

ASIC DERIVATIVE TRANSACTION RULES (REPORTING) 2013

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

Enabling legislation and legislative framework

The Australian Securities and Investments Commission (**ASIC**), acting with the consent of the Minister under section 901K of the *Corporations Act 2001* (the **Act**), makes the *ASIC Derivative Transaction Rules (Reporting) 2013* (the **Rules**) under section 901A of the Act.

Subsection 901A(1) of the Act provides that, subject to Division 2 of Part 7.5A of the Act, ASIC may, by legislative instrument, make rules (referred to in the Act as ‘derivative transaction rules’) dealing with matters as permitted by that section.

Section 901A of the Act appears in Part 7.5A (Regulation of derivative transactions and derivative trade repositories) of the Act. Part 7.5A was inserted by Schedule 1 of the *Corporations Legislation Amendment (Derivative Transactions) Act 2012* (the **Amending Act**) from 3 January 2013.

Matters that may be dealt with in the derivative transaction rules – reporting requirements

Under paragraph 901A(2)(a) and (d) of the Act, the derivative transaction rules may, subject to Division 2 of Part 7.5A of the Act, impose reporting requirements, and requirements that are incidental or related to reporting requirements. ‘Reporting requirements’ is defined in subsection 901A(6) as requirements for information about derivative transactions, or about positions relating to derivative transactions, to be reported to:

- (a) a licensed derivative trade repository, the licence for which authorises the repository to provide services in respect of a class of derivatives that includes the derivatives to which the transactions relate (see paragraph 901A(6)(a)); or
- (b) a facility that is (or that is in a class of facilities that is) prescribed by the regulations for the purpose of this paragraph in relation to a class of derivatives that includes the derivatives to which the transactions relate (see paragraph 901A(6)(b)).

On 28 June 2013 the *Corporations Amendment (Derivative Trade Repositories) Regulation 2013*¹ was made under paragraph 901A(1)(6)(b) of the Act prescribing the facilities listed in the regulation in relation to all classes of Derivatives, provided the relevant facility is registered to operate as a derivative trade repository under a law of a foreign jurisdiction. The prescription ceases to operate on 30 June 2014.

Under subsection 901A(3) of the Act, the derivative transaction rules may also, subject to Division 2 of Part 7.5A of the Act, deal with matters incidental to or related to requirements referred to in subsection 901A(2) of the Act, including any of the following:

- (a) specifying the classes of derivative transactions in relation to which particular requirements apply (see paragraph 901A(3)(a) of the Act);

¹ <http://www.comlaw.gov.au/Details/F2013L01279>

- (b) for reporting requirements:
 - (i) specifying the licensed derivative trade repository or prescribed derivative trade repository (or the class of licensed derivative trade repository or prescribed derivative trade repository), to which information about derivative transactions, or positions, in a particular class must be reported; and
 - (ii) specifying the information that is required to be reported (see paragraph 901A(3)(c) of the Act);
- (c) specifying the persons who are required to comply with requirements imposed by the rules (see paragraph 901A(3)(e) of the Act);
- (d) the manner and form in which persons must comply with requirements imposed by the rules (see paragraph 901A(3)(f) of the Act);
- (e) the circumstances in which persons are, or may be, relieved from complying with requirements in the rules that would otherwise apply to them (see paragraph 901A(3)(g) of the Act);
- (f) 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 rules (see paragraph 901A(3)(h) of the Act);
- (g) any other matters that the provisions of the Act provide may be dealt with in the derivative transaction rules (see paragraph 901A(3)(i) of the Act).

Limitations on rule-making power

ASIC's power to make derivative transaction rules imposing reporting requirements is subject to a number of limitations.

Ministerial determination

Subsection 901B(1) of the Act provides that the derivative transaction rules cannot impose reporting requirements in relation to derivative transactions unless the derivatives to which the transactions relate are covered by a determination under section 901B of the Act that relates to requirements of that kind.

On 2 May 2013 the Treasurer made the *Corporations (Derivatives) Determination 2013*² (**Ministerial Determination**) under subsection 901B(2) of the Act, determining the class of derivatives in relation which reporting requirements may be imposed. Under the Ministerial Determination, the classes of derivatives determined for subsection 901B(2) of the Act is:

- (a) commodity derivatives that are not electricity derivatives;
- (b) credit derivatives;
- (c) equity derivatives;
- (d) foreign exchange derivatives; and
- (e) interest rate derivatives.

The Rules apply only to derivative transactions in derivatives in the prescribed class.

² <http://www.comlaw.gov.au/Details/F2013L00819>

Transactions and positions to which the Rules apply

Paragraph 901A(8)(b) of the Act provides that the derivative transaction rules cannot impose a reporting requirement on a person in relation to a derivative transaction entered into before the requirement started to apply to the person, or in relation to a position as it was at a time before the requirement started to apply to the person.

The Rules apply only to derivative transactions entered into after the reporting requirements start to apply to a person, and to positions as they are at the time the reporting requirement starts to apply.

Regulations

Under section 901C of the Act, the regulations may provide that the derivative transaction rules:

- (a) cannot impose requirements (or certain kinds of requirements) in relation to certain classes of derivative transactions; or
- (b) can only impose requirements (or certain kinds of requirements) in relation to certain classes of derivative transactions in certain circumstances.

Under section 901D of the Act, the regulations may provide that the derivative transaction rules:

- (a) cannot impose requirements (or certain kinds of requirements) on certain classes of persons; or
- (b) can only impose requirements (or certain kinds of requirements) on certain classes of persons in certain circumstances.

As at the date of making the Rules, there are no relevant regulations made under sections 901C or 901D of the Act. In June 2013, Treasury consulted³ on a package of regulations, including a regulation (the **Proposed Regulation**) under section 901D(a) of the Act that would limit ASIC's rule-making power until 31 December 2014 by providing that the derivative transaction rules cannot before that date impose requirements on in relation to an 'end-user', being a person who is not:

- (a) an Australian ADI;
- (b) a CS Facility Licensee;
- (c) a financial services licensee; or
- (d) a person who provides a financial service, relating to derivatives, only to wholesale clients and whose activities, relating to derivatives, are regulated by an overseas regulatory authority.

The Rules do not impose Reporting Requirements on persons defined as 'end-users' in the Proposed Regulation, and are therefore consistent with the Proposed Regulation.

Consultation

Except in certain emergency situations (see section 901L), under section 901J of the Act ASIC must not make a derivative transaction rule unless ASIC:

- (a) has consulted the public about the proposed rule; and

³ <http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2013/Operation-of-Australias-derivatives-trade-reporting-regime>

- (b) has also consulted APRA, the RBA and any other person or body as required by regulations made for the purpose of subparagraph 901J(1)(b)(iii)).

To date no regulations have been made under subparagraph 901J(1)(b)(iii). In its December 2012 Proposals Paper entitled *Implementation of Australia's G-20 over-the-counter derivatives commitments*,⁴ Treasury proposed a regulation under subparagraph 901J(1)(b)(iii) requiring ASIC to consult with the Australian Energy Market Commission before making a derivative transaction rule relating to an electricity derivative, if the rule is about a matter connected with the Commission's functions. The Rules do not apply to electricity derivatives at this time.

For further information relating to consultation on the Rules, see further under the heading 'Consultation' below.

Ministerial consent

Except in certain emergency situations (see section 901L), under section 901K of the Act, ASIC must not make a derivative transaction rule unless the Minister has consented, in writing, to the making of the rule. ASIC makes the Rules with the written consent of the Minister.

Relevant considerations in making derivative transaction rules

In considering whether to make a derivative transaction rule, ASIC:

- (a) must have regard to:
 - (i) the likely effect of the proposed rule on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system; and
 - (ii) the likely regulatory impact of the proposed rule; and
 - (iii) if the transactions to which the proposed rule would relate would be or include transactions relating to commodity derivatives—the likely impact of the proposed rule on any Australian market or markets on which the commodities concerned may be traded; and
- (b) may have regard to any other matters that ASIC considers relevant, for example, relevant international standards and international commitments and matters raised in consultations (if any) under section 901J (see section 901H of the Act).

See further under the heading 'Regulation Impact Statement and section 901H matters' below.

Compliance and penalties

Under section 901E of the Act, a person must comply with provisions of the derivative transaction rules that apply to the person. Section 901E is a civil penalty provision (see section 1317E of the Act).

Under subsection 901A(4) of the Act, the derivative transaction rules may specify a penalty amount for a rule. A penalty amount must not exceed 1,000 penalty units (currently, \$170,000: see section 4AA of the *Crimes Act 1914*).

⁴ See:

http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/2012/G20%20OTC%20derivatives%20commitments/Key%20Documents/PDF/Proposal_Paper.ashx

Background and Rationale

G20 commitment

At the Group of Twenty (**G20**) summit in Pittsburgh in 2009, the Australian Government joined other jurisdictions in committing to substantial reforms to practices in over-the counter (**OTC**) derivatives⁵ markets. Three of the key G20 commitments in relation to OTC derivatives were:

- the reporting (referred to as ‘*trade reporting*’) of transaction information (such as price, maturity, reference entity and counterparties) on all OTC derivatives to ‘trade repositories’: centralised registries that maintain an electronic database of records of transactions;
- the clearing (referred to as ‘*central clearing*’) of all standardised OTC derivatives through central counterparties; and
- the execution (referred to as ‘*trade execution*’) of all standardised OTC derivatives on exchanges or electronic trading platforms, where appropriate.

Global commitment to OTC derivatives reform arose out of the global financial crisis (**GFC**) in 2008. The GFC highlighted structural deficiencies in the global OTC derivatives markets and the systemic risk that those deficiencies posed to wider financial markets and the real economy. In the lead-up to the GFC, those structural deficiencies contributed to the build-up of large counterparty exposures for which the risks were not appropriately managed. With details of OTC derivative transactions generally held only between the counterparties, in many cases those exposures were not transparent to other market participants and regulators.

The overarching objectives of the OTC derivatives reforms are:

- to enhance the transparency of transaction information available to relevant authorities and the public;
- to promote financial stability; and
- to support the detection and prevention of market abuse.⁶

Implementation of the G20 commitments is being coordinated and monitored by the Financial Stability Board (**FSB**). The FSB membership includes the major financial centres around the world including: China, Hong Kong, India, Indonesia, Japan, the Republic of Korea, Singapore and Australia.

Australian response

In March 2012, the Australian Council of Financial Regulators (the **CoFR**) released a report entitled *OTC Derivatives Market Reform Considerations*, recommending that a legislative framework be introduced to implement Australia’s G20 commitments in relation to OTC Derivative Reforms providing for the imposition of a trade reporting requirement and establishment of a trade repository licensing regime. The report notes:

⁵ An OTC derivative may broadly be described as a derivative (i.e. a financial arrangement whose value is derived from an underlying asset, commodity, exchange rate, index or interest rate) that is not traded on an exchange but entered into through bilateral or private negotiation between the counterparties. Examples of OTC derivatives include credit default swaps.

⁶ See CPSS-IOSCO *Principles for financial market infrastructures*, April 2012, p. 9.

‘Reporting to trade repositories should facilitate the maintenance of a reliable and comprehensive source of information on participant trading activity, which would be useful to many regulators in performing their respective functions. It is expected that this increased transparency will assist authorities in identifying vulnerabilities in the financial system and, more broadly, to develop well-informed policies to promote financial stability. Information from trade repositories will be particularly useful in times of financial distress, where rapid and reliable access to accurate data may assist prudential and systemic regulators in their functions. From a market supervision perspective, transaction information stored in trade repositories in some product classes in particular, such as equity derivatives and credit derivatives, has the potential to assist investigations into market misconduct.’

In October 2012, APRA, ASIC and the RBA released the *Report on the Australian OTC Derivatives Markets* recommending that the Australian Government consider a broad-ranging mandatory trade reporting obligation for OTC derivatives.

Part 7.5A of the Act was inserted by Schedule 1 of the Amending Act from 3 January 2013. Part 7.5A establishes a trade repository licensing regime and creates a mechanism by which trade reporting requirements, as well as trade execution and central clearing requirements, may be implemented, in a proportional and gradual way, through supporting regulations and rules. The Revised Explanatory Memorandum to the *Corporations Legislation Amendment (Derivative Transactions) Bill 2012* notes, at paragraph 1.6:

‘In particular, trade reporting will increase transparency in the market. It will also give regulators and market participants access to valuable data with which to assess the risks associated with the OTC market.’

Australia is implementing the G20 commitments to OTC derivative reforms in close coordination with peer jurisdictions. Transaction reporting regimes are being developed concurrently by regulators overseas, including the US Commodity Futures Trading Commission (*CFTC*), the US Securities and Exchange Commission (*SEC*), the European Securities and Markets Authority, the Hong Kong Securities and Futures Commission (*HK SFC*) and the Monetary Authority of Singapore (*MAS*), for their respective jurisdictions.

Purpose of these rules

The Rules aim to:

- give effect to the Australian Government’s G20 commitments in relation to trade reporting;
- implement an Australian trade reporting regime that achieves the stated objectives of the OTC derivatives reforms, in particular by enhancing the transparency of OTC derivative markets, both to regulators and the public, leading to an increased capacity for the oversight and monitoring of systemic risk and the prevention and detection of market abuse;
- ensure the Australian trade reporting regime is consistent with other international regimes, including those in the European Union (*EU*), the United States (*US*), Canada, Hong Kong and Singapore for mutual recognition or substituted compliance purposes; and
- meet internationally-agreed standards on transaction reporting developed by the International Organization of Securities Commissions (*IOSCO*) and the Committee on Payment and Settlement Systems (*CPSS*).

