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Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Access to Data Obtained by Security-Based Swap Data Repositories and Exemption from Indemnification Requirement [File No. S7-15-15]

Dear Mr. Fields,

The Depository Trust & Clearing Corporation (“DTCC”)¹ appreciates the opportunity to provide comments to the Securities and Exchange Commission (“SEC” or “Commission”) on proposed rules on Access to Data Obtained by Security-Based Swap Data Repositories and Exemption from Indemnification Requirement (“Proposed Rules”) under the Securities and Exchange Act of 1934 (“Exchange Act”).²

DTCC has long been a proponent of international data sharing for regulatory oversight purposes and appreciates the Commission’s recognition of the problematic aspects of the indemnification requirements under the Exchange Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). However, for the reasons discussed below, to provide legal certainty with respect to the indemnification requirement, DTCC has consistently called for and continues to believe that a legislative fix is necessary to provide absolute legal certainty.³ The Proposed Rules constitute an important move toward a more productive approach than the status quo, given the uncertain timeline of a permanent legislative remedy.

¹ DTCC provides critical infrastructure to serve all participants in the financial industry, including investors, commercial end-users, broker-dealers, banks, insurance carriers, and mutual funds. DTCC operates as a cooperative that is owned collectively by its users and governed by a diverse Board of Directors. DTCC’s governance structure includes more than 300 shareholders.

² Access to Data Obtained by Security-Based Swap Data Repositories and Exemption from Indemnification Requirement, 80 Fed. Reg. 55,182 (Sept. 14, 2015) (“Proposed Rules”).

³ DTCC has consistently supported proposed legislation to eliminate the Dodd-Frank requirement for swap data repositories to obtain indemnification agreements before sharing information with regulators. For example, DTCC supported the introduction of H.R. 1847 this year, the Swap Data Repository and Clearinghouse Indemnification Correction Act, which would eliminate the Dodd-Frank requirement for swap data repositories to obtain indemnification agreements before sharing information with regulators. In addition, in the House Agriculture Committee hearings regarding the reauthorization of the Commodity Exchange Act, DTCC discussed in its testimony the need for a legislative remedy to the indemnification requirements.

However, it is critically important that any regulatory measure by either the SEC or the Commodity Futures Trading Commission (“CFTC”) that is not completely harmonized with the other agency’s approach will not provide market participants and global regulators with the necessary legal certainty. Accordingly, pending a permanent legislative solution, DTCC recommends that the SEC and CFTC coordinate to promulgate harmonized, consistent regulations that address the indemnification provisions. In this regard, DTCC respectfully submits certain recommendations for the agencies’ consideration when promulgating regulations regarding the indemnification provisions.

DTCC’s Global Operations

DTCC is a user-owned cooperative that serves as the primary financial market infrastructure for the U.S. capital markets across multiple asset classes and has operating facilities and data centers around the world. In addition, following the promulgation of final Dodd-Frank rules governing trade repositories and the reporting of swap and security-based (“SB”) swap data, DTCC has accumulated extensive experience operating repositories through regulated subsidiaries serving the U.S., Europe, Japan, Australia, Singapore, Hong Kong, and Canada. Due to DTCC’s experience supporting regulatory reporting regimes around the world, DTCC is keenly aware of the importance of international data sharing to enhancing market transparency and providing regulators with the necessary tools for effective oversight.

Problematic Nature of the Indemnification Requirement

The indemnification provision under Section 13(n)(5)(H) of the Exchange Act, however, impedes vital data sharing among regulatory authorities globally. Before sharing information with various regulatory authorities,⁴ these provisions require that (1) SB swap data repositories (“SDRs”) “receive a written agreement from each entity stating that the entity shall abide by certain confidentiality requirements . . . relating to the information on [SB] swap transactions that is provided,” and (2) each entity must “agree to indemnify the [SB SDR and the SEC] for any expenses arising from litigation relating to the information provided”⁵

In practice, the Dodd-Frank indemnification provisions have proven to be unworkable. They run counter to policies and procedures adopted by regulatory bodies globally to safeguard and share data, pose a significant barrier to the ability of regulators globally to effectively utilize the transparency offered by SDRs, and may have the effect of precluding U.S. regulators from seeing data housed at non-U.S. repositories.

Indeed, concerns regarding global information sharing have been echoed by regulatory officials and policymakers globally. In an August 2013 report, the Committee on Payment and Settlement Systems and the Board of the International Organization of Securities Commissions highlighted that legal obstacles may preclude trade repositories from providing critical market

⁴ Such regulatory authorities include U.S. prudential regulators, the Financial Stability Oversight Council, the Department of Justice, foreign financial supervisors (including foreign futures authorities), foreign central banks, and foreign ministries.

