H.R. ____, THE SWAP DATA REPOSITORY AND CLEARINGHOUSE INDEMNIFICATION CORRECTION ACT OF 2012

HEARING

BEFORE THE

SUBCOMMITTEE ON CAPITAL MARKETS AND GOVERNMENT SPONSORED ENTERPRISES

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

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H.R. ____, THE SWAP DATA REPOSITORY AND CLEARINGHOUSE INDEMNIFICATION CORRECTION ACT OF 2012

Wednesday, March 21, 2012

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CAPITAL MARKETS AND
GOVERNMENT SPONSORED ENTERPRISES,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 2128, Rayburn House Office Building, Hon. Scott Garrett [chairman of the subcommittee] presiding.

Members present: Representatives Garrett, Schweikert, Posey, Fitzpatrick, Hayworth, Hurt, Stivers; Waters, Maloney, Moore, Donnelly, Peters, and Green.

Chairman GARRETT. Good morning, sorry to make you sit there and wait. Today's Subcommittee on Capital Markets and Government Sponsored Enterprises hearing is called to order.

The hearing will come to order. Today's hearing is on the Swap Data Repository Clearinghouse Indemnification Correction Act of 2012.

We will be looking to our panel in a moment, but first, we will begin with opening statements from the folks up here, 10 minutes on each side.

I will recognize myself for 4 minutes, and then see if there are any other Members on our side with an opening statement.

Again, thank you gentlemen.

So to begin, I think, hopefully, one thing we might be able to agree on is that the Dodd-Frank Act is not totally perfect in every aspect. And therefore, it does require at least some degree of scrutiny, especially what we are looking at now with Title VII.

We have held numerous hearings here in this committee, and I sponsored and cosponsored a number of bills, many of which, as you know, have been done in a bipartisan manner.

And what were they for? They would try to address some of the problems and try to clarify some of the congressional intent in Dodd-Frank, and specifically again in Title VII.

So today, we are here to discuss another issue with Dodd-Frank that may not be as high profile as some of the other hearings that we have had. It does require correction, nonetheless. The issue that we are talking about today is indemnification.

Thankfully, the CFTC and the SEC, as well as many of my colleagues on both sides of the aisle, do recognize that a repeal of the

indemnification provisions in Title VII is required in order to avoid fragmentation in the collection of swap data, and to bring about regulatory transparency to the overall swaps marketplace.

While it is important for the U.S. regulators to collect and also then to analyze swap data, it is equally important for U.S. regulators to share data with foreign regulators in order to thoroughly understand and monitor where the risk is concentrated actually in the entirety of the global swaps market.

And so, while today's indemnification issue is really a little more technical in nature than some of the other issues that we talk about, the issue of extraterritoriality in global swap markets regulations certainly is not that technical in the same respect.

Today, neither the CFTC nor the SEC has proposed rules that will define the scope of the Dodd-Frank extraterritorial reach, and so in essence, the failure to define the reach of clearing, of execution, of capital, of margin, of Volcker, and of other reporting obligations. What that is all doing is preventing market participants from taking the steps necessary to ensure their operations will comply with Dodd-Frank.

So to correct this problem, I have cosponsored a bipartisan piece of legislation with Mr. Himes from Connecticut. And what this does is bring certainty then to this one area, to this issue, that will then be marked up hopefully in the full committee next week.

I cannot be clear enough on this issue. Consistent regulation is fundamental across all lines actually, but especially to the efficient functioning and successful regulation of the derivatives U.S. marketplace.

And in order to reduce systemic risk and to limit the opportunities for regulatory arbitrage, as well as the loss of jobs to going overseas, we cannot afford an inconsistent approach on issues of extraterritoriality among international regulators.

So I am hopeful that we can move this bill through the House pretty quickly. I am also hopeful that the Senate will finally realize that Dodd-Frank is not completely perfect, and that they are willing to take up some of these issues. Maybe it does require some changes for our markets to function properly, and for regulators to understand where and how the risk is concentrated in the overall global system.

I will look forward to hearing the testimony from our witnesses from the SEC, the CFTC, and the DTCC in a moment.

And with that, I yield back.

I recognize the gentlelady from California for her opening statement for—

Ms. WATERS. Thank you very much, Mr. Chairman—

Chairman GARRETT. —4 minutes?

Ms. WATERS. Fine—

Chairman GARRETT. Fine.

Ms. WATERS. I probably don't need that much.

Chairman GARRETT. Okay.

Ms. WATERS. I thank you for holding the hearing this morning.

One of the most important reforms included in Dodd-Frank is our comprehensive regulation of over-the-counter derivatives.

When swaps and security-based swaps are transparent and data is readily available, regulators are able to monitor the exposure of

counterparties, identify risk concentrations, and limit the possibility of another systemic crisis like the one we experienced in 2008.

Swap data repositories are the entities that are responsible for collecting and storing this data on the over-the-counter derivatives. And global regulators have recognized the importance of requiring—reporting to these types of entities as a part of derivatives reform.

Now, I understand that certain provisions in Title VII of Dodd-Frank would require that any U.S. or foreign authority that agreed to provide indemnification to a swap data repository, and the SEC or CFTC for any expenses arising from litigation as a precondition for receiving swaps data.

Foreign regulators have raised a concern that this actually creates a barrier to them gaining access to critical swap data, particularly since they may lack the legal authority to enter into the required indemnification.

These provisions may also have the unintended consequence of fragmenting global swaps reporting in order to circumvent this requirement. One possible consequence is that global regulators could advance their reciprocal provision, thereby harming the ability of U.S. regulators to access data from foreign trade repositories.

So with that said, I am interested to hear more about this issue from the regulators here today as well as the Depository Trust and Clearing Corporation.

I am also eager to hear from Representatives Dold and Moore about the bill that would strike the underlying indemnification provision in Dodd-Frank which many believe is problematic.

I thank you, and I yield back the balance of my time.

Chairman GARRETT. I thank you.

The gentlelady yields back.

And I see no other speakers on our side.

Ms. Moore is recognized for 2 minutes.

Ms. MOORE. Thank you so much, Mr. Chairman, and Madam Ranking Member. I want to thank the witnesses for their appearance today.

I am so pleased to be a sponsor of this bipartisan legislation, the Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012.

This bill is the result of a tremendous collaboration among Republicans and Democrats on this committee, industry, and the regulators, and I might add that there has also been international collaboration and support for this bill.

I am a strong supporter of the new transparency regime for the over-the-counter swaps market enacted in Dodd-Frank, and I am very proud of our work there.

And I firmly believe that this bill will enhance the viability and functioning of the swap data repositories.

By removing the indemnification provision, we do not compromise. I repeat, we do not compromise the legal framework or erode any market protections for market participants on either side of the water.

The bill is consistent with the important goals regarding clearing and reporting of over-the-counter swaps agreed to at the 2009

International G-20 Meeting and that were eventually enshrined in Dodd-Frank.

This bill promotes both better market pricing information and better regulatory oversight of the OTC market, including the tracking and management of systemic risk globally.

This bill represents a small but a highly technical fix which is desperately needed. And it is vital to maintaining the integrity of domestic and global OTC market regulations.

In plain language, the bill strikes the requirement that non-U.S. regulators "indemnify U.S. regulators and private U.S. markets."

It is a requirement that a significant number of non-U.S. regulators would be unable to, and quite frankly, unwilling to comply with for various legal and other reasons.

Accordingly and unfortunately, we have already seen foreign jurisdictions thinking to establish their own SDRs, if only to get around the indemnification issue.

The proliferation of SDRs would have the unwanted effect of undermining global transparency and oversight by promoting the fragmentation of market information, and discouraging data sharing across global markets.

Republicans, Democrats, industry, and regulators agree that striking the indemnification provision would encourage global OTC swap market function and oversight.

I am so pleased that there is such a remarkable concensus on the indemnification issue. And therefore, I now look forward to hearing from today's witnesses, especially the regulators, regarding their views on the related issue of U.S. regulators having plenary access to all information warehouse and U.S.-based SDRs, even trade information that the U.S. regulator does not have a nexus to.

It is my sense that while we are dealing with the indemnification issue, it may also make sense to learn a lot more about, and possibly deal with, the plenary access issue.

So therefore, I thank you, and I look forward to hearing your testimony.

And with that, I yield back.

Chairman GARRETT. Thanks.

The gentlelady yields back.

And now seeing no other requests for time, we welcome our panel this morning from both the SEC and the CFTC.

As always, your complete written statements will be made a part of the record. We look forward now to hearing from you for the next 5 minutes.

Mr. Tafara, from the SEC, welcome and good morning.

STATEMENT OF ETHIOPIS TAFARA, DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS, U.S. SECURITIES AND EXCHANGE COMMISSION (SEC)

Mr. TAFARA. Thank you, Chairman Garrett, Ranking Member Waters, and members of the subcommittee.

Thank you very much for the opportunity to testify on behalf of the Securities and Exchange Commission on the topic of indemnification of security-based swap data repositories.

As you know, Section 763(i) of the Dodd-Frank Act added a new provision to the Securities Exchange Act that requires any U.S. or

foreign authority, other than the SEC, to indemnify both the SEC and security-based swap data repositories for any expenses arising from the litigation relating to the information provided by the repository.

The indemnification requirement presents a barrier to U.S. and foreign governmental agencies' ability to obtain data from a security-based swap data repository. This is because generally speaking, U.S. and most other foreign governmental entities lack the legal authority to enter into such an indemnification agreement.

One of the lessons of the 2008 financial crisis is the importance of ensuring that regulators have timely and comprehensive data about over-the-counter derivatives transactions. Improved transparency of swaps and security-based swaps enables the regulators to monitor the derivative exposure of counterparties to identify risk concentrations and to monitor systemic risks.

Trade repositories can be thought of as electronic filing cabinets for information about derivative transactions, and serve as centralized locations where regulators can obtain data on open OTC derivative contracts.

The establishment of trade repositories and reporting of data to them is a particularly important element of derivatives regulation, because trade repositories offer a venue for regulators from different jurisdictions, to obtain information about cross-border OTC derivative transactions.

Without trade repositories and the ability to access them in a timely and reliable fashion, regulators, including U.S. regulators, would be challenged in carrying out their responsibility to oversee the OTC derivatives markets; a responsibility necessary to reduce threats to financial stability, to increase transparency, and to improve the integrity of the OTC derivatives marketplace.

Given the limitation that the Section 763(i) indemnification requirement would place on regulators' access to data held by an SEC-registered data repository, foreign regulators, through formal and informal contact, have voiced strong concerns about the requirements to SEC Commissioners and to SEC staff.

U.S. and foreign regulators share a common need to have access to data about OTC derivatives transactions, especially those transactions that take place across borders.

In order to protect their access to security-based swap data, some foreign regulators have indicated to SEC staff that they plan to respond to the U.S. indemnification requirement by setting up, or encouraging the establishment of, local trade repositories. These local trade repositories would not be registered with the SEC and would not be subject to the indemnification requirement.

And given these concerns, U.S.-based global trade repositories may seek to shift the bulk of their business to foreign jurisdictions to avoid the indemnification requirement, maintaining only a minimal presence in the United States necessary to service the U.S. market.

The establishment of separate local trade repositories in the United States and in foreign jurisdictions would likely produce inefficiencies and fragmentation of information.

Inefficiency may result from having multiple trade repositories collecting the same data. Fragmentation will result if data regard-

ing the OTC derivatives market is scattered across different trade repositories, and regulators do not have access to all the relevant trade repositories.

If this occurs, regulators will have an incomplete picture of the OTC derivatives market that may threaten the effectiveness of their oversight of the financial markets, and would harm U.S. and foreign regulators alike.

In addition, the SEC is seriously troubled by statements by certain foreign regulators about their intention to adopt reciprocal indemnification requirements. Such requirements would require that the SEC provide written indemnification agreements to foreign SEC-registered trade repositories as a precondition for accessing data.

Currently, the SEC is not able to provide such written indemnification, and therefore would be blocked from accessing data from these foreign trade repositories.

The SEC recommends that Congress consider removing the indemnification requirement of Section 763(i). In removing the indemnification requirement, Congress would assist the SEC, as well as other U.S. regulators, in securing the access it needs to data held in global trade repositories.

