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August 21, 2013

Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street N.E.  
Washington, D.C. 20549

Re: Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR (File Numbers S7-02-13, S7-34-10)

Dear Ms. Murphy:

The Depository Trust & Clearing Corporation (“DTCC”)<sup>1</sup> appreciates the opportunity to provide comments to the U.S. Securities and Exchange Commission (“SEC” or “Commission”) related to proposed rules and interpretive guidance to address the application of the provisions of the Securities Exchange Act of 1934, as amended (“Exchange Act”), that were added by Subtitle B of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”),<sup>2</sup> to cross-border security-based (“SB”) swap activities (“Cross-Border Proposal”).<sup>3</sup>

On July 22, 2013, DTCC provided comments on the Commission’s Proposed SB swap data repository (“SDR”) rules<sup>4</sup> and portions of Regulation SBSR<sup>5</sup> proposed in December 2010. This letter focuses on how the Cross-Border Proposal may impact the SDR regime, including the sharing of information and preservation of confidentiality with respect to data collected and maintained by SDRs. This response also addresses specific provisions of proposed Regulation SBSR and the Commission’s proposed substituted compliance framework.

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<sup>1</sup> DTCC provides critical infrastructure to serve all participants in the financial industry, including investors, commercial end-users, broker-dealers, banks, insurance carriers, and mutual funds. DTCC operates as a cooperative that is owned collectively by its users and governed by a diverse Board of Directors. DTCC’s governance structure includes 344 shareholders.

<sup>2</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>3</sup> Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 Fed. Reg. 30,968 (May 23, 2013).

<sup>4</sup> Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. 77,306 (Dec. 10, 2010).

<sup>5</sup> Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75,208 (Dec. 2, 2010).

DTCC's experience operating an SDR provisionally registered with the Commodity Futures Trading Commission ("CFTC"), a derivatives trade repository registered with the Financial Services Agency of Japan, and other trade repositories internationally as well as other financial market utility services provides useful insight regarding over-the-counter ("OTC") swaps and SB swaps regulation.

## **I. About DTCC**

DTCC is a user-owned cooperative that serves as the primary financial market infrastructure serving the United States capital markets across multiple asset classes, including equities, corporate and municipal bonds, government and mortgage-backed securities, money market instruments, mutual funds, insurance, alternative investment products and OTC derivatives.

Through its subsidiaries, operating facilities and data centers around the world, DTCC automates, centralizes, and standardizes the post-trade processing of financial transactions, enabling thousands of institutions worldwide to issue securities and raise capital to build businesses.

DTCC's subsidiary, the DTCC Data Repository (U.S.) LLC ("DDR"), is provisionally registered as an SDR with the CFTC for the interest rate, credit, equity, foreign exchange, and other commodity asset classes in the United States.

DTCC has extensive experience operating as a trade repository and meeting regulator transparency needs. DTCC provides trade repository services through its established global infrastructure in the United States, Japan, Singapore, and the Netherlands.

DDR began accepting swap transaction data from market participants on October 12, 2012 – the first day that financial institutions began trade reporting for swaps under the Dodd-Frank Act. DTCC, through its subsidiary The Warehouse Trust Company, has been providing public aggregate information for the credit default swap market on a weekly basis, including both open positions and turnover data, since January 2009. This information is available, free of charge, on [www.dtcc.com](http://www.dtcc.com).

## **II. General Comments on Cross-Border Proposal**

### **A. Need to Foster Competition; Protect Market Stability**

As noted in DTCC's July 22, 2013 letter, the Commission's final rules must foster competition in the marketplace without disadvantaging U.S. markets. DTCC supports the Commission's stated goals of protecting market participants and maintaining a fair, orderly, and efficient SB swap market through the promotion of competition. DTCC urges the Commission to ensure the application of these principles across all SB swap market participants, including other registrants and third-party service providers.