The Rules are described in more detail in Attachment A.

Commencement of Rules

The Rules commence on the day after they are registered under the *Legislative Instruments Act 2003*. However, the obligations imposed by the Rules will be implemented in Phases, with the first mandatory reporting Phase commencing on 1 October 2013.

Consultation

CP 205

On 28 March 2013, ASIC released Consultation Paper 205 *Derivative transaction reporting* (CP 205)⁷ proposing draft derivative transaction rules addressing mandatory reporting requirements for OTC derivatives. The consultation period ended 1 May 2013. ASIC received 26 written submissions (including 8 confidential submissions) from a broad range of stakeholders including from market operators, market participants, fund managers and overseas trade repositories. Non-confidential submissions are available on ASIC's website.⁸

ASIC also held a series of meetings with stakeholders, including the Australian Bankers' Association (ABA), the Australian Financial Markets Association (AFMA), the Global Financial Markets Association (GFMA), the Finance and Treasury Association (FTA), the Financial Services Council (FSC) and the International Swaps and Derivatives Association (ISDA). ASIC has also worked closely with the CoFR agencies, particularly the RBA and APRA, in the overall design of the Rules and the specific derivative trade data being requested.

The following is a summary of the key issues raised in consultation and ASIC's response to those issues.

Interim reporting phase

In CP 205, ASIC proposed an 'interim reporting phase', commencing on 1 July 2013, during which reporting entities could 'opt-in' to mandatory trade reporting for a particular class of derivatives identified by the reporting entity, by lodging an 'opt-in notice' with ASIC. ASIC considers the interim reporting phase may be helpful for entities seeking to have a reporting obligation apply to them ahead of when a mandatory reporting obligation would apply, to assist those entities to comply with overseas reporting obligations. Some respondents proposed that the implementation timeline instead be amended to better facilitate equivalence or substituted compliance with other jurisdictions' reporting requirements.

On the basis of feedback received, ASIC has explicitly applied a reporting obligation from 1 October 2013 to certain defined reporting entities (now referred to as 'Phase 1'). This will provide a clear, legally binding requirement on these reporting entities. The set of entities are those that are required to register as 'swap dealers' with the US CFTC. ASIC is maintaining an interim reporting phase (renamed the 'opt-in reporting phase') for those entities that consider this phase may be of some benefit to them.

Implementation dates

⁷ [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp205-published-28-March-2013.pdf/\\$file/cp205-published-28-March-2013.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp205-published-28-March-2013.pdf/$file/cp205-published-28-March-2013.pdf)

⁸ <http://www.asic.gov.au/asic/asic.nsf/byheadline/CP205-Derivative-transaction-reporting--submissions?openDocument>

In CP 205, ASIC had proposed that the some reporting requirements (reporting of credit and interest rate derivatives for ADIs, AFSs, CFSs and exempt foreign licensees with total gross notional outstanding of \$50 billion or more) commence on 31 December 2013. Respondents to CP 205 were generally opposed to reporting from this date, as December is normally a 'freeze' period for financial IT systems, and the holiday period would also make this date particularly challenging for firms.

ASIC has considered the concerns raised during consultation and has changed the Rules so that ADIs, AFSs, CFSs and exempt foreign licensees with total gross notional outstanding of \$50 billion or more will be subject to a reporting obligation from 1 April 2014 (now referred to as 'Phase 2'). A mandatory reporting phase for other ADIs, CFSs and AFS Licensees and exempt foreign licensees will commence on 1 October 2014 (now referred to as 'Phase 3'). ASIC intends to consult on reporting obligations for 'end-users' separately.

Two-sided vs one-side reporting

In CP 205, ASIC consulted on whether both reporting entities to a reportable transaction should be required to report the details of the transaction to a trade repository when entering the transaction (a 'two-sided' obligation). ASIC received substantial feedback on this issue, with the majority of respondents indicating a preference for 'one-sided' reporting. In part, this response was a reflection of the number of major financial institutions that are at an advanced stage in their development of a 'one-sided' system for reporting in accordance with CFTC reporting requirements.

While ASIC recognises that implementing a 'two-sided' reporting presents a number of challenges to reporting entities, ASIC considers the data that will be available to regulators will be substantially more valuable under a two-sided reporting obligation. There is important information that the regulators can only obtain under a two-sided arrangement, including information about valuations, collateral, beneficiaries, and whether derivative transactions are being executed for hedging purposes. The 'two-sided' reporting obligation would be consistent with the approaches taken in a number of key jurisdictions, including the EU and Hong Kong.

On the basis of the feedback to CP 205, ASIC has amended the Rules to defer full 'two-sided' reporting until the commencement of the Phase 3 reporting obligation on 1 October 2014 (during this phase-in period, reporting entities in Phase 1 and 2 will be able to report using 'one-sided' reporting, subject to conditions).

Application to foreign subsidiaries

In CP 205, ASIC proposed that foreign subsidiaries of Australian entities be required to report all their OTC derivative transactions under the Australian regime. ASIC received substantial feedback on this proposed requirement. A number of respondents submitted that this requirement would place an unnecessary burden on stakeholders that goes beyond the requirements of other jurisdictions.

ASIC considers that regulators have a clear interest in capturing transactions by subsidiaries to develop a complete picture of the risk position of the Australian parent entity. This is a particular concern when the subsidiary is guaranteed by the Australian parent entity, but even in the absence of a legal guarantee, there may still be potential for transmission of financial risk to the Australian parent. ASIC does however recognise that requiring foreign subsidiaries to report may be difficult

for some reporting entities, particularly when subsidiaries are located in a jurisdiction that does not have a reporting obligation in place. For the purposes of reporting in Phases 1, 2 and 3 ASIC has limited the scope of the reporting obligation to capture only foreign subsidiaries of ADIs and AFSLs. This will ensure ASIC is only requiring subsidiaries to report when there may be financial risk transmitted to an Australian-regulated entity (subject either to Australian Prudential Regulation Authority (APRA) or ASIC supervision) through the non-Australian subsidiary.

Definition of 'OTC Derivative' – foreign exchange-traded derivatives

In CP 205, ASIC proposed a definition of 'OTC derivative' covering any derivative transaction that is not undertaken on a market subject to ASIC supervision under Part 7.2A of the Act. A number of respondents submitted that the wording of this requirement would effectively require the reporting to derivative trade repositories of certain exchange-traded derivative transactions, specifically those transactions undertaken on foreign exchanges by Australian entities or their subsidiaries. Respondents were concerned with costs and operational issues associated with reporting exchange-traded transactions, and indicated most trade repositories are not yet able to receive reports on exchange-traded derivatives.

ASIC recognises that exchange-traded derivatives are already subject to some level of transparency to the market, and, being generally centrally cleared, are less likely to result in substantial risks to reporting entities (though of course are not without risk). ASIC therefore considers this information may not be as necessary as that relating to other OTC derivative transactions. ASIC has amended Rule 1.2.4 to allow ASIC to from time to time exclude derivative transactions entered into on markets with sufficiently equivalent supervision and reporting requirements to a Part 7.2A market in respect of market integrity and transparency.

Definition of 'OTC Derivative'

In CP 205, ASIC proposed a definition of 'OTC derivative' that, consistent with the Ministerial Determination, relied on the definition of 'derivative' in section 761D of the Act. Respondents to CP 205 felt that further guidance was needed as to which products will be required to be reported to trade repositories.

ASIC recognises the consensus among respondents that more detailed guidance is required as to which derivative transactions will be need to be reported. Taking into account the need for greater clarity and specificity of the definition of derivative, ASIC will consider providing guidance indicating the types of derivatives that ASIC expects to be reported to a derivative trade repository. ASIC will continue to consult with industry and monitor developments as the reporting obligation is implemented to understand if any further regulatory action should be taken.

Other consultation

Derivative trade repository rules

A separate consultation was also held in March/April 2013 to address the trade repository obligations imposed by any derivative trade repository rules: See ASIC Consultation Paper 201: *Derivative trade repositories* (CP 201) released 15 March 2013⁹. It is anticipated that the *ASIC Derivative Trade Repository Rules 2013* will commence at the same time as the Rules.

⁹ [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp201-published-15-March-2013.pdf/\\$file/cp201-published-15-March-2013.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp201-published-15-March-2013.pdf/$file/cp201-published-15-March-2013.pdf)

Treasury consultation

Treasury has also conducted the following consultations in relation to the framework for trade reporting:

- In April 2012 Treasury released a consultation paper entitled *Implementation of a framework for Australia's G20 over-the-counter derivatives commitments*, seeking stakeholder views on the detailed design of a framework to implement Australia's G20 commitments in relation to OTC derivatives.
- In July 2012 an exposure draft of legislation designed to implement the legislative framework was released for public consultation.
- In December 2012 Treasury released a proposals paper entitled *Implementation of Australia's G-20 Over-The-Counter Derivatives Commitments*, seeking stakeholder views on a proposed approach for implementing the G20 commitments, including the proposed timetable for implementation. This paper was based on recommendations by APRA, ASIC and the RBA in their report published in October 2012.

Regulation Impact Statement and section 901H matters

In making the Rules, ASIC has consulted on, and has had regard to:

- the likely effect of the proposed rule on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system;
- the likely regulatory impact of the proposed rule, and
- the likely impact of the proposed rule on any Australian market or markets on which the commodities concerned may be traded, as required by section 901H of the Act.

ASIC also notes that, under subsection 901B(3), the Minister was required to consider these matters before making the Ministerial Determination under subsection 901B(2). ASIC has also had regard to other matters that ASIC considers relevant, including relevant international standards, international commitments and matters raised in consultation under section 901J of the Act.

ASIC notes in this regard:

- ASIC has carefully considered the impact on the commodities markets of the Rules and notes that:
 - In Phase 1, Phase 2 and Phase 3, end-users will not be subject to reporting obligations;
 - The reporting obligations that do apply to non-end-users in Phase 1, Phase 2 and Phase 3 resemble obligations imposed by overseas regulators, notably CFTC and EU authorities, in commodities markets;
 - For non-end-users the impact of the Rules in respect of commodities will not be different to the impact in respect of other markets; and
 - Impacts on activities including liquidity provision in OTC derivative markets is not expected to be material.

- In order to reduce the short-term regulatory impact of the implementation of the reporting obligation, ASIC has included a number of transitional provisions that will reduce the impact on reporting entities, including, for up to 12 months:
 - the availability of ‘one-sided’ reporting;
 - the ability for Australian reporting entities to report to trade repositories that are not licensed in Australia (i.e. ‘prescribed’ trade repositories); and
 - certain data fields will not be required to be reported, including valuations of derivatives, information about collateral exchanged, and information about barriers incorporated into Derivatives.
- In Phases 1, 2 and 3, end-users will only be impacted through the reporting obligations placed on their financial sector counterparties. Transaction-level information, including counterparty identifiers, will be reported to derivative trade repositories. The handling, use and disclosure of this information by licensed derivative trade repositories is subject to limitations on use and disclosure under section 904B of the Act, and confidentiality requirements imposed on the operator under the *ASIC Derivative Trade Repository Rules 2013*.

A Regulation Impact Statement (*G-20 OTC derivatives trade reporting regime*) has been prepared in relation to the Rules and approved by Office of Best Practice Regulation.

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights is included in this Explanatory Statement at [Attachment B](#).

ATTACHMENT A – Provision-by-provision description of the instrument

Capitalised terms used in this Attachment have the same meaning as in the Rules.

CHAPTER 1: INTRODUCTION

Part 1.1 Preliminary

Rule 1.1.1 Enabling legislation

Rule 1.1.1 provides that ASIC makes the instrument under section 901A of the Act. Section 901A of the Act empowers ASIC to make derivative transaction rules imposing reporting requirements.

Rule 1.1.2 Title

Rule 1.1.2 provides that the instrument is the *ASIC Derivative Transaction Rules (Reporting) 2013*.

Rule 1.1.3 Commencement

Rule 1.1.3 provides that the provisions of the instrument commence on the day after the instrument is registered under the *Legislative Instruments Act 2003*.

Rule 1.1.4 Penalties

Subrule 1.1.4(1) provides that, for subsection 901A(4) of the Act, the penalty amount specified under a Rule is the penalty amount for that Rule. Subsection 901A(4) of the Act provides: ‘The derivative transaction rules may specify a penalty amount for a rule. A penalty amount must not exceed 1,000 penalty units’. At the time of making the rules, a penalty unit for the purposes of subsection 901A(4) is \$170 (see section 4AA of the *Crimes Act 1914*).

Subrule 1.1.4(2) provides that, if no penalty amount is specified under a Rule, there is no penalty for that Rule.

Part 1.2 Interpretation

Rule 1.2.1 References to time

Rule 1.2.1 provides that, in the Rules, unless the contrary intention appears, a reference to time is to Australian Eastern Standard Time (AEST) or Australian Eastern Daylight Time (AEDT), as applicable, in Sydney, Australia.

Rule 1.2.2 Words and expressions defined in the Corporations Act

Rule 1.2.2 provides that words and expressions defined in the Act will, unless otherwise defined or specified in the Rules or the contrary intention appears, have the same meaning in the Rules. For convenience, some words and expressions defined in the Act are cross-referenced in Rule 1.2.3.

