

Single sided reporting for OTC derivatives in Australia: When does it apply?

In December 2014 the Australian Government announced its intention to introduce a single sided reporting regime for the benefit of phase 3B entities as part of its de-regulatory policy initiative. At the end of May 2015, the Government released for industry comment the Corporations Amendment (Central Clearing and Single-Sided Reporting) Regulation 2015 (**Regulations**) to, amongst other things, implement the single sided reporting exemption. The Regulations are scheduled to commence on 1 October 2015 in so far as it relates to single-sided reporting. The Regulations are still in draft form.

Who can make use of the single-sided transaction reporting exemption?

Under the Regulations, the proposed single-sided reporting exemption (the **Exemption**) is available in certain circumstances to phase 3 reporting entities. The Regulations do not refer to a phase 3A or 3B reporting entity, but a phase 3 reporting entity with total gross notional outstanding positions of less than A\$5b. This qualifying position must be held for at least two qualifying quarters.

A phase 3 reporting entity is:

- an Australian authorised deposit taking institution (**ADI**) or holder of an Australian financial services licence (**AFS Licensee**) or a credit and settlement facility licensee (**CS Facility Licensee**) or an exempt foreign licensee or a foreign ADI;

- that was not required to report under phase 1 or phase 2; and
- did not opt-in to report during phase 1 or phase 2 by lodging an opt-in notice with the Australian Securities & Investments Commission (**ASIC**).

When can a phase 3 entity rely on the Exemption?

Where a phase 3 reporting entity meets the monetary thresholds (see below), then it is exempt from complying with the requirements under the ASIC Derivative Transaction Rules (Reporting) 2013 (the **Rules**) to report transaction and position information, provided that the other side to the OTC derivative transaction reports the transaction or position information, as the case may be.

Where the counterparty is an entity that is subject to the Rules, the Exemption will apply if the counterparty is required to report (and

Key issues

- Single-sided reporting relief is available to phase 3 reporting entities with total gross notional outstanding positions of less than A\$5b.
- The relief is in the form of an exemption which only applies where the counterparty reports or is obliged to report the trade and/or the position.
- The relief does not have a uniform start date for all phase 3 reporting entities.
- A phase 3 reporting entity has to monitor the status of each of its counterparties and also its compliance with the A\$5b threshold.

is not exempt from reporting itself under this Exemption (i.e. another phase 3 reporting entity) **or** reports the transaction or position information under the Rules.

Where the counterparty is a foreign entity that is not subject to the Rules or the transaction is not a reportable transaction for that foreign entity, then the Exemption will apply if the counterparty is subject to reporting requirements in a foreign jurisdiction that are substantially equivalent to the requirements under the Rules **and** reports information about the transaction or position to a prescribed repository **and** designates (or tags) the information reported as information reported under the Rules.

When will a counterparty be required to report under the Rules?

A counterparty will be required to report under the Rules if they qualify as a reporting entity under the Rules. For example, an end user is not a reporting entity and is not obliged to report under the Rules. Where a phase 3 entity enters into a transaction with an end-user, the phase 3 entity will have to report the transaction.

Additionally, reporting entities are only obliged to report those trades covered under the scope of their reporting obligation set out under rule 1.2.5 (*Reporting Entities and Reportable Transactions*) of the Rules.

Where a counterparty is an Australian entity, then all their trades fall within the scope of their reporting obligation and they are required to report all transactions and positions.

Where a counterparty is a foreign entity (not being a foreign subsidiary of an Australian ADI or AFS Licensee), then only their trades booked to the profit or loss account of a branch of

that entity in Australia or entered into in Australia (or with a nexus to Australia if they opted-in to make use of the nexus derivative exemption) will fall within the scope of their reporting obligation and they are only required to report transactions and positions relating to those trades.

Such a foreign entity is likely to be subject to reporting requirements outside of Australia and may well be reporting that trade under foreign reporting rules applicable to it. Such a report will however not ordinarily be designated or tagged as being a transaction reportable under the Rules and as such will not comply with the requirements of the Exemption. A foreign entity is only required to designate or tag a trade as being reportable under the Rules, if it is making use of the alternative reporting exemption under the Rules and reports transactions initially reportable under the Rules to a foreign prescribed trade repository (so it is reporting trades reportable in Australia under the Rules to a trade repository outside of Australia).

What if the counterparty is not required to report under the Rules?

Where the counterparty is not reporting the trade or is not obliged to report the trade as explained above, then the Exemption will not apply and the phase 3 reporting entity will have to report transaction and position information.

The phase 3 reporting entity may delegate its reporting obligation to a third party (which could include its counterparty). There are requirements under the Rules for delegating a reporting obligation.