Removing the indemnification requirement would address the significant issue of contention with our foreign counterparts while leaving intact confidentiality protections for the information provided.

Thank you for the opportunity to testify. And I would be happy to address any questions later.

[The prepared statement of Mr. Tafara can be found on page 54 of the appendix.]

Chairman GARRETT. And I thank you for your testimony.

From the CFTC, Mr. Berkovitz, thank you for being with us. You are also recognized for 5 minutes.

STATEMENT OF DANIEL M. BERKOVITZ, GENERAL COUNSEL, U.S. COMMODITY FUTURES TRADING COMMISSION (CFTC)

Mr. BERKOVITZ. Thank you, Mr. Chairman.

Good morning, Chairman Garrett, Ranking Member Waters, and members of the subcommittee. Thank you for the opportunity to testify today.

The CFTC is working to ensure that both domestic and international regulators have access to swap data to support their regulatory mandates.

The CFTC participated in the 2010 report of the Financial Stability Board which recommended that market regulators, central banks, and prudential supervisors have effective and practical access to trade repository data.

As has been noted, the Commodity Exchange Act, as amended by the Dodd-Frank Act, contains provisions that would require a foreign or domestic regulator seeking data from a swap data repository to execute an indemnification agreement with the Commission prior to the sharing of any confidential data.

These requirements have caused concern among foreign regulators, some of which have expressed to the Commission an unwill-

ingness to register or to recognize an SDR unless they have access to necessary information.

Some foreign jurisdictions are also considering the imposition of similar conditions on the CFTC's access to swap information of data repositories located abroad.

Last September, the Commission specifically addressed access to SDR data issues in its final rulemaking on SDRs. The CFTC noted that the Dodd-Frank Act requires a registered SDR to make data available on a confidential basis to appropriate domestic regulators and appropriate foreign regulators.

With respect to indemnification, the CFTC's final rule release noted that the Commission is, "mindful that the confidentiality and indemnification agreement requirement may be difficult for certain domestic and foreign regulators to execute with an SDR due to various home country laws and regulations."

Accordingly, the Commission stated that an appropriate domestic regulator may be provided access to swap data reported and maintained by SDRs without being subject to the notice and indemnification provisions of the CEA, if the SDR is subject to the regulatory jurisdiction of and registers with the appropriate domestic regulator.

In addition, pursuant to a separate provision of the CEA, the SDR may be permitted to provide direct electronic access to such regulator designee of the Commission.

With respect to foreign regulatory authorities, the final rule provides that data in an SDR may be accessed by an appropriate foreign regulator without the execution of a confidentiality and indemnification agreement in appropriate circumstances.

Such access may be granted when the regulator is acting with respect to an SDR that is also registered with that regulator, or when the foreign regulator receives SDR information from the Commission.

Recently, in response to further comments and concerns on this issue, the Chairman directed Commission staff to draft, for the Commission's consideration, proposed interpretive guidance stating that access to swap data reported to a trade repository that is registered with the CFTC will not be subject to the indemnification provisions of the Act if such trade repository is regulated pursuant to foreign law, and the applicable requested data is reported to the trade repositories pursuant to foreign law.

Subject to the Commission's approval, this proposed interpretive guidance would be published for public comment.

The CFTC is engaged in a wide range of international projects related to the reporting, trading, and risk management of swaps. We look forward to continuing to work with our domestic and international regulatory counterparts on access to swap data repositories and these other important issues.

Thank you for the opportunity to address this important issue before the subcommittee.

I would be happy to answer any questions that you may have.

[The prepared statement of Mr. Berkovitz can be found on page 25 of the appendix.]

Mr. SCHWEIKERT [presiding] Thank you, Mr. Berkovitz.

The Chair will yield himself a few minutes here.

Help me understand. And as we go through this, one of the things I am most concerned about is sort of the law of unintended consequences. If we make this adjustment, and the bill goes through the process, do we cause another issue?

Part of the mechanic I want to ask is if you and I were a regulator in Europe or Asia, is this whole concept of—as we would do an indemnification, the way our tort laws and mechanics work here, is it just because this is a concept that doesn't weave through their jurisdictions and their laws, or their tradition?

Where do you find most of the conflict?

Mr. BERKOVITZ. That has been one concern that has been reported to us in our communications with the foreign regulators, the concern about being subject to U.S. tort law. And that is one of the motivations for our addressing this issue in the manner that we have.

Mr. SCHWEIKERT. Mr. Tafara? And I have to tell you, if you weren't at the SEC, I would suggest a career as a radio announcer. You have a great voice.

[laughter]

Mr. TAFARA. I think the concern from the standpoint of the foreign regulators is that—and domestic regulators as well, and by the way, given that the indemnification requirement applies to them as well, is that there is data that will be held by the trade repositories to which they do need access to do their jobs.

Yet, they are not in a position, as a matter of law, to actually provide the indemnification required as a prerequisite to getting that data.

So it is the legal impossibility, or the legal impracticality from their standpoint, that makes this indemnification requirement problematic.

Mr. SCHWEIKERT. Gentlemen, during the drafting of this section of Dodd-Frank—and I was not here—I understand parts of this moved very, very quickly.

Did any of this discussion from your understandings come to the forefront?

Mr. BERKOVITZ. In my personal knowledge, I don't recall specifically that we had examined this, and specifically commented on this provision. How it was discussed between the committees on the Hill, I wouldn't have knowledge of.

Mr. SCHWEIKERT. Mr. Tafara?

Mr. TAFARA. My answer would be pretty much the same.

I am not aware of the discussions that took place around this particular requirement between the committees. I suspect had it been raised with us, and it possibly was, we would have indicated the difficulty that this indemnification requirement presented.

Mr. SCHWEIKERT. And this is a little more conceptual and—okay, the legislation moves forward. We fix this—have we created any type of vacuum, or as I was saying before, unintended consequences, where we may have provided an opportunity now that the private tort bars, some other vacuum now, created some of the types of exposures that also might become a barrier for organizations wishing to accurately or fully report?

Mr. Berkovitz?

Mr. BERKOVITZ. We have specifically heard the concern from the foreign regulators about the potential consequences of being subject to this liability, and from their perspective, the various issues that it may create.

And so we have attempted to address that concern while maintaining the confidentiality of those as well.

Mr. SCHWEIKERT. Okay.

And on this—particularly speak to the confidentiality side?

Mr. TAFARA. I think the concern only arises to the extent that the information gets used inappropriately by the regulator that is seeking that information. And I believe this is being sought, and will be sought, for legitimate purposes.

It is in connection with whatever your mandate is: regulating and supervising the trade repository itself; regulating or being prudentially responsible for the dealers who are reporting to the trade repository; or in connection with pursuing an investigation into potential wrongdoing.

Those would be the purposes for which a regulator would be seeking the information. And to that end, I don't know that they run much risk in terms of liability.

Of course, as Dan has indicated, it is important that the information be maintained confidentially by the authorities and used appropriately and not disclosed inappropriately.

So yes, we do think confidentiality is an important aspect of this. But this is something that regulators deal with all the time. We are in possession of nonpublic information as part of our regulatory responsibilities and we use that information appropriately to meet our mandate.

Mr. SCHWEIKERT. All right.

Thank you, gentlemen, and I yield back my time.

I recognize Ranking Member Waters for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman.

I am wondering, to what extent does the SEC or the CFTC have the authority to exempt a foreign jurisdiction from indemnifying a swap data repository registered with either Commission, or to take other actions to limit the impact of this underlying provision in Dodd-Frank?

In other words, I guess my question is to what extent does a change on this issue really require legislative action?

Either one of you may answer.

Mr. BERKOVITZ. We believe we have authority to address this issue.

We addressed the issue in the rule that we published on our swap data repository—we call the core principles which the statue established and the regulation and the licensing of the swap data repository. In that rule, we provided several conditions under which a regulator could get access to the data without an indemnification agreement.

Subsequently, subsequent to the publication and the enactment of that rule, we received comments in particular from the foreign regulators that the rule doesn't address a number of their concerns. And there are a number of instances in which foreign regulators would seek access that may not be covered by the rule that we have already published.

And for this reason, the Chairman has directed the staff, and my office is drafting that additional interpretive guidance, to further address the issue and cover some of these additional situations where we could still provide access to the data without the indemnification agreement, and yet preserve confidentiality.

So we believe we have extensive authority to address this issue already.

Ms. WATERS. Do you share that opinion Mr. Tafara?

Mr. TAFARA. We, like the CFTC, have explored the authority we may have either through exemption or interpretation to preclude the need for indemnification by foreign authorities.

And it is possible that we could identify a way in which to address it.

However, there is always a measure of uncertainty by virtue of going that route. And our sense from our counterparts is that they would prefer for there to be certainty with respect to whether or not they need to provide indemnification.

Ms. WATERS. If this bill doesn't make it through the Senate and to the President's desk, what would you do?

Mr. TAFARA. We would have to continue to explore the authority as—actually address the concerns that have been expressed by our counterparts.

Ms. WATERS. Mr. Berkovitz?

Mr. BERKOVITZ. The Chairman has directed that we draft this additional guidance for the Commission's consideration very shortly. And it is our goal that the Commission should consider putting out this guidance for public comment within the next several weeks.

So that is our goal, to do this very expeditiously.

Ms. WATERS. Thank you very much.

I yield back.

Mr. SCHWEIKERT. Thank you, Ranking Member Waters.

Mr. Posey? No? Okay.

Mr. Hurt, do you have any questions?

Mr. HURT. Just a couple of questions, Mr. Chairman, thank you.

I was wondering in terms of the—I want to make sure I understand the proposal. What we are talking about is a breach of confidentiality, and Dodd-Frank's requirement that there be indemnification agreed to by the foreign regulators.

If this is adopted, the legislative proposal before us, there will still be a remedy available to someone who is aggrieved by a breach in confidentiality, will there not? If there is a breach in confidentiality, there will be a remedy for the persons who—or for the entity that is hurt by that.

Mr. BERKOVITZ. That would depend upon the particular law of this jurisdiction.

So I don't know whether the answer would be yes or no. And I will certainly—

Mr. HURT. And that would depend on the laws of the foreign regulator?

Mr. BERKOVITZ. It would, I guess, depend on the particular circumstance, the parties involved, where the breach occurred, and the actual circumstances.

Mr. HURT. Okay.

Let me ask this. Have the SEC and the CFTC—are your organizations able to actively support this legislation? Is this something that you will go on the record as actively supporting?

Mr. BERKOVITZ. The CFTC has not taken a position on the legislation.

Mr. HURT. Is that just by protocol or do you really not have a position on this?

Mr. BERKOVITZ. It does not have a position.

Mr. TAFARA. We, at the SEC, support elimination of the indemnification requirement, and think that the draft in its current form seems to achieve that objective.

Mr. HURT. Okay.

Thank you, Mr. Chairman.

I yield back my time.

Mr. SCHWEIKERT. Thank you, Mr. Hurt.

Ms. Moore?

Ms. MOORE. Thank you, Mr. Chairman.

I guess I want to make a comment and I want to ask the panel a question. And by the way, the CFTC and the SEC have been very, very helpful to us in drafting this legislation.

There seems to be a lot of concern with regard to breach of confidentiality. And I guess I want to sort of reiterate the fact that there is a regulatory framework on both sides of the water to which entities have to comply.

I guess I want the panel to have the opportunity to provide some details regarding the arrangements that the CFTC and the SEC already engage in with international counterparties for access to information and cooperative oversight, including the memoranda of understanding.

So that if there were a breach of confidentiality, there is a regulatory framework that on this side of the water, the CFTC and the SEC would have authority over and Spain, London, or Asia or in the emerging markets, can you describe for us, without knowing the specifics, what those memoranda of understanding are, and how this is already handled?

Mr. BERKOVITZ. That is correct, Congresswoman.

We have under our existing authority in Section 8 of the Commodity Exchange Act, confidentiality provisions. We are required to keep business information regarding persons and their trading data confidential.

However, the statute also allows us to share this information with domestic regulators and foreign regulators provided that we appropriate assurances of confidentiality.

