

SWAP DATA REPOSITORY AND CLEARINGHOUSE
INDEMNIFICATION CORRECTION ACT OF 2012

MAY 9, 2012.—Ordered to be printed

Mr. BACHUS, from the Committee on Financial Services,
submitted the following

R E P O R T

[To accompany H.R. 4235]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 4235) to amend the Securities Exchange Act of 1934 and the Commodity Exchange Act to repeal the indemnification requirements for regulatory authorities to obtain access to swap data required to be provided by swaps entities under such Acts, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012”.

SEC. 2. REPEAL OF INDEMNIFICATION REQUIREMENTS.

(a) DERIVATIVES CLEARING ORGANIZATIONS.—Section 5b(k)(5) of the Commodity Exchange Act (7 U.S.C. 7a-1(k)(5)) is amended to read as follows:

“(5) CONFIDENTIALITY AGREEMENT.—Before the Commission may share information with any entity described in paragraph (4), the Commission shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided.”

(b) SWAP DATA REPOSITORIES.—Section 21(d) of the Commodity Exchange Act (7 U.S.C. 24a(d)) is amended to read as follows:

“(d) CONFIDENTIALITY AGREEMENT.—Before the swap data repository may share information with any entity described in subsection (c)(7), the swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided.”

(c) SECURITY-BASED SWAP DATA REPOSITORIES.—Section 13(n)(5)(H) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(n)(5)(H)) is amended to read as follows:

“(H) CONFIDENTIALITY AGREEMENT.—Before the security-based swap data repository may share information with any entity described in subparagraph (G), the security-based swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 24 relating to the information on security-based swap transactions that is provided.”

(d) EFFECTIVE DATE.—The amendments made by this Act shall take effect as if enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111–203) on July 21, 2010.

PURPOSE AND SUMMARY

H.R. 4235, the “Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012,” would repeal the indemnification provisions in Sections 725, 728, and 763 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) (PL 111–203) to increase market transparency, facilitate global regulatory cooperation, and ensure that U.S. regulators have access to necessary swaps data from foreign data repositories, derivatives clearing organizations, and regulators.

BACKGROUND AND NEED FOR LEGISLATION

Sections 728 and 763 of the Dodd-Frank Act require swap data repositories and security-based swap data repositories to make data available to non-U.S. financial regulators, including foreign financial supervisors, foreign central banks, and foreign ministries. Before a U.S. data repository can share data with a foreign regulator, however, the foreign regulator must agree that it will abide by applicable confidentiality requirements that it will indemnify the data repository and the Securities and Exchange Commission (SEC) or the Commodity Futures Trading Commission (CFTC) for litigation expenses that may result from the sharing of data with the foreign regulator. Section 725 of the Dodd-Frank Act imposes similar requirements for data sharing between derivatives clearing organizations and foreign regulators, including the requirement that foreign regulators indemnify derivatives clearing organizations and U.S. regulators for litigation expenses that may result from the sharing of data with foreign regulators.

These indemnification provisions—which were not included in the financial reform bill passed by the House of Representatives in December 2009—threaten to make data sharing arrangements with foreign regulators unworkable. Foreign regulators will most likely refuse to indemnify data repositories, derivatives clearing organizations, or their U.S. regulators for litigation expenses in exchange for access to data. As a result, foreign regulators may establish their own data repositories and clearing organizations to ensure they have access to data they need to perform their supervisory duties, which would result in the creation of multiple databases, needlessly duplicative data collection efforts, and the possibility of inconsistent or incomplete data being collected and maintained across multiple jurisdictions. Moreover, the indemnification provisions in Sections 725, 728, and 763 of the Dodd-Frank Act caused foreign regulators to consider adopting similar indemnification requirements, which would prevent U.S. regulators from obtaining data from foreign data repositories and derivatives clearing organizations.

