

19<sup>th</sup> March 2012

ESMA  
103 Rue de Grenelle  
75007 Paris  
France

Submitted via [www.esma.europa.eu](http://www.esma.europa.eu)

Re: **Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories**

Dear Sir/Madam,

MarkitSERV<sup>1</sup> is pleased to submit the following comments to ESMA in response to its Discussion Paper on the Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories (the “*Discussion Paper*” or “*DP*”).

## Introduction

MarkitSERV views its role in the global OTC derivatives markets as an independent facilitator, making it easier for participants in these markets to interact with each other. To achieve this goal, MarkitSERV provides trade processing, confirmation, matching and reconciliation services for OTC derivatives across regions and asset classes, as well as universal middleware connectivity for downstream processing such as clearing and reporting. Such services, which are offered also by various other providers, are widely used by participants in these markets today and are recognized as tools to increase efficiency, reduce cost, and secure legal certainty. With over 2,400 firms currently using the MarkitSERV platform, including over 25,000 buy-side fund entities, its legal, operational, and technological infrastructure plays an important role in supporting the OTC derivatives markets in Europe, the United States, and globally.

MarkitSERV supports ESMA’s objectives of reducing the risks that are associated with the OTC derivatives markets and of establishing common rules for central counterparties (“**CCPs**”) and trade repositories (“**TRs**”) as required by the Regulation on OTC Derivatives, CCPs and Trade Repositories (the “**Regulation**”). As a matter of principle, we recommend that ESMA employs a non-prescriptive approach to drafting the Technical Standards that would allow market participants to utilize efficient and cost-effective solutions to satisfying a requirement. This should include the use of existing infrastructure and delegation to appropriately qualified third parties. Such approach will in turn not only encourage market participants to identify the best solutions to comply with the various requirements but it will also facilitate the implementation of such requirements in a timely and cost-effective manner. That said, please find below more specific comments in relation to Risk mitigation for non-CCP cleared contracts (confirmation requirement and portfolio reconciliation) and Trade Repositories (identifiers and reporting requirement).

## 1. Risk mitigation for non-CCP cleared contracts (Article 6/8)

### 1.1. Confirmation requirement

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<sup>1</sup> MarkitSERV, jointly owned by The Depository Trust & Clearing Corporation (DTCC) and Markit, provides a single gateway for OTC derivatives trade processing. The company provides trade processing, confirmation, matching, and reconciliation services across regions and asset classes, including credit, equity, foreign exchange, and interest rate derivatives. MarkitSERV also connects dealers and buy-side institutions to trade execution venues, CCPs, and trade repositories. In 2011, over 20 million OTC transaction processing events were processed using MarkitSERV. Please see [www.markitserv.com](http://www.markitserv.com) for additional information.

**Question 12: What are your views regarding the timing for the confirmation and the differentiating criteria? Is a transaction that is electronically executed, electronically processed or electronically confirmed generally able to be confirmed more quickly than one that is not?**

We appreciate ESMA's objective of grouping OTC derivatives transactions into a limited number of categories in order to then define an appropriate time period for transactions in these categories to be confirmed. However, based on our experience in providing confirmation services for OTC derivative transactions across asset classes and regions, we believe that the time needed between the execution of a transaction and its confirmation will vary depending not only on the degree of electrification of the transaction (which is indeed often signaled by its electronic execution or processing), but also on the level of legal standardization of the OTC derivative product and the procedures that have been established by the counterparties for confirming their transactions. On the other hand, we agree that transactions in derivative products that are sufficiently standardized to be electronically confirmed can generally be confirmed more quickly than those that need to be confirmed on paper.

We therefore believe that ESMA should not establish such demanding timing requirements for the confirmation of transactions in OTC derivatives across all asset classes that would depend solely on the form of execution or processing.<sup>2</sup> Instead, to ensure the timely confirmation of all OTC derivatives transactions while providing market participants with sufficient flexibility to achieve compliance with these requirements, ESMA should require a derivative transaction to be confirmed "*as soon as technically possible following its conclusion, and no later than 24 hours following its conclusion for a transaction where electronic means of confirmation are available*".

