

Public consultation on:  
A revision of the Market Abuse  
Directive (MAD)

July 2010

Consultation response from



The Depository Trust & Clearing Corporation

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DTCC Derivatives Repository Ltd.

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Contact person:

Andrew Douglas

Head of Public Affairs, Europe

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[awdouglas@dtcc.com](mailto:awdouglas@dtcc.com)

The Depository Trust & Clearing Corporation (DTCC) welcomes the opportunity to provide input to this consultation. We do so from the perspective of being the operator of two global trade repositories covering credit default swaps (live since 2006) and equity derivatives (live July 2010).

We have commented only on the sections relevant to our experience and expertise:

- Section B (Enforcement powers and sanctions)
  - o Sub-section 5, cooperation between competent authorities and with ESMA,
  - o Sub-section 6, cooperation with third countries.
  
- Section C (Single rule book), sub-section 5 - market surveillance.

## **About DTCC**

The Depository Trust & Clearing Corporation (DTCC) brings to the discussion considerable experience and expertise in the operation of critical post-trade market infrastructures. DTCC has a nearly 36-year history of acting as a market-neutral provider of clearing, settlement and depository services to the financial services industry. The organisation is owned and governed by our members and operated on an “at cost” or not-for-profit basis. DTCC is the product of 20 years of consolidation effort among multiple, competing central counterparties (CCPs) and central securities depositories (CSDs). Our central depository provides custody and asset servicing for 3.5 million securities issues valued at \$27.6 trillion and covering 118 countries and territories.

Today, DTCC’s customers are increasingly global financial institutions dealing in globally traded instruments. In response to these changes, DTCC is, more and more, developing services to accommodate global regulatory requirements, and offers services to a networked community of thousands of financial firms in dozens of countries around the globe.

Throughout its history, DTCC has worked closely with market participants and regulators to bring safety, soundness, risk mitigation and transparency to the financial markets. DTCC has been present in Europe since 1995 and today provides a number of services in Europe. Through our subsidiary, EuroCCP, we are one of the leading pan-European central counterparties in the equities market.

DTCC’s Deriv/SERV Matching and Confirmation Service – launched in 2003 – automates the legal confirmation process for OTC derivatives. From a time when only 15% of OTC trades were electronically processed, the share of credit derivatives traded worldwide and captured electronically through this service has risen to more than 95% today. In September 2009, DTCC combined this trade confirmation service with global financial services information company, Markit’s electronic processing platforms to extend benefits to end users through a jointly owned company, MarkitSERV, that is headquartered in the EU.

In addition, DTCC’s Trade Information Warehouse (TIW) – launched in 2006 – is the world’s only comprehensive database and repository for OTC credit derivatives. The establishment of this global repository marked the first time that the financial services industry had addressed OTC derivative inventory control and transparency systematically. TIW provides a central automated repository to house and service virtually all credit default swap (CDS) contracts. DTCC announced in June 2010 that this CDS database service will now also be offered through an EU based trade repository company, DTCC Derivatives Repository Ltd, to specifically address regulator concerns regarding data access.

At the height of the Lehman Brothers crisis, TIW held a large proportion of the information on CDS positions. Although market speculation put the CDS risk exposure from Lehman Brothers at \$400 billion, DTCC was quickly able to tell the market publicly that the true exposure to Lehman Brothers was closer to a net notional value of about \$6 billion. The actual value that changed hands eventually was \$5.2 billion. Since then, TIW has been publishing aggregated OTC derivatives data for the public on a weekly basis on the website [www.dtcc.com](http://www.dtcc.com), and has been providing regulators in the Americas and Europe information which they require, with the agreement of the market participants where necessary.

## Summary

There are a number of tools at the disposal of competent authorities that will facilitate better regulation of OTC markets through the identification of potential examples of market abuse. Amongst these tools, trade repositories for derivative instruments rank highly as being potentially useful and yet largely underutilised.

