

THE FINANCIAL SERVICES ROUNDTABLE
Financing America's Economy



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Submitted via comments.cftc.gov

David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW,
Washington DC, 20581

Re: RIN 3038-AD83, Swap Data Repositories: Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of Section 21(d) of Commodity Exchange Act

Dear Mr. Stawick:

The Financial Services Roundtable¹ (“the Roundtable”) appreciates the opportunity to provide comments concerning the further interpretative guidance released by the Commodity Futures Trading Commission (“CFTC” or “Commission”) with regard to the indemnification provisions contained in sections 21(c)(7) and 21(d) of the Commodity Exchange Act (“CEA”). As enacted by section 728 of the Dodd-Frank Act, these sections require that swap data repositories (“SDRs”) registered under CFTC rules must receive written confidentiality and indemnification agreements before sharing data and information with an entity other than the CFTC.

The Roundtable writes in response to an Interpretative Statement² released by the Commission that clarifies the breadth of an exception to the requirements of CEA section 21(d). Specifically, this most recent Interpretative Statement makes clear that a U.S. registered SDR that is also registered, recognized, or otherwise authorized to collect data in a foreign jurisdiction may share information with a foreign regulator without obtaining an indemnification agreement when the data is shared pursuant to the regulatory requirements of that particular foreign country. This exception covers information that has also been shared with the CFTC pursuant to U.S. regulatory requirements.

The Roundtable supports this clarification as a logical outgrowth of the regulations already adopted by the Commission in its final rulemaking on the registration, core principles, and standards required of swap data repositories.³ We believe the Commission’s Interpretative Statement, along with

¹ The Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs.

² 77 Fed. Reg. 26709 (May 7, 2012).

³ 77 Fed. Reg. 2136 (Jan. 13, 2012); 76 Fed. Reg. 54538 (Sept. 1, 2011)

its earlier rulemakings, represent good faith efforts to implement Congress’s mandate to enhance the regulation of the swaps market by providing avenues for the reporting and aggregation of all applicable swaps transactions. These rules, of course, must also account for the statutory mandate imposed by Section 728 of the Dodd-Frank Act, which added CEA Section 21(d). Although the indemnification provisions of this portion of Title VII may have been well intentioned, it is now clear that these new requirements stand as a barrier to the orderly flow of SDR information. As such, the Roundtable strongly urges the CFTC to publicly support a legislative amendment or repeal of this portion of the CEA.

I. The Roundtable Supports Commission Efforts to Ensure the Effectiveness of SDR Reporting

Title VII of the Dodd-Frank Act created a comprehensive regulatory scheme governing derivative products that fall under the classification of “swap” or “security-based swap.” A key component of Title VII directs the Commission to adopt rules that will require real-time reporting of swaps transactions to registered swap data repositories.⁴ SDRs will, in turn, share the information they collect with the Commission.⁵ Required SDR reporting will include transactions of both cleared and uncleared swaps. Title VII also allows SDRs to share information with other regulators, including foreign financial supervisors, if certain requirements are met. Having access to this information will allow the Commission to monitor emerging trends within the swaps industry. Although information regarding individual level trades will remain confidential, SDR information will allow the Commission to publish reports showing trends in the volume, pricing, and creation of new covered swaps products.

The Roundtable supports the Commission’s efforts to develop its capacity to collect and analyze transactional information relevant to its regulatory oversight authority. Access to market-wide data will be an important tool in helping to identify and address emerging risks that may arise within the swaps market. In addition to requiring the aggregation of market data on swaps transactions, Congress also took steps to ensure the quality of SDR data. Dodd-Frank directs the Commission to register, inspect, and otherwise regulate all entities performing the function of a swap data repository. Taken together, these provisions create a robust framework to help improve the transparency of the overall swaps market.

