

**COMMODITY FUTURES TRADING COMMISSION**

**Swap Data Repositories: Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of Section 21(d) of the Commodity Exchange Act.**

**AGENCY:** Commodity Futures Trading Commission

**ACTION:** Proposed interpretative statement.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is proposing this interpretative statement to provide guidance regarding the applicability of the confidentiality and indemnification provisions set forth in new section 21(d) of the Commodity Exchange Act (“CEA”) added by section 728 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). The Commission requests comment on all aspects of the proposed interpretative statement. The proposed interpretative statement clarifies that the provisions of section 21(d) should not operate to inhibit or prevent foreign regulatory authorities from accessing data in which they have an independent and sufficient regulatory interest, even if that data also has been reported pursuant to the CEA and Commission regulations.

**DATES:** Comments must be received on or before [30 days from FR publication], 2012.

**ADDRESSES:** Comments, identified by RIN number, may be sent by any of the following methods:

- Agency Website, via its Comments Online process:

<http://comments.cftc.gov>. Follow the instructions for submitting comments through the Website.

- Mail: David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.
- Hand Delivery/Courier: Same as mail above.
- Federal eRulemaking Portal: [http:// www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Adedayo Banwo, Counsel, Office of the General Counsel, at (202) 418.6249, [abanwo@cftc.gov](mailto:abanwo@cftc.gov); With respect to questions relating to international consultation and coordination: Jacqueline Mesa, Director, Office of International Affairs, at (202) 418.5386, [jmesa@cftc.gov](mailto:jmesa@cftc.gov), Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act (“FOIA”),<sup>1</sup> a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the CFTC’s regulations.<sup>2</sup> The Commission reserves the right, but shall have no obligation, to review, prescreen,

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<sup>1</sup> 5 U.S.C. 552.

<sup>2</sup> 17 CFR 145.9.

filter, redact, refuse, or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under FOIA.

**SUPPLEMENTARY INFORMATION:**

In this release, the Commission addresses issues raised by foreign regulators with respect to the scope and application of the confidentiality and indemnification provisions of new section 21(d) of the CEA and proposes to clarify that these provisions should not operate to inhibit or prevent foreign regulatory authorities from accessing data in which they have an independent and sufficient regulatory interest.

**I. Background: Statutory and Regulatory Authorities**

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.<sup>3</sup> Title VII amended the CEA to establish a comprehensive new regulatory framework for swaps and security-based swaps.<sup>4</sup> The legislation was enacted to reduce risk, increase transparency and promote market integrity within the financial system by, among other things: (1) providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative

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<sup>3</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010), available at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

<sup>4</sup> Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the “Wall Street Transparency and Accountability Act of 2010;” 7 U.S.C. 1 et seq.

products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission’s rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission’s oversight.

To enhance transparency, promote standardization and reduce systemic risk, section 727 of the Dodd-Frank Act added to the CEA new section 2(a)(13)(G),<sup>5</sup> which requires all swaps—whether cleared or uncleared—to be reported to swap data repositories (“SDRs”). SDRs are new registered entities created by section 728 of the Dodd-Frank Act.<sup>6</sup> SDRs are required to perform specified functions related to the collection and maintenance of swap transaction data and information.<sup>7</sup>

CEA section 21(c)(7) requires that SDRs make data available to certain domestic and foreign regulators<sup>8</sup> under specified circumstances.<sup>9</sup> Separately, section 21(d) mandates that prior to receipt of any requested data or information from an SDR, a regulatory authority described in section 21(c)(7) shall agree in

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<sup>5</sup> 7 U.S.C. 2(a)(13)(G).

<sup>6</sup> Section 721 of the Dodd-Frank Act amends section 1a of the CEA to add a definition of the term “swap data repository.” Pursuant to CEA section 1a(48), the term “swap data repository means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.” 7 U.S.C. 1a(48).

<sup>7</sup> See 7 U.S.C. 24a(c). See also Commission, Final Rulemaking: Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136, Jan. 13, 2012 (“Data Final Rules”). The Data Final Rules, among other things, set forth regulations governing SDR data collection and reporting responsibilities under part 45 of the Commission’s regulations.

<sup>8</sup> The Commission’s regulations designate such regulators as either an “Appropriate Domestic Regulator” or an “Appropriate Foreign Regulator” in § 49.17(b). See Commission, Final Rulemaking: Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538, 54554 Sept. 1, 2011 (“SDR Final Rules”).

