



**ASIC**

Australian Securities & Investments Commission

**REPORT 356**

# **Response to submissions on CP 201 Derivative trade repositories**

July 2013

## **About this report**

This report highlights the key issues that arose out of the submissions received on Consultation Paper 201 *Derivative trade repositories* (CP 201) and details our responses to those issues.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

1 On 15 March 2013, we released Consultation Paper 201 *Derivative trade repositories* (CP 201) outlining our intended approach to regulating Australian derivative trade repository (ADTR) licensees.

2 The consultation package included the following:

- (a) a consultation paper seeking the views of stakeholders, including potential ADTR licensees and users of these facilities, on our proposed derivative trade repository regulatory regime;
- (b) the draft ASIC Derivative Trade Repository Rules 2013 setting out our proposed requirements for ADTR licensees; and
- (c) a draft regulatory guide setting out our approach to granting ADTR licences and our guidance on the derivative trade repository rules.

Note: In this document, 'derivative trade repository rules' refers to the ASIC Derivative Trade Repository Rules 2013.

3 This report highlights the key issues that arose out of the submissions received on CP 201, and our responses to those issues.

4 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 201. We have limited this report to the key issues.

5 For a list of the non-confidential respondents to CP 201, see the appendix. Copies of these submissions are available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 201.

## Background

### Group of Twenty (G20) summit

6 The global financial crisis in 2008 highlighted structural deficiencies in the global over-the-counter (OTC) derivatives market and the systemic risks that those deficiencies can pose for wider financial markets and the real economy. In many countries, these structural deficiencies contributed to the build-up of large, inappropriately risk managed counterparty exposures between some market participants in advance of the global financial crisis—and to the lack of transparency about those exposures for market participants and regulators.

7 At the G20 summit in Pittsburgh in 2009, following the global financial crisis, the Australian Government joined other jurisdictions in committing to

substantial reforms to practices in OTC derivatives markets. Specifically, they committed to three key ‘mandates’:

- (a) *trade reporting*: all OTC derivative transactions should be reported to trade repositories;<sup>1</sup>
- (b) *clearing*: all standardised OTC derivative transactions should be centrally cleared; and
- (c) *trading*: all standardised OTC derivative transactions should be traded on exchanges or trading platforms, where appropriate.

### Australian legislation

- 8 The relevant Australian legislative framework was put in place in January 2013 when the new Pt 7.5A of the *Corporations Act 2001* (Corporations Act) became effective.<sup>2</sup> This regime provides for a flexible framework that allows for the implementation of reforms in graduated measures which respond proportionately in managing risks in Australian OTC markets.<sup>3</sup>
- 9 Under the legislation, the Minister has the power to prescribe certain classes of derivatives as being subject to an ASIC rule-making power for:
- (a) mandatory reporting to a derivative trade repository (trade repository);
  - (b) mandatory clearing by a central counterparty; or
  - (c) mandatory execution on a trading platform.
- 10 The legislation also gives ASIC the power to make rules dealing with a range of matters relating to licensed trade repositories, subject to Ministerial consent. These rules are complemented by Regulatory Guide 249 *Derivative trade repositories* (RG 249), which gives guidance on the licensing regime for this new category of financial market infrastructure.

### The trade repositories licensing regime

- 11 Under s905B of the Corporations Act, a body corporate may, by lodging an application with ASIC, apply for an ADTR licence, authorising the body corporate to operate a trade repository.
- 12 Section 905C provides that ASIC may grant an applicant an ADTR licence if we are satisfied that:
- (a) the application was made in accordance with s905B;

<sup>1</sup> Trade repositories are facilities to which information about derivative transactions, or about positions relating to derivative transactions, can be reported. A derivative trade repository acts as a centralised registry that maintains a database of records of transactions and disseminates the information, including to regulators and the public.

<sup>2</sup> The *Corporations Legislation Amendment (Derivative Transactions) Act 2012*.

<sup>3</sup> The Corporations Legislation Amendment (Derivative Transactions) Bill, Revised Explanatory Memorandum, p 8.

- (b) the applicant will comply with the obligations that will apply if the licence is granted; and
  - (c) no disqualified individual appears to be involved in the applicant.
- 13 Section 905P lists matters that we must take into account in deciding whether to grant an ADTR licence under s905C.