For a trade repository to contribute to the maintenance of market transparency, integrity and safety, there are a number of areas in which harmonised environmental policies must be agreed and implemented. These include how **the global regulatory community should interact in support of a global business** and how these same essentially regional or even national authorities must work to **ensure the existence of global data sets** that permit meaningful regulatory analysis.

Failure to establish either a global regulatory framework or a global data set will consequently limit the effectiveness of any proposals to increase the transparency, integrity and safety of the global OTC derivatives market.

## Detailed comments

### Section B

#### **5. Cooperation between competent authorities and with ESMA**

We would reiterate our longstanding belief that it is a fundamental principle of a trade repository that it should provide unfettered access to the information it holds to all interested regulators. In this regard, we are fully supportive of the global OTC Derivatives Regulators' Forum (the "Forum") efforts to develop a framework, agreed by the global regulatory community, to provide guidance to repositories about how they should evaluate requests for information from regulatory authorities and other governmental entities. We have also engaged in developing special regulator access protocols allowing direct regulator access to data under this global framework without the need to go through repository personnel, thus greatly enhancing the ability of regulators to obtain immediate access to relevant Warehouse data.

Extensive aggregate CDS data from the global repository is also publicly released through DTCC's website at [www.dtcc.com](http://www.dtcc.com); a practice started in November 2008 and continuously enhanced to provide greater transparency.

In addition, we provide both aggregate and trade-level information to any regulator or governmental entity, including counterparty name, if the requesting regulator or other governmental entity affirms that it has a material interest in that information as contemplated by the OTC Derivatives Regulators' Forum in furtherance of its regulatory or governmental responsibilities.

We would therefore recommend that any policy established within the EU to enhance cooperation both with and between competent authorities and ESMA, take note of the Forum guidelines which represent a significant step in demonstrating cooperation between competent authorities in multiple jurisdictions.

For reference, we have appended a copy of the guidelines as presented to us by the Forum in June 2010.

## **6. Cooperation with third country regulators**

The global nature of OTC markets must be reflected by the existence of global repository solutions. At times of market stress, having all positions, both cleared and non-cleared, reported to a single trade repository will greatly reduce exposure to systemic risk by ensuring any relevant global regulator can see a firm's underlying position data and exposure from a central vantage point. To support an efficient solution that provides regulators and other supervisors with the necessary global transparency, recognition of third country trade repositories, and therefore cooperation with third country regulators, is our preferred solution. This type of solution should provide that all appropriate authorities can be guaranteed unfettered access to the data held therein in support of meeting the supervisory and regulatory mandate of the requesting authority. Where a provider operates out of the third country but that country's law prohibits unfettered access, an alternative location should be provided.

Given that the Forum guidelines cover the global regulatory framework, we would again recommend that any policy established by the EU in regard of cooperation between EU and third country regulators take note of the agreement achieved by the Forum.

## Section C

### **5. Market surveillance**

In order for market surveillance to be both possible and meaningful, it is necessary to have a central view on all global market activity. Given the contention outlined above, that the OTC derivatives market is in fact global, any regulation which then fails to support the maintenance of a limited number of global repositories would be a retrograde step in regulatory effectiveness during times of crisis. DTCC strongly believes that fragmentation of data through implementation of multiple repositories is a key risk to realising the regulatory objectives of increasing the transparency achieved by maintaining data in a centralised location. Fragmented repositories (including any CCPs that may not elect to report to a repository) make the ability to produce consolidated information far more complicated and significantly less timely:

- Regulators will need to obtain data from multiple sources, and consolidate themselves.
- True market level concentrations may be diluted and less easy to detect.
- The public may not have direct access to all the data necessary to provide a consolidated view.
- It may not be possible to create a full understanding of the net open position from multiple sources. The absolute values presented by net positions outputs are not additive.
- Obtaining data from multiple sources and consolidating the results will inevitably take longer than obtaining a consolidated report from a central source.
- Given the nature of OTC derivative products, in a multi-repository environment it is not always obvious which repository (or repositories) a given position should be registered in. Global rules will be needed to ensure that positions are neither omitted nor duplicated, and these rules implemented in firms at material aggregate cost.