<sup>9</sup> 7 U.S.C. 24a(c)(7).

writing to abide by the confidentiality requirements described in section 8 of the CEA,<sup>10</sup> and to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under section 8 of the CEA.<sup>11</sup>

Section 752 of the Dodd-Frank Act seeks to “promote effective and consistent global regulation of swaps,” and provides that the CFTC and foreign regulators “may agree to such information-sharing arrangements as may be deemed to be necessary or appropriate in the public interest . . . .”<sup>12</sup> In light of this statutory directive, the Commission has been working to provide sufficient access to SDR data to appropriate domestic and foreign regulatory authorities.

On June 8, 2011, the Chairman of the CFTC and the Chairman of the Securities and Exchange Commission (“Chairmen”) jointly submitted a letter to Michel Barnier, European Commissioner for Internal Markets and Services,<sup>13</sup> highlighting their desire for international cooperation. In the letter, the Chairmen expressed their belief that indemnification and notice requirements need not apply when a registered SDR is also registered in a foreign jurisdiction and the foreign regulator, acting within the scope of its jurisdiction, seeks information directly from the SDR.

On September 1, 2011, the Commission adopted regulations implementing CEA section 21’s registration standards, duties, and core principles for SDRs. To

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<sup>10</sup> 7 U.S.C. 12.

<sup>11</sup> 7 U.S.C. 24a(d).

<sup>12</sup> See section 752(a) of the Dodd-Frank Act.

<sup>13</sup> See letter from Gary Gensler, Chairman of the Commission, and Mary Schapiro, Chairman of the SEC, to Michel Barnier, European Commissioner for Internal Markets and Services, European Commission, dated June 8, 2011.

implement the provisions of section 21(c)(7) and (d), the Commission adopted definitions and standards for determining access by domestic and foreign regulators to data maintained by SDRs.

The Commission acknowledged in the SDR Final Rules that the CEA's indemnification requirement could have the unintended effect of inhibiting direct access by other regulators to data maintained by SDRs due to various home country laws and regulations.<sup>14</sup> The SDR Final Rules provided that under specified circumstances, certain "Appropriate Domestic Regulators"<sup>15</sup> may gain access to the swap data reported and maintained by SDRs without being subject to the notice and indemnification requirements of CEA sections 21(c)(7) and (d).<sup>16</sup> In connection with foreign regulatory authorities, the Commission determined in the SDR Final Rules that confidential swap data reported to and maintained by an SDR may be accessed by an Appropriate Foreign Regulator<sup>17</sup> without the

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<sup>14</sup> See SDR Final Rules at 54554.

<sup>15</sup> The term Appropriate Domestic Regulator is defined in 17 CFR § 49.17(b)(1) as the Securities and Exchange Commission; each prudential regulator identified in section 1a(39) of the CEA. 7 U.S.C. 1a(39); the financial Stability Oversight Council; the Department of Justice; any Federal Reserve Bank; the Office of Financial Research; and any other person the Commission deems appropriate.

<sup>16</sup> In the Commission's view, it is appropriate to permit access to the swap data maintained by SDRs to Appropriate Domestic Regulators that have concurrent regulatory jurisdiction over such SDRs, without the application of the notice and indemnification provisions of sections 21(c)(7) and (d) of the CEA. See SDR Final Rules at 54554 n.163. Accordingly, these provisions do not apply to an Appropriate Domestic Regulator that has regulatory jurisdiction over an SDR registered with it pursuant to a separate statutory authority that is also registered with the Commission, if the Appropriate Domestic Regulator executes an MOU or similar information sharing arrangement with the Commission and the Commission, consistent with CEA section 21(c)(4)(A), designates the Appropriate Domestic Regulator to receive direct electronic access. See 17 CFR § 17(d)(2).

<sup>17</sup> The term Appropriate Foreign Regulator is defined in 17 CFR § 49.17(b)(2) as a foreign regulator with an existing memorandum of understanding ("MOU") or similar type of information sharing arrangement executed with the Commission, and/or a foreign regulator without an MOU as determined on a case-by-case basis by the Commission.

execution of a confidentiality and indemnification agreement when the Appropriate Foreign Regulator has supervisory authority over an SDR registered with it pursuant to foreign law and/or regulation that is also registered with the Commission.