### **The derivative trade repository rules**

- 14 Section 903A of the Corporations Act gives ASIC the power, subject to the Minister's consent under s903H, to make rules imposing requirements on operators and officers of licensed trade repositories. The derivative trade repository rules may deal with any or all of the following matters:
- (a) the manner in which licensed trade repositories provide their services;
  - (b) the handling or use of derivative trade data by licensed trade repositories and their officers and employees;
  - (c) the governance, management and resources (including financial, technological and human resources) of licensed trade repositories;
  - (d) the disclosure of conditions (including fees) on which licensed trade repositories provide their services;
  - (e) the reporting to ASIC or other regulators of matters related to licensed trade repositories; and
  - (f) matters incidental or relating to the matters referred to in 14(a)–14(e), including the keeping of records, or the provision of records or other information, relating to compliance with (or determining whether there has been compliance with) the derivative trade repository rules.

## **Responses to consultation**

- 15 On 15 March 2013, we issued CP 201 seeking industry comment on a draft regulatory guide and draft derivative trade repository rules.
- 16 We received eight responses (including one confidential response) from potential ADTR licence applicants, major industry associations, financial and other professional service providers, and other major market participants.
- 17 We also held discussions with potential ADTR licence applicants and major industry associations and their members to discuss our proposed rules and guidance.
- 18 Respondents were generally supportive of the licensing and regulatory framework we proposed in CP 201 and considered that the licensing

framework would ensure that trade repositories are appropriately qualified and that the regulatory framework will enable us to supervise the provision of trade repository services.

- 19 As previously submitted to Treasury in response to their December 2012 proposals paper,<sup>4</sup> energy sector respondents reiterated their opposition to potentially including energy derivatives as part of the G20 reform agenda. We believe that this concern may be alleviated by the exclusion of electricity derivatives from the scope of ASIC's trade reporting mandate.<sup>5</sup>
- 20 Most respondents were comfortable that the proposed rules and guidance were broadly consistent with the requirements of other international regimes and with the Committee on Payments and Settlement Services (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO) *Principles for financial market infrastructures* (CPSS–IOSCO Principles).<sup>6</sup>
- 21 Many respondents also believed that ASIC had taken a sensible approach in using common licensing foundations between the Australian market licence and ADTR regimes, given that in many respects, operating a data repository is a subset of the functions performed in operating a market.
- 22 The main issues raised by respondents included the following:
- (a) a number of respondents argued that the requirement for an operator of a trade repository to ensure that data received from participants is accurate and complete was an unreasonable expectation of the trade repository (proposed Rule 2.3.1(2)(b));
  - (b) whether the requirement for a trade repository to maintain a 'continuous' physical connection with its participants is a realistic and achievable expectation of an operator of a trade repository (proposed Rule 2.3.1(2)(a));
  - (c) whether there should be express recognition in the derivative trade repository rules and/or guidance permitting a trade repository to commercialise the data received;
  - (d) a number of submissions were concerned with the blanket access by regulators to trade repositories, advocating that regulators should have access in accordance with their mandates;
  - (e) whether bundling of services by a trade repository should be permitted under the derivative trade repository rules;

<sup>4</sup> Department of Treasury, *Implementation of Australia's G-20 over-the-counter derivatives commitments*, proposals paper, December 2012, [www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/2012/G20%20OTC%20derivatives%20commitments/Key%20Documents/PDF/Proposal\\_Paper.ashx](http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/2012/G20%20OTC%20derivatives%20commitments/Key%20Documents/PDF/Proposal_Paper.ashx).

<sup>5</sup> Corporations (Derivative) Determination 2013, [www.comlaw.gov.au/Details/F2013L00819](http://www.comlaw.gov.au/Details/F2013L00819).

<sup>6</sup> CPSS–IOSCO *Principles for financial market infrastructures*, April 2012, [www.bis.org/publ/cpss101a.pdf](http://www.bis.org/publ/cpss101a.pdf).

- (f) a number of submission raised a concern about the potential to identify counterparties from the data published by trade repositories under the statistical data reporting requirements; and
- (g) the precise legal status of the records of derivative trade data.

23 We have taken the feedback to CP 201 into account in our final updated guidance and derivative trade repository rules.



## B Responses to submissions on CP 201

### Key points

This section outlines the key issues raised in the submissions to CP 201, and our responses to those issues. It covers:

- the accuracy and completeness of data;
- continuous connections;
- the commercialisation of data;
- regulators' access to data;
- the bundling of services;
- information capable of identifying counterparties; and
- the legal status of records.

