and the SEC should harmonize the regimes that oversee SDRs. DTCC believes that harmonization is a more important priority than the exact nature of the consistent standard, as SDRs can adjust to meet a single standard but not multiple, inconsistent standards. The CFTC, in its proposed rule related to swap data recordkeeping and reporting requirements,<sup>5</sup> has specifically taken the position that life cycle event processing and legal recordkeeping services are "ancillary" services and not part of core SDR functions.<sup>6</sup> DTCC agrees with the CFTC that these services, which are valuable to market participants and provide a vital function, do not necessarily need to be considered as part of the core role to be performed by an SDR.

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<sup>5</sup>See Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76,574 (December 8, 2010).

<sup>6</sup> See *id.* at 76,592 fn. 67 ("The Commission does not believe that Dodd-Frank precludes an SDR from accepting and maintaining swap data from both counterparties to a swap. For example, an SDR or its affiliate performing the ancillary service of maintaining the single binding legal record of a swap, such as the "gold" record maintained by the Depository Trust & Clearing Corporation ("DTCC") for credit swaps, would not be barred from receiving dual reporting in that connection.").

- DTCC supports the Proposed Regulation’s requirement that an SDR possess the ability to accommodate all swaps and all swap data in a particular asset class for which that SDR serves as a repository. Such a requirement promotes sound public policy by discouraging “cherry picking” only those swaps that are easy-to-process – a practice which contributes unnecessarily to data fragmentation and could undermine any economic case for taking hard-to-process swaps (thereby causing such hard-to-process swaps to fall on the Commission, resulting in an unnecessary monetary burden on taxpayer resources).

DTCC also makes a number of detailed observations addressing specific points and the questions posed in the Proposed Rule. These comments are preceded by a brief overview of DTCC and the Warehouse.

### **Overview of DTCC**

DTCC, through its subsidiaries, provides clearing, settlement and information services for virtually all U.S. transactions in equities, corporate and municipal bonds, U.S. government securities and mortgage-backed securities transactions, money market instruments, and OTC derivatives. DTCC is also a leading processor of mutual funds and annuity transactions, linking funds and insurance carriers with their distribution networks. DTCC does not currently operate a clearing agency for derivatives. DTCC owns a 50% equity interest in New York Portfolio Clearing, LLC (“NYPC”)<sup>7</sup>, which has been granted registration as a derivatives clearing organization (“DCO”) by the CFTC.

DTCC has three wholly-owned subsidiaries which are registered clearing agencies under the Exchange Act of 1934, subject to regulation by the SEC. These three clearing agency subsidiaries are The Depository Trust Company (“DTC”), National Securities Clearing Corporation (“NSCC”) and Fixed Income Clearing Corporation (“FICC”). DTCC is owned by its users and operates as a not-for-profit utility with a fee structure based on cost recovery.

DTC currently provides custody and asset servicing for 3.6 million securities issues from the United States and 121 other countries and territories, valued at almost \$34 trillion. Through its subsidiaries, DTCC processes huge volumes of transactions – more than 30 billion a year – on an at-cost basis. For example, in 2010, DTC settled more than \$1.66 quadrillion in securities transactions. NSCC provides clearing, risk management, (for some securities) central counterparty services and a guarantee of completion for certain transactions. FICC provides clearing, risk management and central counterparty services (through its Government Securities Division) in the fixed income, mortgage backed and government securities markets.

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<sup>7</sup> NYSE Euronext owns the other 50% equity interest. Neither DTCC nor NYSE owns a majority of the equity interests in NYPC. NYPC has its own management team which controls the day to day operations of the company.

## Overview of the Trade Information Warehouse

In November 2006, at the initiative of swap market participants, DTCC launched the Warehouse to operate and maintain the centralized global electronic database for virtually all position data on CDS contracts outstanding in the marketplace. As the life cycle for CDS contracts may extend five years or more, in 2007, DTCC “back-loaded” records in the Warehouse to incorporate information on over 2.2 million outstanding CDS contracts effected prior to the November 2006 implementation date. Today, data for over 95 percent of all OTC credit derivatives are captured in this automated environment. The Warehouse database currently represents about 98 percent of all credit derivative transactions in the global marketplace; constituting approximately 2.3 million contracts with a notional value of \$29 trillion (\$25.3 trillion electronically confirmed “gold” records and \$3.7 trillion paper-confirmed “copper” records).<sup>8</sup>

In addition to repository services, such as those activities contemplated by the Proposed Rule (*e.g.*, the acceptance and public and regulatory dissemination of data reported by reporting counterparties), the Warehouse provides both legal recordkeeping and central life cycle event processing for all swaps registered therein. By agreement with its 17,000+ users worldwide, the Warehouse maintains the most current CDS contract details for both cleared and bilaterally-executed CDS transactions in its “gold” records, which are the official and legal records of those transactions. The repository also stores key information on other CDS transactions, those involving market participants’ single-sided, non-legally binding or “copper” records, helping regulators and market participants gain a clearer and more complete snapshot of the market’s overall risk exposure to OTC credit derivatives instruments.

DTCC’s Warehouse was the first and remains the only centralized global provider of life cycle event processing for OTC credit derivatives contract positions throughout their multi-year terms. As various events occur regarding CDS contracts, such as calculating payments and bilateral netting, settling payments, credit events, early termination, and company renames and reorganizations, DTCC’s Warehouse is equipped to automate the processing associated with those events and related actions. The performance of these functions by the Warehouse distinguishes it from any SDR that merely accepts and stores swap data information.

The Warehouse has provided public information on the CDS market since it began reporting to regulators and the public at the behest of the ODRF, including net open position and weekly transaction activity levels to inform the depth of the market. The Warehouse provides this data on its website and directly to the regulators in the ODRF. In addition, the Warehouse has responded to over 100 *ad hoc* requests for data from over 20 regulators globally and, recently, established a global portal through which regulators

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<sup>8</sup> Data provided as of December 31, 2010. For more information about the Trade Information Warehouse, please see [http://www.dtcc.com/products/derivserv/suite/ps\\_index.php](http://www.dtcc.com/products/derivserv/suite/ps_index.php).

can obtain reports and conduct direct inquiries both independently or with the assistance of the Warehouse. At present, 20 regulators are registered to use the portal, and all members of the ODRF have been encouraged to link into the portal.

### **General Discussion of the Proposed Rule**

Proposed Rules 49.1 to 49.27 govern the SDR registration process, duties, and core principles, including duties related to data maintenance and access by relevant authorities and those seeking to use the SDR's repository services.<sup>9</sup>

DTCC requests that the Commission provide clear guidance as to the scope of the entities covered within the definition of SDR in the Dodd-Frank Act. The statutory duties required of an SDR are extensive and can form a business in their own right. The requirements of an SDR should not be imposed upon service providers looking to provide targeted solutions to specific processes, as opposed to providers looking more broadly to fulfill the role of an SDR. Third party service providers have to perform a level of recordkeeping and often retain data previously submitted by customers to offer services efficiently. This should not transform them into an SDR unless there is a corresponding policy reason for doing so. In fact, there is a strong policy reason to exclude them: the goal of countering the risk of fragmentation in data collection and dissemination on a global basis.