So it is already in the Commodity Exchange Act, that we are permitted to share information if the Commission is satisfied that the data will be adequately protected by the foreign regulator.

So typically we do enter into a memorandum of understanding (MOU) with the commitment of the foreign regulator that they will keep the data appropriately confidential as required by the statute.

And that system has worked. That system has worked very well.

Mr. TAFARA. Along those lines, we have entered into some 40 or more arrangements with counterparts from around the world for purposes of assisting in enforcement matters as well in the supervision of global actors.

Those arrangements call for the sharing of nonpublic information with one another to those ends. And the MOUs make clear the conditions under which the information is provided and how that information can be used.

And much of the information being nonpublic, it must be maintained confidentially by the recipient and only used for the regulatory purposes for which it sought.

One of the things we do in entering into these memoranda of understanding is come to an understanding of the legal protections that foreign counterpart can provide to the information. So we seek a measure of reassurance that as a matter of law, they can keep that information confidential and it is on that basis that we finalize the MOU.

Ms. MOORE. Thank you. I would like to follow up with a concern that still was on the table with regard to plenary access.

Since U.S. regulators already have access to all trades on any SDR registered as a U.S. SDR, even if that SDR is physically located on foreign soil, what would be the benefit or the liability of pursuing plenary access?

Would we find that foreign entities would have the same resistance to plenary access, find themselves establishing their own SDRs and fragmenting those data in the same way?

What are the benefits or liabilities of continuing to pursue a plenary access playing field?

And would it create the same sort of legal—the problems as we have seen in this indemnification issue play out?

Mr. BERKOVITZ. This is another issue that we have begun to discuss with our international counterparts. And there is actually a working group on this issue in which the CFTC believes—my colleague here is also participating in on this issue.

So we are already participating. And to trust some of these issues as the U.S. and the international counterparts are establishing swap data repositories, and the potential structures, and potential regulatory framework, who will have the licenses, what data will go in which license?

These issues have arisen.

And we are committed to working through them with our foreign regulators to ensure that, for example, the CFTC's main objective is to ensure we have access and the statute mandates data that is required to be reported under the Commodity Exchange Act.

That is our primary objective.

And to the extent that there is other data in the repository that might come from other regulatory requirements, who would have access to that or who might not have access to that, I think this is something that we need to reach a mutual understanding or working to reach a mutual understanding on with our international counterparts.

So we are participating in those discussions to address that issue.

Ms. MOORE. [Off-mike.]

Mr. TAFARA. Absolutely, Ms. Moore.

Different regulators will need different depth and breadth of access to the information that is held with the trade repository.

When you think about it, the access that will be sought—it will be sought by different types of regulators.

You will have regulators responsible for the trade repository itself given that it is registered with it. And who will have responsibility also for market surveillance. They will need a certain depth and breadth of access to information.

Prudential supervisors or the dealers that are reporting to the trade repositories will need access to information. The breadth and access of information they need may differ from what you may need as a supervisor of the trade repository.

Law enforcement authorities will need access to the information to the extent they are investigating potential wrongdoing. And the depth and breadth of access they will need will be dictated by the investigation that is being conducted.

And then you will have authorities that will need access for monitoring systemic risk that have been charged.

As Dan has indicated, there is a conversation that has taken place internationally now to understand what depth and breadth these different regulators may need, and to reach an understanding of that and some will need more access than others might, I think.

But coming to agreement on that is something that is actually a work in process right now, and the subject of some debate amongst ourselves as an international regulatory community.

Ms. MOORE. Thank you so much.

Mr. SCHWEIKERT. Thank you, Ms. Moore. Those were terrific questions.

Gentlemen, thank you for your participation. I don't believe we have any more questions for this panel.

So we will now move on to panel number two, Mr. Donahue.

And to the young people who are visiting, where are you visiting from?

I want you to know all hearings are exactly this exciting.

[laughter]

This room has fairly tough acoustics.

I recognize Mr. Donald Donahue, chief executive officer of The Depository Trust & Clearing Corporation is recognized for 5 minutes.

STATEMENT OF DONALD F. DONAHUE, CHIEF EXECUTIVE OFFICER, THE DEPOSITORY TRUST AND CLEARING CORPORATION (DTCC)

Mr. DONAHUE. Chairman Schweikert, Ranking Member Waters, thank you very much for holding today's hearing.

We support the leadership of this subcommittee in introducing legislation to ensure effective swap transaction reporting for monitoring systemic risk in global financial markets.

DTCC and regulators have worked diligently to address these issues. However, it has become clear that a legislative fix is needed.

Today, I address two technical provisions in the Dodd-Frank Act that make it more difficult for regulators around the world to share information. They are generally referred to as indemnification and plenary access. And both promote the risk of data fragmentation

that Congresswoman Moore very eloquently described in her opening remarks.

The first issue, indemnification, is an immediate problem. Many regulators worldwide are unable or unwilling to provide an indemnity agreement. The concept of indemnification is unfamiliar to them, and inconsistent with their traditions and legal structures.

More plainly, though, foreign government agencies will not indemnify private third-party entities such as SDRs. The indemnification provision is also not needed in light of current international data-sharing guidelines developed through the cooperative efforts of more than 50 regulators worldwide including the CFTC, the SEC, and the Federal Reserve.

Without an indemnity agreement, U.S.-based repositories would be legally prohibited from providing regulators outside the United States with market data on transactions under their jurisdiction.

The clear risk is that global supervisors will have no viable option other than to fragment data globally by creating local repositories precisely to avoid indemnification.

DTCC strongly supports the Swap Data Information Sharing Act of 2012 which would remove the indemnification provisions from the Dodd-Frank Act, and make U.S. law consistent with existing international protocols.

This legislation will go a long way to ensuring global regulators can effectively monitor systemic risk. However, resolving indemnification without addressing the second issue, plenary access, still makes it likely that global swap data will be fragmented by jurisdiction.

Addressing both issues now can preempt a future crisis for swap data information sharing.

Plenary access requires U.S.-registered SDRs, even those who might be based outside the United States, to provide U.S. regulators with direct electronic access to data held by the SDR.

While this provision was intended to ensure a thorough examination of the SDR's operations, non-U.S. regulators are very concerned that it may give U.S. agencies access to all swap data retained by the SDR, even data for transactions with no identifiable nexus to U.S. regulation.

A broad interpretation by U.S. regulators of the plenary access provision would likely lead to fragmented swap data across SDRs in multiple jurisdictions, frustrating regulators' ability to monitor systemic risk.

If a regulator can only see a limited slice of data from its own jurisdiction, then that regulator cannot see risk building up in the whole system, or provide adequate market surveillance and oversight.

To illustrate the combined impact of these provisions, let us examine the case of two British banks executing your credit default swap involving a British underlying entity.

Under the plenary access provision, if the trade was reported to a U.K.-based but U.S.-registered SDR, U.S. regulators could claim a legal right to view data on this transaction, even though the U.S. regulator has no material interest in it.

Even worse, the indemnification provision would require the British regulator to indemnify the U.S.-registered SDR to access

the same data, despite the fact that the entirety of the trade falls within the British regulator's jurisdiction.

The issues of indemnification and plenary access must be dealt with in a tougher manner to prevent data fragmentation from occurring.

Congress needs to address plenary access by clarifying the intent of the statute and reinforcing that regulators have access to the data in which the regulator has a material interest by amending and passing the Swap Data Information Sharing Act to ensure that technical corrections to both indemnification and plenary access are addressed.

Congress will create the proper environment for the development of a global trade repository system to support systemic risk management and oversight.

Thank you for your time this morning.

[The prepared statement of Mr. Donahue can be found on page 30 of the appendix.]

Mr. SCHWEIKERT. Thank you, Mr. Donahue.

A quick question—as we are going through the indemnification process of this piece of legislation moving forward, right now is it acting as a barrier for the United States to be the hub of supposition information?

Are you getting much pushback? What is happening at this moment?

Mr. DONAHUE. I think at this moment, Mr. Chairman, as I believe you are aware, we do actually operate a global swap data repository for credits—default swap data. And we are in the early stages of operating such a repository for interest rate swap data.

We have a global data set to which under the agreement of the OTC derivatives regulators forum, under work being done by the International Organization of Securities Commissions, all regulators have equal access to that data, data they have a material interest in, on common terms, on the same terms. And they are in fact routinely accessing that data, routinely making use of that data.

And when the indemnification provision comes in and comes into effect, it is very clear that will shut down the ability of regulators outside the United States to have access to that data, and to use that data the way they have become accustomed to doing that, until they cross the indemnification bridge and deal with the issues that indemnification presents to them.

Our belief, and I think you heard it from the earlier panel, is that they will not be able to provide the indemnification agreements. And therefore, they will not have access to the data. And therefore, they will say, we have to start creating our own trade repositories. We have to start fragmenting the data to be able to keep access to this information that is so critical for us to have access to.

Mr. SCHWEIKERT. Thank you, Mr. Donahue.

So far, this seems actually somewhat simple.

But from your viewpoint and from us doing the policy, one of my constant concerns is the law of unintended consequence.

Do you see anything that might pop up, sneak up on us, cause an issue, cause a mechanic—or is this really truly that simple?

Mr. DONAHUE. I believe this is really truly that simple. I think we have a regime today crafted by the work that the OTC derivatives regulators, foreign and other international groups of regulators, have crafted to create the ground rules under which they all have access on a common set of rules. They are all using that access, and all proceeding under those common rules.

That has proven to be an enormously effective way of giving them access to the data they need for their regulatory purposes to monitor systemic risk. Preserving that is, I think, a very straightforward public policy good that this removal of the indemnification and the plenary access issues would continue to foster.

Mr. SCHWEIKERT. All right. Thank you, Mr. Donahue.

I yield back, and recognize Ranking Member Waters for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman.

Let me just say that Dodd-Frank is a most important piece of reform legislation that we spent an awful lot of time on. And we think that we have created a piece of legislation that will provide transparency and consumer protection and a lot of other things.

So I am very careful as we review all aspects of this legislation. But it is very apparent that there are some pieces of the legislation that need to be revisited.

And as we talk about these certain provisions of Title VII today in Dodd-Frank, that would require that any U.S. or foreign authority agree to provide this indemnification to a swap data repository, and the SEC or the CFTC for any expenses arising from litigation as a precondition for receiving swap data; that the information that we have received both from our regulators and from you, Mr. Donahue, it is quite clear that not only must we correct this legislatively to eliminate any questions or uncertainty about what the intentions are or were, but this is absolutely necessary.

And so I want to thank you for your testimony here today. I have no further questions. Thank you very much.

Mr. SCHWEIKERT. Thank you, Ms. Waters.

Mr. Hurt?

Mr. HURT. Thank you, Mr. Chairman.

Thank you for your testimony, Mr. Donahue.

I guess my question is one I was trying to explore earlier with the earlier witnesses. And I guess I just was hoping to kind of better understand what happens if there is a breach of confidentiality.

First, it does seem that under the current proposal, confidentiality still must be a part of the release of the information. And information cannot be released unless the foreign regulators agree that there will be confidentiality.

Is that true?

Mr. DONAHUE. The information—the guidelines that were adopted by the OTC derivatives regulators forum, and the similar work that is being done by the International Organization of Securities Commissions, is intended to give all regulators access to this information consistent with the rules that pertain—as I think, Mr. Berkovitz was indicating—in their particular regulatory jurisdiction.

Mr. HURT. From—I am sorry. Go ahead.

Mr. DONAHUE. They have access. In our access methodology, we provide all of the regulators an electronic means to access the data in the repository, right. That electronic means limits them to the data that they have a material interest in.

So an Italian regulator for example can see data that has an Italian counterparty, can see data that has an Italian reference entity. They only see what they are entitled to see in terms of what their regulatory jurisdiction is.

And obviously, the retention of that data by them would be subject to whatever rules apply to them in their own jurisdiction—

Mr. HURT. And are they sufficient.

Mr. DONAHUE. I am sorry?

Mr. HURT. Are they sufficient, those existing rules?

Mr. DONAHUE. Obviously, that would be dependent on the jurisdiction of the particular regulator—

Mr. HURT. Are there some that are and are there some that are not?