⁵ Exchange Act § 13(n)(5)(H).

data and encouraged the removal of legal obstacles or restrictions to enable effective and practical access to data.⁶ In addition, legislation focused on resolving issues surrounding the indemnification provisions under Dodd-Frank have garnered bipartisan support,⁷ and SEC and CFTC Commissioners have expressed support for a legislative remedy.⁸

DTCC appreciates the SEC's recognition of the problematic nature of the indemnification provision. In the preamble to the Proposed Rules, the Commission discusses its "understanding that certain authorities may be unable to agree to indemnify a data repository and the Commission."⁹ DTCC agrees with the Commission's assessment that the indemnification requirement should not "frustrate the statutory purposes of data repositories, and hinder relevant authorities' ability to fulfill their regulatory mandates and legal responsibilities."¹⁰ Accordingly, DTCC appreciates the Commission's attempt to address the issues attendant with the indemnification provision.

⁶ See CPSS, *Authorities' Access to Trade Repository Data* (Aug. 2013).

⁷ See, e.g., Promoting Job Creation and Reducing Small Business Burdens Act, H.R. 37, 114th Cong. (2015); Swap Data Repository and Clearinghouse Indemnification Correction Act of 2015, H.R. 1847, 114th Cong. (2015); Commodity End-User Relief Act, H.R. 2289, 114th Cong. (2015); Financial Services and General Government Appropriations Act, 2016, H.R. 2995, 114th Cong. (2015); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2016, H.R. 3049, 114th Cong. (2015); Financial Regulatory Improvement Act of 2015, S. 1484, 114th Cong. (2015); To amend the Commodity Exchange Act to provide end-users with a reasonable amount of time to meet their margin requirements and to repeal certain indemnification requirements for regulatory authorities to obtain access to swap data required to be provided by swaps entities, S. 1560, 114th Cong. (2015); Financial Services and General Government Appropriations Act, 2016, S. 1910, 114th Cong. (2015); An Act Making Appropriations to Stop Regulatory Excess and for Other Purposes, 2016, S. 2132, 114th Cong. (2015).

⁸ SEC Commissioner Michael Piwowar has voiced concern and called for removal of the indemnification provisions. See Commissioner Michael Piwowar, Secs. and Exch. Comm'n, Remarks at the Int'l Swaps and Derivatives Ass'n 30th Annual General Meeting (Apr. 22, 2015). In addition, then Director of the Commission's Office of International Affairs Ethiopis Tafara stated that the Commission "recommends that Congress consider removing the indemnification requirement" of Dodd-Frank, as it "interferes with access to essential information, including information about the cross-border OTC derivatives markets." See Testimony of Director Tafara Before the H. Fin. Servs. Subcomm. on Capital Mkts. and Gov't Sponsored Enters. (Mar. 21, 2012).

CFTC Chairman Timothy Massad has indicated that removal of the indemnification provisions would facilitate the sharing of information and collaboration among regulators to monitor risk by stating that if legislation "did remove [the indemnification] provision, then it would facilitate . . . the sharing of information." See 2015 Agenda for CFTC: Hearing Before the H. Comm. On Ag., 114th Cong. (2015) (colloquy between Chairman Massad and Congressman Eric Crawford). In addition, CFTC Commissioner J. Christopher Giancarlo identified indemnification as a priority issue and expressed support for a legislative fix. See Testimony of CFTC Commissioner J. Christopher Giancarlo Before the H. Comm. on Agric., Subcomm. on Commodity Exchanges, Energy, and Credit (Apr. 14, 2015).

⁹ See Proposed Rules, at 55,183.

¹⁰ See *id.*

Recommendations for Regulations on the Indemnification Provisions

Given the necessity of harmonized, consistent regulations with respect to the indemnification provisions, DTCC submits the following recommendations for the SEC and the CFTC's consideration in light of the proposed requirements offered under the Proposed Rules.

Notification Requirement

DTCC is concerned that a proposed notification requirement as in the Proposed Rules would have a chilling effect on non-U.S. regulators seeking access to data held in U.S. registered data repositories. Under proposed rule 240.13n-4(e), an SB SDR would be required to "inform the Commission upon its receipt of the first request for [SB] swap data from a particular entity"¹¹ The Commission explains that the SB SDR would also need to maintain records "of all information" related to the initial and subsequent requests for data access, including "[t]he identity of the requestor or person accessing the data; the date, time and substance of the request or access; and copies of all data reports or other aggregations of data provided in connection with the request or access."¹²

Based on DTCC's experience with providing regulators globally with data access under voluntary reporting commitments to the OTC Derivatives Regulators Forum ("ODRF"), DTCC understands the importance of anonymity and confidentiality to regulators seeking information from a data repository and opposes the proposed notification for the following reasons.¹³ First, if the Commission were to require SB SDRs to notify the Commission after receiving a data access request, other regulatory authorities may hesitate to make such a request, particularly if such request is in connection with an investigation. In addition, over-the-counter ("OTC") SB swap transactions are conducted on a global basis in contrast to the more regionalized securities markets historically overseen by various securities regulators. Given the global nature of the SB swap markets, DTCC respectfully submits that the Commission should not establish any regulatory impediments, such as a notice requirement, to the free-flowing of information among regulators. Lastly, information sharing has grown more automated with technological advances, yet the notice requirement would impede the ability of regulators around the world to have real-time access to information because an SB SDR would be required to submit a notification to the Commission before sharing data.

