



**EXPOSURE DRAFT (05/06/2013)**

# **Corporations Amendment (Derivatives Transactions) Regulation 2013**

**Select Legislative Instrument No. , 2013**

*(Treasury)*



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## **1 Name of regulation**

This regulation is the *Corporations Amendment (Derivatives Transactions) Regulation 2013*.

## **2 Commencement**

This regulation commences on the day after it is registered.

## **3 Authority**

This regulation is made under the *Corporations Act 2001*.

## **4 Schedule(s)**

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

## Schedule 1—Amendments

### *Corporations Regulations 2001*

#### 1 After Part 7.5

Insert:

#### **Part 7.5A—Regulation of derivative transactions and derivative trade repositories**

#### **Division 2—Regulation of derivative transactions: derivative transaction rules**

#### **Subdivision 2.1—Power to make derivative transaction rules**

##### **7.5A.50 Persons on whom requirements cannot be imposed**

- (1) This regulation is made for paragraph 901D(a) of the Act.
- (2) The class of persons on whom the derivative transactions rules cannot impose requirements consists of end users.
- (3) An *end user* is a person who is not:
  - (a) an Australian ADI; or
  - (b) a CS facility licensee; or
  - (c) a financial services licensee; or
  - (d) a person:
    - (i) who provides a financial service, relating to derivatives, only to wholesale clients; and
    - (ii) whose activities, relating to derivatives, are regulated by an overseas regulatory authority.
- (4) This regulation ceases to have effect at the end of 31 December 2014.

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## **Subdivision 2.2—Enforceable undertakings**

### **7.5A.101 Enforceable undertakings**

- (1) This section is made for paragraphs 901F(1)(d) and 903E(1)(d) of the Act.
- (2) ASIC may accept a written undertaking, entered into by a person who is alleged to have contravened section 901E or 903D of the Act, as an alternative to civil proceedings.
- (3) Without limiting subregulation (2), ASIC may accept an undertaking that includes any of the following:
  - (a) an undertaking to take specified action within a specified period;
  - (b) an undertaking to refrain from taking specified action;
  - (c) an undertaking to pay a specified amount within a specified period to the Commonwealth or to some other specified person.

Note: An undertaking may relate to an infringement notice given in relation to the alleged contravention. For example, an infringement notice may require a person to enter into an undertaking; a person may enter into an undertaking to comply with an infringement notice; a person may enter into an undertaking if the person does not comply with an infringement notice or the infringement notice is withdrawn.

- (4) If ASIC agrees, in writing, to the withdrawal or variation of the undertaking, the person who entered into the undertaking may withdraw or vary the undertaking.
- (5) If ASIC is satisfied that the person who entered into the undertaking has breached a term of the undertaking, ASIC may apply to a Court for an order under subregulation (6).
- (6) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make one or more of the following orders:
  - (a) an order directing the person to comply with the term of the undertaking;
  - (b) an order directing the person to pay to the Commonwealth an amount not exceeding the amount of any financial benefit

that the person has obtained directly or indirectly and that is reasonably attributable to the breach;

- (c) an order directing the person to compensate another person who has suffered loss or damage as a result of the breach;
  - (d) any other order that the Court considers appropriate.
- (7) This regulation does not affect the liability of a person to civil proceedings if ASIC does not accept an undertaking in relation to the alleged contravention of section 901E or 903D of the Act.

## **Subdivision 2.3—Infringement notices**

### **7.5A.102 Infringement notices**

- (1) This Subdivision is made for sections 901F and 903E of the Act.
- (2) This Subdivision does not require ASIC to give an infringement notice to a person in relation to the alleged contravention of those sections.
- (3) This Subdivision does not affect the liability of a person to civil proceedings if ASIC does not give an infringement notice to the person in relation to the alleged contravention of those sections.
- (4) This Subdivision does not affect the liability of a person to civil proceedings if:
  - (a) ASIC gives an infringement notice to the person in relation to the alleged contravention of those sections; and
  - (b) either:
    - (i) the notice is withdrawn; or
    - (ii) the person does not comply with the notice in accordance with regulation 7.5A.108.
- (5) This Subdivision does not limit or otherwise affect the penalty that a Court could impose on the person for a contravention of those sections.

