

15 June 2012

Manager, Financial Markets Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600
Australia

Submitted to: financialmarkets@treasury.gov.au

Re: **Implementation of a framework for Australia's G20 over-the-counter derivatives commitments**

Dear Sir/Madam:

MarkitSERV¹ is pleased to submit the following comments to the Treasury in response to its Consultation Paper on *Implementation of a framework for Australia's G20 over-the-counter derivatives commitments* (the "**Consultation Paper**" or "**CP**").

Introduction

MarkitSERV is a provider of confirmation, connectivity, and reporting services to the global OTC derivatives markets, making it easier for participants in these markets to interact with each other. Specifically, we provide trade processing, confirmation, matching and reconciliation services for OTC derivatives across regions and asset classes, as well as universal middleware connectivity for downstream processing such as clearing and reporting. Such services, which are offered also by various other providers, are widely used by participants in these markets today and are recognized as tools to increase efficiency, reduce cost, and secure legal certainty.

With over 2,400 firms globally using the MarkitSERV platforms, including over 25,000 buy-side fund entities, our legal, operational, and technological infrastructure plays an important role in supporting the OTC derivatives markets in Asia, Europe, the United States, and elsewhere. In Australia, MarkitSERV has provided its services to participants in the OTC derivatives markets for many years. Today, all of the major market makers, inter-dealer brokers, and buy-side institutions are using the platform. On that basis, we believe that a large portion of activity in AUD-denominated interest rate swaps is processed and confirmed via our platforms.

By integrating electronic allocation, trade confirmation and portfolio reconciliation MarkitSERV provides a single gateway for the processing of OTC derivatives transactions. Based on our experience as provider of connectivity and processing services, we have been actively and constructively engaged in the debate about Regulatory Reform of the global OTC derivatives markets and the implementation of

¹ MarkitSERV, jointly owned by The Depository Trust & Clearing Corporation (DTCC) and Markit, provides a single gateway for OTC derivatives trade processing. The company offers trade processing, confirmation, matching, and reconciliation services across regions and asset classes, including interest rate, credit, equity, and foreign exchange derivatives. MarkitSERV also connects dealers and buy-side institutions to trade execution venues, CCPs, and trade repositories. In 2011, over 20 million OTC derivative transaction processing events were processed using MarkitSERV. Please see www.markitserv.com for additional information.

the Pittsburgh G20 commitments.² Over the last 18 months we have submitted over 23 comment letters to regulatory authorities around the world, we have participated in numerous roundtables and we regularly provide the relevant authorities with our insights on current market practice, for example in relation to the electronic confirmation of OTC derivatives transactions, efficient ways of reporting them to Trade Repositories (“*TRs*”), or the reconciliation of existing portfolios of such transactions. We have also advised regulatory authorities on appropriate approaches to enabling a timely and cost-effective implementation of newly established requirements, for example through the use of multi-layered phase-in or by providing participants with a choice of means for satisfying regulatory requirements.

We welcome the Treasury’s consultation regarding the implementation of possible regulatory reforms for the Australian OTC derivatives markets and we appreciate the opportunity to provide you with our comments. Please find below our comments in relation to a) access to eligible facilities; b) back loading; c) reporting to Trade Repositories; d) domestic vs international TRs; e) access to and use of TR data; f) public reporting; as well as g) data reported to TRs and phase-in of the various requirements.

Comments

5. Do you agree that non-discriminatory access requirements should be imposed on eligible facilities?

We agree that eligible facilities should be required to provide non-discriminatory access on fair and open terms to Australian market participants. However, such access would also need to be provided to independent third-party providers such as MarkitSERV that offer agnostic connectivity both to execution venues and to TRs and CCPs and often act on behalf of counterparties to establish connectivity. We believe that the requirement for non-discriminatory access also to other infrastructures will foster competition in the OTC derivatives marketplace which is ultimately to the benefit of all market participants.

Such approach also seems consistent with CPSS-IOSCO’s Principles for Financial Market Infrastructures (“*FMI*s”).³ These Principles state that FMIs should have objective, risk-based and publicly disclosed criteria for participation that permit fair and open access.⁴ The Principles also specify that an FMI should allow for fair and open access to its services, including by direct and indirect participants and other FMIs.

Further, we believe that situations should be prevented where eligible facilities impose an unnecessary restraint on competition by bundling their service offerings. The Treasury should therefore consider establishing a specific prohibition on TRs from bundling their TR services with other services, which is an approach that has been followed in other jurisdictions. We believe that the same approach should also apply to clearing and execution platforms and should prohibit them from bundling their clearing and execution services, respectively, with other services.

