

ASIC DERIVATIVE TRANSACTION RULES (REPORTING) AMENDMENT 2015 (No.1)

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) Amendment 2015 (No. 1)* (the **Amending Instrument**) under sections 901A and 901M of the Act.

Section 901A of the Act provides that, subject to Division 2 of Part 7.5A of the Act, ASIC may, by legislative instrument, make derivative transaction rules dealing with matters as permitted by section 901A, including '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, licensed or prescribed derivative trade repositories.

Section 901M of the Act provides that the Rules may be amended in like manner, and subject to like conditions.

Background

On 9 July 2013, ASIC made the *ASIC Derivative Transaction Rules (Reporting) 2013 (Rules)*, implementing the over-the-counter 'OTC' derivative transaction reporting reforms agreed by the G20 leaders at the 2009 Pittsburgh summit.

The Rules provided for the implementation of reporting obligations in three phases for different types of reporting entities. 'Phase 1' and 'Phase 2' Reporting Entities have commenced reporting. Under existing relief in ASIC Instrument [14/0633], 'Phase 3' Reporting Entities are due to commence reporting in 2015 in two sub-phases: Phase 3A and Phase 3B.

On 25 July 2014, ASIC released CP 221 *OTC derivatives reform: Proposed amendments to the ASIC Derivative Transaction Rules (Reporting) 2013 (CP 221)*, outlining proposed amendments to the Rules in response to a number of implementation issues raised by industry.

The Amending Instrument implements a number of the amendments to the Rules proposed in CP 221 by:

- amending the definition of "Regulated Foreign Market" in Rule 1.2.4 to provide greater specificity as to which facilities are included in the definition;
- amending subrule 2.2.1(3) to broaden the circumstances in which a foreign Reporting Entity may obtain substituted compliance for reporting to a Prescribed Repository under a substantially equivalent foreign regime, and adding a requirement that foreign Reporting Entities designate or 'tag' these trades as being reported under the Rules;
- amending Rule 2.2.7 to provide a 'safe harbour' for delegated reporting, where such reporting is done under a written agreement and the Reporting Entity makes regular

enquiries reasonably designed to determine whether the delegate is reporting on behalf of the Reporting Entity in accordance with the Rules;

- inserting a new Rule 2.2.8 to make "snapshot reporting" a permanent reporting option under the Rules, while allowing ASIC to require "lifecycle reporting" for certain Derivatives in future under certain circumstances;
- including a requirement that Australian Reporting Entities report to a Prescribed Repository if there is no Licensed Repository available; and
- replacing the requirement to report Australian Business Numbers (ABNs) for an entity with a requirement to report an international business entity identifier issued by AVOX Limited (AVID), in circumstances where a legal entity identifier (LEI) or interim entity identifier is not available.

The amendments to the Rules made by the Amending Instrument are described in more detail in Attachment A.

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*).

Commencement of Rules

The Amending Instrument commences on the day after it is registered under the *Legislative Instruments Act 2003*.

Consultation, Regulation Impact Statement and section 901H matters

ASIC has consulted the public about the changes to the Rules in the Amending Instrument (s901J(a)) and 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)¹ (s901J(b)).

Since the close of consultation under CP 221, ASIC has engaged in further targeted consultation on particular issues including reporting by foreign subsidiaries and delegated reporting.

In making the changes to the Rules in the Amending Instrument, 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.

¹ To date no regulations have been made under subparagraph 901J(1)(b)(iii).

ASIC has also had regard to other matters that ASIC considers relevant, including relevant international standards, international commitments and matters raised in consultation under s901J of the Act.

A Regulation Impact Statement (OTC Derivatives reform: Amendments to ASIC Derivative Transaction Rules (Reporting) 2013) (***RIS***) has been prepared in relation to the amendments to the Rules in the Amending Instrument, and the RIS has been approved by Office of Best Practice Regulation. The RIS sets out ASIC's assessment of the regulatory and financial impacts of the amendments to the Rules made by the Amending Instrument. It deals with:

- likely compliance costs and savings;
- ASIC's consideration of industry feedback on the proposals in CP 221; and
- the benefits of obtaining a complete data set of OTC derivative trading activities of Reporting Entities, to allow the Australian Regulators (including ASIC, APRA and the RBA) to meet their respective regulatory mandates.