### **7.5A.103 Definitions for Subdivision**

In this Subdivision:

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**compliance period** has the meaning given by subregulation 7.5A.108(2).

**infringement notice** means an infringement notice given under regulation 7.5A.104.

**recipient**, in relation to an infringement notice, means the person to whom ASIC gives the infringement notice or intends to give the infringement notice under regulation 7.5A.104.

**rule** means a provision of:

- (a) the derivative transaction rules mentioned in section 901E of the Act; or
- (b) derivative trade repository rules mentioned in section 903D of the Act.

#### **7.5A.104 When infringement notice can be given**

- (1) If ASIC has reasonable grounds to believe that a person has contravened a rule, ASIC may give the person an infringement notice in relation to the alleged contravention.
- (2) ASIC may give a person an infringement notice that is in relation to more than one alleged contravention of a rule.
- (3) If ASIC withdraws an infringement notice given to a person in relation to the alleged contravention of a rule, ASIC may give the person a new infringement notice in relation to the alleged contravention.

Example: An infringement notice given to a person in relation to an alleged contravention of a rule may be withdrawn, and a new infringement notice given to the person in relation to that alleged contravention, if the original infringement notice contained an error.

#### **7.5A.105 Statement of reasons must be given**

- (1) Before giving a recipient an infringement notice, ASIC must:
  - (a) give the recipient a written statement that sets out ASIC's reasons for believing that the recipient has contravened a rule; and

- (b) give the recipient, or a representative of the recipient, an opportunity to:
  - (i) appear at a private hearing before ASIC; and
  - (ii) give evidence to ASIC; and
  - (iii) make submissions to ASIC;in relation to the alleged contravention of the rule.
- (2) If a recipient, or a representative of a recipient, gives ASIC evidence or information under paragraph (1)(b), the evidence or information is not admissible in evidence in any proceedings against the recipient, other than proceedings relating to the evidence or information being false or misleading.

#### **7.5A.106 Contents of infringement notice**

An infringement notice:

- (a) must state the date on which it is given; and
- (b) must be identified by a unique code; and
- (c) must state the name and address of the recipient; and
- (d) must state that it is being given by ASIC under regulation 7.5A.104; and
- (e) must specify details of each alleged contravention of the rule to which the infringement notice relates, including:
  - (i) the conduct that made up each alleged contravention (including, to the extent known, the date on which it occurred and the place at which it occurred); and
  - (ii) each rule that ASIC alleges the recipient has contravened; and
- (f) must, in relation to each rule that ASIC alleges the recipient has contravened, state the maximum pecuniary penalty that a Court could order the recipient to pay for contravening the rule; and
- (g) must, in relation to each alleged contravention of the rule to which the infringement notice relates:
  - (i) specify the penalty (if any) payable for each alleged contravention of the rule; and
  - (ii) if subparagraph (i) applies:

- (A) specify the total penalty that the recipient must pay to the Commonwealth; and
- (B) state that the penalty is payable to ASIC on behalf of the Commonwealth; and
- (C) explain how payment of the penalty can be made; and
- (iii) specify the remedial measures (if any) that the recipient must undertake or institute; and
- (iv) specify the sanctions (if any) that the recipient must accept; and
- (v) specify the terms of an undertaking (if any) that the recipient must enter into under regulation 7.5A.101;
- (h) must state that the recipient may choose not to comply with the infringement notice, but that if the recipient does not comply, civil proceedings may be brought against the recipient in relation to the alleged contravention; and
- (i) must explain what the recipient must do to comply with the infringement notice and the effect of compliance with the infringement notice; and
- (j) must state that the recipient may apply to ASIC:
  - (i) for withdrawal of the notice under regulation 7.5A.111; and
  - (ii) for an extension of time under regulation 7.5A.109; and
- (k) must state that ASIC may publish details of the infringement notice under regulation 7.5A.115; and
- (l) may include any other information that ASIC considers necessary.

Note: For sub-subparagraph (g)(ii)(A), the total penalty is the sum of the penalties payable under subparagraph (g)(i).

### **7.5A.107 Amount of penalty payable to the Commonwealth**

- (1) The penalty payable (if any) for an alleged contravention of a rule is the amount determined by ASIC.

