Testimony of

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Legislative Proposals Regarding Derivatives and SEC Economic Analysis

House Financial Services Committee
Capital Markets and Government Sponsored Enterprises Subcommittee

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Thank you for holding today's hearing to discuss legislative proposals to amend or repeal provisions in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The Depository Trust & Clearing Corporation (DTCC) and its subsidiary, DTCC Data Repository (U.S.) support efforts to improve the effectiveness of this landmark legislation, particularly in areas related to regulators' ability to access and utilize a global data set for systemic risk oversight and mitigation purposes.

DTCC strongly supports the Swap Data Repository and Clearinghouse Indemnification Correction Act of 2013 (H.R. 742), a bipartisan proposal co-sponsored by Congressman Bill Huizenga (R-MI), Congresswoman Gwen Moore (D-WI), Congressman Rick Crawford (R-AR), and Congressman Sean Patrick Maloney (D-NY). The legislation was reported out of the House Agriculture Committee on March 20, 2013 with bipartisan support. H.R. 742 will resolve issues surrounding Dodd-Frank's indemnification provisions and confidentiality requirements.

My testimony today explains the Dodd-Frank indemnification provision, how it will fragment swap data, and how fragmentation will hinder regulators' efforts to oversee a global market. I also provide information on how indemnification risks negating the existing global data sharing framework. Finally, I will address the Commodity Futures Trading Commission's (CFTC) Interpretative Statement, what it may mean for U.S. regulators, and explain why legislation is needed in this instance.

I appreciate the opportunity to bring greater attention to the unintended consequences of these provisions and the need for a legislative solution. 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.

The Dodd-Frank Confidentiality and Indemnification Provisions

Sections 728 and 763 of Dodd-Frank apply to swap data repositories (SDRs) registered with the CFTC and the Securities and Exchange Commission (SEC), respectively. Prior to sharing information with U.S. prudential regulators, the Financial Stability Oversight Council, the

Department of Justice, foreign financial supervisors (including foreign futures authorities), foreign central banks, or foreign ministries, Dodd-Frank requires (i) registered SDRs to receive a written agreement from each entity stating that the entity shall abide by certain confidentiality requirements relating to the information on swap transactions that is provided and (ii) each entity must agree to indemnify the SDR and the CFTC or the SEC (as applicable) for any expenses arising from litigation relating to the information provided.

In practice, these provisions have proven to be unworkable.

As an initial matter, indemnification is a common law concept with its origin in tort law. Many countries and their legal systems do not recognize indemnification, and further, many foreign governments cannot or will not agree to indemnify foreign, private third parties (U.S. registered SDRs). Further, regulators have noted that they are already following policies and procedures to safeguard and share data based on both the OTC Derivatives Regulators' Forum (ODRF) and the International Organization of Securities Commissions' (IOSCO) Multi-Lateral Memorandum of Understanding.

Indemnification Requirement Will Fragment the Global Data Set and Impede Regulatory Oversight

The continued presence of the indemnification requirement is a significant barrier to the ability of regulators globally to effectively utilize the transparency offered by a trade repository registered in the U.S. Without a Dodd-Frank compliant indemnity agreement, U.S.-registered SDRs may be legally precluded from providing regulators market data on transactions that are subject to their jurisdiction. In order to access the swap transaction information necessary to regulate market participants in their jurisdiction, global supervisors will be forced to establish local repositories to avoid indemnification.

Foreign regulators have noted concerns with a scenario in which a foreign regulator has an interest in certain data in a U.S. SDR resulting from a jurisdictional nexus with respect to the currency or underlying reference entity, where neither party to the transaction falls under the foreign regulator's oversight authority. For example, a U.S. and a London-based bank may trade on an equity swap involving a Japanese underlying entity, and the trade is reported to a U.S. SDR. If the Japan Financial Services Agency has an interest in accessing such data, it does not appear to be able to do so absent a confidentiality and indemnity agreement.

The creation of multiple SDRs will, by definition, fragment the current consolidated information by geographic boundaries. While each jurisdiction would have an SDR for its local information, it would be far less efficient, more expensive, and prone to error when compared with the current global information sharing arrangement in place today.

Further, a proliferation of local trade repositories would undermine the ability of regulators to obtain a timely, consolidated, and accurate 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 market conditions as a direct result of the indemnification provision. In the name of transparency, this provision creates opacity.

This could have a profound impact for U.S. regulators if other jurisdictions adopt a provision like Dodd-Frank's confidentiality and indemnification requirement. The imposition of the indemnification requirement on foreign governments increases the potential that foreign regimes will adopt reciprocal provisions. The CFTC, SEC, and others may find themselves precluded from accessing non-U.S. SDR data unless they agree to indemnify the non-U.S. private third party trade repository.

Last year, before this Subcommittee, the SEC testified that the agency "would be legally unable to meet any such indemnification requirement and has argued vigorously against similar requirements in other contexts."[1] The CFTC would likely face a similar challenge.

Indemnification Requirement Threatens Existing Global Data Sharing Framework

The indemnification provision threatens to undo the existing data sharing system that was developed through the cooperative efforts of more than 50 regulators worldwide under the auspices of the ODRF and the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions (CPSS-IOSCO).