In addition, we recommend that ESMA consider the following issues in relation to any timing requirements that it might establish for the confirmation of OTC derivatives transactions:

- The confirmation of a derivative transaction can only be achieved once *both* counterparties have agreed on the details of the transaction. ESMA should therefore recognize that for a counterparty to be in a position to confirm a derivatives transaction within a certain period of time following its execution it will have to rely on the cooperation of its counterparty. However, such counterparties might often not be exposed to any specific confirmation requirement themselves. We therefore believe that ESMA, instead of creating an obligation for at least one of the counterparties to confirm the transaction within a certain timeframe, should consider establishing a more general requirement for the relevant party to "establish appropriate policies and procedures to achieve confirmation in a timely manner". Further, any deadlines to confirm a transaction, such as "30 minutes post execution", should only begin to run when all information that is needed to perform the confirmation of the transaction has actually been obtained. Such approach will be relevant, for example, where transactions are allocated.<sup>3</sup>
- Any deadline to confirm derivatives transactions, particularly the longer time periods that might apply to the more bespoke transactions, should be defined as "*within xx hours following execution*" or "*by the end of the following business day*" instead of "*on the same calendar day*".<sup>4</sup> Otherwise, a transaction in a customized OTC derivative that was executed at 5.30pm would have to be confirmed within minutes following its execution given the approaching close of business. ESMA should note that regulatory authorities in other jurisdictions have reflected this issue in their proposed rules.<sup>5</sup>

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<sup>2</sup> For example, ESMA's proposals would require the confirmation of the transaction "within 15 minutes from the execution of the derivative contract, when the transaction is electronically executed" or "within 30 minutes from the execution of the derivative contract when the transaction is not electronically executed but is electronically processed", see Discussion Paper Par. 38.

<sup>3</sup> This would be relevant, for example, for transactions that are entered into with asset managers who commonly execute a single block trade and then allocate positions to their clients. The time period that is needed to complete this process can vary and will be contingent upon a number of factors including approval and compliance processes, or the receipt of client information and instructions.

<sup>4</sup> See Discussion Paper Par. 38

<sup>5</sup> See Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 81519 (proposed Dec. 28, 2010) and Trade Acknowledgment and Verification of Security-Based Swap Transactions, 76 Fed. Reg. 3859 (proposed January 21, 2011).

- A number of OTC derivative products, regardless of whether they can be executed electronically or not, are not sufficiently standardized from a documentation perspective to allow the confirmation of all their details in a short period of time. To enable a timely “confirmation” of these more bespoke transactions, ESMA should consider allowing counterparties to perform a shortened “economic tie-out” confirmation for these transactions within any deadlines that it might establish, instead of requiring the full confirmation of all transaction details.<sup>6</sup> This approach could ensure appropriate regulatory oversight in recognition of the elapsed time between execution and confirmation.
- The extent to which derivative products in different asset classes currently are, or even can be standardized, varies. A “one-size-fits-all” approach to the confirmation requirement is therefore not appropriate. Further, market participants and infrastructure providers will require time to develop the necessary infrastructure and adjust the way they manage their workflow. We therefore believe that ESMA should design a phased-in implementation for the confirmation requirement. While such phase-in should differentiate both between asset class and participant category, it should also phase in the timing requirements over time, starting with longer time periods, to allow market participants to adjust to the new requirements. ESMA should note that such multi-layered phase-in approach has been proposed in other jurisdictions.<sup>7</sup>
- While ESMA makes use of the concept of “electronic processing” as the precondition for the requirement to confirm transactions within 30 minutes following their execution, the meaning of electronic processing has not been further defined. We believe that this is problematic as one could argue that any derivative transaction, no matter how bespoke it might be, will at some point be “electronically processed”, e.g. when some of its details are entered into the electronic systems of one (or both) of the counterparties. We believe that ESMA, if it decided to use the concept of “electronically processed”, will need to further clarify its meaning. A key element of such definition should be that “the counterparties communicate the transaction details between each other in electronic and standardized fashion”.

