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## **Via Agency Website & Courier**

January 24, 2011

Ms. Elizabeth M. Murphy, Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

RE: Security-Based Swap Data Repository Registration, Duties, and Core Principles  
RIN 3235-AK79, File No. S7-53-10

Dear Ms. Murphy:

The Depository Trust & Clearing Corporation (“DTCC”) appreciates the opportunity to provide comments to the Securities and Exchange Commission (“SEC” or the “Commission”) on its proposed new rules under the Securities Exchange Act of 1934 (“Exchange Act”) governing the security-based swap data repository (“SDR”) registration process, duties, and core principles (the “Proposed Rule” or “Proposed Regulation”).<sup>1</sup> Imposing requirements on security-based swap data repositories would promote safety and soundness for all U.S. markets by bringing increased transparency and oversight to over-the-counter (“OTC”) security-based swap (“SBS”) markets, an important component of the reforms sought by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).<sup>2</sup>

### **Summary of Response**

DTCC supports the Commission’s efforts to establish a comprehensive new framework for the regulation of SBSs, including the implementation of registration, duties, and core principles for SDRs. Key points from DTCC’s response are highlighted below.

All SBSs, whether cleared or uncleared, must, by statute, be reported to swap data repositories.<sup>3</sup> The primary purposes of this mandate are to provide regulators with complete transparency into the previously unregulated SBS markets and to assure public dissemination of SBS information as required by statute or as determined by regulators

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<sup>1</sup> See Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. 77,306 (December 10, 2010).

<sup>2</sup> Public Law 111-203, 124 Stat. 1376 (2010).

<sup>3</sup> See Exchange Act Section 13(m)(1)(G) (“Each security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap data repository.”).

to be otherwise necessary for efficient and fair functioning of markets (subject to confidentiality considerations set forth in the Dodd-Frank Act and applicable regulations). These requirements make SDRs unique among the various parts of the market infrastructure for SBSs contemplated by the Dodd-Frank Act, in that all counterparties to all SBS transactions will have the details of each of their transactions reported to an SDR.

The mandatory reporting regime creates an opportunity for the SDR to improperly commercialize the information it receives. It is important that regulators ensure that the public utility function of SDRs, which operate as aggregators and collectors of swap and SBS data to support regulatory oversight and supervisory functions, as well as regulator-mandated public reporting, is separated from potential commercial uses of the data. The principle of user control over the data for non-regulatory purposes must also be scrupulously maintained, and care should be taken to assure that SDRs maintain an arms-length and non-discriminatory relationship with other parts of the market infrastructure (i.e., clearing, confirmation, and execution facilities) and that these other parts of the infrastructure maintain similar relationships with SDRs. It is important, however, that SDRs themselves be allowed to enter into partnerships or coordinated programs in order to better provide aggregate views of data to regulators, to better assure that global regulatory requirements are met, or to promote other public purposes.

Related specific points deserving of more detailed consideration include:

- In order to assure that non-regulatory uses of mandatorily reported data remain in the hands of the counterparties, SDRs should be, broadly speaking, “user-governed.” This should include a board of directors that is broadly representative of market participants and that incorporates voting safeguards designed to prevent non-regulatory uses of data of a particular class of market participants that are objectionable to that class. In addition, no communication of data (other than to, or as required by, applicable regulators) that could have the result of disclosing the actual positions or specific business or trading activity of a counterparty should be permitted without the consent of that counterparty.
- SDRs should not engage in the commercialization of data reported to them and should demonstrate strict impartiality in making data available to, or receiving data from, other providers, including affiliates of SDRs. This is best achieved by following objective, public standards and by assuring that dealings with affiliates (other than cooperating regulated repositories) and competitors of affiliates be subject to oversight by members of the SDR’s board of directors who are not engaged in the governance or oversight of either the affiliates or their competitors. These same objective standards should be used for other providers, such as clearing, confirmation, and execution providers, in their dealings with SDRs.

- SDR fee structures should reflect an at-cost operating budget. Further, since even smaller, non-reporting counterparties will legitimately want to interact with SDRs, if only to verify what has been reported, SDRs should have the flexibility to facilitate such access by not charging, or charging only nominal amounts, for such interaction.

Additional points discussed by DTCC include the following:

- DTCC relies upon the direction provided by the OTC Derivatives Regulators' Forum ("ODRF"), whose membership includes the SEC and the Commodity Futures Trading Commission ("CFTC"). DTCC's Trade Information Warehouse (the "Warehouse" or "TIW") has followed the ODRF's guidance, recognizing that broad agreement among global regulators is difficult to achieve. DTCC is committed to complying with the policies adopted by the regulators and working with the Commission in this regard. DTCC urges the SEC, in its regulation of SDRs, to aim for regulatory comity both as it has already been agreed to by the ODRF and as it may be further agreed to by such other international bodies as the Committee on Payment and Settlement Systems ("CPSS") and the International Organization of Securities Commission ("IOSCO").
- DTCC supports the Commission in requiring robust operational capabilities of an SDR, and specifically recommends that SDR infrastructure should operate on a 24/6 basis, given the global nature of where these products are traded. SDRs should also process transactions in real-time and maintain multiple levels of operational redundancy. Given the importance of SDRs to the regulatory and systemic risk oversight of the financial markets and the important role they will play in providing market transparency, a lack of robust resiliency and redundancy in operations should disqualify an entity from registering as an SDR. Also paramount to service provision is a strong ability to maintain information security. Assessment of these core capabilities should form part of any registration process, including a temporary registration process.
- DTCC recommends that appropriate transitional arrangements be made to avoid market disruption by the implementation of the Proposed Rule. The TIW is a centralized global repository for trade reporting and post-trade processing of OTC credit derivatives contracts, operated by DTCC's wholly-owned subsidiary, The Warehouse Trust Company LLC. The TIW is an integral part of the credit default swap ("CDS") market. Restrictions to its operation could introduce significant operational risks to market participants. DTCC recommends that the final rules be subject to a phase-in period to allow an adequate period for existing service providers like the TIW to make necessary changes to their service offerings. In the alternative, DTCC requests the Commission provide specific transitional arrangements for existing infrastructures.

- To avoid creating conflicts between standards, as well as unnecessary costs, the Commission and the CFTC should harmonize the regimes that oversee SDRs. DTCC believes that harmonization is a more important priority than the exact nature of the consistent standard, as SDRs can adjust to meet a single standard but not multiple, inconsistent standards. The CFTC, in its proposed rule related to swap data recordkeeping and reporting requirements,<sup>4</sup> has specifically taken the position that life cycle event processing and legal recordkeeping services are “ancillary” services and not part of core SDR functions.<sup>5</sup> DTCC agrees with the CFTC that these services, which are valuable to market participants and provide a vital function, do not necessarily need to be considered as part of the core role to be performed by an SDR.

DTCC also makes a number of detailed observations addressing specific points and the questions posed in the Proposed Rule. These comments are preceded by a brief overview of DTCC and the Warehouse.

### **Overview of DTCC**

DTCC, through its subsidiaries, provides clearing, settlement and information services for virtually all U.S. transactions in equities, corporate and municipal bonds, U.S. government securities and mortgage-backed securities transactions, money market instruments and OTC derivatives. DTCC is also a leading processor of mutual funds and annuity transactions, linking funds and insurance carriers with their distribution networks. DTCC does not currently operate a clearing agency for derivatives. However, DTCC owns a 50% equity interest in New York Portfolio Clearing, LLC (“NYPC”)<sup>6</sup>, which has applied to the CFTC for an order granting registration as a Derivatives Clearing Organization (“DCO”).