The confidentiality and indemnification provisions of new CEA section 21 apply only when a regulatory authority seeks access to data from an SDR. In the SDR Final Rules, the Commission noted that section 8(e) of the CEA provides for the Commission (as opposed to an SDR) to share confidential information in its possession with any department or agency of the Government of the United States, or with any foreign futures authority, department or agency of any foreign government or political subdivision thereof,<sup>18</sup> acting within the scope of its jurisdiction.<sup>19</sup>

The SDR Final Rules became effective on October 31, 2011.<sup>20</sup> Under these rules, trade repositories may apply to the Commission for full registration as SDRs. Pending the adoption and effectiveness of other, related regulatory provisions and definitions, however, such registrations are deemed “provisional.”<sup>21</sup>

## **II. Considerations Relevant to the Commission’s Proposed Interpretative**

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<sup>18</sup> Section 725(f) of the Dodd-Frank Act amended section 8(e) of the CEA to include foreign central banks and ministries.

<sup>19</sup> See SDR Final Rules at 54554.

<sup>20</sup> Id.

<sup>21</sup> See 17 CFR § 49.3(b).

## Statement<sup>22</sup>

### A. International Considerations

As noted above, section 752(a) of the Dodd-Frank Act directs the Commission to consult and coordinate with foreign regulatory authorities regarding the establishment of consistent international standards for the regulation of swaps and various “swap entities.” Section 752(a) also provides that the Commission “may agree to such information-sharing arrangements [*with foreign regulatory authorities*] as may be deemed to be necessary or appropriate in the public interest” or for the protection of investors and counterparties.<sup>23</sup>

The Commission is committed to a cooperative international approach to the registration and regulation of SDRs, and consulted extensively with various foreign regulatory authorities in promulgating both its proposed and final regulations concerning SDRs.<sup>24</sup> The Commission notes that the SDR Final Rules are largely consistent with the recommendations and goals of the May 2010 “CPSS-IOSCO Consultative Report, Considerations for Trade Repositories in the OTC Derivatives Market” (“Working Group Report”).<sup>25</sup>

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<sup>22</sup> Legislation has been introduced in Congress that would amend the CEA to eliminate or substantially limit the SDR indemnification provision.

<sup>23</sup> See section 752(a) of the Dodd-Frank Act.

<sup>24</sup> See public comment file in response to the proposal for the SDR Final Rules, available at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=939> and SDR Final Rules note 6 at 54539, supra.

<sup>25</sup> This working group was jointly established by the Committee on Payment and Settlement Systems (“CPSS”) of the Bank of International Settlements and the Technical Committee of the International Organization of Securities Commissions (“IOSCO”). The Working Group Report presented a set of factors to consider in connection with the design, operation and regulation of SDRs. A significant focus of the Working Group Report is access to SDR data by appropriate regulators. The Working Group Report urges that a trade repository “should support market transparency by making data available to relevant authorities and the public in line with their respective information needs.” The Working Group Report is available at

B. Public Comments on SDR Regulations.

In developing the SDR Final Rules, the Commission received several comments regarding access to SDR data by foreign regulatory authorities and the confidentiality and indemnification provisions of CEA section 21(d). The Commission has considered these comments in formulating this proposed interpretation but requests further comment concerning the specific interpretative statement proposed.

Managed Funds Association (“MFA”) requested that the Commission actively participate in facilitating foreign regulatory access and confirming a foreign regulator’s authority in connection with any SDR data request.<sup>26</sup> The CME Group Inc. (“CME”) argued against the Commission designating any third party to receive swap data, and TriOptima suggested that the Commission “adopt as flexible an interpretation as possible” regarding the indemnification provisions in CEA section 21(d).<sup>27</sup>

The Depository Trust & Clearing Corporation (“DTCC”) stated that the “indemnification provisions should not apply in situations where regulators are carrying out regulatory responsibilities, acting in a manner consistent with international agreements and maintaining the confidentiality of data.”<sup>28</sup>

Additionally, the Commission received a comment letter from the European

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<http://www.bis.org/publ/cpss90.pdf>. See also CPSS-IOSCO Consultative Report, Principles of Financial Market Infrastructures (March 2011) available at <http://www.bis.org/publ/cpss94.pdf>. See also Financial Stability Board (“FSB”), Implementing OTC Derivatives Market Reforms, Oct. 25, 2010 (“FSB Report”); FSB, Derivative Market Reforms, Progress Report on Implementation, Apr. 15, 2010 (“FSB Progress Report”).