### Accuracy and completeness of data

- 24 In CP 201, we proposed that a core responsibility of an ADTR licensee would be accepting all derivative trade data that it is licensed to accept. Additionally, under Rule 2.3.1(2)(b), as consulted on, an operator must establish, implement and maintain policies, procedures, systems and controls reasonably designed to ensure that derivative trade data reported to the trade repository by participants is, and remains, at all times complete, accurate and current.
- 25 A number of submissions were of the view that a trade repository should not be responsible for the accuracy of the data submitted, on the basis that the trade repository does not have ready access to, or direct knowledge of:
- (a) the participant's internal processes and procedures;
  - (b) the underlying transaction; or
  - (c) the participant's internal control processes for accuracy of their trade reporting.
- 26 Some submissions argued that a trade repository would not be able to ensure that trade reports completely and accurately reflect the economics of a trade because they do not have access to the underlying trade. Further, it was also submitted that a trade repository should only be responsible for accurately recording data it receives from participants in a complete, accurate and current way.

- 27 One submission suggested that a trade repository could ensure that the data was complete to the extent that it conformed to any rules for data submission.

*ASIC's response*

We consider the accuracy of trade reports to be an important issue that is integral to the reliability of the information provided to regulators from trade repositories. We do, however, recognise that a licensed trade repository will have limited visibility into the economics of a trade.

In response to the feedback received, we have amended the language of Rule 2.3.1 so that the trade repository's obligation is to have in place policies and procedures designed to provide reasonable assurance that the derivative data reported is complete, accurate and current.

Our guidance in RG 249 at RG 249.173 includes examples of policies and procedures that may be implemented, including:

- requiring reporting entities to confirm data submitted is accurate and complete;
- requiring adequate ongoing representations and warranties from users in user agreements as to the accuracy and completeness of data submitted; and
- processes to identify material discrepancies or incomplete data fields in reports submitted by or on behalf of reporting entities for the same transactions, and implementing procedures to verify the accuracy of this data with the counterparties.

Each ADTR licensee will need to assess the particular nature of their activities to consider what steps will be necessary to comply with this rule.

## Continuous connections

- 28 In CP 201, we proposed that an ADTR licensee must maintain a reliable connection with the trade repository and its participants. Rule 2.3.1(2)(a) provides that an operator must establish, implement and maintain policies, procedures, systems and controls reasonably designed to maintain a continuous, reliable and secure connection between the trade repository and participants for the purposes of accepting derivative trade data.
- 29 A number of respondents submitted that the requirement to provide a 'continuous' connection is a difficult and unrealistic expectation to have of an operator of a trade repository. One submission noted that this 'continuous' expectation would be impossible given that any trade repository systems will require at least some downtime for periodic maintenance.

- 30 Some submissions advocated that, as a solution, Rule 2.3.1(2)(a) should be altered to remove the word ‘continuous’ for connections between the trade repository and participants.
- 31 Additionally, some submissions argued that an operator cannot control the participant’s physical connection, with some less sophisticated participants likely to utilise secure web-based connections to connect with the trade repository.

*ASIC’s response*

We consider it key for an ADTR licensee to maintain a continuous, reliable and secure connection between the trade repository and its participants for the purposes of accepting derivative trade data.

We do recognise the practical limitations for maintaining a ‘continuous’ connection between the trade repository and its participants at all times, as reasonable outages may be expected due to maintenance and other such events. We consider that the current language already contemplates such events because it provides that connectivity is required for the purposes of accepting derivative trade data, and is not necessarily required at all times of the day.

We have not amended Rule 2.3.1(2)(a) because we consider the position is adequately addressed, but will monitor whether future guidance may be necessary.

## Commercialisation of data

- 32 Under s904B(1)(b) a licensed trade repository may use or disclose derivative trade data only if the use or disclosure is required or permitted by either:
- (a) the Corporations Act;
  - (b) the derivative trade repository rules;
  - (c) the ASIC Derivative Transaction Rules (Reporting) 2013; or
  - (d) another law of the Commonwealth or a law of a State or Territory.

Note: In this document, ‘derivative transaction rules (reporting)’ refers to the ASIC Derivative Transaction Rules (Reporting) 2013.

- 33 Rule 2.3.3 reinforces s904B by requiring that a licensed trade repository must have policies, procedures and controls designed to ensure that the trade repository complies with s904B in respect of using and disclosing trade data.
- 34 Additional derivative trade repository rules relating to the use and disclosure of data are as follows:

- (a) Rule 2.3.4 requires trade repositories to provide regulators with ready access to all data, including transaction-level data, with participants also required to be given access to any data they have submitted; and
- (b) Rule 2.3.5 requires trade repositories to provide aggregate data on a weekly basis to the public free of charge.

