

HOUSE COMMITTEE ON FINANCIAL SERVICES SUBCOMMITTEE ON CAPITAL MARKETS AND GOVERNMENT SPONSORED ENTERPRISES

HEARING ON “LIMITING THE EXTRATERRITORIAL IMPACT OF TITLE VII OF THE DODD-FRANK ACT” STATEMENT FOR THE RECORD

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Chairman Garrett and Ranking Member Waters,

Thank you for the opportunity to submit a statement for the record on the issue of information sharing by U.S.-based swap data repositories (SDRs) and non-U.S. regulators pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA). The Depository Trust & Clearing Corporation (DTCC) remains concerned about the combined impact of the DFA's broad extraterritorial reach and the confidentiality and indemnification agreement provisions. These provisions are fundamentally unworkable, as they do not recognize either foreign legal systems, or the inability of the U.S. to accept reciprocal demands from foreign entities. For reasons set forth in this statement, these provisions risk fragmenting the global data for over-the-counter (OTC) derivatives and undermining efforts to increase market transparency and to mitigate risk in this market. These provisions risk putting U.S. regulators in a position of having less complete information on swaps available to them in the future than they have today.

DTCC currently operates two subsidiaries specifically responsible for providing repository services to the global derivatives community: the Trade Information Warehouse (TIW) operated by The Warehouse Trust Company LLC for credit derivatives, a U.S. regulated entity; and DTCC Derivatives Repository Limited (DDRL) for equity derivatives, a U.K. regulated entity. In response to the G20 commitments made at the September 2009 Pittsburgh Summit, the Financial Stability Board (FSB) Report on OTC Derivatives Market Reform, and forthcoming statutory legislation in various jurisdictions, the international financial community recently selected DTCC's DDRL entity to provide global repository services for interest rates and FX swaps. DTCC also was selected to operate the commodities repository (together with the European Federation of Energy Traders) under its newly established Netherlands entity, Global Trade Repository for Commodities B.V.

DTCC is working closely with global partners and asset class experts to design repositories to meet the regulatory reporting requirements identified in the respective regional or national jurisdictions. DTCC has completed its first phase of creating and operating the new Global Trade Repository for Interest Rates (GTR for Rates) and Commodities (GTR for Commodities). DTCC expects the GTR for Rates regulatory reporting to commence in late February 2012. DTCC is currently in discussions with industry and regulatory authorities, developing consensus on the right framework for the GTR for Commodities' reporting.

DTCC has extensive experience operating as a trade repository and meeting transparency needs. In November 2008, in response to mounting concerns and speculation regarding the size of the credit default swaps (CDS) market following the collapse of Lehman Brothers, DTCC began public aggregate reporting of the CDS open position inventory. Today, this reporting includes open positions and volume turnover, providing aggregate information that is extremely beneficial to both the public and regulators in understanding

the size of the market and activity. Further, following the OTC Derivatives Regulators Forum (ODRF)¹ data access guidelines for the TIW, DTCC launched a regulatory portal in January 2011, which provides automated counterparty exposure reports and query capability for market and prudential supervisors and transaction data for central banks with aggregate report views by currency and concentration. Nearly 40 regulators world-wide have signed up to the portal. DTCC plans to expand on this portal as it launches its global trade repository services for the other asset classes.

Two Important DFA Provisions Require Congressional Action

Two key extraterritorial concerns in the Swap Data Repository area of the DFA need further examination by the Congress and legislative resolution:

- 1. Plenary Access:** Under the DFA, any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps must register in the United States as a SDR. The law also requires SDRs to provide data prescribed by the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) to the CFTC and the SEC for each swap collected and maintained by the registered SDR.
- 2. Indemnity:** The DFA requires U.S.-based SDRs to receive a written indemnification agreement from non-U.S. regulators confirming (1) that they will abide by confidentiality requirements and (2) that they will indemnify the SDR and the regulating U.S. Commission(s) for any expenses arising from litigation relating to the information.

The combined impact of the plenary access and indemnification provisions on a global trade repository operating in the U.S. will mean, for example, that U.S. regulators could have the legal right to review data on a trade between two British banks transacting in the U.K. involving a British underlying entity even though such a transaction falls outside the scope of U.S. jurisdiction. Compounding the issue and using this same example, the British regulator would be required to indemnify the U.S. SDR to gain access to that same data – data that is within its jurisdiction.

Many regulators worldwide have expressed deep concerns about the reach and scope of the indemnity provision and have stated it creates an environment for data fragmentation. Taken together, the DFA requirements will (1) impede global regulatory cooperation, (2) risk fragmentation of a global data set for OTC derivatives, and (3) undermine efforts to increase market transparency and mitigate risk in this market.

Plenary Access, Indemnification Risk Regulators' Ability to Monitor and Mitigate Systemic Risk

As a result of the DFA requirements, and because many foreign regulators have indicated that they will be unable or unwilling to grant U.S.-based SDRs indemnification in exchange for access to information, DTCC has applied to remove the global repository function from the TIW and has applied to establish a distinct and separate regulatory portal only for U.S. data.