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.

Paragraph 1 Enabling legislation

This paragraph provides that ASIC makes the instrument under section 901A and 901M of the Act. Section 901A of the Act empowers ASIC to make derivative transaction rules imposing reporting requirements. Section 901M of the Act provides that ASIC may amend or revoke a derivative transaction rule in like manner and subject to like conditions.

Paragraph 2 Title

This paragraph provides that the instrument is the *ASIC Derivative Transaction Rules (Reporting) Amendment 2015 (No. 1)*.

Paragraph 3 Commencement

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

Paragraph 4 Amendments

This paragraph provides that Schedule 1 of the Amending Instrument amends the Rules, as follows:

Regulated foreign markets

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). Rule 1.2.4 provides a definition of 'OTC Derivative'. Relevantly, Rule 1.2.4 carves out from the definition of 'OTC Derivative', Derivatives traded on certain domestically licensed and supervised markets, and on 'Regulated Foreign Markets' that ASIC determines are subject to 'sufficiently equivalent' requirements and supervision as domestically licensed and supervised markets.

Clause [1] of Schedule 1 of the Amending Instrument makes a consequential amendment arising out of the amendment made by clause [2] of Schedule 1.

Clause [2] of Schedule 1 of the Amending Instrument amends Rule 1.2.4 to expressly include in the definition of "Regulated Foreign Market", facilities that are registered as a 'Designated Contract Market' with the US Commodity Futures Trading Commission (**CFTC**) under the US *Commodity Exchange Act 1936 (CEA)*, and facilities that are 'Regulated Markets' under Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (the **Directive**).

Clause [3] of Schedule 1 of the Amending Instrument makes minor changes to Rule 1.2.4 to clarify that ASIC may make a determination in relation to "Regulated Foreign Markets", by identifying a class of financial markets (in addition to individual financial markets).

Clause [4] of Schedule 1 of the Amending Instrument further amends Rule 1.2.4 to allow ASIC to determine a financial market as a "Regulated Foreign Market", where the financial market is subject to 'sufficiently equivalent' requirements and supervision as a 'Designated Contract Market' in the US, or 'Regulated market' in the EU.

Clauses [5] – [10] of Schedule 1 of the Amending Instrument, provide that a determination by ASIC in relation to "Regulated Foreign Markets" is a legislative instrument that is required to be registered on the Federal Register of Legislative Instruments.

These amendments provide certainty that Derivatives traded on major markets in the US and EU will be regarded as 'exchange-traded' for the purposes of the Rules.

Alternative reporting

Clause [11] of Schedule 1 of the Amending Instrument makes a change to the Rules consequential upon the amendments made to the rules by clause [15] of Schedule 1, by inserting a further exception to the reporting provisions of Rule 2.2.1 which takes into account snapshot reporting permitted by new Rule 2.2.8.

Clause [12] of Schedule 1 of the Amending Instrument amends subrule 2.2.1(3) so that the exemption to the Australian Reporting Requirements for foreign Reporting Entities applies where the Reporting Entity is subject to reporting requirements (referred to in the Rule as ***Alternative Reporting Requirements***) in one or more foreign jurisdictions (in the Rule, each, a ***Foreign Jurisdiction***) that are substantially equivalent to the Reporting Requirements under the Rules, and the Reporting Entity or another entity has either:

- reported the information to a Prescribed Repository, in compliance with the Alternative Reporting Requirements in at least one Foreign Jurisdiction; or
- the Reporting Entity is exempt from the requirement in all of the Foreign Jurisdictions to report the information or there is no requirement in any of the Foreign Jurisdictions to report the information.