DTCC has three wholly-owned subsidiaries which are registered clearing agencies under the Exchange Act, subject to regulation by the Commission. These three clearing agency subsidiaries are The Depository Trust Company (“DTC”), National Securities Clearing Corporation (“NSCC”) and Fixed Income Clearing Corporation (“FICC”). DTCC is owned by its users and operates as a not-for-profit utility with a fee structure based on cost recovery.

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<sup>4</sup> See Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76,574 (December 8, 2010).

<sup>5</sup> See *id.* at 76, 592 fn. 67. (“The Commission does not believe that Dodd-Frank precludes an SDR from accepting and maintaining swap data from both counterparties to a swap. For example, an SDR or its affiliate performing the ancillary service of maintaining the single binding legal record of a swap, such as the “gold” record maintained by the Depository Trust & Clearing Corporation (“DTCC”) for credit swaps, would not be barred from receiving dual reporting in that connection.”).

<sup>6</sup> NYSE Euronext owns the other 50% equity interest. Neither DTCC nor NYSE owns a majority of the equity interests in NYPC. NYPC will have its own management team which will control the day to day operations of the company.

DTC currently provides custody and asset servicing for 3.6 million securities issues from the United States and 121 other countries and territories, valued at almost \$34 trillion. Through its subsidiaries, DTCC processes huge volumes of transactions – more than 30 billion a year – on an at-cost basis. For example, in 2009, DTC settled more than \$1.48 quadrillion in securities transactions. NSCC provides clearing, risk management, (for some securities) central counterparty services and a guarantee of completion for certain transactions. FICC provides clearing, risk management and central counterparty services (through its Government Securities Division) in the fixed income, mortgage backed and government securities markets.

### **Overview of the Trade Information Warehouse**

In November 2006, at the initiative of swap market participants, DTCC launched the Warehouse to operate and maintain the centralized global electronic database for virtually all position data on CDS contracts outstanding in the marketplace. As the life cycle for CDS contracts may extend five years or more, in 2007, DTCC “back-loaded” records in the Warehouse to incorporate information on over 2.2 million outstanding CDS contracts effected prior to the November 2006 implementation date. Today, data for over 95 percent of all OTC credit derivatives are captured in this automated environment. The Warehouse database currently represents about 98 percent of all credit derivative transactions in the global marketplace; constituting approximately 2.3 million contracts with a notional value of \$29 trillion (\$25.3 trillion electronically confirmed “gold” records and \$3.7 trillion paper-confirmed “copper” records).<sup>7</sup>

In addition to repository services, such as those activities contemplated by the Proposed Rule (*e.g.*, the acceptance and public and regulatory dissemination of data reported by reporting counterparties), the Warehouse provides both legal recordkeeping and central life cycle event processing for all swaps registered therein. By agreement with its 17,000+ users worldwide, the Warehouse maintains the most current CDS contract details for both cleared and bilaterally-executed CDS transactions in its “gold” records, which are the official and legal records of those transactions. The repository also stores key information on other CDS transactions, those involving market participants’ single-sided, non-legally binding or “copper” records, helping regulators and market participants gain a clearer and more complete snapshot of the market’s overall risk exposure to OTC credit derivatives instruments.

DTCC’s Warehouse was the first and remains the only centralized global provider of life cycle event processing for OTC credit derivatives contract positions throughout their multi-year terms. As various events occur regarding CDS contracts, such as calculating payments and bilateral netting, settling payments, credit events, early termination and company renames and reorganizations, DTCC’s Warehouse is equipped to automate the processing associated with those events and related actions. The performance of these

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<sup>7</sup> Data provided as of December 31, 2010. For more information about the Trade Information Warehouse, please see [http://www.dtcc.com/products/derivserv/suite/ps\\_index.php](http://www.dtcc.com/products/derivserv/suite/ps_index.php).

functions by the Warehouse distinguishes it from any SDR that merely accepts and stores swap data information.

### **General Discussion of the Proposed Rule**

Proposed Rules 13n–1 to 13n–11 under the Exchange Act govern the SDR registration process, duties, and core principles, including duties related to data maintenance and access by relevant authorities and those seeking to use the SDR’s repository services. The Proposed Rule would require SBS transaction information to be: (1) provided to SDRs in accordance with uniform data standards; (2) verified and maintained by SDRs, which serve as secure, centralized recordkeeping facilities that are accessible by relevant authorities; and (3) publicly disseminated in a timely fashion by SDRs.<sup>8</sup>

DTCC requests that the Commission provide clear guidance as to the scope of the entities covered within the definition of SDR in the Dodd-Frank Act. The statutory duties required of an SDR are extensive and can form a business in their own right. The requirements of an SDR should not be imposed upon service providers looking to provide targeted solutions to specific processes, as opposed to providers looking more broadly to fulfill the role of an SDR. All third party service providers have to perform a level of recordkeeping and often retain data previously submitted by customers to offer services efficiently. This should not transform them into an SDR unless there is a corresponding policy reason for doing so. In fact, there is a strong policy reason to exclude them, the goal of countering the risk of fragmentation in data collection and dissemination on a global basis.

The CFTC, in its proposed rule related to swap data recordkeeping and reporting requirements,<sup>9</sup> has specifically taken the position that life cycle event processing and legal recordkeeping services are “ancillary” services and not part of core SDR functions.<sup>10</sup> DTCC agrees with the CFTC that these services, which are valuable to market participants and provide a vital function, should not necessarily be considered part of the core role to be performed by an SDR.

The Commission’s proposed required practices are generally consistent with those of the Warehouse. The Warehouse currently receives event-based records and, based upon those records, maintains positions and publishes CDS market data. It also currently makes data available to regulators upon request. To date, the Warehouse has received SBS data on a service-based basis, rather than due to a regulatory mandate, offering its

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<sup>8</sup> See Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. at 77,307.

<sup>9</sup> See Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. at 76,574.

<sup>10</sup> See *id.* at 76, 592 fn. 67. (“The Commission does not believe that Dodd-Frank precludes an SDR from accepting and maintaining swap data from both counterparties to a swap. For example, an SDR or its affiliate performing the ancillary service of maintaining the single binding legal record of a swap, such as the “gold” record maintained by the Depository Trust & Clearing Corporation (“DTCC”) for credit swaps, would not be barred from receiving dual reporting in that connection.”).

customers legal record-keeping, position updates, and life cycle event services (such as messaging and updating for successor and credit events, payment amount determination, and net settlement calculations and processing). The Warehouse continues to benefit customers by providing a single operational process and single platform for reconciliation for customers, rather than providing merely separate series of bilateral event, settlement, trade, and portfolio processes and reconciliations. The Warehouse does not currently perform real-time price dissemination activities, nor does it obtain certain trade attributes requested by the Commission in Proposed Rule SBSR.<sup>11</sup> These processes would need to be adjusted to support these functions. The existing TIW regulatory reporting process provides direct access for relevant regulators to information in the furtherance of their regulatory responsibilities, including a number of standard reports recommended by the ODRF. These processes, which have been extensively relied upon by regulators, would also need to be modified in light of the Proposed Rule.