10. From the point of view of your business and/or of your clients, do you have any concerns around any ‘back loading’ requirements? For example, are there any problems with obligations applying to transactions that are outstanding at the time the rule is made?

To enable regulatory authorities to develop a comprehensive understanding of the relevant OTC derivatives markets, recordkeeping and reporting requirements would need to apply not only to new

² “Leaders’ Statement: The Pittsburgh Summit” (Sept. 24-25, 2009), available at http://www.g20.org/pub_communiques.aspx.

³ CPSS-IOSCO: Principles for Financial Market Infrastructures (April 2012).

⁴ CPSS-IOSCO Principle 18.

transactions but also to those that are outstanding already. This view has already been reflected in some jurisdictions where requirements for the back loading of transactions into TRs have been established. For example, the CFTC recently finalized swap data recordkeeping and reporting requirements for pre-enactment and transition swaps.⁵ These requirements in relation to “historical swaps” aim to provide regulators with a “complete picture” of the OTC derivatives market by including data for transactions that were executed in the past.⁶ Specifically, the rules require reporting to a Swap Data Repository (“**SDR**”) of all OTC derivative transactions that were outstanding on the effective date of the Dodd-Frank Act, regardless of whether they still exist on the compliance date or have expired already.⁷

However, we believe that any requirement to report transactions that have been executed in the past should only apply to transactions that are live as of the compliance date, not to those that existed at the time that the regulations became effective. This is because requiring firms to backload into TRs transactions that have already matured or have been terminated prior to the compliance date creates little value for regulatory authorities but a potentially significant burden on firms.

Questions 11, 12, and 13: Do you agree with the option of prescribing a broad range of derivative classes to be subject to the mandate for trade reporting? Do you agree with the option of including a broad range of entities in the mandate to report trades? If not what option do you prefer? Are there specific classes of entity that should be excluded from the potential reach of trade reporting DTRs?

Based on our experience in supporting market participants across multiple jurisdictions to achieve compliance with requirements to report OTC derivatives transactions to TRs, we know that the implementation of such requirements can be complex and create significant costs. This is particularly true as such requirements are established in many jurisdictions at almost the same time, which not only leads to duplicative but often also conflicting requirements.

On that basis, we believe that, when the Treasury designs requirements to report transactions in OTC derivatives to a TR for Australia, it should provide the relevant parties with sufficient flexibility to simplify the task of reporting as much as possible. Further, the requirements should take into account the market practices that have been established in the global OTC derivatives markets over the years and permit that, where appropriate, such practices can be used to satisfy the newly created regulatory requirements. Such approach will help avoiding the creation of unnecessary cost and it will enable a timely implementation. At the same time, however, the requirements need to ensure the accuracy of the data that is reported to and stored in the relevant TRs.

Specifically, we believe that the Treasury should take the following recommendations into account when it aims to achieve these objectives:

- Allow delegation to third parties – Experience has shown that it will often be most efficient if the reporting to a TR is not performed by the counterparties to the transaction themselves, but by third parties who are specialized on this task and benefit from economies of scale. Allowing counterparties to use such third-parties for the reporting to TRs can therefore enable a cost-effective and timely implementation of the proposed reporting requirements. The Treasury should hence explicitly permit counterparties to choose how to best satisfy their reporting obligations,

⁵ Swap Data Recordkeeping and Reporting: Pre-Enactment and Transition Swaps, 17 CFR Part 46 (finalized May 18, 2012).

⁶ Gary Gensler, Statement of Supporting Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps (May 18, 2012).

⁷ The rule specifies what records must be kept and what data must be reported. It is also designed to ensure that historical swap data is available to regulators through SDRs.

including by the use of third parties. Such approach would be consistent with requirements that have been established in other jurisdictions.⁸