The purpose of these amendments is to allow foreign Reporting Entities to rely on subrule 2.2.1(3) where the foreign Reporting Entity reports to a Prescribed Trade Repository that is not in the Reporting Entity's home jurisdiction, and/or where the foreign Reporting Entity reports in accordance with Alternative Reporting Requirements in a Foreign Jurisdiction that is not the Reporting Entity's home jurisdiction (for example, because the Reporting Entity is registered as a 'Swap Dealer' in the US and subject to Dodd-Frank reporting requirements).

Subrule 2.2.1(3) as amended requires foreign Reporting Entities that rely on subrule 2.2.1(3) to designate or 'tag' the information reported to the Prescribed Repository as information that has been reported under the Australian Reporting Requirements. This amendment ensures that Prescribed Repositories are able to provide the information to Australian regulators, and that Australian regulators are able to obtain more timely and complete access to information about OTC Derivatives activity that is relevant to Australian financial markets.

Clause [13] of Schedule 1 of the Amending Instrument amends Rule 2.2.1 to insert a new subrule, (4), to provide that that 'tagging' requirement in amended subrule 2.2.1(3) does not apply until 13 April 2015.

Rule 2.2.7 Derivative Transaction Information—Delegation of reporting

Clause [14] of Schedule 1 of the Amending Instrument substitutes a new Rule 2.2.7. Prior to the insertion of new Rule 2.2.7 the Rule provided 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). The Amending Instrument omits and substitutes existing Rule 2.2.7, with a new Rule 2.2.7.

New subrule 2.2.7(1) provides that the Reporting Entity may appoint one or more persons (in the Rule, each a ***Delegate***) to report on behalf of the Reporting Entity in accordance with Rules 2.2.1 to 2.2.5 and 2.2.8.

New subrule 2.2.7(2) provides that a Reporting Entity that appoints a Delegate in accordance with subrule 2.2.7(1) is taken to have complied with Rules 2.2.1 to 2.2.5 in relation to the Reportable Transactions and Reportable Positions which the Delegate has been appointed to report, if the terms of the Delegate's appointment and any related agreements or arrangements are documented in writing and the Reporting Entity makes regular enquiries reasonably designed to determine whether the Delegate is discharging its obligations under the terms of its appointment.

The Reporting Entity retains 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. Revised Rule 2.2.7 addresses concerns raised – particularly, by Phase 3 Reporting Entities—that a Reporting Entity that delegates its reporting responsibilities may be exposed to liability for breaches of the Rules, even if the Reporting Entity takes all reasonable steps to ensure that the reported information is complete, accurate and up-to-date. The revised Rule provides a 'safe harbour' for Reporting Entities, by stating the conditions under which a Reporting Entity will be taken to have complied with Rule 2.2.1 to 2.2.5 where it delegates reporting,

Note 1 to revised Rule 2.2.7 notes by way of example that the Reporting Entity may appoint as a delegate a counterparty of the Reporting Entity, central counterparty, trading platform, service provider, broker or any other third party. Note 2 to revised Rule 2.2.7 notes that while other forms of delegation are permissible under the Rules, a Reporting Entity may only be taken to have complied with the reporting obligations in Rules 2.2.1 to 2.2.5 for those Reportable Transactions and Reportable Positions reported by a Delegate in accordance with Rule 2.2.7.

Lifecycle or snapshot reporting

Clause [15] of Schedule 1 of the Amending Instrument inserts a new Rule 2.2.8.

New subrule 2.2.8(1) provides that a Reporting Entity may comply with Rule 2.2.1 in relation to a Reportable Transaction in an OTC Derivative (***Relevant OTC Derivative***), other than a Derivative that is an Excluded Derivative or that is in a class of Excluded Derivatives at the time the Reportable Transaction is entered into, on a day (***Relevant Day***) by:

- reporting Derivative Transaction Information separately for each Reportable Transaction in the Relevant OTC Derivative; or
- reporting Derivative Transaction Information in relation to the Relevant OTC Derivative on its terms as of the Relevant Day,

The Reporting Entity must otherwise report the information in accordance with the Rules.