For nearly three years, regulators globally have followed the ODRF 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) and interest rates data stored in its trade repositories. For example, under ODRF guidelines, regulators must maintain the confidentiality of information they obtain from DTCC's trade repositories and must affirm that information obtained is of material interest to their oversight.

The Dodd-Frank indemnification requirement has not been copied by Asian and European regulators. In fact, the European Market Infrastructure Regulation (EMIR) considered and rejected an indemnification requirement. Congress should enact H.R. 742 quickly to bring American law in line with the rest of the world.

Limitations of the Commodity Futures Trading Commission Interpretative Statement

In May 2012, the CFTC issued an *Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of the Commodity Exchange Act* (Interpretative Statement).

DTCC appreciates the Commission's serious effort to address these problems in the context of its rulemaking authority. However, due to the limitations inherent in a regulatory modification to a statutory problem, and in light of discussions with regulators globally, the language of the statute

[1] *H.R. __, the Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012: Hearing Before the Subcomm. on Capital Mkts. and Gov't. Sponsored Enters. of the H. Comm. on Fin. Servs.*, 112th Cong. (2012) (statement by Ethiopis Tafara, Director, Office of International Affairs, SEC), *available at* http://financialservices.house.gov/uploadedfiles/hhrg-112-ba-wstate-etafara-20120321.pdf.

ultimately requires a "legislative fix" to clarify the scope and applicability of Dodd-Frank's confidentiality and indemnification provisions. Many regulators globally have expressed to DTCC the belief that a legislative resolution is needed to address the issues presented by this provision. Congress should act to bring certainty and clarity to global swaps markets.

While the Interpretative Statement provides clarification with respect to how the Commission proposes to construe the application of Dodd-Frank, it does not provide complete resolution to the concerns expressed by foreign regulatory authorities relating to regulator access. Even with adoption of the Interpretative Statement, which DTCC supports as a necessary first step, the indemnification provisions may still cause limited data sharing across jurisdictions.

The Swap Data Repository and Clearinghouse Indemnification Correction Act of 2013

The *Swap Data Repository and Clearinghouse Indemnification Correction Act of 2013* would make U.S. law consistent with existing international standards by removing the indemnification provisions from sections 728 and 763 of Dodd-Frank. DTCC strongly supports this legislation, which we believe represents the only viable solution to the unintended consequences of indemnification.

H.R. 742 is necessary because the statutory language in Dodd-Frank leaves little room for regulators to act without U.S. Congressional intervention. This point was reinforced in the CFTC/SEC January 2012 *Joint Report on International Swap Regulation*, which 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."[2] It indicates legislation is needed, saying that "Congress may determine that a legislative amendment to the indemnification provision is appropriate."[3]

H.R. 742 would send a clear 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 over-the-counter (OTC) derivatives. By amending and passing this legislation to ensure that technical corrections to indemnification 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 and Regulatory Support for the Swap Data Repository and Clearinghouse Indemnification Correction Act of 2013

The SEC supports removing the indemnification provision from the DFA. Just this past week, SEC Chairman Elisse Walter reiterated the SEC's public support for a legislative fix, citing limitations of the indemnification requirements.[4] Last year, during a hearing before this

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[2] CFTC and SEC, *Joint Report on International Swap Regulation* (Jan. 31, 2012), at 103, *available at* http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/dfstudy_isr_013112.pdf.

[3] *Id.*

[4] Chairman Elisse Walter, Secs. and Exch. Comm'n, Remarks at the American Bar Association Spring Meeting, Regulation of Cross-Border OTC Derivatives Activities: Finding the Middle Ground (Apr. 6, 2013).

Subcommittee, the Commission testified that 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."[5]

CFTC Commissioners Scott O'Malia, Bart Chilton, and Jill Sommers have publically stated their support for a legislative solution to address the unintended consequences of the provision.[6] Recently, during a Senate Committee on Agriculture, Nutrition & Forestry hearing, CFTC Chairman Gary Gensler identified the indemnification issue as one that Congress may address.[7]

There is bicameral, bipartisan support to resolve the consequences of indemnification. In the last Congress, H.R. 4235 secured 41 co-sponsors and was one of the few DFA corrections bills to garner bipartisan, bicameral support. While the legislation passed the House Financial Services Committee, it was ultimately taken off the House Agriculture Committee hearing calendar.

On March 14, 2013, the House Agriculture Committee held a hearing on various legislative proposals, including the Swap Data Repository and Clearinghouse Indemnification Correction Act of 2013. Americans for Financial Reform, which characterized this bill as a "non-substantive and necessary change[ ] to facilitate the achievement of the goals of the [Dodd-Frank Act]," testified that it does not oppose H.R. 742. On March 20, 2013, the Committee approved the bill with bipartisan support.

