Larry E. Thompson
General Counsel

Tel: 212-855-3240
Fax:212-855-3279
lthompson @dtcc.com

The Depository Trust & Clearing Corporation
55 Water Street
New York, NY 10041-0099

June 10, 2011

The Honorable Mary Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

The Honorable Gary Gensler
Chairman
U.S. Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Chairman Schapiro and Chairman Gensler:

The Depository Trust & Clearing Corporation ("DTCC") appreciates the opportunity to provide additional comments related to the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Dodd-Frank") by the Securities and Exchange Commission ("SEC" or a "Commission") and the Commodity Futures Trading Commission ("CFTC" or a "Commission" and, together with the SEC, the "Commissions"). The following comments supplement those provided to the Commissions on June 3, 2011, which addressed specific substantive points related to the SEC and CFTC's proposed rules (the "Proposed Rules").[1]

DTCC believes that the reporting of all trades – cleared and uncleared – to SDRs should be among the first requirements to be made effective. As noted in comments filed last week, the Commissions need current, accurate trade information to make appropriate decisions related to other parts of the Dodd-Frank Act, including mandatory clearing and mandatory trade execution. SDR trade information will also educate the agencies on the cleared open interest and the kind of liquidations that it may give rise to in order to understand the extent to which restrictions ought to be put on markets. The Commissions should focus first on the products with the greatest automation and then on products with less automation. The more widespread the automated processing, the higher quality the data reported to SDRs. Credit derivatives, the most automated, should be the first, followed by interest rate derivatives, FX derivatives, then commodity and equity derivatives last.

[1] *See* letter to SEC and CFTC dated June 3, 2011.

While the order of implementation is vital to the success of new rules, proper implementation of the Dodd-Frank Act requires more than appropriate phasing of rules. While DTCC generally agrees with the CFTC's phased implementation considerations, it is equally important to focus on the degree of coordination that a successful implementation will require between and among market participants and the three pillars of the Dodd-Frank infrastructure: swap execution facilities, designated contract markets and national securities exchanges ("Trading Platforms"), clearers (clearing agencies and derivatives clearing organizations or "DCOs") and swap data repositories ("SDRs"). Previous comments have been submitted to the Commissions on implementation sequencing. This letter's focus will be on the coordination required for parties to swaps to successfully implement the Dodd-Frank swap data reporting obligations.

Dodd-Frank provides that the market participants themselves have the legal responsibility for swap data reporting, although they may use agents to physically report on their behalf.[2] Therefore, any implementation program needs to start with those parties.

Under the Dodd-Frank infrastructure, most trading parties will likely use multiple and competitive Trading Platforms and DCOs, as well as engage in purely bilateral trading. Under the Proposed Rules, and as permitted by Dodd-Frank, these same Trading Platforms and DCOs will inevitably perform, on their users' behalf, a significant amount of the required reporting to SDRs. It is likely that many of the larger users, as well as much of the remaining user community, with reporting obligations under Dodd-Frank will determine that the best way to ensure full and complete compliance with their own reporting obligations, is to have all of these Trading Platforms and DCOs report to a single SDR that would in turn serve as a single control and reconciliation point for the reporting of their entire swap portfolios, either in any particular asset class or across all asset classes.

In our operational capacity as a non-commercial, at-cost industry utility and with broad user representation on the DTCC board (including both dealers and buy-side), it has been our experience that users with the legal obligations to report the majority of reportable trades have already made this determination. It is here that the application of the twin principles of open access and user choice, which are deeply imbedded in both the letter and the spirit of Dodd-Frank and the Proposed Rules,[3] should be made explicit.

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[2] Section 2(a)(13)(F) of the Commodity Exchange Act, added by 727 of the Dodd-Frank Act, provides that "Parties to a swap (including agents of the parties to a swap) ***shall be responsible*** for reporting swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission." (Emphasis added.) A similar provision governs reporting of security based swaps. It is noteworthy in particular that the statutory language refers to non-parties who may be reporting on behalf of parties as "agents" of the parties, meaning that the parties are legally on the hook for the failures of their agents to comply.

[3] Both Dodd-Frank and the Proposed Rules are virtually littered with requirements that providers in each of the three required legs of the Dodd-Frank infrastructure (Trading Platform, DCOs, and SDRs) maintain strict open access, not provide any artificial barriers to access, not impose anti-competitive burdens on the trading, clearing or reporting of transactions, etc.

The Dodd-Frank Act and the Proposed Rules require that Trading Platforms, DCOs, and SDRs, maintain strict open access, not erect any artificial barriers to access, not impose anti-competitive burdens on the trading, clearing or reporting of transactions, and (at least in certain circumstances, which should be universal) allow for reporting counterparties to dictate where their transaction data is reported.[4] Given the ease with which any one provider, whether Trading Platform, DCO or SDR, can disrupt the reporting implementation, additional clarity regarding specific application of these general principles is essential.

Without such clarity there is a serious risk of disputes, delay and legal challenges. Dodd-Frank clearly defines the SDR role as one that "collects and maintains information…with respect to… swaps entered into by third parties," and the SDR does this with for "***the purpose of*** providing a centralized recordkeeping facility." (emphasis added) The SDR has no interest as a principal to a trade or any other interest than to provide record keeping services for the benefit of regulators and the general public. The more detailed safeguards described below are necessary to protect this role.

