



STATE STREET

The Committee of European Securities Regulators  
11-13 Avenue de Friedland  
F- 75008 Paris

December 5, 2008

**RESPONSE TO THE CALL FOR EVIDENCE ON THE REVIEW OF THE  
SCOPE OF THE MIFID TRANSACTION REPORTING OBLIGATION**

*State Street Corporation, headquartered in Boston, U.S.A., specializes in providing institutional investors with investment servicing, investment management and investment research and trading. With \$14.0 trillion in assets under custody and \$1.7 trillion in assets under management, State Street operates in 26 countries and more than 100 markets worldwide. Our European-based workforce of over 6,200 employees provides institutional investors with local support and service from our offices in Austria, Belgium, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Poland, Switzerland and the United Kingdom.*

Dear Sirs, dear Madams

State Street Corporation would like to thank CESR for the opportunity to comment on the call for evidence on the scope of the MiFID transaction reporting obligation.

We would be happy to discuss with you, in further detail, any comments you may have. Please do not hesitate to contact Gabriele Holstein at 0041 44 560 5101.

Sincerely,

Stefan Gavell  
Executive Vice President  
Regulatory and Industry Affairs

Dr. Gabriele Holstein  
Director of European Regulatory and  
Industry Affairs

**State Street Corporation's response to the call for evidence on the  
review of the scope of the MiFID transaction reporting obligation  
("The Paper")**

**INTRODUCTION**

This memorandum contains State Street's response to the overall content and the specific questions set out in CESR's call for evidence. We welcome CESR's commitment to review the MiFID transaction reporting regime with a view to achieving further Member State convergence.

State Street's businesses engage in the following MiFID-related activities on behalf of institutional clients:

- (i) As an asset manager providing *portfolio management services*, we make and implement investment decisions for portfolios held in custody accounts maintained in the name of the client. This includes implementing investment decisions through agency transactions with selected broker-dealers, as well as transactions executed using an internal equity crossing system.
- (ii) As a provider of *transition management services*, we make and implement trading and other investment decisions in relation to the transitioning of portfolios held in custody accounts maintained in the name of the client.
- (iii) As a provider of *non-discretionary trading services (NTS)*, we route transactions upon receiving customer instructions via an electronic communication system.
- (iv) As a *broker*, we execute buy / sell orders relating to securities as an agent for our clients on regulated markets, multilateral trading facilities (MTFs) and over the counter.

In the CESR Level 3 Guidelines on MiFID transaction reporting published in May 2007, CESR noted that the MiFID transaction reporting regime is based on reporting of *executed* transactions. It was therefore considered necessary to separate execution of a transaction from reception and transmission of orders. Specifically, CESR

Members committed themselves to collect reports of those transactions which are (a) conducted by firms transacting directly with or as an execution venue, so called “immediate market facing investment firms” and (b) transactions where the investment firm is undertaking transactions on its own account (either on-market or off-market).

Given the nature of our business, State Street would like to comment on:

(i) the MiFID transaction reporting obligation as it relates to our brokerage activities where we report on transactions executed on behalf of a client firm providing the service of portfolio management (*i.e.* category (a)). Please note that we do not conduct transactions on our own account and are therefore unable to provide comments in the context of CESR category (b).

(ii) the varying interpretations among CESR Members of the extent to which firms that provide the service of portfolio management can rely on their brokers to report transactions.

State Street’s detailed responses to the specific questions posed in the call for evidence follow below.

**Q1: Have the differences in the scope of the transaction reporting obligation between CESR Members caused problems for you? Please provide practical examples of any difficulties encountered.**

Since our European brokerage business is based in London, all transactions are reported to the UK's Financial Services Authority (FSA), in accordance with MiFID's principle of home-country control. In this context, we have not experienced any problems caused by the MiFID transaction reporting obligations.

For our portfolio management business, however, which is currently in the process of establishing an automated reporting framework, the differences in scope of the transaction reporting obligation between CESR members have caused challenges. The following four issues are of particular importance:

- 1. The absence of a clear definition in MiFID (as well as the Implementing Regulation and CESR's preliminary guidelines) of investment firms which are obliged to transaction report.** This has led to inconsistencies across Member States. Specifically, the definition of "firms which execute transactions" in Article 25 (3) is subject to different interpretations despite the guidelines issued by CESR. The FSA interpretation of the transaction reporting regime differs strongly from other EU Member States in that the FSA has interpreted the passing of an order from a portfolio manager to a broker as being caught under "execution", while other CESR Members do not.

In practical terms, this means that while our portfolio management businesses in France and Germany can always rely on their brokers to report trades, this is not true in the UK.<sup>1</sup> For example, we need to report transactions separately when using our internal equity crossing system. Also, when we use a non-EEA broker to buy or sell a security which is dually listed on an EEA-regulated market, we are

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<sup>1</sup> In the UK, the application of SUP 17 to portfolio managers, in particular SUP 17.2.2., which outlines a number of scenarios where portfolio management activities are not exempt from reporting obligations, causes many practical problems.

obliged to report the transaction to the FSA. Furthermore, we cannot rely on the exemption when using a non-MiFID investment firm broker or a non-EEA broker.