The Warehouse keeps records of SBS transactions in electronic format. These records are updated to reflect life cycle events and preserve a complete audit trail. Certain repositories, including DTCC's OTC equity derivatives repository, take only a periodic upload of open position data in electronic form, and would be required to undergo extensive changes to comply with the Proposed Rule.

The Proposed Rule should require the retention of electronic records of transactions, including life cycle events. These should be maintained for the life of the contract in order to provide an audit trail to positions and for a reasonable retention period thereafter. An SDR's records should be in an electronically readable format (where available) that allows for application and analysis. SBS transaction data retained as electronic images of paper documents is cumbersome and will frustrate regulatory oversight efforts.

The SDR's documents should be relied upon by regulators to complement the records retained by SBS counterparties and should not be seen as a replacement for SBS counterparty record retention requirements. Further, certain aggregate data should be maintained beyond the maturity of contracts to provide public availability of time series data. With respect to an industry standard format for SBS information and records, definitions and standards published by the International Swaps and Derivative Association ("ISDA") are widely accepted by the industry and relied upon by market participants.

Further, the Proposed Rule may have the consequence of unintentionally disclosing participant identity, by overly detailed public dissemination, due to the low volume of activity in certain instruments. The possibility of inadvertent disclosure should be considered in conjunction with the execution model, for example information transferred in a request-for-quote process could be linked to actual executions published by the SDR.

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<sup>11</sup> See Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75,208 (December 2, 2010).

There appear to be relatively narrow differences between the Commission and the CFTC's approaches to the regulation of SDRs. However, because SDRs will operate in both the swaps and SBS markets, particularly in equities and credit asset classes, SDRs are likely to register with both the Commission and the CFTC. For that reason, it is vitally important that there not be any conflict in regulatory regimes between the two agencies. DTCC believes that harmonization is a more important priority than the exact nature of the consistent standard, as SDRs can adjust to meet a single standard but not multiple, inconsistent standards.

In determining whether an entity decides to operate an SDR, it must consider its corporate strategy and positioning. Generally, entities best positioned to operate an SDR are financial market utilities that can provide a broad utility service to the market, data companies who seek to enhance commercial data services, or commercial market infrastructure providers seeking to capture flow and increase barriers to entry for their competitors.

Likely investors in or providers of capital for new SDRs must be aware of the uncertainty of market share or volume of SBS transaction processing for a new SDR in contrast with the certain significant investment necessary to establish the robust and detailed technological systems required for the operation of a successful SDR.

Finally, DTCC believes that there is a significant advantage to the market if SDRs are required to provide basic services on an at-cost or utility model basis, as it avoids the potential abuse or conflict of interest related to a relatively small number of service providers in the SDR industry.

## **Registration of SDRs**

### **Proposed New Form SDR**

The Commission is proposing Rule 13n-1, which establishes the procedures by which an SDR may apply to the Commission for registration.<sup>12</sup> The Proposed Rule requires that the application for registration be filed electronically in a tagged data format on proposed new Form SDR.<sup>13</sup> The information provided on Form SDR would enable the Commission to determine whether to grant or deny an application for registration. Form SDR would require an SDR to indicate the purpose for which it is submitting the form (*i.e.*, application for registration, amendment to an application, or amendment to an effective registration) and provide information in seven categories: (1) general information, (2) business organization, (3) financial information, (4) operational capability, (5) access to services and data, (6) other policies and procedures, and (7) legal opinion.<sup>14</sup>

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<sup>12</sup> See Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. at 77,366.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* at 77,310.

If the applicant is a non-resident SDR, then the signer of Form SDR would also be required to certify that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission.<sup>15</sup>

With respect to operational capabilities, it is essential that proposed Form SDR request information related to the SDR's operating schedule, real-time processing, existence of multiple redundant infrastructures for continuity, strong information security controls, and robust reporting operations (including direct electronic access by the Commission). Because an SDR provides important utility services to regulators and market participants, such resiliency and redundancy should be evaluated in light of the significant policies and procedures for establishing such redundancy, including several backup locations in different geographic regions that DTCC and other market utilities have already developed, implemented, and tested. DTCC has developed and enhanced such efforts for its entire operations in the aftermath of the September 11, 2001 attacks to ensure continuous operations during times of crisis.

DTCC would not support reduced registration requirements for non-resident SDRs at this time. The current European repositories offer periodic position-based data and do not currently meet the requirements of the Proposed Rule related to the reporting and dissemination of SBS information. The regulatory regimes outside the U.S. with respect to OTC derivatives trade repositories are in an early phase of development and not yet supported by international standards, with only draft considerations issued by CPSS-IOSCO to date.

The proposed Regulation SBSR contemplates that an SDR would be required to register with the Commission as a securities information processor ("SIP") and submit an application for registration as an SIP on Form SIP. As the Commission notes, the reporting and recordkeeping burden of Form SDR and Form SIP are not insignificant.<sup>16</sup> Because of the duplicative nature of the information required by Form SDR and Form SIP, DTCC requests that the Commission combine Form SDR and Form SIP such that an SDR would register as an SDR and an SIP using only one form. In the alternative, DTCC suggests that one form (either Form SDR or Form SIP) be permitted for an application for registration as both an SDR and an SIP.

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<sup>15</sup> See *id.* at 77,366.

<sup>16</sup> See *id.* at 77,348 ("[T]he Commission estimates that it would take an SDR approximately 400 hours to complete the initial Form SDR with the information required and in compliance with these proposals.") See also *id.* at 77,348 fn. 208 ("The Commission calculated in 2008 that Form SIP takes 400 hours to complete. 73 FR 34060 (June 16, 2008) (outlining the most recent Commission calculations regarding the PRA burdens for Form SIP).").

### Temporary Registration

Proposed Rule 13n-1(d) would provide a method for SDRs to register temporarily with the Commission, to enable both the SDR and the Commission to comply with the Dodd-Frank Act upon its effective date (*i.e.*, the later of 360 days after the date of its enactment or 60 days after publication of the final rule implementing Exchange Act Section 13(n)) despite any unexpected issues with the use of Form SDR.<sup>17</sup> The temporary registration would expire on the earlier of: (1) the date that the Commission grants or denies registration of the SDR; or (2) the date that the Commission rescinds the temporary registration of the SDR.<sup>18</sup> The Commissions emphasize that SDRs registered on a temporary registration basis must demonstrate that they have the capacity and resources to comply with their regulatory obligations on an ongoing basis as their business evolves.<sup>19</sup>

DTCC is concerned that the SEC's proposed implementation schedule for reporting to SDRs is heavily compressed and, when coupled with the temporary registration regime, may lead to compromised solutions, including operational and security compromises. Potential SDRs are incented to enter the market early to capture market share, as initial trade reporting obligates further reporting on that trade, and the long tenors of the trades will make switching SDRs onerous for reporting parties. However, potential SDRs are unlikely to be able to offer fully robust or efficient solutions for early registration, given that the final rules will be available relatively shortly before the effective date.

DTCC recommends that appropriate due diligence is conducted with respect to the temporary registration process and that those diligence findings are either used to support transition of existing infrastructure or used for new entrants who can demonstrate that their infrastructure supports key operational capabilities, including 24/6 operation, real-time processing, multiple redundancy, and robust information security controls.