## Other issues in relation to confirmation

### a) Which transactions need to be confirmed?

The Regulation requires the timely confirmation of transactions that are “not cleared by CCPs” as an important means to reduce legal and systemic risk in the OTC derivatives markets. However, we believe that the concept of a transaction that is “not cleared”, which is also used in the Discussion Paper<sup>8</sup>, requires further clarification.

Several types of OTC derivatives will not be centrally cleared in the future and will hence be subject to the requirements of Articles 6/8 that apply to transactions that are “not cleared by CCPs”. However, even a transaction that is *designated* to be centrally cleared will initially consist of a transaction between the two counterparties (sometimes called the “alpha trade”), which is only subsequently replaced through novation to the CCP by two transactions in which the original counterparties are facing the CCP (sometimes called “beta” and “gamma” trades). While the time between the conclusion of the alpha trade and its novation to the CCP, i.e. its replacement by beta and gamma trades, will vary depending on several factors, legal risk and uncertainty exists while the transaction remains both unconfirmed and uncleared. To create clarity about the scope of the confirmation requirement, we encourage ESMA to specify to what extent such

<sup>6</sup> We note that ESMA has not actually clarified what represents a “confirmation”. Please see our below comments for views on this question.

<sup>7</sup> In the United States, the CFTC finalized rules related to real-time and swap data reporting where the relevant requirements are phased-in by category of market participant, by asset class, and over time. The requirements will be first applied in the asset classes of credit and interest rates, reflecting their higher degree of standardization and automation, followed by equity, FX, and commodities. See Real Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012) and Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012).

<sup>8</sup> ESMA Discussion Paper: Draft Technical Standards for the Regulation of OTC Derivatives, CCPs and Trade Repositories, Section III.I, Article 6/8.

requirement applies to a transaction that is designated to be cleared but has not been cleared yet.

As a general principle one could assume that every derivative transaction should be confirmed. However, based on our discussions with various stakeholders, we believe that it might generally be acceptable for the confirmations of the two novated transactions that are issued by the CCP to also satisfy the confirmation requirement that exists for the original counterparties. This should be acceptable as long as the original transaction is accepted for clearing in a timely manner, specifically within the applicable confirmation deadline. In contrast, where the original transaction is not accepted for clearing within the applicable deadline for confirmation, the original counterparties to the transaction will satisfy their confirmation requirement by confirming the original transaction prior to clearing. It is worth noting that this issue has been recognized in some of the final rules in the United States.<sup>9</sup>

## **b) Who is responsible for confirming?**

To enable the timely and cost-efficient implementation of the requirement to confirm transactions in OTC derivatives, the counterparties to the original transaction, and thereafter any relevant parties to the transaction such as a new party to whom the transaction has been novated, should be responsible for confirming it in a timely manner. The relevant parties should also be permitted to choose the appropriate means to confirm. While the counterparties should be permitted to make use of third parties, such as middleware providers or trading platforms, to facilitate the confirmation of transactions, such third parties should be required to produce a legally binding confirmation that serves as the consummation and agreement to all terms of the swap and all changes to terms thereafter. All of these principles should apply regardless of how the transaction is executed or whether it is centrally cleared or remains bilateral.