Mr. DONAHUE. I don't have any—I am not implying that there may be some that are not. I don't have any reason to think that there are not appropriate confidentiality restrictions for their jurisdiction.

But as you well appreciate, they vary—

Mr. HURT. By jurisdiction. Okay.

So because in your testimony you said that there are—that many of these groups, foreign groups, are not familiar—or indemnification is not part of their jurisprudence, so to speak.

Mr. DONAHUE. Yes.

Mr. HURT. But it sounds like, to me, that confidentiality is.

Mr. DONAHUE. I think confidentiality—I think pretty much every regulatory jurisdiction around the globe recognizes that regulators get from their regulatees highly confidential information

Mr. HURT. Right—

Mr. DONAHUE. —about their business—

Mr. HURT. —that is what I am concerned about—

Mr. DONAHUE. —that kind of thing and ergo each of them must have their own expression of how that gets retained.

Mr. HURT. And then can you walk through for me an example or talk to me about in the event that there is a breach of confidentiality by a foreign regulator who misuses this information, what are the remedies available?

What are the remedies available if there is not an indemnification agreement?

What are the remedies available to that person, or to that entity, that has suffered the consequence of misuse of this information?

That is sort of what I was trying to get at.

Mr. DONAHUE. Okay. I again would suggest to you that the information a particular regulator has is information first and foremost that his regulatees already could be obligated to provide to him, right.

So an Italian regulator who receives information from the repository about Italian counterparties activities, obviously part of the nexus here is that he could say to those counterparties, you have to report this to us. And we are trying to make it a more efficient and effective process.

So they would have, to the extent he disclosed that inappropriately as highly unlikely, as hypothetical as that is, those entities would have the remedies against the regulator that they would have under Italian law in my example.

And they would be able to go against the regulator to enforce whatever remedy they would have against that kind of a breach.

Mr. HURT. Okay.

Thank you, sir.

I yield back my time.

Mr. SCHWEIKERT. Thank you, Mr. Hurt.

Ms. Moore?

Ms. MOORE. Thank you so much, Mr. Chairman, and Madam Ranking Member. And I want to thank Mr. Donahue for appearing.

Mr. Donahue, I do know that the DTCC was very, very instrumental in this last financial crisis that we had, because of its repository responsibility was very, very helpful in responding and cooperating with regulators in our crisis.

And so, I want to just follow up on some of the questions that other members have already asked with regard to if there is another financial crisis, and it is a global financial crisis, I want you to sort of walk us through how plenary access, in particular, would have an adverse impact on your ability to respond to these financial crises.

I guess my understanding of your testimony is number one, you think that plenary access is just as contentious as indemnification with regard to preventing data fragmentation of the market, and that this legislation before us really needs to be amended to include plenary access.

Can you just sort of walk us through an example of how plenary access might add to this market fragmentation?

Mr. DONAHUE. Thank you, Congresswoman Moore.

Yes, perhaps a way of doing that is to describe what specifically happened in the fall of 2008 after the failure of Lehman Brothers.

Ms. MOORE. Exactly.

Mr. DONAHUE. We had, as I believe you know, a fully mature trade repository for credit default swap data at that time. And during the weeks following the failure of Lehman Brothers, there was a market firestorm essentially in terms of rumors about the magnitude of the liability counterparties on credit default swaps using Lehman as a reference entity had.

There were rumors that the liability was north of $400 billion. And clearly, there was a panic in the market that it was going to sink the markets—

Ms. MOORE. Right.

Mr. DONAHUE. —if that kind of exposure was present.

We were able from data in the repository to say the total liability is in fact not going to exceed $6 billion. We did say that publicly.

In any event, it was $5.3 billion.

Ms. MOORE. Right.

Mr. DONAHUE. So we were able, because we had all of that information together, to tell people this is how bad it looks. It is clearly not anything like the—

Ms. MOORE. $400 billion—

Mr. DONAHUE. —the problem you think that you have—

Ms. MOORE. Yes—

Mr. DONAHUE. —number one, right.

But in a plenary access world, right, if plenary access motivates non-U.S regulators to say we need to create our own trade repositories. We need to fragment the data into our own jurisdiction. We need to preclude our own regulated firms from putting data anywhere else other than in our own repository.

We would not have known what the picture was with respect to Lehman.

We might have known, gee, we know $10 billion of the contracts are outstanding, but they are spread out in all other kinds of repositories, all around the world.

No one could have put all of the pieces together and said this is what it would look like. This in fact is what the exposure is. No one could have put out that firestorm.

And that firestorm could have had obviously very severe effects in terms of what was a very sensitive market environment at the time.

Ms. MOORE. Mr. Donahue?

The CFTC thinks that there is a workaround for plenary access. Can you explain to us here today why you think that there is a legislative fix that needs to be done?

Mr. DONAHUE. I certainly am not familiar with what specifically the CFTC has in mind.

But I think the regulators outside of the United States in our discussions with them, in our contacts with them in the context of the credit default swap repository that we already have, had been very clear about their sensitivity about the confidentiality of the data actually.

They are concerned that they see the same data that everyone else sees. And that no one is given the authority to see more data than the generally agreed international rules regarding data access would enable all regulators to be able to see.

When they hear that there is a possibility that certain regulators might be able to see data that they view as confidential with respect to their own regulatees, that is something they view very, very negatively.

And that is something where they think, wait a minute. That means I may need to pull my data back so that I control who is able to see it.

Ms. MOORE. Unanimous consent to just have more follow-up or no?

Thank you so much.

So with regard to your seeing a need for a legislative fix, we heard testimony earlier today that the SEC and the CFTC say that those conversations are happening already with regard to the depth and breadth of information that needs to be done.

Do you think right now that given the integrity of the relationships that already occur, if there needs to be some sort of data-sharing without plenary access, that literally we could go to other regulators in Asian markets or Latin American markets or other markets and say, we need to see this data through an MOU versus having plenary access?

Do you think the integrity of those relationships already exist without our having plenary access?

Mr. DONAHUE. Our impression from our dialogue with regulators outside the United States suggests that that relationship is of the nature you described.

I think I would add that having a conversation about the ground rules for sharing data among all regulators, where all regulators understand that they are approaching that discussion on a level platform can be a fruitful discussion.

Having that dialogue when some of the regulators believe that some other regulators, namely the U.S. regulators, are privileged because of the plenary access provisions, that skews the way that dialogue is going to happen right from the beginning.

And I think they will be less amenable to coming up with a global ground set because they are just going to say, wait a minute, some of us here are playing by different rules. We are not sure that we are willing to go down that road.

So I think the removal of plenary access is precisely important to foster the kind of cooperative dialogue that you are describing.

Ms. MOORE. Thank you so much.

And I thank the Chair for his indulgence.

And thank you, Mr. Donahue.

I yield back.

Mr. SCHWEIKERT. Mr. Stivers?

Mr. STIVERS. Thank you, Mr. Chairman. I would like to first recognize the Ohio State University Mount Scholars in the second row for being here, and go Buckeyes.

Mr. SCHWEIKERT. Mr. Stivers, do we owe them an apology for an exciting hearing?

Mr. STIVERS. It is pretty exciting. And I am sorry if we are getting your adrenaline pumping too much. So I would like to apologize for that.

I do want to thank Mr. Donahue for your testimony. I have had a chance to see a working model of your credit default swap repository, and it is an impressive amount of data. I think you explained very well its value in the wake of the Lehman Brothers crisis.

And I would like to ask you a question about if plenary access and the indemnification were required before that, and it resulted in the data fragmentation that you explained that is logical, what happened with those two requirements, would you have been able to give regulators enough access to data to calculate the exposure to focus on the Lehman Brothers problem?

Mr. DONAHUE. If indemnification had existed, if plenary access had existed at the time we created the credit default swap repository, we would never have accumulated all of the data.

So by definition, we would have known one piece. We would have had the tail of the elephant. We wouldn't have had the elephant.

And we could not have told people, this is what the total picture is. We could have only reported on one slice of that picture.

Mr. STIVERS. And looking forward to potential future issues, data fragmentation and the risk of it, because of plenary access and indemnification, could risk the ability of regulators, not only in the United States but globally, to understand the exposure that their firms face on a worldwide basis.

Is that correct?

Mr. DONAHUE. There is no question if you fragment the data because of those factors, you are enormously handicapped in being able to do that.

Mr. STIVERS. And Ms. Moore already alluded to it. But I want to hear you say it from your own mouth.

The bill that is in draft form here does deal with the indemnification issue, but does not deal with the plenary access issue. Would you recommend that we include that in this bill?

Mr. DONAHUE. We believe that the two issues are crucially joined, and must both be addressed to be able to eliminate the risk of data fragmentation that we are very concerned about, so plenary access definitely needs to be addressed.

Mr. STIVERS. Great, thank you. I appreciate your testimony, and being involved in these issues is very important.

I think there seems to be unanimity among the subcommittee here that this is an issue that is really important and needs to be dealt with in a very thoughtful way.

And that the two issues here, while they may have worked in some circumstances, don't fit where we are in this point in time, and need to be corrected so that we can get better access to data, not only for American regulators, but global regulators.

Mr. DONAHUE. We would agree with that completely.

Mr. STIVERS. Thank you for your time.

I yield back the balance of my time, Mr. Chairman.

Mr. SCHWEIKERT. Thank you, Mr. Stivers.

And Mr. Donahue, thank you for your time.

Without objection, the written statements of both panels will be made a part of the record.

The Chair notes that some Members may have additional questions for the panels, which they may wish to submit in writing. Without objection, the hearing record will remain open for 30 days for Members to submit written questions to these witnesses and to place their responses in the record.

And with that, this hearing is adjourned.

[Whereupon, at 11:14 a.m., the hearing was adjourned.]

A P P E N D I X

March 21, 2012

Statement
Chairman Spencer Bachus
"H.R. ____, the Swap Data Repository and Clearinghouse Indemnification Act of 2012"
Subcommittee on Capital Markets and Government Sponsored Enterprises
March 21, 2012

Thank you, Chairman Garrett, for convening this hearing as the Subcommittee continues its oversight of Title VII of the Dodd-Frank Act, which governs the trading, reporting, clearing, and execution of over-the-counter derivatives.

Title VII requires swap data repositories, security-based swap data repositories, and clearing organizations to make data available to non-U.S. financial regulators. Before any U.S. entity can share data with a foreign regulator, however, the foreign regulator must agree that it will indemnify the U.S. entity and the SEC or the CFTC for litigation expenses that may result from the sharing of data with the foreign regulator.

These indemnification provisions—which were not included in the financial reform bill passed by the House in December 2009—threaten to make data sharing arrangements with foreign regulators unworkable. Foreign regulators will most likely refuse to indemnify data repositories, derivatives clearing organizations, and their U.S. regulators for litigation expenses in exchange for access to data.

We have before us today bipartisan legislation offered by Mr. Dold of Illinois and Ms. Moore of Wisconsin to clarify these indemnity provisions.

The legislation will ensure that U.S. regulators have complete access to swap and security-based swap data and that the regulation of over-the-counter derivatives does not impede global regulatory cooperation. It is my expectation that the Full Committee will mark up this legislation next week.

Thank you to the witnesses for appearing today and I yield back the balance of my time.

Testimony of Dan M. Berkovitz
General Counsel
Commodity Futures Trading Commission
Hearing on H.R. __
The Swap Data and Clearinghouse Indemnification Correction Act of 2012

Before the Subcommittee on Capital Markets and Government Sponsored Enterprises
Committee on Financial Services
United States House of Representatives

March 21, 2012

Good morning Chairman Garrett, Ranking Member Waters, and members of the Subcommittee. I am Dan Berkovitz, the General Counsel at the Commodity Futures Trading Commission. Thank you for the opportunity to testify today regarding draft legislation titled the Swap Data and Clearinghouse Indemnification Correction Act of 2012.