Further, DTCC encourages the Commission to rely on the recommendations of the Committee on Payment and Settlement Systems (“CPSS”)<sup>6</sup> and the International Organization of Securities Commissions (“IOSCO”),<sup>7</sup> including CPSS-IOSCO’s “Principles for financial market infrastructures.”<sup>8</sup> For example, the Commission has concurred with the CPSS–IOSCO consultative report’s recommendation that “[m]arket infrastructures and service providers that may or may not offer potentially competing services should not be subject to anticompetitive practices such as product tying, contracts with non-compete and/ or exclusivity clauses, overly restrictive terms of use and anti-competitive price discrimination”<sup>9</sup> by quoting them in the proposed rules. In a global SB swap market, the anti-competitive practices of even a single market participant have potential ramifications for the entire marketplace. DTCC, therefore, urges the Commission to adopt rules that preserve a competitive marketplace and forbid anti-competitive practices by all SB swap market participants, not just trade repositories.

### **B. Importance of Harmonization at Home and Abroad**

DTCC strongly encourages the United States’ continued participation in global efforts to promote harmonized rules governing OTC swaps markets. Given the global nature of OTC swaps and SB swaps markets, the United States should continue to promote an approach to the regulation of the swaps markets that adheres to international comity and mitigates the risk of regulatory arbitrage in market decisions.

Regulations among jurisdictions must be coordinated in a manner that promotes competition, transparency, and protects the safety and soundness of these global markets. At the same time, the Commission should remain vigilant that the

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<sup>6</sup> The CPSS is a standard setting body for payment, clearing and securities settlement systems. It also serves as a forum for central banks to monitor and analyze developments in domestic payment, clearing and settlement systems as well as in cross-border and multicurrency settlement schemes.

<sup>7</sup> IOSCO, established in 1983, is the acknowledged international body that brings together the world’s securities regulators and is recognized as the global standard setter for the securities sector. IOSCO develops, implements, and promotes adherence to internationally recognized standards for securities regulation, and is working intensively with the G20 and the Financial Stability Board FSB on the global regulatory reform agenda. IOSCO’s membership regulates more than 95% of the world’s securities markets. Its members include over 120 securities regulators and 80 other securities markets participants (i.e. stock exchanges, financial regional and international organizations etc.). IOSCO is the only international financial regulatory organization which includes all the major emerging markets jurisdictions within its membership.

<sup>8</sup> COMMITTEE ON PAYMENT AND SETTLEMENT SYSTEMS, BOARD OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, PRINCIPLES FOR FINANCIAL MARKET INFRASTRUCTURES (2012), <http://www.bis.org/publ/cps101a.pdf> (“A [trade repository] should not engage in anti-competitive practices such as product or service tying, setting overly restrictive terms of use, or anticompetitive price discrimination. A [trade repository] also should not develop closed, proprietary interfaces that result in vendor lock-in or barriers to entry with respect to competing service providers that rely on the data maintained by the [trade repository].”).

<sup>9</sup> 75 Fed. Reg. at 77,321.

international framework is efficient and does not unfairly disadvantage or concentrate systemic risk in the United States.

Likewise, the Commission should work, to the extent possible, with the CFTC to minimize the number of regulatory inconsistencies between the two agencies. Given the significant number of registered entities (execution platforms, clearinghouses, SDRs, dealers, and major swap participants) that will face dual oversight, unnecessary distinctions in the registration and regulation of these entities risk jeopardizing regulatory compliance, add confusion to Dodd-Frank Act implementation, and ultimately impose unnecessary costs.

While DTCC's July 22, 2013 letter includes specific examples where the Commission and CFTC should strive to have consistent regulations, DTCC stresses the need for harmonization on regulations governing the real-time public dissemination of executed swap transactions. DTCC is concerned that if the Commission adopts Proposed Rule 242.902(b), the SEC will have a different set of requirements than the CFTC. Market participants, who have adapted to existing regulations related to real-time dissemination, would need to construct a second platform to comply with the SEC's approach. Two sets of rules for real-time public dissemination will dilute transparency and increase complexity to the consumer reviewing such data.

DTCC stresses the need for harmonization on regulations governing the real-time public dissemination of executed swap transactions. The DDR's post-trade public dissemination of swaps data is fully operational in the United States pursuant to CFTC regulations, providing market participants with accurate, timely information about OTC swaps activity for transactions reported to the DDR. The Commission should consider modifying Proposed Rule 242.902(b) to adopt an approach that would allow for use of the existing real-time ticker used for CFTC reporting to satisfy the SEC's requirements. Any other outcome would require the development and maintenance of two different real-time dissemination systems, rather than a true consolidated ticker, without any identifiable benefit that could not be attained by one harmonized standard.