We welcome that the SEC and the CFTC highlighted the concern of data fragmentation in the recently published Joint Report on International Swap Regulation.² By precluding SDRs from providing data to non-U.S. regulators unless an indemnification agreement exists, jurisdictions are likely to establish their own “national” repositories, such as has already occurred in Hong Kong, to ensure they have access to the data they need. The application to remove the global repository function from the TIW was a logically required step to avoid the proliferation of “national” repositories which would fragment the current global data set into multiple local sets and limit global regulators' ability to have a comprehensive view of market activity.

¹ The ODRF consists of over 50 international financial regulators, including the SEC and CFTC.

² (“The DFA requires that foreign authorities provide a written agreement to indemnify a Swaps data repository and the CFTC or SEC, as applicable, for any litigation expenses as a condition to obtaining Swaps data maintained by the Swaps data repository. This requirement has caused concern among foreign regulators, some of which have expressed unwillingness to register or recognize an SDR unless able to have direct access to necessary information. Some regulators also are considering the imposition of a similar requirement that would restrict the CFTC’s and SEC’s access to information at TRs abroad. The CFTC and SEC are working to develop solutions that provide access to foreign regulators in a manner consistent with the DFA and to ensure access to foreign-based information. Congress may determine that a legislative amendment to the indemnification provision is appropriate.”)

Asian, European Regulators Opposed to Indemnification Requirement, Plenary Access

The DFA approach to ensuring data safety and confidentiality has not been welcomed by Asian and European regulators. The European Market Infrastructure Regulation (EMIR), which is anticipated to reach its final legislative phase and be adopted shortly, considered and rejected an indemnification requirement.

Moreover, the confidentiality concerns can be addressed without imposing both the DFA indemnification requirement and plenary access provisions. Under the ODRF data access guidelines, regulators must maintain the confidentiality of information they obtain from DTCC's trade repositories and must affirm that information obtained is of material interest to their oversight.

With respect to plenary access, regulators expect to have appropriate access to an SDR registered in their jurisdiction for direct oversight. This access is necessary to ensure thorough examination of the SDRs operations, guaranteeing the completeness and accuracy of the data published by an SDR. This access is distinct from that required by non-supervisory regulators who rely upon the SDR's data for market oversight. The level of access to an SDR's data should reflect the purpose for which a regulator seeks to review the SDR's information. Regardless, regulators internationally require that appropriate privacy safeguards are in place to protect the data.

Potential Legislative Solutions to Indemnification

The indemnification provisions, which are contained in Sections 728 and 763 of DFA, were added to the legislation during the final hours of the "Conference Committee" and were not subject to the hearing process. Now that the unintended consequences of these provisions have been brought to light, there is bicameral, bipartisan support to resolve the consequences of indemnification. Last year, Senator Agriculture Committee Chairwoman Debbie Stabenow (D- MI) and Ranking Member Pat Roberts (R-KS), and House Appropriations Agriculture Subcommittee Congressman Jack Kingston (R-GA) and Ranking Member Sam Farr (D-CA) authored separate letters to their counterparts in the European Parliament expressing interest in working together on a solution to the issue. In addition, several other Members of Congress have also publicly declared their support for a technical correction to the provision. CFTC Chairman Gensler and SEC Chairman Schapiro have written to European Commissioner Michel Barnier regarding the indemnification provisions of the DFA. The SEC and CFTC recently indicated that any remedy must originate in the legislature.

DTCC has developed several potential approaches to resolving the issues posed by indemnification provisions of the DFA. There exist options for a technical legislative correction to avoid the unintended consequences of the DFA indemnification provision. Congress could eliminate, or modify the statutory language and incorporate a technical correction to the legislation by including a mutual "memorandum of understanding" (MOU) option for regulatory compliance with the indemnification requirement if a foreign regulator is carrying out its responsibilities in a manner consistent with ODRF, or other agreed upon international policy forums. Congress also could include a "reciprocal equivalence" provision in the legislation in a manner consistent with the European Union draft EMIR legislation.

Ultimately, Congress must act to avoid further unintended consequences of the DFA indemnification provision. Correcting the DFA indemnification requirement is imperative not only to prevent the potential repercussions of a non-equivalency determination by E.U. regulators, but also to ensure market transparency and risk mitigation of global financial markets.

Potential Legislative Solutions to Plenary Access

Absent clarification by the CFTC and the SEC on the extraterritorial application of the SDR provisions of the DFA, Congress should consider a technical correction to the DFA that clarifies the purpose of the direct access provision is to allow for direct regulation of the SDR, and is not intended to grant regulatory authorities access to information that otherwise the regulator would not be entitled for its market surveillance activities.

The SDR framework should not establish a conflict in reporting rules that frustrates the global development of trade repositories to meet the G20 commitment. To ensure complete and accurate information to SDRs in multiple jurisdictions, in addition to swaps reporting to U.S.- based SDRs, additional reporting of these trades should be permitted to a non-U.S. SDR without the non-U.S. SDR being required to register with U.S. regulators.

Thank you for your time and attention this afternoon.