DTCC envisages global solutions which recognise the international nature of trading in OTC derivatives as well as local regulator concerns about guaranteed access. We believe that such concerns can be alleviated through the establishment of a subsidiary that is capable of providing local regulators access to a data set that is:

- Complete in breadth: i.e. contains details of all contracts relevant to EU regulatory and supervisory requirements.
- Complete in depth, i.e. contains all data elements stored for a relevant contract.
- Updated daily according to a schedule pre-agreed with regulators.

DTCC believes that there is benefit in positions being reported to the repository by both counterparties. This should include any derivative contract entered into by the party, both EU and non-EU. Our experience shows that generally, where both parties report the transaction, there will be a general improvement in the quality of the underlying data.

As we believe that reporting by both parties to a trade is critical, we believe the regulation should promote such reporting to ensure best quality data and enable public and regulator reliance on this data, in the following ways:

- It should permit the use of reporting agents with such arrangements being formally documented including recognition by the repository. Formalisation allows:
  - Precise and consistent identification of customers.
  - The repository to obtain necessary consents to share data, which will still be important for transactions outside the EU in which EU regulators have an interest.
- It should support the needs of all market participants including smaller participants by ensuring availability of cost effective communication methods, e.g. customer affirmation via a web portal interface, with customers' trades based on trade submissions from the price-making firms.
- Recognise and encourage the use of electronic solutions in use for other services relevant to OTC derivatives but which are beyond the scope of repositories, e.g. execution, confirmation, automated give-up and portfolio matching. With the support of the OTC Derivatives Supervisors' Group, industry participants have been significantly increasing their use of electronic connectivity, and we believe that electronic connectivity for most participants will be part of the transaction lifecycle. Such connectivity will support the reuse of these electronic solutions to enable submissions of trades to repositories.

Having assembled such a 'complete' data set, it would then be possible to determine analytical routines that would provide pointers to potential areas of market abuse. Such routines would need to be determined with the relevant regulatory bodies and the frequency and triggers of such analysis mutually agreed.

It should also be recognised that such analyses would be post-trade but can be utilised in conjunction with any pre-trade or trade level tools implemented by trading venues. Such tools would complement the drive to create public transparency of aggregate data and regulatory transparency on position data and deal books by participating firms and would be cost effective, being built as part of existing key derivative infrastructure.

Finally, we would refer to the following detailed papers for further background on the above:

[http://www.dtcc.com/downloads/leadership/issues/repository/Role\\_of\\_a\\_TradeRepository\\_in\\_EU.pdf](http://www.dtcc.com/downloads/leadership/issues/repository/Role_of_a_TradeRepository_in_EU.pdf)

[http://www.dtcc.com/downloads/leadership/issues/repository/Central\\_Data\\_Repository\\_in\\_Europe.pdf](http://www.dtcc.com/downloads/leadership/issues/repository/Central_Data_Repository_in_Europe.pdf)

## Appendix

OTC DERIVATIVES REGULATORS' FORUM - June 2010

### **Range of Access to Information stored in The Warehouse Trust LLC<sup>[1]</sup>**

Regulatory access to information stored in trade repositories for over-the-counter (OTC) derivatives is critical to various authorities to carry out their respective mandates and legal responsibilities.<sup>[2]</sup>

This document aims to identify data that regulators around the world expect to request from The Warehouse Trust, a global trade repository for credit derivatives. Regulators should actively and mutually support each other's access to data in which they have a material interest in furtherance of their regulatory and/or governmental responsibilities, regardless of the particular corporate charter or geographic location of a repository. At the same time, any regulatory consensus on such data sharing should not be seen as limiting an individual regulator from obtaining other data for which it has the lawful responsibility and authority to obtain directly from a given repository. The guiding principles below are intended to help ensure that the relevant financial authorities have appropriate access to the data that they require.