Taken in conjunction with the Commission's proposed rules related to swap data recordkeeping and reporting requirements,<sup>10</sup> DTCC supports the position that life cycle event processing and legal recordkeeping services are "ancillary" services and not part of core SDR functions.<sup>11</sup> DTCC agrees with the CFTC that these services, which are valuable to market participants and provide a vital function, should not necessarily be considered part of the core role to be performed by an SDR.

The Commission's proposed required practices are generally consistent with those of the Warehouse. The Warehouse currently receives event-based records and, based upon those records, maintains positions and publishes CDS market data. It also makes further data available to regulators upon request or through a self-service portal, configured to report according to the guidance issued to the Warehouse by the ODRF. To date, the Warehouse has received swap data on a service-based basis, rather than due to a regulatory mandate, offering its customers legal record-keeping, position updates, and

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<sup>9</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,926.

<sup>10</sup> See Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. at 76,574.

<sup>11</sup> See *id.* at 76,592 fn. 67. ("The Commission does not believe that Dodd-Frank precludes an SDR from accepting and maintaining swap data from both counterparties to a swap. For example, an SDR or its affiliate performing the ancillary service of maintaining the single binding legal record of a swap, such as the "gold" record maintained by the Depository Trust & Clearing Corporation ("DTCC") for credit swaps, would not be barred from receiving dual reporting in that connection.").

life cycle event services (such as messaging and updating for successor and credit events, payment amount determination, and net settlement calculations and processing). The Warehouse benefits customers by providing a single operational process and single platform for reconciliation for customers and avoids separate series of bilateral event, settlement, trade, and portfolio processes and reconciliations. The Warehouse does not currently perform real-time price dissemination activities, nor does it obtain certain trade attributes requested by the Proposed Rule.

The Warehouse keeps records of swap transactions in electronic format. These records are updated to reflect life cycle events and preserve a complete audit trail. Certain repositories, including DTCC's OTC equity derivatives repository, take only a periodic upload of open position data in electronic form and would be required to undergo extensive changes to comply with the Proposed Rule.

There appear to be relatively narrow differences between the Commission and the SEC's approaches to the regulation of SDRs. However, because SDRs will operate in both the swaps and security-based swap markets, particularly in equities and credit asset classes, SDRs are likely to register with both the Commission and the SEC. For that reason, it is vitally important that there not be any conflict in regulatory regimes between the two agencies. DTCC believes that harmonization is a more important priority than the exact nature of the consistent standard, as SDRs can adjust to meet a single standard but not multiple, inconsistent standards.

## **Registration of SDRs**

### *Proposed New Form SDR*

The Commission is proposing Rule 49.3, which establishes the procedures by which an SDR may apply to the Commission for registration.<sup>12</sup> Each SDR must electronically file for registration using proposed Form SDR.<sup>13</sup> Applicants will be required to provide the CFTC with information regarding the: (1) business organization; (2) financial resources; (3) technological capabilities; and (4) accessibility of services of the SDR.<sup>14</sup>

The Proposed Rules also allow the CFTC, upon the request of an applicant, to grant a provisional registration of an SDR which would expire on the earlier of: (1) the date that the Commission grants or denies registration of the SDR; or (2) rescission by the Commission.<sup>15</sup> An SDR that is provisionally registered with the Commission would be subject to the same requirements as a registered SDR during the period in which the

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<sup>12</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,927.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* at 80,900.

<sup>15</sup> See *id.* at 80,928.



Commission is reviewing the SDR's application of registration.<sup>16</sup> A "sunset" provision limits the availability of provision registration; provisional registration will be unavailable after 365 days from the effective date of the rulemaking.<sup>17</sup> Applications seeking provisional registration that are received close to the effective date of the SDR registration requirement may not be reviewed and approved by the effective date.<sup>18</sup>

DTCC recommends that appropriate due diligence is conducted with respect to the temporary registration process and that those diligence findings are either used to support transition of existing infrastructure or used for new entrants who can demonstrate that their infrastructure supports key operational capabilities, including 24/6 operation, real-time processing, multiple redundancy, and robust information security controls.

DTCC is concerned that the CFTC's proposed implementation schedule for reporting to SDRs is heavily compressed and, when coupled with the provisional registration regime, may lead to compromised solutions, including operational and security compromises. Potential SDRs are incented to enter the market early to capture market share, as initial trade reporting obligates further reporting on that trade, and the long tenors of the trades will make switching SDRs onerous for reporting parties. However, potential SDRs are unlikely to be able to offer fully robust or efficient solutions for early registration, given that the final rules will be available relatively shortly before the effective date.

Proposed Rule 49.7 enables the Commission to obtain necessary swap data and related books and records maintained by an SDR located outside of the United States.<sup>19</sup> Foreign SDRs would be required to provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to its books and records and submit to onsite inspection and examination by the Commission.<sup>20</sup>

DTCC would not support reduced registration requirements for non-resident SDRs at this time. The current European repositories offer periodic position-based data and do not currently meet the requirements of the Proposed Rule related to the reporting and dissemination of swap information. The regulatory regimes outside the U.S. with respect to OTC derivatives trade repositories are in an early phase of development and not yet supported by international standards, with only draft considerations issued by CPSS-IOSCO to date. If equivalent regimes are developed, DTCC believes such regimes should be recognized, particularly given that data required by regulators is broader than that captured in one jurisdiction.

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<sup>16</sup> *See id.* at 80,901.

<sup>17</sup> *See id.* at 80,928.

<sup>18</sup> *See id.* at 80,901.

<sup>19</sup> *See id.* at 80,929.

<sup>20</sup> *See id.* at 80,927.

DTCC respectfully urges the Commission to ensure that the registration process does not interrupt the current operations of existing trade repositories who intend to register as SDRs. This can be achieved as a phase-in for existing SDRs where services will need to be amended to conform with the final rules given the compressed time period between the publication of the final rules and the effective date of the Dodd-Frank Act. It is important that the Commission ensure both the continuation of counterparty reporting and the ability of the trade repository to receive and maintain current trade information on an ongoing basis. The continuation of these activities is imperative for effective oversight of systemic risk and the availability of relevant trade information to the Commission, as well as the continuance of the operational services to market participants. Specifically, the TIW is an integral part of the CDS market, and limitations to its operation could introduce significant operational risks to market participants. Transitional arrangements, including temporary registration, may be required to ensure these activities continue without interruption.

### **Duties and Core Principles of SDRs**

Section 21(a)(3) of the CEA requires an SDR to comply with certain requirements and core principles, as well as any requirement that the Commission prescribes by rule or regulation, in order to be registered and maintain registration as an SDR with the Commission.<sup>21</sup>

#### Regulatory Access

The Warehouse, as a centralized global repository, serves as an important source of regulatory information for the Commission and other appropriate regulators. However, DTCC believes that the value of the information provided by an SDR will be limited if data reporting becomes too fragmented. If the Commission receives pieces of information from many sources, and not one full picture from any source, the Commission's ability to monitor systemic risk in the marketplace in a timely and global manner will be severely limited.

