



ASIC

Australian Securities & Investments Commission

REPORT 422

Response to submissions on CP 221 Proposed amendments to ASIC Derivative Transaction Rules (Reporting) 2013

February 2015

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 221 *OTC derivatives reform: Proposed amendments to ASIC Derivative Transaction Rules (Reporting) 2013* (CP 221) 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.

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- 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.

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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

Background

1 In response to the global financial crisis, the leaders of the Group of Twenty (G20) (including Australia) agreed to a range of reforms to over-the-counter (OTC) derivatives markets at the 2009 Pittsburgh summit. One of the reforms was mandatory reporting of OTC derivative transactions to trade repositories.

2 In May 2013, the Minister made the Corporations (Derivatives) Determination 2013, which gave the Australian Securities and Investments Commission (ASIC) the power to make derivative transaction rules to require reporting of transactions in five classes of derivatives to trade repositories, these were:

- (a) interest rate derivatives;
- (b) foreign exchange derivatives;
- (c) equity derivatives;
- (d) credit derivatives; and
- (e) commodity derivatives other than electricity derivatives.

3 In July 2013, we made the ASIC Derivative Transaction Rules (Reporting) 2013 which implemented the mandatory OTC derivative transaction reporting reforms and allowed for the implementation of reporting obligations in three phases for different types of reporting entities.

Note: In this document a reference to the 'derivative transaction rules (reporting)' is a reference to the ASIC Derivative Transaction Rules (Reporting) 2013.

4 Phase 1 and Phase 2 reporting entities are already reporting data and, consequently, ASIC, the Reserve Bank of Australia (RBA) and the Australian Prudential Regulation Authority (APRA) (together, the Australian regulators) are entitled to access that data.

5 In the lead-up to the commencement of Phase 1 and Phase 2, we engaged extensively with industry with the aim of facilitating smooth implementation of the reporting obligations. Through this, we identified a number of implementation issues and have sought to address these issues by granting temporary relief. In some cases, those issues were addressed by giving time-limited exemptive relief (individual and class order). For example, in July 2014 we made ASIC Instrument [14/0633] *Transitional exemptive relief for Phase 3 Reporting Entities from elements of the ASIC Derivative Transaction Rules (Reporting) 2013*, which allowed for the staggered and delayed start of Phase 3—now due to commence in two sub-phases, on 13 April 2015 and 12 October 2015.

- 6 In October 2014, we issued transitional exemptive relief for Phase 1, 2 and 3 reporting entities by way of ASIC Instrument [14/0952] *Transitional exemptive relief for Reporting Entities from elements of the ASIC Derivative Transaction Rules (Reporting) 2013*, which provided reporting entities with relief from the derivative transaction rules (reporting) and extended elements of relief previously granted to reporting entities—some of which have now been made permanent by amendment of the rules.

Note: The relief instruments are available on [our website](#).

- 7 In the course of granting and discussing these time-limited waivers with affected stakeholders, we have identified instances where the derivative transaction rules (reporting) impose compliance costs on reporting entities that are disproportionate to the regulatory benefits gained from obtaining the relevant data or, conversely, might lead to undesirable ‘gaps’ in reporting. We decided to consult on changes to the derivative transaction rules (reporting) to address those issues on a permanent basis.

Response to consultation

- 8 On 25 July 2014, we released CP 221 which outlined proposed regulatory options for amending the derivative transaction rules (reporting). We received 16 submissions (including four confidential submissions) in response to CP 221 over the course of the consultation period, which ended on 29 August 2014.
- 9 Since the close of consultation we have engaged with stakeholders through further targeted consultation on particular issues, including reporting by foreign subsidiaries and delegated reporting.

B Response to submissions on CP 221

Key points

This section outlines the key issues raised in the submissions on CP 221, and our responses to those issues. It covers:

- alternative reporting and the obligation to ‘tag’ trades;
- reporting by foreign subsidiaries of Australian financial entities;
- delegated reporting;
- snapshot reporting;
- availability of alternative reporting;
- the definition of ‘regulated foreign markets’;
- reporting to a prescribed trade repository;
- removal of ABNs as counterparty identifiers; and
- other changes to reporting fields.