<sup>26</sup> See comment letter from MFA.

<sup>27</sup> See comment letters from CME and TriOptima.

<sup>28</sup> See comment letter from DTCC.

Securities and Markets Authority (“ESMA”)<sup>29</sup> stating that it believes the indemnification provision “undermines” principles of trust and consultation.

C. Consultations with Foreign Regulatory Authorities

Consistent with the international harmonization envisioned by section 752 of the Dodd-Frank Act, the Commission has engaged in consultations with foreign regulatory authorities regarding the Commission’s regulations relating to the Dodd-Frank Act. During these consultations, many foreign regulatory authorities have expressed concern about the difficulty in complying with the indemnification provisions of CEA section 21(d).

As a consequence of these consultations with foreign regulatory authorities, and pursuant to the mandate for cooperation under section 752, the Commission concludes that further guidance is necessary to ensure that appropriate access by foreign regulatory authorities is not unnecessarily inhibited. For example, the Commission has learned that foreign regulatory authorities have asked whether a recognition regime with respect to SDRs, and/or access by foreign authorities that do not regulate an SDR, would conflict with § 49.17(d)(3) and § 49.18(c) of the SDR Final Rules, which refer to registration with Appropriate Foreign Regulators. Foreign regulatory authorities have also taken action to harmonize regulatory reporting rules.

While the SDR Final Rules address foreign regulators with supervisory authority and regulatory responsibility, the Commission is proposing the following interpretative statement, pursuant to section 752, to ensure that foreign regulators receive sufficient access to data reported to SDRs where such foreign

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<sup>29</sup> See comment letter from ESMA.

regulators have an independent and sufficient regulatory interest.

### **III. Commission Proposed Interpretative Statement**

In this proposed interpretative statement, the CFTC provides guidance regarding the confidentiality and indemnification provisions of CEA section 21(d). As noted above, the Commission seeks comment from interested members of the public on all aspects of this proposed interpretative statement.

#### **A. Data Reported to Registered SDRs**

The Commission understands that some registered SDRs also may be registered, recognized or otherwise authorized in a foreign jurisdiction and may accept swap data reported pursuant to the foreign regulatory regime. The Commission concludes that the confidentiality and indemnification provisions of CEA section 21(d) generally apply only to such data reported pursuant to the CEA and Commission regulations.

The Commission further concludes that the confidentiality and indemnification provisions should not operate to inhibit or prevent foreign regulatory authorities from accessing data in which they have an independent and sufficient regulatory interest (even if that data also has been reported pursuant to the CEA and Commission regulations).

Accordingly, and consistent with the Commission's SDR Final Rules, the Commission proposes to interpret CEA section 21(d) such that a registered SDR would not be subject to the confidentiality and indemnification provisions of that section if:

- Such registered SDR also is registered, recognized or otherwise authorized in a foreign jurisdiction’s regulatory regime; and
- The data sought to be accessed by a foreign regulatory authority has been reported to such registered SDR pursuant to the foreign jurisdiction’s regulatory regime.

This proposed interpretative guidance is grounded in principles of international law and comity. For example, in F. Hoffmann-La Roche Ltd. v. Empagran S.A., the U.S. Supreme Court, in reviewing the extraterritorial applicability of a different federal statute, stated that extraterritorial jurisdiction should be construed, where ambiguous, “to avoid unreasonable interference with the sovereign authority of other nations.”<sup>30</sup> In cases considering concepts of international law and comity in evaluating the extraterritorial scope of federal statutes, the Supreme Court has noted that the principles in the Third Restatement of Foreign Relations Law are relevant to the interpretation of U.S. law.<sup>31</sup>

Specifically, section 403 of the Third Restatement of Foreign Relations Law states, in relevant part:

Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

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<sup>30</sup> F. Hoffmann-LaRoche, Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004). In Hoffmann-LaRoche, the Supreme Court also stated that canons of statutory construction “assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.” Id.

<sup>31</sup> Id. at 164-165.

- (a) The link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) The connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) The character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) The existence of justified expectations that might be protected or hurt by the regulation;
- (e) The importance of the regulation to the international political, legal, or economic system;
- (f) The extent to which the regulation is consistent with the traditions of the international system;
- (g) The extent to which another state may have an interest in regulating the activity; and
- (h) The likelihood of conflict with regulation by another state.<sup>32</sup>

To avoid unreasonable interference with the sovereign authority of foreign regulators, this proposed interpretative statement is supported and underpinned by principles of international law and comity.