35 In light of these general requirements one submission argued that, in accordance with s904B(1)(b)(ii), there needs to be express provision in the rules to permit the use of trade data for non-statistical (commercial) purposes.

*ASIC's response*

We recognise that the ability to commercialise the data collected may provide trade repositories with another source of revenue that may diversify their income base. This may assist in maintaining lower pricing levels for reporting entities.

However, granting trade repositories the ability to commercialise data will raise issues regarding property in the information submitted to the trade repository and the reports that are generated by trade repositories, as well as confidentiality issues.

In light of these considerations, we have decided to permit commercialisation only for data already made public under the derivative trade repository rules, or with user and counterparty consent. This position is broadly consistent with international regulations.

We have amended the derivative trade repository rules to allow a trade repository to use or disclose data (such uses may include producing data products or services available for a fee) that is:

- data that has been made public under the statistical data rules (Rules 2.3.5 and 2.3.6); and
- data contained in a user's transaction reports required to be submitted under the derivative transaction rules (reporting), if the user and any relevant counterparty has consented in writing to such commercialisation, and the user's consent was not made a condition of that user's access to the trade repository (Rule 2.3.3).

Rule 2.3.3 also provides that an operator of a trade repository must not induce or attempt to induce a participant to consent to the use or disclosure of the participant's derivative trade data by offering or providing to the participant incentives or benefits that are not offered or provided to participants that do not consent to the use or disclosure of their derivative trade data, unless the incentive or benefit is reasonably related to the value to the operator of using or disclosing the participant's derivative trade data.

## Regulators' access to data

- 36 In CP 201, we proposed that trade repositories must provide Australian regulators and prescribed foreign financial regulators with ready access to all data, including transaction-level data, if requested.
- 37 Some respondents submitted that Australian regulators should not have blanket access rights to trade repository data, with access instead being based upon the function and purpose of those regulatory bodies.
- 38 One submission noted that blanket access is contrary to the position set out by CPSS–IOSCO, which recommends that regulators should only be able to access trade data for the purposes of their objectives and functions.<sup>7</sup>
- 39 Some respondents suggested that regulators should have tiered access rights, based on the function and purpose of the regulatory body, and that controls should be put in place to ensure there is no misuse of the data or breaches in confidentiality.

### *ASIC's response*

Access to derivative trade data by relevant regulators is fundamental to the objective of implementing a trade reporting regime and establishing trade repositories in the OTC derivatives market.

CPSS–IOSCO have made guidelines for regulators, such as ASIC, on the powers to access information contained within a trade repository for the purpose of carrying out supervisory responsibilities.

In accordance with the CPSS–IOSCO guidance, and taking into account feedback from respondents, we have amended Rule 2.3.4 to recognise that an operator of a trade repository that receives a request from an Australian regulator for derivative trade data is excused from complying with the request unless the request is for derivative trade data that is required by the Australian regulator in connection with the performance of its functions or exercise of its powers.

## Bundling of services

- 40 A number of submissions raised the issue of bundling trade reporting services with non-trade reporting services. Bundling of services involves providing services to customers on a 'tied' basis. For example, if a customer uses clearing services they must also use that entity's or group's trade repository services for those cleared trades.

<sup>7</sup> CPSS–IOSCO, *Consultative report on authorities' access to trade repository data*, consultation report, 11 April 2013, [www.iosco.org/library/pubdocs/pdf/IOSCOPD408.pdf?v=1](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD408.pdf?v=1).

- 41 We do not explicitly refer to bundling of services in either the derivative trade repository rules or RG 249. However, in the derivative trade repository rules we require trade repository services to be provided on an open and non-discriminatory basis, with appropriate operational separation of functions. Specifically, the derivative trade repository rules provide that:
- (a) access to a trade repository’s services should permit open and non-discriminatory access to and participation in the trade repository by users and, if applicable, indirect participants (Rule 2.2.2); and
  - (b) where a trade repository, its subsidiary, holding company or other related entity provides ancillary services they must ‘establish, implement, maintain and enforce policies, procedures, systems and controls designed to ensure the operational separation between the non-trade reporting services and the trade reporting services’ (Rule 2.4.12).
- 42 Of the respondents who raised this issue, the majority were strongly opposed to the bundling of services by a trade repository, with many advocating that participants should not be forced to use a trade repository’s ancillary services.
- 43 One respondent submitted that a trade repository with a commercial motive in the use of trade repository data could implement rules that over time would force participants to use their services, forcing out competition.
- 44 Another respondent argued that the bundling of services was inconsistent with CPSS–IOSCO Principle 18.<sup>8</sup>

*ASIC’s response*

It is our view that Rules 2.2.2 and 2.4.12 adequately provide for the concerns raised, requiring both open and non-discriminatory access to, and participation in, trade repository services as well as operational separation between services provided.