Alternative reporting and the obligation to ‘tag’ trades

- 10 In CP 221, we proposed to require foreign reporting entities relying on the alternative reporting exemption in the derivative transaction rules (reporting) to designate (or ‘tag’) trades reported to a prescribed trade repository as being reportable to ASIC.
- 11 Overall, industry was opposed to the proposal to tag information reported to prescribed trade repositories for the following reasons:
- (a) the current limitations with the tagging function of relevant trade repositories;
 - (b) the potential for the costs of any trade repository software development work for Australia-specific functionality to be passed on; and
 - (c) the costs of implementation to support tagging.
- 12 As an alternative to the new tagging requirement, several submissions proposed that international regulators cooperate to share data in trade repositories.

ASIC’s response

We consider there are compelling reasons to impose the tagging requirement on foreign reporting entities wishing to use the alternative reporting exemption.

While we recognise that this proposal may impose some costs on foreign reporting entities, we believe the overriding need for regulators to be able to access this information justifies the cost.

It is not currently practicable to obtain daily transaction data indirectly through cooperative arrangements with foreign

regulators. Indirect access through regulators is likely to remain ad hoc and inquiries-based, due to the operational risk of handling and transmitting large amounts of sensitive information outside of a secure trade repository environment.

Tagging helps ensure that ASIC and the Australian regulators are able to obtain ongoing direct access to data reported to offshore prescribed trade repositories. Without the tagging requirement, ASIC and the other Australian regulators risk losing oversight of trades booked, or entered into, in Australia by foreign reporting entities—which can contribute to the build-up of risk or affect market integrity in OTC derivatives markets.

On a practical level, key global trade repository groups already support tagging of trades according to jurisdiction. Indeed, a number of Phase 2 reporting entities are already tagging trades that are 'booked in' Australia pursuant to ASIC Instrument [14/0234] *Transitional exemptive relief for Phase 2 Reporting Entities from elements of the ASIC Derivative Transaction Rules (Reporting) 2013*.

Canada has implemented a similar tagging requirement and Singapore is in the process of considering the introduction of a similar requirement.

In our view, if tagging by foreign reporting entities is not implemented then, to ensure access to data reported by foreign entities, the derivative transaction rules (reporting) must be amended to remove alternative reporting (and with it, the benefits of alternative reporting). We note that very few other jurisdictions offer alternative reporting in the same way that ASIC does.

We do not believe either alternative (i.e. no tagging or removing alternative reporting altogether) achieves a satisfactory result for the Australian regulators or industry. We consider the tagging proposal strikes a balanced position by allowing alternative reporting under the condition of tagging trades.

There will be a delay in the implementation of the tagging requirement, from the commencement of the derivative transaction rules (reporting) to 13 April 2015, at the earliest, to allow industry time to adjust their reporting systems to implement tagging.

Reporting by foreign subsidiaries of Australian financial entities

- 13 In CP 221, we proposed to amend the derivative transaction rules (reporting) to require certain foreign subsidiaries of Australian authorised deposit-taking institutions (ADIs) and Australian financial services (AFS) licensees to report OTC derivatives to trade repositories. This was a re-consultation on a proposal we included in our consultation on the draft trade reporting rules in early-2013 (see Consultation Paper 205 *Derivative transaction reporting* (CP 205)), which was not finalised at the time the trade reporting regime was introduced in July 2013.