- Ensure data accuracy - It is established practice in international OTC derivatives markets that counterparties confirm the complete set of transaction details before the verified record of the transaction is reported to the TR, either by one of the counterparties or by a third party. Such approach will ensure the accuracy of the data that is reported to the TR, while it avoids the need for the TR to reconcile several records that it might otherwise receive for a single transaction. We believe that the Treasury should therefore not only permit, but encourage, the reporting by only *one* party of transaction records that have been *verified by both counterparties*. Ultimately, such approach can ensure data accuracy and significantly reduce the burden to counterparties. It is also consistent with regulation proposed in other jurisdictions.⁹
- Eliminate duplicative requirements - As part of the Regulatory Reform efforts in the OTC derivatives markets, TRs will be set up across asset classes and regions to be the providers of definite records for OTC derivatives transactions to regulatory authorities. TRs are expected to perform this function regardless of whether a specific regulator wants to perform systemic risk analysis, market surveillance, or identify any market manipulation or insider trading. We therefore believe that the existence of any duplicative requirements in a jurisdiction where the same transactions would be reported several times under different regulatory regimes should be avoided.¹⁰ We believe that it will be in the interest of all stakeholders if TRs were used as the source of all reporting to the various recipients as they can ensure that it will occur in the most efficient and timely fashion.

Questions 25 and 26: From the point of view of your business and/or that of your clients, do you have concerns with reporting Australian trades to Australian and/or international trade repositories? Would Australian market participants support a domestic trade repository as an alternative to an international trade repository, recognizing there are likely to be cost implications in establishing and maintaining a trade repository?

Based on our experience in discussing the issue of “domestic vs. international TR” with regulatory authorities and other stakeholders in various other jurisdictions, we urge the Treasury to very carefully analyse the benefits and drawbacks, including the costs, before making any decision on whether the establishment of a domestic TR for OTC derivatives should be required.

Transparency in financial markets is most useful if it is provided in a consolidated fashion. We are therefore concerned that the creation of various domestic TRs for OTC derivatives could result in duplicative reporting of transactions and might create fragmented data that is not sufficiently harmonized to be aggregated. Any data fragmentation or duplicative reporting will reduce the benefit of transparency in the OTC derivatives market, so it should be avoided wherever possible. We believe that the most cost-effective and efficient approach to capturing, storing, and providing information

⁸ Real Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012) and Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012). See Swap Data Recordkeeping and Reporting, Section 45.9. Even if the reporting obligation often falls explicitly on certain entities, the Commission recognizes that efficiencies and decreased cost may be gained by engaging third parties. Registered entities and counterparties that are required to report may contract with third party service providers to facilitate reporting, but remain fully responsible for timeliness and accuracy of reported data.

⁹ Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 Fed. Reg. 54538 (September 1, 2011). When trade data is reported by a counterparty, the Swap Data Repository is required to notify both counterparties of the data reported and receive acknowledgement of the accuracy from both counterparties. The Swap Data Repository will not be required to affirmatively communicate with both counterparties when data is received from a Swap Execution Facility, Designated Contract Market, Designated Clearing Organization or third-party service provider if the Swap Data Repository reasonably believes the data is accurate, the data reflects that both counterparties agreed to the data and the counterparties were provided with a 48-hour correction period.

¹⁰ This might apply, for example, to so-called transaction reporting regimes to market regulators, or to the reporting of transactions to prudential regulators by individual institutions.

about OTC derivatives transactions to regulatory authorities around the globe would be the establishment of global TRs that feed the relevant data to local regulators, or where necessary into other TRs. Such approach would not only be preferable because of cost and efficiency considerations, but the use of global TR structure would also help avoiding the dangers of double reporting and data fragmentation.¹¹

We therefore believe that the creation of domestic TRs should generally be avoided. However, we acknowledge that some jurisdictions might see sufficient reason to establish their own domestic TRs. Where that is the case, it will be essential for the relevant regulatory authorities to ensure the accuracy of the data that is held in any domestic TRs and its consistency with data that is held in foreign TRs. We believe that these objectives can best be achieved if international providers of Independent Verification Services (“*IVS*”)¹² can be tasked with reporting in multiple jurisdictions.¹³ Further, OTC derivative transactions are often entered into between international counterparties that might be subject to multiple reporting obligations. We therefore welcome the approach taken by regulatory authorities in some countries¹⁴ that permits the reporting of the OTC derivatives transaction by the foreign counterparty to a foreign, recognized TR.¹⁵

Questions 25.2, 28, and 29: What restrictions should there be on the use of reported data by trade repositories? Should any requirements be imposed on trade repositories with respect to obligations to provide third parties with access to the information (subject to authorisation from data providers and regulators)? Do you have any initial views on the property rights in trade information passed to trade repositories?