### **III. Cross-Border Application of SDR Rules; Access to Data**

#### **A. Interpretive Guidance and Exemption for Non-U.S. Persons That Perform the Functions of an SDR within the United States**

The Commission proposes to exempt non-U.S. persons that perform the functions of an SDR within the United States from registering with the Commission, subject to a condition. Proposed Rule 240.13n-12 exempts the non-U.S. person from registration with the Commission as an SDR if "each regulator with supervisory authority over such non-U.S. person has entered into a supervisory and enforcement memorandum of understanding or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S.

person, access by the Commission to such data, and any other matters determined by the Commission.”<sup>10</sup>

The SDR registration requirement should apply to any entity, regardless of physical location of servers, that receives SB swap transaction data from reporting sides who are U.S. persons for the purpose of complying with the Commission’s reporting regulations. If the entity collects and maintains SB swap transaction information or records in furtherance of these obligations, then it should be deemed to “function” as an SDR in the United States and face the registration requirements.

By contrast, an entity that (i) collects and maintains non-SB swap transaction information, (ii) collects and maintains SB swap transaction information from activity between non-U.S. persons, or (iii) collects and maintains SB swap transaction information reported to the entity pursuant to regulatory requirements or commitments unrelated to those imposed by the Commission, then that entity should not be considered to function in the United States. Accordingly, such an entity would not be required to register with the Commission as an SDR.

### **B. Indemnification Provision, Proposed Exemption & Global Information Sharing Arrangements**

Section 13(n)(5)(H) (“Indemnification Provision”) of the Exchange Act provides that, before sharing information with any entity described in Section 13(n)(5)(G), an SDR must obtain a written agreement from the entity stating that the entity shall abide by the confidentiality requirements described in Section 24 of the Exchange Act, and the rules and regulations thereunder, relating to the information on SB swap transactions that is provided; in addition, the entity shall agree to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under Section 24 of the Exchange Act and the rules and regulations thereunder.

In an attempt to codify an exemption to the Indemnification Provision, Proposed Rule 240.13n-4(d) provides that a registered SDR is not required to comply with the indemnification requirement if: (1) a specifically enumerated entity<sup>11</sup> requests SB swap information from the SDR to fulfill a regulatory mandate and/or legal responsibility of the entity, (2) the request of such entity pertains to a person or financial product subject to the jurisdiction, supervision, or oversight of the entity, and (3) such entity has entered into a supervisory and enforcement memorandum of understanding or other arrangement with the Commission that addresses the

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<sup>10</sup> 78 Fed. Reg. 31,209

<sup>11</sup> This includes an “appropriate prudential regulator” (as defined in Exchange Act Section 3(a)(74)), the Financial Stability Oversight Council, the CFTC, the Department of Justice, the Federal Deposit Insurance Corporation and any other person that the Commission determines to be appropriate, including, but not limited to: (A) foreign financial supervisors (including foreign futures authorities); (B) foreign central banks; and (C) foreign ministries.

confidentiality of the SB swap information provided and any other matters as determined by the Commission (“Indemnification Exemption”).<sup>12</sup>

### **1. Need for Legislative Solution**

DTCC appreciates the Commission’s efforts to provide an exemption to the Indemnification Provision to minimize its potentially negative impact, but believes that the rulemaking itself does not erase the need for a legislative solution to clarify the scope and applicability of this provision.

Despite the exemption to the Indemnification Provision in the Cross-Border Proposal, domestic and foreign regulatory authorities continue to have concern that the Indemnification Provision, as a statutory requirement, will continue to limit data sharing across jurisdictions. As the Commission notes, “a supervisory and enforcement MOU or other arrangement would not necessarily provide SDRs . . . with the same level of protection that an indemnification agreement would provide” and “an SDR may prefer the benefits of the Indemnification Requirement rather than rely on the Indemnification Exemption.”<sup>13</sup> This recognition of the practical limits of the exemption proposed by the Commission exemplifies the concern shared by financial market regulators in other jurisdictions that the Indemnification Provision remains a possible deterrent to global information sharing regimes. Many non-U.S. regulators 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 Provision (even as modified by the exemption in the Cross-Border Proposal) may pose problems for Commission-regulated, U.S.-based SDRs and their ability to share information with third-party regulatory authorities. As a result, foreign regulators may seek to establish their own “national” repositories to ensure access to the information they need, fragmenting the data among jurisdictions. Similarly, non-U.S. trade repositories may find themselves subject to similar reciprocal impediments to sharing information with the Commission or other U.S. regulatory agencies absent a confidentiality and indemnification agreement.