Rule 1.2.3 Definitions

Rule 1.2.3 provides definitions for the following terms used in the Rules:

- Act;
- AFS Licence;
- AFS Licensee;
- ASIC;
- Australian ADI;
- Australian Entity;
- Business Day;
- CS Facility Licensee;
- Derivative;
- Derivative Position Information;
- Derivative Trade Data;
- Derivative Trade Repository;
- Derivative Transaction;
- Derivative Transaction Information;
- Effective Date;
- Exempt Foreign Licensee;
- Foreign ADI;
- Licence;
- Licensed CS Facility;
- Licensed Repository;
- Operating Rules;
- Opt-In Notice;
- Opt-In Reporting Phase;
- OTC Derivative;
- Part 7.2A Market;
- Position Reporting Date;
- Position Reporting Requirements;
- Prescribed Class;
- Prescribed Repository;
- Regulated Foreign Market;
- Regulations;
- Relevant Jurisdiction;
- Reportable Position;
- Reportable Transaction;
- Reporting Entity;
- Reporting Period;
- Reporting Requirements;
- RE;
- Rules;
- Transaction Reporting Requirements; and
- Trustee.

Rule 1.2.4 OTC Derivatives

Rule 1.2.4 provides a definition of ‘OTC Derivatives’ for the purposes of the Rules. Under the Rules, Reporting Entities are required to report information about their Derivative Transactions in

OTC Derivatives (referred to in the Rules as ‘Reportable Transactions’), and positions in relation to OTC Derivatives (referred to in the Rules as ‘Reportable Positions’) (see Rule 1.2.5).

Subrule 1.2.4(1) provides that, subject to subrule 1.2.4(2), in the Rules a Derivative is an ‘OTC Derivative’ if the Derivative is in a Prescribed Class. ‘Prescribed Class’ is defined in Rule 1.2.3 to mean ‘*a class of Derivatives that the Minister has determined, under section 901B of the Act, is a class of Derivatives in relation to which Reporting Requirements may be imposed (and that determination has not been revoked)*’. Subrule 1.2.4(1) therefore ensures the scope of the Reporting Requirements is consistent with the limitations on ASIC’s rule-making power provided for in subsection 901B(2) of the Act, and the relevant Ministerial Determination. As at the date of making the Rules, the Prescribed Classes are:

- commodity derivatives that are not electricity derivatives;
- credit derivatives;
- equity derivatives;
- foreign exchange derivatives; and
- interest rate derivatives.

Subrule 1.2.4(2) of the Rules carves out certain exchange-traded Derivatives from the definition of ‘OTC Derivatives’ for the purposes of the Rules. Under that subrule, a Derivative is not an OTC Derivative if:

- it is able to be traded (within the meaning of section 761A of the Act) on a Part 7.2A Market and the entry into the arrangement that is the Derivative takes place on the Part 7.2A Market, or is reported to the operator of the Part 7.2A Market in its capacity as operator of the Part 7.2A Market, in accordance with the Operating Rules of the Part 7.2A Market; or
- it is able to be traded on a Regulated Foreign Market and the entry into of the arrangement that is the Derivative takes place on the Regulated Foreign Market.

Part 7.2A Markets

‘Part 7.2A Market’ is defined in Rule 1.2.3 as ‘*a financial market the operator of which is licensed under subsection 795B(1) of the Act, but does not include a financial market operated by an operator specified in regulation 10.15.02 of the Regulations¹⁰ or any other financial market that ASIC does not have the function of supervising under section 798F of the Act.*’ At the time of making the Rules, the financial markets that fall within the definition of a Part 7.2A Market are the financial markets operated by:

- Asia Pacific Exchange Limited (APX);
- ASX Limited (ASX);
- Australian Securities Exchange Limited (ASX 24);
- Chi-X Australia Pty Ltd (Chi-X);
- FEX Global Pty Ltd (FEX);
- IMB Ltd (IMB); and
- National Stock Exchange of Australia Limited (NSXA).

¹⁰ At the time of making the Rules, the operators specified in regulation 10.15.02 are BGC Partners (Australia) Pty Limited, Bloomberg Tradebook Australia Pty Ltd, Mercari Pty Ltd, Yieldbroker Pty Limited.

Regulated Foreign Markets

Under subrule 1.2.4(3), ASIC may determine that a financial market in a foreign jurisdiction is a 'Regulated Foreign Market' for the purposes of subrule 1.2.4(2), where, in the opinion of ASIC, the operation of the financial market in the foreign jurisdiction is subject to requirements and supervision that are sufficiently equivalent, in relation to market integrity and market transparency, to the requirements and supervision to which a Part 7.2A Market is subject in this jurisdiction. A determination by ASIC for the purposes of subrule 1.2.4(3) will be published on ASIC's website and takes effect on the day following publication on ASIC's website (see subrule 1.2.4(4)). A determination may be withdrawn by ASIC by notice published on ASIC's website, from a date specified in the notification that is not less than 1 calendar month after the date the notice is given, and once withdrawn ceases to have effect (see subrule 1.2.4(5)).

Subrules 1.2.4(3), (4) and (5) were included in the Rules in response to concerns raised during consultation that the definition of 'OTC Derivative' may capture foreign exchange-traded Derivatives and that the reporting of those exchange-traded Derivatives would require significant outlay and lead-time. Subrules 1.2.4(3), (4) and (5) provide ASIC with flexibility to carve foreign exchange-traded Derivatives out of the scope of the Reporting Requirements in appropriate circumstances.

Cleared and uncleared trades

A Derivative is an OTC Derivative under Rule 1.2.4 regardless of whether it is cleared through a Licensed CS Facility. This means that both cleared and uncleared Derivative Transactions in OTC Derivatives are reportable under the Rules. Where an OTC Derivative is, for example, novated to a Licensed CS facility, this may give rise to separate Reportable Transactions for the purposes of the Rules.

The information that must be reported about a Reportable Transaction or Reportable Position includes information about whether the OTC Derivative has been subject to clearing: see items 17 to 20 and 38 in Table S2.1(1) in Rule S2.1.1 (Derivative Transaction Information) and items 13 to 16 of Table S2.2(1) in Rule S2.2.1 (Derivative Position Information).

Rule 1.2.5 Reporting Entities and Reportable Transactions

Rule 1.2.5 and Table 1 define the scope of the Reporting Requirements by defining 'Reporting Entity', and 'Reportable Transaction' in relation to each kind of Reporting Entity, for the purposes of the Rules.

The Reporting Entity is the person who is required to comply with the Reporting Requirements imposed by the Rules (see paragraph 901A(3)(e) of the Act). A 'Reportable Transaction' in relation to a Reporting Entity referred to in column 2 of Table 1, is a 'Derivative Transaction' (as defined in Rule 1.2.3 and section 761A of the Act) in an OTC Derivative (as defined in Rule 1.2.5) of the kind referred to in column 3 of Table 1.

The definition of 'Derivative Transaction' in the Rules and Act covers entry into an arrangement that is a 'Derivative' (as defined in Rule 1.2.3 and section 761D of the Act), and modification, assignment or termination of such an arrangement. However, under subparagraph 1.2.5(1)(b)(iii), an assignment of an OTC Derivative will only be a Reportable Transaction in relation to a Reporting Entity if the Reporting Entity has actual knowledge of the assignment. Paragraph (d) of the definition of 'derivative transaction' in section 761A also allows for other types of transaction

to be included through the regulations¹¹. As at the date of making the Rules, there are no regulations under paragraph (d) of the definition of ‘derivative transaction’ in section 761A.

Table 1 below summarises the definitions in Rule 1.2.5.

Table 1 – Reporting Entities and Reportable Transactions

Reporting Entity	Reportable Transaction
An Australian Entity (defined in Rule 1.2.3 as an entity (including a corporation, partnership, managed investment scheme or trust) that is incorporated or formed in this jurisdiction).	Entry into, modification, termination or assignment of an OTC Derivative to which the Reporting Entity is a counterparty, regardless of where the OTC Derivative is entered into
<p>A foreign subsidiary of an Australian Entity where that Australian Entity is:</p> <ul style="list-style-type: none"> • an Australian ADI (defined in Rule 1.2.3 as an Australian Entity that is an Australian ADI as defined in section 9 of the Act); or • an AFS Licensee (defined in Rule 1.2.3 as a holder of an Australian financial services licence granted under section 913B of the Act). 	Entry into, modification, termination or assignment of an OTC Derivative to which the Reporting Entity is a counterparty, regardless of where the OTC Derivative is entered into
A Foreign ADI that has a branch located in this jurisdiction	Entry into, modification, termination or assignment of an OTC Derivative:
A foreign company that is required to be registered under Division 2 of Part 5B.2 of the Act	<ul style="list-style-type: none"> • booked to the profit or loss account of a branch of the Reporting Entity located in this jurisdiction; or • entered into by the Reporting Entity in this jurisdiction
An RE (defined in Rule 1.2.3 as a responsible entity of a managed investment scheme) or Trustee (defined in Rule 1.2.3 as a trustee of a trust).	Entry into, modification, termination or assignment of an OTC Derivative in the RE or Trustee’s capacity as RE or Trustee of an Australian Entity

A Reporting Entity that is, for example, both a foreign subsidiary of an Australian Entity and is also required to be registered under Division 2 of Part 5B.2 of the Act, would be required to report all Derivative Transactions in OTC Derivatives to which it is a counterparty, and not just those booked to the profit and loss account of a branch of the Reporting Entity located in this jurisdiction, or entered into by the Reporting Entity in this jurisdiction.

It is noted that, under section 900A of the Act, Part 7.5A of the Act applies to (among other things) derivatives, derivative transactions and persons located in or otherwise connected with Australia or a place outside Australia. Paragraph 1.96 of the Revised Explanatory Memorandum to the *Corporations Legislation Amendment (Derivative Transactions) Bill 2012* notes with regard to section 900A:

¹¹ Paragraph 1.65 of the Explanatory Memorandum to the Bill states: ‘This flexibility is required to ensure that the Act can potentially apply to transactions dealt with in the laws of other jurisdictions — to enable rules that facilitate compliance with foreign laws and mutual recognition under foreign laws of compliance with our requirements’.

‘The broad territorial reach of the provision is required to ensure that ASIC is able to coordinate its rule-making with foreign jurisdictions to aid in consistency of regulatory approaches and to assist in ensuring that international capital markets remain open to cross-border participation.’

The Revised Explanatory Memorandum at paragraph 1.100 also notes that ‘Derivative transaction rules are not limited in their application to the parties to a transaction. For example, a person involved in arranging a transaction may be made subject to a rule.’

Rule 1.2.6 References to Licensed Repositories and Prescribed Repositories

Rule 1.2.6 provides that a reference in the Rules to reporting information about a Reportable Transaction, or a Reportable Position, to:

- a Licensed Repository, is a reference to reporting the information to a Licensed Repository, the Licence for which authorises the Licensed Repository to provide services in respect of a class of Derivatives that includes the Derivatives to which the Reportable Transaction or Reportable Position relates;
- a Prescribed Repository, is a reference to reporting the information to a Prescribed Repository that is prescribed in relation to a class of Derivatives that includes the Derivatives to which the Reportable Transaction or Reportable Position relates.

Under subsection 901A(6) of the Act, the Rules may require reporting to facilities that are licensed under section 905C of the Act or prescribed under paragraph 901A(6)(b) (defined in the Rules as ‘Licensed Repositories’ and ‘Prescribed Repositories’ respectively). Rule 1.2.6 aligns the Reporting Requirements set out in the Rules with the definition of ‘reporting requirements’ in subsection 901A(6) of the Act.

As noted in paragraph 1.109 of the Revised Explanatory Memorandum to the *Corporations Legislation Amendment (Derivative Transactions) Bill 2012*:

‘The rules may require trade reporting, clearing and execution to or on prescribed facilities (in addition to licensed facilities). The ability to prescribe facilities will provide flexibility to: (a) enable non-licensed domestic facilities to be utilised, such as to enable trade reporting in respect of certain classes of derivatives to a non-licensed government body such as a regulator; and (b) to enable rules to be made to support compliance with foreign trade reporting, clearing or execution laws (where such laws involve non-domestically licensed facilities)...’

It is anticipated that it will take some time before a facility is licensed under section 905C of the Act. In the interim, a number of overseas facilities have been prescribed by the *Corporations Amendment (Derivative Trade Repositories) Regulation 2013*¹² made under paragraph 901A(6)(b) of the Act.

Rule 1.2.7 References to total gross notional outstanding

Rule 1.2.7 deals with references in the Rules to ‘total gross notional outstanding’.

¹² <http://www.comlaw.gov.au/Details/F2013L01279>

Schedule 1 provides for the Transaction Reporting Requirements and Position Reporting Requirements to be implemented in phases. Phase 2 of the Reporting Requirements applies to Australian ADIs, AFS Licensees, CS Facility Licensees and Exempt Foreign Licensees that, as at 31 December 2013 hold total gross notional outstanding positions of \$50 billion or more.

Rule 1.2.7 makes provision in relation to how 'total gross notional outstanding' is calculated for the purposes of the Phase 2 Reporting Requirements.

Subrule 1.2.7(1) provides that a reference in the Rules to the total gross notional outstanding positions held by a Reporting Entity is a reference to the total gross notional outstanding positions aggregated across all OTC Derivatives, and all Derivatives that would be OTC Derivatives but for the fact that the Derivatives are not in a Prescribed Class. Outstanding positions in electricity derivatives must therefore be included in the calculation.

Subrule 1.2.7(1) also provides that a reference in the Rules to the total gross notional outstanding positions held by a Reporting Entity does not include positions in OTC Derivatives held by a related body corporate of the Reporting Entity. 'Related body corporate' is as defined in section 9 of the Act and comprises the Operator's holding company, subsidiaries, and subsidiaries of the Operator's holding company.