The Roundtable strongly believes that the effective use of these new regulatory tools will act as an important barrier against the dangers posed by systemic risk. However, rules in this area must take into account the international nature of the swaps market. As noted by the Commission in its interpretative release, Congress clearly recognized the importance of international harmonization in swaps regulations by enacting Section 752 of the Dodd-Frank Act, which calls for U.S. regulators to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation of swaps and swap entities. Thus, it is surprising that some of the statute’s language may in fact run counter to Congress’s expressed goals of ensuring transparency and fostering a globally uniform system for the regulation of swaps.

The indemnification requirements of CEA § 21(d) will implicitly undermine the ability of regulators to reliably track developments within the global swaps marketplace. While §21(d)

⁴ Dodd-Frank Act § 727.

⁵ A parallel requirement in Dodd-Frank § 764 requires that information related to security-based swaps be relayed to a security-based swaps data repository.

ostensibly provides increased protection to SDRs that share information with parties besides the Commission, the provision does not consider the data-sharing agreements that already exist in the swaps market. A variety of foreign leaders have expressed concerns and even objections to amending those agreements to include the required indemnification provisions. Accordingly, § 21(d) may have the unfortunate consequence of fragmenting the data set for the swaps market between different repositories and different government regulators. Leaders of existing swap data repositories have testified that the indemnification mandate is unnecessary and will ultimately harm the Commission's ability to effectively regulate against harmful developments in the swaps market.⁶

II. The Commission Should Work Actively With Congress to Alter or Repeal the Indemnification Requirements of CEA Section 21(d)

The Roundtable supports the Commission's efforts to minimize any adverse consequences imposed by CEA § 21(d). These efforts include provisions of the Commission's final rules on Swap Data Recordkeeping and Reporting and the most recent interpretative guidance issued by the Commission. Each of these statements gives deference to collection procedures established by foreign regulators and allows U.S. registered SDRs to share information with regulators pursuant to those requirements. We agree that such an approach is justifiable considering the importance of international comity in this area.

However, despite these efforts, the exact scope of the requirements imposed by CEA § 21(d) remains unclear. Although the Commission has provided several examples when U.S. registered SDRs may share information with "appropriate" foreign regulators without first entering into an indemnification agreement, no examples have been established to demonstrate when such an agreement would be required. Furthermore, CFTC guidance on this topic leaves open the important topic of whether U.S. registered SDRs will be able to share information with the regulators of a different country, absent an indemnification agreement, in a case where the country's swaps regulations have not been fully developed or enacted.

The Roundtable strongly believes that the effectiveness of current information sharing systems within the swaps market justifies a repeal of § 21(d). Absent repeal, SDRs and foreign regulators will continue to be burdened by an ambiguous mandate that is both onerous and seemingly unnecessary. This view is also shared by other actors within the swaps market including both current SDRs and foreign regulators.⁷ Amending the CEA to remove the indemnification requirement of § 21(d) would remove a needless barrier to the establishment of a uniform, efficient, and effective process for aggregating swaps market data on a global scale; a goal that is especially vital, considering the vast scope of the current domestic and multinational swaps market.

As the CFTC continues to study this issue, we ask that Commission staff engage in a direct and comprehensive discussion with Members of Congress on the perceived impacts and perceived problems that exist with regard to § 21(d). We note that bi-partisan legislation to remove the

⁶ *Hearing to review H.R. 3283, the "Swap Jurisdiction Certainty Act", H.R. 1838 to repeal Section 716 of Dodd-Frank, and H.R. 4235, the "Swap Data Repository & Clearinghouse Indemnification Correction Act of 2012" Before the H. Subcomm. On General Farm Commodities and Risk Management, 112th Congress (March 28, 2012) (statement of Michael Bodson, Chief Operating Officer, Depository Trust and Clearing Corporation). Available at <http://agriculture.house.gov/pdf/hearings/Bodson120328.pdf>.*

⁷ *Id.*; Lucas Becker, *EC Official: Don't Enforce Trade Repository Indemnity Rules*, INTERNATIONAL FINANCIAL LAW REVIEW, ¶2-3 (June 16, 2011), <http://law.fordham.edu/corporate-law-center/22709.htm>.