DTCC respectfully urges the Commission to ensure that the registration process does not interrupt current operation of existing trade repositories who intend to register as SDRs. This can be achieved as a phase-in for existing SDRs where services will need to be amended to conform with the final rules given the compressed time period between the publication of the final rules and the effective date of the Dodd-Frank Act. It is important that the Commission ensure both the continuation of counterparty reporting and the ability of the trade repository to receive and maintain current trade information on an ongoing basis. The continuation of these activities is imperative for effective oversight of systemic risk and the availability of relevant trade information to the Commission, as well as the continuance of the operational services to market participants. Transitional arrangements, including temporary registration, may be required to ensure these activities continue without interruption.

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<sup>17</sup> *See id.* at 77,314.

<sup>18</sup> *See id.* at 77,366.

<sup>19</sup> *See id.* at 77,314.

## Duties and Core Principles of SDRs

Section 763(i) of the Dodd-Frank Act requires an SDR to comply with the requirements and core principles described in Exchange Act Section 13(n), as well as any requirement that the Commission prescribes by rule or regulation, in order to be registered and maintain registration as an SDR with the Commission.<sup>20</sup>

The Warehouse, as a centralized global repository, serves as an important source of regulatory information for the Commission and other appropriate regulators. However, DTCC believes that the value of the information provided by an SDR will be limited if data reporting becomes too fragmented. If the Commission receives pieces of information from many sources, and not one full picture from any source, the Commission's ability to monitor systemic risk in the marketplace in a timely and global manner will be severely limited.

DTCC expects that normal market forces will result in the provision of aggregate data to the Commission. However, to the extent that such aggregation does not occur as SDRs develop, the Commission should consider designating one SDR as the consolidator of market information (for example, by asset class) responsible for providing the Commission with direct electronic access.<sup>21</sup> The role of an aggregating SDR is significant in that it ensures regulators efficient, streamlined access to consolidated data, reducing the strain on limited agency resources. International financial regulators have identified this approach as a valuable one, noting that:

“Authorities should ensure that [SDRs] are established that provide aggregate global coverage of the global derivatives market and that the data collected can be aggregated so as to provide a comprehensive view of the market. The establishment of uniform data standards and functional requirements for data exchange will be a necessary condition for authorities to have a timely and consistent global view for assessing and analysing the OTC derivatives markets. One beneficial solution would be to establish a single global data source to aggregate the information from [SDRs] [emphasis added].”<sup>22</sup>

With regard to regulatory access, DTCC's understanding of the Commission's access provisions are not in accordance with the guidance issued by the ODRF. DTCC believes that regulators want direct electronic access to data in SDRs where that data is needed to fulfill regulatory responsibilities. DTCC supports regulators' access to regular reports from SDRs that are scheduled temporally or triggered by certain events, including certain

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<sup>20</sup> See *id.* at 77,317.

<sup>21</sup> See Exchange Act Section 13(n)(5) (“An SDR shall...provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity).”).

<sup>22</sup> Financial Stability Board, *Implementing OTC Derivatives Market Reforms*. October 25, 2010. Available at: [http://www.financialstabilityboard.org/publications/r\\_101025.pdf](http://www.financialstabilityboard.org/publications/r_101025.pdf).

concentration levels, rather than by request, with notice to another regulatory authority or requiring indemnification. Finally, the regulatory model should be location agnostic, without preferential access for the prudential regulator, except to perform its prudential duties.

The indemnification provisions should not apply in situations where regulators are carrying out regulatory responsibilities, acting in a manner consistent with international agreements and maintaining the confidentiality of data. However, recognizing that the indemnity provision is mandated by the Dodd-Frank Act, DTCC believes that the Commission should provide model indemnity language to be used by all SDRs in arrangements with regulators. Ensuring consistent application of this legislative mandate will minimize any disruption to the global repository framework. Further, DTCC believes that any indemnity should be limited in scope to minimize the potential reduction in value of registered SDRs to the regulatory community.

An important issue that U.S. and global regulators will need to address, particularly as the implementation of the Dodd-Frank Act results in the growth of SDRs globally, is how to best handle data collected by an SDR where the trade would not be reportable under the statute to U.S. regulators by virtue of where it took place or the counterparties involved. In this regard, DTCC points to the guidance in a letter from the ODRF membership<sup>23</sup> related to global regulator access to TIW data.<sup>24</sup> The ODRF letter contemplates that the SEC receives data from the TIW that goes beyond the scope of information proposed by the Dodd-Frank Act or the Proposed Rule, such as data related to overseas transactions entered into by non-U.S. persons on U.S. underlyings. Today, the TIW routinely provides this transaction data to U.S. regulators (and conversely, routinely provides data related to transactions in the U.S. by U.S. persons on European underlyings to European regulators), as contemplated by the ODRF letter. As the Commission knows, it is important to preserve this spirit of cooperation and coordination between regulators around the world. Without such cooperation, the SEC's ability to routinely receive details of purely European transactions written on U.S. underlyings would be frustrated.

DTCC is concerned that the current asymmetry in the Proposed Rule, when compared to existing international standards, will lead to fragmentation along regional lines and prohibit global services and global data provision, which will weaken the introduction of trade repositories as a financial markets reform measure. Further, because of the onerous standards imposed on SDRs compared to the regulatory framework of other competitive jurisdictions, the U.S. will be less attractive than other locations for the purpose of storing full global data where SDRs are actively looking to service the global regulatory community.

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<sup>23</sup> Authorities Currently Involved in the OTC Derivatives Regulators' Forum. *Available at:* <http://www.otcdrf.org/about/members.htm>.

<sup>24</sup> *See* letter from OTC Derivatives Regulators' Forum to the Warehouse Trust Company, dated June 18, 2010. *Available at:* [http://www.dtcc.com/downloads/legal/imp\\_notices/2010/derivserv/tiw044.zip](http://www.dtcc.com/downloads/legal/imp_notices/2010/derivserv/tiw044.zip).

DTCC strongly supports the use of third party service providers to report SBS data on behalf of reporting parties (*e.g.*, counterparties, security-based swap execution facilities). However, such reporting should be required to be clearly authorized by the reporting parties. The reporting parties need to control the data flow to SDRs to ensure completeness and accuracy of the data. Different firms will wish to have different workflows to support third party service providers' reporting, just as they do in the procedures used to undertake confirmation services. It is important that firms with the reporting obligation maintain control over reported positions throughout the life of the contract, even when third party service providers act on behalf of the reporting party. Otherwise, it is difficult for any party to take responsibility for the accuracy of the resultant position at the SDR.

The use of third party service providers will also strengthen the ability of the SDR to fulfill its statutory obligation to confirm the data with both parties.<sup>25</sup> In many cases, the third party service provider will report trade information on behalf of both counterparties to a trade. Allowing such an arrangement will reduce the regulatory burden of the counterparties, and ensure prompt compliance with reporting obligations. DTCC believes that, in many instances, firms will wish to submit every trade to the SDR or have a third party service provider manage their submissions to the SDR. Given the complexities related to establishing a new regulatory framework in a global market (particularly with jurisdictions expected to adopt new reporting rules related to SDRs as part of their G-20 commitments), there is considerable complexity to replicate in a firm's technology systems the rules that will determine the reporting party or the reporting requirements based on the product type.