This is not a legally binding document nor does it supersede or replace any other extant authority. It will be used to provide guidance to The Warehouse Trust in order to establish a transparent process by which relevant financial authorities may directly access the credit derivatives data maintained in the Warehouse Trust pursuant to the principles outlined below. Nevertheless, there will be instances where regulators may use other means to obtain data from Warehouse Trust or request data that is outside the scope of or not reflected in this guidance.

#### Guiding Principles

The information needs and levels of access to data will vary depending on responsibilities and statutory or other legal authority.

- Authorities, including central banks, prudential supervisors, resolution authorities and market regulators, with a material interest in credit derivatives information in furtherance of their regulatory and/or governmental responsibilities should have unfettered access to the relevant data, irrespective of the location of the trade repository.
- The scope of data access should be comparable for similarly situated authorities. However, this is without prejudice to the authority of the primary regulator or any other authority with jurisdiction over the trade repository as any such authorities need to retain their statutory authority to access any information they need to be able to carry out their statutory responsibilities. The primary regulator would not generally access participant specific data for trades where both counterparties are outside of its supervisory jurisdiction.
- Authorities accessing data in the trade repository must have the legal right and ability to keep the data confidential. This would not prohibit authorities from disclosing data if required to do so by law.

<sup>1</sup> This document is intended to provide guidance to The Warehouse Trust; however, the underlying principles might also be used to inform guidance for other global trade repositories as well.

<sup>2</sup> The terms "regulators" and "authorities" are used interchangeably and are intended to encompass public sector financial authorities including central banks, securities and market regulators, and prudential supervisors of market participants that would have a material interest in credit derivatives data in furtherance of regulatory and/or governmental responsibilities.

- These principles will be satisfied to the extent permitted by applicable data privacy and confidentiality laws. Using these principles as guidance, the following table is illustrative of the various authorities that are likely to seek information from The Warehouse Trust and proposes criteria for the types of data to which regulators would have access. This table is provided only to indicate the types of information that would be covered and is not exclusive.

This document will be provided to The Warehouse Trust as guidance for responding to individual requests of authorities to access and receive credit derivatives data. A requesting authority would make formal data requests directly to The Warehouse Trust by affirming that the authority has a material interest in the information being requested in furtherance of its regulatory and/or governmental responsibilities. Warehouse Trust will work directly with the requesting authority to determine the practical procedures for accommodating its request. In addition, through the OTC Derivatives Regulators' Forum, common data reporting formats and periodic data reports are being discussed for authorities that would like to receive data relevant to their responsibilities on a periodic basis.

Authority	Definition	Potential Data Requests*
<p align="center"><b>Market Regulator</b></p>	<p>A national government entity or equivalent that, through legal mandate, has responsibilities in the jurisdiction in which it is domiciled to maintain market stability and integrity, and/or investor protection. Such responsibilities may be carried out through:</p> <ul style="list-style-type: none"> <li>• Surveillance activities, including, looking at market patterns/characteristics in the markets to determine where there are potential risks/concentrations in the underlying positions.</li> <li>• Fraudulent activity/financial crimes detection (e.g. insider trading).</li> <li>• Oversee inspection of market participants (securities firms, brokers, investment advisers, ratings agencies, etc).</li> <li>• Enforcement, including specific actions against market participants.</li> </ul>	<ul style="list-style-type: none"> <li>• Transaction/position level data for counterparties in its jurisdiction/market it oversees, including market intermediaries for which it acts as a primary supervisor.</li> <li>• Transaction/position level data for all cleared and uncleared contracts written on a specific reference entity, industry and/or region related to the market regulated by the authority, regardless of the location of the counterparties.</li> </ul>
<p align="center"><b><u>Possible Example</u></b></p> <p align="center"><b>United States</b></p> <p align="center"><b>Securities and Exchange Commission</b></p>	<p>The Mission of the SEC is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. The SEC is responsible to: interpret federal securities laws; issue new rules and amend existing rules; oversee the inspection of securities firms, brokers, investment advisers, and ratings agencies; oversee private regulatory organizations in the securities, accounting, and auditing fields; and coordinate US securities regulation with federal, state, and foreign authorities</p> <p><i>www.sec.gov</i></p>	<ul style="list-style-type: none"> <li>• Transaction level data for US market participants bought/sold to other US market participants on any reference entity.</li> <li>• Transaction level data for US market participants on any reference entity.</li> <li>• Transaction level data for non US participants bought/sold to non US participants on US reference entities.</li> </ul>