- 14 Under this proposal, foreign subsidiaries of ADIs and AFS licensees would be required to start reporting transactions in OTC derivatives globally, where their gross notional outstanding in a jurisdiction—individually, or in combination with other subsidiaries of the Australian entity—is \$5 billion or more. The proposed threshold was intended to minimise compliance costs by only requiring the reporting of transactions that could reasonably transfer material risk to the Australian financial system.
- 15 Importantly, the proposal would allow foreign subsidiaries to access alternative reporting through substantially equivalent foreign reporting regimes, as long as they tagged the reports as reportable pursuant to the derivative transaction rules (reporting) under the separate tagging proposal.
- 16 This proposal was intended to fill information gaps in relation to transactions made by foreign subsidiaries of Australian ADIs and AFS licences, and provide a more complete picture of Australian OTC derivative data to the Australian regulators.
- 17 There was substantial industry opposition to the proposed requirement for foreign subsidiary reporting. Industry stakeholders who addressed the issue stated that the proposal:
- (a) took an approach to extra-territorial reach that was not aligned with the regimes of foreign regulators and was too expansive;
 - (b) would impose significant and ongoing costs and complexity to industry and ASIC;
 - (c) would present a barrier to certain offshore investments;
 - (d) would present costs and hurdles not sufficiently removed by the alternative reporting exception or the proposed threshold; and
 - (e) was inconsistent with the Australian Government’s deregulatory agenda and ASIC’s risk-based approach to regulatory oversight.

ASIC’s response

We have considered the responses carefully and consulted with the RBA and APRA, as potential key users of the data, on the extent to which not going ahead with the proposal would detrimentally affect their ability to meet their respective mandates.

We note that, from a market integrity perspective, data about OTC transactions made by foreign subsidiaries that are not conducted in Australian markets are not of direct interest to ASIC. We have also taken into account regulation made by the Australian Government, which has limited the number of foreign subsidiaries that ASIC could place a reporting obligation on.

We consider that the Australian regulators do not presently have an overriding need for the data from foreign subsidiaries that cannot be met through other means (e.g. through consolidated

reporting or ad-hoc requests for information about exposures of foreign subsidiaries). We have therefore decided not to implement the proposal to bring foreign subsidiaries within the Australian reporting regime, at this time.

However, the Australian regulators will continue to monitor whether the Australian financial market may be vulnerable to a build-up of systemic risk from foreign subsidiaries and, based on the results, may reconsider this issue in the future.

We also note that in November 2014, the Australian Government made the Corporations Laws Amendment (2014 Measures No. 3) Regulation 2014. This regulation made permanent the end-user exemption in reg 7.5A.50 which would otherwise have expired at the end of 2014. This exemption prevents ASIC from placing reporting obligations on end users (as defined)—that is, persons (including foreign subsidiaries of Australian reporting entities) other than ADIs, AFS licensees, clearing and settlement facility licensees, or foreign exempt wholesale financial service providers.

Delegated reporting

- 18 In CP 221, we consulted on amending the delegated reporting provision in the derivative transaction rules (reporting) to introduce a ‘safe harbour’ designed to make delegated reporting more attractive to potential users.
- 19 As proposed, the safe harbour would require the delegate to take all reasonable steps to ensure the accuracy of the reported information and the terms of the delegate’s appointment to be put in writing. The written agreement would require the delegate to report in accordance with specified provisions of the derivative transaction rules (reporting) and take all reasonable steps to ensure the accuracy of the information reported. The delegator would also be required to make regular enquiries, reasonably designed to determine whether the delegate is discharging its obligations under the terms of its appointment.
- 20 Under this proposal, the delegator would not be residually liable for a delegate’s breach of the derivative transaction rules (reporting).
- 21 The feedback we received on this proposal was mixed. Buy-side trade association respondents welcomed the introduction of a safe harbour. However, sell-side entities (and some individual buy-side entities) were concerned that the proposed delegated reporting regime would impose a very high standard of responsibility on the delegate and would increase the cost for dealers. These respondents proposed a number of technical changes to the drafting of the provision. One concern expressed in stakeholder discussions was that the derivative transaction rules (reporting) should not prevent parties that wish to sign delegation agreements in the standard form developed by the International Swaps and Derivatives Association (ISDA) from doing so.

- 22 Many industry respondents also suggested the alternative approach of allowing single-sided reporting to reduce the compliance burden for Phase 3 reporting entities.