In addition to the recognized value inherent in relying upon third party service providers to carry out certain functions on behalf of reporting parties, DTCC urges the Commission to ensure that third party service providers do not "bundle" services to include the SDR function. To ensure accurate, timely information for regulatory oversight and to mitigate potential conflicts of interest, an SDR must be free from conflict with the operation and pricing of other market services (*e.g.*, clearing and trade execution). Allowing bundling of obligations undertaken by third party service providers with an SDR will detract from the SDR's utility function and jeopardize the value of SDRs to regulators and the market.

With respect to whether the Commission should require SDRs to establish automated systems for monitoring, screening, and analyzing SBS data or provide the data for the Commission to perform these functions, DTCC believes monitoring, screening, and analysis should be performed centrally by an SDR, as it would promote efficiency in the system. The data maintained by the SDR should then be made available to potentially impacted regulators. Concentration data would be especially disposed to this approach as it requires aggregate market wide data.

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<sup>25</sup> See Exchange Act Section 13(n)(5)(B) ("A security-based swap data repository shall . . . confirm with both counterparties to the security-based swap the accuracy of the data that was submitted.").

### Implementation of Core Principles

Each SDR is required, under Exchange Act Section 13(n)(7), to comply with core principles relating to: (1) market access to services and data, (2) governance arrangements, and (3) conflicts of interest.<sup>26</sup>

#### *First Core Principle: Market Access to Services and Data*

The first core principle is intended to protect investors and to maintain a fair, orderly, and efficient SBS market. Proposed Rule 13n-4(c)(1) is designed to ensure that any dues or fees are, on a case-by-case basis, fair, reasonable, do not unreasonably discriminate and are applied consistently across all similarly situated users of the SDR's services. The Proposed Rule would also require each SDR to permit market participants to access specific services offered by the SDR separately, such as ancillary matching and confirmation services. Further, each SDR must permit fair, open, and not unreasonably discriminatory access to its services offered and the data it maintains.

DTCC's perspective is that access to data is a key issue relating to SDRs. DTCC supports open access to data by other service providers, based on the consent of the parties for that provider to receive the data. DTCC believes this is an important principle for allowing development of automation and efficient operational processing in the market, while preserving the parties' control over confidential information. The Warehouse currently provides access to many vendors, including trade confirmation and trade messaging providers, central counterparties, portfolio reconciliation service providers, portfolio compression services, custodians and outsource providers. A corollary of this sort of independence is that third party service providers should be barred from bundling their services with those of any SDR. Open access and neutral dealing with other providers should be a two-way street.

With respect to fees, the TIW's current model operates on an at-cost basis, charges the dealers for services, and operates at no cost to the buy-side and end-users. This model has been successful in an industry-led voluntary regime as market participants have been able to benefit from cost savings from operational efficiencies, while also encouraging broad-based usage. It is also important to ensure that all counterparties to trades reported to an SDR should, as a matter of principle, have access to all data relating to trades to which they are a counterparty. This access should be made available to smaller, lower volume market participants, as necessary, through the reduction or waiver of certain fees.

In addition, the fees for certain services should reflect the specific costs of the related service. For example, if a reporting party uses a third party service provider for trade submission, which fulfils the SDR's requirement to confirm the trade with both parties, this report would potentially be charged at a lower cost than a direct report to the SDR, requiring the SDR itself to confirm with the other party.

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<sup>26</sup> See Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. at 77,320.

The TIW offers certain services at no extra cost, currently charging a position-based fee. In some cases, third party costs incurred by TIW are charged directly to the consuming customer rather than spread evenly across all users, where these costs only apply to certain types of trade. In many cases, the marginal cost of operating the additional services are very low. DTCC supports this approach because it incentivizes the adoption of automation and electronic processing, such as the central settlement service and triggering for restructuring credit events, bringing reduced risk to the market. Customer reception to these services is very positive. However, it is important to recognize that current usage of TIW is on a voluntary basis. Therefore, an appropriate option would be to permit customers with two (or more) services options: one that fulfills the minimum regulatory reporting process, and a suite of other services to compliment the mandatory reporting function.

*Second Core Principle: Governance Arrangements*

Proposed Rule 13n-4(c)(2) would require each SDR to establish governance arrangements that are well defined and include a clear organizational structure with effective internal controls, including fair representation of market participants. The Proposed Rule would further require each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, to have a clear understanding of their responsibilities, and to exercise sound judgment about the SDR's affairs. Finally, the Commission could, but has not proposed, minimum requirements pertaining to board composition or impose ownership restrictions.

DTCC believes that the use of ownership and voting limitations would be an imprecise tool with which to achieve the policy goals of the Commission regarding conflicts of interest. These policy goals can best be met by structural governance requirements. In the specific case of an SDR, governance by market participants is appropriate, given that most potential conflicts of interest are dealt with directly in the Proposed Rule and will be overseen directly by the regulator.

The SDR is not defining the reporting party, timeliness or content for public dissemination, and similarly the SDR is not defining the reporting party, content or process for regulatory access. Therefore, the SDR does not have significant influence over the inclusion or omission of information in the reporting process, nor does it control the output of the process. This position is significantly different from other market infrastructures, where these infrastructures may have the ability to influence participation in a service (e.g. execution, clearing membership, portfolio compression), or completeness of product offering (where it is proposed that all trades in an asset class are accepted).

DTCC suggests that the Commission focus on ensuring the SDR open access provisions described above are in place. To support these requirements, the SDR needs governance that has independence from its affiliates and which is representative of users who are the beneficiaries of choice in service providers. The TIW has a separate board, consisting of fee-paying users, which acts independently from the DTCC parent company board, though the Warehouse must ensure its actions do not damage the financial strength or reputation of its parent. DTCC, as the parent company, does not direct the strategy of the TIW nor promote its interests within the TIW.

Furthermore, in order to assure that non-regulatory uses of mandatorily reported data remain in the hands of the counterparties, SDRs should be broadly speaking “user-governed”. This should include a board of directors that is broadly representative of market participants and that incorporates voting safeguards designed to prevent non-regulatory uses of data of a particular class of market participants that are objectionable to that class. In addition, no communication of data (other than to or as required by applicable regulators) that could have the result of disclosing the actual positions or specific business or trading activity of a counterparty should be permitted without the consent of that counterparty.

Independent perspectives can provide value to a board of directors, but those who do not directly participate in markets may not have sufficient, timely, and comprehensive expertise on those issues critical to the extraordinarily complex financial operations of SDRs. These entities require industry expertise at the board level and it is critical for the safety and soundness of SDRs that the composition of their boards sufficiently incorporates the range of necessary expertise as well as independent judgment.

*Third Core Principle: Rules and Procedures for Minimizing and Resolving Conflicts of Interest*

Each SDR is statutorily required to establish and enforce written policies and procedures reasonably designed to minimize and resolve conflicts of interest in the SDR’s decision-making process.<sup>27</sup> Based on information provided by industry representatives regarding how SDRs will likely operate, the Commission preliminarily believes that a small number of dealers could control SDRs, which may require SDR owners to balance competing interests.<sup>28</sup> Owners of an SDR could derive greater revenues from their non-repository activities in the SBS market than they would from sharing in the profits of the SDR in which they hold a financial interest.<sup>29</sup> In addition, there may be a tension between an SDR’s statutory obligations and its own commercial interests or those of its owners.<sup>30</sup>

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<sup>27</sup> See *id.* at 77,369.

