

COMMENT LETTER

May 31, 2016

ICI Submits Comment Letter in Response to Swap Data Repository Rulebook

May 31, 2016 Brent J. Fields Secretary U.S. Securities and Exchange Commission 100 F Street, NE Washington, D.C. 20549 Re: Security-Based Swap Data Repositories; ICE Trade Vault, LLC; Notice of Filing of Application for Registration as a Security-Based Swap Data Repository (File No. SBSDR-2016-01) Dear Mr. Fields: The Investment Company Institute (“ICI”)¹ appreciates the opportunity to comment on the Form SDR application of ICE Trade Vault, LLC (“ICE Trade Vault”) for registration with the Securities and Exchange Commission (“Commission” or “SEC”) as a security-based swap data repository (“SDR”).² Our members—investment companies that are registered under the Investment Company Act of 1940 (“funds”)—use security-based swaps and other derivatives in a number of ways to manage their portfolios prudently and deliver long-term returns to their shareholders.³ We generally support the Commission’s goal of increasing oversight and transparency of the security-based swap market but believe the rules, policies, and procedures of SDRs should not impose on funds significant 1 ICI is a leading, global association of regulated funds, including mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s U.S. fund members manage total assets of \$17.6 trillion and serve more than 90 million U.S. shareholders. 2 See Security-Based Swap Data Repositories; ICE Trade Vault, LLC; Notice of Filing of Application for Registration as a Security-Based Swap Data Repository, Securities Exchange Act Release No. 34-77699 (April 22, 2016), available at <https://www.sec.gov/rules/other/2016/34-77699.pdf>. The application is available at <https://www.sec.gov/rules/other/2016/ice-trade-vault-form-sdr.htm>. 3 For example, a fund may use security-based swaps to hedge other investment positions, equitize cash that the fund cannot immediately invest in direct equity holdings, manage the fund’s cash positions more generally, adjust the duration of the fund’s portfolio or manage the fund’s portfolio in accordance with the investment objectives stated in the fund’s prospectus. Mr. Brent J. Fields May 31, 2016 Page 2 of 9 new burdens that the Commission did not intend when it adopted Regulation SBSR⁴ or the registration regime for SDRs.⁵ Specifically, we commend the Commission for recognizing that funds and other end users of security-based swaps typically will lack the infrastructure to report these transactions to SDRs and for adopting rules that generally recognize these limitations. To implement the reporting regime as envisioned by the Commission, SDRs must not impose new obligations that would expand the duties of end users of security-based swaps. We recommend that the Commission follow certain principles in reviewing and approving SDR rules, including those of ICE Trade Vault, to fulfill the Commission’s intention not to burden unduly or unreasonably funds and

other end users that do not have the primary obligation to report security-based swaps. Part I of our letter explains the legal requirements that the Commission imposed on funds and other end users of security-based swaps in Regulation SBSR and describes why the Commission should not allow SDRs to expand the scope of these requirements. Part II urges the Commission not to approve SDR rules that would condition a fund's ability to meet its reporting requirements under Regulation SBSR on the fund agreeing to become a participant of that SDR. Part III urges the Commission not to approve any SDR rule that would expand the scope of obligations placed on funds and other end users of security-based swaps. Part IV recommends that the Commission ensure that SDR rulebooks contain unambiguous and complete information to allow potential users to understand SDR operations.

I. The Commission Should Preserve the Limited Reporting Regime for Non-Reporting Sides Regulation SBSR requires reporting of all security-based swaps to an SEC-registered SDR. The regulation assigns reporting obligations for an uncleared security-based swap transaction to a counterparty ("reporting side") using a hierarchy designed to place reporting duties on the side with the greater reporting capability.⁶ This reporting hierarchy requires registered security-based swap dealers to report their transactions with non-dealers. As a consequence of bearing the reporting obligation, Regulation SBSR permits the dealer to choose the SDR to which it reports, enabling the dealer to choose the SDR that will provide it with greatest ease of use or lowest fees.⁷

4 Regulation SBSR – Reporting and Dissemination of Security-Based Swap Information, Securities Exchange Act Release No. 74244 (February 11, 2015), 80 FR 14564 (March 19, 2015) ("Regulation SBSR Adopting Release").