DTCC appreciates the Commission’s previous support of legislation<sup>14</sup> to remove the Indemnification Provision from the Exchange Act and requests that the Commission continue to promote this pending bipartisan proposal.

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<sup>12</sup> 78 Fed. Reg. 31,209.

<sup>13</sup> *Id.* at 31,049.

<sup>14</sup> 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>; Chairman Elisse Walter, Secs. and Exch. Comm’n, Remarks at the American Bar Association Spring Meeting, Regulation of Cross-Border OTC Derivatives Activities: Finding the Middle Ground (Apr. 6, 2013).

The Swap Data Repository and Clearinghouse Indemnification Correction Act of 2013<sup>15</sup> will resolve issues surrounding the indemnification provisions and confidentiality requirements of the Dodd-Frank Act by removing the provisions from the law. H.R. 742, which passed the House in a 420-2 vote on June 12, 2013, represents the only viable solution to the unintended consequences of indemnification. This bipartisan legislation will help ensure regulators and the public obtain a consolidated and accurate view of the global marketplace.

## **2. Comments on Indemnification Exemption**

DTCC appreciates the Commission's thoughtful approach to providing market participants with relief pursuant to the Commission's regulations. Nevertheless, as mentioned above, DTCC strongly believes that the only solution to the problems posed by the Indemnification Provision is through legislation.

DTCC urges the Commission to incorporate a safe harbor provision from liability for information shared pursuant to global information sharing agreements into the Indemnification Exemption for SDRs operating pursuant to information sharing arrangements, as defined in the Indemnification Exemption, or comparable to those published by the OTC Derivatives Regulators Forum ("ODRF") or CPSS-IOSCO.

Examples of information sharing arrangements include the ODRF guidelines, by which regulators who access the data under these guidelines are required to maintain the confidentiality of the information based upon DTCC's "terms of use" agreement. Additionally, ODRF guidelines require regulators to affirm that any information obtained from an ad-hoc request is of material interest to their oversight and that such information will be kept confidential. Similarly, CPSS-IOSCO's "Authorities' access to trade repository data"<sup>16</sup> sets forth a framework and guidelines for authorities' access to trade repository data and includes an illustrative template data request form. The Commission's safe harbor provision should allow for an SDR to operate under such established international standards as they evolve over time.

DTCC believes that an SDR safe harbor will further public policy objectives related to systemic risk oversight and global information sharing without the restrictions of the Indemnification Provision. Such an approach will also promote regulators' participation in multilateral global discussions on information sharing and encourage SDRs to comply with those standards. Further, promoting international standards provides for flexibility as these arrangements evolve over time, reflecting changes to global regulatory approaches to data sharing.

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<sup>15</sup> H.R. 742, 113<sup>th</sup> Cong. (2013).

<sup>16</sup> COMMITTEE ON PAYMENT AND SETTLEMENT SYSTEMS, BOARD OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, AUTHORITIES' ACCESS TO TRADE REPOSITORY DATA (2013), <http://www.bis.org/publ/cpss110.pdf>.

In line with the safe harbor provision proposed, DTCC discourages the Commission from requiring a notification requirement upon initial request as suggested by the Cross-Border Proposal. Authorities will likely be hesitant to make such request to an SDR if it triggers a notice to another authority, particularly if such request is pursuant to an investigation. DTCC proposes that the Commission consider notification to be deemed satisfied if the request is made by an entity to the SDR pursuant to an established information sharing arrangement, as discussed above.

#### **IV. Specific Comments on Proposed Regulation SBSR**

DTCC appreciates the opportunity to comment on the Commission's re-proposal of Regulation SBSR. In particular, DTCC (1) supports the Commission's exclusion of clearing agencies as reporting sides under Rule 901, and (2) suggests revisions to the proposed definition of the term "life cycle" event.

