

April 16, 2019

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

RE: File Number S7-28-18
Risk Mitigation Techniques for Uncleared Security-Based Swaps

Dear Mr. Fields,

The Depository Trust & Clearing Corporation (“DTCC”),¹ in conjunction with its swap data repository, DTCC Data Repository (U.S.) LLC (“DDR”) and ICE Trade Vault, LLC (“ICE Trade Vault”), appreciate the opportunity to provide comments to the U.S. Securities and Exchange Commission (“Commission”) related to the proposed rules addressing risk mitigation techniques for security-based swaps not submitted for clearing (the “Proposed Rules”).² The comments below are specifically related to the obligation of a security-based swap data repository (“SDR”) to confirm with both counterparties to the security-based swap the accuracy of the data submitted (the “SDR Confirmation Obligation”).³

DTCC and ICE Trade Vault appreciate the Commission’s attention to the SDR Confirmation Obligation. Specifically, the Commission’s recognition that requiring a SDR to verify trade details with a counterparty with which it has no relationship presents inherent challenges.⁴ As discussed

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. DTCC operates four trade repositories in North America, Europe and Asia, serving seven jurisdictions. DDR, which is the swap data repository that would apply for registration as a security-based swap data repository, was provisionally registered by the CFTC on September 29, 2012, and as a designated or recognized trade repository in all Canadian provinces and territories in 2014 and 2016. Affiliates of DDR operate other regulated trade repositories in Europe and Asia.

² Risk Mitigation Techniques for Uncleared Security-Based Swaps, Exchange Act Release No. 84861, 84 FR 4614 (February 15, 2019) (“Risk Mitigation Proposing Release”).

³ Exchange Act Section 13(n)(5)(B), 17 C.F.R. 240.13n-4(b)(3) (2015) (requires the SDR to “[c]onfirm, as prescribed in Rule 13n-5 (§240.13n-5), with both counterparties to the security-based swap the accuracy of the data that was submitted.”), 17 C.F.R. 240.13n-5(b)(1)(iii) (2015) (requires the SDR to “establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself that the transaction data that has been submitted to the security-based swap data repository is complete and accurate, and clearly identifies the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of the transaction data.”).

⁴ Risk Mitigation Proposing Release, 84 FR at 4634, *supra* note 2 (“The Commission understands these concerns and the difficulty SDRs could face when attempting to contact counterparties to a security-based swap transaction with whom the SDR has no existing relationship.”).

in the letter from DTCC to the Commission dated September 22, 2017,⁵ and the ICE Trade Vault letter to the Commission dated September 26, 2017,⁶ the SDR cannot compel the non-reporting side to cooperate in the confirmation process and the non-reporting side has no incentive to do so.⁷ Accordingly, a SDR is unable to control its own ability to comply with a regulatory requirement.

To respond to the questions presented by the Commission in the Risk Mitigation Proposing Release, DTCC and ICE Trade Vault agree with the Commission's analysis that the Proposed Rules (including the definition of "material terms" in proposed Rule 15Fi-1(i)) *could* help address concerns identified in the 2017 DTCC Letter and the 2017 ICE Trade Vault Letter with respect to the SDR Confirmation Obligation *for a portion* of the security-based swaps submitted to the SDR. Specifically, DTCC and ICE Trade Vault believe the Proposed Rules provide a sufficient basis for a SDR to *reasonably* rely on a SBS Entity⁸ to independently provide the definitive report of a given security-based swap position in satisfaction of its SDR Confirmation Obligation.