DTCC expects that normal market forces will result in the provision of aggregate data to the Commission. However, to the extent that such aggregation does not occur as SDRs develop, the Commission should consider designating one SDR as the consolidator of market information (for example, by asset class) responsible for providing the Commission with direct electronic access.<sup>22</sup> The role of an aggregating SDR is significant in that it ensures regulators efficient, streamlined access to consolidated data, reducing the strain on limited agency resources. International financial regulators have identified this approach as a valuable one, noting that:

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<sup>21</sup> See CEA Section 21(c)(3) ("A swap data repository shall...maintain the data described in paragraph (1) in such form, in such manner, and for such period as may be required by the Commission.").

<sup>22</sup> See CEA Section 21(c)(4)(A) ("A swap data repository shall . . . provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity).").

“Authorities should ensure that [SDRs] are established that provide aggregate global coverage of the global derivatives market and that the data collected can be aggregated so as to provide a comprehensive view of the market. The establishment of uniform data standards and functional requirements for data exchange will be a necessary condition for authorities to have a timely and consistent global view for assessing and analysing the OTC derivatives markets. One beneficial solution would be to establish a single global data source to aggregate the information from [SDRs] [emphasis added].”<sup>23</sup>

With regard to regulatory access, DTCC’s understanding of the Commission’s access provisions are not in accordance with the guidance issued by the ODRF. DTCC believes that regulators want direct electronic access to data in SDRs where that data is needed to fulfill regulatory responsibilities and for that regulatory model to be location agnostic, without preferential access for the prudential regulator of the SDR, except to perform its prudential duties. Further, DTCC currently supports regulators’ access to regular reports from SDRs that are scheduled temporally and expects to support those triggered by certain events, including certain concentration levels, rather than by request, with notice to another regulatory authority or requiring indemnification.

The indemnification provisions should not apply in situations where regulators are carrying out regulatory responsibilities, acting in a manner consistent with international agreements and maintaining the confidentiality of data. However, recognizing that the indemnity provision is mandated by the Dodd-Frank Act, DTCC believes that the Commission, in concert with global regulators, should provide model indemnity language to be used by all SDRs in arrangements with regulators. Ensuring consistent application of this legislative mandate will minimize any disruption to the global repository framework. Further, DTCC believes that any indemnity should be limited in scope to minimize the potential reduction in value of registered SDRs to the regulatory community.

An important issue that U.S. and global regulators will need to address, particularly as the implementation of the Dodd-Frank Act results in the growth of SDRs globally, is how to best handle data collected by an SDR where the trade would not be reportable under the statute to U.S. regulators by virtue of where it took place or the counterparties involved. In this regard, DTCC points to the guidance in a letter from the ODRF membership<sup>24</sup> related to global regulator access to TIW data.<sup>25</sup> The ODRF letter

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<sup>23</sup> Financial Stability Board, *Implementing OTC Derivatives Market Reforms*. October 25, 2010. Available at: [http://www.financialstabilityboard.org/publications/r\\_101025.pdf](http://www.financialstabilityboard.org/publications/r_101025.pdf).

<sup>24</sup> Authorities Currently Involved in the OTC Derivatives Regulators’ Forum. Available at: <http://www.otcdrf.org/about/members.htm>.

<sup>25</sup> See letter from OTC Derivatives Regulators’ Forum to the Warehouse Trust Company, dated June 18, 2010. Available at: [http://www.dtcc.com/downloads/legal/imp\\_notices/2010/derivserv/tiw044.zip](http://www.dtcc.com/downloads/legal/imp_notices/2010/derivserv/tiw044.zip).

contemplates that the CFTC receives data from the TIW that goes beyond the scope of information proposed by the Dodd-Frank Act or the Proposed Rule, such as data related to overseas transactions entered into by non-U.S. persons on U.S. underlyings. Today, the TIW routinely provides this transaction data to U.S. regulators (and conversely, routinely provides data related to transactions in the U.S. by U.S. persons on European underlyings to European regulators), as contemplated by the ODRF letter. As the Commission knows, it is important to preserve this spirit of cooperation and coordination between regulators around the world. Without such cooperation, the Commission and the SEC's ability to routinely receive details of purely European transactions written on U.S. underlyings would be frustrated.

DTCC is concerned that the current asymmetry in the Proposed Rule, when compared to existing international standards, will lead to fragmentation along regional lines and prohibit global services and global data provision, which will weaken the introduction of trade repositories as a financial markets reform measure. Further, because of the onerous standards imposed on SDRs compared to the regulatory framework of other competitive jurisdictions, the U.S. will be less attractive than other locations for the purpose of storing full global data where SDRs are actively looking to service the global regulatory community.

#### *Third Party Service Providers Reporting to SDRs*

DTCC strongly supports the use of third party service providers (*e.g.*, swap execution facilities and exchanges) to report swap data on behalf of reporting parties (*e.g.*, counterparties) to SDRs. However, such reporting should be required to be clearly authorized by the reporting parties. The reporting parties need to control the data flow to SDRs to ensure completeness and accuracy of the data. Different firms will wish to have different workflows to support third party service providers' reporting, just as they do in the procedures used to undertake confirmation services, which represent a similar post-execution information flow. It is important that firms with the reporting obligation maintain control over reported positions throughout the life of the contract, even when third party service providers act on behalf of the reporting party. Otherwise, it is difficult for any party to take responsibility for the accuracy of the resultant position at the SDR.

The use of third party service providers reporting counterparty data to SDRs will also strengthen the ability of the SDR to fulfill its statutory obligation to confirm the data with both parties.<sup>26</sup> In many cases, the third party service provider will report trade information to the SDR on behalf of both counterparties to a trade. Allowing such an arrangement will reduce the regulatory burden of the counterparties, and ensure prompt compliance with reporting obligations. DTCC believes that, in many instances, firms will wish to submit every trade to the SDR or have a third party service provider manage

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<sup>26</sup> See CEA Section 21(c)(2) ("A swap data repository shall . . . confirm with both counterparties to the swap the accuracy of the data that was submitted.").

their submissions to the SDR. Given the complexities related to establishing a new regulatory framework in a global market (particularly with jurisdictions expected to adopt new reporting rules related to SDRs as part of their G-20 commitments), there is considerable complexity to replicate in a firm's technology systems the rules that will determine the reporting party or the reporting requirements based on the product type.

In addition to the recognized value inherent in relying upon third party service providers to carry out certain functions on behalf of reporting parties, DTCC urges the Commission to ensure that third party service providers do not "bundle" services to include the SDR function. To ensure accurate, timely information for regulatory oversight and to mitigate potential conflicts of interest, an SDR must be free from conflict with the operation and pricing of other market services (*e.g.*, clearing and trade execution). Allowing bundling of obligations undertaken by third party service providers with an SDR will detract from the SDR's utility function and jeopardize the value of SDRs to regulators and the market.

