

# OTC derivative reporting in Australia: What you need to know

Under Part 7.5A of the Corporations Act 2001 (**Corporations Act**) the Australian Securities & Investments Commission (**ASIC**) has the power to make rules with regards to trade reporting, central clearing and platform trading in respect of those classes of derivatives determined by the Minister. The Minister made such a determination in May 2013 and ASIC published the ASIC Derivative Transaction Rules (Reporting) 2013 in July 2013 (**Rules**) as amended in February 2015.

## Who needs to report?

The following entities qualify as reporting entities under the Rules (**Reporting Entities**):

- an Australian entity (including a corporation, partnership, managed investment scheme or trust) that is incorporated or formed in Australia;
- a foreign subsidiary of an Australian authorised deposit taking institution (**ADI**) or holder of an Australian financial services licence (**AFS Licensee**);
- a foreign ADI that has a branch located in Australia; and
- a foreign company that is required to be registered as a foreign company in Australia.

## What product types need to be reported?

The Minister made a determination that the Rules can only apply to

commodity derivatives (excluding electricity derivatives), credit derivatives, equity derivatives, foreign exchange derivatives and interest rate derivatives.

The entry into of an arrangement that is a derivative in this class or the modification or termination of such arrangement or the assignment by a party to such an arrangement, of some or all of the party's rights and obligations under the arrangement or any other transaction that relates to such a derivative must be reported.

Firstly however the derivative must qualify as a derivative under the Corporations Act. In addition, derivative transactions traded on an Australian or foreign regulated market are excluded.

An Australian regulated market is known as a Part 7.2A market (being a market the operator of which is licensed under the Corporations Act and supervised by ASIC).

## Key issues

- Reporting entities are required to report information about their reportable transactions and reportable positions to a trade repository;
- Reporting is being phased in over different start dates for different types of Reporting Entities;
- The Rules do not apply to end users; and
- A reporting entity can delegate its reporting obligation to a third party. The Rules include safe harbour provisions in certain circumstances.

A regulated foreign market is the European and US equivalents, being a financial market that is registered by the United States Commodity Futures Trading Commission as a "Designated Contract Market" under the Commodity Exchange Act 1936 (US) or as a "Regulated market" under a directive of the European Parliament and of the Council, or any market designated by ASIC as being a regulated foreign market.

## What transactions need to be reported?

Australian entities and foreign subsidiaries of an Australian ADI or

AFS Licensee must report all relevant derivative transactions to which it is a counterparty, regardless of where it is entered into.

A foreign ADI with a branch located in Australia or a foreign company that is required to be registered as a foreign company in Australia, only needs to report those derivatives that are:

- booked to the profit or loss account of a branch of the Reporting Entity located in Australia; or
- entered into by the Reporting Entity in Australia.

Ordinary contract law principles apply in order to determine whether a derivative transaction is entered into in Australia. These principles are based on offer and acceptance, including the manner of communication of acceptance.

This complicates matters for foreign banks with branches located in Australia and foreign companies required to be registered as foreign companies in Australia. The International Swaps and Derivatives Association (**ISDA**) made an application to ASIC on behalf of these entities highlighting the difficulty with this approach and ASIC granted relief in the form of providing an alternative test to the one based on ordinary principles of Australian contract law.

A foreign bank with a branch located in Australia or a foreign company required to be registered as a foreign company in Australia may opt-in to make use of this exemption (it cannot make use of the exemption if it does not opt-in). Once an entity opts-in, such entity only has to report derivative transactions if the transaction has a nexus to Australia (**Nexus Transaction**). The test to determine whether a transaction is a Nexus Transaction focuses on the location of persons performing certain

functions in relation to derivatives.

For more information see our briefing on this topic, available here:

[http://www.cliffordchance.com/briefing/s/2015/02/otc\\_derivatives\\_reporting\\_exemption\\_for\\_certain.html](http://www.cliffordchance.com/briefing/s/2015/02/otc_derivatives_reporting_exemption_for_certain.html)

## When does reporting start?

Reporting has been phased in over four phases known as Phase 1, Phase 2, Phase 3A and Phase 3B.

