

# ASIC REGULATED FOREIGN MARKETS DETERMINATION [OTC DET 13/1145]

## EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*ASIC Derivative Transaction Rules (Reporting) 2013*

The Australian Securities and Investments Commission (*ASIC*) makes the ASIC Regulated Foreign Markets Determination (the *ASIC Determination*) under subrule 1.2.4(3) of the *ASIC Derivative Transaction Rules (Reporting) 2013* (the *Rules*).

Under subrule 1.2.4(3), ASIC may determine from time to time that a financial market in a foreign jurisdiction is a 'Regulated Foreign Market' 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..

Capitalised terms in this Explanatory Statement refer to the corresponding defined terms in the Rules.

### 1. Background

*ASIC Derivative Transaction Rules (Reporting) 2013*

In July 2013, ASIC, acting with the consent of the Minister under section 901K of the Act, made the Rules under section 901A of the Act. The Rules impose reporting requirements (within the meaning of subsection 901A(6) of the Act), and incidental and related requirements (within the meaning of paragraph 901A(2)(d) of the Act), on 'Reporting Entities'.

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 about their positions in relation to 'OTC Derivatives' (referred to in the Rules as 'Reportable Positions'), to licensed or prescribed derivative trade repositories.

The Rules seek 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 the reporting (referred to as 'transaction reporting') of transaction information on all OTC derivatives to 'trade repositories' (centralised registries that maintain an electronic database of records of transactions);
- implement an Australian transaction reporting regime in accordance with the recommendations in the March 2012 report of the Australian Council of Financial Regulators entitled *OTC Derivatives Market Reform Considerations*; and
- achieve the objectives of the *Corporations Legislation Amendment (Derivative Transactions) Act 2012*, by increasing transparency in the OTC derivatives markets and giving regulators and market participants access to valuable data with which to assess the risks associated with the OTC derivatives market.

#### Rule 1.2.4

Rule 1.2.4 provides a definition of ‘OTC Derivative’ for the purposes of the Rules. 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)’.<sup>1</sup>

Subrule 1.2.4(2) of the Rules in turn 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
- 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 Regulations<sup>2</sup> or any other financial market that ASIC does not have the function of supervising under section 798F of the Act.’<sup>3</sup>

#### *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.

The consequence of a financial market being a Regulated Foreign Market is that Derivatives entered into on the Regulated Foreign Market are not OTC Derivatives under the Rules and do not need to be reported by Reporting Entities under the Rules.

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)).

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<sup>1</sup> At the time of making the ASIC Determination: commodity derivatives that are not electricity derivatives; credit derivatives; equity derivatives; foreign exchange derivatives; and interest rate derivatives: see the *Corporations (Derivatives) Determination 2013* made on 2 May 2013.

<sup>2</sup> At the time of making the ASIC Determination: 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.

<sup>3</sup> At the time of making the ASIC Determination: 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).

## CP 205

ASIC consulted on the Rules in its March 2013 Consultation Paper 205: *Derivative transaction reporting* (CP 205). In CP 205, ASIC proposed a definition of 'OTC Derivative' in Rule 1.2.4 covering any derivative transaction that is not undertaken on a market subject to ASIC supervision under Part 7.2A of the Act.

As ASIC noted in Report 357: *Response to submissions on CP 205 Derivative transaction reporting*, a number of respondents to CP 205 submitted that the wording of this requirement would effectively require the reporting to 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, as most trade repositories are not yet able to receive reports on exchange-traded derivatives. It was also submitted that these transactions are not intended to be captured under a mandatory reporting regime, and, as they are undertaken on markets equivalent to Australian licensed markets, they are already subject to sufficient oversight by the operator of that market and markets authority in that jurisdiction. It was also noted that exchange-traded derivatives tend to have a lower risk profile compared to other OTC derivative products.

A number of respondents therefore argued that exchange-traded derivatives should be carved out of the definition of OTC derivative transactions.

ASIC recognises that exchange-traded derivatives are already subject to some level of transparency to the market, and, being centrally cleared, are less likely to result in substantial risks to reporting entities (though of course they are not without risk).

On that basis, ASIC amended Rule 1.2.4 to allow ASIC to from time to time exclude from the reporting requirement Derivatives entered into on markets with sufficiently equivalent supervision and reporting requirements to a Part 7.2A market in respect of market integrity and transparency.