The Commodity Exchange Act (CEA), as amended by the Dodd-Frank Act, contains three provisions concerning indemnification and the sharing of confidential data with regulators. The first two are found in CEA Section 21. Section 21(c)(7) requires registered swap data repositories ("SDRs"), upon request and after notifying the Commission, to make available, on a confidential basis under CEA Section 8, all data obtained by the SDR, including individual trade and position data, to each appropriate prudential regulator, the Financial Stability Oversight Council ("FSOC"), the Securities and Exchange Commission ("SEC"), the Department of Justice ("DOJ"), and any other person that the Commission determines to be appropriate, including foreign financial supervisors (including foreign futures authorities), foreign central banks, and foreign ministries. CEA Section 8 prohibits the Commission from releasing information that would disclose the business transactions or market positions of any person, trade secrets or names of customers, or information concerning any pending investigation of any person. Section

21(d) requires receipt by the SDR of a written agreement on confidentiality and indemnification before any data may be shared.

CEA Section 5b contains the third provision. Under Section 5b(k)(5), the CFTC may share information on cleared swaps that it has collected from Derivatives Clearing Organizations ("DCOs") with each appropriate prudential regulator, the SEC, the FSOC, the DOJ, and any other person that the CFTC determines to be appropriate, including foreign financial supervisors (including foreign futures authorities), foreign central banks, and foreign ministries. Such sharing is contingent upon receipt of a written agreement to comply with the confidentiality requirements of CEA Section 8 and an agreement to indemnify the CFTC for any expenses arising from litigation related to the information provided under Section 8. This restriction does not affect a DCO's ability to share information.

These requirements have caused concern among foreign regulators, some of which have expressed unwillingness to register or recognize a SDR unless they have access to necessary information. Some foreign jurisdictions also are considering the imposition of a similar requirement that would impose conditions on the CFTC's access to swap information at data repositories located abroad. The CFTC and SEC noted these concerns in their Joint Report on International Swap Regulation issued under Section 719(c) of the Dodd-Frank Act.

Last September, the Commission specifically addressed access to SDR data in its final rulemaking on SDRs. In that rulemaking, the CFTC noted that the Dodd-Frank Act requires a registered SDR to make data available on a confidential basis to "Appropriate Domestic

Regulators" and "Appropriate Foreign Regulators." With respect to Appropriate Domestic Regulators, the final rule provides that this term includes the SEC, the Financial Stability Oversight Council, the Department of Justice, any Federal Reserve Bank, the Office of Financial Research, and any prudential regulator with respect to requests related to any of such regulator's authorities. The CFTC rulemaking also provides that the Appropriate Domestic Regulator category will apply to any other person the Commission deems appropriate.

The final rule defines an Appropriate Foreign Regulator to be one with an existing Memorandum of Understanding (MOU) or other similar type of information sharing arrangement executed with the CFTC. A foreign regulator without an MOU with the Commission may be deemed an Appropriate Foreign Regulator as determined on a case by case basis.

With respect to indemnification, the CFTC's final rule release noted that the Commission is "mindful that the Confidentiality and Indemnification Agreement requirement . . . may be difficult for certain domestic and foreign regulators to execute with an SDR due to various home country laws and regulations." Accordingly, the Commission stated that an Appropriate Domestic Regulator may be provided access to swap data reported and maintained by SDRs without being subject to the notice and indemnification provisions of the CEA if the SDR is subject to the regulatory jurisdiction of, and registers with, the Appropriate Domestic Regulator. In addition, pursuant to a separate provision of the CEA, the SDR may be permitted to provide direct electronic access to such regulator as a designee of the Commission.

With respect to foreign regulatory authorities, the final rule provides that data in an SDR may be accessed by an Appropriate Foreign Regulator without the execution of a confidentiality and indemnification agreement in appropriate circumstances. Such access may be granted when the regulator is acting with respect to a SDR that is also registered with that regulator or when the foreign regulator, pursuant to section 8(e) of the CEA, receives SDR information from the Commission.

The Commission continues to review the indemnification provisions of the CEA. Recently, the Chairman directed Commission staff to draft, for the Commission's consideration, proposed interpretative guidance stating the Commission's view that access to swap data reported to a trade repository that is registered with the CFTC will not be subject to the indemnification provisions of the Commodity Exchange Act if such trade repository is regulated pursuant to foreign law and the applicable requested data is reported to the trade repository pursuant to foreign law.

Subject to the Commission's approval, this proposed interpretive guidance would be published for public comment.

The CFTC is working to ensure that both domestic and international regulators have access to swap data to support their regulatory mandates. The CFTC was an active participant in the 2010 report of the Financial Stability Board, which highlighted the fact that trade repository data will allow authorities to address vulnerabilities in the financial system and to develop well-informed regulatory, supervisory and other policies that promote financial stability and reduce

systemic risks. The FSB's report includes a recommendation that market regulators, central banks and prudential supervisors have "effective and practical" access to trade repository data.

The CFTC remains engaged in a wide range of international projects related to the clearing, reporting, trading, and risk management of OTC derivatives. We work with the International Organization of Securities Commissions, the Committee on Payment and Settlement Systems, and the Financial Stability Board's OTC Derivatives Working Group. Our staff participates in technical dialogues with our regulatory counterparts in the European Union, Japan, Hong Kong, Singapore, and Canada.

The Swap Data and Clearinghouse Indemnification Correction Act of 2012 would repeal the indemnification requirements set forth in CEA Sections 5b and 21. Under the proposed legislation, any U.S. or foreign regulator identified in CEA Sections 5b(k)(4) or 21(c)(7) seeking access to swap data that comes from a DCO or SDR still would be required to provide assurances that the regulator shall abide by the confidentiality requirements of CEA Section 8.

Thank you for the opportunity to address the Subcommittee. I'd be happy to answer any questions you may have.

House Committee on Financial Services
Subcommittee on Capital Markets and Government Sponsored Enterprises

Hearing on "The Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012"

Donald F. Donahue
President and Chief Executive Officer
The Depository Trust & Clearing Corporation

March 21, 2012

Chairman Garrett and Ranking Member Waters,

Thank you for scheduling today's hearing on Congressmen Dold and Moore's bipartisan legislation to address the indemnification provisions and modify the confidentiality requirements in the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA). I appreciate the opportunity to testify and bring greater attention to the unintended consequences of provisions that have the potential to fragment the current global data set for over-the-counter (OTC) derivatives and derail efforts to increase transparency and help regulators mitigate risk in this marketplace.

Over the past year, DTCC, among others, has been raising concerns over the impact of the DFA's broad extraterritorial reach, particularly as it relates to the confidentiality of market data and the indemnification agreement provisions of the law. These concerns have been echoed by regulatory officials and policymakers globally, including by representatives of the European Parliament, European Commission and Council, by Asian governments and by both Republican and Democratic Members of the U.S. Congress.

This Subcommittee's leadership is vital as there is a clear need to shine a light on these technical provisions of the DFA – provisions that, if not addressed, risk decreasing the current level of transparency into OTC derivatives markets. Having a bipartisan group of Members in both the House and Senate recognize the unintended consequences of these provisions and commit to working within Congress and with policymakers internationally to develop a mutually agreeable resolution is very promising.

Two Important DFA Extraterritorial Provisions Require Congressional Action
The two key extraterritorial provisions in the DFA that risk fragmenting global swap data are the confidentiality and indemnification provisions and the so-called "plenary access" duties imposed on swap data repositories (SDRs). These issues merit further examination by Congress and require legislative resolution.

First, Sections 728 and 763 of the DFA require SDRs registered with the Commodity Futures Trading Commission (CFTC) or Securities and Exchange Commission (SEC) to receive a written agreement from "third-party" non-U.S. regulators confirming that the supervisory agency requesting the information will abide by certain confidentiality requirements and indemnify the SDR and the regulating U.S. Commission(s) for any expenses arising from litigation relating to the information.

Second, the duties imposed on a registered SDR – both with the CFTC and the SEC – require, among other things, that the SDR provide "direct electronic access to the Commission (or any designee of the Commission, including another registered entity)." The phrase "direct electronic access" has been identified to us by non-US regulators as problematic because it creates an unnecessary degree of ambiguity and may be interpreted by the regulatory agencies and others as a requirement that a registered SDR must provide access to all swap data retained by the SDR – even when that SDR might maintain swap data for transactions with no identifiable nexus to U.S. regulation.

The concern that a U.S. regulator might demand data that falls wholly outside its jurisdiction as part of its "direct electronic access," coupled with the lack of clear extraterritorial guidance from the CFTC and the SEC, would functionally prevent non-U.S. SDRs from registering in the United States. If this occurs, swap data would splinter across jurisdictions and frustrate regulators' abilities to monitor global systemic risk.

Plenary Access & Indemnification in Dodd-Frank: Solving a Problem That Does Not Exist
The original indemnification and plenary access provisions, while well-intended, are unworkable as currently drafted and threaten to undo the existing system for data sharing that was developed through the cooperative efforts of more than 40 regulators worldwide under the auspices of the OTC Derivatives Regulators' Forum (ODRF) and, more recently by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions (CPSS IOSCO).

For nearly two years, regulators globally have followed these guidelines to access the information they need for systemic risk oversight. It is the standard that DTCC uses to provide regulators around the world with access to global credit default swap (CDS) data that is held in its Trade Information Warehouse (TIW). It is accurate to say that the plenary access and indemnification provisions attempt to solve a problem that does *not* exist – and, in doing so, create several new problems that heretofore did not exist.

Asian and European regulators have identified indemnification and plenary access as among the most troubling extraterritorial provisions of the DFA because of their potential to fragment the current global data set for OTC derivatives. They recognize, as do many Members of the House and Senate here in the United States, that these provisions would reduce the level of transparency that currently exists in these markets.

In an effort to avoid unintended consequences, European policymakers specifically considered and rejected an identical indemnification requirement in the European Market Infrastructure Regulation (EMIR), opting instead for a policy based on the principle of "reciprocal equivalence." In Asia, the Monetary Authority of Singapore has aligned its regulations with the Europeans in this area and Japan expects its draft regulations, due in a few days, to be similarly aligned. However, policymakers in Hong Kong have begun to move forward with developing a national repository for its swap data.

Indemnification Would Fragment the Global Data Set and Impede Regulatory Oversight
It is highly unlikely third-party regulators will comply with the DFA requirement that they must provide an indemnification in order for U.S.-registered SDRs to share critical market data with them for two primary reasons.

First, the concept of indemnification is based on U.S. tort law and, therefore, inconsistent with many of the traditions and legal structures in other parts of the world. Many regulators worldwide have indicated that they would be unable or unwilling to provide an indemnity agreement to a private third party as required under the DFA. Second, these same regulators have noted that they are already following policies and procedures to safeguard and share data based on both the ODRF and recently adopted International Organization of Securities Commissions (IOSCO) guidelines.

Without an indemnity agreement, U.S.-based repositories may be legally precluded from providing regulators outside the U.S. with market data on transactions that are under their jurisdiction. The clear risk is that global supervisors will have no viable option other than to create local repositories to avoid indemnification—a move that is the definition of data fragmentation. While each jurisdiction would have an SDR for its local information, it would be extremely difficult and time consuming to effectively share information between regulators.

A proliferation of local repositories would undermine the ability of regulators to obtain a comprehensive and unfragmented view of the global marketplace. If a regulator can only "see" data from the SDR in its jurisdiction, then that regulator cannot get a fully aggregated and netted position of the entire market as a whole. And if a regulator cannot see the whole market, then the regulator cannot see risk building up in the system or provide adequate market surveillance and oversight. In short, regulators will be blind to the market conditions as a direct result of the indemnification provision. In the name of transparency, this provision creates opacity.

The CFTC and the SEC have carefully reviewed the impact of the indemnification provision and in a joint report concluded, "Congress may determine that a legislative amendment to the indemnification provision is appropriate."

Plenary Access: Congress Needs to Clarify Intent of Statute and Rules
The concept of "plenary access" was intended to ensure that U.S. authorities have appropriate access to an SDR registered in their jurisdiction for direct oversight. Direct oversight is necessary to ensure thorough examination of the SDR's operations, guaranteeing the completeness and accuracy of the data published by the SDR. This type of access, which could more easily be achieved by imposing a statutory books and records obligation related to the operation of the SDR, is distinct from that required by non-supervisory regulators who rely upon the SDR's data for systemic risk oversight. The level of access to an SDR's data should reflect the purpose for which a regulator seeks to review the SDR's information.