DTCC urges the Commissions to issue the following clarifications to protect the implementation and integrity of the trade reporting process:

- *Vertical bundling of services should be explicitly disallowed*. While Trading Platforms and DCOs may also offer repository services, no provider of trading or clearing services should be permitted to simply declare it to also be the SDR for trades that happen to come its way for other purposes. This is particularly important, but not exclusively, when this action would be against the wishes of its customers. Market participants must have the right to contract separately for trading, clearing and repository services.[5] It is important to note here that, aside from being anti-competitive, this type of vertical bundling would also both (a) reverse the principal-agent relationship explicitly set forth in Dodd-Frank (see footnote 4 above) and (b) add a layer of unnecessary risk to the control processes that market participants may determine is needed (*e.g.*, by forcing unwanted multiple control points). Ultimately, the risk of SDR data being incomplete and/or inaccurate would increase.

[4] *See, e.g.*, Core Principles and Other Requirements for Swap Execution Facilities, § 37.202(a) (1), (3), 76 Fed. Reg. 1,214, 1,242 (Jan. 7, 2011) (to be codified at 17 C.F.R. 37); Registration and Regulation of Security-Based Swap Execution Facilities, § 242.810(b)(1)–(3), 76 Fed. Reg. 10,948, 11,060 (Feb. 28, 2011) (to be codified at 17 C.F.R. 240, 242 & 249); Risk Management Requirements for Derivatives Clearing Organizations, § 39.12(a)(1), 76 Fed. Reg. 3,698, 3,719 (Jan. 20, 2011) (to be codified at 17 C.F.R. 39); Clearing Agency Standards for Operation and Governance, § 240.17Ad–22(b)(5)–(6), 76 Fed. Reg. 14,472, 14,538 (Mar. 16, 2011) (to be codified at 17 C.F.R. 240); Swap Data Repositories, §§ 49.19(b), 49.27(a)–(b), 75 Fed. Reg. 80,898, 80,932, 80,937–38 (Dec. 23, 2010) (to be codified at 17 C.F.R. 49); Security-Based Swap Data Repository Registration, Duties, and Core Principles, § 240.13n–4(c)(1), 75 Fed. Reg. 77,306, 77,368 (Dec. 10, 2010) (to be codified at 17 C.F.R. 240 & 249).

[5] This "no bundling" principle should expressly apply relative to all three services, not just reporting.

- *Cross-subsidies between services should also be explicitly disallowed*. The "no bundling" principle described above cannot be fully realized unless the fees charged for these services are determined based upon the true costs of providing each service (*i.e.*, there is no cross-subsidy between services). Nor is this requirement sufficient in itself. While market participants should be able to enjoy the economies of shared platforms (*e.g.*, DCO recordkeeping doubling as SDR recordkeeping where practical), the allocations of platform operating costs between services cannot be arbitrary. If a clearing provider were to simply charge for repository operations at the margin, for example, that would be a clear subsidy.[6] Allocations of the costs of ongoing shared services and generic development need to have a rational basis.

- *Open access is absolute*. Upstream providers should not be permitted to refuse or delay linkages with downstream providers (*e.g.*, Trading Platforms to DCOs and SDRs and DCOs to SDRs) who employ open access principles, such as publicized APIs, standard testing procedures, widely used commercially available links, and others, when there is customer demand for the linkages. Nor should upstream providers be permitted, for competitive or commercial reasons, to prioritize downstream linkages with lower customer demand over downstream linkages with higher customer demand. Conversely, all downstream providers must follow open access principles and must deal with all upstream providers on an impartial basis, regardless of whether they are affiliated or identical with such providers.

- *The Commissions should clarify rules protecting choice and open access generally*. To avoid any provider taking advantage of gaps in specific rules, the Commissions should clarify their rules regarding the following points, which will enhance enforcement: (a) prevent predatory or coercive pricing by providers engaged in any two or more of trading, clearing or repository services, and (b) prevent any other unfair or coercive direct or indirect linking or blocking of links between trading, clearing or repository services.

- *Similar rules should apply to prevent unfair horizontal bundling of services across asset classes*. Finally, identical rules ought to apply within each of the trading, clearing and reporting services under the Dodd-Frank infrastructure to prevent unfair horizontal bundling of services across asset classes. Any provider offering trading clearing or repository services for one asset class should not be permitted any of the above bundling or tying when providing services for other asset classes.

[6] We do not mean, by this example, that costs incurred by a DCO in the original building of its clearing platform ought to be re-allocated every time a new service is added. No company can operate that way (imagine IBM having to re-allocate all of its R&D costs with each new service), and the industry needs to be able to build on past developments and take advantage of prior development projects.

Conclusion

DTCC appreciates the opportunity to offer these comments on the substance and implementation of the above-referenced Proposed Rules. Should the Commissions wish to discuss these comments further, please contact me at 212-855-3240 or lthompson@dtcc.com.

Sincerely yours,

Larry E. Thompson
General Counsel