While DTCC generally supports the Commission's approach allowing third party service providers to support reporting parties in fulfilling their reporting obligations, DTCC believes that real-time public reporting should be within the exclusive province of registered SDRs. As noted in Commissioner Sommers' dissenting statement, real-time reporting is one of the core functions that Congress intended registered SDRs to perform.<sup>27</sup>

By allowing unregulated, non-SDRs to accept data from swap markets and to serve the function of a real-time public disseminator (as proposed by the Commission), such entities will be authorized to fulfill a core function of a registered SDR without regulatory oversight. Reliance on an unregistered and unregulated third party real-time disseminator to fulfill regulatory dissemination requirements fails to provide an oversight mechanism for the Commission to ensure the accuracy and completeness of the data disseminated. Additionally, allowing other entities to fulfill the regulatory requirements of real-time dissemination may add to the processes by which counterparties are required to submit data and further complicate the rules for market participants. Furthermore, the rules and core principles governing SDRs will help ensure that such dissemination is carried out in a manner consistent with the public utility function provided.

DTCC respectfully requests the Commission amend its Proposed Regulations and require that mandated dissemination be performed by registered SDRs. However, if third party dissemination by non-SDRs is allowed under the Commission's final rules, DTCC believes the Commission should clarify that reporting trade data to such a third party real-time disseminator does not fulfill the reporting requirements that counterparties to transactions must meet under proposed Part 45 (trade reporting to an SDR).<sup>28</sup>

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<sup>27</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,945

<sup>28</sup> See Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. at 76,574.

### Implementation of Core Principles

Each SDR is required, under CEA Section 21(f), to comply with core principles relating to: (1) antitrust, (2) governance arrangements, and (3) conflicts of interest.<sup>29</sup>

#### *First Core Principle: Market Access to Services and Data*

Consistent with Section 21(f)(1) of the CEA, Proposed Regulation 49.19 would require an SDR to (unless necessary or appropriate to achieve the purposes of the CEA) avoid adopting any rule, regulation or policy, or taking any action that results in an unreasonable restraint of trade or imposing any material anticompetitive burden on the trading, clearing, reporting and/or processing of swaps (“Core Principle 1”).<sup>30</sup>

DTCC’s perspective is that access to data is a key issue relating to SDRs. DTCC supports open access to data by other service providers, based on the consent of the parties for that provider to receive the data. DTCC believes this is an important principle for allowing development of automation and efficient operational processing in the market, while preserving the parties’ control over confidential information. The Warehouse currently provides access to many vendors, including trade confirmation and trade messaging providers, central counterparties, portfolio reconciliation service providers, portfolio compression services, custodians, and outsource providers. A corollary of this sort of independence is that third party service providers should be barred from bundling their services with those of any SDR. Open access and neutral dealing with other providers should be a two-way street.

With respect to fees, the TIW’s current model operates on an at-cost basis, charges the dealers for services, and operates at no cost to the buy-side and end-users. To date, this model has been successful in an industry-led voluntary regime as market participants have been able to benefit from cost savings from operational efficiencies, while also encouraging broad-based usage. It is also important to ensure that all counterparties to trades reported to an SDR should, as a matter of principle, have access to all data relating to trades to which they are a counterparty. This is reinforced by the SDR’s obligation to confirm the reported trade with both parties to the trade. This access should be made available to smaller, lower volume market participants, as necessary, through the reduction or waiver of certain fees.

In addition, the fees for certain services should reflect the specific costs of the related service. For example, if a reporting party uses a third party service provider for trade submission, which fulfils the SDR’s requirement to confirm the trade with both parties, this report would potentially be charged at a lower cost than a direct report to the SDR, requiring the SDR itself to confirm with the other party.

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<sup>29</sup> See CEA Section 21(f).

<sup>30</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,932.

The TIW currently offers certain services at no extra cost, charging a position-based fee. In some cases, third party costs incurred by TIW are charged directly to the consuming customer rather than spread evenly across all users, where these costs only apply to certain types of trade. In many cases, the marginal cost of operating the additional services are very low. DTCC supports this approach because it incentivizes the adoption of automation and electronic processing, such as the central settlement service and triggering for restructuring credit events, bringing reduced risk to the market. Customer reception to these services is very positive. However, it is important to recognize that current usage of TIW is on a voluntary basis. Therefore, an appropriate option would be to permit customers with two (or more) services options: one that fulfills the minimum regulatory reporting process, and a suite of other services to compliment the mandatory reporting function.

*Second Core Principle: Governance Arrangements*

Section 21(f)(2) of the CEA requires that each SDR establish governance arrangements that are transparent to fulfill public interest requirements and to support the objectives of the federal government, owners, and participants (“Core Principle 2”).<sup>31</sup>

The CFTC proposes requiring an SDR to: (1) include a statement in its charter documents regarding the transparency of its governance arrangements, and the manner in which such transparency supports the objectives of the federal government; (2) make available certain information to the public and relevant authorities; (3) ensure that the information made available is current, accurate, clear and readily accessible; and (4) disclose summaries of significant decisions in a sufficiently comprehensive and detailed fashion so that the public and relevant authorities would have the ability to discern the SDR policies or procedures implicated and the manner in which SDR decisions implement or amend such policies or procedures.<sup>32</sup> In addition, although a registered SDR is not required to disclose minutes of board of directors or committee meetings to the public, it must furnish this information to the Commission upon request.<sup>33</sup>

Proposed Regulation 49.20(c) would require each registered SDR to establish, maintain, and enforce policies and procedures to ensure that: (1) its board of directors; and (2) any SDR committee that has the authority to either (a) act on behalf of the board of directors or (b) amend or constrain the action thereof, adequately consider a perspective independent of competitive, commercial, or industry interests in its deliberations.<sup>34</sup> In counterbalancing the perspective of certain reporting entities controlling an SDR, the integration of an independent perspective would aid in addressing the conflicts of interest identified herein.

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<sup>31</sup> See CEA Section 21(f)(2).

<sup>32</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,933.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

In order to ensure proper implementation of Core Principles 2 and 3 (discussed below), respectively, the Commission proposes regulations regarding: (1) the transparency of SDR governance arrangements; and (2) SDR identification and mitigation of existing and potential conflicts of interest.<sup>35</sup>

DTCC believes that the use of ownership and voting limitations would be an imprecise tool with which to achieve the policy goals of the Commission regarding conflicts of interest. These policy goals can best be met by structural governance requirements. In the specific case of an SDR, governance by market participants is appropriate, given that most potential conflicts of interest are dealt with directly in the Proposed Rule and will be overseen directly by the regulator.

The SDR is not defining the reporting party, timeliness, or content for public dissemination, and similarly the SDR is not defining the reporting party, content, or process for regulatory access. Therefore, the SDR does not have significant influence over the inclusion or omission of information in the reporting process, nor does it control the output of the process. This position is significantly different from other market infrastructures, where these infrastructures may have the ability to influence participation in a service (*e.g.*, execution, clearing membership, portfolio compression) or completeness of product offering (where it is proposed that all trades in an asset class are accepted).

DTCC suggests that the Commission focus on ensuring the SDR open access provisions described above are in place. To support these requirements, the SDR needs governance that has independence from its affiliates and which is representative of users who are the beneficiaries of choice in service providers. The TIW has a separate board, consisting of fee-paying users, which acts independently from the DTCC parent company board, though the Warehouse must ensure its actions do not damage the financial strength or reputation of its parent. DTCC, as the parent company, does not direct the strategy of the TIW nor promote its interests within the TIW.

