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June 6, 2012

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

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

Dear Mr. Stawick:

The Depository Trust & Clearing Corporation (“DTCC”) appreciates the opportunity to comment on, and provide specific modifications to, the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) interpretative statement providing guidance on the applicability of the confidentiality and indemnification provisions set forth in new section 21(d) of the Commodity Exchange Act (“CEA”) added by section 728 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) (the “Interpretative Statement”).¹

DTCC has worked closely with Congress and federal regulators to ensure that the financial regulatory reforms implemented in connection with the Dodd-Frank Act serve to reduce risk, increase transparency and promote market integrity within the financial system.² The Dodd-Frank Act’s Title VII indemnification provisions create significant problems with the ability to ensure effective swap transaction data sharing between regulators globally and in the United States.³

¹ See Swap Data Repositories: Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of Section 21(d) of the Commodity Exchange Act, 77 Fed. Reg. 26,709 (May 7, 2012).

² Notably, two DTCC subsidiaries have applied, pursuant to the Commission’s Part 49 rules, to operate swap data repositories (“SDRs”): DTCC Data Repository (U.S.) LLC; and the Global Trade Repository for Commodities (U.S.) LLC, a U.S.-based entity intended to be an SDR for all commodities.

³ The provisions are implemented pursuant to CEA section 21(d) and Securities Exchange Act of 1934 section 13(n)(5)(H), as amended by Dodd-Frank Act §§ 728 and 763, respectively (the “Indemnification Provisions”).

Limitations of the Interpretative Statement

DTCC appreciates the Commission's serious effort to address these problems in the context of its rulemaking authority. However, due to the limitations inherent in a regulatory modification to a statutory problem, and in light of discussions with regulators globally, the language of the statute ultimately requires a "legislative fix" to clarify the scope and applicability of CEA section 21(d)'s confidentiality and indemnification provisions.

In previous comment letters and through ongoing dialogue with the Commission, DTCC has consistently expressed concerns that the Indemnification Provisions threaten to undermine global data sharing among regulators by operating to prevent or inhibit foreign regulatory authorities from accessing data maintained by SDRs, leading to the fragmentation of a global data set into multiple, unaggregated entities.

While the Interpretative Statement provides clarification with respect to how the Commission proposes to construe the application of CEA section 21(d), it does not provide complete resolution to the concerns expressed by foreign regulatory authorities relating to regulator access. Even with adoption of the Interpretative Statement, which DTCC supports as a necessary first step, the Indemnification Provisions may still cause limited data sharing across jurisdictions. Many regulators globally have expressed to DTCC the belief that a legislative resolution is needed to address the issues presented by the Indemnification Provisions.

The continued presence of the indemnification requirement (even as modified by the proposed Interpretative Statement) is viewed as a significant barrier to the ability of regulators globally to effectively utilize the transparency offered by a trade repository registered in the U.S. For example, foreign regulators have noted concerns with a scenario in which a foreign regulator has an interest in certain data in a U.S. SDR resulting from a jurisdictional nexus with respect to the currency or underlying reference entity, where neither party to the transaction falls under the foreign regulator's oversight authority. For example, a U.S. and a London-based bank may trade on an equity swap involving a Japanese underlying entity, and the trade is reported to a U.S. SDR. If the Japan Financial Services Agency has an interest in accessing such data, it does not appear to be able to do so absent a confidentiality and indemnity agreement.

Additionally, DTCC suggests that the Interpretative Statement support SDRs receiving data for non-Dodd-Frank Act purposes without being subject to the mandate of the Indemnification Provisions. For example, the industry has expressed a strong desire in leveraging the existing SDR infrastructure (as an agent or third-party service) to meet reporting obligations elsewhere while using a consistent and uniform reporting template. Since this data would be reported to assist firms with additional reporting obligations, the voluntary reporting of non-Dodd-Frank Act data should not be subject to the Indemnification Provisions.

Because of the limitations of the CFTC's Interpretative Statement, U.S.-based SDRs may have difficulty providing market data to third-party regulatory authorities. In turn, the difficulty of sharing data may cause foreign regulators to establish their own "national" repositories to ensure access to data. Even with the Interpretative Statement, there is little benefit in sharing with a U.S. SDR, as it does not extend data access and would tend to narrow to data reported pursuant to specific regulation, while adding the apparent complexity of dual regulation. A proliferation of national repositories would result in the fragmentation of a single global data set into multiple local ones, providing regulators an incomplete picture of critical market data. Such a result runs counter to the important Dodd-Frank Act goals of enhancing transparency, promoting standardization and reducing systemic risk.

Need for Interim Solution

DTCC recognizes that considerable time may lapse before Congress can complete action on the appropriate legislation to resolve this problem and, therefore, a workable interim solution is required. To that end, the CFTC's interpretative relief is welcome. However, the Interpretative Statement should be modified to provide clarity and assurance to both registered SDRs and foreign regulators to ensure the effective sharing of critical swap transaction data on a global basis. These modifications will promote the ability of non-U.S. regulators to access critical information needed to conduct timely and effective market and systemic risk.