New subrule 2.2.8(2) provides that where a Reporting Entity complies with Rule 2.2.1 in relation to a Reportable Transaction that is a modification of an OTC Derivative in accordance with new

paragraph 2.2.1(1)(b), the Reporting Entity does not have to comply with Rules 2.2.1 and 2.2.2 in relation to that Reportable Transaction to the extent those Rules require a Reporting Entity to report the Derivative Transaction Information in Item 55 of Table S2.1(1) for a Reportable Transaction.

New subrule 2.2.8(3) provides that ASIC may determine from time to time that an OTC Derivative, or a derivative product class, is an Excluded Derivative for the purposes of subrule 2.2.8(1), where, in the opinion of ASIC, doing so is desirable in order to enhance the transparency of transaction information available to relevant authorities and the public, promote financial stability or support the detection and prevention of market abuse.

New subrule 2.2.8(4) provides A determination by ASIC for the purposes of new subrule 2.2.8(3) will be published on ASIC's website and takes effect on the day specified in the determination.

New subrule 2.2.8(5) provides that a determination by ASIC for the purposes of subrule 2.2.8(3) may be withdrawn by ASIC, from a date specified in a notice of withdrawal that is not less than 90 calendar days after the date the notice is published on ASIC's website, and once withdrawn ceases to have effect.

New subrule 2.2.8(6) provides, for the purposes of s7 of the *Legislative Instruments Act 2003*, that a determination under subrule 2.2.8(3) is not a legislative instrument.

The Rules require reporting of all Derivative Transactions in an OTC Derivative, including intra-day modifications of an OTC Derivative. This is commonly referred to as "lifecycle reporting".

"Snapshot" reporting is a form of reporting whereby Reporting Entities report positions as of each business day. This is a form of reporting which is permitted in other jurisdictions, including the United States (US), and many Reporting Entities have developed their systems to report in this manner.

"Snapshot" reporting is regarded by industry as simpler and more cost-effective to administer, and generally provides regulators with adequate information to meet their regulatory objectives, particularly from the perspective of financial stability oversight. However, for some kinds of Derivatives, more granular "lifecycle" reporting may be required to facilitate, for example, the detection and prevention of market abuse.

Accordingly, new Rule 2.2.8 includes a mechanism (in new subrule 2.2.8(3) described above) whereby ASIC may determine from time to time that Derivative Transactions in a particular Derivative (referred to in the Rules as an Excluded Derivative) must be reported on lifecycle basis.

Reporting to Prescribed Repositories

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

Column 5 of Table S1.1 sets out the Transaction Reporting Requirements that apply 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. 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.

Clauses [16] and [19] of Schedule 1 of the Amending Instrument amend column 5 of Table S1.1 and column 4 of Table S1.2 respectively, to reflect that while Reporting Entities in Phases 1 to 3 are required to report their Reportable Transactions and Reportable Positions to a Licensed Repository from 1 October 2014, in the event that there is no Licensed Repository, the Reportable Transactions and Reportable Positions must be reported to a Prescribed Repository instead.

Clauses [17] and [18] of Schedule 1 of the Amending Instrument also amend subrule S1.2.1(2)(a) and (b) respectively to refer to the Position Reporting Requirements in column 4 of Table S1.2, correcting a typographical error in the Rules.

ABNs and AVIDs

Schedule 2 of the Rules provides for the information to be reported in accordance with the Transaction Reporting Requirements and the Position Reporting Requirements. Rule S2.1A.1 provides definitions for the terms used in the Tables in Parts S2.1 and S2.2.

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. 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 those items in the Tables in Parts S2.1 and S2.2 that require reporting of information about an entity (e.g. a counterparty or beneficiary to a transaction), a Reporting Entity must report an identifier for that entity in accordance with a 'hierarchy' of identifiers.

Under the hierarchy, the Reporting Entity must report a legal entity identifier (LEI) or interim entity identifier for the entity. Where no LEI or interim entity identifier is available, the Reporting Entity must report an Australian Business Number (ABN) for the entity. If an ABN is not available, other identifiers may be used.

