

Wednesday, 6th July 2022

Craig McBurnie
Senior Analyst
Market Infrastructure
Level 5
100 Market Street
Sydney NSW 2000

By email only: otcd@asic.gov.au

[non-confidential submission – open for publication]

Dear Mr McBurnie,

Retail Derivatives Forum (“RDF”) response to ASIC’s Consultation Paper 367 Proposed changes to simplify the ASIC Derivative Transaction Rules (Reporting): Second consultation

Thank you for the detailed consultation paper and the opportunity to have an in-depth discussion on this paper behind closed doors, with the RDF on 20th June 2022.

Opening Comments

The RDF was created in 2017 in recognition of complexities faced by various firms within the sector. We are attempting to establish a common understanding and unified approach in relation to both MiFIR and EMIR Transaction Reporting requirements for Retail Derivative firms.

Attendees of our forum operate as platforms for Retail or Professional clients, or brokers to facilitate and/or engage in trading activity across three key product types; Contract for Difference, Spread Bet (UK specific only) and for some members, Cash Equity. Within these product types, a range of assets are offered, including Equity, Forex, Commodity, Debt and Cryptocurrency.

The RDF have been actively participating in consultations being held by the United Kingdom’s Financial Conduct Authority (FCA) and the European Securities Markets Authority (ESMA) in respect of the European Markets Infrastructure Regulation (EMIR) and Markets in Financial Instruments Regulation (MiFIR) updates.

The attendees of our forum are either directly or indirectly responsible for reporting millions of transactions a day through the remaining Australian Derivative Trade Repository (ADTR), DTCC, using the lifecycle method.

Likewise, our members account for trading and settling approximately 70% of the UK Retail Derivative market share, contributing to over 5 million transaction reports a day over both the EMIR and MiFIR regimes.

A list of members contributing to this feedback are:

- Assured DTR
- AxiCorp
- CMC Markets
- eToro
- StoneX
- IG Group
- Kaizen Reporting Ltd
- OANDA Australia Pty Ltd
- S&P Global Market Intelligence
- Traction Fintech Pty Ltd

Our responses for those questions where feedback was received are set out on the following pages, and upon our review of this consultation paper, we recognise the impact some of these measures could have for firms in our industry.

Members of our forum have invested significant amounts of financial and human resources in their transaction reporting requirements since the inception of the respective regimes. The EMIR and MiFIR regimes have been regularly evolving from both the legislative and technical standpoints since their inception. Likewise, the ASIC regime has benefited from feedback and consultation since the commencement of Phase 3B in late 2015. These factors operating in tandem have meant that trade reporting has not been a 'set and forget' function within our member organisations. Rather, our members have been perpetually seeking to improve and update their daily regulatory submissions to meet best practices and regulatory expectations as this information becomes available.

With this in mind, the RDF is concerned to minimise global divergence between regimes, which would require additional investment and create disruption for the industry, and the costs may potentially be borne by the investor.

If you require any further information or feedback from the RDF, please do not hesitate to let us know.

Yours sincerely,

Chair of the Retail Derivatives Forum

SECTION B: THE UNIQUE TRANSACTION IDENTIFIER (UTI)

B1Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

Our understanding is that ASIC are attempting to harmonise itself with ESMA's approach where the UTI generation follows a waterfall method.

Whilst this is unlikely to have a direct impact for retail clients where the CFD firm is expected to be the UTI generator, we do acknowledge that in some instances where this is not the case, there will be difficulties in keeping track of which transactions are reportable by the various jurisdictions, as each regulation will have its own nuances.

Hence, we welcome a bilateral approach to provide flexibility for who will ultimately be generating the UTI. As an example, some firms may look to include this within their customer agreement, which we would expect ASIC to be in favour of, as this reduces operational overheads and establishes a clear order for the UTI generating entity.

In terms of the UTI being shared within a specific time frame, again, we welcome a time frame being set. However, whilst we appreciate 10am Sydney time might be tight for firms who have to generate the UTI, it is important not to underestimate the amount of work that will be required by the reporting entity to ingest this information and create a report to send to the repository. Hence, we would appreciate if the time to submit a transaction report was to be in line with MAS, where we see a t+2 reporting requirement. In most cases, firms will still continue to report t+1, however, this also gives flexibility and avoidance of a breach as a result of a late UTI.

We acknowledge that firms could use a temporary UTI where a UTI is not shared within a timely manner, and then replace this once a UTI is received, but this approach will require quite a significant system build, for scenarios which may be infrequent. Again, by having a t+2 reporting requirement, a temporary UTI may never be required.