<p style="text-align: center;"><b>Central Bank</b></p>	<p>A central bank, reserve bank, or monetary authority may issue currency, regulate the supply of credit, hold the reserve of other banks, sell new issues of securities for the government, maintain financial stability and oversee payment systems and market infrastructure.</p> <p>Such authorities have responsibilities that may include: implementing monetary policy; determining interest rates; controlling the nation's money supply; acting as the Government's banker and the bankers' bank; acting as lender of last resort; managing the country's foreign exchange and gold reserve and the Government's stock register, and ensuring the robust functioning of financial intermediaries, markets and market infrastructures to promote financial stability.</p> <p><i>If a central bank also has supervisory powers, or a capacity to obtain participant and/or transaction level information, scope of access <u>in that capacity</u> will be covered separately below.</i></p>	<ul style="list-style-type: none"> <li>• Aggregate notional data for all trades in the currency of the authority and/or settled in its currency, including breakdown by reference entity and/or sector.</li> <li>• Aggregate notional data, in its country's currency, for each of the top [10] counterparties active in that currency.</li> <li>• Aggregate notional data for contracts written on each reference entity in its jurisdiction, including the top [10] aggregate positions for each reference entity.</li> <li>• Top [10] counterparty positions, where the authority's sovereign debt is a reference obligation.</li> <li>• Top [10] counterparty positions per reference entity, where the reference entity is one of the [10] largest financial groups in its jurisdiction.</li> <li>• Top [10] counterparty positions for each of the [10] largest financial groups in its jurisdiction.</li> </ul> <p><i>Top [10] counterparties will be determined by notional volume.</i></p>
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<p style="text-align: center;"><b><u>Possible Example</u></b></p> <p style="text-align: center;"><b>Bank of Italy</b></p>	<p>The Bank of Italy is the central bank of the Republic of Italy and part of the European System of Central Banks and the Euro system. The main functions of the Bank are to ensure monetary and financial stability. The Bank's responsibilities include monetary policy, foreign exchange market and official reserves, operations on behalf of the Ministry for the Economy and Finance, investment portfolio, market supervision, payment system oversight, treasury functions, not issues, research and international relations, supervision.</p> <p><a href="http://www.bancaditalia.it">www.bancaditalia.it</a></p>	<ul style="list-style-type: none"> <li>• Aggregate data for all contracts traded or settled in the euro.</li> <li>• A list of top 10 counterparties trading euro denominated contracts with each counterparty's aggregated notional position.</li> <li>• Aggregated notional data for contracts written on an Italian reference entity, including a list of the top 10 aggregated notional counterparty positions for contracts written on each reference entity.</li> <li>• A list of the top 10 counterparties' aggregate notional positions where contracts reference the debt of the Republic of Italy.</li> <li>• A list of the top 10 counterparties aggregate notional positions where contracts reference one of the five largest financial groups in Italy.</li> <li>• A list of the top 10 counterparty positions for each of the five largest financial groups in Italy</li> </ul>
<p><b>Prudential Supervisor / Authority Responsible for Facilitating Resolution of Failed Institutions</b></p>	<p>A national government entity or equivalent that has direct statutory authority to supervise and regulate or to monitor and conduct surveillance on, or resolve financial institutions (banks, financial service providers, insurance providers, securities firms etc.) and ensure a safe banking system. This may include enforcing laws and establishing rules to protect banking depositors and other customers.</p>	<ul style="list-style-type: none"> <li>• Transaction level data for each participant regulated by the authority, for own account and/or on behalf of customers.</li> <li>• Aggregate notional counterparty positions and transaction level data for contracts written on a regulated entity, regardless of the counterparties.</li> </ul>

