Bundesverband
Öffentlicher Banken
Deutschlands

VÖB

European Securities and Markets
Authority
103, rue de Grenelle
75007 Paris
FRANKREICH

name: Ute Foshag
phone: +49 30 81 92 - 2 54
fax: +49 30 81 92 - 2 58
email: ute.foshag@voeb.de

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Comments of the Association of German Public Banks – Bundesverband Öffentlicher Banken Deutschlands – on the Consultation paper ESMA/ 2012/379 Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories

Dear Sir or Madam,

Thank you for giving us the opportunity to comment on Consultation paper ESMA/2012/379 Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories published by the European Securities and Markets Authority.

The Association of German Public Banks – Bundesverband Öffentlicher Banken Deutschlands, VÖB – is a leading industry association in the German banking industry representing 62 member institutions including the regional banks (Landesbanken) as well as the funding agencies owned by the federal and state governments. Our member banks, having collectively about 80.000 employees, provide for approximately 24% of credits handed out to German industry and are leading in financing of local authorities. The VÖB together with the four other top-level associations of the German banking industry comprise the German Banking Industry Committee, GBIC (Die Deutsche Kreditwirtschaft, DK).

A. Introductory Comments

References in these comments are made in connection with the relevant provisions in the draft regulatory and implementing technical standards on OTC derivatives (collectively the "Draft Regulations" or each separately the "Draft Regulation") as set forth in Annexes II to VI of the consultation paper ESMA/2012/379 Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories (the "Consultation Paper").

Any reference to the regulation is to be understood as a reference to the Regulation (EU) No 648/2012 of the European Parliament and of the Council of July 4, 2012 on OTC derivatives, central counterparties and trade repositories (the "Regulation").

B. General Comments

1. In light of the international nature of the derivative markets a close coordination between the regulatory authorities in respect of the future international regulatory framework dealing with clearing of OTC derivatives and reporting of derivatives is of very high importance. We understand that ESMA and its international counterparts are currently engaged in discussions with a view to ensuring coherence between the regulatory frameworks, including the issue of the recognition of equivalent regulatory provisions. With regard to substituted compliance as suggested and possible under the Commodity Futures Trading Commission's (CFTC) Guidance on Cross Border Application of the Swap Provisions of the Dodd-Frank Act it would be of utmost importance that ESMA and national supervisors of EU member states will enter into a dialogue to determine comparability of the Regulation (and possibly other relevant national laws and regulations) with Dodd-Frank Act requirements. The CFTC expects that it would enter into memoranda of understanding or similar agreements with relevant foreign supervisors on the determination of comparability and comprehensiveness of foreign regulations. Market participants are highly interested in obtaining information on the progress of this process. The issue is of such importance that it may merit a separate hearing or at least further communication by ESMA and national supervisors. We deem it very important to determine with undue delay whether ESMA or national supervisors assume responsibility for substituted compliance with Dodd-Frank Act.

2. It would be very advantageous to consolidate all definitions used in the Draft Regulations into one set making it applicable to all technical standards. The Draft Regulations as currently proposed, each contain its own set of definitions although a number of these defined terms are used in more than one Draft Regulation. This may cause uncertainties over the understanding of such terms as it is unclear whether these have to be interpreted autonomously. E. g. "confirmation" is defined in Annex V while

not defined in Annex II. The same applies to the six classes of derivatives (equity, credit...) defined in Annex V only.

C. Comments on and queries in respect of individual sections and provisions of the Consultation Paper

I. Annex II – Commission delegated regulation regarding regulatory technical standards on OTC derivatives

1. Indirect Clearing Arrangements (Art. 1 to 4 ICA of the Draft Regulation)

1.1. Art. 2 ICA para (1):
To avoid uncertainties and in order to ensure an adequate regulatory framework for any client offering indirect clearing services it should be considered to specify the regulated entities which are considered to be subject to appropriate regulation for the purposes of indirect clearing services. Presumably this should include credit institutions within the meaning of directive 2006/49/EC but not necessarily all counterparties qualifying as financial counterparties under the R egulation.

