Draft Response to Commodity Futures Trading Commission ("CFTC")

RE: CFTC Request for Information regarding SDR Governance\*

1. Please provide an overview of each trade repository's corporate structure, particularly its ownership and management structures, governance arrangements and committee structure, and any significant affiliate relationships.

The Warehouse Trust Company LLC ("Warehouse Trust") and DTCC Derivatives Repository Ltd. ("Derivatives Repository") are each wholly owned subsidiaries of DTCC Deriv/SERV LLC ("Deriv/SERV"), which is a wholly owned subsidiary of The Depository Trust & Clearing Corporation ("DTCC"). DTCC is an industry-owned holding company with several hundred shareholders. DTCC's board of directors includes wide representation from the dealer and buy-side community, as well as independent directors.

Each of these subsidiaries follow an at cost business model. DTCC currently does not sell or otherwise receive commercial benefit from Warehouse Trust or Derivatives Repository data, but it does serve a public policy goal of providing regulators with a centralized view of risk across the global derivatives market—and it provides the public with greater transparency of market activity (to the extent agreed with regulators and consistent with data privacy agreements and laws) free of charge.

The Warehouse Trust, Derivatives Repository and Deriv/SERV boards are comprised of the same members, except as described below, and include a broad spectrum of paying users (currently these are swap dealers only, but board membership criteria may change from functionally based to volume based in the future). Due to commitments to E.U. authorities, voting members of the boards are equally numbered between U.S. based firms and E.U. based firms. Donald Donahue (Chairman and CEO of DTCC) is a nonvoting management member and Chairman of the Warehouse Trust Board. Mr. Donahue, who is also Chairman of the Derivatives Repository Board, and Stewart Macbeth, Derivatives Repository CEO, are voting management members of the Derivatives Repository Board.

Non-voting participants at board meetings include representatives of major buy-side industry associations in Europe and the U.S., such as European Fund and Asset Management Association, Managed Funds Association, Asset Management Group of the Securities Industry and Financial Markets Association and, in addition, buy-side representatives of the DTCC board.

<sup>\*</sup> Email from Alicia L. Lewis, Attorney-Advisor, U.S. Commodity Futures Trading Commission, Division of Clearing & Intermediary Oversight to Jeffrey Waddle and Gina Ghent, dated 09/27/2010.

<sup>&</sup>lt;sup>1</sup> The boards are intended to be comprised of the same members, however, as a technical matter, some approvals are still being sought.

# 2. What involvement, if any, do market participants have in each trade repository's governance/oversight/advisory committees? What responsibilities/powers do these committees have?

The boards of both Warehouse Trust and Derivatives Repository are comprised of market participants (see response to question #1 above). In addition, an Audit Committee of the Warehouse Trust Board reviews and advises on audit and compliance issues.

The ISDA Equity Steering Committee repository subgroup serves as an advisory committee to the Derivatives Repository Board, advising it on equity repository offerings and requirements to which major dealers have committed in letters to the OTC Derivatives Supervisors Group.

Executive management of the Warehouse Trust and Derivatives Repository execute board decisions.

## 3. What types of conflicts of interest may potentially arise in the operation of an SDR?

There are several types of conflicts of interest that could potentially arise in the operation of an SDR due to ownership structure, including bundling of services, access issues and board independence.

The issue of vertical bundling could arise where Designated Contract Markets ("DCM"), Swap Execution Facilities ("SEF") and Derivatives Clearing Organizations ("DCO") have preferred access or servicing arrangements with SDRs primarily due to ownership overlaps.

In addition, ownership of an SDR could lead to access restrictions on non-owners.

Warehouse Trust and Derivatives Repository are required by current supervisors in the U.S. (Federal Reserve and New York State Banking Department in the case of Warehouse Trust) and U.K. (Financial Services Authority in the case of Derivatives Repository) as well as by commitments to the European authorities, to maintain independence from DTCC as follows:

- The Warehouse Trust and Derivatives Repository boards must be independent of the parent board. DTCC's Board oversight is limited to circumstances where Warehouse Trust or Derivatives Repository board governance takes action creating undue operational, legal, financial, reputational or systemic risk for DTCC.
- DTCC Board members who are on the Warehouse Trust or Derivatives Repository boards do not vote on Warehouse Trust or Derivatives Repository arrangements with third parties that compete with DTCC's other interests in the

OTC derivatives space. As a matter of fact, the overlap between parent/child boards is minimal.