However, because the Proposed Rules and Risk Mitigation Proposing Release (i) do not define the steps a SDR must take for its reliance on the submission of a SBS Entity to be reasonable⁹ and (ii) do not provide definitive confirmation that reasonable reliance on the submission of a SBS Entity fulfills the SDR Confirmation Obligation,¹⁰ DTCC and ICE Trade Vault do not believe the Commission has provided the regulatory certainty necessary for a SDR to rely on a SBS Entity submission to satisfy its SDR Confirmation Obligation. In addition, as the Proposed Rules are not applicable to all submitters of information to the SDR, reliance on submitters subject to the

⁵ Letter from Michael C. Bodson, President and Chief Executive Officer, The Depository Trust & Clearing Corporation, and Larry E. Thompson, Chairman, DTCC Data Repository (U.S.) LLC, Managing Director and Vice Chairman, The Depository Trust & Clearing Corporation, dated Sept. 22, 2017, (discussing issues with outreach to the non-reporting side of a security-based swap when that non-reporting counterparty is not a member of a SDR and proposing that Section 13(n)(5)(B) and corresponding Rule 13n-4(b)(3) be interpreted as requiring SDRs to confirm the accuracy of the security-based swap solely with counterparties who are its members) (the "2017 DTCC Letter"). In addition, please be advised that to the extent not otherwise addressed herein, the issues, and requests, set forth in the 2017 DTCC Letter remain applicable.

⁶ ICE Trade Vault Request for Exemptive or Interpretive Relief from Certain Provisions of Section 13(n)(1) of the Securities Exchange Act of 1934 and the Rules and Regulations (Sept. 26, 2017) (the "2017 ICE Trade Vault Letter").

⁷ 2017 DTCC Letter at 3, *supra* note 5 ("While the duty of the SBSDR is to confirm the accuracy of the data with both counterparties, the obligation to report a security-based swap to the Commission is only required of the reporting side. Yet the statute and regulations provide no mechanism for the SBSDR to compel the non-reporting side to cooperate in the confirmation process and no incentive for the non-reporting side to do so. . . . Accordingly, operationally and legally, DDR is limited with respect to outreach to the non-reporting side if they are not Users.").

⁸ "SBS Entity" as a registered security-based swap dealer and /or a registered major security-based swap participant.

⁹ Risk Mitigation Proposing Release, 84 FR at 4634, *supra* note 2 ("Such reliance *could be based, at least in part,* on that fact that the SBS Entity would be subject to the portfolio reconciliation requirements in proposed Rule 15Fi-3 using the proposed definition of "material terms" in Rule 15Fi-1(i), were it to be adopted, to initially reconcile all of the terms of a transaction required to be reported to an SDR or the Commission pursuant to Rule 901, particularly in cases when the SBS Entity's counterparty is not onboarded to the SDR." (emphasis added)).

¹⁰ Risk Mitigation Proposing Release, 84 FR at 4634, *supra* note 2 ("Accordingly, like the previous example involving the third-party confirmation process, *it may be appropriate* to allow an SDR to meet its obligations by reasonably relying on an SBS Entity." (emphasis added)).

Proposed Rules would only be a partial solution to the concerns identified in the 2017 DTCC Letter and the 2017 ICE Trade Vault Letter.

i. Reliance on SBS Entity Submissions

In the Risk Mitigation Proposing Release, the Commission indicates that a SDR may need to evaluate information beyond the existence of the Proposed Rules to determine if reliance on an SBS Entity is reasonable.¹¹ This language suggests that a SDR would be required to take additional steps to demonstrate that reliance on an SBS Entity is reasonable but does not define those steps. The Commission goes on to refer to commentary in the SBSDR Adopting Release, where entity-specific evaluations were described as a prerequisite for reasonable reliance.¹² DTCC and ICE Trade Vault believe it should not be necessary for a SDR to conduct entity specific evaluations to reasonably rely on a submission by or on behalf of a SBS Entity.

As the Proposed Rules impose clear independent confirmation¹³ obligations on SBS Entities, DTCC and ICE Trade Vault believe these would, in and of themselves, make it reasonable for a SDR to rely on submissions by or on behalf of¹⁴ a SBS Entity in connection with the satisfaction of its SDR Confirmation Obligation. Further, Dodd-Frank defines the role of a SDR as one that “collects and maintains information...with respect to... swaps entered into by third parties,” and the SDR does this with “the purpose of providing a centralized recordkeeping facility.”¹⁵ DTCC and ICE Trade Vault believe entity specific evaluations go beyond the SDR’s proper role to store and report data, which would impose a burden on the resources of a SDR outside the statutory requirements. These additional evaluations would also be inherently subjective, creating a risk

¹¹ Risk Mitigation Proposing Release, 84 FR at 4634, *supra* note 2 (“Such reliance could be based, at least in part, on that fact that the SBS Entity would be subject to the portfolio reconciliation requirements in proposed Rule 15Fi-3 using the proposed definition of “material terms” in Rule 15Fi-1(i), were it to be adopted, to initially reconcile all of the terms of a transaction required to be reported to an SDR or the Commission pursuant to Rule 901, particularly in cases when the SBS Entity’s counterparty is not onboarded to the SDR.” (emphasis added)).