These rules are supplemented by the general protections to competition in the *Competition and Consumer Act 2010*.

If we consider any arrangements made raise any potential competition issues, we will review and engage with market and other regulators as necessary: see RG 249.167. In the future, we may revisit the issue of bundling within the derivative trade repository rules in light of any major developments in market practices and/or international regulatory responses.

<sup>8</sup> ‘Principle 18: Access and participation requirements—An FMI should have objective, risk-based and publicly disclosed criteria for participation, which permit fair and open access’, available at [www.bis.org/publ/cpss106.pdf](http://www.bis.org/publ/cpss106.pdf).

## Information capable of identifying counterparties

- 45 In CP 201, we proposed that an operator must, at least on a weekly basis, create and disclose statistical data on derivative trade data that is retained in the trade repository, making it available at no charge, through a publicly accessible website.
- 46 A number of submissions raised concerns about the potential to identify counterparties from the data published by trade repositories under the statistical data reporting requirements.
- 47 Submissions argued that data should only be provided at the aggregate level. Public disclosure of statistical data should not enable the identification of counterparties, particularly for thinly traded, illiquid derivatives.
- 48 One submission suggested that ASIC should evaluate the breadth, depth and liquidity of the market in each asset class to determine if disclosure might cause the release of individual price data to be harmful to participants, or impair liquidity.

### *ASIC's response*

In light of concerns raised by submissions, we have amended Rule 2.3.5 to provide greater clarity on the statistical information published by trade repositories.

Under the amended rules, an operator of a trade repository must disclose weekly aggregate statistical data from a period that is between three to five business days after which the relevant period ends.<sup>9</sup>

Additionally, Rules 2.3.5(6) and 2.3.6 provide that the statistical data published under the derivative trade repository rules must not include derivative trade data capable of identifying a counterparty to a derivative transaction.

Specifically, we aim to balance the need to publicly share derivative trade data against the maintenance of anonymity for counterparties who have reported information to a trade repository. The approach taken in final Rules 2.3.5 and 2.3.6 is consistent with that of other jurisdictions.

## Legal status of records

- 49 In CP 201, we proposed that licensees must have rules, procedures and contractual arrangements that clearly define the legal status of the records of derivative trade data retained in the trade repository including, for example,

<sup>9</sup> The 'relevant period' is the seven calendar day period commencing from the day the operator first accepts a report of a relevant derivative trade.

whether the trade record was a legal binding record of the derivative transaction.

- 50 One respondent submitted that there was potential confusion around the precise legal status of trade reports that have been recorded by the trade repository. The respondent was concerned that trade reports would be regarded as the final determinant of the legal status of the trade or the enforceable terms. Such matters are already commonly dealt with in industry-standard documentation.

*ASIC's response*

The explanatory note to CPSS–IOSCO Principle 1 recognises that most trade repositories store transaction data that does not represent legally enforceable trade records, but that some trade records may, with the agreement of the counterparties, provide the official economic details of a legally binding contract.<sup>10</sup> We have also noted that in a number of other jurisdictions the rules or proposed rules do not include any requirements regarding the legal status of trade reports.

In accordance with the general position adopted in other jurisdictions and with the CPSS–IOSCO guidance, and taking into account feedback from respondents, we have amended Rule 2.2.1 to remove the requirement for the operator of a trade repository to clearly define the legal status of records of derivative trade data retained in the trade repository.

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<sup>10</sup> Available at [www.bis.org/publ/cpss101a.pdf](http://www.bis.org/publ/cpss101a.pdf).



## Appendix: List of non-confidential respondents

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- ASX Ltd
  - Australian Financial Markets Association
  - The Depository Trust & Clearing Corporation
  - The International Swaps and Derivatives Association, Inc.
  - MarkitSERV LLC
  - Origin Energy Ltd
  - Vanguard Investments Australia Ltd
-