Furthermore, in order to assure that non-regulatory uses of mandatorily reported data remain in the hands of the counterparties, SDRs should be “user-governed.” This should include a board of directors that is broadly representative of market participants and that incorporates voting safeguards designed to prevent non-regulatory uses of data of a particular class of market participants that are objectionable to that class. In addition, no communication of data (other than to or as required by applicable regulators) that could have the result of disclosing the actual positions or specific business or trading activity of a counterparty should be permitted without the consent of that counterparty.

Independent perspectives can provide value to a board of directors, but those who do not directly participate in markets may not have sufficient, timely, and comprehensive

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<sup>35</sup> *See id.* at 80,916.



expertise on those issues critical to the extraordinarily complex financial operations of SDRs. These entities require industry expertise at the board level and it is critical for the safety and soundness of SDRs that the composition of their boards sufficiently incorporates the range of necessary expertise as well as independent judgment.

*Third Core Principle: Rules and Procedures for Minimizing and Resolving Conflicts of Interest*

Section 21(f)(3) of the CEA provides that each SDR must establish and enforce rules to minimize conflicts of interest in the decision-making process of the SDR and to establish a process for resolving such conflicts (“Core Principle 3”).<sup>36</sup> The Commission has identified several potential conflicts of interest, including but not limited to, discrimination against certain reporting entities and unfair or anticompetitive disclosure.<sup>37</sup> A control group may compete with other reporting entities in the execution or clearing of swap transactions and may have an incentive to leverage its influence over the registered SDR to gain a competitive advantage in relation to other reporting entities.<sup>38</sup> Additionally, because the Dodd-Frank Act requires all swaps (whether cleared or uncleared) to be reported to a registered SDR, swap data and SDR analyses of SDR Information could have great commercial value.<sup>39</sup> A control group may have an incentive to (1) limit or burden access to such analyses on a discriminatory basis; or (2) disclose or use the data of other reporting entities for its own competitive purposes (*e.g.*, front-running).<sup>40</sup> The control group may also have an incentive to cause the SDR to provide such data to an affiliate for derivative applications or ancillary services (especially if such applications or services are bundled).<sup>41</sup>

The issues described are directly addressed by the market access and governance arrangements recommended above by DTCC. The TIW strongly supports the principle of open access, having established many vendor connections, including those of confirmation and messaging services, central counterparties, portfolio compression services, portfolio reconciliation services, custodians, and outsource providers. DTCC, again, emphasizes the importance of SDRs being “user-governed,” including a board of directors that is broadly representative of market participants and that incorporates voting safeguards with respect to all classes of market participants. Further, regulatory oversight and supervisory functions, as well as regulator-mandated public reporting, must be separated from potential commercial uses of the data and operated at-cost.

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<sup>36</sup> See CEA Section 21(f)(2).

<sup>37</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,918.

<sup>38</sup> See *id.*

<sup>39</sup> See CEA Section 2(a)(13)(G) (“Each swap (whether cleared or uncleared) shall be reported to a registered swap data repository.”).

<sup>40</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,919.

<sup>41</sup> See *id.* at 80,919.

## **Duties of Registered SDRs**

### *Data Collection and Maintenance*

The CFTC is proposing in a related proposed rulemaking new Part 45 to the Commission's regulations.<sup>42</sup> Part 45 outlines the data elements that must be reported by designated contract markets, DCOs, swap execution facilities, foreign boards of trade, swap dealers, major swap participants and/or end-users in connection with the reporting of such swap data to SDRs.<sup>43</sup> These data elements and standards that must be reported would include continuation data throughout the life of the swap.<sup>44</sup> The related proposed rulemaking provides specific requirements for SDRs regarding: (1) determining which counterparty must report to the SDR; (2) third party facilitation of swap data reporting; (3) reporting to a single SDR in connection with the reporting of swap data; (4) required data standards; and (5) the reporting of errors and omissions.<sup>45</sup>

The Proposed Rule also requires that market participants fulfill their reporting obligations to SDRs in a reliable, secure, and efficient manner.<sup>46</sup> For that reason, SDRs must adopt policies and procedures that will enable the SDR to electronically accept data and other regulatory information.<sup>47</sup> These policies and procedures must provide specific technological protocols for market participants in submitting swap data to the SDR.<sup>48</sup>

Proposed Regulation 49.10 will also require SDRs to accept all swaps in an asset class for which they have registered.<sup>49</sup> Form SDR will require the SDR applicant to specify the specific asset classes for which it will accept swap data.<sup>50</sup> "Asset class" is defined in proposed Regulation 49.2(a)(2) as those swaps in a particular broad category of goods, services or commodities underlying a swap.<sup>51</sup> The asset classes include: (1) credit; (2) equity; (3) interest rates; (4) currency; and (5) other commodities.<sup>52</sup> The CFTC may also determine additional asset classes if necessary.<sup>53</sup>

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<sup>42</sup> See Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. at 76,574

<sup>43</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,904.

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at 80,929.

<sup>50</sup> See *id.* at 80,904.

<sup>51</sup> See *id.* at 80,926.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

DTCC supports the Commission's proposed requirement that an SDR possess the ability to accommodate all swaps and all swap data in a particular asset class for which the SDR registers. Such a requirement promotes sound public policy by discouraging "cherry picking" only those swaps that are easy-to-process (*e.g.*, high volume products) – a practice which contributes unnecessarily to data fragmentation and could undermine any economic case for taking hard-to-process (*e.g.*, more complex and less frequently traded) swaps. If, as a result of "cherry picking," the burden of processing hard-to-process swaps falls on the Commission, unnecessary monetary burdens may thereby be placed on taxpayer resources.

DTCC does not believe the definition of "asset class" requires significant further definition. In the SEC's proposed regulations governing SDRs, the SEC distinguishes between loan-based and credit asset classes.<sup>54</sup> DTCC believes such a distinction is unnecessary and notes products like CDS on loans, while loan-based, are currently reported alongside other CDS products to the TIW. The requirement for an SDR to support all trades in an asset class will reduce the complexity for reporting parties. Given the need for reporting parties to report life cycle events and potentially report valuation data to the SDR that originally received the trade, these processes would be burdensome otherwise.

In general, derivatives will be easy to classify, although it is possible that certain transactions could be mixed and more difficult to classify. In these cases, DTCC believes mixed swaps should be reported to one SDR. In practice, SDRs will need to evolve to accept new products and variations in product structures, so this requirement should not impose a significant burden on an SDR in receiving such a swap. Furthermore, DTCC does not believe that the funding leg of a total return swap product should result in classification as a mixed swap.

From a systemic risk oversight perspective, it is imperative that all swaps are recorded by registered SDRs and that the trade information is accurately and promptly made available for regulators.

#### Confirmation of Data Accuracy

Proposed Regulation 49.11 would require every SDR to establish policies and procedures to ensure the accuracy of swap data and other regulatory information required to be reported under proposed Part 49.<sup>55</sup> In particular, in accordance with Section 21(c)(2) of the CEA, proposed Section 49.11 requires that SDRs confirm with both counterparties to the swap the accuracy of the data and information submitted.<sup>56</sup> The

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<sup>54</sup> See Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. 77,306, 77,369 (December 10, 2010).