5 Security-Based Swap Data Repository Registration, Duties, and Core Principles, Securities Exchange Act Release No. 74246 (February 11, 2015), 80 FR 14438 (March 19, 2015) ("SDR Registration Rules").

6 See Regulation SBSR Adopting Release at 14598 ("The reporting hierarchy is designed to locate the duty to report with counterparties who are most likely to have the resources and who are best able to support the reporting function.")

7 Regulation SBSR Adopting Release at 14597-98. Mr. Brent J. Fields May 31, 2016 Page 3 of 9 Because funds typically enter into security-based swaps with security-based swap dealers, they generally will not be the reporting side.⁸ Even as a non-reporting side, however, if a fund receives a report from an SDR identifying security-based swaps to which such fund is party for which the SDR lacks the counterparty ID and (if applicable) broker ID, branch ID, execution agent ID, desk ID, and trader ID (collectively, "UIC Information"), the fund must provide the missing information to the SDR within 24 hours.⁹ Even this limited requirement may prove burdensome for funds, which generally do not have existing systems in place to generate and report UIC Information. Moreover, because Regulation SBSR permits the reporting side to select the SDR to which a non-reporting side must report, funds will be required to report data to one or more SDRs not of their choosing and which may not offer attractive terms of use or pricing arrangements. The Commission should mitigate these concerns of funds by ensuring that all SDRs offer access to non-reporting sides, including funds, on terms that are fair, reasonable, not unreasonably discriminatory, and proportionate to their SEC-mandated reporting obligations.¹⁰ As described below, we believe that certain aspects of the ICE Trade Vault SDR rulebook fall short of this standard.

II. SDR Rulebooks Should Not Require Non-Reporting Sides to Become SDR Participants The Commission should not approve SDR rulebooks that force funds and other non-reporting sides to become SDR participants. Mandating that funds sign SDR participant agreements is unreasonable because these contracts demand compliance with obligations that are disproportionate to a fund's limited reporting duties under Regulation SBSR. Specifically, if the Commission permits ICE Trade Vault to compel funds to become participants of its SDR, funds will be contractually obligated to assume a variety of reporting and other duties that the SEC did not impose in Regulation SBSR or the

8 See Securities Exchange Act of 1934 ("Exchange Act") Rule 901(a)(2).

9 See Exchange Act Rule

906(a). The non-reporting side also must provide to each applicable SDR information sufficient to identify its ultimate parent(s) and any affiliate(s) that have security-based swaps reported to that SDR, and notify the SDR promptly of any changes to that information. Under the definitions of “ultimate parent” and “affiliate” for these purposes, we believe that most funds will not have an “ultimate parent” or any “affiliates” to report. However, funds with a 25% shareholder (which may occur, for example, during a period when a fund is seeded by its sponsor) would have an “ultimate parent” and may have various “affiliates,” including other funds seeded by the same sponsor. Also, a fund that controls a subsidiary that enters into swaps reported to the same SDR would have to report that subsidiary as an “affiliate” (and vice versa). See Exchange Act Rule 906(b). In addition, if a non-reporting side discovers an error in information previously reported under Regulation SBSR, it must promptly notify the reporting side of the error. See Exchange Act Rule 905(a). 10 SDRs are required to comply with certain core principles under Exchange Act Rule 13n-4(c). One such core principle is that an SDR must “[...]e]stablish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the security-based swap data repository as well as fair, open, and not unreasonably discriminatory participation by market participants...” Exchange Act Rule 13n-4(c)(iii). Mr. Brent J. Fields May 31, 2016 Page 4 of 9 SDR Registration Rules.¹¹ As discussed in more detail in Part III, these new duties would unnecessarily and unreasonably burden funds—and other non-reporting sides—and we urge the Commission not to approve this aspect of ICE Trade Vault’s Security-Based Swap Data Repository Guidebook (“Guidebook”). Section 3.1.1 of the Guidebook states that access to the ICE SDR service “is provided to parties that have a duly executed participant agreement (“Participant Agreement”) in effect with ICE Trade Vault.”¹² Under this provision, any non-reporting side that does not agree to register with ICE Trade Vault would be unable to report trade information to the SDR or view such information stored at the SDR. We disagree with the premise that funds must become full participants of the SDR to satisfy their limited obligations under Regulation SBSR.¹³ Although we appreciate that ICE Trade Vault may have data confidentiality and security concerns with respect to data provided to SDRs, there are more tailored approaches that would address those concerns without requiring funds to become full participants of SDRs with obligations attendant to such status. In adopting Regulation SBSR, the Commission considered and rejected the possibility that Exchange Act Rule 906(a) would require a non-reporting side to agree to the terms and conditions of membership in the SDR chosen by the reporting side. The Commission noted that “some non-reporting sides may not wish to connect directly to a registered SDR” and suggested that SDRs allow “non-reporting sides to provide [applicable UIC information] in a minimally burdensome manner.”¹⁴ Instead of adhering to this directive, the Guidebook proposes to require non-reporting sides to become participants in its SDR and, as described below, assume even more obligations than those required by Regulation SBSR. ¹¹ We explain a number of the specific duties that ICE Trade Vault’s rules would impose on funds and other non-reporting sides that are compelled to become SDR participants in Part III, *infra*. ¹² Section 1.29 of the Guidebook, Exhibit GG.2 to the application, available at <https://www.sec.gov/rules/other/2016/ice-trade-vault-form-sdr.htm>. ¹³ We understand that a fund or other non-reporting side could contract with its counterparty or a market utility to provide applicable UIC Information, as well as ultimate parent and affiliate information, on the fund’s behalf, and thereby avoid becoming a “participant” of ICE Trade Vault. However, dealers and other vendors may not choose to provide this service or funds may be reluctant to report in that manner because they would retain the obligation to report the required information under Regulation SBSR. Also, funds might have to pay fees for such services, which will be indirectly borne by fund shareholders. ¹⁴ Regulation SBSR Adopting Release