<p style="text-align: center;"><b><u>Possible Example</u></b></p> <p style="text-align: center;"><b>Japan FSA</b></p>	<p>The FSA is responsible for ensuring the stability of Japan's financial system, protection of depositors, insurance policyholders and securities investors, planning and policymaking concerning the financial system, inspection and supervision of private sector financial institutions and surveillance of securities transactions. Through its Securities and Exchange Surveillance Commission branch the FSA is also responsible for the market regulation.</p> <p><a href="http://www.fsa.go.jp/en">www.fsa.go.jp/en</a></p>	<ul style="list-style-type: none"> <li>• Transaction level data for Japanese institutions bought/sold to other Japanese institutions on any reference entities.</li> <li>• Transaction level data for Japanese institutions bought/sold to non Japanese institutions on any reference entity.</li> <li>• A list of aggregated notional counterparty positions where contracts reference regulated Japanese institutions, where one or more counterparties may be on-Japanese institutions.</li> </ul> <p><i>Japan FSA would only receive data for those financial institutions which it regulates or for contracts written on an institution it regulates.</i></p>
<p style="text-align: center;"><b>Systemic Risk Regulators</b></p>	<p>A financial authority mandated to oversee the entire financial system of a given jurisdiction and identify emerging risks.</p>	<p>Aggregated global data.</p>
<p style="text-align: center;"><b>Law Enforcement Authorities</b></p>		<p>Law enforcement authorities would have restricted access based on legal necessity through the normal legal channels.</p>
<p style="text-align: center;"><b>Other Authorities</b></p>		<p>Other interested authorities not listed above can access data by directly contracting relevant regulators in their jurisdiction or the institutions in their jurisdiction that are participants in trade repositories and in accordance with the applicable regulations in the relevant jurisdiction. In addition, they will have access to any public data made available by the trade repositories.</p>

*\*There are three classifications of data provided in the table above. The most granular is transaction level data, which includes individual trade details. The next is position level data, which includes aggregated position data for individual counterparties. The last is aggregated notional data, which would not provide counterparty details. An authority that receives transaction level data would thereby also have access to position level and aggregate data. Further breakdowns of this data (e.g. geography, sector, notional bought/sold, maturity) will be available to authorities as needed and as applicable to the interests outlined above.*

## **Revised Attachment - signatories**

Australian Prudential Regulation Authority  
Australian Securities and Investments Commission  
Bank of Canada  
Bank of England  
Bank of France  
Bank of Italy  
Bank of Japan  
Bank of Portugal  
Bank of Spain  
Belgian Banking, Finance and Insurance Commission (CBFA)  
Commodity Futures Trading Commission  
Deutsche Bundesbank  
European Central Bank  
European Commission  
Federal Deposit Insurance Corporation  
Federal Reserve Bank of Chicago  
Federal Reserve Bank of New York  
Federal Reserve Board  
French Autorité de Contrôle Prudentiel (ACP)  
French Financial Markets Authority (AMF)  
German Financial Supervisory Authority (BaFin)  
Hellenic Republic Capital Market Commission  
Hong Kong Monetary Authority  
Hong Kong Securities and Futures Commission  
Japan Financial Services Agency  
Korean Financial Services Commission  
Korean Financial Supervisory Service  
Monetary Authority of Singapore  
National Bank of Belgium  
Netherlands Authority for the Financial Markets (AFM)  
Netherlands Bank  
New York State Banking Department  
Office of the Comptroller of the Currency  
Ontario Securities Commission  
Portuguese Securities Market Commission (CMVM)  
Quebec Autorité des Marchés Financiers (AMF)  
Reserve Bank of Australia  
Securities and Exchange Commission  
Spanish National Securities Market Commission (CNMV)  
Swedish Financial Supervisory Authority  
Swiss Financial Market Supervisory Authority (FINMA)  
Swiss National Bank  
UK Financial Services Authority

Original document available at [http://www.dtcc.com/legal/imp\\_notices/derivserv/2010.php](http://www.dtcc.com/legal/imp_notices/derivserv/2010.php)