Also excluded from the calculation of total gross notional outstanding are positions where the entry into, modification, termination and assignment of the OTC Derivative to which the position relates is not a Reportable Transaction in relation to the Reporting Entity within the meaning of Rule 1.2.5 (other than by reason that the Derivatives are not in a Prescribed Class). Accordingly, a Reporting Entity that is, for example, a Foreign ADI, may only be required to include in the calculation positions in OTC Derivatives booked to the profit and loss account of a branch of the Foreign ADI located in this jurisdiction or entered into by the Foreign ADI in this jurisdiction.

Subrule 1.2.7(2) provides that, for the purposes of the Transaction Reporting Requirements and Position Reporting Requirements that apply in Phase 2, a Reporting Entity that is an RE or Trustee may determine whether the Reporting Entity holds total gross notional outstanding positions of \$50 billion or more separately in relation to each managed investment scheme or trust for which the Reporting Entity is the RE or Trustee.

Under subrules S1.1.1(2) and S1.2.1(2), the RE or Trustee will only be required to report during Phase 2 in relation to those schemes or trusts that exceed the \$50 billion threshold. Subrules 1.2.7(2) and S1.1.1(2) and S1.2.1(2) do not affect the Reporting Entity acting in a capacity other than as RE or Trustee (for example, if the RE or Trustee is also a Reporting Entity in its own right, it must determine whether it is required to report during Phase 2 in its own right).

Rule 1.2.7 was included in the Rules in response to clarification sought during the CP 205 consultation period as to how total gross notional outstanding is calculated for the purposes of determining whether a Reporting Entity is required to report during Phase 2.

CHAPTER 2: REPORTING REQUIREMENTS

Chapter 2 of the Rules, along with the Schedules:

- imposes reporting requirements as permitted by paragraph 901A(2)(b) and subsection 901A(6) of the Act;

- specifies the persons who are required to comply with the reporting requirements imposed by the Rules as permitted by paragraph 901A(3)(e) of the Act;
- deals with the manner and form in which persons are required to comply with the reporting requirement imposed by the Rules as permitted by paragraph 901A(3)(f) of the Act; and
- deals with the circumstances in which persons are relieved from complying with the reporting requirements in the Rules that would otherwise apply to them as permitted by paragraph 901A(3)(g) of the Act.

Part 2.1 Application

Rule 2.1.1 Application

Rule 2.1.1 provides that Chapter 2 imposes obligations on Reporting Entities to report their Reportable Transactions and Reportable Positions to Licensed Repositories and Prescribed Repositories. It is noted that Schedule 1 deals with phased implementation of the Reporting Requirements and Schedule 2 sets out the information to be reported.

Part 2.2 Reporting Requirements

Rule 2.2.1 Reporting Requirements

Subrule 2.2.1(1) - Transaction Reporting Requirements and Position Reporting Requirements

Under subrule 2.2.1(1) and subject to exceptions set out in subrules 2.2.1(2) and (3) and Part 2.4, Reporting Entities must report information about their Reportable Transactions and Reportable Positions in accordance with the Reporting Requirements set out in the Schedules to the Rules, and in accordance with the other requirements of Part 2.2 concerning:

- timing of reporting (generally, T+1) (see Rule 2.2.3);
- format of reporting (see Rule 2.2.4);
- continuity of reporting (see Rule 2.2.5);
- accuracy of reporting (see Rule 2.2.6);
- delegation of reporting (see Rule 2.2.7).

Paragraph 2.2.1(1)(a) - Reportable Transactions entered into after the Reporting Requirement starts to apply

Paragraph 2.2.1(1)(a) provides that Reporting Entities must report each of their Reportable Transactions in accordance with the Transaction Reporting Requirements in Part S1.1 of Schedule 1, during the applicable Reporting Periods set out in that Part, other than a modification, termination or assignment referred to in paragraph 2.2.1(1)(c). Part S1.1 of Schedule 1 provides for phased implementation of the Transaction Reporting Requirements for different kinds of Reporting Entities and Part S1.2 of Schedule 2 provides for the Derivative Transaction Information to be reported.

Paragraph 2.2.1(1)(a) deals with the reporting of OTC Derivatives entered into after the relevant Reporting Requirement starts to apply to the Reporting Entity, and any subsequent modification,

termination or assignment of OTC Derivatives entered into after the Reporting Requirement starts to apply. However paragraph 2.2.1(1)(a) does not deal with a Reportable Transaction that is the modification, termination or assignment of an OTC Derivative that was entered into before the Reporting Requirement starts to apply and that occurs before the Position Reporting Date for that OTC Derivative (see paragraph 2.2.1(1)(c)).

Paragraph 2.2.1(1)(b) – Positions in relation to Reportable Transactions entered into before the Reporting Requirement starts to apply

Reporting Entities must report their Reportable Positions in accordance with the Position Reporting Requirements in Part S1.2 of Schedule 1, by the applicable Position Reporting Date set out in that Part (paragraph 2.2.1(1)(b)). Part S1.2 of Schedule 1 provides for phased implementation of the Position Reporting Requirements for different kinds of Reporting Entities and Part S2.2 of Schedule 2 provides for the Derivative Position Information to be reported.

Paragraph 2.2.1(1)(b) deals with reporting of positions (referred to in the Rules as ‘Reportable Positions’) in relation to OTC Derivatives, where both of the following apply:

- the OTC Derivative was entered into before a Transaction Reporting Requirement starts to apply to a person and is still outstanding at the time the Transaction Reporting Requirement starts to apply; and
- if the OTC Derivative had been entered into on or after the time the Transaction Reporting Requirement started to apply, the entry into the OTC Derivative would be required to be reported by the Reporting Entity in accordance with the Transaction Reporting Requirements.

Paragraph 2.2.1(1)(c) - A Reportable Transaction that is the modification, termination or assignment of Reportable Position before the Position Reporting Date for that Reportable Position

Reporting Entities must report a Reportable Transaction that is a modification, termination or assignment of a Reportable Position and that occurs before the applicable Position Reporting Date for that Reportable Position, in accordance with Rule 2.4.4 (paragraph 2.2.1(1)(c)). See the explanatory material on Rule 2.4.4 below, for further information.

Phased implementation of reporting requirements under subrule 2.2.1(1)

Opt-In Reporting Phase

The Opt-In Reporting Phase is designed for to allow a Reporting Entity to commence reporting under Australian law before the start of Phase 1, Phase 2 or Phase 3 (as applicable to the Reporting Entity). The key objective of the Opt-In Reporting Phase is to assist Reporting Entities to comply with their foreign reporting obligations from an earlier date.

A Reporting Entity may choose to start reporting during the Opt-In Reporting Phase, by lodging an ‘Opt-In Notice’ with ASIC under Rule 2.4.1.

Opt-In Phase	Summary of Reporting Requirements
Who must report?	Under Rule 2.2.1, Part S1.1 and Part S1.2, a Reporting Entity that has given ASIC an Opt-In Notice under Rule 2.4.1 must commence reporting as part of the Opt-In Reporting Phase.
Transaction Reporting Requirement	<p>From the Effective Date(s) specified in the Opt-In Notice until the date the Opt-In Reporting Entity is first required to report the Reportable Transaction under Phase 1, Phase 2 or Phase 3, the Reporting Entity must report the Reportable Transactions, or Reportable Transactions in the class or classes of Reportable Transactions, specified in the Opt-In Notice.</p> <p>For each Reportable Transaction the Reporting Entity must report the Derivative Transaction Information set out in Part S2.1 of Schedule 2, or information that is substantially equivalent to the Derivative Transaction Information set out in Part S2.1 of Schedule 2, as specified in the Opt-In Notice, to the Licensed Repository or Prescribed Repository specified in the Opt-In Notice.</p>
Position Reporting Requirement	<p>By the Effective Date(s) specified in the Opt-In Notice, being no later than 30 September 2014, Opt-In Reporting Entities must report the outstanding positions, as at the Effective Date(s) specified in the Opt-In Notice, in relation to the Reportable Transactions, or class or classes of Reportable Transactions, specified in the Opt-In Notice.</p> <p>For each Reportable Position the Reporting Entity must report the Derivative Position Information set out in Part S2.2 of Schedule 2, or information that is substantially equivalent to the Derivative Position Information set out in Part S2.2 of Schedule 2, to the Licensed Repository or a Prescribed Repository specified in the Opt-In Notice.</p>
Exceptions	<p>Opt-In Reporting Entities:</p> <ul style="list-style-type: none"> may, until 1 October 2014, comply with subrule 2.2.1(1) by reporting to a Prescribed Repository information substantially equivalent to the Derivative Transaction Information, substantially in accordance with the requirements of Part 2.2 (see subrule 2.4.2(1)); may, until 1 October 2014, rely on conditional one-sided reporting (see subrules 2.4.2(2) and (3)); and until 1 October 2014, will not be required to report the Derivative Transaction Information in items 30–32 (mark-to-market, mark-to-model or other valuation), items 40–44 (collateral) and items 51–52 (barrier type and value) in Table S2.1(1) in Schedule 2 (see Rule 2.4.3). <p>Subrule 2.2.1(3) also provides an ongoing exception for Reporting Entities other than Australian Entities, or an RE or Trustee acting in its capacity as RE or Trustee of an Australian Entity, that are subject to foreign reporting obligations.</p>
Stage 1 - Porting requirement	<p>Under Rule 2.4.5, an Opt-In Reporting Entity that, on a day prior to 1 October 2014:</p> <ul style="list-style-type: none"> complied with subrule 2.2.1(1) by reporting Derivative Transaction Information, or substantially equivalent information, about a Reportable Transaction (in Rule 2.4.5, a 'Relevant Reportable Transaction') to a Prescribed Repository, and the Prescribed Repository does not become a Licensed Repository by 1 October 2014; or did not report Derivative Transaction Information, or substantially equivalent information, about a Reportable Transaction (in Rule 2.4.5, a 'Relevant Reportable Transaction') to a Licensed Repository or Prescribed Repository, in reliance on conditional one-sided reporting under subrule 2.4.2(2) or (3), <p>must, by 1 October 2014, report to a Licensed Repository either:</p>

Opt-In Phase**Summary of Reporting Requirements**

- the Derivative Transaction Information for each Relevant Reportable Transaction; or
- Derivative Position Information, as at the end of 30 September 2014, for the OTC Derivative to which each Relevant Reportable Transaction relates.

Phase 1 – CFTC-registered Swap Dealers

Under Phase 1, Australian Reporting Entities that are registered (or provisionally registered) as swap dealers with the United States Commodity Futures Trading Commission (**CFTC**), and therefore potentially subject to reporting obligations under CFTC rules, will be required to start reporting under Australian law from 1 October 2013.

Phase 1**Summary of Reporting Requirements**

Who must report?	Under subrule 2.2.1(1), Part S1.1 and Part S1.2, a Reporting Entity that is an Australian Entity and that is registered or provisionally registered as a swap dealer with the CFTC in accordance with the <i>Commodity Exchange Act 1936</i> (US), must commence reporting as part of Phase 1.
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Transaction Reporting Requirement	<p>From 1 October 2013 until 30 September 2014 (inclusive), Phase 1 Reporting Entities must report their Reportable Transactions in all asset classes (credit derivatives, equity derivatives, foreign exchange derivatives, interest rate derivatives and commodity derivatives that are not electricity derivatives). For each Reportable Transaction the Reporting Entity must report the Derivative Transaction Information set out in Part S2.1 of Schedule 2 to a Licensed Repository or a Prescribed Repository.</p> <p>From 1 October 2014 onwards, Phase 1 Reporting Entities must comply with the Transaction Reporting Requirement by reporting the Derivative Transaction Information set out in Part S2.1 of Schedule 2 to a Licensed Repository only.</p>
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Position Reporting Requirement	By 1 October 2014, Phase 1 Reporting Entities must report outstanding positions in OTC Derivatives as at 1 October 2013, that, if entered into on 1 October 2013 would be required to be reported by the Reporting Entity in accordance with the Transaction Reporting Requirements. For each Reportable Position the Reporting Entity must report the Derivative Position Information set out in Part S2.2 of Schedule 2 to a Licensed Repository or a Prescribed Repository.
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Exceptions	<p>Phase 1 Reporting Entities:</p> <ul style="list-style-type: none"> • may, until 1 October 2014, comply with subrule 2.2.1(1) by reporting to a Prescribed Repository information substantially equivalent to the Derivative Transaction Information, substantially in accordance with the requirements of Part 2.2 (see subrule 2.4.2(1)); • may, until 1 October 2014, rely on conditional one-sided reporting (see subrules 2.4.2(2) and (3)); and • until 1 October 2014, will not be required to report the Derivative Transaction Information in items 30–32 (mark-to-market, mark-to-model or other valuation), items 40–44 (collateral) and items 51–52 (barrier type and value) in Table S2.1(1) in Schedule 2 (see Rule 2.4.3).
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Phase 1	Summary of Reporting Requirements
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Subrule 2.2.1(3) also provides an ongoing exception for Reporting Entities other than Australian Entities, or an RE or Trustee acting in its capacity as RE or Trustee of an Australian Entity, that are subject to foreign reporting obligations.