ASIC's Response

Acknowledging the need for industry cooperation in operationalising delegated reporting, particularly from larger entities that are likely to take on the role of delegate, we have re-drafted the safe harbour provision to remove the requirement for the delegate to take all reasonable steps to ensure the accuracy of the information reported and to remove the prescribed elements of the written delegation agreement.

In the final version of the derivative transaction rules (reporting), the safe harbour provision will require the delegator to document the delegation agreement in writing, the content of which is bilaterally negotiated between industry participants, and make regular enquiries reasonably designed to determine whether the delegate is discharging its obligations under the terms of its appointment. We would expect that the derivative transaction rules (reporting), as amended, would be compatible with standard-form delegation agreements such as that developed by ISDA. We believe this approach strikes an appropriate balance in the regulation of the safe harbour option.

Based on our subsequent consultation with stakeholders, we believe this approach would be supported by most stakeholders. We also believe our objectives of facilitating the take-up of delegated reporting and providing more clarity to the parties, would be met.

We note that on 12 December 2014, the Acting Assistant Treasurer announced that financial entities that engage in small amounts of OTC derivatives activity will benefit from 'single-sided' reporting relief, provided they conduct their derivative transactions with counterparties that are already required to report the trade: see Media Release (058-2014), [Making over-the-counter derivatives markets safer](#), 12 December 2014.

This will apply to all Phase 3B reporting entities, as defined in the derivative transaction rules (reporting). Regulations setting out the details of the 'single-sided' reporting regime will be released for public consultation in early-2015.

Snapshot reporting

- 23 In CP 221, we consulted on a proposal to require reporting entities to report transaction information for each OTC derivative that is current as at the end of each business day ('snapshot reporting'), instead of individually for every transaction opened, closed or amended during the business day ('lifecycle reporting').

- 24 This proposal was intended to provide compliance cost savings for reporting entities, many of which have built reporting systems that allow for snapshot reporting under overseas regimes, such as the *Dodd–Frank Wall Street Reform and Consumer Protection Act* (US).
- 25 The feedback we received from industry stakeholders was strongly supportive of this proposal. We received feedback that snapshot reporting is simpler and more cost effective to administer than lifecycle reporting.
- 26 One category of trades that snapshot reporting would not cover is intraday trades that are opened and closed on the same day. We therefore consulted on whether industry would support an exception to snapshot reporting being made for intraday trades and a reversion to transaction-by-transaction reporting in the future, having regard to applicable record-keeping requirements and practices. Industry stakeholders did not support this proposal due to the potential implementation costs associated with infrastructure and IT builds, and suggested that record-keeping requirements and practices would allow individual transactions to be reconstructed ad hoc.

ASIC's response

We consider that the long-term nature of most OTC derivatives means that the usefulness and quality of data available under snapshot reporting to the Australian regulators would not significantly suffer from a lack of more granular, trade-by-trade data. Indeed, Phase 1 and Phase 2 reporting entities are currently reporting trades on a snapshot basis under relief granted in waivers (most recently, ASIC Instrument [14/0952]) and, in our experience, the data analysis we have been able to undertake has not significantly diminished as a result.

On the other hand, in order to be in a position to fully discharge our market integrity oversight function, we consider it important to retain the ability to require more granular lifecycle reporting for shorter-term trades that are opened and closed within a day, such as contracts for difference (CFDs). For this reason, the derivative transaction rules (reporting) have been amended to provide ASIC with the power to determine that a derivative (or class of derivative) is an 'excluded derivative' and must be reported in accordance with lifecycle reporting. At this stage, we are not proposing to require any intraday trades to be reported, but we will keep the matter under review.

When determining whether a derivative product is an 'excluded derivative' under the derivative transaction rules (reporting), we will consider whether the determination will enhance the transparency of information available to relevant authorities and the public, promote financial stability or support the detection and prevention of market abuse.

Such a determination:

- would be published on our website and take effect on the day specified in the determination;
- may be withdrawn by ASIC, from a date specified in a notice of withdrawal that is not less than 90 calendar days after the date the notice is published on our website and, once withdrawn, ceases to have effect; and
- is not a legislative instrument.