## **1.2. Portfolio reconciliation and dispute resolution**

***Question 16: What are your views regarding the frequency of the reconciliation? What should be the size of the portfolio for each reconciliation frequency?***

***Question 18: What are your views regarding the procedure counterparties shall have in place for resolving disputes?***

***Question 19: Do you consider that legal settlement, third party arbitration and/or a market polling mechanism are sufficient to manage disputes?***

***Question 20: What are your views regarding the thresholds to report a dispute to the competent authority?***

MarkitSERV believes that the active reconciliation of key trade terms and valuations for swaps portfolios ("**Portfolio Reconciliation**") reduces risk in the derivatives markets as it allows market participants to identify any issues related to their counterparty exposure early and to minimize the reconciliation efforts that might be required to locate any contributing trades. We believe in general that any requirement to reconcile portfolios of derivatives positions should consider the following:

1. Counterparties should only be required to reconcile the key economic terms of their positions, not all material terms

We do not believe that reconciliation of all material terms is necessary to ensure that parties understand the terms of their agreements, and therefore believe that such requirement would be unnecessarily burdensome. Today, for example, many counterparties obtain the data that is used for reconciliation purposes from different internal systems, e.g., trade capture and accounting systems. These systems frequently do not hold – and therefore do not supply – fields such as Master Agreement date, or the trade execution time. Thus, requiring parties to reconcile these terms would impose potentially significant additional operational burdens on counterparties in order to handle the amounts of relevant static data. This

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<sup>9</sup> Such rules contain procedures where, for example, the responsibilities in relation to reporting transaction confirmations will vary depending on whether the transaction has been accepted for clearing within the deadlines for reporting or only thereafter. See Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012).

cost must be weighed against the seemingly small benefit that might be obtained by requiring parties to spend time and effort reconciling terms that do not seem relevant to the purpose of Portfolio Reconciliation: the resolution of disputes that materially impact collateralization. We believe that examples of terms with relatively little benefit are the Master Agreement date, the execution venue, the exchange rate at the moment of agreement (for currency swaps), and the platform/deal source.

We therefore encourage ESMA to require reconciliation only of “key economic terms”. Such key economic terms should only include data which could have a material impact on the valuation or collateralization of a swap, for example notional amount, currency, and fixed rate, and that ESMA should clearly define which data fields are encompassed under this definition. In this regard, we particularly believe that parties should be required to reconcile their Independent Amount data, only where applicable, on a transaction level. Given its direct impact on collateralization, transaction-level Independent Amount is important in the process of discrepancy resolution, and therefore should be included in the set of data fields that need to be reconciled.

2. Counterparties should not be required to disclose all of their potentially sensitive information to their counterparties, instead they should be permitted to reconcile their portfolios by communicating key economic terms to third parties who will compare the data

We believe that the mutual exchange of mark-to-market data would facilitate the identification and timely resolution of valuation disputes, but this may impose undue burdens on buy-side counterparties. Currently, for example, many buy-side firms receive position and valuation details from counterparties, but it is less common for these buy-side firms to also communicate their own valuation data, which can be viewed as private information, unless a significant difference has become apparent.

We believe that this issue can be addressed while ensuring transparency and active resolution of discrepancies through the use of automated solutions, including appropriately qualified third-party providers or internal tools, to perform Portfolio Reconciliation. These solutions are capable of identifying and communicating discrepancies to both parties, and can also centrally facilitate the communication and audit data required for dispute resolution. Third party platforms or in-house tools can distribute mark-to-market data when valuation disputes exceed the designated thresholds, or bilaterally agreed procedures, to ensure that valuation disputes can be effectively addressed without imposing the additional operational burden firms may face in preparing more regular and comprehensive dissemination of valuation data externally.

We therefore welcome ESMA’s proposal that would allow the relevant entities to perform reconciliation internally or via the use of qualified third parties, and that they should only be required to distribute valuation data where it is applicable to a dispute.

3. The frequency of portfolio reconciliations should be determined based on the size and sophistication of the corresponding counterparties.

We support ESMA’s approach that would determine the frequency of reconciliation based on the number of active positions between counterparties. We further believe that consistency in such tiering structure among global regulators would be desirable as it would allow firms to more easily and consistently meet their compliance requirements.