Note: See subsections 901F(2) and 903E(2) of the Act for the maximum penalty payable.

- (2) If an infringement notice is in relation to more than one alleged contravention of a rule, the total penalty payable under the infringement notice is the sum of the penalties payable (if any) for the alleged contraventions.

#### **7.5A.108 Compliance with infringement notice**

- (1) A recipient complies with an infringement notice if, during the compliance period, the recipient does all of the following:
- (a) pays the penalty specified in the infringement notice under sub-subparagraph 7.5A.106(g)(ii)(A) (if any);
  - (b) undertakes or institutes the remedial measures specified in the infringement notice under subparagraph 7.5A.106(g)(iii) (if any);
  - (c) accepts the sanctions specified in the infringement notice under subparagraph 7.5A.106(g)(iv) (if any);
  - (d) enters into an undertaking (including an undertaking to comply with the infringement notice) with the terms specified in the infringement notice under subparagraph 7.5A.106(g)(v) (if any).
- (2) The *compliance period* for an infringement notice:
- (a) starts on the day on which the infringement notice is given to the recipient; and
  - (b) ends:
    - (i) 27 days after the day on which the infringement notice is given to the recipient; or
    - (ii) on another day permitted by this regulation.
- (3) If the recipient applies for a further period of time in which to comply with the infringement notice, and the application is granted, the compliance period ends at the end of the further period allowed.
- (4) If the recipient applies for a further period of time in which to comply with the infringement notice, and the application is refused, the compliance period ends on the later of:
- (a) 28 days after the day on which the infringement notice was given to the recipient; and

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- (b) 7 days after the notice of refusal is given to the recipient.
  - (5) If the recipient applies for the infringement notice to be withdrawn, and the application is refused, the compliance period ends 28 days after the notice of refusal is given to the recipient.

#### **7.5A.109 Extension of compliance period**

- (1) During the compliance period, a recipient may apply, in writing, to ASIC for a further period of no more than 28 days in which to comply with the infringement notice.
- (2) The application must:
  - (a) specify the infringement notice's unique code; and
  - (b) set out the reasons for the application.
- (3) Within 14 days after receiving the application, ASIC must:
  - (a) grant or refuse a further period no longer than the period sought (and no more than 28 days); and
  - (b) notify the recipient in writing of the decision and, if the decision is a refusal, the reasons for the decision.
- (4) If ASIC refuses a further period under paragraph (3)(a), the recipient may not make a further application under subregulation (1) in relation to that infringement notice.
- (5) If ASIC has not granted or refused a further period under paragraph (3)(a) within 14 days after receiving the application, ASIC is taken to have refused a further period.

#### **7.5A.110 Effect of compliance with infringement notice**

- (1) Subject to subregulation (3), if:
  - (a) an infringement notice is given to a recipient in relation to an alleged contravention of a rule; and
  - (b) the infringement notice is not withdrawn; and
  - (c) the recipient complies with the infringement notice;the effects in subregulation (2) apply.
- (2) The effects are:

- (a) any liability of the recipient to the Commonwealth for the alleged contravention of the rule is discharged; and
- (b) no civil or criminal proceedings may be brought or continued by the Commonwealth against the recipient for the conduct specified in the infringement notice as being the conduct that made up the alleged contravention of the rule; and
- (c) no administrative action may be taken by ASIC under section 914A, 915B, 915C or 920A of the Act against the recipient for the conduct specified in the infringement notice as being the conduct that made up the alleged contravention of the rule; and
- (d) the recipient is not taken to have admitted guilt or liability in relation to the alleged contravention; and
- (e) the recipient is not taken to have contravened the rule.

Note: Third parties are not prevented from commencing civil proceedings against the recipient, including under section 1101B of the Act. ASIC is not prevented from applying for an order on behalf of a plaintiff in accordance with the Act.

- (3) Subregulation (2) does not apply if the recipient has knowingly:
  - (a) provided false or misleading information to ASIC; or
  - (b) withheld evidence or information from ASIC;in relation to the alleged contravention of the rule.