#### B. Foreign Regulatory Access

In the Commission's view, a foreign regulator's access to data held in a registered SDR that also is registered, recognized, or otherwise authorized in a foreign jurisdiction's regulatory regime, where the data sought to be accessed has

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<sup>32</sup> Rest. 3d., Third Restatement Foreign Relations Law section 403 (scope of a statutory grant of authority must be construed in the context of international law and comity including, as appropriate, the extent to which regulation is consistent with the traditions of the international system).

been reported pursuant to that regulatory regime, should be governed by such foreign jurisdiction's regulatory regime. The Commission concludes that application of the requirements of CEA section 21(d) in these circumstances is unreasonable in light of, among other things, the importance of such data to the foreign jurisdiction's regulatory regime, foreign regulators' interest in unfettered access to such data, and the traditions of mutual trust and cooperation among international regulators.<sup>33</sup>

Therefore, the Commission proposes that a foreign regulator's access to data from a registered SDR that also is registered, recognized, or otherwise authorized in a foreign jurisdiction's regulatory regime, where the data to be accessed has been reported pursuant to that regulatory regime, will be dictated by that foreign jurisdiction's regulatory regime and not by the CEA or Commission regulations. Such access is appropriate, in the Commission's view, even if the applicable data is also reported to the registered SDR pursuant to the Commission's Data Final Rules.<sup>34</sup>

Additionally, the Commission reiterates that a foreign regulatory authority, like domestic regulators, can nonetheless receive confidential data,

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<sup>33</sup> The Commission notes that access to data held by trade repositories is a concept under discussion and development among international regulators. At the request of the FSB, CPSS and IOSCO have established a working group of relevant authorities to produce a forthcoming report regarding authorities' access to trade repository data.

<sup>34</sup> Regarding the Commission's access to SDR data, section 21(b)(1)(A) of the CEA states that the Commission "shall prescribe standards that specify the data elements for each swap that shall be collected and maintained by each registered swap data repository." Section 21(c)(1) of the CEA requires registered SDRs to "accept data prescribed by the Commission for each swap under subsection (b)." Therefore, with respect to Commission access to data held in registered SDRs, the Commission concludes that the direct electronic access provisions of CEA section 21(c)(4) apply only to such data that the SDR is required to accept under section 21(c)(1), which is further defined by part 45 of the Commission's regulations. In this respect, the Commission concludes that its direct electronic access applies only to such data reported pursuant to section 21 and Commission regulations promulgated thereunder.

without the execution of a confidentiality and indemnification agreement, from the Commission (as opposed to an SDR) pursuant to section 8(e) of the CEA.<sup>35</sup> Such data sharing and access would be governed by the confidentiality provisions of section 8 of the CEA.

C. Request for Comment

The Commission requests comment on all aspects of its proposed interpretative statement. In particular, the Commission requests comment on the following issue: how would the timing and implementation of foreign jurisdictions' regulatory regimes affect the Commission's proposed interpretative guidance?

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<sup>35</sup> As noted above, CEA section 8(e) allows the Commission to share confidential information in its possession obtained in connection with the administration of the CEA with "any department or agency of the Government of the United States" or with any foreign futures authority or a department, central bank or ministry, or agency of a foreign government or political subdivision thereof, acting within the scope of its jurisdiction. The Commission acknowledges the difficulty that registered SDRs may face in determining what data or reporting falls within the jurisdiction of a regulatory authority. In this regard, the Commission is considering a separate release regarding section 2(i) of the CEA.

Issued in Washington, DC, on April 30, 2012, by the Commission,

David A. Stawick

Secretary of the Commission

**Appendices to Swap Data Repositories: Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of Section 21(d) of the Commodity Exchange Act Interpretive Statement—Commission Voting Summary and Statements of Commissioners**

**NOTE: The following appendices will not appear in the Code of Federal Regulations**

**Appendix-1 Commission Voting Summary**

**On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner votes in the negative.**

**Appendix 2- Statement of Chairman Gary Gensler**

I support the proposed interpretative statement regarding the application of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) indemnification provisions for swap data repositories (SDRs). The Commission is working closely with international regulators on a collaborative approach regarding how data may be accessed by regulators. The proposed guidance, which benefited from international input, states the Commission's view that foreign regulators will not be subject to the indemnification provisions in the Dodd-Frank Act if the SDR is registered, recognized or otherwise authorized by foreign law and the data to be accessed is reported to the SDR pursuant to foreign law. The public will now have an opportunity to comment on the proposed

guidance, and I look forward to the public's input.