##### **A. Reporting Obligations**

In the Commission's re-proposal of Regulation SBSR, the Commission revises the initially proposed term "reporting party" to "reporting side." Under this revision, a "side" would mean "a direct counterparty and any indirect counterparty," whereas a "reporting side" would mean "the side of a security-based swap having the duty to report information." If a side has the duty to report an SB swap transaction, any counterparty on that side—direct or indirect—would have responsibility for carrying out the reporting obligation.

DTCC appreciates the Commission's efforts to further clarify market participants' obligations under its reporting framework. Notably, the Commission's designation of reporting obligations under re-proposed Rule 901(a) does not contemplate that a clearing agency would be a reporting side.<sup>17</sup> This exclusion of clearing agencies as a potential reporting side is consistent with DTCC's understanding of the Commission's initial Regulation SBSR proposing release.<sup>18</sup> The Commission explained in the preamble of the initial proposing release that the Exchange Act, as amended by the Dodd-Frank Act, "does not explicitly specify which counterparty should be the reporting party for those [SB swaps] that are cleared by a clearing agency or derivative[s] clearing organization."<sup>19</sup> The Commission stated, however, that "for the sake of uniformity and ease of applicability, the duty to report a [SB swap] should attach to the same counterparty regardless of whether the [SB swap] is cleared or uncleared."<sup>20</sup> Though Rule 901(a) "would not prevent a reporting party

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<sup>17</sup> DTCC observes that Proposed Rule 242.901(d) classifies the name of the clearing agency as "secondary trade information" required to be reported by the reporting side. The inclusion of the identification of the clearing agency as secondary data to be reported to the SDR further evidences that the Commission did not contemplate the clearing agency as a potential reporting side.

<sup>18</sup> See Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75,208, 75,211 (Dec. 2, 2010) (hereinafter "Initial Regulation SBSR Proposing Release").

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

to a SB swap from entering into an agreement with a third party to report the transaction on behalf of the reporting party,” the Commission stated that “a [SB swap] counterparty that is a reporting party would retain the obligation to ensure that information is provided to a registered SDR.”<sup>21</sup>

DTCC supports the Commission’s reporting framework under the re-proposal of Regulation SBSR in this regard, including its focus on and recognition of counterparty choice,<sup>22</sup> and agrees with the Commission that reporting obligations should attach to the same reporting side regardless of whether a SB swap is cleared or uncleared.

## **B. Life Cycle Events**

Proposed Rule 242.900(p) defines a life cycle event as “any event that would result in a change in information reported to the registered security-based swap data repository.”<sup>23</sup> As noted in DTCC’s July 22, 2013 letter, DTCC believes that such definition is too broad as it would seem to require the reporting of any change to the contract. DTCC believes the scope should be limited to those events that impact the counterparties to or the pricing of the SB swap. Accordingly, DTCC suggests that the definition be changed to “an event that would result in a change in the counterparty or price of a security-based swap reported to the registered security-based swap data repository.”

Under Proposed Rule 242.901(e), the Commission states the reporting side shall submit the lifecycle event promptly after such event occurs. DTCC suggests that event-by-event reporting is overly burdensome and not necessary. Instead, the Proposed Rule should allow for the flexibility of either reporting event-by-event or multiple events through one daily submission.

DTCC also questions the necessity of including the clause “for a security-based swap that is not cleared, any change to the collateral agreement” in the definition of life cycle event, particularly because collateral agreement terms are not among the data required to be reported upon execution.<sup>24</sup>

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<sup>21</sup> *Id.* at 75,211-12.

<sup>22</sup> As evidenced by the CFTC’s treatment of derivatives clearing organization rule submissions (*e.g.* the Chicago Mercantile Exchange Inc.’s request to add Rule 1001 (“Regulatory Reporting of Swap Data”) and ICE Clear Credit LLC’s submission to add Rule 211 (“Regulatory Reporting of Swap Data”)), DTCC notes that the CFTC’s approach to reporting obligations runs counter to the Commission’s proposed approach.

<sup>23</sup> 78 Fed. Reg. 31,211 (emphasis added).

<sup>24</sup> *Id.*

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### **Conclusion**

Should the Commission wish to discuss these comments further, please contact me at 212-855-3240 or [lthompson@dtcc.com](mailto:lthompson@dtcc.com).

Sincerely yours,

A handwritten signature in cursive script that reads "Larry E. Thompson".

Larry E. Thompson  
General Counsel