4. Parties should adopt policies and procedures that are reasonably designed to reconcile their portfolios even for centrally cleared transactions

Based on our experience as a provider of Portfolio Reconciliation services we believe that some level of Portfolio Reconciliation may be beneficial even for OTC derivatives transactions that are centrally cleared, e.g. by helping to correct discrepancies. For example, in certain situations, swap transactions that were intended to clear fail to actually do so. Additionally, lifecycle events, such as post-trade netting activities, may not be automatically carried back into the systems of the buy-side counterparty. We therefore

recommend that counterparties adopt policies and procedures to reconcile their positions in cleared swaps on a regular basis. We do not believe that the timeliness or manner of these internal reconciliations should be prescribed by regulation, but should be left to the client's discretion.

## 2. Trade Repositories

### Reporting obligation

#### a) Identifiers

**Question 70:** *Are the possible fields included in the attached table, under Parties to the Contract, sufficient to accurately identify counterparties for the purposes listed above? What other fields or formats could be considered?*

**Question 71:** *How should beneficiaries be identified for the purpose of reporting to a TR, notably in the case of long chains of beneficiaries?*

**Question 72:** *What are the main challenges and possible solutions associated to counterparty codes? Do you consider that a better identifier than a client code could be used for the purpose of identifying individuals?*

We believe that it would be in the best interest of all relevant stakeholders if a common set of identifiers was used across jurisdictions. In contrast, if each jurisdiction had different identifiers it would be logistically inefficient and would require the aggregation and re-coding of all the identifiers.

MarkitSERV is therefore a supporter of the global LEI initiative and we believe that the relevant proposal should be adopted as proposed.

**Question 73:** *What taxonomy and codes should be used for identifying derivatives products when reporting to TRs, particularly as regards commodities or other assets for which ISIN cannot be used? In which circumstances should baskets be flagged as such, or should their composition be identified as well and how? Is there any particular aspect to be considered as regards a possible UPI?*

**Question 74:** *How complex would be for counterparties to agree on a trade ID to be communicated to the TR for bilaterally executed transactions? If such a procedure is unfeasible, what would the best solution be to generate the trade ID?*

We believe that it would be in the interest of all stakeholders to avoid the creation and use of multiple trade IDs in multi-jurisdictional trades. We therefore believe that ESMA should take a global approach in relation to the assignment of trade specific identifiers. For example, a multi-jurisdictional transaction could have a single Unique Swap Identifier. In order to assign such transaction IDs, counterparties to the transaction could use their LEI as the namespace or allow a middleware provider that has been asked by the counterparties to assign a transaction ID to use its own namespace.

#### b) What is reported?

**Question 76:** *What is your view of the granularity level of the information to be requested under these fields and in particular the format as suggested in the attached table?*

**Question 77:** *Are the elements in the attached table appropriate in number and scope for each of these classes? Would there be any additional class-specific elements that should be considered, particularly as regards credit, equity and commodity derivatives? As regards format, comments are welcome on the possible codes listed in the table.*

Determining which data fields have to be reported to a TR is complex and challenging. We note that a number of regulatory authorities have spent significant amounts of time aiming to capture all the intricacies of the almost infinite variety of products that trade in the OTC derivatives market. These efforts often resulted in the creation of numerous and complicated lists of data fields that differentiate both between asset class and product categories. However, we believe that this issue can be addressed in a fairly straightforward manner.

To enable a timely and cost-efficient implementation of the reporting requirement, ESMA should follow a two-pronged approach in defining what data sets have to be reported to the TR:

1. A basic data set that contains key economic terms in normalized data fields should be reported to a TR for every derivative transaction. Such data set could be applicable across asset classes and products, and the number of additional fields that are asset class specific would be very limited. ESMA should take the views of TRs into account when making the determination about the appropriate data fields.
2. All relevant elements of the transaction need to be captured in TRs so they can be made available to regulatory authorities if required. ESMA should therefore require counterparties to also report the full set of transaction confirmation data (either in normalized data fields or as a copy/electronic image of the paper confirmation where appropriate) to the TR for each OTC derivatives transaction.