at 14645. When the Commission adopted Regulation SBSR, it recognized that Exchange Act Rule 906(a) could cause SDRs to send reports to and obtain information from persons that had not signed participant agreements. The operator of a trade repository raised this issue in a comment letter responding to the proposed rule. See Regulation SBSR Adopting Release at 14644 (describing comments from DTCC). The Commission adopted Exchange Act Rule 906(a) substantially as proposed and responded to DTCC's comments by advising SDRs to develop a way to accommodate reports from non-participants, as described above. Mr. Brent J. Fields May 31, 2016 Page 5 of 9 The Commission should find the proposed requirement for a non-reporting side to become a full SDR participant unreasonable and inconsistent with Exchange Act Rule 13n-1(c)(iii) because it provides a single, unduly burdensome mechanism for a fund to report limited information to an SDR. As the Commission recognized in the Regulation SBSR Adopting Release, a non-reporting side's limited reporting obligations should not subject it to the full panoply of SDR membership requirements.¹⁵ Requiring non-reporting sides to assume all of the obligations of "participants" merely to report applicable UIC Information and ultimate parent and affiliate information also is inconsistent with Exchange Act Rule 13n-4(c)(1)(ii), which requires SDRs to "[p]ermit market participants to access specific services offered by the security-based swap data repository separately." ICE Trade Vault's SDR Guidebook would not allow non-reporting sides to access Rule 906 reporting services separately from the more comprehensive reporting services required for reporting sides. We urge the Commission to require ICE Trade Vault to offer non-reporting sides access to its service on terms that are proportionate to the scope of their obligations under Regulation SBSR. For example, ICE Trade Vault could develop a method for such entities to upload the required information to the SDR without being required to access the full range of services offered by ICE Trade Vault SDR to participants. The Commission should require ICE Trade Vault to modify its Guidebook to provide non-reporting sides access only to the specific services they require to fulfill their duties under Regulation SBSR.