### **Appendix 3- Statement of Commissioner Jill E. Sommers**

I concur in the issuance of this Proposed Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of Section 21(d) of the Commodity Exchange Act (Proposed Interpretive Statement). It provides some additional clarification with respect to how the Commission intends to interpret the application of the Section 21(d) indemnification provisions beyond what the Commission stated when it finalized the swap data repository (SDR) rules. *See Swap Data Repositories: Registration Standards, Duties and Core Principles*, 76 Fed. Reg. 54,538 (Sept. 1, 2011). However, a legislative fix is the only real solution to providing appropriate regulators, both foreign and domestic, with timely access to relevant data. I agree with Commissioner O'Malia that the Commission should publicly support repeal of the indemnification provisions, and note that the SEC has already done so.

When finalizing the SDR rules, the Commission stated that a foreign regulator may have direct access to confidential swap data reported to and maintained by an SDR registered with the Commission without executing a Confidentiality and Indemnification Agreement when the SDR is also registered with the foreign regulator and the foreign regulator is acting in a regulatory capacity with respect to the SDR. *See id.* at 54,554. The Proposed Guidance clarifies that this should be the case even if the data the foreign regulator seeks also has been reported pursuant to the CEA and Commission regulations.

Aside from making this point, the Proposed Interpretive Statement does not provide any information that cannot be otherwise gleaned from the SDR final rules, with one notable exception. The final SDR rules define an “Appropriate Foreign Regulator” as one that has supervisory authority over an SDR that is *registered* with the foreign regulator and with the CFTC. The Proposed Interpretive Statement expands this concept to SDRs that are *registered, recognized, or otherwise authorized* in a foreign jurisdiction’s regulatory regime. Thus, registration and recognition are equivalent. This is a welcome clarification and a step in the right direction.

I should note that the indemnification provisions of Section 21(d) may have an adverse effect on U.S. regulators too. The Proposed Interpretive Statement touches on a distinction drawn in Part 49 between “Appropriate Domestic Regulators,” which include a number of domestic regulatory authorities, and an “Appropriate Domestic Regulator with Regulatory Responsibility over a Swap Data Repository” (a single entity subcategory of Appropriate Domestic Regulators, namely, the Securities and Exchange Commission (SEC)). Only the latter category of domestic regulator (*i.e.* the SEC) is exempt from the indemnification provisions of Section 21(d). While it makes sense that the SEC should be able to receive SDR data directly from an SDR absent an indemnification agreement, I encourage comments as to whether other Appropriate Domestic Regulators should have similar access.

#### **Appendix 4- Statement of Commissioner Scott D. O'Malia**

I concur in support of the Commission's proposed interpretative statement ("Proposed Interpretative Statement") regarding the confidentiality and indemnification provisions of Section 21(d) of the Commodity Exchange Act ("CEA").

Ultimately, Congress should repeal the confidentiality and indemnification provisions of Section 21(d) of the CEA and the Commission should publicly support that repeal. Absent a legislative fix, however, I believe the Commission is taking the right step to allay the concerns expressed by many foreign regulatory authorities.

I am somewhat concerned that the Proposed Interpretative Statement does not address one important issue. Specifically, the Proposed Interpretative Statement would not provide foreign regulatory authorities with access to swaps data if those authorities had not yet finalized their regulations. In order to better understand the public's view on this issue, I have added a question seeking comment on how the timing and implementation of foreign jurisdictions' regulatory regimes should affect the Commission's final interpretation.

Lastly, I am pleased that this Proposed Interpretative Statement is based on principles of international harmonization and comity. The Commission should continue to consult with foreign regulatory authorities in a manner consistent with international agreements regarding the registration of swap data repositories and the sharing of swaps data. In my view, these principles should establish the foundation of the Commission's forthcoming rulemaking concerning the

extraterritorial application of the Dodd-Frank Act to foreign-based entities. Several foreign jurisdictions are in the process of finalizing new rules for the regulation of swaps and it is important that those rules provide a level and competitive playing field for U.S. firms as well.