<sup>55</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,930.

<sup>56</sup> See *id.*

specific form and content of the swaps data will be established by the Commission in the Commission's related proposed rulemaking on proposed Part 45.<sup>57</sup>

Proposed Regulation 49.11 provides that in connection with the required confirmation, the SDR must confirm with each counterparty to the swap and receive acknowledgement of all data submitted, as well as corrections of any errors.<sup>58</sup> The acknowledgement and correction of errors must pertain to all information submitted by either counterparty or entity that has been delegated the reporting obligation.<sup>59</sup> The SDR must keep a record of corrected errors and make that record available upon request to the CFTC.<sup>60</sup> Confirmation is unnecessary when the reporting obligation is borne by a swap execution facility, designated contract market, DCO or a confirmation or matching service provider to whom the swap counterparty has delegated its reporting obligation.<sup>61</sup> In these situations, however, the SDR still has an obligation to ensure that the data and information it receives from such entity is accurate.<sup>62</sup>

DTCC strongly supports the promotion of data accuracy under Proposed Regulation 49.11.<sup>63</sup> The Dodd-Frank Act requires SDRs to confirm with both counterparties to each swap all data reported for regulatory purposes.<sup>64</sup> Further, the ODRF has emphasized the importance of authoritative data (*i.e.*, data that has been verified in some manner by both parties). DTCC believes that electronically confirmed data, including centrally processed or confirmed life cycle events, constitutes the most authoritative of such data. As it relates to the Commission's pending rulemaking under Part 45, DTCC notes that it may be overly burdensome for daily snapshots to be verified with both parties to each trade each day. Therefore, DTCC proposes that reporting firms have the option of reporting changes in primary economic terms only, particularly where changes due to life cycle events are rare. Such a reporting option will promote the accuracy of reported data, without imposing the burden of daily snapshots.

In the current TIW model, the onus is on the customers to ensure the accuracy of the data. This ensures their records are synchronized with the life cycle event processing and asset servicing offered by the TIW. This model formed the basis of the value proposition of the TIW, namely that the multiple bilateral reconciliations performed between the

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<sup>57</sup> Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. at 76,574.

<sup>58</sup> *See* Swap Data Repositories, 75 Fed. Reg. at 80,930.

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See id.* at 80,905.

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 80,930.

<sup>64</sup> *See* CEA Section 21(c)(2) ("A swap data repository shall . . . confirm with both counterparties to the swap the accuracy of the data that was submitted.").

parties to a trade throughout the life of a trade (and often on an *ad hoc* basis or only following a dispute), could be replaced by one single reconciliation framework with a shared central record, increasing both operating efficiency, as well as reducing operational risks.

In adapting this model to place the obligation to ensure accuracy on the SDR, TIW would look to place reliance on dedicated confirmation and matching services where they can demonstrate appropriate policies and procedures (*e.g.*, timeliness and completeness of submission to the SDR of data received from reporting parties, details of matching status, recognition by the parties to the trade that they placed reliance on such service, and legal opinion as to the quality or validity of the match or confirmation). DTCC welcomes further discussion of the appropriate SDR activities that would fulfill this requirement without constituting full replication of current commercial trade confirmation and portfolio reconciliation services within each SDR.

DTCC's discussions with a number of market participants suggest an interest in reconciling internal trade records to the SDRs on an ongoing basis.

#### Recordkeeping Requirements

Proposed Regulation 49.12, requires SDRs to maintain the books and records of all activity and data relating to swaps reported to the SDR.<sup>65</sup> Proposed Regulation 49.12(c) would also require the books and records maintained by an SDR to be open to inspection upon request by any representative of the CFTC, the U.S. Department of Justice, the SEC or by any representative of a prudential regulator as authorized by the CFTC.<sup>66</sup> The SDR would be required to provide copies to the Commission, either by electronic means, in hard copy, or both, as requested by the CFTC.<sup>67</sup> Finally, Proposed Regulation 49.12(d) would require each SDR that publicly disseminates swap data in real time to comply with the real time public reporting and recordkeeping requirements prescribed in Part 43.<sup>68</sup>

The Proposed Rule should require the retention of electronic records of transactions, including life cycle events. These should be maintained for the life of the contract in order to provide an audit trail to positions and for a reasonable retention period thereafter. An SDR's records should be in an electronically readable format (where available) that allows for application and analysis. Swap transaction data retained as electronic images of paper documents is cumbersome and will frustrate regulatory oversight efforts.

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<sup>65</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,930.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*

The SDR's documents should be relied upon by regulators to complement the records retained by swap counterparties and should not be seen as a replacement for swap counterparty record retention requirements. With respect to an industry standard format for swap information and records, definitions and standards published by the International Swaps and Derivative Association ("ISDA") are widely accepted by the industry and relied upon by market participants.

DTCC reiterates its earlier comments that the regulatory model should be location agnostic, without preferential access for the prudential regulator of the SDR, except to perform its prudential duties.

### Position Data

Proposed Regulation 49.12(e) would require every SDR to establish policies and procedures to calculate positions for all persons with unexpired swaps for which the SDR maintains records.<sup>69</sup> Position data is required to be provided by an SDR to certain entities pursuant to Section 2(a)(13) of the CEA.<sup>70</sup>

DTCC believes that position data is most valuable when aggregated among all SDRs to accurately reflect a counterparty's true position in a timely manner. Allowing each SDR to calculate positions will result in inaccurate, fragmented reporting to regulators. To this end, DTCC would suggest that one SDR should be given the responsibility to aggregate and maintain the consolidated position data for regulatory purposes.

The Warehouse currently maintains policies and procedures, including technical specifications where automated routines are used, to support position calculation processes. It is DTCC's opinion that where market values are required, they should be provided by firms. Firms invest considerable resources in valuing trades, including personnel, data feeds, and capital to assess valuation levels. It would be difficult for an SDR to replicate these activities for all trades, including model selection, trade parameterization to the model, market data sourcing and transformation to model input, and valuation testing. An SDR could contract with a market valuation service to provide some values and this would provide some independent valuation, but this will not readily extend to illiquid or structured products.

Mark-to-market values would be of some use to regulators without collateral information, as regulators may be able to better understand some of the market risk exposures and marking disputes with access to this information. Mark-to-market values would also readily fulfill portfolio reconciliation functions. However, the values would not be useful in assessing counterparty risk exposures without collateral information.

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<sup>69</sup> *See id.*

<sup>70</sup> *See* CEA Section 2(a)(13) ("The Commission is authorized and required to provide by rule for the public availability of swap transaction and pricing data.").

Many collateral agreements are structured at the portfolio level, and the reporting regime should reflect this, rather than attempt to arbitrarily attribute collateral holdings to individual trades.