It is also possible that the counterparty may agree to report,

despite it not being obliged to report under the Rules.

It remains to be seen whether foreign entities will be prepared to accept the risk of delegated reporting or reporting in instances where they are not required to do so.

When should the threshold be calculated?

The threshold of less than A\$5b of total gross notional outstanding positions should be tested at the end of each quarter day. A quarter day is defined as 31 March, 30 June, 30 September and 31 December.

If at the end of a quarter day the total gross notional outstanding positions held by the phase 3 reporting entity is less than A\$5b, then that will be a qualifying quarter day. Conversely, if at the end of a quarter day the gross notional outstanding positions held by that entity exceeds A\$5b, then that will be a disqualifying quarter day.

What is the earliest date the Exemption can first apply to a phase 3 reporting entity?

The earliest date the Exemption can apply to a phase 3 reporting entity varies and depends on when that entity became a phase 3 reporting entity.

The Regulations differentiate between a new phase 3 reporting entity and a continuing phase 3 reporting entity.

New phase 3 reporting entity:

A new phase 3 reporting entity is an entity which becomes a phase 3 reporting entity **on or after 1 October 2015**.

For those reporting entities, the Exemption will apply from the date it becomes a phase 3 reporting entity.

Continuing phase 3 reporting entity:

A continuing phase 3 reporting entity is:

- an entity that qualifies as a phase 3 reporting entity **by 30 September 2015** and was not required to report under phase 1 or phase 2; or
- a new phase 3 reporting entity for which the Exemption has ceased to apply after two disqualifying quarter days.

Once it has been established that an entity is a continuing phase 3 reporting entity, then the date of first application of the Exemption will depend on whether the entity was a reporting entity on or before 31 March 2015 or only becomes a phase 3 reporting entity between 1 April 2015 and 30 September 2015.

If the entity was a reporting entity **on or before 31 March 2015**, then:

- if the entity had two disqualifying quarter days calculated as at 31 March 2015 and 30 June 2015, then the Exemption will not apply from 1 October 2015 when the Regulations are proposed to become effective, but will only start to apply on the quarter day that next follows two successive qualifying quarter days on or after 30 September 2015. So the earliest it could apply is 31 March 2016, provided that the phase 3 reporting entity had two qualifying quarter days on 30 September 2015 and 31 December 2015; or
- if the entity did not have two disqualifying quarter days, then the Exemption will apply from 1 October 2015.

If the entity was not a reporting entity on or before 31 March 2015, but became a reporting entity **between 1 April 2015 and 30 September 2015**, then the Exemption will apply from

1 October 2015 regardless of any disqualifying quarters in that period.

How long will the Exemption continue to apply to a phase 3 reporting entity?

Once the Exemption starts to apply, it will apply until the end of the quarter day that next follows two successive disqualifying quarter days in respect of that phase 3 reporting entity. So if the phase 3 reporting entity has disqualifying quarter days on 31 December and 31 March, then the Exemption will cease to apply on 31 March (being the quarter day that next follows two successive disqualifying quarter days).

The Exemption will start to apply again on the day after the quarter day that next follows two successive qualifying quarter days. So if the phase 3 reporting entity had two successive qualifying quarter days on 31 March and 30 June, the Exemption will start to apply again from 1 October (being the day after the quarter day that next follows two successive qualifying quarter days).

Duties of a phase 3 reporting entity

The Exemption only applies to the phase 3 entity's reporting obligations; any other obligations under the Rules remain.

A phase 3 reporting entity has for example record keeping obligations under the Rules. These are not affected by the Exemption. The phase 3 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. It must also keep all information that it is required to report. However where it 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.

A phase 3 reporting entity will have to enquire from each counterparty whether it is subject to reporting under the Rules. Where the counterparty is a foreign entity, the counterparty must not only be subject to substantially equivalent reporting requirements, but must also actually report and tag the transaction. The phase 3 reporting entity will have to have processes in place to make the necessary enquiries and follow up that reporting and tagging are taking place.

Where the counterparty is subject to reporting under the Rules all that is required is that the counterparty is obliged to report or otherwise reports the trade. Again the phase 3 reporting entity will have to put processes in place to monitor this.

Submissions

The Regulations are still in draft form and submissions have been made to Treasury that it does not necessarily have the deregulatory impact on phase 3 reporting entities that it intended to have.

Phase 3 reporting entities will have ongoing monitoring requirements and will have to obtain representations from its counterparties on a trade by trade basis.

Also the current drafting of the Regulations is creating a competitive advantage in favour of Australian entities over counterparties that are foreign entities, as phase 3 entities may choose to deal only with counterparties who are reporting trades and positions under the Rules. This will have an impact not only on foreign entities but also on the market.

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