1.2. Art. 2 ICA para (2):
Sentence 1 appears to imply that the client shall have the sole discretion in determining the contractual framework required to enable indirect clearing. Moreover, under sentence 2 the contract between the client and the indirect client governing the terms and conditions under which transactions are to be entered into the clearing system of a CCP via a clearing member would have to include a contractual term obligating that clearing member accepting the transactions to "honour any obligations" agreed between the client and indirect client in the event of a default of the client.
This is misleading in the context of (1) the contractual relationships as well as (2) national insolvency law:

(1) A contractual agreement between the client and the indirect client cannot be binding upon the clearing member. Furthermore, contractual terms concerning the consequences of a default of one of the parties to that contract may not be enforceable or effective under applicable insolvency law in the event of such default. The contractual agreement between the indirect client and client can therefore only contain provisions setting out an obligation of the client to ensure that the client enters or has entered into a contractual agreement with the relevant clearing member which adequately addresses the consequences of a default of the client on the indirect client and the relevant transaction (or representations to this effect).

(2) Whether and, if so, to what extent these contractual provisions and obligations agreed as (a) between the indirect client and client on the one hand and (b) the client and the clearing member on the other hand remain applicable or enforceable is a matter of the applicable insolvency law. The risk that these

national insolvency laws override the contractually agreed rights of the indirect client can only be averted by further harmonisation of insolvency laws of the member states and the introduction of special provision protecting the position of the indirect client in this specific situation. This needs to be recognised when defining or interpreting any requirements to provide for protection of positions by purely contractual means.

The same issue arises in connection with the requirements to protect the client positions in the event of the default of a clearing member and is at least recognised in recital 64 of the Regulation and repeated in recital 4 of the Draft Regulation. However the language in the recitals is not sufficient to override existing insolvency laws.

1.3. Art. 4 ICA para (1)

Para (1) appears to imply that any clearing member will be offering client clearing services and is also able to do so. This, however, may not be the case as some clearing members may have valid reasons not to offer any client clearing services at all (and clear only own transactions). The choice whether and if so, to what extent and under what terms a clearing member is willing to provide clearing services, in particular involving indirect clearing services, cannot be restricted in any way. Para 1 should therefore be revised and limited to an obligation to make public whether a clearing member is willing to provide these service. We suggest the following wording "A clearing member, if offering indirect clearing, shall be required...".

In addition, in order to ensure a consistent framework and level playing field it should be clarified that the provisions in the R egulation (e. g. under Art. 39 of the Regulation) setting out requirements and obligations to be met by clearing members in respect of their clients apply mutatis mutandis to clients offering indirect clearing services.

1.4. Art. 4 ICA para (3)

Art. 4 ICA para (3) Draft Regulation refers to Art. 39 (9) of the Regulation defining the requirements that need to be met with regard to the obligation to distinguish in accounts with the clearing member the assets held for indirect clients. One of these requirements becoming applicable by way of this reference is the obligation to ensure that the positions recorded in an account "are not exposed to losses". In practice, this will primarily concern collateral posted by the indirect client (specifically, the initial margin) and passed on to the CCP.

As long as there are no harmonised special provisions in the EU requiring national laws to protect client positions in view of the specific circumstances of client clearing against the consequences of an insolvency of the account holder, national insolvency laws will always override any contractual arrangement. It will therefore not be possible to ensure complete protection by contractual means only.

With contractual means, a certain level of protection can be achieved by agreeing on the posting of collateral by way of a pledge (or other similar rights by which an asset becomes security interest of a third party without affecting legal title of the original owner). The use of pledging as a means to ensure greater protection in this specific context is, however, restricted in two ways:

(1) Posting of collateral by way of pledge only makes sense in connection with pledged securities and not in connection with cash: Cash can never be distinguished in a legally effective manner from other assets of the party receiving the cash. This is because the cash itself is necessarily always intermingled with the assets of the recipient. The party transferring the cash only retains a right to demand repayment from the recipient and only this right can be subject to a pledge. The use of custodian accounts would not materially improve the level of protection: Even if cash is deposited with a third party instead of the secured party, this would not extinguish a credit risk exposure, rather, the risk exposure to the secured party would only be exchanged with that of the third party.

(2) Collateral in the form of pledged securities (instead of a full title transfer of securities or cash) can only serve as initial margin. Any collateral to be posted as variation margin needs to be posted by way of full title transfer of securities or cash. This is because the collateral serving as variation margin is subject to constant adjustments in view of the constant changes of the market value. Such constant adjustments of the variation margin cannot be effected in the requisite timeframe and accuracy if the collateral is posted in the form of pledged securities.