#### **7.5A.111 Application to withdraw infringement notice**

- (1) During the compliance period, a recipient of an infringement notice may apply, in writing, to ASIC for the infringement notice to be withdrawn.
- (2) The application must:
  - (a) specify the infringement notice's unique code; and
  - (b) set out the reasons for the application.
- (3) Within 14 days after receiving the application, ASIC must:
  - (a) withdraw or refuse to withdraw the infringement notice; and
  - (b) notify the recipient in writing of the decision and, if the decision is a refusal, the reasons for the decision.

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- (4) Without limiting subregulation (3), ASIC may withdraw the infringement notice after taking into account the following matters:
    - (a) whether the recipient has previously been found to have contravened the rule to which the notice relates;
    - (b) the circumstances in which the contravention set out in the infringement notice is alleged to have occurred;
    - (c) whether an infringement notice has previously been given to the recipient in relation to an alleged contravention of the rule to which the notice relates, and whether the recipient complied with the infringement notice;
    - (d) any other relevant matter.
  - (5) If, under paragraph (3)(a), ASIC refuses to withdraw the infringement notice, the recipient may not make a further application under subregulation (1) in relation to that infringement notice.
  - (6) If ASIC has not withdrawn, or refused to withdraw, the infringement notice within 14 days after receiving the application, ASIC is taken to have refused to withdraw the infringement notice.

#### **7.5A.112 Withdrawal of infringement notice by ASIC**

- (1) ASIC may withdraw an infringement notice given by ASIC without an application under regulation 7.5A.111 having been made.
- (2) Without limiting subregulation (1), ASIC may withdraw the infringement notice after taking into account a matter mentioned in paragraph 7.5A.111(4)(a), (b), (c) or (d).

#### **7.5A.113 Notice of withdrawal of infringement notice**

- (1) A notice withdrawing an infringement notice must include the following information:
  - (a) the name and address of the recipient;
  - (b) the date the infringement notice was given;
  - (c) the infringement notice's unique code.

- (2) The notice must also state that the infringement notice is withdrawn.

#### **7.5A.114 Withdrawal of notice after compliance**

- (1) ASIC may withdraw an infringement notice after the recipient has complied with the infringement notice only if the recipient agrees, in writing, to the withdrawal.
- (2) If an infringement notice is withdrawn after the penalty specified in it (if any) has been paid, the Commonwealth must refund the amount of the penalty to the person who paid it.
- (3) If an infringement notice is withdrawn after the recipient has complied with a requirement specified in the infringement notice:
  - (a) to undertake or institute remedial measures; or
  - (b) to accept sanctions other than a payment of a penalty to the Commonwealth; or
  - (c) to enter into an undertaking;the remedial measures, sanctions or undertaking are taken to no longer be enforceable by ASIC.

#### **7.5A.115 Publication of details of infringement notice**

- (1) If ASIC gives an infringement notice to a recipient, ASIC may, at the end of the compliance period, publish details of the infringement notice.
- (2) If ASIC decides to publish details of the infringement notice, ASIC must publish the details in accordance with either or both of subregulations (3) and (4).
- (3) ASIC may publish details of an infringement notice by publishing in the Gazette:
  - (a) a copy of the infringement notice; and
  - (b) the following statements:
    - (i) a statement as to whether the recipient has complied with the infringement notice;
    - (ii) if the recipient has complied with the infringement notice, a statement that:



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- (A) compliance is not an admission of guilt or liability; and
  - (B) the recipient is not taken to have contravened the rule;
- (iii) if the recipient has not complied with the infringement notice, a statement that:
    - (A) the giving of an infringement notice to a recipient is only an allegation that the recipient has contravened the rule; and
    - (B) the recipient is not taken to have contravened the rule.
- (4) ASIC may publish details of an infringement notice by issuing a written or oral statement that:
- (a) includes an accurate summary of the details of the infringement notice, including:
    - (i) the name of the recipient; and
    - (ii) the amount of the penalty specified in the infringement notice (if any); and
    - (iii) the remedial measures specified in the infringement notice (if any); and
    - (iv) the sanctions specified in the infringement notice (if any); and
    - (v) the terms of an undertaking specified in the infringement notice (if any); and
    - (vi) the conduct specified in the infringement notice as being the conduct that made up the alleged contravention of the rule; and
  - (b) includes the following statements:
    - (i) a statement as to whether the recipient has complied with the infringement notice;
    - (ii) if the recipient has complied with the infringement notice, a statement that:
      - (A) compliance is not an admission of guilt or liability; and
      - (B) the recipient is not taken to have contravened the rule;

- (iii) if the recipient has not complied with the infringement notice, a statement that:
  - (A) the giving of an infringement notice to a recipient is only an allegation that the recipient has contravened the rule; and
  - (B) the recipient is not taken to have contravened the rule.

