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**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.