¹² Risk Mitigation Proposing Release, 84 FR at 4634, *supra* note 2. (“For example, the Commission previously stated that if an SDR develops reasonable policies and procedures that rely on confirmations completed by another entity, such as a third-party confirmation provider, as long as such reliance is reasonable the SDR could use such confirmation to fulfill its obligations under certain SDR rules.”). Referencing the Commission’s statement in the SBSDR Adopting Release where reasonable reliance is described in entity specific terms. *See* Security-Based Swap Data Repository Registration, Duties, and Core Principles, Exchange Act Release No. 74246 (Feb. 11, 2015, 80 FR 14437 at 14491 (Mar. 19, 2015) (codified at 17 C.F.R §240.13n-1 et seq.(2016)) (“SBSDR Adopting Release”) (“In order for such policies and procedures establishing reliance on a third party to be reasonable, the SDR would need to oversee and supervise the performance of the third-party confirmation provider. This could include having policies and procedures in place to monitor the third-party confirmation provider’s compliance with the terms of any agreements and to assess the third-party confirmation provider’s continued fitness and ability to perform the confirmations. It could also include having the SDR or an independent auditor inspect or test the performance of the third-party confirmation provider, with the SDR retaining records of such inspections or tests.” (emphasis added)). *See also* Id. (“However, the SDR would not comply with Exchange Act Section 13(n)(5)(B), Rule 13n-4(b)(3), and this Rule 13n-5(b)(1)(iii) if the confirmation proves to be inaccurate and the SDR’s reliance on the SB SEF for providing accurate confirmations was unreasonable (e.g., the SDR ignored a pattern of inaccuracies or red flags).”).

¹³ This confirmation would be completed by the parties in the best position to identify and resolve any inaccuracy in the data.

¹⁴ Because a SBS Entity would be responsible for confirming data accuracy even if submitted by a third party, DTCC and ICE Trade Vault believe it would be reasonable for a SDR to rely on the third party or agent submission in the same way it would on a direct SBS Entity submission.

¹⁵ Section 1(a)(48) of the Commodity Exchange Act, as amended by Section 721 of the Dodd-Frank Act; Section 3(a)(75) of the Securities Exchange Act of 1934, as amended by Section 761 of the Dodd-Frank Act.

that the Commission could disagree as to the reasonableness of relying on a particular SBS Entity or submission. This risk would cause the unintended consequence of undermining the comfort a SDR should have to rely on submissions by SBS Entities in connection with the satisfaction of its SDR Confirmation Obligation. Finally, such evaluations raise questions as to how a SDR should treat a submission by an entity when it cannot confirm reliance is reasonable, which would require additional guidance from the Commission as to the steps the SDR could take if it is unable to confirm an entity or submission meets the requirements for reasonable reliance (e.g. could the SDR reject the submission?).

Accordingly, DTCC and ICE Trade Vault suggest that the Commission issue definitive guidance making clear that the SDR acts reasonably when it relies on submissions by or on behalf of a SBS Entity without requiring additional entity-specific evaluations and that these submissions, together with the policies and procedures described in the 2017 DTCC Letter and the 2017 ICE Trade Vault Letter¹⁶, fulfill the SDR Confirmation Obligation.