Thus, Art. 39 (9) of the Regulation and any similar requirements calling for a certain level of protection by way of contractual means need to be interpreted and applied in such a way that the above described factual limitations are taken into account. Otherwise, the regulatory requirements defined by the Regulation and the Draft Regulations could be incompatible with legal reality.

2. Public register (Art. 1 PR of the Draft Regulation)

<u>Art. 1 PR para (4)</u>
The practical implementation of the clearing obligation will be very challenging. Market participants thus need sufficient time to adjust their processes. The clearing obligation therefore needs to be phased in over a sufficient period of time. The draft proposal allows for such a phase-in. The manner in which a phase-in is to occur should be defined on a case by case basis, allowing a significant degree of flexibility, including the flexibility to structure the phase-in also based on sub-categories of products.

3. Non-Financial Counterparties (Art. 1 and 2 NFC of the Draft Regulation)

Market participants are not in any position to determine whether a non-financial counterparty is subject to the clearing obligation or not. In the interest of legal certainty and in order to prevent a distortion of competition, they need to be able to rely on the information provided by the non-financial counterparty. It should be clearly stated in the Draft Regulation that there is no obligation to verify or investigate the information provided by the non-financial party regarding its clearing obligation.

As a consequence thereof it should be clarified that the reporting party, when reporting on behalf of both counterparties, (1) may not complete fields 15 and 16 of Table 1 Annex V and field 22 of Table 2 Annex V or, if those fields are completed, (2) does not accept any responsibility for the correctness of such data.

4. Risk Mitigation techniques for bilateral transactions (Art. 1 to 8 RM of the Draft Regulation)

4.1. Art. 1 RM para (2)
We concur with the time limits proposed and the general concept regarding the confirmation of transactions. However, this is based on the understanding that "confirmation" in this context interpreted in line with current practice as the (first) confirmation of the key terms by one of the counterparties and not any response to such confirmation from the other counterparty. We also assume that it is not expected that such confirmation covers all aspects of the transaction in minute detail but focusses on the key terms (so called "short confirmation").

The present Draft Regulation currently lacks a definition of the term "confirmation". The term "confirmation" is, however, defined in Art. 2 para (4) of Annex V of the Draft Regulation. It is, however, not clear, whether the definition in that Draft Regulations is to apply directly or indirectly to Art 1 RM. Moreover, the definition in Art. 2 para (4) the Draft Regulation in Annex V is not compatible with the function and understanding of "confirmation" as currently applied in practice (in particular in the context covered by Art. 1 RM), see also comment to Annex V below. To avoid any uncertainty over the understanding of the term "confirmation", we suggest that it is defined in line with the above described understanding and also uniformly for the purposes of all Draft Regulations (ideally in single section on definitions applicable to all Draft Regulations to avoid uncertainties, see general comments above).

The wording "which is not cleared by a CCP" is misleading and should be replaced by "which is not to be cleared".

It will be necessary to define what is to be understood under "where available". Availability should only be assumed where an electronic system can be reasonably expected taking into account the trade volume on the one hand and the cost of implementing and maintaining such system on the other.

4.2. Art. 1 RM para (3)
The time required for an electronic confirmation may differ considerably depending on the type of transaction and market participants involved. In particular less sophisticated market participants (which would include a significant portion of market participants falling under the definition of financial counterparty in particular small and medium sized banks) will have a significantly less developed infrastructure (human resources, system capacity) for the processing of transactions and thus will generally require more time for processing transactions.

Small financial and non-financial counterparties with a limited range of derivative exposure should not be forced to implement and perform a confirmation process through electronic platforms. In any event, the benchmarks set by highly sophisticated market participants and in relation to simpler transactions should not set the standard for all confirmations (electronic or non-electronic).