Market participants and regulators have expressed concerns about these indemnification provisions. For example, in a February 8, 2012, statement for the record at a Capital Markets and Government Sponsored Enterprises Subcommittee hearing, Larry Thompson, Managing Director and General Counsel for the Depository Trust & Clearing Corporation, stated that “[m]any regulators worldwide have expressed deep concerns about the reach and scope of the indemnity provision and have stated it creates an environment for data fragmentation.” Mr. Thompson noted that such provisions will “(1) impede global regulatory cooperation, (2) risk fragmentation of a global data set for OTC derivatives, and (3) undermine efforts to increase market transparency and mitigate risk in this market.” Carlos Tavares, Vice Chairman of the European Securities and Markets Authority, expressed similar concerns in a January 17, 2012, letter to SEC Chairman Mary Schapiro, writing that “indemnification agreements undermine the key principle of trust . . . essential for exchanging information among regulators.”

On February 1, 2012, the CFTC and the SEC staff issued a “Joint Report on International Swap Regulation,” which acknowledged these problems with the indemnification provisions in Sections 728 and 763 of the Dodd-Frank Act. The Commissions’ staff reported that the indemnification provisions have “caused concern among foreign regulators, some of which have expressed unwillingness to register or recognize [a swaps data repository] unless able to have direct access to necessary information.” The staff reported that foreign regulators “are considering the imposition of a similar requirement that would restrict the CFTC’s and SEC’s access to information at [data repositories] abroad.” The staff noted that even though the CFTC and SEC are working to provide access to foreign regulators consistent with the Dodd-Frank Act and to ensure that U.S. regulators have access to foreign-based information, “Congress may determine that a legislative amendment to the indemnification provision is appropriate.”

To mitigate the potential negative impacts of the Dodd-Frank Act’s indemnification provisions, Representatives Robert Dold and Gwen Moore introduced H.R. 4235, the “Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012.” During a March 21, 2012 hearing on the legislation, the Subcommittee on Capital Markets and Government Sponsored Enterprises received testimony from Ethiopis Tafara, the Director of the Office of International Affairs at the SEC, who acknowledged the problems associated with the indemnification provisions in the Dodd-Frank Act and the need for a legislative fix. Mr. Tafara stated that “[t]he 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).” Mr. Tafara testified that the SEC is “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.” Mr. Tafara concluded that the “SEC recommends that Congress consider removing the indemnification requirement added by the Dodd-Frank Act,” which “would assist the SEC, as well as

other U.S. regulators, in securing the access it needs to data held in global trade repositories.”

HEARINGS

On March 21, 2012, the Subcommittee on Capital Markets and Government Sponsored Enterprises held a hearing entitled “H.R. _____, the Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012,” to consider a discussion draft of H.R. 4235. This was a two-panel hearing, and the following witnesses testified:

- Mr. Ethiopis Tafara, Director, Office of International Affairs, U.S. Securities and Exchange Commission
- Mr. Daniel Berkovitz, General Counsel, U.S. Commodity Futures Trading Commission
- Mr. Donald Donahue, Chief Executive Officer, The Depository Trust & Clearing Corporation

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on March 27, 2012, and ordered H.R. 4235, as amended, favorably reported to the House by voice vote.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. There were no record votes taken on amendments or in connection with ordering H.R. 4235, as amended, reported to the House.

During consideration of H.R. 4235 by the Committee, the following amendment and motion were considered:

1. An amendment offered by Mr. Dold, no. 1, to add a short title to the bill: “The Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012,” was agreed to by voice vote.
2. A motion offered by Mrs. Biggert to move the previous question on H.R. 4235 was agreed to by voice vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee has held hearings and made findings that are reflected in this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee establishes the following performance related goals and objectives for this legislation:

The objective of H.R. 4235 is to repeal the indemnification provisions in Sections 725, 728, and 763 of the Dodd-Frank Act to increase market transparency, facilitate global regulatory cooperation, and ensure that U.S. regulators have access to necessary swaps data from foreign data repositories, derivatives clearing organizations, and regulators.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX
EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

APRIL 27, 2012.

