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August 27, 2012

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

Re: Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (RIN 3038-AD57)

Dear Mr. Stawick:

The Depository Trust & Clearing Corporation (“DTCC”) submits these comments to the Commodity Futures Trading Commission (“CFTC” or “Commission”) in connection with the Commission’s proposed interpretive guidance and policy statement on the “Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act” (the “Interpretive Guidance”).¹

DTCC appreciates the CFTC’s diligent effort to provide clarity about the cross-border application of certain swaps provisions of the Commodity Exchange Act (“CEA”).² The publication of the proposed Interpretive Guidance demonstrates the effort taken by the Commission to attempt to harmonize the interaction between multiple regulatory regimes seeking to implement the objectives of the evolving financial regulatory regimes by the Group of 20 nations in a global market.

As a participant-owned and governed cooperative that serves as a critical infrastructure for global financial markets, DTCC welcomes the release of the Interpretive Guidance. DTCC has been deeply involved in discussions with regulators and market participants globally about the new financial regulatory framework and applauds the Commission’s efforts to seek input from interested parties.

¹ Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41214 (July 12, 2012).

² 7 U.S.C. 1, *et seq.*

Overview

DTCC supports the central tenets of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”),³ including that swap data for all swaps – cleared and uncleared – are to be reported to a registered swap data repository (“SDR”) for regulatory oversight and transparency purposes.⁴

This letter focuses primarily on two proposals in the Interpretive Guidance:

- 1) The Commission should implement its proposed “substituted compliance” regime in a manner consistent with a principle-based, regulatory-recognition approach and in reliance on the oversight and supervision of other regulators pursuing similar regulatory objectives; and
- 2) The cross-border application of the swaps provisions of the CEA should be harmonized and effected in concert with the Commission’s regulatory counterparts in the U.S. and in other jurisdictions. Direct discussions with international regulatory bodies will enable the CFTC to achieve a coordinated global regulatory framework that (a) allows each regulator access to the requisite swap data to enable it to (i) perform its necessary market oversight functions and (ii) best ensure safe and transparent markets in its jurisdiction and (b) allows substituted compliance with respect to swap data reporting to operate in the manner proposed.

Substituted Compliance

The Interpretive Guidance indicates that a non-U.S. swap dealer (“SD”) or non-U.S. major swap participant (“MSP”) will be permitted to conduct business by complying with its home regulations, without additional requirements under the CEA, if the Commission finds that such home regulations are comparable to cognate requirements under the CEA and Commission regulations.⁵ The Commission proposes that it may make comparability determinations on an individual requirement basis, rather than the foreign regime as a whole.

DTCC encourages the Commission to implement mutual recognition of equivalent foreign regulatory regimes, using a principles-based approach of “regulatory recognition” in which one regulator relies on the oversight and supervision of another regulator pursuing the same regulatory objectives.⁶ Such approach is

³ Public Law 111–203, 124 Stat. 1376 (2010).

⁴ 7 U.S.C. 2(a)(13)(G).

⁵ 77 Fed. Reg. at 41229.

⁶ While the Commission has historically relied upon “mutual recognition” in determining how to reconcile regulatory consistency between jurisdictions, it is not clear from the Interpretive Guidance what standard the Commission will apply in determining substituted compliance. DTCC believes that the Interpretive Guidance should clarify the distinction between “substituted compliance,” “regulatory equivalence,” and “mutual recognition.” *See also* Concurring Statement of Commissioner Jill Sommers, *Id.* at 41239.

consistent with the Group of 20 nations' agreement to comprehensively regulate swaps, and the CFTC can benefit from home regulators' respective regional expertise in appropriately overseeing markets within their jurisdiction.

Access to Data

The Interpretive Guidance categorizes swap data reporting as an "entity-level" requirement and would require non-U.S. SDs and MSPs to report all of their swaps to a registered SDR. The Commission proposes allowing substituted compliance for the reporting of swaps by non-U.S. SDs and MSPs with non-U.S. counterparties if the CFTC has direct access to the swap data for such non-U.S. SD or MSP that is reported to the foreign trade repository.⁷ For foreign affiliates or subsidiaries of a U.S. swap dealer, substituted compliance is permitted provided that the Commission has direct access to the swap data for these swaps that is stored at the foreign trade repository.⁸

As substituted compliance with respect to swap data reporting is contingent on the CFTC having direct access to the data in the relevant foreign trade repository, DTCC is concerned about the lack of a clear international agreement directly regarding regulatory access to requisite swap data. This gap amongst and between regulators requires resolution if substituted compliance is to operate as intended.

Section 21 of the CEA, as established by Section 728 of the Dodd-Frank Act, requires that SDRs make data available to "foreign financial supervisors" on a confidential basis and only when such foreign financial supervisor agrees to indemnify the SDR and the CFTC for any expenses arising from litigation relating to the information provided. This provision, if not amended, threatens to jeopardize the global swap data information sharing framework. DTCC shares the concern that many entities, including the U.S. Securities and Exchange Commission, have identified in the need for a technical correction or an amendment to avoid the potential negative unintended consequences of the indemnification provision.

DTCC notes the Commission's proposed interpretative statement regarding the confidentiality and indemnification provisions of Section 21(d),⁹ and draws attention to our comments to this proposed interpretive statement.¹⁰ An appropriate reciprocal framework is needed to ensure that access to swap data is not restricted

⁷ *Id.* at 41230. The CFTC considers foreign branches and agencies of a U.S. person to be part of such U.S. person and, thus, the U.S. person will be responsible for complying with all applicable requirements, including the SDR reporting requirement (regardless of whether the counterparty is a U.S. or non-U.S. person).

⁸ *Id.* at 41231.

⁹ Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of Section 21(d) of the Commodity Exchange Act, 77 Fed. Reg. 26709 (May 7, 2012).

¹⁰ See letter from Larry Thompson, General Counsel, DTCC to David Stawick, Secretary, CFTC, dated June 6, 2012, available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58238&SearchText=>.

for those regulators that “have legitimate regulatory interests in the trading of swaps by multinational organizations”.¹¹

Conclusion

DTCC applauds the CFTC for crafting an Interpretive Guidance that is “guided by consideration of international comity principles”¹² which is part of the Commission’s “longstanding policy of considering principles of international comity in its rulemakings and interpretations.”¹³

DTCC encourages the Commission to continue its engagement with regulators in various jurisdictions and to remain active in international dialogue related to the cross-border application of the Dodd-Frank Act and other jurisdictions’ corresponding laws and regulations. Regulatory oversight, both in the United States and overseas, should be applied in such a manner so as not to risk fragmentation of swap data or serve as an impediment to any regulator’s access to data within its regulatory authority.

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

Sincerely yours,



Larry E. Thompson
General Counsel

¹¹ See Concurring Statement of Commissioner Scott D. O’Malia, 77 Fed. Reg. at 41241.

¹² *Id.* at 41218.

¹³ *Id.* at 41223, FN 62.