Of course, the scope of any requirements under the derivative transaction rules (reporting) on the reporting of intraday transactions does not detract from the record-keeping obligations for reporting entities under the rules, or for AFS licensees under the Corporations Act.

Availability of alternative reporting

- 27 Alternative reporting is an optional regime that allows a foreign reporting entity to comply with the Australian reporting requirements by reporting transactions under a sufficiently equivalent overseas regime. The alternative reporting regime is intended to relieve foreign reporting entities from the requirement to report under the derivative transaction rules (reporting) when they have already reported a transaction under a sufficiently equivalent reporting regime, or when the relevant transaction is exempt from being reported under that regime.
- 28 In CP 221, we proposed to extend the alternative reporting regime to allow for alternative reporting when the foreign reporting entity is required to report to a prescribed trade repository that is not incorporated in the same jurisdiction as the reporting entity. Our intention was to relieve foreign reporting entities from being subject to overlapping reporting requirements, including where the reporting entity is required or permitted by its home jurisdiction to report to a trade repository in another jurisdiction—rather than in the same jurisdiction, as required under the current derivative transaction rules (reporting).
- 29 Industry stakeholders generally welcomed this change. We received feedback that the amendment would allow foreign reporting entities to build systems and report in accordance with one regulatory reporting regime. This would be more cost-effective than having to build multiple reporting systems, particularly when there are differences in the reportable transactions and positions.
- 30 However, we did receive feedback that the connection between the jurisdiction of incorporation, and reporting in accordance with sufficiently equivalent rules in the jurisdiction of incorporation, was still too narrow to reduce overlapping reporting requirements.

ASIC's response

Following the release of CP221, and in consideration of the feedback received, we have slightly broadened the scope of the original alternative reporting proposal—it will now also allow alternative reporting by foreign reporting entities to prescribed trade repositories, pursuant to the substantially equivalent reporting requirements of jurisdictions other than those where they are incorporated or formed.

We have also added conditions that are designed to ensure that globally-active reporting entities do not combine or 'cherry-pick' exemptions of local reporting regimes to avoid having to report reportable transactions altogether.

Definition of 'regulated foreign markets'

- 31 In CP 221, we proposed to expand the definition of 'regulated foreign markets' so that certain categories of markets in the United States and the European Union—in addition to specific financial markets or classes of financial markets, as determined by ASIC—would be deemed to be a 'regulated foreign market' in Australia. Trades concluded on those markets would not be required to be reported.
- 32 We also proposed to expand ASIC's power to make determinations. In addition to considering whether the operation of a financial market is subject to requirements and supervision that are sufficiently equivalent to a Pt 7.2A market under the Corporations Act, we may also consider whether the operation of a financial market is sufficiently equivalent to the requirements and supervision of the deemed 'regulated foreign markets' in the United States and European Union. In this way, we will have a clearer basis in which to make determinations about the inclusion of a financial market in the definition of 'regulated foreign market'.
- 33 Some industry stakeholders indicated that the proposed definition was still difficult to administer and may require considerable industry and ASIC resources to determine whether new exchanges should be added to the definition of 'regulated foreign markets'.
- 34 We received submissions suggesting an alternative approach, which involved specifically defining the term 'exchange traded derivative' and carving that type of transaction out of the regime. One of the submissions suggested that an 'exchange traded derivative' could be defined by reference to certain criteria used to determine whether an OTC derivative is an 'exchange traded derivative', including whether an option or forward is traded on, or pursuant to, the rules of an exchange.

ASIC's response

We consider an incremental approach is appropriate to define derivatives markets for the purposes of determining the scope of the reporting regime. We believe that the proposed amendment to the 'regulated foreign market' definition provides certainty in relation to the reporting requirements for major markets in the United States and European Union.