The time limit proposed under Article 1 RM para (2) appears to be based on benchmarks set by highly sophisticated market participants and in relation to simple transactions and thus cannot be applied to all market participants and in relation to all types of transactions (in particular bespoke transactions). Against this background, a limit of 5 days would be more realistic and ensure a higher quality and efficiency of the confirmation process with regard to non-electronic confirmation of less sophisticated market participants. We suggest therefore the following amendment of Article 1 RM para (2):

" ... of the same business day. ***In case of non-electronic confirmation the OTC derivative contract should be confirmed at the latest by the end of the fourth business day following the business day of the transaction."***

Besides, to avoid uncertainties we suggest introducing a definition for the terms "business day" and "local time". In both cases this should be the day and time at the place where the confirming party is located.

4.3. Art. 3 RM
Under the current proposal the counterparties would be required to prepare "a reasonable and valid explanation" to be presented to the competent authority (if so requested) in the event the counterparties deem a compression exercise inappropriate.

Portfolio compression can only cover certain of the relevant counterparties' own positions, never the entire portfolio. For example, positions required for specific hedging purposes need to be maintained. Therefore, the total number of transactions which may be eligible for compression may be significantly lower than the total number of transactions outstanding between two counterparties. The conclusion that a compression exercise is not appropriate may therefore be not an exceptional but rather common occurrence.

We therefore would like to request clarification, e. g. in the recitals, whether the threshold of 500 or more OTC derivative contracts in Art. 3 RM para (2) Draft Regulation shall be applicable to financial and non-fincial counterparties.

4.4. Entry into force/phase-in

The obligations under Art. 11 of the Regulation regarding risk mitigation techniques for transactions not cleared by a CCP (bilateral transactions) will cause significant and far reaching changes to operational processes. Market participants will not be able to implement the new requirements immediately. Recital 93 of the Regulation already clarifies that obligations arising under the Regulation which are further developed by implementing acts, in particular technical standards, will only apply as of the date the relevant regulations or acts on level 2 defining these obligations start to apply.

While this at least clarifies that the obligations regarding risk mitigation techniques for bilateral transactions do not become applicable before the technical standards defining the actual content of the obligations come into force, this will still not resolve the problem that the implementation of the new requirements can only be initiated on the basis of the final technical standards. Thus, the addressees of these requirements need a certain period of time following the finalisation of the technical standards to adjust their processes to these new requirements.

Although the Regulation does not explicitly provide for the introduction of an implementation/transition period as part of the relevant technical standards, we strongly believe that an appropriate transition period is necessary.

4.5. Art. 4 RM para (2)

In respect of the proposed obligation to agree on "detailed procedures and processes" it should be taken into account that counterparties must retain the requisite level of flexibility to agree on standards and terms corresponding to their specific needs and legal background. Any requirements to be defined cannot follow one specific model solution.

4.6. Art. 7 RM

Along the lines of Art. 7 RM para (1) Draft Regulation we share ESMA's reading that intragroup transactions within a Member State and without any impediments for the transfer of funds are not to be notified to the competent authority because they are exempted from the clearing obligation in general in the level 1-text. Art. 4 para (2) subpara (1) Draft Regulation of the regulation releases a general exemption whereas subpara (2) lit. b refers to the cases of cross border transactions within and outside of the EU.

Irrespective of the remarks above, it should be expressly set out in Art. 7 RM Draft Regulation that the relevant notifications do not have to be made individually, in respect of each transaction but rather in form of a general notification covering all transactions of the relevant group members.

II. Annex III – Commission delegated regulation regarding regulatory technical standards on requirements for central counterparties

1. Art. 1 RK ff.

We suggest introducing a provision pursuant to which a client has access to the relevant Data of the CCP following novation.

2. Art. 1 MAR

We do not agree that OTC derivatives demand per se a higher confidence interval than other financial instruments. Derivatives can be more liquid than other instruments and therefore are easier to liquidate. Whether it's necessary to better capture "tail risks" is a question of the underlying and not on whether the contract is traded on regulated market, MTF or OTF (or correspondent concepts in other jurisdictions). The IOSCO-Basel Consultation Paper on "Margin requirements for non-centrally-cleared derivatives" of July 2012 specifies a 99% confidence level for OTC derivatives.

3. Art. 1 COL

With regard to financial instruments, the condition under subsection (b) (i) should additionally include a threshold above which the assets would always be considered as having a low credit risk. This threshold could e. g. be based on the credit rating of the financial instrument so any instrument with a rating of minimum AA- or above would fulfill the condition of entailing low credit risk.