Due to the foreseeable impact of a notification requirement, DTCC respectfully submits that any rulemaking should not include such a notification requirement or, at minimum, should not require a data repository to submit the identity of the requesting party to the SEC or CFTC.

¹¹ *Id.* at 55,211.

¹² *Id.* at 55,189.

¹³ See Letter from OTC Derivatives Regulators' Forum to the Warehouse Trust Company (June 18, 2010), available at <http://dtcc.com/~media/Files/Downloads/Data-and-Repository-Services/GTR/GTR-Europe/tiw044.zip>.

Data Access by Regulatory Authorities

Under the Proposed Rules, the Commission “specifically identif[ies], as being eligible to access data, each of the entities encompassed within the statutory ‘prudential regulator’ definition.”¹⁴ For the sake of clarity, in addition to those other regulatory authorities specifically enumerated under the Exchange Act, DTCC appreciates the Commission’s identification of the prudential regulators that would be subject to a regulatory exemption from the indemnification requirement. DTCC believes, however, that with respect to other entities, the Commission should determine on a case-by-case basis whether an SB SDR should make available confidential swap data based on the unique set of facts and circumstances of that request for information and address permissible uses and disclosures of such data, such as for research or publications. This approach would ensure that the Commission (or the CFTC, in a parallel rulemaking) takes a careful, deliberative approach with respect to ensuring data access is granted based on an entity’s regulatory mandate, responsibly balances the need for efficient, timely information sharing, and avoids overly expansive access to confidential information.

Need for a Legislative Remedy

As noted above, while DTCC appreciates the Commission’s attempt in the Proposed Rules to address the issues related to the indemnification provision, for the following reasons, DTCC continues to believe that a legislative remedy that eliminates the Exchange Act requirement for SB SDRs (and the corresponding Commodity Exchange Act (“CEA”) requirement for SDRs) to obtain indemnification agreements before sharing information with regulators is necessary to remove all uncertainty related to the indemnification provision.

First, notwithstanding any Commission rule related to the indemnification provision, the plain language of the mandate leaves an SB SDR uncertain as to potential accusations that it has failed to comply with the statutory provision. As a result, while the SB SDR may operate in compliance with the Commission’s exemption under proposed rule § 240.13n-4(d), the SB SDR risks being found to operate in direct contravention with the statutory requirement set forth in Exchange Act § 13(n)(5)(H). The risk of statutory liability, while it may be mitigated by a Commission rule, does not provide the same certainty for SB SDRs and regulators globally as would be the case if the provision were completely removed by Congress.

In addition, the agencies charged with carrying out the indemnification provisions have taken different procedural approaches. While the Commission’s proposal, if adopted, provides market participants with an exemption by regulation, the CFTC chose to address the issue through interpretive guidance. DTCC believes that the disparate methods could give rise to regulatory interpretation and compliance complexities for a data repository dually-registered with both agencies. It would also be tremendously difficult for such a dually-registered data repository to create separate procedural workflows to comply with any differences in the CFTC and SEC rules or interpretive guidance for indemnification. In other words, if one of the enumerated regulatory authorities requested information from a dually-registered data repository for swap and SB swap data, the dually-registered data repository would have to conduct two parallel work procedures to

¹⁴ Proposed Rules, at 55,185.

comply with, on one hand, the SEC's exemptive regulation and, on the other hand, the CFTC's interpretive guidance. Not only would disparate approaches impose unnecessary regulatory burdens on SDRs and global regulators for comparable statutory mandates under the Exchange Act and the CEA, but DTCC also submits that such complexity would cause regulatory uncertainties, including with respect to mixed swaps, which are subject to the jurisdiction of both the Commission and the CFTC.

For these reasons, DTCC believes that a legislative remedy is solely capable of not only providing complete regulatory certainty for registered data repositories, but also enabling the timely, efficient sharing of data among domestic and international regulatory authorities. Until such time as a legislative remedy is achieved, however, DTCC submits that harmonized rulemakings by the SEC and the CFTC would constitute an important move in a more productive direction than the status quo in terms of addressing the indemnification issues.

* * *

DTCC appreciates the Commission's recognition of the problematic aspects of the indemnification requirements under the Exchange Act and attempt to address such issues through a formal Administrative Procedure Act rulemaking. For the reasons discussed herein, while DTCC continues to strongly believe that a legislative remedy is necessary, the Proposed Rules constitute an important move toward a more productive approach than the status quo, given the uncertain timeline of a legislative remedy. As an interim measure, however, DTCC respectfully submits that the SEC and CFTC should coordinate to promulgate harmonized, consistent regulations that address the indemnification provisions.

Should the Commission wish to discuss these comments further, please contact me at [REDACTED] or [REDACTED].

Sincerely yours,



Larry E. Thompson
General Counsel

cc: Christopher Kirkpatrick, Secretary of the CFTC