Porting requirement	<p>Under Rule 2.4.5, a Phase 1 Reporting Entity that, on a day prior to 1 October 2014:</p> <ul style="list-style-type: none"> • complied with subrule 2.2.1(1) by reporting Derivative Transaction Information, or substantially equivalent information, about a Reportable Transaction (in Rule 2.4.5, a 'Relevant Reportable Transaction') to a Prescribed Repository, and the Prescribed Repository does not become a Licensed Repository by 1 October 2014; or • did not report Derivative Transaction Information, or substantially equivalent information, about a Reportable Transaction (in Rule 2.4.5, a 'Relevant Reportable Transaction') to a Licensed Repository or Prescribed Repository, in reliance on conditional one-sided reporting under subrule 2.4.2(2) or (3), <p>must, by 1 October 2014, report to a Licensed Repository either:</p> <ul style="list-style-type: none"> • the Derivative Transaction Information for each Relevant Reportable Transaction; or • Derivative Position Information, as at the end of 30 September 2014, for the OTC Derivative to which each Relevant Reportable Transaction relates.
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Phase 2 – Australian ADIs, AFS Licensees, Exempt Foreign Licensees, CS Facility Licensees and Foreign ADIs with total gross notional outstanding of \$50 billion or more as at 31 December 2013

Under Phase 2, Australian ADIs, AFS Licensees, CS Facility Licensees, Exempt Foreign Licensees and Foreign ADIs, that have total gross notional outstanding of \$50 billion or more as at 31 December 2013, will be required to start reporting under Australian law from 1 April 2014.

Phase 2	Summary of requirements
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Who must report?	<p>Under Rule 2.2.1, Part S1.1 and Part S1.2, a Reporting Entity that is:</p> <ul style="list-style-type: none"> • an Australian ADI, an AFS Licensee, a CS Facility Licensee, an Exempt Foreign Licensee or a Foreign ADI; and • as at 31 December 2013, has total gross notional outstanding of \$50 billion or more; and • is not required to report under Phase 1, <p>must commence reporting as part of Phase 2.</p>
Stage 1 - Transaction Reporting Requirement	<p>From 1 April 2014 to 30 September 2014 (inclusive), Phase 2 Reporting Entities must report their Reportable Transactions in credit derivatives and interest rate derivatives. For each Reportable Transaction the Reporting Entity must report the Derivative Transaction Information set out in Part S2.1 of Schedule 2 to a Licensed Repository or a Prescribed Repository.</p>
Stage 1 - Position	<p>By 1 October 2014, Phase 2 Reporting Entities must report outstanding positions as at 1</p>

Phase 2	Summary of requirements
Reporting Requirement	<p>April 2014 in OTC Derivatives that are credit derivatives and interest rates derivatives, that, if entered into on 1 April 2014, would be required to be reported by the Reporting Entity in accordance with the Transaction Reporting Requirements. For each Reportable Position the Reporting Entity must report the Derivative Position Information set out in Part S2.2 of Schedule 2 to a Licensed Repository.</p>
Stage 1 – Exceptions	<p>Phase 2 Reporting Entities:</p> <ul style="list-style-type: none"> • may, until 1 October 2014, comply with subrule 2.2.1(1) by reporting to a Prescribed Repository information substantially equivalent to the Derivative Transaction Information, substantially in accordance with the requirements of Part 2.2 (see subrule 2.4.2(1)); • may, until 1 October 2014, rely on conditional one-sided reporting (see subrules 2.4.2(2) and (3)); and • until 1 October 2014, will not be required to report the Derivative Transaction Information in items 30–32 (mark-to-market, mark-to-model or other valuation), items 40–44 (collateral) and items 51–52 (barrier type and value) in Table S2.1(1) in Schedule 2 (see Rule 2.4.3). <p>Subrule 2.2.1(3) also provides an ongoing exception for Reporting Entities other than Australian Entities, or an RE or Trustee acting in its capacity as RE or Trustee of an Australian Entity, that are subject to foreign reporting obligations.</p>
Stage 1 - Porting requirement	<p>Under Rule 2.4.5, a Phase 2 Reporting Entity that, on a day prior to 1 October 2014:</p> <ul style="list-style-type: none"> • complied with subrule 2.2.1(1) by reporting Derivative Transaction Information, or substantially equivalent information, about a Reportable Transaction (in Rule 2.4.5, a 'Relevant Reportable Transaction') to a Prescribed Repository, and the Prescribed Repository does not become a Licensed Repository by 1 October 2014; or • did not report Derivative Transaction Information, or substantially equivalent information, about a Reportable Transaction (in Rule 2.4.5, a 'Relevant Reportable Transaction') to a Licensed Repository or Prescribed Repository, in reliance on conditional one-sided reporting under subrule 2.4.2(2) or (3), <p>must, by 1 October 2014, report to a Licensed Repository either:</p> <ul style="list-style-type: none"> • the Derivative Transaction Information for each Relevant Reportable Transaction; or • Derivative Position Information, as at the end of 30 September 2014, for the OTC Derivative to which each Relevant Reportable Transaction relates.
Stage 2 – Transaction Reporting Requirement	<p>From 1 October 2014, Phase 2 Reporting Entities must start reporting their Reportable Transactions in all asset classes (credit derivatives, equity derivatives, foreign exchange derivatives, interest rate derivatives and commodity derivatives that are not electricity derivatives). For each Reportable Transaction the Reporting Entity must report the Derivative Transaction Information set out in Part S2.1 of Schedule 2 to a Licensed Repository.</p>
Stage 2 – Position Reporting Requirement	<p>By 1 April 2015, Phase 2 Reporting Entities must report outstanding positions as at 1 October 2014 in OTC Derivatives that are equity derivatives, foreign exchange derivatives and commodity derivatives that are not electricity derivatives, that, if entered into on 1</p>

Phase 2	Summary of requirements
	October 2014, would be required to be reported by the Reporting Entity in accordance with the Transaction Reporting Requirements. For each Reportable Position the Reporting Entity must report the Derivative Position Information set out in Part S2.2 of Schedule 2 to a Licensed Repository.
Stage 2 – Exceptions	There are no transitional exceptions available in Stage 2 of Phase 2. Subrule 2.2.1(3) provides an ongoing exception for Reporting Entities other than Australian Entities, or an RE or Trustee acting in its capacity as RE or Trustee of an Australian Entity, that are subject to foreign reporting obligations.
<p data-bbox="177 665 1401 734"><i><u>Phase 3 – All other Australian ADIs, AFS Licensees, Exempt Foreign Licensees, CS Facility Licensees and Foreign ADIs</u></i></p> <p data-bbox="177 772 1401 909">Under Phase 3, all other Australian ADIs, AFS Licensees, CS Facility Licensees, Exempt Foreign Licensees and Foreign ADIs will be required to start reporting under Australian law from 1 October 2014. As noted, Rules imposing Reporting Requirements on ‘end-users’ will not be made without further consultation.</p>	
Phase 3	Summary of requirements
Who must report?	<p data-bbox="421 1064 1158 1093">Under Rule 2.2.1, Part S1.1 and Part S1.2, a Reporting Entity that is:</p> <ul data-bbox="480 1111 1401 1223" style="list-style-type: none"> <li data-bbox="480 1111 1401 1171">• an Australian ADI, an AFS Licensee, a CS Facility Licensee, an Exempt Foreign Licensee or a Foreign ADI; and <li data-bbox="480 1189 1059 1223">• is not required to report under Phase 1 or Phase 2, <p data-bbox="421 1240 916 1267">must commence reporting as part of Phase 3.</p>
Stage 1 - Transaction Reporting Requirement	From 1 October 2014 to 31 March 2015 (inclusive), Phase 3 Reporting Entities must report their Reportable Transactions in credit derivatives and interest rate derivatives. For each Reportable Transaction the Reporting Entity must report the Derivative Transaction Information set out in Part S2.1 of Schedule 2 to a Licensed Repository.
Stage 1 - Position Reporting Requirement	By 1 April 2015, Phase 3 Reporting Entities must report outstanding positions as at 1 October 2014 in OTC Derivatives that are credit derivatives and interest rates derivatives, that, if entered into on 1 October 2014, would be required to be reported by the Reporting Entity in accordance with the Transaction Reporting Requirements. For each Reportable Position the Reporting Entity must report the Derivative Position Information set out in Part S2.2 of Schedule 2 to a Licensed Repository.
Stage 1 – Exceptions	<p data-bbox="421 1767 1401 1890">Until 1 April 2015, Phase 3 Reporting Entities will not be required to report the Derivative Transaction Information in items 30–32 (mark-to-market, mark-to-model or other valuation), items 40–44 (collateral) and items 51–52 (barrier type and value) in Table S2.1(1) in Schedule 2 (see Rule 2.4.3).</p> <p data-bbox="421 1908 1401 2002">Subrule 2.2.1(3) also provides an ongoing exception for Reporting Entities other than Australian Entities, or an RE or Trustee acting in its capacity as RE or Trustee of an Australian Entity, that are subject to foreign reporting obligations.</p>

Phase 3	Summary of requirements
Stage 2 – Transaction Reporting Requirement	From 1 April 2015, Phase 3 Reporting Entities must report their Reportable Transactions in all asset classes (credit derivatives, equity derivatives, foreign exchange derivatives, interest rate derivatives and commodity derivatives that are not electricity derivatives). For each Reportable Transaction the Reporting Entity must report the Derivative Transaction Information set out in Part S2.1 of Schedule 2 to a Licensed Repository.
Stage 2 – Position Reporting Requirement	By 1 October 2015, Phase 3 Reporting Entities must report outstanding positions as at 1 April 2015 in OTC Derivatives that are equity derivatives, foreign exchange derivatives and commodity derivatives that are not electricity derivatives, that, if entered into on 1 April 2015, would be required to be reported by the Reporting Entity in accordance with the Transaction Reporting Requirements. For each Reportable Position the Reporting Entity must report the Derivative Position Information set out in Part S2.2 of Schedule 2 to a Licensed Repository.
Stage 2 – Exceptions	There are no transitional exceptions available in Phase 3, Stage 2. Subrule 2.2.1(3) also provides an ongoing exception for Reporting Entities other than Australian Entities, or an RE or Trustee acting in its capacity as RE or Trustee of an Australian Entity, that are subject to foreign reporting obligations.

Subrule 2.2.1(2) - Exception where no Licensed Repository and no Prescribed Repository

Subrule 2.2.1(2) provides for a general, ongoing exception to the requirements of subrule 2.2.1(1) and Part 2.2, for all Reporting Entities.

Subrule 2.2.1(2) provides that a Reporting Entity is not required to comply with the requirements of subrule 2.2.1(1) and Part 2.2 that would otherwise apply to the Reporting Entity in relation to a Reportable Transaction or a Reportable Position if, at the time the Reporting Entity is required to comply with the requirements:

- there is no Licensed Repository authorised to provide services in respect of the class of Derivatives that includes the Derivatives to which the Reportable Transaction or Reportable Position relates; and
- there is no Prescribed Repository that is prescribed in relation to the class of Derivatives that includes the Derivatives to which the Reportable Transaction or Reportable Position relates.

Subrule 2.2.1(2) is included to make it clear that a Reporting Entity will not breach its reporting obligations where there is no Licensed Repository and no Prescribed Repository that can accept reports in relation to a particular Reportable Transaction or Reportable Position.

Subrule 2.2.1(3) - Alternative reporting exception for foreign entities

Subrule 2.2.1(3) provides for a specific, ongoing, exception to the requirements of subrule 2.2.1(1) and Part 2.2, for all Reporting Entities other than Australian Entities or an RE or Trustee acting in its capacity as RE or Trustee of an Australian Entity. Subrule 2.2.1(3) is designed to ensure that foreign Reporting Entities are not subject to duplicate reporting requirements, where they are subject to a reporting obligation in another jurisdiction.

Subrule 2.2.1(3) provides that a Reporting Entity other than an Australian Entity or an RE or Trustee acting in its capacity as RE or Trustee of an Australian Entity, is not required to comply with the requirements of subrule 2.2.1(1) and Part 2.2 that would otherwise apply to the Reporting Entity in relation to a Reportable Transaction or a Reportable Position if, at the time the Reporting Entity is required to comply with the requirements:

- there is a Prescribed Repository in the jurisdiction (referred to in Rule 2.2.1 as the ‘Foreign Jurisdiction’) in which the Reporting Entity is incorporated or formed; and
- either:
 - the Reporting Entity or another entity has reported information about the Reportable Transaction or the Reportable Position to the Prescribed Repository, in compliance with requirements in the Foreign Jurisdiction that are substantially equivalent to the requirements that would otherwise apply to the Reporting Entity in relation to the Reportable Transaction or Reportable Position under subrule 2.2.1(1) and Part 2.2; or
 - the Reporting Entity is exempt from the requirement in the Foreign Jurisdiction to report information about the Reportable Transaction or the Reportable Position, or
 - there is no requirement in the Foreign Jurisdiction to report information about the Reportable Transaction or Reportable Position.

Rule 2.2.2 – Reporting Requirement – Changes

Rule 2.2.2 requires a Reporting Entity to report changes to previously reported information that do not constitute a Reportable Transaction. It is noted that change that does constitute a Reportable Transaction (e.g. a modification, termination or assignment of the OTC Derivative) will be required to be reported under subrule 2.2.1(1).

Subrule 2.2.2(1) provides that, where a Reporting Entity has reported information about a Reportable Transaction or Reportable Position in accordance with subrule 2.2.1(1) and there is a change to the information reported that does not constitute a Reportable Transaction, the Reporting Entity must report the change, and also the applicable information about the change set out in item 55 of Table S2.1(1), in accordance with the requirements of Part 2.2. Item 55 of Table S2.1(1) requires an indication of the nature of the change.