In addition, several other Members of Congress have publicly declared their support for a technical correction to the provision. Senate Agriculture Committee Chairwoman Debbie Stabenow (D-MI) and former Ranking Member Pat Roberts (R-KS), and former House Appropriations Agriculture Subcommittee Congressman Jack Kingston (R-GA) and Ranking Member Sam Farr (D-CA), authored separate letters to their counterparts in the European Parliament expressing interest in working together on a solution to this issue.[8]

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[5] H.R. __, the Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012: Hearing Before the Subcomm. on Capital Mkts. and Gov't. Sponsored Enters. of the H. Comm. on Fin. Servs., 112th Cong. (2012), *supra* note 1.

[6] *See* Commissioner Jill Sommers and Commissioner Scott O'Malia, Dissenting Statement, Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of Section 21(d) of the Commodity Exchange Act, *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/sommers_omailadissentstatement; *see also* Dodd-Frank Derivatives Reform: Challenges Facing U.S. and International Markets: Hearing Before the H. Comm. on Agric., 112th Cong. (2012) (Commissioner Bart Chilton expressing support for a legislative solution), transcript *available at* http://agriculture.house.gov/sites/republicans.agriculture.house.gov/files/transcripts/112/112-35New.pdf.

[7] *See* Oversight of the Commodity Futures Trading Commission: Hearing Before the S. Comm. on Agric., Nutrition, and Forestry, 113th Cong. (2011) (colloquy between Chairman Gensler and Senator Saxby Chambliss).

[8] *See* Letter from Representative Jack Kingston and Representative Sam Farr to Mr. Sharon Bowles, Mr. Jean-Paul Gauzes, Dr. Werner Langen, and Mr. Gabor Butor (May 18, 2011); *see also* Letter from Senator Debbie Stabenow and Senator Pat Roberts to Ms. Sharon Bowles and Dr. Werner Langen (June 2, 2011).

DTCC Has Experience Operating Global Trade Repositories

DTCC provides critical infrastructure to serve all participants in the financial industry, including investors, commercial end-users, broker-dealers, banks, insurance carriers, and mutual funds. We operate as a cooperative that is owned collectively by its users and governed by a diverse Board of Directors.

DTCC has extensive experience operating as a trade repository and meeting transparency needs. We provide trade repository services in the U.S., the U.K., Japan, Singapore and the Netherlands and have established a global trio of fully replicated GTR data centers. To support Dodd-Frank requirements, the DTCC Data Repository (DDR) applied for and received provisional registration from the CFTC to operate a multi-asset-class SDR for OTC credit, equity, interest rate, foreign exchange (FX) and commodity derivatives in the U.S. DDR began accepting trade data from its clients on October 12, 2012 – the first day that financial institutions began trade reporting under the DFA. Furthermore, on December 31, DDR was the first and only registered SDR to publish real-time price information. DTCC has been providing public aggregate information for the CDS market on a weekly basis, including both open positions and turnover data, since January 2009. This information is available, free of charge, on www.dtcc.com.

Last month, DTCC announced that registered swaps dealers are now submitting OTC derivatives trade information for all five major asset classes into the DDR. The DDR is the only repository to offer reporting across all asset classes, a major milestone in meeting regulatory calls for robust trade reporting and risk mitigation in the global OTC derivatives market. Currently, there are approximately three million new positions across asset classes for a total of nearly seven million positions registered in the DDR.

I am pleased to report that DTCC's application for registration to establish a Japanese OTC derivatives trade repository was recently approved by the Financial Services Agency of Japan (J-FSA). DTCC began operating this service ahead of the J-FSA's mandated April 1 deadline for market participants in Japan to begin reporting their OTC derivatives transactions. DTCC Data Repository (Japan) KK (DDRJ) is the first trade repository to be approved and established for the Japanese market. DDRJ will support trade reporting across four major OTC derivatives asset classes including credit, equities, interest rates, and FX.

In 2012, DTCC expanded the Global Trade Repository (GTR) in order to support mandatory regulatory reporting requirements for OTC derivatives. The GTR, which holds detailed data on OTC derivatives transactions globally, gives market participants and regulators an unprecedented degree of transparency into this $650 trillion market – an essential tool for managing systemic risk.

The GTR is now established as the industry's preferred provider for global OTC derivatives reporting. It holds data on more than 98% of credit default swaps, 70% of interest rate derivatives and 60% of equities derivatives traded globally – and it is expanding to include foreign exchange and commodities derivatives.

Thanks in large part to the financial industry's voluntary effort to report data to the GTR, the CDS market is the most transparent in the world as far as regulatory understanding of counterparty exposures. In fact, we believe the CDS market is even more transparent than the equity and bond markets.

The GTR's Regulators Portal, which provides detailed information on counterparty positions as well as notional and transaction-level data, is leveraged on a regular basis by more than 40 supervisors globally to help manage sovereign debt crises, corporate failures, credit downgrades and significant losses by financial institutions. The portal is the first global service of its kind in the financial marketplace to provide regulators with granular data on transactions that occur within their jurisdictions.

Although DTCC and the industry continue to work closely to meet regulatory reporting requirements, the obstacles presented by the DFA indemnification provisions and confidentiality requirements aren't going away. Ultimately, Congress must act to avoid further unintended consequences and to ensure market transparency and risk mitigation of global financial markets. I urge Congress to pass H.R. 742, the Swap Data Repository and Clearinghouse Indemnification Correction Act of 2013.

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