We believe that the Treasury should take the following considerations into account when making determinations in respect to the ownership and use of the data that has been reported to a TR:

- The task of TRs is to receive, store, and make available accurate data of OTC derivatives transactions. TRs should not be conflicted by aiming to monetize the data that they receive and they should only be permitted to do so if they received the permission from the reporting parties.
- TRs need to generate revenues to enable them to perform their services. They should therefore be permitted to charge the reporting parties on a fair and not unreasonable basis.
- Counterparties that report transaction data to the TR should be able to access the data that they have reported without any unreasonable restrictions being imposed on them.
- The transaction data that is stored by TRs is often needed as input into post-trade processing activities and other services. TRs should therefore be required to provide open, non-discriminatory access to third party service providers of ancillary services such as confirmation or portfolio

¹¹ The ability to consolidate global OTC derivatives data will be complicated by differing regulatory requirements and domestic practices. Two of the complications that are likely to arise due to differing reporting requirements are double reporting and data fragmentation. Double reporting will happen if more than one jurisdiction requires data reporting for cross-border transactions (and possibly even for transactions that do not stretch across any borders if that data had to be reported to multiple TRs). Data fragmentation occurs if the reported data is stored and/or disseminated by various entities and cannot be easily consolidated. Both double reporting and data fragmentation can endanger the value of the transparency that is provided to regulators and the public.

¹² We define IVS as “entities that act independently from and on behalf of the counterparties to the transaction to facilitate the agreement of a verified record of the complete transaction details that is used for subsequent processing.”

¹³ As many OTC derivatives transactions are cross-border, their processing is often facilitated by IVSs who operate internationally. These entities tend to operate across jurisdictions, so it will often be easier and more efficient to task them with ensuring the compliance of participants across various national requirements than for counterparties to handle such responsibilities themselves. We believe that the use of such entities for reporting, as well, would provide benefits to the international regulatory authorities, as well as market participants. We therefore believe it is important for counterparties to be able to delegate their various regulatory obligations to internationally-operating third party service providers.

¹⁴ Monetary Authority of Singapore Consultation Paper P003-2012: Proposed Regulation of OTC Derivatives. February 2012.

¹⁵ See Monetary Authority of Singapore Consultation Paper P003-2010 Section 4.7.

reconciliation.¹⁶ However, the provision of access to such third-parties to the TR data should be subject to the permission of the reporting party.

The Treasury should note that such approach would be consistent with other jurisdictions.¹⁷

25.4 Should the prices and sizes of individual transactions reported to trade repositories be made publicly available? If so, do you have any views on the time frame in which the information should become publicly available? Should there be different time periods for public release of transaction data depending on the size of particular transactions?

MarkitSERV does not have a view on whether there is a need to establish a post-trade transparency regime for OTC derivatives in Australia. However, if the Treasury decided to introduce such a regime we believe that it should take the following considerations into account in relation to its implementation.

Based on our experience in helping market participants across the globe to comply with upcoming requirements to report their transactions in OTC derivatives, we know that these requirements impose a significant burden on the industry. This is particularly true given that such requirements are established in various jurisdictions at almost the same time, but also that they often differ to some extent. We therefore encourage regulators to harmonize, to the extent possible, requirements to report transaction to TRs. In addition, regulators should also avoid creating duplicative requirements within each jurisdiction.

Further, as we have seen in other jurisdictions,¹⁸ the reporting of a transaction to a TR (as basis for the creation of transparency for regulators) and the reporting of the same transaction to a “public disseminator” (as basis for the creation of post-trade transparency) are often treated as two distinct, separate requirements. While this might be somewhat unavoidable given the nature of the rule writing we believe it is important that these requirements are harmonized in their substance so that the reporting of both datasets can be performed simultaneously. This will not only be cost-efficient but it will also enable a timely implementation of these requirements.

34. Do you have any preliminary views on matters to which DTRs should apply?

We believe that the CP correctly identifies the issues that the Derivative Transaction Rules (“**DTRs**”) should encompass. While we have already provided comments on several issues that might be relevant for the DTRs please find below our thoughts on a) what information should be reported in relation to a transaction and b) the phase-in of implementation of the various requirements.

- Data to be reported

Determining which of the many data fields that constitute the details of an OTC derivatives transaction have to be reported to a TR and how these data fields should be reported is a complex and challenging task. We note that a number of regulatory authorities have spent significant amounts of time aiming to capture all the intricacies of the almost infinite variety of products that trade in the OTC derivatives market. These efforts often resulted in the creation of numerous and complicated lists of data fields that differentiate both between asset class and product categories. We recommend that, to enable a

¹⁶ Such services can be valuable to the reporting parties or could also provide transparency and data to the Treasury or other relevant regulatory authorities.