#### Controls to Prevent Invalidation

Proposed Regulation 49.10(c) would require every SDR to establish policies and procedures reasonably designed to prevent any provision in a valid swap from being invalidated or modified through the confirmation or recording process of the SDR.<sup>71</sup>

DTCC supports the approach that records are not invalidated by the actions of the SDR. Changes to records must be agreed upon between the bilateral parties via the confirmation service platform or via a centralized life cycle event processor. The SDR should be able to offer life cycle event processing and asset servicing activities and these may lead to an update or modification to the records in the SDR. This role is currently supported by the customer contracts of the TIW and is akin to a legal agreement as a third party service provider to the reporting party. DTCC believes that an SDR should be able to act as a provider of additional services to reporting parties and thus, should be able to update a record with the consent of both parties. Through the provision of such additional services, DTCC believes that SDR data can be used for more purposes and improve in accuracy.

#### Dispute Resolution Procedures

Proposed Regulation 49.10(d) would require every SDR to establish procedures and provide facilities for effectively resolving disputes over the accuracy of swap data and positions maintained by the SDR.<sup>72</sup> The Commission suggests that, in this manner, disputes can be resolved quickly and efficiently so that the integrity and reliability of SDR data reporting and recordkeeping is facilitated.<sup>73</sup>

DTCC recognizes the importance of accurate data at the SDR and believes that an SDR should be in a position to identify disputes or unconfirmed data as part of its process to confirm the data with both parties. However, only the parties to a transaction can resolve any dispute as to the terms of the trade. In many situations, trade reporting will take place through a third party service provider, which acts directly as an affirmation, confirmation, or verification platform and already utilizes dispute resolution workflows.

For that reason, resolution by the third party service provider (*i.e.*, a matching service) will result in updated records being reported to the SDR. DTCC does not support a Proposed Rule that would require the SDR build processes to replicate these services. It

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<sup>71</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,930.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.* at 80,905.

is not the primary role of an SDR to be a matching service, nor should matching services be bundled with SDR services. Instead, an SDR should be able to receive information from such services regarding the status or quality of any match and make the quality of the data or disputed trades visible to a firm's prudential regulator and this would act as an incentive to timely resolution.

With respect to whether the Commission should require SDRs to establish automated systems for monitoring, screening, and analyzing swap data or, alternatively, provide the data for the Commission to perform these functions, DTCC believes certain monitoring, screening, and analysis should be performed centrally by an SDR, as it promotes efficiency in the system. The data maintained by the SDR should then be made available to potentially impacted regulators. Concentration data would be especially disposed to this approach as it requires aggregate market wide data, as would the related function of monitoring position limits.

### **Maintenance of Data Privacy**

Proposed Regulation 49.16 would implement the statutory requirements of Section 21(c)(6) of the CEA to maintain the privacy and confidentiality of swap data provided to the SDR.<sup>74</sup> In particular, an SDR must maintain the privacy of any and all swap transaction information that the swap data repository receives from a swap dealer, counterparty, or any other registered entity.<sup>75</sup>

Proposed Regulation 49.16 would require the SDR to establish, maintain, and enforce specific policies and procedures to protect the privacy or confidentiality of any and all SDR information.<sup>76</sup> This would also include privacy or confidentiality policies and procedures for the sharing of SDR Information with SDR affiliates, as well as certain non-affiliated third parties.<sup>77</sup> As noted above, swap data that is publicly disseminated in real-time by SDRs pursuant to proposed Part 43 of the Commission's regulations would not be subject to the privacy and confidentiality requirements set forth in proposed Regulation 49.16.<sup>78</sup>

Proposed Regulation 49.16 would also require the SDR to establish and maintain safeguards, policies, and procedures that would, at a minimum, address the misappropriation or misuse of swap data that the Commission is prohibited (with limited exceptions) from disclosing pursuant to Section 8 of the CEA.<sup>79</sup>

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<sup>74</sup> See *id.* at 80,908.

<sup>75</sup> See CEA Section 21(c)(6).

<sup>76</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,931.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.* at 80,908.

<sup>79</sup> See *id.*



DTCC fully supports the Commission's efforts to protect the privacy of any and all swap transaction information received by an SDR. Currently, the Warehouse has published Operating Procedures requiring it to treat as confidential (both during and after the termination of a user's access to the system) all confidential information, including transaction data, specified in records received by the Warehouse, any data, reports, summaries or payment amounts which may be produced as a result of processing such transaction data, and the identity of any entity a user uses to settle obligations. DTCC may not transfer or disclose this information to any non-affiliated third party or use information except as expressly contemplated under the Warehouse's operating procedures, or as reasonably deemed necessary to provide the services or system, or in response to, for example, subpoenas or regulatory requests.<sup>80</sup>

DTCC notes that the Proposed Regulations may have the consequence of unintentionally disclosing participant identity, by overly detailed public dissemination, due to the low volume of activity in certain instruments. The possibility of inadvertent disclosure should be considered in conjunction with the execution model. For example, information transferred in a request-for-quote process could be linked to actual executions published by the SDR.

### **Disclosure to Market Participants**

Proposed Regulation 49.26 would provide that before accepting any swap data from a reporting entity or upon a reporting entity's request, each SDR shall furnish to the reporting entity a disclosure document that contains the following written information: (1) the SDR's criteria for providing others with access to services offered and data maintained by the SDR; (2) the SDR's criteria for those seeking to connect to or link with the SDR; (3) a description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability to protect the confidentiality and security of such data; (4) the SDR's policies and procedures reasonably designed to protect the privacy of any and all swap data information that the SDR receives from a reporting entity; (5) the SDR's policies and procedures regarding its noncommercial and/or commercial use of the swap transaction information that it receives from a market participant, any registered entity, or any other person; (6) the SDR's dispute resolution procedures; (7) a description of all the SDR's services, including any ancillary services; (8) the SDR's updated schedule of any fees, rates, dues, unbundled prices or other charges for all of its services (including any ancillary services), any discounts or rebates offered, and the criteria to benefit from such discounts or rebates; and (9) a description of the SDR's governance arrangements.<sup>81</sup>

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<sup>80</sup> See Warehouse Trust Company Operating Procedures, *available at*: <http://www.dtcc.com/customer/membership/derivserv/derivserv.php>.

<sup>81</sup> See Swap Data Repositories, 75 Fed. Reg. at 80,937.

DTCC recognizes the importance of providing market participants with disclosure documents outlining the SDR's policies regarding member participant criteria and the safeguarding and privacy of data submitted to the SDR. The Warehouse ensures that its users are provided these relevant documents and makes available copies of its policies to its users on its website.