## **Division 5—Regulation of licensed derivative trade repositories: other obligations and powers**

### **7.5A.150 Obligations and powers—confidential information**

- (1) This regulation is made for subsection 903A(5) of the Act and applies to information given to ASIC, by the operator (or an officer of the operator) of a licensed derivative trade repository, under a provision of:
  - (a) Part 7.5A of the Act; or
  - (b) the regulations made for that Part; or
  - (c) the derivative transaction rules or derivative trade repository rules.
- (2) The information is taken, for the purpose of section 127 (confidentiality) of the ASIC Act, to be given to ASIC in confidence in connection with the performance of ASIC's functions under the Act, unless:
  - (a) the information has been made publicly available in accordance with the provisions mentioned in paragraph (1)(a), (b) or (c); or
  - (b) a law requires or permits the information to be released.

### **7.5A.151 Obligations relating to derivative trade data**

For subparagraph 904B(5)(b)(i) of the Act, every derivative trade repository licensee is excused from complying with a request for derivative trade data under paragraph 904B(2)(e) of the Act.

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**7.5A.200 ASIC may assess licensee's compliance**

- (1) This regulation is made for paragraph 904J(4)(d) of the Act.
- (2) The following persons or bodies are prescribed for that paragraph:
  - (a) the Clean Energy Regulator;
  - (b) the Australian Competition and Consumer Commission;
  - (c) the Australian Prudential Regulation Authority;
  - (d) the Australian Taxation Office;
  - (e) the Australian Transaction Reports and Analysis Centre;
  - (f) an authority of a State or Territory having functions and powers similar to those of the Director of Public Prosecutions;
  - (g) the police force or service of each State and the Northern Territory;
  - (h) the Department of Consumer and Employment Protection of Western Australia;
  - (i) the Commissioner of State Revenue of Western Australia;
  - (j) the Department of Fair Trading of New South Wales;
  - (k) the Office of Fair Trading and Business Affairs of Victoria;
  - (l) the State Revenue Office of Victoria;
  - (m) the Office of Consumer Affairs of Queensland;
  - (n) the Office of State Revenue of Queensland;
  - (o) the Office of Consumer and Business Affairs of South Australia;
  - (p) the Office of Consumer Affairs and Fair Trading of Tasmania;
  - (q) the Department of Treasury and Finance of Tasmania;
  - (r) the Consumer Affairs Bureau of the Australian Capital Territory;
  - (s) the Fair Trading Group of the Northern Territory.

## **Division 7—Regulation of prescribed derivative trade repositories**

### **7.5A.250 Obligations and powers—confidential information**

- (1) This regulation is made for subsection 906A(3) of the Act and applies to information given to ASIC, by the operator (or an officer of the operator) of a licensed derivative trade repository, under a provision of:
  - (a) Part 7.5A of the Act; or
  - (b) the regulations made for that Part; or
  - (c) the derivative transaction rules or derivative trade repository rules.
- (2) The information is taken, for the purpose of section 127 (confidentiality) of the ASIC Act, to be given to ASIC in confidence in connection with the performance of ASIC's functions under the Act, unless:
  - (a) the information has been made publicly available in accordance with the provisions mentioned in paragraph (1)(a), (b) or (c); or
  - (b) a law requires or permits the information to be released.

## **Division 8—Other matters**

### **7.5A.270 Record-keeping**

- (1) This regulation is made for paragraph 854A(1)(b) of the Act.
- (2) A derivative trade repository licensee must keep the following records:
  - (a) a list of names and contact details of each director, secretary and senior manager of the licensee;
  - (b) a list of names and contact details of individuals who hold more than 15% of the voting power in the licensee.
- (4) The licensee must keep the records for at least 5 years.