This lack of harmonization has caused considerable uncertainty in regards to the development of a fully automated transaction reporting system, resulting in additional costs and delays. We would therefore welcome more detailed clarification of the portfolio managers' transaction reporting obligations, with the goal of ensuring that the rules are consistent throughout all EU Member States. Specifically, we call upon CESR to clarify that where portfolio management activities are executed with brokers as opposed to exchanges, and where the broker has a degree of discretion as to where to complete the deal, portfolio managers should not be considered to have "executed" a transaction. As such, they should not be regarded by the FSA as falling under SUP 17 and be expected to transaction report where they cannot rely on a broker to do so.

2. **The absence of a common understanding in regards to financial instruments that have to be reported**, for instance whether over-the-counter (OTC) derivatives are to be covered. Again, the FSA differs from other CESR Members in that OTC derivative trades have to be reported. Such a requirement further increases the complexity of reporting systems leading to additional costs. We would welcome clarification in CESR guidelines to ensure that the rules are consistent throughout all EU Member States.
3. **The lack of a complete list of instruments admitted to trading on EEA regulated and prescribed markets which are subject to transaction reporting.** In order to identify a reportable transaction, it is necessary to maintain a list of regulated and prescribed markets as well as a list of securities admitted for trading in these markets.<sup>2</sup> Currently CESR provides a list of instruments admitted to

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<sup>2</sup> According to the SUP, a *reportable security* is one which belongs to the "reportable asset class" *i.e.* financial instruments admitted to trading in regulated and prescribed markets with the exception of commodity, FX and interest rate derivatives. A *reportable transaction* is a trade in a reportable security which in addition satisfies any of the following criteria: (i) a trade instruction resulting from an investment decision made by a UK portfolio manager (ii) a trade instruction dealt with a UK trading desk, (iii) crossing transactions where at least one leg is the result of an investment decision by a UK portfolio manager. *Transaction reporting exemption* can be claimed where the asset manager has reasonable ground to believe that the EEA and MiFID investment firm broker through whom the transaction has been done will do the transaction reporting.

trading on EEA regulated and prescribed markets which are subject to transaction reporting. However, this list currently only covers equities. To avoid differing interpretations by national authorities of which instruments are covered, we urge CESR to extend its database to *all* instruments covered by the transaction reporting rules.

4. **MiFID requirement that transaction reports need to be submitted on a T+1 basis.** Since State Street operates across different time zones, this requirement can cause practical problems, especially in light of different national holiday cycles. We would therefore find a more flexible interpretation of the T+1 rule in cases where brokers in other time zones are involved to be most helpful.

**Q2: Please provide information on your practical experiences in reporting transactions that fall under each of the items (a)-(c) above? Is the difference between these three categories sufficiently clear? Do the competent authorities interpret the scope of these categories in the same way? If not, where in particular have you encountered problems?**

As pointed out above, only category (a) is relevant to State Street Global Markets, our brokerage business. Our obligation in regards to reporting transactions falling under (a) is limited to the FSA.

We reiterate, however, that the FSA's interpretation of the transaction reporting regime for portfolio management firms is at odds with that of other EU Member States. Considering the costs and benefits, further CESR guidance should clarify that portfolio managers are not subject to transaction reporting obligations. The costs of establishing a transaction reporting system and the level of investment portfolio managers would need to make, is in our view, not proportionate to the fairly narrow range of circumstances where trades would be reportable should portfolio managers be subject to the transaction reporting obligation.

**Q3: In your opinion, what are the advantages and disadvantages of competent authorities systematically receiving transaction reports covering the information**

**referred to in item (c) above versus acquiring that information on an ad-hoc basis by other means?**

Our brokerage business identifies the client firm, which in most cases deals on behalf of the ultimate client in its transaction reporting to the FSA. In certain cases, ad-hoc inquiries have been made to establish the underlying client. This ad-hoc process works well.

Systematic reporting of the ultimate client is, in our view, however, not practicable because the costs for systems changes and the retrieval of the necessary information would outweigh any regulatory benefits.

Finally, the meaning of “ultimate client” is not clear, in particular if portfolio management firms were to be subject to transaction reporting obligations.

**Q4: On the basis of their pros and cons, what would be the preferred solution in relation to the possible convergence of the scope of the transaction reporting obligation (regarding what constitutes ‘execution of a transaction’)? Please provide justifications for your choice. When analysing the pros and cons, please consider also whether there is a danger of regulatory arbitrage if the scope of the transaction reporting obligation is not harmonised between Member States, as well as the implications for transparency calculations on shares considering that in the future these calculations will be conducted on the basis of the transaction reporting data?**

Transactions can be executed in many ways. A clear definition of what “execution of an order” means, and its consistent use by authorities throughout all EU Member States, would therefore be very helpful. In particular, CESR should establish a common approach to (i) which investment firms are obliged to transaction report and (ii) which instruments are covered under transaction reporting obligations.