

**Testimony Concerning  
Indemnification of Security-Based Swap Data Repositories  
by**

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

My name is Ethiopsis 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.<sup>1</sup> 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),<sup>2</sup> established a reporting requirement for OTC transactions. Pursuant to Title VII of the Dodd-

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

<sup>2</sup> 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.<sup>3</sup> The Act refers to such a repository as a “security-based swap data repository.”<sup>4</sup>

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).<sup>5</sup>

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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<sup>3</sup> 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)).

<sup>4</sup> 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>.

<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> The SEC would be legally unable to meet any such indemnification requirement and has argued vigorously against similar requirements in other contexts.<sup>8</sup>

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

<sup>7</sup> 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.

<sup>8</sup> 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.<sup>9</sup>

## ***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).

<sup>9</sup> 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.