The DFA rules proposed and adopted by the CFTC and SEC are helpful, but they do not adequately address this problem. The concern remains that it can be interpreted too broadly, giving U.S. regulators access to data in which a U.S. nexus does not exist. Congress should seriously consider and assist in finding an appropriate solution that clarifies that U.S. regulators may access the swap data of its registrant SDRs only to the extent necessary to perform its oversight and surveillance responsibilities or to regulate the operation of the SDR.

Without clarifying language in the law, it is likely that non-U.S. financial firms executing transactions without a U.S. nexus would avoid reporting their trade data to a U.S.-registered SDR. Much like indemnification, plenary access would fragment swap transaction data across countless repositories that reside around the world, frustrating systemic risk oversight efforts. DTCC has analyzed potential methods to resolve this complicated issue, and remains ready and willing to assist legislators in fashioning a remedy to ensure regulators can access the information that they need.

Within the context of considering legislation that would repeal the indemnification provisions, addressing the concerns over plenary access would compliment these efforts and help create a framework for global swaps data that is accessible to regulators in the United States and around the world.

Indemnification and Plenary Access: A Case Study
To illustrate the combined impact of indemnification and plenary access and underscore why it has emerged as a major source of concern for regulators worldwide, let's examine the case of two British banks executing a CDS trade in the U.K. involving a British underlying entity. Under the plenary access provision, if the trade was reported to a U.K.-based but U.S.-registered SDR, U.S. regulators could claim, as the regulator of the SDR, a legal right to view data on this transaction – even though the U.S. SDR regulator has no material interest in the counterparties, the transaction, or the underlying entity (as opposed to a prudential regulator seeking data for market oversight purposes). To compound the situation, the indemnification provision would require the British regulator to indemnify the U.S.-registered SDR in order to access this same data – despite the fact that the entirety of the trade falls within the British regulator's jurisdiction.

Just as a U.S. regulator would not be inclined to have sensitive data on U.S. trades available to non-U.S. supervisors – or, for that matter, have to provide indemnity to access data that is rightly theirs to view – regulators globally consider this extraterritorial reach inappropriate and inconsistent with widely established and agreed upon data sharing practices.

In contrast, under both the current ODRF guidelines and the recently adopted IOSCO regimes that have served regulators and the markets well, supervisors are provisioned to access data where there is a nexus to the jurisdiction or entity. Therefore, US regulators can view data where there is a U.S. nexus and, equally, British regulators can view data with a U.K. nexus. And in no case is an indemnification agreement needed before access to data is provided.

"Swap Data Information Sharing Act of 2012": A Potential Legislative Solution
The *Swap Data Information Sharing Act of 2012* would make U.S. law consistent with existing international protocols by removing the indemnification provisions from sections 728 and 763 of the DFA. DTCC strongly supports this legislation, which represents the only viable solution to the unintended consequences of indemnification.

The *Swap Data Information Sharing Act of 2012* is necessary because the statutory language in the DFA leaves little room for regulators to act without U.S. Congressional intervention. This point was reinforced in the recent CFTC/SEC *Joint Report on International Swap Regulation*. The Report noted that the Commissions "are working to develop solutions that provide access to foreign regulators in a manner consistent with the DFA and to ensure access to foreign-based

information." It goes on to say, as noted earlier, "Congress may determine that a legislative amendment to the indemnification provision is appropriate."

This bill would send a strong message to the international community that the United States is strongly committed to global data sharing and determined to avoid fragmenting the current global data set for OTC derivatives.

However, resolving indemnification without addressing plenary access leaves open the likelihood that global swap data will be fragmented by jurisdiction. The two pieces must be dealt with together. Resolving one without the other does not diminish the likelihood of data fragmentation occurring. While this legislation is a strong step in the right direction, it is one of two key technical corrections that is required to ensure regulators continue to have the highest degree of transparency into OTC derivatives markets.

Congress needs to address the issue of plenary access by simply and clearly clarifying the intent of the statue and reinforcing that access to data is limited to only those records in which the regulator has a material interest. Under the attached suggested amendment, which would add the so-called "books and records" provision to the law, regulators in the U.S. would continue to have full and complete access to any and all data to which there is a U.S. nexus. This would align U.S. policy with the current global data sharing standards that have been in place since 2010 and which have provided regulators with all of the information needed to oversee market participants and activity in their jurisdiction.

By amending and passing this legislation to ensure that technical corrections to both indemnification and plenary access are addressed, Congress will help create the proper environment for the development of a global trade repository system to support systemic risk management and oversight.

Bipartisan, Bicameral Congressional Support for Resolving Indemnification
As the unintended consequences of the indemnification provisions have been brought to light, there is bicameral, bipartisan support to resolve this issue. For example, Senator Agriculture Committee Chairwoman Debbie Stabenow (D-MI) and Ranking Member Pat Roberts (R-KS), and House Appropriations Agriculture Subcommittee Congressman Jack Kingston (R-GA) and Ranking Member Sam Farr (D-CA), authored separate letters last year to their counterparts in the European Parliament expressing interest in working together on a solution to the issue.

In addition, several other Members of Congress have also publicly declared their support for a technical correction to the provision. As CFTC Chairman Gary Gensler indicated in testimony to this Committee in June 2011, both he and SEC Chairman Schapiro have written to European Commissioner Michel Barnier regarding the indemnification provisions of the DFA and are currently engaged in efforts to find a solution to the challenges of this section.

DTCC Has Deep Experience Operating Global Trade Repositories
DTCC currently operates two subsidiaries specifically responsible for providing repository services to the global derivatives community: the TIW operated by The Warehouse Trust Company LLC for credit derivatives, a U.S. regulated entity; and DTCC Derivatives Repository Limited (DDRL) for equity derivatives, a U.K. regulated entity.

In response to the G20 commitments made at the September 2009 Pittsburgh Summit, the Financial Stability Board (FSB) Report on OTC Derivatives Market Reform, and forthcoming statutory legislation in various jurisdictions, the international financial community recently selected DTCC's DDRL entity to provide global repository services for interest rates and FX swaps. DTCC also was selected to operate the commodities repository (together with the European Federation of Energy Traders) under its newly established Netherlands entity, Global Trade Repository for Commodities B.V.

DTCC is working closely with global partners and asset class experts to design repositories to meet the regulatory reporting requirements identified in the respective regional or national jurisdictions. DTCC has completed its first phase of creating and operating the new Global Trade Repository for Interest Rates (GTR for Rates) and Commodities (GTR for Commodities). The GTR for Rates recently began regulatory test reporting. DTCC is currently in discussions with industry and regulatory authorities, developing consensus on the right framework for the GTR for Commodities' reporting.

DTCC has extensive experience operating as a trade repository and meeting transparency needs. In November 2008, in response to mounting concerns and speculation regarding the size of the CDS market following the collapse of Lehman Brothers, DTCC began public aggregate reporting of the CDS open position inventory. Today, this reporting includes open positions and volume turnover, providing aggregate information that is extremely beneficial to both the public and regulators in understanding the size of the market and activity.

Further, following the ODRF data access guidelines for the TIW, DTCC launched a regulatory portal in February 2011, which provides automated counterparty exposure reports and query capability for market and prudential supervisors and transaction data for central banks with aggregate report views by currency and concentration. Nearly 40 regulators world-wide have signed up to the portal. DTCC plans to expand on this portal as it launches its global trade repository services for the other asset classes.

Thank you for your time and attention this afternoon. I am happy to answer any questions that you may have.

TESTIMONY OF GARY GENSLER

CHAIRMAN, COMMODITY FUTURES TRADING COMMISSION

BEFORE THE

U.S. HOUSE COMMITTEE ON FINANCIAL SERVICES

WASHINGTON, DC

June 16, 2011

Good morning Chairman Bachus, Ranking Member Frank and members of the Committee. I thank you for inviting me to today's hearing on the international context of financial regulatory reform. I also thank my fellow Commissioners and CFTC staff for their hard work and commitment on implementing the legislation.

I am pleased to testify alongside my fellow regulators.

Global Crisis

It has now been more than two years since the financial crisis, when both the financial system and the financial regulatory system failed. So many people – not just in the United States, but throughout the world – who never had any connection to derivatives or exotic financial contracts had their lives hurt by the risks taken by financial actors. The effects of the crisis remain. All over the world, we still have high unemployment, homes that are worth less than their mortgages and pension funds that have not regained the value they had before the crisis. We still have significant uncertainty in the financial system.

Though the crisis had many causes, it is clear that the swaps market played a central role. Swaps added leverage to the financial system with more risk being backed up by less capital. They contributed, particularly through credit default swaps, to the bubble in the housing market and helped to accelerate the financial crisis. They contributed to a system where large financial institutions were thought to be not only too big to fail, but too interconnected to fail. Swaps – initially developed to help manage and lower risk – actually concentrated and heightened risk in the economy and to the public.

At the conclusion of the September 2009 G-20 summit held in Pittsburgh, leaders of 19 nations and the European Union concurred that "[a]ll standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements."

We now are working across borders to achieve that goal.

Derivatives Markets

Each part of our nation's economy relies on a well-functioning derivatives marketplace. The derivatives market – including both the historically regulated futures market and the heretofore unregulated swaps market – is essential so that producers, merchants and other end-

users can manage their risks and lock in prices for the future. Derivatives help these entities focus on what they know best – innovation, investment and producing goods and services – while finding others in a marketplace willing to bear the uncertain risks of changes in prices or rates.

With notional values of approximately $300 trillion in the United States – that's more than $20 of swaps for every dollar of goods and services produced in the U.S. economy – and approximately $600 trillion worldwide, derivatives markets must work for the benefit of the public. Members of the public keep their savings with banks and pension funds that use swaps to manage their interest rate risks. The public buys gasoline and groceries from companies that rely upon futures and swaps to hedge their commodity price risks.

That's why international oversight must ensure that these markets function with integrity, transparency, openness and competition, free from fraud, manipulation and other abuses. Though the CFTC is not a price-setting agency, recent volatility in prices for basic commodities – agricultural and energy – are very real reminders of the need for common sense rules in the derivatives markets.

International Coordination

To address changes in the derivatives markets as well as the real weaknesses in swaps market oversight exposed by the financial crisis, the CFTC is working to implement the Dodd-

Frank Wall Street Reform and Consumer Protection Act's derivatives oversight reforms. Our international counterparts also are working to implement reform.

Japan has acted and is now working to implement its reforms. In September of last year, the European Commission (E.C.) released its swaps proposal. The European Council and the European Parliament are now considering the proposal. Asian nations, as well as Canada, also are working on their reform packages.

As we work to implement the derivatives reforms in the Dodd-Frank Act, we are actively coordinating with international regulators to promote robust and consistent standards and avoid conflicting requirements in swaps oversight. The Commission participates in numerous international working groups regarding swaps, including the International Organization of Securities Commissions Task Force on OTC Derivatives, which the CFTC co-chairs with the Securities and Exchange Commission (SEC). The CFTC, SEC, European Commission and European Securities Market Authority are intensifying discussions through a technical working group.

As we do with domestic regulators, we are sharing many of our memos, term sheets and draft work product with international regulators. We have been consulting directly and sharing documentation with the European Commission, the European Central Bank, the UK Financial Services Authority, the new European Securities and Markets Authority, the Japanese Financial Services authority and regulators in Canada, France, Germany and Switzerland. Two weeks ago,

I met with Michel Barnier, the European Commissioner for Internal Market and Services, to discuss ensuring consistency in swaps market regulation.

The Dodd-Frank Act recognizes that the swaps market is global and interconnected. It gives the CFTC the flexibility to recognize foreign regulatory frameworks that are comprehensive and comparable to U.S. oversight of the swaps markets in certain areas. In addition, we have a long history of recognition regarding foreign participants that are comparably regulated by a home country regulator. The CFTC enters into arrangements with our international counterparts for access to information and cooperative oversight. We have signed memoranda of understanding with regulators in Europe, North America and Asia.