<sup>28</sup> See *id.* at 77,324.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

The Commission notes that a few entities that presently provide or anticipate providing repository services have identified conflicts of interest that could arise at an SDR.<sup>31</sup> First, owners of an SDR could have commercial incentives to exert undue influence to control the level of access to the services offered and data maintained by the SDR and to implement policies and procedures that would further their self-interests to the detriment of others by impeding competition.<sup>32</sup> Second, an SDR could favor certain market participants over others with respect to the SDR's services and pricing for such services.<sup>33</sup> Third, an SDR could require that services be purchased on a "bundled" basis.<sup>34</sup> Finally, an SDR could misuse or misappropriate data reported to the SDR for financial gain.<sup>35</sup>

The TIW recognizes that market access by service providers to an SDR could be a potential source for conflicts of interest, but strongly supports the principle of open access, having established many vendor connections. The Warehouse operates at-cost, rebates any excess revenues, and charges only dealers for its services. The reporting rules for SDRs are highly prescriptive, and the primary consumers of this data are regulators, leaving limited room for conflicts involving regulatory or public data access. Access for other service providers is a key requirement for efficiency and strongly supported by a user-governed organization.

### **Data Collection and Maintenance**

The Commission is proposing Rule 13n-5 under the Exchange Act to specify the data collection and maintenance requirements applicable to SDRs.

DTCC believes that there should be a common definition for the products within each asset class that is used by all SDRs to ensure that reporting counterparties know where to report trade information. The requirement for an SDR to support all trades in an asset class is also important to reduce the complexity for reporting parties. Given the need for reporting parties to report life cycle events and potentially report valuation data to the SDR that originally received the trade, these processes can be burdensome. In addition, the requirement to support all trades in an asset class discourages an SDR from only servicing high volume products within an asset class to maximize profit, and leaving more complex (and less frequently traded) transactions to be reported by reporting parties directly to the Commission.

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<sup>31</sup> *See id.*

<sup>32</sup> *See id.*

<sup>33</sup> *See id.* at 77,325.

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

## Definitions

DTCC does not feel that the definition of “asset class” needs further definition for SBS. DTCC does think the distinction between loan-based and credit asset classes is unnecessary, and notes products like CDS on loans, while loan-based, are currently reported alongside other CDS products to the TIW.

## Requirements

### *Transaction Data*

The Proposed Rule would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of transaction data to the SDR, and would require the SDR to accept all transaction data that is reported to the SDR in accordance with such policies and procedures under proposed Rule 13n-5(b)(1)(i).<sup>36</sup> Further, proposed Rule 13n-5(b)(1)(ii) would require an SDR, if it accepts any SBS in a given asset class, to accept all SBSs in that asset class that are reported to it in accordance with its policies and procedures required by paragraph (b)(1) of the Proposed Rule.<sup>37</sup> Finally, proposed Rule 13n-5(b)(1)(iii) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data that has been submitted to the SDR is accurate.<sup>38</sup> This is in accordance with Exchange Act Section 13(n)(5)(B), which requires an SDR to “confirm with both counterparties to the security-based swap the accuracy of the data that was submitted.”<sup>39</sup>

As noted above, DTCC believes that the Commission should require an SDR to accept all SBSs of a given asset class. In general, equity and credit derivatives will be easy to classify, although it is possible that certain transactions could be mixed and more difficult to classify. DTCC considers classification difficulties are more likely to occur between a swap and an SBS, rather than between SBS asset classes. For example, trades may be constructed based on the correlation between commodities and equities. The Commission can further mitigate this potential problem by combining the loan-based asset class with credit derivatives, and allowing an SBS to be reported to either the equity or credit SDR if there is any uncertainty of a product’s asset class. In practice, SDRs will need to evolve to accept new products and variations in product structures, so this requirement should not impose a significant burden on an SDR in receiving such an SBS.

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<sup>36</sup> See *id.* at 77,369.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *id.* at 77,327.

SDRs should not have additional duties with respect to verifying the accuracy of submission, as there is limited data available to the SDR. The SDR may carry out certain routine functions to identify trades which may indicate erroneous data (*e.g.* based on size), but in general, the primary responsibility for accuracy of reported information should remain with the reporting party.

From a systemic risk oversight perspective, it is imperative that all SBSs are recorded by registered SDRs and that the trade information is accurately and promptly made available for regulators.

### *Position Data*

The Commission's proposed Rule 13n–5(b)(2) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open SBSs for which the SDR maintains records.<sup>40</sup> Position data is required to be provided by an SDR to certain entities pursuant to Exchange Act Section 13(n)(5)(G).<sup>41</sup> In order for the positions to be calculated accurately, the SDR will need to promptly incorporate recently reported transaction data and collected unreported data.<sup>42</sup>

DTCC believes that position data is most valuable when aggregated among all SDRs to accurately reflect a counterparty's true position in a timely manner. Allowing each SDR to calculate positions will result in inaccurate, fragmented reporting to regulators. To this end, DTCC would suggest that one SDR should be given the responsibility to aggregate and maintain the consolidated position data for regulatory purposes.

The Warehouse currently maintains policies and procedures, including technical specifications where automated routines are used, to support position calculation processes. It is DTCC's opinion that where market values are required, they should be provided by firms. Firms invest considerable resources in valuing trades, including personnel, data feeds and capital to assess valuation levels. It would be difficult for an SDR to replicate these activities for all trades, including model selection, trade parameterization to the model, market data sourcing and transformation to model input, and valuation testing. An SDR could contract with a market valuation service to provide some values and this would provide some independent valuation, but this will not readily extend to illiquid or structured products.

Mark-to-market values would be of some use to regulators without collateral information, as regulators may be able to better understand some of the market risk exposures and marking disputes with access to this information. Mark-to-market values would also readily fulfill portfolio reconciliation functions. However, the values would not be useful in assessing counterparty risk exposures without collateral information.

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<sup>40</sup> *See id.* at 77,369.

<sup>41</sup> *See id.* at 77,326.

<sup>42</sup> *See id.* at 77,329.

Many collateral agreements are structured at the portfolio level, so the reporting regime should reflect this, rather than attempt to arbitrarily attribute collateral holdings to individual trades.

#### *Maintain Accurate Data*

Proposed Rule 13n–5(b)(3) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are accurate. Maintaining accurate records is a core function of an SDR.<sup>43</sup> The Commission believes it is important that an SDR has policies and procedures to ensure reasonably the accuracy of the transaction data and positions that it maintains.<sup>44</sup> These policies and procedures could include portfolio reconciliation.<sup>45</sup>

In the current TIW model, the onus is on the customers to ensure the accuracy of the data, and this ensures their records are synchronized with the life cycle event processing and asset servicing offered by the TIW. This model formed the basis of the value proposition of the TIW, namely that the multiple bilateral reconciliations performed between the parties to a trade throughout the life of a trade (and often on an ad hoc basis or only following a dispute), could be replaced by one single reconciliation framework with a shared central record, increasing both operating efficiency as well as reducing operational risks. The Commission’s suggestion for portfolio reconciliation seems well aligned with this, and this would give the direct benefit of improved bilateral portfolio reconciliation processes between the parties.

#### *Controls to Prevent Invalidation*

Proposed Rule 13n–5(b)(5) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR.<sup>46</sup>

DTCC supports the approach that records are not invalidated by the actions of the SDR. Changes to records must be agreed upon between the bilateral parties via the confirmation service platform or via a centralized life cycle event processor. The SDR should be able to offer life cycle event processing and asset servicing activities and these may lead to an update or modification to the records in the SDR. This role is currently supported by the customer contracts of the TIW and is akin to a legal agreement as a third party service provider to the reporting party. DTCC believes that an SDR should be able to act as a provider of additional services to reporting parties and thus, should be able to update a record with the consent of both parties.