Phase	Who covered	Transaction reporting start date	Position reporting start date
1	CFTC registered swap dealers	1 October 2013	1 October 2014
2	Major financial institution (>\$50b notional outstanding)	1 April 2014 (rates, credit)	1 October 2014 (rates, credit)
		1 October 2014 (other)	1 April 2015 (other)
3A	Financial institutions/intermediaries (\$5b-<\$50b notional outstanding)	13 April 2015 (rates, credit)	19 October 2015 (rates, credit)
		12 October 2015 (other)	18 April 2016 (other)
3B	Financial institutions/intermediaries (<\$5b notional outstanding)	12 October 2015	18 April 2016

\*\*these dates assume that an entity has not opted-in to report earlier

Phase 3 Reporting Entities are to start reporting information on valuations, collateral and barriers, 7 calendar months after their transaction reporting start date.

## How is the notional outstanding position calculated?

It is the gross notional outstanding position of that Reporting Entity and includes the notional principal outstanding, but do not include:

- OTC derivatives held by subsidiaries or other related bodies corporate; and
- OTC derivative transactions not within scope of the reporting requirements, for example for a foreign entity, a transaction not entered into in Australia or booked to the profit or loss account of the foreign entity will

not be taken into account to determine its gross notional outstanding position.

For managed investment schemes and trusts, the thresholds can be measured in respect of each managed investment scheme or trust.

## Where must reporting be made?

A Reporting Entity must report to a licensed trade repository, being a trade repository with an Australian trade repository license. As at the end of July 2015, DTCC Data Repository Singapore (**DDRS**) is the only trade repository with an Australian derivative trade repository license. It was licensed on 15 September 2014.

Foreign entities (not being a responsible entity or trustee acting in its capacity as such of an Australian entity) may report to a licensed or a prescribed trade repository, provided that where they report to a prescribed trade repository, they designate or 'tag' the information as being reported under the Rules.

On 25 June 2015, ASIC made a determination (ASIC Prescribed Trade Repositories Determination [15-0591]) prescribing several overseas trade repositories. These are:

- DTCC Data Repository (U.S.) LLC;
- Derivatives Repository Ltd;
- DTCC Data Repository (Japan) KK;
- DTCC Data Repository (Singapore) Pte Ltd;
- UnaVista Limited; and
- the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance of Hong Kong.

## Further points to note:

### Delegation of reporting:

A Reporting Entity may appoint another person to report on its behalf. Upon the appointment of a delegate by the Reporting Entity, the Reporting Entity would be taken to have complied with the Rules relating to reporting transaction and positions, provided that the appointment is in writing and the Reporting Entity makes regular enquiries to determine whether the delegate is discharging its obligations under the terms of the appointment.

**Record keeping:** A Reporting Entity must keep records to show that it has complied with its requirements of the Rules and keep these records for at least five years. Also a Reporting Entity must keep all information that it is required to report. However where a Reporting Entity has an arrangement with a licensed or prescribed trade repository to have access to the information that it is required to report, then it does not have to keep this information.

**End users:** End-users are excluded from the operation of the Rules. End-users are those that are not an ADI, an AFS Licensee, a credit and settlement facility licence holder or an exempt foreign licensee. It has been proposed that an AFS Licensee will also be an end-user if that entity's Australian financial services licence does not authorise it to deal in derivatives which are subject to the Rules.

### Single-sided reporting relief:

Australia introduced double sided reporting. However Treasury recently released draft regulations to implement single sided reporting for industry comment. Single sided reporting relief is aimed at Reporting Entities with a derivatives portfolio of less than \$5b as at 30 June 2014. Where the relief applies to a Reporting Entity, it will only be relieved from reporting where the other side to the transaction is required to or has agreed to report the transaction.

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