As an alternative to the definitive guidance discussed above, the Commission could also provide an exemption from the SDR Confirmation Obligation for a SDR that relies on submissions by or on behalf of a SBS Entity. Such an exemption could effectively resolve the issues highlighted in the 2017 DTCC Letter and the 2017 ICE Trade Vault Letter for all submissions by or on behalf of a SBS Entity provided: (i) the relief is permanent; and (ii) the scope of the relief is broad enough to cover all submissions by or on behalf of a SBS Entity.

ii. Additional Submitters

Relying on submissions by or on behalf of a SBS Entity to provide the definitive report of a given security-based swap is not a complete solution to the concerns related to the SDR Confirmation Obligation.¹⁷ Submitters of information to the SDR are not limited to SBS Entities or those submitting on their behalf (e.g. agent submissions¹⁸, end users, clearing agencies, etc.). Thus, a portion of the data submitted to the SDR would not be covered by a solution applicable only to submissions by or on behalf of SBS Entities. For these other submissions, the concerns identified in the 2017 DTCC Letter and the 2017 ICE Trade Vault Letter remain applicable.

To specifically address how the SDR Confirmation Obligation applies to cleared security-based swaps, DTCC and ICE Trade Vault request that the Commission publish guidance making clear that a SDR may rely on existing market infrastructures, such as clearing agencies, for the confirmation and verification of cleared security-based swap trade submissions. Recognizing that an SDR has an important role in facilitating data quality, DTCC and ICE Trade Vault recommend that SDRs be able to reasonably allocate, by written contract, after a thorough due diligence

¹⁶ These include a contractual requirement that the SBS Entity keep data accurate and up-to-date and provide a means for the SBS Entity to identify errors, dispute trades and exit or amend the trades as needed.

¹⁷ See the discussion on the 2017 DTCC Letter for additional detail.

¹⁸ As used in this context, an agent submission is a submission by the counterparty that does not have the reporting obligation on behalf of the counterparty with the reporting obligation. In this case, the SDR would not know the counterparty with the reporting obligation, only the counterparty without the reporting obligation.

review, and based upon the SDR forming a reasonable belief that the swap data is accurate, the verification of trade details to a regulated clearing agency.¹⁹

DTCC and ICE Trade Vault request that the Commission address these submissions through interpretive guidance or exemptive relief and make clear that (i) the relief is permanent and (ii) the scope of the relief is broad enough to cover all submissions to the SDR not covered under an approach applicable only to SBS Entity submissions.

Conclusion

DTCC and ICE Trade Vault appreciate the opportunity to comment on the Commission's Proposed Rules. As discussed above, the reconciliation process set forth in the Proposed Rules presents the possibility for a partial solution to the concerns identified in the 2017 DTCC Letter and the 2017 ICE Trade Vault Letter with respect to the SDR Confirmation Obligation. However, as this would not resolve all issues related to the SDR Confirmation Obligation or the additional concerns identified in the 2017 DTCC Letter and the 2017 ICE Trade Vault Letter, DTCC and ICE Trade Vault reiterate the requests set forth in the 2017 DTCC Letter and the 2017 ICE Trade Vault Letter.

Should the Commission wish to discuss these comments further, for DTCC, please contact Katherine Delp at [REDACTED] or [REDACTED], and, for ICE Trade Vault, please contact Kara Dutta at [REDACTED] or [REDACTED].

Sincerely yours,



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Executive Director
The Depository Trust & Clearing Corporation



Kara Dutta
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¹⁹ The SEC adopted a similar approach in its Rule 15c3-5, which permits a broker or dealer with market access to reasonably allocate control over specific regulatory risk management and supervisory procedures to a broker dealer customer. See paragraph (d)(1) of Rule 15c3-5. This is consistent with the approach the CFTC has adopted for submissions by or behalf of derivatives clearing organizations. Under the CFTC approach, the SDR is not required to affirmatively communicate with both counterparties when the data is received from a derivatives clearing organization. Swap Data Repositories: Registration Standards, Duties and Core Principals, Final Rule, 76 FR 54538 at 54547 (September 1, 2011). In this context, a SDR would be able to form a reasonable belief that the swap data is accurate through a contractual requirement that the registered clearing agency keep data accurate and up-to-date and by providing a means for the registered clearing agency to identify errors, dispute trades and exit or amend the trades as needed.