UNPACKING THE AUSTRALIAN OTC DERIVATIVE REPORTING REGIME

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The Australian government has released draft regulations implementing a single sided exemption from the trade reporting regime for over-the-counter (OTC) derivatives. Consultation on the regulations closed in late June and the exemption is to be finalised in preparation for commencement of the final phase of the reporting regime in October this year. The single sided exemption supplements the delegation mechanism already contained in the rules.

Trade reporting is designed to give regulators a more complete picture of the OTC derivatives sector in Australia by requiring relevant derivatives transactions to be reported to a trade repository licensed by the Australian Securities and Investments Commission (ASIC).

Superannuation funds and managed funds which use derivatives that are not exchange traded could be impacted by the regime. These funds will need to assess the extent they can rely on the exemption and put strategies in place now for any residual reporting requirements, so they are ready for the November commencement.

SINGLE SIDED EXEMPTION

The single sided exemption will apply to entities with total gross notional exposure of less than AUD5 billion (referred to as Phase 3B entities, though this term is not used in the draft regulations) and could substantially reduce the regulatory burden for those entities.

Australia's two sided reporting regime will generally require both counterparties to an OTC derivative contract to report information about the trade to a trade repository licensed by ASIC. Where the exemption is available, only one of the counterparties will need to report.

As the regulations are currently drafted, availability of the exemption will depend on the identity of the other counterparty.

If a Phase 3B entity is dealing with an Australian counterparty, the exemption is available where the counterparty:

- is required to report under Australian reporting rules
- actually reports in accordance with Australian reporting rules (even though it is not required to do so).

On the other hand, if a Phase 3B entity is dealing with a foreign entity, the exemption is only available where the counterparty:

- is subject to foreign reporting rules that are substantially equivalent to Australia's reporting rules
- actually reports in accordance with the foreign reporting rules to a prescribed trade repository
- notifies the prescribed trade repository that the trade has an Australian connection. This is referred to as 'tagging' in Australia.

Some industry participants have questioned these eligibility differences and have called for greater alignment. Specifically, it has been asked why entities need to consider whether foreign reporting rules are equivalent to the Australian rules. They argue that foreign reporting and tagging should be sufficient. Alternatively, if this element is retained, it has been suggested that the Government or ASIC could prescribe foreign regimes which they consider to be equivalent.

Furthermore, the exemption will require reporting entities to closely monitor reports submitted by any foreign counterparties to ensure they qualify for the exemption.

If a Phase 3B entity qualifies for the exemption for some, but not all, of its trades it will still need to report to an ASIC licensed trade repository. DTCC Data Repository (Singapore) Pte Ltd is currently the only licensed repository and its onboarding process could take months rather than weeks. Entities with residual reporting obligations should begin that process as soon as possible.

INTERACTION WITH DELEGATED REPORTING

The Australian reporting regime already includes a delegation mechanism. Under this mechanism, reporting entities can delegate their reporting obligations to another entity.

As a result of a "safe harbour" built into the delegation rules, the reporting entity is excused from reporting as long as it makes regular enquiries about the delegate's reporting and takes reasonable steps to ensure the reporting is accurate, complete and current.

For small reporting entities dealing with foreign counterparties, delegation may provide a more effective reporting solution than the single sided exemption. As currently proposed, the single sided exemption would require the reporting entity to ensure all reports are submitted and tagged to Australia. This may be more onerous than the reasonable steps required under delegated reporting.

In response to the Government's consultation, a number of submissions advocated for "safe harbour" provisions to be included in the single sided exemption, mirroring the delegation arrangements. This would mean small reporting entities would not lose the benefit of the exemption just because their counterpart had an isolated reporting failure. This would greatly increase the utility of the exemption. It is not clear, however, whether such changes will be introduced in time for commencement.

The interaction between the single sided exemption as currently proposed and delegated reporting is summarised below.

	Single Sided Exemption		**Delegated Reporting**
	If Trading with an Australian Counterparty	**If Trading with a Foreign Counterparty**	
Current Status	Under consultation		In force
Which Reporting Entities Qualify?	A reporting entity with gross notional exposure of less than AUD5 billion.		Any reporting entity
Which Counterparties Qualify?	Exemption available where counterparty either: ▪ is required to report under the Australian regime ▪ actually reports (even though not required to do so).	Exemption available where counterparty satisfies all of the following: ▪ is required to report under substantially equivalent foreign rule ▪ actually reports ▪ "tags" trades to Australia.	Any counterparties
Who Submits the Report?	Counterparty.		Any person appointed as a delegate (e.g., counterparty, manager, administrator, broker, custodian).
Who is the Report submitted to?	Australian licensed trade repository	Foreign trade repository prescribed in the regulations or by ASIC	Australian licensed trade repository
Ongoing Supervision of the	Reporting entity is not required to supervise counterparty if the counterparty is required to	Reporting entity must ensure the counterparty: ▪ actually reports	Reporting Entity must: ▪ document delegation in

Counterparty or Delegate	report under the Australian regime. If not, reporting entity must ensure the counterparty actually reports every trade.	every trade ▪ tags every trade to Australia.	writing ▪ make regular enquiries of the delegate's reporting ▪ take all reasonable steps to ensure the completeness, ▪ accuracy and currency of the information being reported. Reporting entity is not required to ensure delegate actually reports every trade.

With commencement of the Australian reporting regime only months away, all potential reporting entities will need to finalise their processes for compliance. ASIC believes the industry has had ample time to prepare for commencement and has indicated it will not tolerate non-compliance.

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