We urge ESMA not to overly limit the scope of eligible collateral. The Regulation as well as the Capital Requirements Directive (CRD IV) are both intended to become binding rules as of the beginning of 2013. This can have the effect that a great number of market participants will be attempting to get a hold of the same type of assets not only for the Liquidity Coverage Ratio (LCR) but also to cover collateral needs with CCPs (among other developments raising the need for collateral). Given that the total amount of eligible assets is limited to a certain extent, this demand may result in significant market distortions and serious unforeseeable consequences.

III. Annex V – Commission delegated regulation regarding regulatory technical standards on trade repositories

1. General comments on Art. 3, Art. 6 and Tables 1 and 2 of Annex V

Art. 3 and 6 together with Tables 1 and 2 of Annex V Draft Regulation set out an obligation to report the market value (changes in comparison to the last evaluation) and the amount of collateral posted in view of every single transaction to be reported. The reporting obligation is thereby turned into an obligation to constantly evaluate and report the market valuation of each transaction including its collateralisation.

There is, however, no legal basis for such an extensive and constant reporting obligation in the Regulation. Moreover, the Regulation does not provide for a mandate to regulate such far reaching obligations by way of technical standards. Art. 9 para (1) of the Regulation requires reporting of "the details of any derivative contract concluded and any modification or termination". The market value (and the collateral posted in this connection) and/or changes thereto are not details of the contract, but rather circumstances laying outside of the contract details themselves. Consequently, the relevant provisions in the Draft Regulations exceed the mandate granted under the Regulation.

In addition, the requirement to report market and collateral values are also conflicting and inconsistent with the Regulation itself and other European regulatory requirements. Pursuant to Art. 11 para (2) of the Regulation the obligation to assess the market value of a transaction is expressly limited to derivative contracts not cleared by a CCP. The reporting obligation, as provided for under Art. 3 para (2) and Table 2 of Annex V of the Draft Regulation would, however, subject counterparties of all derivative contracts to report market values. Additionally, the requirement to generally demand the reporting of the level of collateralisation on transaction basis ignores the fact that collateralisation generally occurs on a net basis as a consequence of the risk reducing effect of netting agreements. This practice is accepted and actively encouraged by other regulatory rules, including the present and future legal framework for the capital requirements (Capital Requirements Regulation/Directive) and the Financial Collateral Directive. Art. 6 of the Draft Regulation appears to address this fact to some extent. However, in view of the fact that collateralisation on a net basis (portfolio basis) is the norm and not the exception, Art. 6 and the relevant sections in Table 2 need to be revised. Moreover, market valuations of positions as well as collateral to be reported by counterparties will never perfectly match. The information reported to the trade register will thus be conflicting (if both parties report) or inconclusive (if one party reports following a delegation of its obligations).

Therefore, fields 34 and 35 of Table 2, Annex V and Annex VI Draft Regulation should be deleted.

2. Art. 1

The term "derivative" is defined in Article 2 para (5) Regulation by reference to Directive 2004/39/EC. It should be clarified that spot contracts and commercial foreign exchange forwards are not covered by such term and therefore not subject to reporting.

3. Art. 2

3.1 Art. 2 para (1)

The Regulation distinguishes between obligations which have to be met by "financial counterparties" and "non-financial counterparties" on the one hand and obligations to be met by "counterparties" (and thus perhaps even those not falling within the scope of the definition of financial or non-financial counterparty) on the other hand. The Regualtion itself provides no definition for "counterparties", but ESMA now defines the term "counterparty" as "financial and non-financial counterparties", at least for the purposes of the reporting obligation. In consequence the scope of the addressees of the reporting obligation will not include

(1) any party to the contract established or living outside the EU (third country entities) and
(2) any counterparty in the EU not qualifying as an undertaking, which - under European law, in particular case law concerning Art. 101 of the TFEU, which defines undertaking as any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.

It would be helpful to know whether the definition of "counterparty" set out in Annex V Draft Regulation is intended to apply only in the context of the reporting obligation or is intended to serve as a general definition.