With respect to section III.A. of the Commission's Interpretative Statement addressing data reported to registered SDRs, the Commission indicates that a registered SDR will not be subject to the confidentiality and indemnification provisions of CEA section 21(d) if (1) the registered SDR is also registered, recognized or otherwise authorized in a foreign jurisdiction's regulatory regime; and (2) the data sought to be accessed by a foreign regulatory authority has been reported to such registered SDR pursuant to the foreign jurisdiction's regulatory regime.⁴

DTCC encourages the Commission to clarify that the "otherwise authorized in a foreign jurisdiction's regulatory regime" provision also applies to a regulator with oversight responsibilities conferred under its jurisdiction's laws or regulations over specific entities or entity types without requiring registration or licensing of the SDR. Further, SDRs operating in accordance with the principles for trade repositories set forth in the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions' (IOSCO) report on *Principles for financial market infrastructures* should be deemed authorized to provide such data in the foreign jurisdiction's regulatory regime.⁵ The CPSS-IOSCO principles provide internationally agreed upon standards for the operation of financial market infrastructures, including trade

⁴ See Interpretative Statement, 77 Fed. Reg. at 26,712.

⁵ See CPSS-IOSCO Principles for financial market infrastructures (Apr. 2012); available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377.pdf>.

repositories, and adherence to such standards should provide the requisite structure for the sound operation of a trade repository in disclosing data to a foreign regulatory regime.

The Commission should consider changing the Interpretative Statement to specifically provide that, for purposes of identifying data reported “pursuant to the foreign jurisdiction’s regulatory regime,” a foreign “regulatory regime” includes a foreign jurisdiction’s adherence to those principles outlined for market regulators with respect to the oversight, supervision and regulation of financial market infrastructures, including trade repositories, as detailed by the CPSS-IOSCO report on *Principles for financial market infrastructures*.⁶ The CPSS-IOSCO principles outlined for market regulators promote trade repository oversight, supervision and regulation in a manner consistent with international standards outlined by the CPSS-IOSCO report.

Regarding section III.B. of the Commission’s Interpretative Statement addressing foreign regulatory access to data held in registered SDRs, the Commission proposes that a foreign regulator’s access to data from a registered SDR will be dictated by that foreign jurisdiction’s regulatory regime (not the CEA or the Commission’s regulations) where the registered SDR is also registered, recognized or otherwise authorized in the foreign jurisdiction’s regulatory regime and the data to be accessed has been reported pursuant to that regulatory regime. DTCC encourages the Commission to clarify section III.B. of the Interpretative Statement consistent with the approach advocated above with respect to section III.A; specifically, by elaborating on the scope of the meaning of (1) “otherwise authorized in a foreign jurisdiction’s regulatory regime;” and (2) “pursuant to the foreign jurisdiction’s regulatory regime.”

DTCC notes the Commission’s footnote⁷ regarding direct electronic access to swap data reported to an SDR pursuant to CEA section 21 and the Commission’s regulations. DTCC believes the Commission’s explanatory comments will positively assist in alleviating certain foreign regulators’ concerns regarding plenary access by affirming that the Commission’s direct electronic access to data will be limited to that data reported pursuant to the Commission’s jurisdiction in accordance with CEA section 21 and the promulgating regulations.

Commission Support for Legislative Repeal

In written testimony before the House Financial Services Committee in support of legislation (H.R. 4325) to remove the Indemnification Provisions from the Dodd-Frank Act, the U.S. Securities and Exchange Commission (“SEC”) indicated that it “is seriously troubled by the statements of certain foreign regulators about their intention to adopt reciprocal indemnification requirements, such that U.S. regulators would have to provide written indemnification agreements to foreign trade

⁶ See *id.*

⁷ See Interpretative Statement, 77 Fed. Reg. at 26,712-13, fn. 34.

repositories as a precondition for accessing data, or otherwise block access by U.S. regulators to foreign trade repositories.....[t]he SEC would be legally unable to meet any such indemnification requirement and has argued vigorously against similar requirements in other contexts.”⁸ The SEC explicitly recommended that “Congress consider removing the indemnification requirement added by the Dodd-Frank Act.”⁹

It would be a positive signal to regulators globally for the Commission to join the SEC in publicly supporting repeal of the Indemnification Provisions.

Conclusion

DTCC greatly appreciates the opportunity to offer these comments on the Interpretative Statement. Should the Commissions wish to discuss these comments further, please contact me at 212-855-3240 or lthompson@dtcc.com.

Sincerely yours,



Larry E. Thompson
General Counsel

⁸ Written Testimony of Ethiopis Tafara, House Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises (Mar. 21, 2012), *available at* <http://financialservices.house.gov/UploadedFiles/HHRG-112-BA-WState-ETafara-20120321.pdf>.

⁹ *Id.*