Hon. SPENCER BACHUS,
*Chairman, Committee on Financial Services,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4235, the Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 4235—Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012

Under current law, derivatives clearing organizations (DCOs) and swap data repositories (SDRs) are required to report information about swap transactions to the Commodity Futures Trading Commission (CFTC), or in the case of security-based SDRs, to the Securities and Exchange Commission (SEC). Further, such information must be shared with other regulatory agencies, both foreign and domestic, upon request and under certain conditions. H.R. 4235 would eliminate one of those conditions: that those other regulatory agencies indemnify the SDRs and the CFTC (or the SEC for security-based swap information) for expenses that arise from litigation related to the shared information. The bill would retain the current-law condition that those other regulatory agencies agree to certain confidentiality requirements prior to receiving the data.

Neither the CFTC nor the SEC (the agencies required to develop and enforce regulations related to swap transactions) has finalized regulations related to DCOs and SDRs. Based on information from the two agencies, CBO expects that incorporating the provisions of

H.R. 4235 at this point in the regulatory process would not require a significant increase in the workload of either agency. Therefore, CBO estimates that any change in discretionary spending to implement the legislation, which would be subject to the availability of appropriated funds, would not be significant. Further, under current law, the SEC is authorized to collect fees sufficient to offset the cost of its annual appropriation each year; therefore, we estimate the net cost to the agency would be negligible, assuming annual appropriation actions consistent with that authority.

Based on information from several federal financial regulators, CBO estimates that enacting H.R. 4235 would have an insignificant effect on direct spending; therefore, pay-as-you-go procedures apply. (Enacting the bill would not affect revenues.) Under current law, any litigation expenses of the federal government related to sharing information about swap transactions, in certain instances, would be paid by foreign regulators. Under the bill, such expenses would become a federal liability. CBO expects that any such liability would not arise in the next 10 years because the regulations are yet not in place.

H.R. 4235 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Susan Willie. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of the section 102(b)(3) of the Congressional Accountability Act.

EARMARK IDENTIFICATION

H.R. 4235 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

The short title of the Act is the “Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012.”

Section 2. Repeal of indemnification requirements

This section repeals the indemnification provisions in Sections 725, 728, and 763 of the Dodd-Frank Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COMMODITY EXCHANGE ACT

* * * * *

SEC. 5b. DERIVATIVES CLEARING ORGANIZATIONS.

(a) * * *

* * * * *

(k) REPORTING REQUIREMENTS.—

(1) * * *

* * * * *

[(5) CONFIDENTIALITY AND INDEMNIFICATION AGREEMENT.—Before the Commission may share information with any entity described in paragraph (4)—

[(A) the Commission shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided; and

[(B) each entity shall agree to indemnify the Commission for any expenses arising from litigation relating to the information provided under section 8.]

(5) *CONFIDENTIALITY AGREEMENT.—Before the Commission may share information with any entity described in paragraph (4), the Commission shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided.*

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SEC. 21. SWAP DATA REPOSITORIES.

(a) * * *

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[(d) CONFIDENTIALITY AND INDEMNIFICATION AGREEMENT.—Before the swap data repository may share information with any entity described in subsection (c)(7)—

[(1) the swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided; and

[(2) each entity shall agree to indemnify the swap data repository and the Commission for any expenses arising from litigation relating to the information provided under section 8.]

(d) *CONFIDENTIALITY AGREEMENT.—Before the swap data repository may share information with any entity described in subsection (c)(7), the swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided.*

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SECURITIES EXCHANGE ACT OF 1934

TITLE I—REGULATION OF SECURITIES EXCHANGES

* * * * *

PERIODICAL AND OTHER REPORTS

SEC. 13. (a) * * *

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(n) SECURITY-BASED SWAP DATA REPOSITORIES.—

(1) * * *

* * * * *

(5) DUTIES.—A security-based swap data repository shall—

(A) * * *

* * * * *

[(H) CONFIDENTIALITY AND INDEMNIFICATION AGREEMENT.—Before the security-based swap data repository may share information with any entity described in subparagraph (G)—

[(i) the security-based swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 24 relating to the information on security-based swap transactions that is provided; and

[(ii) each entity shall agree to indemnify the security-based swap data repository and the Commission for any expenses arising from litigation relating to the information provided under section 24.]

(H) CONFIDENTIALITY AGREEMENT.—Before the security-based swap data repository may share information with any entity described in subparagraph (G), the security-based swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 24 relating to the information on security-based swap transactions that is provided.

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