¹⁷ Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 Fed. Reg. 54538 (September 1, 2011). Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories, (published 20 October, 2011).

¹⁸ See Real Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012) and Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012).

timely and cost-efficient implementation of the reporting requirement, one should follow a two-pronged approach in defining what data sets have to be reported to the TR:

- A basic data set that contains key economic terms in normalized data fields should be reported to a TR for every derivative transaction that is covered by the regime. Such data set could be applicable across asset classes and products, and the number of additional fields that are asset class specific would be very limited.¹⁹
- Further, all relevant elements of the transaction somehow need to be captured in TRs so they can be made available to regulatory authorities if needed. We believe that the Treasury should therefore require counterparties to also report the full set of transaction confirmation data (either in normalized data fields or as a copy/electronic image of the paper confirmation, where appropriate) to the TR for each OTC derivatives transaction.

We believe that the combination of reporting a limited set of key economic data (as normalized data fields) in addition to the full confirmation (in the appropriate format) will be an efficient way of achieving the regulatory objectives of data reporting to TRs. Such approach would also be consistent with requirements that have been established in other jurisdictions.²⁰ We further recommend that international regulators coordinate their efforts to agree on a set of minimum key economic terms that need to be reported in verified format. Such harmonization would significantly aid parties in their attempts to satisfy the reporting requirements that are established by regulators globally.

- **Phase-in of requirements**

We believe that, given the multitude of requirements and the large number of entities that are affected, the compliance with G20 related requirements for OTC derivatives should be phased in and sequenced appropriately to enable a cost effective and timely implementation. We further believe that there is a natural order to implementing the various requirements which is 1) definitions/registration, 2) regulatory reporting/TRs, 3) central clearing/CCPs, and 4) public reporting and trading requirement/trading venues. Specifically we believe that:

- The Treasury/ASIC should first accept applications for TRs, regulated clearing organizations and regulated execution facilities. Registering and identifying these entities will be an important first step towards establishing the infrastructure on which the rest of the rules will rely. The Treasury/ASIC should also consider pre-registering these entities to facilitate a timely transition to the new market designed by the proposed regulatory reforms.
- Because certain regulatory reforms cannot be appropriately finalized or implemented without an analysis of a significant amount of trade data, the Treasury/ASIC should initially encourage participants to voluntarily submit data to TRs and collect and use such data for further analysis. Thereafter, the Treasury/ASIC should require parties to comply with regulatory reporting requirements to TRs, which will permit the Treasury/ASIC to analyze the entire market.
- Following the formal establishment of regulatory reporting, the Treasury/ASIC should implement any clearing requirements because any reporting and execution requirements will be dependent on the determination of which transactions should be subject to clearing.
- Only thereafter the Treasury/ASIC should make any determination whether post-trade reporting and/or an execution mandate was appropriate in Australia. This is because the data that will be

¹⁹ In the United States, the CFTC's final real-time and swap data reporting rules phase-in compliance with the reporting requirements by category of market participant, by asset class, and over time. See Real Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012) and Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012).

²⁰ Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012).

collected via TRs will be useful to market participants executing on a registered execution facility and will be useful to the execution facilities when building and optimizing their product offerings. Finally, the Treasury/ASIC should review clearing and other observed data to determine what transactions should be subject to any proposed execution reforms.

We further believe that most of these individual requirements should be phased in by category of market participant and by asset class. Such approach could, for example, reflect that certain market participants are more prepared or better resourced for compliance than others²¹ and that the degree of standardization and electrification varies significantly between asset classes.²²

Such multi-pronged phase-in of the various requirements would be consistent with what has been proposed in other jurisdictions.²³

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MarkitSERV appreciates the opportunity to comment on the Treasury's Consultation Paper on *Implementation of a framework for Australia's G20 over-the-counter derivatives commitments*. We would be happy to elaborate or further discuss any of the points addressed above. In the event you may have any questions, please do not hesitate to contact the undersigned or Henry Hunter at henry.hunter@markitserv.com.

Yours sincerely



Jeff Gooch
Chief Executive Officer
MarkitSERV

²¹ Active dealers vs infrequent users, for example corporates.

²² Credit and interest rates vs commodities and equities.

²³ For example Securities and Exchange Commission: Statement of General Policy on the Sequencing of the Compliance Dates for final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act. (June 11, 2012).