We believe that the combination of reporting a limited set of key economic data as normalized data fields in addition to the full confirmation will be an efficient way of achieving the regulatory goals of data reporting to TRs. Such approach also seems in line with requirements that have been established in other jurisdictions.<sup>10</sup> We recommend that international regulators coordinate their efforts to establish a verified set of minimum key economic terms. This harmonization would significantly aid parties in their attempts to satisfy the reporting requirements that are established by regulators globally.

### **c) Who reports (including reporting by third parties)?**

Both the Regulation<sup>11</sup> and the Discussion Paper are unclear in terms of which entity will actually perform the reporting to the TR, and how the accuracy of the reported data will be ensured. We believe that, as a general principle, any reporting requirements should be designed to permit the relevant parties to simplify the task of reporting as much as possible, while, at the same time, ensuring the accuracy of the data that is reported to the TR.

That said, it is unclear how exactly ESMA expects the reporting of the various data sets that are relevant for each transaction<sup>12</sup> to happen. Specifically, it is not clear whether each of the counterparties to a transaction will have to report certain data sets or all of the data separately, or whether all of the reporting for a transaction could be performed by a single entity, be it one of the counterparties or a third party.<sup>13</sup> Further, while it is sometimes suggested that duplicative reporting to TRs could improve data accuracy, we believe it should be avoided wherever possible as it tends to result in confusion and the need for costly reconciliation.<sup>14</sup> We therefore believe that ESMA should explicitly allow for the actual reporting of all details of a transaction to the TR to be performed by a single entity, as agreed between the parties. Technical

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<sup>10</sup> Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012).

<sup>11</sup> ESMA Discussion Paper: Draft Technical Standards for the Regulation of OTC Derivatives, CCPs and Trade Repositories, Section III.III, Article 6/7.

<sup>12</sup> I.e. "counterparty data" and "common data". See Discussion Paper Annex II.

<sup>13</sup> For example, the DP states that "counterparty data" shall be reported "separately by each CP or their appointed reporting entity" while "common data" "may be reported by only one CP, if reporting also on behalf of the other, or an appointed reporting entity". Further, Par 174 states that the reporting obligation "is placed on both counterparties (including CCPs), without prejudice to the fact that counterparties may delegate reporting to one of the two counterparties or to a third entity inside or outside the EU." It goes on to say that "such delegation to a third party does not affect the liability of the individual counterparty under the duty to report nor the need for it to ensure any outsource or delegate follows all applicable requirements under EMIR and its implementing measures." On another occasion the DP states that counterparty data "must be reported in relation to each CP for each derivatives transaction" while common data "may be reported by the two CPs separately or may be reported only once and on behalf of both CPs."

<sup>14</sup> This also seems to contradict the Regulation that explicitly requires the reporting "without duplication".

standards should therefore allow the reporting of all relevant data by one of the counterparties or a third party that the reporting task has been delegated to, while requiring for the reported data to be verified by both counterparties. Such approach seems consistent with requirements that have been established in other jurisdictions.<sup>15</sup>

In line with our above comments in relation to the confirmation of transactions that are designated to be centrally cleared but have not been accepted by the CCP yet, we believe that ESMA's clarification is also needed in relation to the reporting responsibilities for cleared transactions. We believe that Technical Standards should clearly assign the responsibility to report the derivative transaction to a TR to the counterparties of the original transaction (alpha trade), and to the counterparties and the relevant CCP for any cleared transactions (beta/gamma trades). To minimize the risk of harmful data fragmentation, the choice of which TR the transaction is reported to (in case there are several) should be with the reporting counterparty of the original transaction. For the same reason, lifecycle events as well as beta/gamma trades shall be reported to the same TR as the original transaction. Such approach would be consistent with requirements that have been established in other jurisdictions.<sup>16</sup>

**Question 79: Do you agree with this proposed approach? What are in your view the main challenges in third party reporting and the best ways to address them?**

We agree with ESMA's proposal that reporting to TRs may be undertaken by third parties, i.e. parties other than the two counterparties to a derivatives transaction. We also support ESMA's view that the counterparties to the transaction should carefully select such third parties to ensure that they provide indeed accurate and timely information to TRs, particularly given the fact that they may be outside the powers of a Competent Authority ("CA").