We did not consider the suggested criteria to be clear enough to provide suitably robust guidance, particularly because what amounts to an 'exchange' is not always clear and, in some circumstances, OTC derivatives markets may resemble fully-regulated markets.

Reporting to a prescribed trade repository

- 35 In CP 221, we proposed to amend the derivative transaction rules (reporting) to require reporting entities to report to a prescribed trade repository where no licensed trade repository is available. The feedback received indicated almost unanimous support for this proposal.
- 36 On 15 September 2014, ASIC licensed DTCC Data Repository (Singapore) Pte Ltd (DDRS) as the first licensed Australian derivative trade repository (ADTR).
- 37 This technical amendment would have the effect of ensuring that reporting entities can report to a prescribed trade repository in the event there ceases to be a trade repository licensed in Australia.

ASIC's response

Given the strong support for this proposal, we have amended the derivative transaction rules (reporting) to require reporting entities to report to a prescribed trade repository where no licensed ADTR is available.

Removal of ABNs as counterparty identifiers

- 38 In CP 221, we proposed to amend the hierarchy of counterparty identifiers that reporting entities must report by removing references to the Australian business number (ABN) entity identifier.
- 39 DDRS, the licensed ADTR used by Australian reporting entities, does not technically support the reporting of ABNs and the automatic population of counterparty names using an ABN. We also understand that DDRS is unlikely to support ABNs in the future—for the reason that ABNs are a purely national form of identifier and DDRS seeks to maximise cross-jurisdictional economies of scale, wherever possible.

- 40 The industry was largely supportive of the proposal to remove the reference to ABNs in the hierarchy of counterparty identifiers. Many respondents also suggested replacing the entire hierarchy with a model developed by ISDA ('ISDA identifier waterfall'). It was submitted that this would bring Australia in-line with emerging international standards and reduce implementation costs for reporting entities by permitting a cross-regime technology build.

ASIC's response

We will remove references to ABNs from the hierarchy of counterparty identifiers because ABNs are not and will not be supported by DDRS in the future. This change will occur through a transitional period to give the industry time to adjust their reporting practices—to the extent they are inconsistent with the amendment.

From the commencement of the derivative transaction rules (reporting) to 12 April 2015, reporting entities may report using an ABN and, on or after 13 April 2015, the ABN reference will be substituted with an international business entity identifier issued by AVOX Limited (AVID).

Due to AVID's position in the hierarchy, where a Legal Entity Identifier (LEI) or pre-LEI is available, it must be quoted instead of an AVID under the derivative transaction rules (reporting).

While we have not completely replaced the hierarchy of counterparty identifiers with the ISDA identifier waterfall, the replacement of the ABN reference with an AVID closely aligns the counterparty identifier hierarchy in the derivative transaction rules (reporting) with the ISDA identifier waterfall.

Other changes to reporting fields

- 41 We received unsolicited technical feedback on a number of reporting fields. A number of other suggestions were also made in relation to changing the description of other reporting fields.
- 42 We would prefer to deal with reporting field amendment issues at a later time, for the following reasons:
- (a) reporting entities have been building towards reporting according to the existing field descriptions;
 - (b) ESMA is currently consulting on reporting fields; and
 - (c) the harmonisation of particular reporting fields is an area of international focus.
- 43 We have, however, taken into account feedback by amending one of the reporting fields relating to hedging (i.e. it will no longer be required to be completed by financial entities), to bring the field in-line with the corresponding position under the European Market Infrastructure Regulation.

Appendix: List of non-confidential respondents

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- Australian Bankers' Association (ABA)
 - Australian Custodial Services Association (ACSA)
 - Australian Financial Markets Association (AFMA)
 - Australian Institute of Superannuation Trustees (AIST)
 - Australian Securitisation Forum (ASF)
 - Customer Owned Banking Association (COBA)
 - Depository Trust and Clearing Corporation (DTCC)
 - Financial Services Council (FSC)
 - Global Financial Markets Association (GFMA)
 - International Swaps and Derivatives Association (ISDA)
 - Origin Energy
 - State Street Bank and Trust Company
-