Finally, we would like ASIC to be aware that in the worst-case scenario where a UTI is not received, it will lead to a state where all but x number of trades will have its UTI generated by the other counterparty, against the x number of trades generated by the reporting counterparty. This could potentially lead to both firms submitting different UTIs should the reporting counterparty not share this value to the other reporting counterparty. We do not believe this scenario creates an obligation where the reporting counterparty should be sharing this UTI, as not only will this require additional system build, but as a result of the other counterparty, the reporting counterparty would be incurring additional costs as a result of additional system build to facilitate this.

B1Q2 Do you consider that you would have any issues of interpretation of the definitions or text of draft Rule 2.2.9? In your response, please give detailed reasons for your answer.

We understand the existing set of ASIC transaction reporting rules are set to end in 2023. However, by introducing a two phased approach where the UTI generation is part of this phase, does put this out of line with ESMA and the FCA implementation timelines?

We would prefer if ASIC moved the UTI element into the "amended" rules so that multiple regulations are to go live with the same approach, at a similar time.

B2Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

No comment.

B2Q2 Do you consider that you would have any issues of interpretation of the definitions or text of draft Rule 2.2.9? In your response, please give detailed reasons for your answer.

No comment.

SECTION C: THE UNIQUE PRODUCT IDENTIFIER (UPI)

C1Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

There continues to be gaps in the UPI system for the CFD industry for asset classes like a Commodity. The validation requirements to the additional fields required whilst the UPI system is enhanced will be quite pivotal to understand the impact for reporting firms within the RDF.

In times where a UPI does not exist yet there is a need for a product to be traded (for example when a product is to roll from one contract month to the next), we would expect some flexibility in submitting a UPI whilst one is being created, which is likely to be the case for almost all CFD products offered to a client.

SECTION E: THE ASIC DATA ELEMENTS

E1Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

We welcome the recognition of “transaction-to-position” conversion practices, which is a widely used method of reporting by firms in the RDF.

For clarification, our understanding is that the new Rule 1.2.5(1)(b)(iv) allows for all four reports to be submitted as referenced in paragraph 374. This mirrors the example created by ESMA in the EMIR Q&A on OTC derivatives, central counterparties and trade repositories, question 3b(a), and therefore is allowing firms in our industry to continue using a harmonised approach across jurisdictions.

We also understand that this is an optional way of reporting, and any firms who have not been using such approach and therefore not making use of a “transaction-to-position” type method, are able to continue doing so whilst staying compliant.

E2Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

We are concerned about back reporting transactions with data elements that would not have been captured at the time of the original transaction. In effect, firms would need to ensure their build captures this information at a date significantly earlier than when the rules come into force. Manually adding some of the missing information would be extremely costly and time consuming, and therefore we would appreciate flexibility on

- a) the fields that need to be populated; and
- b) the transactions that could be populated.

E2Q2 Do you consider that, from the commencement of the amended ASIC Rules, a trade state report should be structured on a ‘carried forward/enlarged’ basis, a ‘converted’ basis or on some other basis: see paragraphs 411–417? In your response, please give detailed reasons for your answer.

As most firms in the RDF report on the “transaction-to-position” conversion basis, we would prefer values to be carried forward and converted. This will limit a mixture of old and new values and provide a consistent approach for all fields.

Saying that, most firms are planning to update all their reports on the 1st April 2024, and in doing so, this would be a sensible approach.

A few firms are considering changing the UTI structure on the 1st April 2024 for both new and existing trades; we would like to understand whether ASIC would have any concerns with this approach providing an audit of the UTI was kept.

E3Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

We seek clarification on the below fields:

- a) Underlying – whether this refers to immediate underlying, or the ultimate underlying.
E.g. for a CFD on a stock option, the immediate underlying is the listed stock option, whilst the ultimate underlying is the stock

As a general question – we would also like to seek clarity on whether you would expect derivatives over Cryptocurrencies to be reported as a Commodity. There has been no written guidance from ASIC to date, meaning that we are aware of firms taking different approaches to whether they report these instruments or not.

E4Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

We would prefer ASIC to ensure the data validation elements for these fields with the repository consider CFDs as a product. We have previously seen fields being populated for a CFD, even though the relevance of these fields for a CFD bears no resemblance to the product that is traded by the client.

For example, “Quantity unit of measure” is required for a Commodity asset group, where firms currently populate the underlying product, but actually does not reflect the CFD contract itself.

E5Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

We seek clarification on the below fields:

- a) Direction 2 – in the example of a CFD FX position where the reportable entity is buying 50 contracts of AUD/USD, is it correct to populate Direction - Leg 1 with TAKE if Notional Currency – Leg 1 is populated with AUD, and equally it is possible to populate Direction – Leg 1 with MAKE if Notional Currency – Leg 1 is populated with USD?
- b) Price currency – is the expectation for an Index to be populated with an ISO 4217 currency code, as opposed with “Basis points”?
- c) Delta – we do not believe this field should be populated for CFD stock options.