## **2. Purpose of the Determination**

The ASIC Determination determines 51 Regulated Foreign Markets that in ASIC's opinion at the time of making the ASIC Determination, meet the criteria in subrule 1.2.4(3). The ASIC Determination takes effect on 20 September 2013.

The Regulated Foreign Markets in the ASIC Determination are all are operated by members of the World Federation of Exchanges. The WFE's membership criteria are published on its website. Broadly, WFE members are expected to:

- be significant within their country of origin, based on their size and their role in supporting, the formation of investment capital or the management of investment and economic risks, and should be an important factor within the home country's economy;
- be licensed as an exchange and regulated and supervised by an independent, public authority that is in turn a member of IOSCO, and should also have their own specific responsibilities to regulate the markets and market participants;
- operate an active platform for raising initial and secondary capital, and provide options or futures contracts for managing risk; and

- pursue purposes that are in the public interest, having as a goal to be fair, orderly and neutral to protect all public participants.

Additionally, all of the Regulated Foreign Markets in the ASIC Determination are based in jurisdictions with which ASIC has existing regulatory cooperation arrangements and regular exchanges on cross-border issues through a range of fora including the International Organization of Securities Commissioners (IOSCO) and the OTC Derivatives Regulators Group.

### **3. Consultation**

ASIC has not consulted separately on the ASIC Determination. However, as noted in the background to this Explanatory Statement, by providing for certain exchange-traded derivatives to be carved out of the definition of ‘OTC Derivative’ for the purposes of the Rules the ASIC Determination takes into account feedback received to CP 205 that:

- there are costs and operational issues associated with reporting exchange-traded transactions;
- trade repositories are not yet able to receive reports on exchange-traded derivatives;
- exchange-traded derivatives are not intended to be captured under a mandatory reporting regime, and as they are undertaken on markets equivalent to Australian licensed markets, they are already subject to sufficient oversight by the operator of that market and markets authority in that jurisdiction;
- exchange-traded derivatives tend to have a lower risk profile compared to other OTC derivative products; and
- exchange-traded derivatives should be carved out of the definition of OTC derivative transactions.

ASIC intends to engage in ongoing consultation with industry to ensure that the ASIC Determination remains appropriate, and is updated as necessary.

### **4. Statement of Compatibility with Human Rights**

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

## **ATTACHMENT A – Statement of Compatibility with Human Rights**

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

### ***ASIC REGULATED FOREIGN MARKETSDETERMINATION [OTC DET 13/1145]***

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 Australian Securities and Investments Commission (**ASIC**) makes this legislative instrument (the **ASIC Determination**) under subrule 1.2.4(3) of the *ASIC Derivative Transaction Rules (Reporting) 2013* (the **Rules**).

The Rules impose reporting requirements on ‘Reporting Entities’ 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’ for the purposes of the Rules. 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)’.<sup>4</sup>

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
- 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 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

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<sup>4</sup> At the time of making the ASIC Determination: commodity derivatives that are not electricity derivatives; credit derivatives; equity derivatives; foreign exchange derivatives; and interest rate derivatives: see the *Corporations (Derivatives) Determination 2013* made on 2 May 2013.

an operator specified in regulation 10.15.02 of the Regulations<sup>5</sup> or any other financial market that ASIC does not have the function of supervising under section 798F of the Act.<sup>6</sup>

Under subrule 1.2.4(3), ASIC may determine from time to time that a financial market in a foreign jurisdiction is a 'Regulated Foreign Market' 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.

The consequence of a financial market being a Regulated Foreign Market is that Derivatives entered into on the Regulated Foreign Market are not OTC Derivatives under the Rules and do not need to be reported by Reporting Entities under the Rules.

The ASIC Determination determines 51 financial markets as Regulated Foreign Markets for the purposes of subrule 1.2.4(2) of the Rules.

## **2. Human rights implications**

This legislative instrument does not have any effect on human rights and freedoms recognised or declared in the international instruments listed in section 3 of *the Human Rights (Parliamentary Scrutiny) Act 2011* because it does not engage any of the applicable rights or freedoms.

## **3. Conclusion**

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

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<sup>5</sup> At the time of making the ASIC Determination: 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.

<sup>6</sup> At the time of making the ASIC Determination: 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).