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<sup>43</sup> See *id.* at 77,369.

<sup>44</sup> See *id.* at 77,329.

<sup>45</sup> See *id.* at 77,330.

<sup>46</sup> See *id.* at 77,369.

### *Dispute Resolution Procedures*

Proposed Rule 13n-5(b)(6) would require every SDR to establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions maintained by the SDR.<sup>47</sup> The Commission believes this is necessary because the data maintained by the SDR will be used by regulators to make assessments about counterparties, such as whether the counterparty is a major SBS participant.<sup>48</sup> Further, the counterparties also will use this data, and in some cases the data maintained by the SDR may be considered by the counterparties to be the legal record of the SBS.<sup>49</sup>

DTCC recognizes the importance of accurate data at the SDR and believes that an SDR should be in a position to identify disputes or unconfirmed data as part of its process to confirm the data with both parties. However, only the parties to a transaction can resolve any dispute as to the terms of the trade. In many situations, trade reporting will take place through a third party service provider, which act directly as an affirmation, confirmation or verification platform and already utilizes dispute resolution workflows.

For that reason, resolution by the third party service provider will result in updated records being reported to the SDR. DTCC does not support a Proposed Rule that would require that the SDR building processes to replicate these services. It is not the primary role of an SDR to be a matching service, as other service providers act in this capacity, which services should not be bundled with SDR services. Instead, an SDR can make the quality of the data or disputed trades visible to a firm's prudential regulator and this would act as an incentive to timely resolution.

### **Automated Systems**

#### Requirements for SDRs' Automated System

The Proposed Rule provides standards for SDRs with regard to their automated systems' capacity, resiliency, and security, based upon the Commission's current Automation Review Policy ("ARP") program. Proposed Rule 13n-6 would require an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, resiliency, and security; and submit to the Commission annual reviews of its automated systems, systems outage notices, and prior notices of planned system changes.

DTCC believes that the operating hours of an SDR should be 24/6, that processing should be real-time, and that business continuity provisions should include multiple redundant systems. Due to its key position in the financial services industry, DTCC has always placed a high priority on maintaining business resiliency. DTCC has in place

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<sup>47</sup> *See id.*

<sup>48</sup> *See id.* at 77,329.

<sup>49</sup> *See id.*

multiple fully staffed data and operations centers in diverse regions of the country, each capable of handling DTCC's entire business. This infrastructure, when combined with a highly resilient network, allows DTCC to recover from a regional incident and be back in operation within two hours. DTCC performs both data center and operational failover tests every year. Datacenter recovery tests are performed at least six times a year in various configurations, and there are more than two dozen operational failover tests each year, ranging from a single department failover, to an operational recovery involving more than 400 staff. These capabilities are fundamental to any registration as an SDR.

### **Reports to be Provided to the Commission**

The Commission is proposing Rule 13n-8 under the Exchange Act to specify certain reports that the SDR would have to provide to the Commission.<sup>50</sup> Proposed Rule 13n-8 would require an SDR to "promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the [Exchange] Act."<sup>51</sup>

DTCC currently makes information available directly to regulators, having created a web portal for access to scheduled reports, and providing extracts from the TIW's database based on parameters set by regulators. These reports are available in electronic formats. Through this system, DTCC expects to be able to offer acceptable access to the Commission.

### **Privacy of SBS Transaction Information**

In order to fulfill the requirements of the Dodd-Frank Act, the Commission is proposing to require each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity.<sup>52</sup> Each SDR must establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of: (1) any confidential information received by the SDR, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers; (2) material, nonpublic information; and/or (3) intellectual property, such as trading strategies or portfolio positions, by the SDR or any person associated with the SDR for their personal benefit or the benefit of others. Such safeguards, policies, and procedures shall address, without limitation, (a) limiting access to such confidential information, material, nonpublic information, and intellectual property, (b) standards pertaining to the trading by persons associated with the SDR for their personal benefit or the benefit of others, and (c) adequate oversight to ensure compliance of this

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<sup>50</sup> *See id.* at 77,338.

<sup>51</sup> *See id.*

<sup>52</sup> *See id.* at 77,339.

provision.<sup>53</sup> Under the Warehouse's Operating Procedures, users are responsible for adhering to the security procedures promulgated by the Warehouse.

DTCC fully supports the Commission's efforts to protect the privacy of any and all SBS transaction information received by an SDR. Currently, the Warehouse has published Operating Procedures requiring it to treat as confidential (both during and after the termination of a User's access to the System) all confidential information, including transaction data, specified in records received by the Warehouse, any data, reports, summaries or payment amounts which may be produced as a result of processing such transaction data, and the identity of any entity a User uses to settle obligations. DTCC may not transfer or disclose this information to any non-affiliated third party or use information except as expressly contemplated under the Warehouse's Operating Procedures, or as reasonably deemed necessary to provide the services or system, or in response to, for example, subpoenas or regulatory requests.<sup>54</sup>

### **Disclosure to Market Participants**

Proposed Rule 13n-10 would provide that before accepting any SBS data from a market participant or upon a market participant's request, each SDR shall furnish to the market participant a disclosure document that contains the following written information: (1) the SDR's criteria for providing others with access to services offered and data maintained by the SDR; (2) the SDR's criteria for those seeking to connect to or link with the SDR; (3) a description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability to protect the confidentiality and security of such data; (4) a description of the SDR's policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity; (5) a description of the SDR's policies and procedures regarding its noncommercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person; (6) a description of the SDR's dispute resolution procedures involving market participants; (7) a description of all the SDR's services, including any ancillary services; (8) the SDR's updated schedule of any dues, unbundled prices, rates, or other fees for all of its services (including any ancillary services); any discounts or rebates offered, and the criteria to benefit from such discounts or rebates; and (9) a description of the SDR's governance arrangements.<sup>55</sup>

DTCC recognizes the importance of providing market participants with disclosure documents outlining the SDR's policies regarding member participant criteria and the safeguarding and privacy of data submitted to the SDR. The Warehouse ensures that its

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<sup>53</sup> *See id.*

<sup>54</sup> *See* Warehouse Trust Company Operating Procedures, *available at*: <http://www.dtcc.com/customer/membership/derivserv/derivserv.php>.

<sup>55</sup> *See* Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. at 77,340.

users are provided these relevant documents, and makes available copies of its policies to its users on its website.

### **Chief Compliance Officer of Each SDR**

The Commission is proposing Rule 13n–11, which would incorporate the duties of an SDR’s chief compliance officer (“CCO”) that are enumerated in Exchange Act Section 13(n)(6) and impose additional requirements.<sup>56</sup>

#### Enumerated Duties of Chief Compliance Officer

Each SDR must identify on Form SDR a person who has been designated by the board to serve as the CCO of the SDR.<sup>57</sup> The CCO would be responsible for, among other things, keeping the board or the SDR’s chief executive officer apprised of significant compliance issues and advising the board or chief executive officer of needed changes in the SDR’s policies and procedures.<sup>58</sup> The Commission specifies that he or she must be competent and knowledgeable regarding the federal securities laws and must be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the SDR.<sup>59</sup> To meet his or her statutory obligations, a CCO should also have a position of sufficient seniority and authority within the SDR to compel others to adhere to the SDR’s policies and procedures.<sup>60</sup>

DTCC agrees with the Commission that a robust internal compliance function plays an important role in facilitating an SDR’s monitoring of, and compliance with, the requirements of the Exchange Act (and rules thereunder) applicable to SDRs. Requiring a CCO is an appropriate way to further this goal.