3.2 <u>Art. 2 para (4)</u>
The definition of "confirmation" is inconsistent with the understanding and function of a confirmation as applied in practice. The confirmation, as an one-side legal act, thus only covers key aspects/elements and does not settle or cover the agreement in minute detail. The confirmation follows the legal conclusion of an agreement (often via telephone) and only serves to provide a record of what has been agreed and enable the parties to detect potential inconsistencies. We also refer to our above comments on Annex II, Art. 1 RM Draft Regulation above and our general suggestion to set out definitions of key terms used in the various Draft Regulations in a separate instrument.

3.3 <u>Art. 2 para (6) to (11)</u>
There are many derivative instruments that do not clearly belong to only one of the proposed categories. Counterparties thus must be able to allocate these instruments in accordance with their assessment of what class is the most appropriate. It would be favourable if classification of derivative contracts could be made alongside the already existing ISDA product categories. This would clearly minimize inconsistencies regarding the classification of complex derivative contracts.

To mitigate these concerns, it should be clarified whether and under which conditions convertibles are covered by the definition of "equity derivatives".

Options, forwards and futures on bonds, notes or other debt instruments should be covered by the term "interest rate derivatives".

Underlying such as emission certificates, freight, inflation or capacity rights should be assigned to the commodity basket. The fact that the assets mentioned above are very often traded by the institution's commodity desks would justify their consolidation.

The term "hybrid derivative" should be introduced as a new definition. It should be defined as a contract where the underlying consists of two or more asset classes (e. g., a basket of equity, interest and currency). Hybrids should be allocated to the asset class that constitutes the majority of assets within such basket and is agreed by the counterparties as set forth in Annex V Art. 8 and Annex VI Art. 4 (c) Draft Regulations. The same principle should be applied to units of mutual funds where a look-through approach can be applied.

4. Art. 5

Since "novation" may have different meanings, we urge ESMA to define the meaning. The term should be defined as the mechanism by which the central counterparty imposes itself between counterparties to the contract (as defined in Article 2 para (1) of the Regulation). Any other change in counterparty, which may occur prior to the clearing of the contract (and which may be achieved by a give-up or novation and assumption agreement) should be dealt with as a modification of the contract. It would help the users if ESMA would illustrate Article 5 Draft Regulation by examples or case studies.

According to the current version, a novation of a contract is treated as a modification pursuant to Art. 5 para (1) Draft Regulation. This also has effects on the contents of the fields reported according to Tables 1 and 2. We understand that under the currently suggested fields such modification would need to be reported in field 63 of Table 2 of Annex V Draft Regulation. However, it is unclear whether the remaining counterparty data of Table 1 would remain that of the original counterparty. In such case the information reported would not correctly reflect the facts of the transaction. In cases of multiple changes in counterparty prior to clearing of the contract, the contents of the reported fields would not correctly reflect the then existing contract, e. g. with respect to collateral or other information regarding the contract. In the event, the goal of reporting a novation as modification (and not consider it as an entirely new filing) is to have the chain of all counterparties to one derivative contract in one report, it may be advisable to introduce a new field "old counterparty" that will contain such information.

5. Art. 6 para 1

"Pledge" is not a specific type of asset used as collateral but rather a certain legal form by which a security interest is vested in a certain asset. We therefore suggest to delete the word "pledge".

6. Art 6 para 3

As to our general concerns regarding the obligation to report collateral in respect of a transaction, we refer to our general comments above. In addition, we would like to point out the following:

Table 1 of Annex V as well as table 1 of Annex VI Draft Regulations are missing a data field to report the specific contracts over which collateral has been exchanged. This field would need to accommodate up to many hundreds identification of contracts. Very likely there is no technical way to store all the data for all contracts concluded between the counterparties (e. g. trade IDs). Therefore Article 6 para (3) Draft Regulation should be deleted.

Moreover, reports on collateral may be made on micro or macro level which provides for a heterogeneous process and additional time, costs and effort. If reporting of collateral should nevertheless be required, we strongly urge ESMA to consider it sufficient to include one field determining, whether collateral has been posted for a contract, e. g. flagging the report of a derivate contract with a "yes/no" field.

Specific remarks on Table 2

General
Table 2 is missing all fields for reporting of credit derivatives.