Subrule 2.2.2(2) provides that, without limiting subrule 2.2.2(1) and subject to subrule 2.2.2(3), a Reporting Entity must report:

- each updated mark-to-market, mark-to-model or other valuation of the OTC Derivative to which the Reportable Transaction or Reportable Position relates, whether performed by the Reporting Entity or by another person on behalf of the Reporting Entity; and
- each change to the collateral held in relation to the OTC Derivative to which the Reportable Transaction or Reportable Position relates.

Subrule 2.2.2(3) provides that if there is more than one update to the valuation or change to the collateral during a Business Day, the Reporting Entity is only required to report the update or change that occurs closest to the end of that Business Day. Subrule 2.2.2(3) ensures that Reporting Entities are not required to report multiple intra-day mark-to-market valuations and changes to collateral.

‘Business Day’ is defined in Rule 1.2.3 to mean a day that is not a Saturday, a Sunday, or a public holiday or bank holiday in the Relevant Jurisdiction. ‘Relevant Jurisdiction’ is also defined in Rule 1.2.3 to mean, in relation to a Reportable Transaction or Reportable Position:

- this jurisdiction, if the Reportable Transaction or Reportable Position was booked to the profit or loss account of a branch of the Reporting Entity located in this jurisdiction or was entered into by the Reporting Entity in this jurisdiction; or
- if the Reportable Transaction or Reportable Position was not booked to the profit or loss account of a branch of the Reporting Entity located in this jurisdiction or was not entered into by the Reporting Entity in this jurisdiction:
 - (i) the jurisdiction in which the Reportable Transaction or Reportable Position was booked to the profit or loss account of a branch of the Reporting Entity; or
 - (ii) the jurisdiction in which the Reportable Transaction was entered into by the Reporting Entity.

Rule 2.2.3 – Reporting Requirement – Timing (generally T+1)

Subrule 2.2.3(1) provides that, subject to subrule 2.2.3(2), a Reporting Entity that is required to:

- report information about a Reportable Transaction in accordance with paragraph 2.2.1(1)(a) or (c); or
- a change to information about a Reportable Transaction or Reportable Position, in accordance with subrule 2.2.2(1),

must report the information or change by no later than the end of the next Business Day after the requirement to report the information or change arises.

The Position Reporting Dates for reporting information about Reportable Positions are set out separately in Part S1.2 of Schedule 1.

Subrule 2.2.3(2) provides that if the Licensed Repository or Prescribed Repository to which the information or changes are to be reported is not available to accept the report of information or changes by the time required under subrule 2.2.3(1), the Reporting Entity must report the information or changes as soon as practicable after the Licensed Repository or Prescribed Repository becomes available to accept the report.

Subrule 2.2.3(2) of the Rules is designed to ensure a Reporting Entity does not breach subrule 2.2.3(1) where the Trade Repository’s services are temporarily unavailable. It is noted that paragraph 2.3.1(3)(a) of the *ASIC Derivative Trade Repository Rules 2013* requires the Operator of a Licensed Repository to have in place policies, procedures, systems and controls reasonably designed to maintain continuous, reliable and secure connections with Participants (i.e. Reporting Entities or persons reporting on their behalf) for the purposes of accepting Derivative Trade Data.

Rule 2.2.4 – Reporting Requirement – Format

Rule 2.2.4 provides that a Reporting Entity that is required to report information about:

- a Reportable Transaction, or a Reportable Position in accordance with subrule 2.2.1(1); or
- a change to information about a Reportable Transaction or Reportable Position in accordance with subrule 2.2.2(1),

must report the information or change in an electronic form and in accordance with any format requirements specified:

- in the Rules; and
- by the Licensed Repository or Prescribed Repository to which the information or change is reported, to the extent those format requirements are not inconsistent with any format requirements specified in the Rules.

Some format requirements are specified in Schedule 2 of the Rules.

Rule 2.2.5 – Reporting Requirement – Continuity of reporting

Subrule 2.2.5(1) provides that, subject to subrule 2.2.5(2) and Rule 2.4.5, a Reporting Entity that reports to a Derivative Trade Repository (in Rule 2.2.5, the “Original Trade Repository”):

- information about a Reportable Transaction in an OTC Derivative, or a Reportable Position in an OTC Derivative, in accordance with subrule 2.2.1(1); or
- a change to information about a Reportable Transaction in an OTC Derivative, or a Reportable Position in an OTC Derivative, in accordance with subrule 2.2.2(1),

must take all reasonable steps to ensure that it reports further information or changes that relate to the same OTC Derivative, to the Original Trade Repository.

Subrule 2.2.5(2) provides if the Reporting Entity or the person that reports on its behalf is no longer a participant of the Original Trade Repository, or is no longer able to comply with subrule 2.2.1(1) or 2.2.2(1) by reporting the information to the Original Trade Repository, the information must be reported to another Licensed Repository or Prescribed Repository in accordance with the requirements of Part 2.2.

Rule 2.2.6 Reporting Requirement—Accuracy of reporting

Rule 2.2.6 provides that a Reporting Entity must take all reasonable steps to ensure that information reported under subrule 2.2.1(1) and any change to that information reported under subrule 2.2.2(1), whether reported by the Reporting Entity or on its own behalf or by another person on behalf of the Reporting Entity, is and remains at all times complete, accurate and current.

It is noted that under paragraph 2.3.1(3)(b) of the *ASIC Derivative Trade Repository Rules 2013*, the Operator of a Licensed Repository will be required to establish, implement and maintain policies, procedures, systems and controls designed to provide reasonable assurance that Derivative Trade Data reported to the Licensed Repository by Participants generally is and remains at all times complete, accurate and current.

The Reporting Entity retains primary responsibility under Rule 2.2.6 for the completeness, accuracy and currency of the information reported, regardless of whether the Reporting Entity reports through another person and regardless of the policies, procedures, systems and controls the Operator of the Licensed Repository puts in place to comply with paragraph 2.3.1(3)(b) of the *ASIC Derivative Trade Repository Rules 2013*.

Rule 2.2.7 Derivative Transaction Information—Delegation of reporting

Rule 2.2.7 provides that a Reporting Entity may appoint one or more persons to report on its behalf information under subrule 2.2.1(1) or any change to that information under subrule 2.2.2(1).

A Reporting Entity may appoint, for example, a counterparty of the Reporting Entity, a central counterparty, a trading platform, a service provider, a broker or any other third party. A Reporting Entity that appoints another person to report on its behalf remains responsible at all times for complying with the Rules.

Part 2.3 Records

Part 2.3 of the Rules deals with the keeping or records, or the provision of records or other information, relating to compliance with (or determining whether there has been compliance with) the Rules, as permitted by paragraph 901A(3)(g) of the Act.

Rule 2.3.1 Keeping of records

Subrule 2.3.1(1) provides that a Reporting Entity must keep records that enable the Reporting Entity to demonstrate it has complied with the requirements of the Rules. A Reporting Entity must keep the records referred to in subrule 2.3.1(1) for a period of at least five years from the date the record is made or amended (see subrule 2.3.1(2)).

Subrule 2.3.1(3) provides that, without limiting subrule 2.3.1(1) and subject to subrule 2.3.1(4), a Reporting Entity must keep a record of all information that it is required to report under subrules 2.2.1(1) and 2.2.2(2).

Under subrule 2.3.1(4) a Reporting Entity is not required to keep the records referred to in subrule 2.3.1(3) where the Reporting Entity has arrangements in place to access to those records in a Licensed Repository or Prescribed Repository, either directly or through another person, for the period set out in subrule 2.3.1(2).

Rule 2.3.2 Provision of records or other information

Subrule 2.3.2(1) provides that a Reporting Entity must, on request by ASIC, provide ASIC with records or other information relating to compliance with or determining whether there has been compliance with these Rules.

Subrule 2.3.2(2) provides that a request by ASIC under subrule 2.3.2(1) must be in writing and give the Reporting Entity a reasonable time to comply.

Subrule 2.3.2(3) provides that the Reporting Entity must comply with a request under subrule 2.3.2(1) within the time specified in the request or if no time is specified, within a reasonable time.

Part 2.4 Transitional matters

Part 2.4 of the Rules:

- deals with matters incidental or related to the reporting requirements set out in Part 2.2 as permitted by subsection 901A(2) of the Act; and

- deals with the circumstances in which persons are relieved from complying with the reporting requirements in the Rules that would otherwise apply to them as permitted by paragraph 901A(3)(g) of the Act.

Rule 2.4.1 Opt-In Reporting Phase—Opt-In Notice

As previously noted, under subrule 2.2.1(1) and Parts S1.1 and S2.1 of Schedule 1, a Reporting Entity may choose to start reporting on a transitional basis during the Opt-In Reporting Phase, by lodging an ‘Opt-In Notice’ with ASIC under Rule 2.4.1.

Under subrules 2.4.1(1) and (2), the Opt-In Notice lodged by the Reporting Entity must set out:

- the name of the Reporting Entity;
- the Reportable Transactions or class or classes of Reportable Transactions, and positions in relation to those Reportable Transactions, that the Reporting Entity intends to report during the Opt-In Reporting Phase (for example, the Reporting Entity may specify a class of Reportable Transactions that relates to a particular Prescribed Class);
- the Derivative Trade Data, being Derivative Transaction Information (as set out in Part S2.1 of Schedule 2) and Derivative Position Information (as set out in Part S2.2 of Schedule 2), or information that is substantially equivalent to the Derivative Transaction Information and Derivative Position Information, that the Reporting Entity intends to report during the Opt-In Reporting Phase in relation to the identified Reportable Transactions and positions in relation to Reportable Transactions;
- whether the Reporting Entity intends to report the identified Derivative Trade Data to a Licensed Repository or Prescribed Repository, and the name of that Licensed Repository or Prescribed Repository; and
- the date (Effective Date) or series of Effective Dates from which the Reporting Entity intends to report during the Opt-In Reporting Phase, being a date that:
 - falls on or after 1 July 2013 and on or after the date on which the Opt-In Notice is lodged;
 - in respect of a position in relation to a Reportable Transaction, is a date no later than 30 September 2014.

Under subrule 2.4.1(3), ASIC may publish on its website any Opt-In Notice given to it by a Reporting Entity.

It is noted that, under Rule 2.2.1 and Parts S1.1 and S1.2 of Schedule 1, a Reporting Entity that has lodged an Opt-In Notice in accordance with Rule 2.4.1 must comply with the applicable Transaction Reporting Requirements and Position Reporting Requirements during the Opt-In Reporting Phase.

Rule 2.4.2 Alternative reporting and conditional one-sided reporting until 1 October 2014

Subrule 2.4.2(1) - Alternative reporting—Phase 1 and first stage of Phase 2

Subrule 2.4.2(1) allows for all Reporting Entities, for a transitional period up until 1 October 2014, to report their Reportable Transactions to a Prescribed Repository substantially in accordance with Australian Reporting Requirements. This will allow Reporting Entities covered in Phase 1 and Phase 2 for this transitional period to comply with requirements under the Rules by

complying with alternative requirements, which will allow them to utilise work that may have been done to allow the Reporting Entities to comply with foreign reporting obligations, and provide sufficient time for them to comply with the full set of reporting obligations under the Rules.

Subrule 2.4.2(1) provides that a Reporting Entity that is required by subrule 2.2.1(1) to report Derivative Transaction Information about a Reportable Transaction to a Licensed Repository or Prescribed Repository in accordance with the requirements of Part 2.2, is taken to comply with subrule 2.2.1(1) and the requirements of Part 2.2 in relation to the Reportable Transaction where:

- the Reporting Entity reports information (referred to in subrule 2.4.2(2) as the ‘Equivalent Information’) that is substantially equivalent to the Derivative Transaction Information, about the Reportable Transaction, to a Prescribed Repository;
- the Equivalent Information is reported substantially in accordance with the requirements of Part 2.2 of the Rules; and
- the Prescribed Repository has accepted the report.

Subrule 2.4.2(1) is subject to:

- subrule 2.4.2(4) (which provides that subrule 2.4.2(1) ceases to apply on 1 October 2014); and
- compliance with the ‘porting’ requirements in Rule 2.4.5 (see below).

Subrule 2.4.2(2) - One-sided reporting of transactions with another Reporting Entity

Subrule 2.4.2(2) provides that a Reporting Entity that is required by subrule 2.2.1(1) to report Derivative Transaction Information about a Reportable Transaction to a Licensed Repository or Prescribed Repository in accordance with the requirements of Part 2.2, is taken to comply with subrule 2.2.1(1) and the requirements of Part 2.2 in relation to that Reportable Transaction where:

- another Reporting Entity (referred to in subrule 2.4.2(2) as the ‘Other Reporting Entity’) is required by subrule 2.2.1(1) to report Derivative Transaction Information about the same Reportable Transaction to a Licensed Repository or Prescribed Repository in accordance with the requirements of Part 2.2;
- the Other Reporting Entity has reported the Derivative Transaction Information about the same Reportable Transaction to a Licensed Repository or Prescribed Repository in accordance with subrule 2.2.1(1) and the requirements of Part 2.2; and
- the Licensed Repository or Prescribed Repository (as applicable) has accepted the report.

The relief in subrule 2.4.2(2) is therefore only available where the Other Reporting Entity has complied with its obligation under the Rules to report the Reportable Transaction.

Subrule 2.4.2(2) is subject to:

- subrule 2.4.2(4) (which provides that subrule 2.4.2(2) ceases to apply on 1 October 2014); and
- compliance with the ‘porting’ requirements in Rule 2.4.5 (see below).