Furthermore, Section 722(d) of the Dodd-Frank Act states that the provisions of the Act relating to swaps shall not apply to activities outside the U.S. unless those activities have "a direct and significant connection with activities in, or effect on, commerce" of the U.S. We are developing a plan for application of 722(d) and expect to receive public input on that plan.

I will highlight a few broad areas where both regulators in the U.S. and regulators abroad are implementing swaps oversight reform.

Broadening the Scope

Foremost, the Dodd-Frank Act broadened the scope of oversight. The CFTC and the SEC will, for the first time, have oversight of the swaps and security-based swaps markets. The

CFTC's remit is growing from a marketplace that has a notional value of approximately $40 trillion to one with a notional value of approximately $300 trillion.

Similar to the Dodd-Frank Act, the European Commission's proposal covers the entire product suite, including interest rate swaps, currency swaps, commodity swaps, equity swaps and credit default swaps. It is important that all standardized swaps are subject to mandatory central clearing. We are working with our counterparts in Europe to make sure that all swaps, whether bilateral or traded on platforms, are subject to such mandatory clearing.

Centralized Clearing

Another key reform of the Dodd-Frank Act is to lower interconnectedness in the swaps markets by requiring standardized swaps between financial institutions to be brought to central clearing. This interconnectedness was, in part, the reason for the $180 billion bailout of AIG.

Clearing is another area where the Dodd-Frank Act and the E.C.'s proposal generally are consistent. In both cases, financial entities, such as swap dealers, hedge funds and insurance companies, will be required to use clearinghouses when entering into standardized swap transactions with other financial entities. Non-financial end-users that are using swaps to hedge or mitigate commercial risk, however, will be able to choose whether or not to bring their swaps to clearinghouses.

Capital and Margin

The Dodd-Frank Act includes both capital and margin requirements for swap dealers to lower risk to the economy. Capital requirements, usually computed quarterly, help protect the public by lowering the risk of a dealer's failure. Margin requirements, usually paid daily, help protect dealers and their counterparties in volatile markets or if either of them defaults. Both are important tools to lower risk in the swaps markets.

The Dodd-Frank Act authorizes bank regulators, the CFTC and the SEC to set both capital and margin "to offset the greater risk to the swap dealer or major swap participant and the financial system arising from the use of swaps that are not cleared."

In Europe, Basel III includes capital requirements for swap dealers. The E.C.'s swaps proposal includes margin requirements for uncleared swaps to lower the risk that a dealer's failure could cascade through its counterparties.

Data Reporting

The Dodd-Frank Act includes robust recordkeeping and reporting requirements for all swaps transactions. It is important that all swaps – both on-exchange and off – be reported to data repositories so that regulators can have a window into the risks posed in the system and can police the markets for fraud, manipulation and other abuses.

There is broad international consensus on the need for data reporting on swaps transactions. The E.C. proposal includes similar requirements to the Dodd-Frank Act's requirements. Regulators in Japan, Hong Kong and China also have indicated the need for reporting of swaps data.

Business Conduct Standards

The Dodd-Frank Act explicitly authorizes regulators to write business conduct standards to lower risk and promote market integrity. The E.C. proposal addresses similar protections through what it calls "risk mitigation techniques." This includes documentation, confirmation and portfolio reconciliation requirements, which are important features to lower risk. Further, the Dodd-Frank Act provides regulators with authority to write business conduct rules to protect against fraud, manipulation and other abuses.

Promoting Transparency

In the U.S., the Dodd-Frank Act brings transparency to the derivatives marketplace. Economists and policymakers for decades have recognized that market transparency benefits the public.

The more transparent a marketplace is, the more liquid it is, the more competitive it is and the lower the costs for hedgers, borrowers and their customers.

The Dodd-Frank Act brings transparency in each of the three phases of a transaction.

First, it brings pre-trade transparency by requiring standardized swaps – those that are cleared, made available for trading and not blocks – to be traded on exchanges or swap execution facilities.

Second, it brings real-time post-trade transparency to the swaps markets. This provides all market participants with important pricing information as they consider their investments and whether to lower their risk through similar transactions.

Third, it brings transparency to swaps over the lifetime of the contracts. If the contract is cleared, the clearinghouse will be required to publicly disclose the pricing of the swap. If the contract is bilateral, swap dealers will be required to share mid-market pricing with their counterparties.

The Dodd-Frank Act also includes robust recordkeeping and reporting requirements for all swaps transactions so that regulators can have a window into the risks posed in the system and can police the markets for fraud, manipulation and other abuses.

In Europe, the E.C. is considering revisions to its existing Markets in Financial Instruments Directive (MiFID), which includes a trade execution requirement and the creation of a report with aggregate data on the markets similar to the CFTC's Commitments of Traders reports.

Furthermore, in February 2011, IOSCO issued a report on trading that included eight characteristics that trading platforms should have. Many of the IOSCO members participating in the report indicated a belief that added benefits are achieved through multi-dealer trading platforms. The IOSCO report concluded that, beyond the added benefits of pre-trade transparency, trading helps mitigate systemic risk and protect against market abuse.

Japan's swaps reform promotes transparency through mandated post-trade reporting to a trade repository. Hong Kong is examining exchange-trading and electronic platform requirements as it pursues derivatives reform. China intends to mandate electronic trading of RMB FX forwards, RMB forward swaps and RMB currency swaps on trading platforms by the end of 2012.

Foreign Boards of Trade

The Dodd-Frank Act broadened the CFTC's oversight to include authority to register foreign boards of trade (FBOTs) providing direct access to U.S. traders. To become registered, FBOTs must be subject to regulatory oversight that is comprehensive and comparable to U.S. oversight. This new authority enhances the Commission's ability to ensure that U.S. traders cannot avoid essential market protections by trading contracts on FBOTs that are linked with U.S. contracts.

Access to Data

The Dodd-Frank Act includes a provision that generally requires domestic and foreign authorities, in certain circumstances, to provide written agreements to indemnify SEC- and CFTC-registered trade repositories, as well as the SEC and CFTC, for certain litigation expenses as a condition to obtaining data directly from the trade repository regarding swaps and security-based swaps. In addition, the trade repository must notify the SEC or CFTC upon receipt of an information request from a domestic or foreign authority.

After having consulted with staff, SEC Chairman Shapiro and I wrote to European Commissioner Barnier to indicate our belief that the indemnification and notice requirements need not apply to requests for information from foreign regulators in at least two circumstances.

First, the indemnification and notice requirements need not apply when a trade repository is registered with the SEC or CFTC, is registered in a foreign jurisdiction and the foreign regulator, acting within the scope of its jurisdiction, seeks information directly from the trade repository. In such dual-registration cases, we acknowledged our belief that the Dodd-Frank Act's indemnification and notice requirements need not apply, provided that applicable statutory confidentiality provisions are met. Our staff is considering this, along with other recommendations, as it prepares final rules for the Commissions' consideration.

Second, as indicated in the SEC's and CFTC's proposed rules regarding trade repositories' duties and core principles, foreign regulators would not be subject to the indemnification and notice requirements if they obtain information that is in the possession of the SEC or CFTC. The

SEC and CFTC have statutory authority to share such information with domestic and foreign counterparts and have made extensive use of this authority in the past to share information with our counterparts around the world. Furthermore, separate statutory authority exists to allow the SEC and CFTC to obtain information from a trade repository on behalf of a foreign regulator if that foreign regulator is investigating a possible violation of foreign law.

I anticipate that the CFTC staff will make additional recommendations for the Commission's consideration to facilitate regulators' access to information necessary for regulatory, supervisory and enforcement purposes.

Rule-Writing Process

The CFTC is working deliberatively, efficiently and transparently to write rules to implement the Dodd-Frank Act. The Commission on Tuesday scheduled public meetings in July, August and September to begin considering final rules under Dodd-Frank. We envision having more meetings throughout the fall to take up final rules.

The Dodd-Frank Act has a deadline of 360 days after enactment for completion of the bulk of our rulemakings -- July 16, 2011. The Dodd-Frank Act and the Commodity Exchange Act (CEA) give the CFTC the flexibility and authority to address the issues relating to the effective dates of Title VII. We are coordinating closely with the SEC on these issues.

The Dodd-Frank Act made many significant changes to the CEA. Section 754 of the Dodd-Frank Act states that Subtitle A of Title VII – the Subtitle that provides for the regulation of swaps – "shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provisions of this subtitle."

Thus, those provisions that require rulemakings will not go into effect until the CFTC finalizes the respective rules. Furthermore, they will only go into effect based on the phased implementation dates included in the final rules. During Tuesday's public Commission meeting, the CFTC released a list of the provisions of the swaps subtitle that require rulemakings.

Unless otherwise provided, those provisions of Title VII that do not require rulemaking will take effect on July 16. The Commission on Tuesday voted to issue a proposed order that would provide relief until December 31, 2011, or when the definitional rulemakings become effective, whichever is sooner, from certain provisions that would otherwise apply to swaps or swap dealers on July 16. This includes provisions that do not directly rely on a rule to be promulgated, but do refer to terms that must be further defined by the CFTC and SEC, such as "swap" and "swap dealer."

The order proposed by the Commission also would provide relief through no later than December 31, 2011, from certain CEA requirements that may result from the repeal, effective on July 16, 2011, of some of sections 2(d), 2(e), 2(g), 2(h) and 5d.

The proposed order will be open for public comment for 14 days after it is published in the Federal Register. We intend to finalize an order regarding relief from the relevant Dodd-Frank provisions before July 16, 2011.

Conclusion

Though two years have passed, we cannot forget that the 2008 financial crisis was very real. Effective reform cannot be accomplished by one nation alone. It will require a comprehensive, international response. With the significant majority of the worldwide swaps market located in the U.S. and Europe, the effectiveness of reform depends on our ability to cooperate and find general consensus on this much needed regulation.

Thank you, and I'd be happy to take questions.

June 2, 2011

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Dear Colleagues:

As leaders of the United States Senate Committee with primary jurisdiction over Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("the Act"), we write to express our desire to work closely with the European Union as you reform regulation of the derivatives markets.

International harmonization of regulation is critical to fostering transparent, global financial markets. A key objective of the Act was to "consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards" for the regulation of derivative transactions.

The goal of strengthening cooperation between our legislative bodies and our regulatory authorities remains steadfast. We look forward to working closely with you to harmonize rules on trade reporting, execution and other issues that affect the global markets. For example, there are issues regarding the potential extraterritorial applications of the Act by U.S. regulators. We agree that there are significant questions about the legal and jurisdictional reach of U.S. regulation and we are committed to working with you and our regulators to resolve these questions.

It is also important to ensure that we can safely share access to derivatives transaction information. There are concerns with the provision of the Act that mandates "indemnification" of Swap Data Repositories ("SDRs") and of the Commodity Futures Trading Commission for any expenses arising from litigation. Some of these data-sharing provisions were included in an effort to increase transparency while protecting the confidentiality of swap transaction data. While it is important to assure market participants that our regulators and SDRs have the highest security standards possible, we should develop a reporting regime that minimizes regulatory burdens and provides the transparency necessary for market efficiency and improved regulatory oversight.

Guided by the agreement reached by the 2009 Pittsburgh G-20 Communiqué, we are committed to working with you and our respective regulatory authorities to create standardized and complementary oversight of the derivatives markets.

Sincerely,

Senator Debbie Stabenow
Chairwoman

Senator Pat Roberts
Ranking Member

cc:
Michel Barnier, European Commissioner for Internal Market and Services
Nathan Faull, Director General, Internal Market and Services, European Commission
Gábor Bútor, Office of the Hungarian Presidency of the Council of the European Union

Congress of the United States
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Mr Jean-Paul Gauzès, MEP
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Mr Gábor Butor
Senior Financial Services Attaché
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May 18, 2011

Dear Colleagues,

We are writing because of our concern with the indemnification provisions found in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (P.L. 111-203, the Dodd-Frank Act) and the unintended negative consequences the provisions may have on global market transparency and regulatory harmonization.

