House Committee on Agriculture
Subcommittee on General Farm Commodities and Risk Management

To review H.R. 3283, the "Swap Jurisdiction Certainty Act", H.R. 1838 to repeal Section 716 of Dodd-Frank, and H.R. 4235, the "Swap Data Repository & Clearinghouse Indemnification Correction Act of 2012"

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Chairman Conaway and Ranking Member Boswell,

Thank you for scheduling today's hearing on Representatives Rick Crawford (R-AR) and Terry Sewell's (D-AL) bipartisan legislation, introduced with Representatives Robert Dold (R-IL) and Gwen Moore (D-MI), 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 these provisions, which 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.

The House Agriculture Committee'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 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 fragment 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 50 regulators worldwide under the auspices of the OTC Derivatives Regulators' Forum (ODRF) and, more recently, taken up 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 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) data in its Trade Information Warehouse (TIW), which holds more than 98% of all CDS trades globally. 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). This was a positive development because, as the SEC noted in testimony before the House Financial Services Committee last week, the agency "would be legally unable to meet any such indemnification requirement and has argued vigorously against similar requirements in other contexts." The CFTC would have a similar challenge.

In addition, the early EMIR texts in Europe, which called for "direct access," were amended to call for "immediate access." In Asia, the Monetary Authority of Singapore (MAS) has indicated in its public consultation that it will align its regulations with the Europeans in this area, and we expect the Japanese FSA, whose draft regulations due shortly, to be similarly aligned. However, policymakers in Hong Kong have responded by beginning to move forward with the development of 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 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 IOSCO's Multi-Lateral Memorandum of Understanding.

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 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."

Furthermore, the SEC testified in support of removing the indemnification provision from the DFA during a hearing of the House Financial Services Capital Markets Subcommittee last week. The agency said 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."

Plenary Access: Congress Needs to Clarify Intent of Statute and Rules
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 and remain within the regulator's authority.

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.

While DTCC fully supports regulators having plenary access for SDR supervision activities, we oppose plenary access for other purposes because, as a result of this provision, non-U.S. financial firms executing transactions without a U.S. nexus will 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.

In the course of dozens of meetings with global regulators, including discussions we held last week in several Asian countries and at the ODRF, non-U.S. supervisors have consistently indicated that they will not permit the use of a U.S.-based trade repository for its domestic transactions if there are asymmetric access rights and no protection of the confidentiality for their market participants, particularly their private individual and sovereign data.

If data fragmentation occurs, U.S. regulators like the SEC would face the daunting, expensive and time-consuming challenge of having to aggregate data with a U.S. nexus for purposes of market oversight and surveillance and systemic risk mitigation. This creates several significant burdens for the agency, including 1) the need to develop and enter into information-sharing agreements because current memoranda of understanding (MoU) limit transfer of data for only certain situations, such as market abuse investigations, and 2) the need to harmonize their rules with the European standard of equivalent recognition contained in EMIR.

Data fragmentation would also impose a significant financial burden on the SEC, CFTC as well as the Office of Financial Research (OFR), which would be responsible for aggregating and standardizing data and resolving issues of data omission and duplication. Furthermore, the resulting fragmentation of data would negatively impact systemic risk analysis – if not make it completely impossible.

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 they need. Congress should seriously consider finding an appropriate legislative 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.

Within the context of considering legislation that would repeal the indemnification provisions, addressing the concerns over plenary access would complement these efforts and help create a framework for global swaps data that is accessible to regulators in the United States and around the world. The goal of any amendment to the bill should be to appropriately position the DFA and U.S. regulators on plenary access. The SEC, CFTC, foreign regulatory agencies, governmental staff and lawmakers should be more comfortable that the intent of the ultimate regulatory interpretations of statute is designed to respect privacy and confidentiality, where there is no risk to the US financial system.

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 an interest rate swap in the U.K. involving a Sterling reference rate. 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 that have served regulators and the markets well, supervisors are authorized 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* (H.R. 4235), introduced by Representatives Dold, Moore, Crawford and Sewell, 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 regulators have access to the data in which the regulator has a material interest. We are pleased that several members of the House Capital Markets Subcommittee voiced their concerns with plenary access during last week's hearing on H.R. 4235 and indicated their interest in crafting a legislative solution to address this problem. We stand ready to work with them and their colleagues on a technical correction to clarify the intent of the law.

Toward that end, 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 and according to their regulatory domain. 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 morning. I am happy to answer any questions that you may have.