- d) Other Payment Type – we believe a CFD transaction should not be caught within the “Other Payment Type” category, specifically when values such as “Unwind” are to be populated. The CDE connects “Other Payment Type” in relation to a CDS and whether the payment can be connected to the price field. No other derivative type has been mentioned as having an “Other Payment”. Therefore, if a transaction does not have a payment related to its transactional events, there is no reason to connect a termination to this payment type. The final settlement of a CFD is not referred to as a scheduled payment and therefore we would not deem early terminations to be considered as a payment. This is the same view we have formed across other jurisdictions with the same field.

Generally, we would also like to understand which fields would be mandatory, as in many cases we have seen fields forced to be populated even though the specific field does not relate to the CFD contract.

E5Q2 Do you consider that the explanations of data elements in this consultation paper are an appropriate basis for guidance in a Schedule 1 Technical Guidance document? Are there particular data elements for which you consider additional guidance is required and what is the nature of the additional guidance required?

The validation requirements for each field would be beneficial when the product is a CFD. Examples for different asset classes e.g. FX, Cryptocurrency, Indices, etc would be welcomed.

ESMA produced a helpful document¹ under the MiFIR Transaction Reporting requirements, and captured a wide range of scenarios which we would believe would be useful to include guidance on.

E6Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

No comment.

¹ https://www.esma.europa.eu/sites/default/files/library/2016-1452_guidelines_mifid_ii_transaction_reporting.pdf

SECTION F: ISO 20022 MESSAGING STANDARD

F1Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

No comment.

SECTION G: SCOPE OF REPORTABLE TRANSACTIONS AND REPORTING ENTITIES

G1Q1 Do you agree with these proposals? In your response, please give detailed reasons for your answer.

No comment.

SECTION H: ALTERNATIVE REPORTING AND DELEGATED REPORTING

H1Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

We propose to retain the safe-harbour provision in the remade rules for 2023 and consider the removal of this in the amended rules for 2024. This will allow time for firms to strengthen existing governance frameworks and prepare for the resultant increased reporting costs. This may include changes to existing business processes such as developing and implementing additional controls, enhancing existing controls, reviewing, and amending existing legal agreements, and acquiring new systems and resources to perform additional monitoring. We believe the additional time will allow firms to build a more robust framework, enhancing data quality and reducing the frequency of reporting errors, whilst also giving them time to prepare for the adverse financial impact on their monetary resources.

H1Q2 What elements of revised RG 251 guidance would better assist reporting entities to understand their responsibilities and oversee their delegated reporting arrangements?

No comment.

H1Q3 Do you agree that revised RG 251 guidance outlining our approach to reporting errors and breaches can assist in reducing reporting entities' concerns about delegated reporting breaches in the absence of a 'safe harbour'?

We would appreciate if some guidance could be provided to determine whether a breach of the ASIC Rules would be deemed "significant and reportable" for a given firm. For example, ESMA have provided a materiality formula in their consultation paper, and this helps provide an objective view as to whether a breach is to be reportable or not.

H1Q4 Are there any elements of revised RG 251 guidance that should be aligned with other regulatory requirements for outsourcing arrangements?

No comment.

SECTION I: REPORTING REQUIREMENTS

I1Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

No comment.

OTHER FEEDBACK

1. LEI requirements for ASIC firms

Our forum is unanimously against the proposed restriction on firms reporting a transaction against a counterparty where the counterparty's LEI has lapsed. Not only does this make Australian firms less competitive, but it also causes the reporting counterparty to be in breach as its reports would be rejected by the repository.

The reporting counterparty has no control over the other counterparty's LEI renewal process. In other jurisdictions, the reporting counterparty is able to successfully report their leg of the transaction to the repository, whilst the other counterparty would indeed have a rejection, prompting the requirement for an LEI to be renewed.

2. Financial costs

The financial burden through the amended ASIC rules are similar to the burden taken on in other jurisdictions. However, a phased approach proposed by ASIC does create a shift where there are higher costs specifically under ASIC, as the UTI implementation part requires significant system builds to be ready in advance of other jurisdictions. Where possible, we would prefer conformity against a global standard with all other regulations to limit any bespoke builds for a given regulation.

3. Go live date (Monday 1st April 2024)

We are keen to understand whether this is to be taken as "reporting date" or "trade date". The difference is important because the reporting date implies it would include trades from Friday 29th March 2024 (i.e., the prior working day). This may create problems for some firms where the preference would be to release code over the weekend and create a clean slate of trades being reported from trade date Monday 1st April 2024. Hence, we would like to see clarification for what ASIC are expecting for transactions reported related to trade date Friday 29th March and Monday 1st April 2024.

That being said, we equally understand this type of discussion needs to be had with DTCC as they will be releasing their own code change to consider the new rules.

Another important point to mention is Monday 1st April 2024 falls on a public holiday (Easter Monday) and would appreciate if this is taken into consideration with the proposed date.