Sections 728 and 763 of the Dodd-Frank Act require swap data repositories (SDRs) to obtain indemnification agreements from foreign regulators before sharing information with these regulators. While we understand the concept of the provisions, mandating "indemnification" by certain non-U.S. regulatory entities may result in several unintended consequences. We understand that there is a growing concern in the European Parliament about the extraterritorial requirements related to international agreements of third-party countries to agree to SDRs.

If not clarified or amended, these provisions in the Dodd-Frank Act could adversely impact international efforts to ensure that regulators receive a consolidated perspective of market data and position concentrations. Ensuring this oversight will help to mitigate threats posed by systemic risk and global regulatory disharmony. Our goal is to enable cooperation amongst regulators world-wide, and support data access guidelines as described in the OTC Derivatives Regulators Forum. We support such a model that allows equal access to data.

As Congress indicated in the Dodd-Frank Act, the Commodity Futures Trading Commission must coordinate and work with its global counterparts to ensure that U.S. regulations are harmonized in order to avoid undermining the ability of regulators to obtain information on a global basis. This is especially true in areas that are paramount in ensuring systemic safety, such as data collection and storage.

We are aware of your concerns and hope to work with U.S. regulators to try and address the integration issues with the indemnity section of the Dodd-Frank Act.

Sincerely,

Jack Kingston
Chairman
House Appropriations Subcommittee on Agriculture
United States Congress

Sam Farr
Ranking Member
House Appropriations Subcommittee on Agriculture
United States Congress

Testimony Concerning
Indemnification of Security-Based Swap Data Repositories
by
Ethiopis Tafara
Director, Office of International Affairs
U.S. Securities and Exchange Commission

Before the Subcommittee on Capital Markets and Government Sponsored Enterprises
United States House of Representatives
March 21, 2012

Chairman Garrett, Ranking Member Waters, and members of the Subcommittee:

My name is Ethiopis Tafara, and I am the Director of the Office of International Affairs at the Securities and Exchange Commission. Thank you for the opportunity to testify on behalf of the Securities and Exchange Commission on the topic of indemnification of security-based swap data repositories.

Function of Trade Repositories and Reporting Requirement

One of the lessons of the 2008 financial crisis is the importance of ensuring that regulators have timely and comprehensive data about over-the-counter (OTC) derivatives transactions. Improved transparency of swaps and security-based swaps enables regulators to monitor the exposure of counterparties to such OTC derivatives transactions, identify risk concentrations, and monitor systemic risks.

Trade Repositories can be thought of as electronic filing cabinets for information about derivatives transactions and serve as centralized locations where regulators can obtain data on open OTC derivatives contracts. The establishment of trade repositories and reporting of data to them is a particularly important element of international OTC derivatives regulation because trade repositories offer a venue where regulators from different jurisdictions can obtain information about cross-border OTC derivatives transactions.

The OTC derivatives market is a global market; it is estimated that between 55 and 75 percent of U.S. derivatives dealers' total exposures from derivatives are to non-U.S. persons and entities.[1] Without trade repositories and the ability to access them in a timely and reliable fashion, regulators, including U.S. regulators, would be challenged in carrying out their responsibility to oversee the OTC derivatives market – a responsibility necessary to reduce threats to financial stability, increase transparency and improve the integrity of the OTC derivatives marketplace.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), [2] established a reporting requirement for OTC transactions. Pursuant to Title VII of the Dodd-

[1] Sally Davies, "Cross-border derivatives exposures: how global are derivatives markets?" available at: http://www.bis.org/ifc/publ/ifcb31n.pdf (July 2009).

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act § 752 (Pub. L. 111-203, H.R. 4173) (2010).

Frank Act, security-based swaps – the type of swaps that are regulated by the SEC – must be reported to a trade repository that is registered with the SEC and that complies with a set of duties and core principles established by the Dodd- Frank Act and SEC rules.[3] The Act refers to such a repository as a "security-based swap data repository."[4]

The G20 Leaders also recognized the importance of global reporting to trade repositories as a core component of OTC derivatives regulatory reform, and in September 2009, agreed that "OTC derivatives contracts should be reported to trade repositories."

The Indemnification Requirement

Section 763(i) of the Dodd-Frank Act added a new provision to the Securities Exchange Act which would require that any U.S. or foreign authority, other than the SEC, seeking to obtain security-based swap data from a SEC-registered security-based swap data repository agree to provide indemnification to the security-based swap data repository and the SEC "for any expenses arising from litigation relating to the information provided." This indemnification requirement is a precondition to obtaining data maintained by the security-based swap data repository.

The indemnification requirement presents a barrier to U.S. and foreign governmental entities' ability to obtain data from a security-based swap data repository, in particular because U.S. and most other foreign governmental entities lack the legal authority to enter into the necessary indemnification agreement required by Section 763(i).[5]

Given the limitation that the indemnification requirement would place on regulators' access to data held by a SEC-registered security-based swap data repository, foreign regulators, through formal and informal contact, have voiced strong concerns about the requirement to SEC Commissioners and staff, and have urged the SEC to find a way to exempt them from the indemnification requirement.

In both bilateral and multilateral discussions with SEC staff, regulators of the major OTC derivatives markets have expressed concern that they would not be able to comply with the indemnification requirement, and that the indemnification requirement presents an obstacle to their ability to access data about OTC derivatives transactions necessary for the exercise of the duties of the regulator. The European Securities and Markets Authority submitted a comment

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[3] Section 763(i) of the Dodd-Frank Act added Section 13(n) to the Securities Exchange Act of 1934 and requires a person to register as a security-based swap data repository if that person directly or indirectly "make[s] use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository." Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(n)(1)).

[4] In November 2010, the SEC proposed Regulation SBSR, which would implement the Dodd-Frank Act reporting requirements to security-based swap data repositories. *See* Release No. 34-63346, *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information* (November 19, 2010), available at http://www.sec.gov/rules/proposed/2010/34-63346.pdf.

[5] For example, the Antideficiency Act, 31 USC sec. 1341, enacted in 1982, prohibits the SEC (and any other officer or employee of the US Government) from providing a general or unlimited undertaking to a court or to any third party.

letter to the SEC expressing its view that the indemnification requirement undermines the key principle of trust underlying the exchange of information between the SEC and European Union regulators.[6]

We are concerned that there is a potential danger to our regulatory framework if foreign regulators are unable to access data held by SEC-registered security-based swap data repositories. U.S. and foreign regulators share a common need to have access to data about OTC derivatives transactions, especially those transactions that take place across borders. In order to protect their access to security-based swap data, some foreign regulators have indicated to SEC staff that they plan to respond to the U.S. indemnification requirement by setting up, or encouraging the establishment of, local trade repositories, which would not be registered with the SEC and, therefore, would not be subject the indemnification requirement. In addition, U.S.-based global trade repositories may seek to shift the bulk of their business to foreign jurisdictions to avoid the indemnification requirement, maintaining only a minimal presence in the United States necessary to service the U.S. market.

The establishment of separate local trade repositories in the United States and in foreign jurisdictions would be likely to produce inefficiency and fragmentation. Inefficiency may result from having multiple trade repositories collect overlapping data. Under these circumstances, regulators will have to interact with many different trade repositories to obtain an accurate picture of the relevant OTC derivatives market. In addition, market participants may find themselves having to provide the same transaction data to multiple trade repositories.

Fragmentation will result if data regarding the OTC derivatives markets is scattered among different trade repositories and regulators do not have access to all of the relevant trade repositories. If this occurs, regulators will have an incomplete picture of the OTC derivatives markets. Such fragmentation may threaten the effectiveness of oversight of the financial markets and would harm U.S. and foreign regulators alike.

The SEC is seriously troubled by the statements of certain foreign regulators about their intention to adopt reciprocal indemnification requirements, such that U.S. regulators would have to provide written indemnification agreements to foreign trade repositories as a precondition for accessing data, or otherwise block access by U.S. regulators to foreign trade repositories.[7] The SEC would be legally unable to meet any such indemnification requirement and has argued vigorously against similar requirements in other contexts.[8]

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6 Available at http://www.sec.gov/comments/s7-35-10/s73510-19.pdf.

[7] For example, during the negotiation of the European Markets Infrastructure Regulation, or "EMIR" as it is colloquially known, a Member of the EU Parliament introduced an amendment that would institute an indemnification requirement into EMIR legislation for EU-registered trade repositories. Specifically, the amendment would have required that a non-EU regulator such as the SEC agree to indemnify the trade repository and the EU authorities for expenses related to any litigation that arises out of the trade repository's sharing of information. I understand that certain EU politicians argued that this indemnification provision be included in EMIR in direct response to the Dodd-Frank Act indemnification requirement.

[8] The SEC argued and prevailed in a case before the UK High Court of Justice that public bodies such as the SEC should not be required to post unlimited undertakings in connection with asset freeze cases and other litigation. *SEC*

Reconsidering the Indemnification Requirement

The SEC recommends that Congress consider removing the indemnification requirement added by the Dodd-Frank Act. As I have explained in this testimony, the indemnification requirement interferes with access to essential information, including information about the cross-border OTC derivatives markets. In removing the indemnification requirement, Congress would assist the SEC, as well as other U.S. regulators, in securing the access it needs to data held in global trade repositories. Removing the indemnification requirement would address a significant issue of contention with our foreign counterparts, while leaving intact confidentiality protections for the information provided.[9]

Conclusion

As Chairman Mary Schapiro noted in her testimony before the Committee on Financial Services last June, the Dodd-Frank Act requires the SEC, among other regulators, to conduct a substantial number of rulemakings that, directly or indirectly, may have international implications. To this end, SEC Commissioners and staff have been having frequent discussions with our foreign counterparts to promote international cooperation and high standards of financial regulatory reform.

Thank you for the opportunity to testify about security-based swap data repositories and the indemnification requirement and describe potential effect this requirement may have on trade reporting.

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v. Manterfield, [2008] EWHC 1349 (QB) (High Court of Justice, Queen's Bench Division, Royal Courts of Justice, Feb. 29, 2008).

[9] Section 13(n)(5)(H)(i) of the Securities Exchange Act requires the entity seeking data from the security-based swap data repository to provide a written agreement stating that it shall abide by certain confidentiality requirements. The SEC believes that receiving such assurances of confidential treatment is an appropriate condition to accessing data from a security-based swap depository. The SEC and other regulators comply with such confidential treatment obligations regularly as part of on-going supervisory and enforcement cooperation efforts.

.....
(Original Signature of Member)

112TH CONGRESS
2D SESSION

H. R. _____

To amend the Securities Exchange Act of 1934 and the Commodity Exchange Act to repeal the indemnification requirements for regulatory authorities to obtain access to swap data required to be provided by swaps entities under such Acts.

IN THE HOUSE OF REPRESENTATIVES

Mr. DOLD (for himself and Ms. MOORE) introduced the following bill; which was referred to the Committee on .....

A BILL

To amend the Securities Exchange Act of 1934 and the Commodity Exchange Act to repeal the indemnification requirements for regulatory authorities to obtain access to swap data required to be provided by swaps entities under such Acts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012".

SEC. 2. REPEAL OF INDEMNIFICATION REQUIREMENTS.

(a) DERIVATIVES CLEARING ORGANIZATIONS.—Section 5b(k)(5) of the Commodity Exchange Act (7 U.S.C. 7a-1(k)(5)) is amended to read as follows:

"(5) CONFIDENTIALITY AGREEMENT.—Before the Commission may share information with any entity described in paragraph (4), the Commission shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided.".

(b) SWAP DATA REPOSITORIES.—Section 21(d) of the Commodity Exchange Act (7 U.S.C. 24a(d)) is amended to read as follows:

"(d) CONFIDENTIALITY AGREEMENT.—Before the swap data repository may share information with any entity described in subsection (c)(7), the swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided.".

(c) SECURITY-BASED SWAP DATA REPOSITORIES.—Section 13(n)(5)(H) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(n)(5)(H)) is amended to read as follows:

"(H) CONFIDENTIALITY AGREEMENT.—Before the security-based swap data repository may share information with any entity described in subparagraph (G), the security-based swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 24 relating to the information on security-based swap transactions that is provided.".

(d) EFFECTIVE DATE.—The amendments made by this Act shall take effect as if enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203) on July 21, 2010.

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