DTCC currently has an established compliance infrastructure for its businesses, including the Warehouse, which includes processes for establishing and implementing required compliance policies and procedures and overseeing adherence to those procedures and a mechanism for reporting, tracking, remediating and closing compliance issues whether self-identified or identified through internal or external examinations. DTCC expects to build on this existing operation in establishing the compliance function for an SDR. In light of this experience, DTCC would like to make certain suggestions as to the proposed rules in this area and the implementation of the chief compliance officer requirement. While DTCC fully supports the principles underlying the proposed role and functions of a chief compliance officer, it believes that some of the enumerated responsibilities of that role require clarification in order to avoid an overly broad reading of those duties.

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<sup>56</sup> *See id.* at 77,341.

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

As provided in the Proposed Rule, each CCO shall: (1) report directly to the board or to the chief executive officer of the SDR; (2) review the compliance of the SDR with respect to the requirements and core principles described in Exchange Act Section 13(n); (3) in consultation with the board or the SDR's chief executive officer, resolve any conflicts of interest that may arise; (4) be responsible for administering each policy and procedure that is required to be established pursuant to Exchange Act Section 13; (5) ensure compliance with the rules and regulations under the Exchange Act relating to SBSs, including each rule prescribed by the Commission under Exchange Act Section 13; (6) establish procedures for the remediation of noncompliance issues identified by the CCO through any (a) compliance office review, (b) look-back, (c) internal or external audit finding, (d) self-reported error, or (e) validated complaint; and (7) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.<sup>61</sup>

As noted above, DTCC believes that some of the descriptions of the CCO's responsibilities may be too broad and could be read to encompass responsibilities beyond those traditionally understood to be part of a compliance function (*i.e.*, those issues that can as a matter of competence, and typically would be, handled by a compliance department). In DTCC's view, the CCO should be responsible for establishing relevant compliance procedures, and monitoring compliance with those procedures and other applicable legal requirements. The CCO should also participate in other aspects of the SDR's activities that implicate compliance or regulatory issues. However, the CCO cannot be, and should not be, required to be responsible for the overall operation of the SDR's business. Accordingly, DTCC believes that such requirements as "administering each policy and procedure that is required to be established under" Exchange Act Section 13(n) should be understood in this light.

Similarly, the Commission should recognize that oversight of certain aspects of SDR activities are principally (and, as a practical matter, need to be) within the purview of risk management and operations personnel. Although there may be a regulatory component to whether an SDR is meeting its operational readiness, service level or data security responsibilities for example, oversight of those aspects of the SDR business should remain with the relevant business areas, subject of course to oversight by senior management and ultimately the board of directors. While a CCO may have an important role to play in overall oversight and remediation of any problems, the Commission's rules should not be interpreted to impose on CCOs responsibility outside of their traditional core competencies.

With respect to the requirement to resolve conflicts of interest, DTCC believes that the Commission should clarify what types of conflict of interest should be within the CCO's purview. Some issues, such as permissibility of dealings with related parties or entities, are properly within the CCO's functions. Other issues, such as restrictions on ownership and access, may be fundamental for the board of directors and senior management to address. Furthermore, to the extent that the Proposed Rule requires consultation with the

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<sup>61</sup> *See id.*

board or senior management, some materiality threshold would be appropriate, as not every potential conflict of interest that might be addressed by a CCO (or his or her subordinates) would need such consultation. The determination of materiality is something currently within the CCO's purview to determine based on factors such as nature and scope of the issue and potential exposure.

In addition, in DTCC's view, the Commission should also clarify that the CCO's specific responsibilities related to conflicts are limited to compliance with the provisions of Exchange Act Section 13(n) and the final rules thereunder as they relate to the SBS operations of an SDR. The Commission should not mandate compliance responsibilities with respect to other regulatory requirements to which an SDR may be subject; those responsibilities should be specified by the regulator imposing the other requirements.

### **Points Raised in the Proposed Rule**

In response to the Commission's specific questions in the release, DTCC believes, as a general matter, that the Commission does not need to be overly prescriptive as to the specific compliance responsibilities of the CCO and that SDRs should have some flexibility to implement the required compliance procedures in ways consistent with their structure and business. The SBS markets are continuing to evolve, and will likely change significantly as a result of the introduction of SDRs and other requirements under the Dodd-Frank Act. In light of this ongoing development, DTCC believes SDRs are best suited to determine the most effective way to implement the general requirements of Exchange Act Section 13(n) and Rule 13n-11.

With respect to the question about potential incremental costs, DTCC believes that it is difficult to assess at this time. As noted above, DTCC has an established compliance infrastructure, but it is likely that the new requirements of Rule 13n-11 will entail additional costs, potentially including additional personnel and systems. DTCC also believes that compliance responsibilities in an SDR will evolve (and likely increase) as the scope of transactions reported to that SDR increase, which may also result in additional incremental costs.

In terms of the proposed requirement in Rule 13n-11 for the CCO of an SDR to prepare an annual report as to compliance, DTCC would suggest several clarifications and modifications. First, DTCC believes that any such report should be limited to compliance with the requirements of the Exchange Act and the policies and procedures of the SDR that relate to its activities as such with respect to SBSs (as opposed to policies and procedures that may address other regulatory requirements).

In addition, DTCC does not believe it is appropriate to require the report to include a discussion of recommendations for material changes to the policies and procedures of the SDR as a result of the annual review (as well as the rationale for such recommendations and whether the policies or procedures will be modified as a result of such recommendations). DTCC believes that the inclusion of a description of any material changes to the SDR's policies and procedures, and any material compliance matters

identified both since the date of the preceding compliance report, provide comprehensive information. In DTCC's view, requiring the CCO to detail every recommendation (whether or not accepted) may chill open communication between the CCO and other SDR management (including the board of directors) regarding improvements to the compliance policies and procedures. Such an approach could have the undesirable effect of making it less likely for CCOs to propose improvements to compliance policies and procedures.

As noted above, DTCC also believes that it is not appropriate to place the principal responsibility on a CCO to review such business matters as service levels, cost, pricing and operational reliability for purposes of preventing anticompetitive behavior. DTCC believes that other personnel teams, particularly in the risk management, operational or business areas, are best positioned to perform these functions. Of course, a CCO should be involved in remedying any noncompliance issues discovered during such review.

DTCC firmly believes the annual report should be kept confidential by the Commission. Given the level of disclosure expected to be required, DTCC believes that the report will likely contain confidential and proprietary business information. Such information should not be made available to the public or market participants generally.

DTCC fully supports Commission efforts to require the highest standards of regulatory compliance at SDRs, and believes requiring each SDR to have a CCO is an effective way to ensure compliance.

### **Conclusion**

We appreciate the opportunity to comment on the Commission's Proposed Rule and provide the information set forth above. Should you wish to discuss these comments further, please contact me at 212-855-3240 or [lthompson@dtcc.com](mailto:lthompson@dtcc.com).

Regards,



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