Field 5
If the two counterparties are required to agree on a unique trade ID this should be dealt with by the front office at the time of conclusion of the derivative contract. The unified trade identification should either be generated internally by the counterparties or, if deemed necessary, centrally through a responsible organization. This may reduce the risk of inconsistencies between counterparties in determining the trade ID. This would effectively mitigate all potential problems along the chain of processing the derivative. It should be ensured that field 5 provides for a sufficient number of figures to accommodate the complex trade ID. In addition, as the trade ID refers to the derivative contract between the specific parties, it should be reported in Table 1 rather than Table 2. Otherwise problems of matching reports may occur (i.e. if both counterparties report separately to different trade registers, the reports may not be matched).

Field 18
The master agreement type is not relevant for the terms and conditions agreed for a contract and should be deleted. It is, for example, market practice to enter into credit derivatives under a German Master Agreement for Financial Transactions but using the 2003 ISDA Credit Derivatives Definitions as a reference.

Field 19
The date to be entered in this filed is presumably the date a master agreement has been entered into. Since information on the master agreement the transaction is based on is of little practical relevance (see comment regarding field 18 above) this also applies to the date the agreement has been entered into.

Fields 22 - 36
All fields (and possibly other fields in Table 2) should be reviewed under the aspect that they may rather refer to information regarding one of the counterparties and therefore should be reported in Table 1. One example is field 22,

which should be reported by the non-financial counterparty, obligated to determine the clearing obligation. The fields referring to collateralization posted by one counterparty, if reported at all, should also rather be reported in Table 1.

Fields 27 - 36
As to our general concerns regarding any obligation to report information on collateralization, see our comments above. We doubt that the data fields 27 to 36 would be adequate to report collateral. They are rather one dimensional and would not give any meaningful information if for example collateral is posted in different currencies. Thus, we propose to delete those fields replacing them with one single field where a flag "yes/no" should be set determining whether collateral for such derivative contract has been posted or not.

Field 29
It could be clarified that ESMA expects only one value to be entered into field 29 and that if several types of collateral are posted or received the value "M" (mixed) should be reported.

Field 30
In consequence, field 30 is to be completed only if field 29 shows "M" (mixed). Otherwise it may be left blank.

Field 31
As to our general concerns regarding any obligation to report information on collateralization, see our comments above.

It would need to be clarified what is meant by "collateral" and whether it covers both, initial margin and variation margin. As far as exchange traded derivatives is concerned, the initial margin for each transaction is specified in the clearing house report and the reporting institution would only have to account for any additional initial (bank) margin. The variation margin is exchanged over time and may be received or paid on any business day on which the current market price differs from the closing price on the previous business day. As clearing houses do not apply thresholds or minimum transfer amounts, the aggregated variation margin received and paid since inception of the contract should be the current closing price of the exchange. As far as CCP cleared OTC derivatives are concerned, the same rules apply. For non-cleared OTC derivatives the term "collateral amount" would specify the amount actually posted or received (i.e., after applying thresholds, minimum transfer amounts and rounding rules).

Field 34
We are of the opinion that field 34 should be deleted (see general remarks to Annex V). In the event this should not be the case, we propose, that as far as exchange traded derivatives are concerned, the field should show the current closing price of the exchange and not the difference to the amount reported

on the previous way. A "closing price" does not exist for OTC derivatives. For OTC derivatives market values should be reported and, if cleared, the market values determined by the clearing house which after novation to the CCP are legally relevant for the client relationship.

If Mark to Market should be reported by both counterparties delegation of reporting to a third entity as provided for in the Regulation and Art. 4 of the Draft Regulation is hardly possible in practice. Mark to market valuations by the counterparties will practically never perfectly match. In consequence, either the reporting party knows the Mark to Market value of the counterparty (implausible) or the counterparty has to report it to the reporting party leaving the delegation useless.

Field 63
It should be specified whether a correction of data is reported as "cancel" and "new" or as "modify". It should also be specified whether any novation pursuant to Art. 5 Draft Regulation should be reported as modification in this field (see also comments to Annex V Art. 5 above).

IV. Annex VI – Commission delegated regulation regarding implementing technical standards on trade repositories

Table 2

Field 2
We suggest that for the unified product identifier (UPI) the ISDA draft taxonomy should be used.

Fields 22 - 36
We refer to our comments to the respective fields under Annex V and to apply our comments mutatis mutandis to the corresponding fields in Annex VI.

Yours sincerely
Bundesverband Öffentlicher Banken Deutschlands

(Georg Baur) (Ute Foshag)