DDRS, the Licensed Repository used by Australian reporting entities, does not currently support the reporting of ABNs and the automatic population of counterparty names using the ABN. Furthermore, because ABNs are an entity identifier that is unique to Australia, it is unlikely that the reporting of ABNs will be supported in the foreseeable future.

Clauses [21], [23] - [27] of Schedule 1 of the Amending Instrument therefore amends the hierarchy, to provide for the reporting of an international business entity identifier issued by Avox Limited (AVID) in place of an ABN, from 13 April 2015. The AVID is part of the International Swaps and Derivatives Association (**ISDA**) 'identifier waterfall'.

To achieve this transition, Clause [20] of Schedule 1 of the Amending Instrument inserts a new definition of "Designated Business Identifier" in Rule S2.1A.1. "Designated Business Identifier" is defined to mean, until 13 April 2015, an ABN and from 13 April 2015, an AVID.

Hedging Transactions

Item 54 of Table S2.1(2) of the Rules provides that the Derivative Transaction Information to be reported includes an indication of whether the Derivative to which the Reportable Transaction

relates is entered into by the Reporting Entity for the purposes of managing financial risk that arises in the ordinary course of business.

Clause [22] of Schedule 1 of the Amending Instrument amends Item 54 of Table S2.1(2) of the Rules to provide that the requirement to report Item 54 information only arises if the Reporting Entity is not an Australian ADI, an AFS Licensee, a CS Facility Licensee, and Exempt Foreign Licensee or a Foreign ADI.

This amendment addresses concerns among Reporting Entities that the requirement to report information in this field is unduly onerous and inappropriate for financial entities for which trading is an integral element of their businesses. The amendment is consistent with the approach taken under the EU reporting regime.

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) Amendment 2015 (No. 1)

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) Amendment 2015 (No. 1)* (the **Legislative Instrument**) are made by ASIC under sections 901A and 901M of the Act, acting with the consent of the Minister under section 901K of the Act.

The Legislative Instrument amends the *ASIC Derivative Transaction Rules (Reporting) 2013* (Rules) by:

- amending the definition of "Regulated Foreign Market" in Rule 1.2.4 to provide greater specificity as to which facilities are included in the definition;
- amending subrule 2.2.1(3) to broaden the circumstances in which a foreign Reporting Entity may obtain substituted compliance for reporting to a Prescribed Repository under a substantially equivalent foreign regime, and adding a requirement that foreign Reporting Entities designate or 'tag' these trades as being reported under the Rules;
- amending Rule 2.2.7 to provide a 'safe harbour' for delegated reporting, where such reporting is done under a written agreement and the Reporting Entity makes regular enquiries reasonably designed to determine whether the delegate is reporting on behalf of the Reporting Entity in accordance with the Rules;
- inserting a new Rule 2.2.8 to make "snapshot reporting" a permanent reporting option under the Rules, while allowing ASIC to require "lifecycle reporting" for certain Derivatives in future under certain circumstances;
- including a requirement that Australian Reporting Entities report to a Prescribed Repository if there is no Licensed Repository available; and
- replacing the requirement to report Australian Business Numbers (ABNs) for an entity with a requirement to report an international business entity identifier issued by AVOX Limited (AVID), in circumstances where a legal entity identifier (LEI) or interim entity identifier is not available.

The amendments made by the Legislative Instrument address several issues where the Rules have either:

- imposed compliance costs on Reporting Entities that are disproportionate to the regulatory benefits gained from obtaining the relevant data; or

- led to undesirable gaps in reporting, where regulators and the market do not have access to comprehensive and complete information that is relevant to Australian financial markets and which impacts fair and efficient market operations.

2. Human rights implications

The Legislative Instrument does not engage any of the applicable rights or freedoms.

3. Human rights implications

The Legislative Instrument is compatible with human rights as it does not raise any human rights issues.