Subrule 2.4.2(3) - One-sided reporting of transactions with another entity that is not a Reporting Entity

Subrule 2.4.2(3) provides that a Reporting Entity that is required by subrule 2.2.1(1) to report Derivative Transaction Information about a Reportable Transaction to a Licensed Repository or Prescribed Repository in accordance with the requirements of Part 2.2, is taken to comply with subrule 2.2.1(1) and the requirements of Part 2.2 in relation to that Reportable Transaction where:

- another entity (referred to in subrule 2.4.2(3) as the ‘Other Entity’) is required under the requirements (referred to in subrule 2.4.2(3) as the ‘Foreign Requirements’) of a foreign jurisdiction to report information (referred to in subrule 2.4.2(3) as the ‘Equivalent Information’) that is substantially equivalent to the Derivative Transaction Information, about the same Reportable Transaction, to a Licensed Repository or Prescribed Repository;
- the Other Entity has reported the Equivalent Information about the same Reportable Transaction in accordance with the Foreign Requirements;
- the Equivalent Information reported is complete and accurate; and
- the Licensed Repository or Prescribed Repository (as applicable) has accepted the report.

The relief in subrule 2.4.2(3) is therefore only available where the Other Entity has complied with its obligation under the Foreign Requirements to report the Reportable Transaction.

Subrule 2.4.2(3) is subject to:

- subrule 2.4.2(4) (which provides that subrule 2.4.2(3) ceases to apply on 1 October 2014); and
- compliance with the ‘porting’ requirements in Rule 2.4.5 (see below).

A Reporting Entity that has relied on subrule 2.4.2(1), (2) or (3) in relation to an OTC Derivative in the period up until 1 October 2014:

- will still be required to report any Reportable Position in relation to the OTC Derivative, by the Position Reporting Date;
- will need to comply with the ‘porting’ requirements of Rule 2.4.5 (see below); and
- will be required to report any Reportable Transaction (e.g. modification, termination or assignment) in relation to the OTC Derivative that occurs after 1 October 2014.

Rule 2.4.3 Reporting of valuations, barrier type and barrier value

Subrule 2.4.3(1) provides that, subject to subrule 2.4.3(2), a Reporting Entity is not required to comply with subrules 2.2.1(1) or 2.2.2(1) to the extent those subrules require the Reporting Entity to report the Derivative Transaction Information in items 30–32 (mark-to-market, mark-to-model, or other valuation), items 40–44 (collateral) and items 51–52 (barrier type and value) in Table S2.1(1), or changes to that information. This will provide Reporting Entities with additional lead-time before they are required to report this particular type of Derivative Transaction Information.

Subrule 2.4.3(2) provides that subrule 2.4.3(1) ceases to apply:

- on 1 October 2014, for a Reporting Entity that is first required to start complying with subrules 2.2.1(1) and 2.2.2(1) as part of Phase 1 or Phase 2; and

- on 1 April 2015, for a Reporting Entity that is first required to start complying with subrules 2.2.1(1) and 2.2.2(1) as part of Phase 3.

Rule 2.4.4 Modification, termination or assignment of outstanding positions before the Position Reporting Date

Rule 2.4.4 provides, for the purposes of paragraph 2.2.1(1)(c), for reporting of a Reportable Transaction that is a modification, termination or assignment of a Reportable Position in an OTC Derivative, before the relevant Position Reporting Date.

Paragraph 2.1.1(1)(c) deals with the reporting of modifications, terminations or assignments of Reportable Positions where the modification, termination or assignment occurs before the applicable Position Reporting Date for the Reportable Position. The modification, termination or assignment of an OTC Derivative is itself a Reportable Transaction for the purposes of these Rules (see Rule 1.2.5 and the definition of ‘derivative transaction’ in section 761A of the Act).

Where an OTC Derivative is entered into before the Reporting Requirement starts to apply but the position is still outstanding at the time the Reporting Requirement starts to apply, the Reporting Entity will have until the applicable Position Reporting Date (generally 6-12 months after the Reporting Requirement starts to apply) to report the outstanding position.

Under Rule 2.4.4, for the purposes of paragraph 2.2.1(1)(c), where:

- a Reporting Entity is required to report information about a Reportable Position in accordance with the Position Reporting Requirements in Part S1.2 of Schedule 1 to a Licensed Repository or a Prescribed Repository; and
- before the Position Reporting Date, the arrangement that is the OTC Derivative to which the Reportable Position relates is modified or terminated, or a party to that arrangement assigns some or all of its rights and obligations under the arrangement,

the Reporting Entity must report all of the applicable information in Tables S2.1(1)–(5) about:

- the OTC Derivative to which the Reportable Position relates; and
- the Reportable Transaction that is the modification, termination or assignment of that OTC Derivative (as applicable),

to the Licensed Repository or Prescribed Repository to which the Reportable Position will be reported, and must report the applicable information in accordance with Part 2.2 of the Rules.

The purpose of Rule 2.4.4 is twofold:

- To ensure that, in accordance with the limitations on ASIC’s rule-making power provided for in paragraph 901A(8)(b) of the Act, the Derivative Transaction Information reported in these circumstances relates to:
 - the position as it was at the time the Reporting Requirement started to apply to the Reporting Entity (and not as it was at a time before the Reporting Requirement started to apply to the Reporting Entity); and
 - the Derivative Transaction entered into after the Reporting Requirement started to apply to the Reporting Entity (i.e. the modification, termination or assignment of the arrangement) and not to the Derivative Transaction that was entered into

before the Reporting Requirement started to apply to the Reporting Entity (i.e. the entry into the arrangement).

As noted in paragraph 1.107 of the Explanatory Memorandum: *‘The derivative transaction rules do not impose requirements retrospectively. They are limited in the obligations they can impose prospectively in relation to transactions entered into prior to their creation.’*

- To ensure that where the modification, termination or assignment of the OTC Derivative position is reported before the position itself is reported, there is sufficient context in the report to identify the OTC Derivative to which the modification, termination or assignment relates.¹³ However, the Reporting Entity is still required to report the position in accordance with the Position Reporting Requirements, by the Position Reporting Date.

It is noted that a requirement to report a modification, termination or assignment under Rule 2.4.4 does not extinguish the requirement to report position information under paragraph 2.2.1(1)(b).

Rule 2.4.5 Reporting to Licensed Repositories from 1 October 2014

Reporting Entities relying on alternative reporting

Subrule 2.4.5(1) provides that subrule 2.4.5(3) applies to a Reporting Entity where:

- the Reporting Entity, on a day prior to 1 October 2014, complied with subrule 2.2.1(1) by reporting Derivative Transaction Information, or substantially equivalent information, about a Reportable Transaction (referred to in Rule 2.4.5 as a ‘Relevant Reportable Transaction’) to a Prescribed Repository (whether or not in reliance on the exception in subrule 2.4.2(3)); and
- the Prescribed Repository to which the Derivative Transaction Information or substantially equivalent information was reported does not become a Licensed Repository by 1 October 2014.

Reporting Entities relying on conditional one-sided reporting

Subrule 2.4.5(2) provides that subrule 2.4.5(3) applies to a Reporting Entity where the Reporting Entity, on a day prior to 1 October 2014, did not report Derivative Transaction Information, or substantially equivalent information, about a Reportable Transaction (to in Rule 2.4.5 as a ‘Relevant Reportable Transaction’) to a Licensed Repository or Prescribed Repository, in reliance on an exception in:

- subrule 2.4.2(2) (‘conditional one-sided reporting’ where the Reportable Transaction was reported by another Reporting Entity in accordance with Australian requirements); or
- subrule 2.4.2(3) (‘conditional one-sided reporting’ where the Reportable Transaction was reported by another entity in accordance with foreign requirements).

Reporting to a Licensed Repository

¹³ Under Rule S2.1.1, if a Reportable Transaction is the modification or termination of an arrangement, the Derivative Transaction Information to be reported only consists of any changes to the information set out in Tables S2.1(1)–(5) in Schedule 2 resulting from the modification or termination of the arrangement, to the extent that information is relevant to the Reportable Transaction

Subrule 2.4.5(3), which applies in the circumstances set out in subrules 2.4.5(1) and (2), provides that the Reporting Entity must, by 1 October 2014, for each Relevant Reportable Transaction, report to a Licensed Repository:

- Derivative Transaction Information for the Relevant Reportable Transaction; or
- Derivative Position Information, as at the end of 30 September 2014, for the OTC Derivative to which the Relevant Reportable Transaction relates.

This will ensure that when Reporting Entities are required to transition to reporting to Licensed Repositories under the phased implementation timetable set out in Schedule 1, Australian regulators (ASIC, APRA and the RBA) will be able to obtain from the Licensed Repository a complete picture of the Reporting Entity's Reportable Transactions and Reportable Positions from the date the Reporting Entity was first required to start reporting.

SCHEDULE 1: REPORTING REQUIREMENTS—PHASING

Schedule 1 provides for the phased implementation of the Transaction Reporting Requirements established under paragraph 2.2.1(1)(a) and the Position Reporting Requirements established under paragraph 2.2.1(1)(b).

Part S1.1 Transaction Reporting Requirements

Part S1.1 in Schedule 1 provides for the phased implementation of the Transaction Reporting Requirements.

Rule S1.1.1 and Table 1 Transaction Reporting Requirements

As previously noted, under paragraph 2.2.1(1)(a), a Reporting Entity must report information about each of its Reportable Transactions (other than a Reportable Transaction that is a modification, termination or assignment referred to in paragraph 2.2.1(c), which is dealt with in Rule 2.4.4) in accordance with the Transaction Reporting Requirements in Part S1.1 of Schedule 1, during the applicable Reporting Periods set out in that Part.

For the purposes of paragraph 2.2.1(1)(a):

- column 1 of Table S1.1 sets out the name of each implementation phase (the Opt-In Reporting Phase, Phase 1, Phase 2 and Phase 3);
- column 5 of Table S1.1 sets out the Transaction Reporting Requirement that applies to the Reporting Entities specified in column 2, in relation to the Reportable Transactions specified in column 4, during the Reporting Period specified in column 3.

Subrule S1.1.1(2) makes special provision in relation to a Reporting Entity that is a Reporting Entity in its capacity as RE or Trustee. Subrule S1.1.1(2) provides that where, for the purposes of the Transaction Reporting Requirement in Phase 2, a Reporting Entity has determined in accordance with subrule 1.2.7(2) that a managed investment scheme or trust (referred to in subrule S1.1.1(2) as the 'Reporting Scheme or Trust') for which the Reporting Entity is RE or Trustee holds total gross notional outstanding positions of \$50 billion or more as at 31 December 2013, the Reporting Entity is required to:

- in Phase 2, comply with the Transaction Reporting Requirement in column 5 of Table S1.1 in relation to Reportable Transactions in its capacity as RE or Trustee of the

Reporting Scheme or Trust, and not in relation to Reportable Transactions in its capacity as RE or Trustee of any managed investment scheme or trust that is not a Reporting Scheme or Trust; and

- in Phase 3, comply with the Transaction Reporting Requirement in column 5 of Table S1.1 in relation to Reportable Transactions in its capacity as RE or Trustee of any managed investment scheme or trust that was not a Reporting Scheme or Trust for the purposes of Phase 2.

Part S1.2 Position Reporting Requirements

Part S1.2 in Schedule 1 provides for the phased implementation of the Position Reporting Requirements.

Rule S1.2.1 Position Reporting Requirements

As previously noted, under paragraph 2.2.1(1)(b), Reporting Entities must report their Reportable Positions in accordance with the Position Reporting Requirements in Part S1.2 of Schedule 1, by the Position Reporting Date set out in that Part.

For the purposes of paragraph 2.2.1(1)(b):

- column 1 of Table S1.2 sets out the name of each implementation phase (the Opt-In Reporting Phase, Phase 1, Phase 2 and Phase 3);
- column 4 of Table S1.2 sets out the Position Reporting Requirement that applies to the Reporting Entities specified in column 2, in relation to the outstanding positions (referred to in the Rules as 'Reportable Positions') specified in column 3, by the Position Reporting Date specified in column 5.

Subrule S1.2.1(2) makes special provision in relation to a Reporting Entity that is a Reporting Entity in its capacity as RE or Trustee. Subrule S1.2.1(2) provides that where, for the purposes of the Position Reporting Requirement in Phase 2, a Reporting Entity has determined in accordance with subrule 1.2.7(2) that a managed investment scheme or trust (referred to in subrule S1.2.1(2) as the 'Reporting Scheme or Trust') for which the Reporting Entity is RE or Trustee holds total gross notional outstanding positions of \$50 billion or more as at 31 December 2013, the Reporting Entity is required to:

- in Phase 2, comply with the Position Reporting Requirement in column 4¹⁴ of Table S1.2 in relation to Reportable Positions held in its capacity as RE or Trustee of the Reporting Scheme or Trust, and not in relation to Reportable Positions held in its capacity as RE or Trustee of any managed investment scheme or trust that is not a Reporting Scheme or Trust; and
- in Phase 3, comply with the Position Reporting Requirement in column 4¹⁵ of Table S1.2 in relation to Reportable Positions held in its capacity as RE or Trustee of any managed investment scheme or trust that was not a Reporting Scheme or Trust for the purposes of Phase 2.

¹⁴ Note: The reference in paragraph S1.2.1(2)(a) to 'column 2' is a typographical error and will be corrected by amendment in due course.

¹⁵ Note: The reference in paragraph S1.2.1(2)(b) to 'column 5' is a typographical error and will be corrected by amendment in due course.

SCHEDULE 2: INFORMATION REQUIREMENTS

Schedule 2 provides for the information to be reported in accordance with the Transaction Reporting Requirements established under paragraph 2.2.1(1)(a) and the Position Reporting Requirements established under paragraph 2.2.1(1)(b).