III. The Commission Should Not Permit SDRs to Expand the Duties of Non-Reporting Sides In adopting Regulation SBSR and the SDR Registration Rules, the Commission recognized that funds and other non-reporting sides have limited reporting capabilities and, accordingly, sought to avoid imposing unnecessary and costly reporting obligations on these entities. We urge the Commission not to approve SDR rules that would frustrate the Commission's intent to subject non-reporting sides to a lighter reporting obligation than reporting sides. We are concerned that funds that are compelled to become participants of ICE Trade Vault would take on new obligations that the Commission had not intended them to assume.¹⁶ For example, the Participant Agreement would allow ICE Trade Vault to conduct an onsite audit of a participant following five days' notice to inspect a participant's use of the system.¹⁷ It does not seem necessary to

¹⁵ See supra note 10. ¹⁶ The Participant Agreement would contractually obligate a fund to adhere to the provisions of the Guidebook and to assume a variety of additional obligations not imposed by SEC rules. See Section 3(a) of the Participant Agreement, Exhibit U.2 to the application, available at <https://www.sec.gov/rules/other/2016/ice-trade-vault-form-sdr.htm>. These new obligations would be particularly problematic if the Commission forces funds to become participants of ICE Trade Vault to satisfy obligations under Exchange Act Rule 906. ¹⁷ Section 3(h) of the Participant Agreement. Mr. Brent J. Fields May 31, 2016 Page 6 of 9 subject funds or other non-reporting sides to onsite audits when fund reporting obligations would include only applicable UIC Information (upon a request from ICE Trade Vault) and ultimate parent and affiliate information. Also, ICE Trade Vault can unilaterally amend the Participant Agreement (although two weeks' notice must be provided of any change that is likely to affect materially and adversely a participant).¹⁸ This provision would allow ICE Trade Vault to impose even more onerous provisions on non-reporting sides. None of these obligations imposed on the non-reporting sides under the Participant Agreement is required

or contemplated by Regulation SBSR. The Guidebook also would impose new obligations on non-reporting side participants. For example, the Guidebook would impose an affirmative duty for all participants to verify that all trade information submitted to the SDR is complete and accurate.¹⁹ This provision would effectively transfer to a non-reporting side an obligation that the Exchange Act and SEC rules impose on SDRs.²⁰ At a minimum, the Commission should require ICE Trade Vault to limit this obligation to information reported by the participant. Regulation SBSR and the SDR Registration rules do not require a non-reporting side to verify or vouch for the accuracy of trade information submitted by the reporting side. The Guidebook also would require participants, including non-reporting sides, to participate in the ICE Trade Vault dispute resolution process, which would place amorphous burdens on both sides of a transaction.²¹ We believe this requirement should be modified to limit non-reporting side duties to those required by Exchange Act Rule 905, which directs a non-reporting side to notify the reporting side upon noticing an error in reported data. This modification would be consistent with the design of Regulation SBSR, which generally imposes reporting responsibility on the counterparty that is most able to monitor and report information such as disputes.

IV. SDR Rulebooks Should Be Unambiguous and Complete

SDRs will play an important role in the Commission's oversight of the security-based swap market. Regulation SBSR and the SDR Registration Rules permit SDRs to adopt rules governing member conduct, even though these entities are not self-regulatory organizations. In the interest of improving data quality and minimizing burdens on market participants, we urge the Commission to

18 Section 2 of the Participant Agreement. 19 Section 4.2.4.6 of the Guidebook. 20 Section 13(n)(5)(B) of the Exchange Act and Exchange Act Rule 13n-4(b)(3) require an SDR to confirm with both parties to a security-based swap the accuracy of the data that were submitted. Also, Exchange Act Rule 13n-5(b)(1) requires every SDR to establish, maintain and enforce written policies and procedures reasonably designed to satisfy the SDR that the transaction data reported to it is complete and accurate. The Commission intended to provide SDRs some flexibility in meeting this responsibility, but ICE Trade Vault's proposal to force participants, particularly non-reporting sides, to assume this duty completely abrogates the responsibilities of the SDR. See SDR Registration Rules at 14491 ("...the Commission believes that an [SDR] can fulfill its responsibilities ... by developing reasonable policies and procedures that rely on confirmations completed by another entity, such as [a security-based swap execution facility], clearing agency, or third party vendor, as long as such reliance is reasonable.") 21 Section 4.6.1 of the Guidebook. Mr. Brent J. Fields May 31, 2016 Page 7 of 9 ensure that SDR rules clearly and fully explain an SDR's operations. ICE Trade Vault's proposed Guidebook falls short of this standard in numerous ways, including the following:

- The Guidebook would require all participants to review and resolve all error messages generated by ICE Trade Vault.²² The Guidebook also makes all participants responsible for the timely resolution of errors contained in trade information that has been submitted to ICE Trade Vault.²³ The information provided in the Guidebook does not allow prospective participants to understand fully the obligations that they might have to assume as part of the proposed error resolution process.²⁴ It would be helpful if the Guidebook explained how error messages would be used and clarified that a participant is only responsible for resolving error messages regarding trade information submitted by that participant. Our members do not generally have the systems in place to monitor affirmatively trade information data reported by their counterparties for errors. Funds would need to expend significant time and resources to assume this burden, increasing costs to fund shareholders that the Commission did not intend or consider when it adopted Regulation SBSR or the SDR Registration Rules.
- Regulation SBSR permits security-based swap counterparties to hire an agent to handle reporting obligations.²⁵ We note that the Guidebook does not explain whether reporting agents must become participants of the SDR to report on behalf

of counterparties or how SDR rules would apply to these entities. • Rule 902 of Regulation SBSR requires SDRs to disseminate publicly primary trade information for security-based swap transactions. Funds and other market participants may use the publicly disseminated information to improve their understanding of the market or inform trading decisions. We urge the Commission to ensure that all market participants have access to publicly disseminated security-based swap information. We note that ICE Trade Vault's Guidebook does not explain how market participants can view this information and how ICE Trade Vault intends to comply with Exchange Act Rule 903, which prohibits the use of coded information unless the information necessary to interpret the codes is widely available to users of the information on a non-fee basis. 22 Section 4.2.1 of the Guidebook. 23 Section 4.6 of the Guidebook. 24 As noted in Part III, *supra*, ICE Trade Vault's vague description of its dispute resolution process also provides insufficient information for funds to assess how to comply with those obligations. 25 Regulation SBSR Adopting Release at 14602. Mr. Brent J. Fields May 31, 2016 Page 8 of 9 • Section 4.10 of the Guidebook appears not to comply with Exchange Act Rule 906(a). Because the reporting side chooses the SDR that will receive the transaction report, a fund or other non-reporting side might not know that its counterparty had reported a trade to ICE Trade Vault. Section 4.10 of the Guidebook would address this situation by providing that a non-reporting side that is not an ICE Trade Vault participant must contact ICE Trade Vault to register for access to the SDR service and its trade information. This approach contradicts the plain language of Regulation SBSR, which defines "participant" as any counterparty to a security-based swap that is reported to that SDR, subject to certain territorial limitations. 26 Under Exchange Act Rule 906(a), a registered SDR must, at least once per day "send a report to each participant of the registered [SDR]...identifying for each security-based swap to which the participant is a counterparty, the security-based swap(s) for which the registered [SDR] lacks [applicable UIC information]" (emphasis supplied). In other words, the SEC's rule requires an SDR to provide the report to each counterparty and does not condition providing that report on the counterparty signing the SDR's participant agreement. ICE Trade Vault's proposal to require the non-reporting side to petition the SDR for access ignores this Regulation SBSR requirement. 26 See Exchange Act Rule 900(u). Mr. Brent J. Fields May 31, 2016 Page 9 of 9

*** We respectfully urge the Commission to ensure that all SDRs will operate in a manner consistent with the Exchange Act and the intent of Regulation SBSR to limit burdens on non-reporting sides. Therefore, SDR rules must meet three criteria. First, SDR rules should not require funds and other non-reporting sides to become participants of SDRs. Second, SDR rules should not require non-reporting sides to assume reporting duties exceeding those provided in Regulation SBSR or the SDR Registration Rules. Third, the Commission should ensure that an SDR's rules, policies and procedures, and other publicly available documents enable participants and users of the SDR to understand the SDR's operations. We urge the Commission to require ICE Trade Vault to amend its rulebook to satisfy these standards. If you have any questions on our comment letter, please feel free to contact me at (202) 326-5876. Sincerely, /s/ Jennifer S. Choi Jennifer S. Choi Associate General Counsel

cc: The Honorable Mary Jo White The Honorable Kara M. Stein The Honorable Michael S. Piwowar Stephen Luparello, Director, Division of Trading and Markets Gary Goldsholle, Deputy Director, Division of Trading and Markets Christian Sabella, Associate Director, Division of Trading and Markets David Shillman, Associate Director, Division of Trading and Markets