### **Chief Compliance Officer of Each SDR**

Proposed Regulation 49.22 would incorporate the duties of an SDR's chief compliance officer ("CCO") enumerated in Section 21(e) of the CEA and impose additional requirements.<sup>82</sup> Section 21(e) of the CEA (1) requires that every SDR designate an individual to serve as CCO; (2) enumerates specific duties for CCOs; and establishes their responsibilities within an SDR; and (3) outlines the requirements of a mandatory annual report from SDRs to the Commission, which must be prepared and signed by an SDR's CCO.<sup>83</sup>

#### *Enumerated Duties of Chief Compliance Officer*

The CCO would report directly to the board of directors or senior officer of the SDR.<sup>84</sup> The Commission specifies that he or she must have the background and skills appropriate for fulfilling the responsibilities of the position.<sup>85</sup> Further, a CCO should have the authority and resources to develop and enforce the duties subscribed to the CCO by the Dodd-Frank Act and the Proposed Regulations, with supervisory authority over all staff acting in furtherance of the CCO's duties.<sup>86</sup> As noted in the preamble to the Proposed Regulations, "[i]n short, [the Proposed Regulation] establishes CCOs as the focal-point of an SDR's regulatory compliance functions."<sup>87</sup>

Under Proposed Regulation 49.22, the enumerated duties of the CCO include (1) reviewing an SDR's compliance with the requirements and core principles described in Section 21 of the CEA; (2) resolving any conflicts of interest that may arise, in consultation with the board of directors or the senior officer of the SDR; (3) administering any policy or procedure that is required to be established by an SDR pursuant to Section 21; (4) ensuring compliance with the CEA and Commission Regulations as they pertain to agreements, contracts, or transactions entered into by an SDR; (5) establishing procedures for the remediation of noncompliance issues identified by the CCO; (6) establishing and following appropriate procedures for the handling,

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<sup>82</sup> *See id.* at 80, 913.

<sup>83</sup> *See id.* at 80, 912.

<sup>84</sup> *See id.* at 80, 934.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

<sup>87</sup> *See id.* at 80, 913.

management response, remediation, retesting, and closing of noncompliance issues; and (7) establishing and administering a written code of ethics.<sup>88</sup>

DTCC agrees with the Commission that a robust internal compliance function plays an integral role in facilitating an SDR's monitoring of, and compliance with, the requirements of the CEA (and rules promulgated thereunder) applicable to SDRs. Requiring a CCO is an appropriate way to further this goal.

DTCC currently has an established compliance infrastructure for its businesses, including the Warehouse, which includes processes for establishing and implementing required compliance policies and procedures and overseeing adherence to those procedures and a mechanism for reporting, tracking, remediating and closing compliance issues whether self-identified or identified through internal or external examinations. DTCC expects to build on this existing operation in establishing the compliance function for an SDR. In light of this experience, DTCC would like to make certain suggestions as to the Proposed Regulations and the implementation of the chief compliance officer requirement. While DTCC fully supports the principles underlying the proposed role and functions of a chief compliance officer, it believes that some of the enumerated responsibilities of that role require clarification in order to avoid an overly broad reading of those duties.

As noted above, DTCC believes that some of the descriptions of the CCO's responsibilities may be too broad and could be read to encompass responsibilities beyond those traditionally understood to be part of a compliance function (*i.e.*, those issues that can as a matter of competence, and typically would be, handled by a compliance department). In DTCC's view, the CCO should be responsible for establishing relevant compliance procedures and monitoring compliance with those procedures and other applicable legal requirements. The CCO should also participate in other aspects of the SDR's activities that implicate compliance or regulatory issues. However, the CCO cannot be, and should not be, required to be responsible for the overall operation of the SDR's business. Accordingly, DTCC believes that such requirements as "reviewing an SDR's compliance with the requirements and core principles described in Section 21 of the CEA" should be understood in this light.<sup>89</sup>

Similarly, the Commission should recognize that oversight of certain aspects of SDR activities are principally (and, as a practical matter, need to be) within the purview of risk management and operations personnel. Although there may be a regulatory component to whether an SDR is meeting its operational readiness, service level or data security responsibilities for example, oversight of those aspects of the SDR business should remain with the relevant business areas, subject of course to oversight by senior management and ultimately the board of directors. While a CCO may have an important

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<sup>88</sup> *See id.* at 80, 934.

<sup>89</sup> *See id.*

role to play in overall oversight and remediation of any problems, the Commission's rules should not be interpreted to impose on CCOs responsibility outside of their traditional core competencies.

With respect to conflicts of interest, the Proposed Regulation includes some specific examples where potential conflicts of interest may arise, including conflicts between business considerations and compliance requirements; conflicts between business considerations and the requirement that the registered SDR provide fair and open access to its services; and conflicts between a registered swap data repository's management and members of the board of directors.<sup>90</sup> With respect to the requirement to resolve conflicts of interest, DTCC believes that the Commission should elaborate further on those conflicts of interest within the CCO's purview.

Some issues, such as permissibility of dealings with related parties or entities, are properly within the CCO's functions. Other issues, such as restrictions on ownership and access, may be fundamental for the board of directors and senior management to address. Furthermore, given the Proposed Regulation's requirement that conflicts of interest be resolved in consultation with the board or senior management, some materiality threshold would be appropriate, as not every potential conflict of interest that might be addressed by a CCO (or his or her subordinates) would necessitate such consultation. The determination of materiality is currently within the CCO's purview based on factors such as nature and scope of the issue and potential exposure.

In addition, in DTCC's view, the Commission should also clarify that the CCO's specific responsibilities related to conflicts are limited to compliance with the provisions of Section 21 of the CEA and the final rules thereunder as they relate to the swap operations of an SDR. The Commission should not mandate compliance responsibilities with respect to other regulatory requirements to which an SDR may be subject; those responsibilities should be specified by the regulator imposing the other requirements.

DTCC believes, as a general matter, that the Commission does not need to be overly prescriptive as to the specific compliance responsibilities of the CCO and that SDRs should have some flexibility to implement the required compliance procedures in ways consistent with their structure and business. The swap markets are continuing to evolve, and will likely change significantly as a result of the introduction of SDRs and other requirements under the Dodd-Frank Act. In light of this ongoing development, DTCC believes SDRs are best suited to determine the most effective way to implement the general requirements of Section 21 of the CEA and the Proposed Regulations.

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<sup>90</sup> *See id.*

*Preparation of Annual Compliance Report*

In terms of the proposed requirement in Proposed Regulation 49.22(e) for the CCO of an SDR to prepare an annual report as to compliance, DTCC would suggest several clarifications and modifications.<sup>91</sup> First, DTCC believes that any such report should be limited to compliance with the requirements of the CEA and the policies and procedures of the SDR that relate to its activities as such with respect to swaps (as opposed to policies and procedures that may address other regulatory requirements).

As noted above, DTCC also believes that it is not appropriate to place the principal responsibility on a CCO to review such business matters as service levels, cost, pricing and operational reliability for purposes of preventing anticompetitive behavior. DTCC believes that other personnel teams, particularly in the risk management, operational or business areas, are best positioned to perform these functions. Of course, a CCO should be involved in remedying any noncompliance issues discovered during such review.

DTCC firmly believes the annual report should be kept confidential by the Commission. Given the level of disclosure expected to be required, DTCC believes that the report will likely contain confidential and proprietary business information. Such information should not be made available to the public or market participants generally.

DTCC fully supports Commission efforts to require the highest standards of regulatory compliance at SDRs, and believes requiring each SDR to have a CCO is an effective way to ensure compliance.

**Conclusion**

We appreciate the opportunity to comment on the Commission's Proposed Rule and provide the information set forth above. Should you wish to discuss these comments further, please contact me at 212-855-3240 or [lthompson@dtcc.com](mailto:lthompson@dtcc.com).

Regards,



Larry E. Thompson  
General Counsel

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<sup>91</sup> *See id.*