Part S2.1A Definitions

Rule S2.1A.1 Definitions

Rule S2.1A.1 provides definitions for the following terms used in the Tables in Parts S2.1 and S2.2:

- Non-reporting Counterparty.
- Portfolio Basis; and
- Reporting Counterparty.

Part S2.1 Derivative Transaction Information and Part S2.2 Derivative Position Information

Rule S2.1.1 Derivative Transaction Information and Rule S2.2.1 Derivative Position Information

Rule S2.1.1 and Tables S2.1(1) to (5) set out the Derivative Transaction Information that must be reported in relation to Reportable Transactions for the purposes of paragraph 2.2.1(1)(a) and (c). Table S2.1(1) sets out common data to be reported for all Reportable Transactions, while Tables S2.1(2) to (5) set out additional asset-specific data for each asset class.

Rule S2.2.1 and Tables S2.2(1) to (5) set out the Derivative Position Information that must be reported in relation to Reportable Positions for the purposes of paragraph 2.2.1(1)(b). Table S2.2(1) sets out common data to be reported for all Reportable Transactions, while Tables S2.2(2) to (5) set out additional asset-specific data for each asset class.

As at the date the Rules are made, the Prescribed Classes under the *Corporations (Derivatives) Determination 2013* are commodity derivatives (other than electricity derivatives), credit derivatives, equity derivatives, foreign exchange derivatives and interest rate derivatives. The Derivative Transaction Information and Derivative Position Information to be reported is therefore categorised according to these Prescribed Classes, as summarised in the Table below.

Reportable Transaction	Derivative Transaction Information to be reported	Derivative Position Information to be reported
Commodity derivatives (other than electricity derivatives)	Tables S2.1(1) and S2.1(2)	Tables S2.2(1) and S2.1(2)
Credit derivatives	Tables S2.1(1) and S2.1(3)	Tables S2.2(1) and S2.2(3)
Equity derivatives	Tables S2.1(1) and S2.1(3)	Tables S2.2(1) and S2.2(3)
Foreign exchange derivative	Tables S2.1(1) and S2.1(4)	Tables S2.2(1) and S2.2(4)
Interest rate derivative	Tables S2.1(1) and S2.1(5)	Tables S2.2(1) and S2.2(5)

The Derivative Transaction Information and Derivative Position Information set out in Parts S2.1 and S2.2 of Schedule 2 is based on the needs of the Australian Regulators to achieve the objectives of the trade reporting regime, and the fields being required to be reported in other jurisdictions, such as Canada, the EU, Hong Kong, Japan, Singapore and the US.

The Derivative Transaction Information and Derivative Position Information set out in Parts S2.1 and S2.2 of Schedule 2 falls broadly into the following categories

- Counterparty information – such as an identifier for the counterparty to a Derivative (e.g. a legal entity identifier).
- Operational information – such as an identifier for the Derivative Transaction, information about the master agreement type and date, and information about whether the Derivative Transaction was traded on an execution venue, cleared and/or confirmed.
- Product information – such as information about the type of Derivative (e.g. swap, forward, option) and in the case of options, the exercise style (e.g. American, Asian, European or Bermudan).
- Transaction economics – the material terms of a Derivative, including effective dates, termination dates, notional amounts, coupon amounts and payment schedules.
- Exposures data – information about the mark-to-market, mark-to-model or other valuation of a Derivative, and information about collateral exchanged on the Derivative.
- Event data – information that records the occurrence of an event and includes a timestamp, such as a confirmation, clearing, execution or reporting timestamp.

ATTACHMENT B – Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

ASIC Derivative Transaction Rules (Reporting) 2013

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1. Overview of the Legislative Instrument

The *ASIC Derivative Transaction Rules (Reporting) 2013* (the **Rules**) are made by ASIC under section 901A of the Act, acting with the consent of the Minister under section 901K of the Act.

The aim of the Rules is:

- Together with the *ASIC Derivative Trade Repositories Rules 2013*, to give effect to:
 - one of the key commitments made by the Australian Government at the Group of Twenty (**G20**) summit in Pittsburgh in 2009 to substantial reforms to practices in OTC derivatives markets; and
 - the recommendations in the March 2012 report (**CoFR Report**) of the Australian Council of Financial Regulators entitled *OTC Derivatives Market Reform Considerations*; and
 - the objectives of the *Corporations Legislation Amendment (Derivative Transactions) Act 2012*¹⁶;

by taking a necessary step in the implementation of the Australian regime for reporting (referred to as **trade reporting**) of information about over-the-counter (**OTC**) derivatives to ‘derivative trade repositories’ (centralised registries that maintain an electronic database of records of transactions) and for the licensing and regulation of those repositories in this jurisdiction. Global commitment to OTC derivatives reform arose out of the global financial crisis (GFC) in 2008, during which the magnitude of systemic risk inherent in the OTC derivatives markets, and the lack of transparency in relation to counterparty exposures in those markets, became apparent.

- Together with the *ASIC Derivative Trade Repositories Rules 2013*, to implement an Australian trade reporting regime and regime for the licensing and regulation of derivative trade repositories, that achieves the stated objectives of the OTC derivatives reforms¹⁷ and the CoFR Report, by enhancing the transparency of transaction information available to relevant authorities and the public (leading to an increased capacity for the oversight and monitoring of systemic risk), promoting financial stability and supporting the detection and prevention of market abuse.

¹⁶ As noted in the Revised Explanatory Memorandum to the originating Bill, at paragraph 1.6: ‘In particular, trade reporting will increase transparency in the market. It will also give regulators and market participants access to valuable data with which to assess the risks associated with the OTC market’.

¹⁷ See CPSS–IOSCO *Principles for financial market infrastructures*, April 2012, p. 9.

- To ensure the Australian trade reporting regime is consistent with other international regimes, including those in the European Union (EU), the United States (US), Canada, Singapore and Hong Kong¹⁸, for recognition or substituted compliance purposes.

The Rules:

- impose reporting requirements as permitted by paragraph 901A(2)(b) and subsection 901A(6) of the Act;
- specify the persons who are required to comply with the reporting requirements imposed by the Rules as permitted by paragraph 901A(3)(e) of the Act;
- deal with the manner and form in which persons are required to comply with the reporting requirement imposed by the Rules as permitted by paragraph 901A(3)(f) of the Act; and
- deal with the circumstances in which persons are relieved from complying with the reporting requirements in the Rules that would otherwise apply to them as permitted by paragraph 901A(3)(g) of the Act.

2. Human rights implications

The Rules may engage the right to privacy and reputation in Article 17 of the International Covenant on Civil and Political Rights (**Article 17**). Article 17 prohibits unlawful or arbitrary interferences with a person's privacy, family, home (which the UN Human Rights Committee has interpreted as including a person's workplace) and correspondence. It also prohibits unlawful attacks on a person's reputation. It provides that persons have the right to the protection of the law against such interference or attacks. The UN Human Rights Committee has not defined 'privacy'. The Commonwealth Attorney-General's Department has provided guidance that privacy should be understood to comprise freedom from unwarranted and unreasonable intrusion into activities that society recognises as falling into the individual sphere of autonomy. To avoid being considered arbitrary, any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.

The Rules may engage the right to privacy and reputation in Article 17

The Rules require a 'Reporting Entity' (as defined in Rule 1.2.3 of those rules) to provide certain 'derivative trade data' to a derivative trade repository that is licensed under section 905C of the Act or a derivative trade repository that is prescribed under paragraph 901A(6)(b) of the Act. Under Rules 2.3.1 and 2.3.2 of the *ASIC Derivative Trade Repository Rules 2013*, an operator of a licensed derivative trade repository must accept and retain that information in records of derivative trade data. Under subsection 904B(2) of the Act and Rule 2.3.4 of the *ASIC Derivative Trade Repository Rules 2013*, the operator of a licensed derivative trade repository may be required to provide derivative trade data on request made by ASIC, APRA, the RBA, a prescribed person or body, or another licensed derivative trade repository.

¹⁸ Australia is implementing the G20 commitments to OTC derivative reforms in close coordination with peer jurisdictions. Transaction reporting regimes are being developed concurrently by regulators overseas, including the US Commodity Futures Trading Commission (CFTC), the US Securities and Exchange Commission (SEC), the European Securities and Markets Authority (ESMA), the Hong Kong Securities and Futures Commission (HK SFC) and the Monetary Authority of Singapore (MAS), for their respective jurisdictions.

Derivative trade data includes, for each side of an OTC derivative transaction, information that identifies or is capable of identifying the counterparty to the OTC derivative (referred to as ‘counterparty information’) (see Tables S2.1(1) and S2.2(1) in Schedule 2 to the Rules).

‘Counterparty information’ may contain ‘personal information’ as defined in the *Privacy Act 1988*, being information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. This may be the case where the counterparty is an individual and the reporting entity reporting the OTC derivative elects to provide a code to identify the individual from which the identity of the individual is apparent or can reasonably be ascertained.

The right in Article 17 is engaged by the Rules by reason that the reporting of derivative trade data in accordance with the Rules may:

- involve the collection, storage, security, use or disclosure of personal information;
- create confidentiality or secrecy provisions relating to personal information;
- provide for mandatory disclosure or reporting of information.

Compatibility of Rules with the rights recognised in Article 17

The Rules are compatible with the rights recognised in Article 17 of the ICCPR by reason that any interference with a person's privacy or reputation resulting from compliance with those Rules will be lawful and not arbitrary. In particular:

- The Rules are made in accordance with ASIC’s power to make derivative transaction rules imposing reporting requirements (see paragraph 901A(2)(b) and subsection 901A(6) of the Act).
- The Rules are critical to the implementation of an Australian trade reporting regime and regime for the licensing and regulation of derivative trade repositories, that achieves the stated objectives of the OTC derivatives reforms and the CoFR Report, by enhancing the transparency of transaction information available to relevant authorities and the public (leading to an increased capacity for the oversight and monitoring of systemic risk), promoting financial stability and supporting the detection and prevention of market abuse.
- The Rules achieve the objects of the *Corporations Legislation Amendment (Derivative Transactions) Act 2012* by increasing transparency in the market and giving regulators and market participants access to valuable data with which to assess the risks associated with the OTC derivatives market.
- The Rules as a whole further the objects of Chapter 7 of the Corporations Act, including promoting fair, orderly and transparent markets for financial products (see paragraph 760A(c) of the Act).

The Rules are subject to a number of safeguards, including

- Any personal information in derivative trade data provided to ASIC will be protected in accordance with ASIC’s legislative obligations under s127 of the *Australian Securities and Investments Commission Act 2001* (the *ASIC Act*), and to the extent the information is personal information, under the *Privacy Act 1988*. In particular, subrule 2.3.4(10) of the

ASIC Derivative Trade Repository Rules 2013 provides that information given to ASIC by the operator, or an officer of an operator, of a derivative trade repository under Part 7.5A of the Act or regulations made under that Part, or under the Rules or the *ASIC Derivative Trade Repository Rules 2013*, will be taken to have been given to ASIC in confidence for the purposes of s127 of the ASIC Act (unless the information has already been made publicly available in accordance with those legislative provisions, or as otherwise required or permitted by law).

- The operator of a derivative trade repository will be subject to obligations under section 904B of the Act, and under Rules 2.3.3, 2.3.4, 2.3.5, 2.3.6 and 2.4.8 of the *ASIC Derivative Trade Repository Rules 2013* to only use or disclose derivative trade data in certain circumstances, and to take steps to maintain the confidentiality, security and integrity of the derivative trade data at all times.
- Under the Rules, the counterparty information that must be reported is likely to be in a form from which the identity of the counterparty cannot be readily ascertained without further enquiries by Australian regulators (and subject to legislative safeguards applying to those regulators).

If the Rules were considered to limit the right in Article 17 of the ICCPR, ASIC considers that the Rules are nevertheless compatible with that right. The right in Article 17 is not absolute. As noted, the right has implied limitations ('unlawful' and 'arbitrary') and may be subject to a permissible limitation where that limitation aims to achieve a legitimate objective, there is a rational connection between the limitation, and the objective and the limitation is reasonable, necessary and proportionate.

Any limitation imposed on the right by the Rules has a clear legal basis, in that it aims to achieve a legitimate objective, has a rational connection with the objective, and is reasonable, necessary and proportionate.

As noted in the CoFR Report:

'Reporting to trade repositories should facilitate the maintenance of a reliable and comprehensive source of information on participant trading activity, which would be useful to many regulators in performing their respective functions. It is expected that this increased transparency will assist authorities in identifying vulnerabilities in the financial system and, more broadly, to develop well-informed policies to promote financial stability. Information from trade repositories will be particularly useful in times of financial distress, where rapid and reliable access to accurate data may assist prudential and systemic regulators in their functions. From a market supervision perspective, transaction information stored in trade repositories in some product classes in particular, such as equity derivatives and credit derivatives, has the potential to assist investigations into market misconduct.'

Effective regulation of the OTC derivatives market requires regulators to have detailed data on counterparty exposures where these will pose a systemic risk. A requirement to report transactions, and counterparty information in relation to those transactions, is the most effective method of achieving this legitimate objective.

The Rules are necessary to achieve the legitimate objective because they provide ASIC and other regulators with the data they need to assess counterparty exposures, and support the detection and prevention of market abuse. The Rules contains adequate safeguards by only requiring market participants to report the data necessary to achieve that objective, and, in conjunction with section

904B of the Act, to require operators to maintain the confidentiality, security and integrity of that information. Further safeguards are provided by statutory obligations to protect confidential and personal information contained in the data.