indemnification requirements from the CEA has already been introduced in the House of Representatives.⁸

While the Roundtable urges the Commission to support a legislative solution to this issue, we realize the sensitivity of revisiting a massive legislative effort that was finalized only twenty-two months ago. We strongly believe, however, that large pieces of legislation such as the Dodd-Frank Act, by their very nature, require a comprehensive review that results in the adoption of many technical corrections. Revisiting the amendments made to the CEA by Section 728 of the Dodd-Frank Act is more than warranted considering the unintended harms that the SDR indemnification requirements may have on the broader objectives of Title VII. As such, we urge the Commission to work with Congress to adopt a permanent solution to this particular issue.

III. The Commission Should Continue its Efforts to Create a Workable Global Framework for Swaps Regulation

We again reiterate our support for the core purposes of Title VII. We especially support and commend efforts by Congress and the Commission to improve the transparency of the swaps market and to implement policy and procedures designed to achieve these goals. As the Commission continues its work to implement the comprehensive reforms of Title VII, matters of international harmonization, similar to issues presented by the Commission's interpretation of CEA § 21(d), will continue to arise in many important contexts.

In addressing such issues, we urge the Commission to continue its conversations with international regulators and to continue to support the development of internationally applicable standards through international bodies such as the International Organization of Securities Commissions ("IOSCO"). We fully support any and all efforts to develop guidance, principles, and memorandums of understanding that enhance the ability of swaps markets participants to more easily understand how to conduct common transactions across multiple jurisdictions. Such uniformity in regulations not only improves the efficiency of the swaps market, but also helps ensure the effective implementation of the principles for derivatives regulation adopted by the G-20 during its 2009 conference in Pittsburgh. As such discussions continue, we hope that the Commission will continue to be guided by the principles of international comity announced by the Supreme Court in the *F. Hoffman-La Roche Ltd.*⁹ decision.

The global nature of the swaps market requires that certain market participants be willing and able to transact business in multiple jurisdictions across the globe. In view of this reality, we urge the Commission to be especially mindful of the concerns of entities that commonly conduct non-U.S. based transactions. Entities regulated under Title VII, especially certain swap dealers, will soon face an array of new requirements across multiple jurisdictions. The risk that such entities may confront conflicting requirements is real and we urge the Commission to continue to be mindful of concerns that may arise as the new regulatory regime covering swaps continues to develop. Many of these concerns can be effectively addressed through the release of clarifying rules and guidance from the Commission. However, we also urge the Commission to consider and support possible legislative solutions when the stated requirements of the CEA and other laws conflict with the overall purpose and intent of regulatory reforms imposed by Title VII.

⁸ H.R. 4235, 112th Cong. 2d Sess. (2012) (sponsored by Rep. Robert Dold (R-IL) and Rep. Gwen Moore (D-WI)).

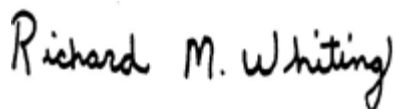
⁹ 542 U.S. 155 (2004).

As a final thought, we commend the Commission for its continuing efforts to develop an official proposal regarding the expected extra-territorial scope of its Title VII regulations. This effort will provide important clarifications concerning how the Commission will implement the concepts contained in Section 722(d) of the Dodd-Frank Act. Development of the jurisdictional concepts contained in § 722(d) will be vital in helping to clarify the applicability of Title VII in foreign transactions. We look forward to participating in the notice and comment process associated with this release.

IV. Conclusion

The Roundtable appreciates the opportunity to share its views with the Commission. To the extent you have any questions regarding the points made in this letter, please contact either me or Richard Foster, Senior Counsel for Legal & Regulatory Affairs, at (202) 589-2424.

Sincerely,

A handwritten signature in black ink that reads "Richard M. Whiting". The signature is written in a cursive, slightly slanted style.

Richard M. Whiting
Executive Director and General Counsel
The Financial Services Roundtable