However, we believe that several of the requirements that might be imposed on third parties or the actions that ESMA reserves for itself in relation to their activities go beyond what is necessary or proportionate.<sup>17</sup> We believe that in reality the counterparties themselves, given that they remain responsible for reporting accurate data to the TR, will exercise sufficient control of the third parties that they have delegated reporting functions to, hereby ensuring that they properly perform their functions.

**c) When to report?**

We believe that the availability of high-quality data is critical to achieving the goals of improved transparency and reduced risks associated with the OTC derivatives market. While the timely availability of comprehensive transparency of derivative transactions and positions to regulatory authorities is important, we do not believe that time lines for reporting to TRs that are as aggressive as those proposed in some jurisdictions are appropriate.<sup>18</sup> In contrast, reporting to TRs should happen only "as soon as possible once the relevant information is available" which would be in line with the transaction reporting requirements under MiFID. Any specific deadlines for reporting of confirmation data should hence be linked to the deadlines that ESMA will set for the confirmation of the transactions.<sup>19</sup>

**Question 69: What is your view on the need to ensure consistency between different transaction**

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<sup>15</sup> Real Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012) and Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012).

<sup>16</sup> Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012).

<sup>17</sup> For example, the need for third parties to "guarantee protection of the data and compliance with the reporting obligation the same way the counterparty appointing them is required to" seems to create excessive liabilities. Further, the ability of ESMA "in the most extreme cases ... to require CPs under their scope of action to stop using a certain reporting entity" or "to prevent a TR under its supervision to accept reporting by third parties that may jeopardize the accuracy of the data held in the TR" is, in our view, unnecessary. This is because, with the counterparties retaining responsibility for reporting accurate data to the TR, they will want to exercise a sufficient level of scrutiny on the service provider already, and should be expected to stop using a provider that has reported inaccurate data on their behalf.

<sup>18</sup> See Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012).

<sup>19</sup> For example, reporting of the confirmation data to the TR should happen "as soon as possible following confirmation of the transaction and, in any case, no later than the working day following the conclusion, modification, or termination of the contract."



***reporting mechanisms and the best ways to address it, having in mind any specific items to be reported where particular challenges could be anticipated?***


We believe that the reporting of OTC derivatives transactions to TRs as required under the Regulation will create a significant burden for counterparties to these transactions. Any such requirements should thus be designed to provide counterparties with sufficient flexibility to perform the reporting in the most efficient manner and, if so desired, by using existing infrastructure, while double reporting should be avoided wherever possible.

Further, the requirements to report to TRs should be designed as such that TRs receive and can provide regulatory authorities with all the information they need to perform not only systemic risk analysis, but also to monitor activity for signs of market abuse and manipulation. Any requirement to report a transaction both under MiFID and under the Regulation should at least be harmonized in terms of scope, the data that is reported for each transaction, and the timing of the reporting, to allow for a single report to satisfy both requirements. However, we also believe that there should be little reason to maintain any requirement for OTC derivatives transactions to be reported also under MiFID, once reporting to TRs has been firmly established by the Regulation.

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MarkitSERV appreciates the opportunity to comment on ESMA's Discussion Paper on Draft Technical standards on OTC Derivatives, CCPs, and Trade Repositories. We would be happy to elaborate or further discuss any of the points addressed above. In the event you may have any questions, please do not hesitate to contact the undersigned or Henry Hunter at [henry.hunter@markitserv.com](mailto:henry.hunter@markitserv.com).

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Gooch".

Jeff Gooch  
Chief Executive Officer  
MarkitSERV