• All dealings with third parties must be on standardized basis - parties in like businesses (for example, all DCOs or all SEFs) must be treated similarly. Warehouse Trust and Derivatives Repository supervisors require open access for all third party providers - including standardized connectivity arrangements using readily available commercial (non-proprietary) products, with options ranging from real-time computer to computer links to secure web interfaces, standardized testing and implementation timeframes. Supervisors have required that all charges to third party providers be standard, published and commercially reasonable. Currently, third party providers are not charged. Links have been established with all major central counterparty providers in the E.U. and U.S. as well as 12 other providers.

Commitments have also been made for users to have open access to Warehouse Trust and Derivatives Repository with no individualized restrictions on access and no unduly burdensome requirements (not including requirements consistent with relevant anti-money laundering and anti-terrorist laws), and no fees related to access for lower volume market participants (currently only dealers are charged).

DTCC has implemented the following additional conflict of interest mitigations -

- The repository and warehouse businesses are operated as separate at cost industry
  utilities, with any excess revenues returned to paying users of those services and
  not available to DTCC generally, under the auspices of true user governance as
  described above.
- DTCC currently does not sell or otherwise receive commercial benefit from Warehouse Trust or Derivatives Repository data, but provides it to regulators and the public (to the extent agreed with regulators and consistent with data privacy agreements and laws) free of charge.
- DTCC will provide a user's data to any third party, as designated by that user, free of charge (except that counterparty information is deleted unless the consent of that counterparty is also obtained). This does not include reporting to regulators and governmental entities, which is done pursuant the OTC Derivatives Regulators Forum ("ODRF") guidelines (attached and described further in response to question #7 below) and to agents of users who are standing in place of the user for purposes of using Warehouse Trust or Derivatives Repository services and have no rights beyond those of the user.

- 4. How might an SDR use the information that we mandate it receive for commercial purposes?
- a. Would such use present competitive problems? If so, how could this be remedied?

SDR data is extremely valuable and could be sold either stand alone or enhanced with other market data and analysis. The use of this data in this manner would present competitive problems. As at cost utilities, DTCC's SDRs have adopted a policy of not monetizing SDR data in the form of charging the public or third party providers for the data and having an open access policy overseen by independent governing (not advisory) bodies and regulators/supervisors (provided, however, to the extent that costs become excessive, commercial third party providers may be required to reimburse DTCC for the costs of providing the data).

The best protection against misuse of the potential commercial advantage of being designated an SDR is to require that SDRs operate as true industry utilities – on an at cost basis with independent user governance and subject to open access requirements.

5. Would an ownership cap mitigate the potential conflicts of interests already identified? If so, what should the cap be?

DTCC does not support ownership caps, as they could result in a distortion in ownership with unintended consequences and may lead to misaligning risk and reward. The issue is managed more effectively with open access requirements, cost based (i.e., utility based) pricing and commitment to let users direct use of their data by commercial providers.

6. Would requiring that a certain percentage of an SDR board be composed of independent or public directors mitigate the potential conflicts of interest already identified? If so, what should the percentage be and why?

While the concept of independent or public directors to represent the public interest has certain merits, requiring independent or public directors to mitigate potential conflicts of interest should not be necessary if (i) public reporting rules are sufficiently prescriptive to avoid conflict issues and (ii) regulators are able to access data in line with their authority and requirements, both of which can be dealt with directly by regulatory oversight.

7. Please provide an overview of your confidentiality policies.

Warehouse Trust and Derivatives Repository can provide data to regulators and governmental entities (see attached excerpts from the Operating Procedures which form the contractual rights and obligations between each company and its customers).

In addition, Warehouse Trust has adopted a policy to follow the ODRF guidelines (attached) based on an affirmation to Warehouse Trust that the regulator or governmental entity has a material interest in the information in furtherance of its regulatory or governmental responsibilities. Derivatives Repository expects to follow similar guidelines in the future should they be established.

#### Attachments:

#### **ODRF** Guidelines

- 1. TIW009 -- Trade Information Warehouse Data
- 2. TIW44 Trade Information Warehouse Data ODRF Guidance
- 3. Regulatory Access Guidance June 2010
- 4. DTCC Revised ODRF Attachment 6.24

### **Confidentiality Provisions**

- 1. Warehouse Trust Operating Procedures extracts
- 2. Derivatives Repository Operating Procedures extracts