

# ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844

## ASIC Corporations (Repeal) Instrument 2015/859

### EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes the *ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844* (the **Principal Legislative Instrument**) and the *ASIC Corporations (Repeal) Instrument 2015/859* (the **Repealing Legislative Instrument**) under paragraph 907D(2)(a) of the *Corporations Act 2001 (Act)*.

Under paragraph 907D(2)(a) of the Act, ASIC may exempt a person or class of persons from all or specified provisions of the *ASIC Derivative Transaction Rules (Reporting) 2013 (Rules)*.

An exemption may apply unconditionally or subject to specified conditions, and a person to whom a condition specified in an exemption applies must comply with the condition.

#### 1. Background

In July 2013, ASIC, acting with the consent of the Minister under section 901K of the Act, made the Rules. Unless explained otherwise, capitalised terms used in this Explanatory Statement have the meaning given by the Rules.

The Rules impose reporting requirements in relation to OTC Derivatives on ‘Reporting Entities’.

Under Rule 2.2.1 of 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 (referred to in the Rules as ‘Reportable Positions’) in relation to OTC Derivatives, to a Licensed Repository or a Prescribed Repository. These requirements are referred to in the Rules as the ‘Reporting Requirements’.

ASIC has previously granted time-limited exemptions (**Phase 1 Exemptions**) to each of the Phase 1 Reporting Entities to facilitate their transition into the trade reporting regime.<sup>[2]</sup>

ASIC has also previously granted time-limited transitional exemptions (**Phase 2 Exemptions**) to all Phase 2 Reporting Entities<sup>[3]</sup>. Phase 2 entities commenced reporting credit and interest rate derivatives on 1 April 2014, and commenced reporting the remaining asset classes (equity derivatives, foreign exchange derivatives and commodity derivatives that are not electricity derivatives) on 1 October 2014.

In September 2014, ASIC provided further time-limited exemptive relief extending elements of the Phase 1 Exemptions and Phase 1 Exemptions through a legislative instrument applying to all Reporting Entities, ASIC Instrument [14/0952]. The majority of the relief under ASIC Instrument [14/0952] expires on 30 September 2015. Many of the underlying issues which the

relief in ASIC Instrument [14/0952] seeks to address are continuing issues. The Principal Legislative Instrument therefore provides continued time-limited exemptive relief for the industry, acknowledging that the majority of these issues are issues that will be resolved at an international level and are outside the control of any one Reporting Entity. The Repealing Legislative Instrument repeals ASIC Instrument [14/0952] given that the relief in ASIC Instrument [14/0952] is superseded by the relief in the Principal Legislative Instrument.

## **2. Purpose of the Legislative Instruments**

The purpose of the Principal Legislative Instrument is to provide time-limited transitional exemptions from the Reporting Requirements under the Rules, for varying periods, to all Reporting Entities. The Principal Legislative Instrument extends some elements of the existing relief under ASIC Instrument [14/0952], to address ongoing implementation issues.

Broadly, the Principal Legislative Instrument provides transitional time-limited exemptive relief in the following areas:

- relief from reporting of OTC Derivatives entered on certain foreign financial markets;
- relief to report an internal identifier where an identifier required under the Rules is not available for the entity;
- relief from reporting the legal names of entities, where technological limitations at the Licensed Repository prevent such reporting;
- relief from reporting of identity information (names and identifiers) in relation to counterparties and beneficiaries of OTC Derivatives, where such reporting would breach a foreign law or regulation, an actionable duty of confidence owed to the client, or a contractual duty owed to the client;
- relief from reporting of identity information in relation to Government Entities where consent cannot be obtained;
- relief from the requirement to report a trade identifier that is a 'universal transaction identifier' or a 'single transaction identifier', where the Reporting Entity reports specified other identifiers;
- relief from strict compliance with the Reporting Requirements from reporting collateral information for a short testing window, to facilitate the transition for the start of reporting collateral; and
- relief from reporting of certain OTC Derivatives known as 'Foreign Exchange Security Conversion Transactions'.

Broadly, the Repealing Legislative Instrument repeals ASIC Instrument [14/0952] given that the relief in ASIC Instrument [14/0952] is superseded by the relief in the Principal Legislative Instrument.

The Principal Legislative Instrument and the Repealing Legislative Instrument are described in more detail in [Attachment A](#).

## **3. Commencement of Legislative Instruments**

Each of the Principal Legislative Instrument and the Repealing Legislative Instrument commences on the later of the day after the instrument is registered under the *Legislative*

*Instruments Act 2003* and 1 October 2015. The relief under the Principal Legislative Instrument applies during the periods specified in the Principal Legislative Instrument

#### **4. Consultation**

##### *Consultation on Legislative Instruments*

ASIC consulted on the Principal Legislative Instrument through discussions and correspondence with industry working groups facilitated by the Australian Financial Markets Association (*AFMA*), and the International Swaps and Derivatives Association (*ISDA*). The members of the industry working groups are current or prospective Reporting Entities, including Phase 1, Phase 2 and Phase 3 Reporting Entities. Three meetings were held between ASIC, AFMA, ISDA and their members, to discuss the proposed Principal Legislative Instrument and various matters relating to the implementation of the Reporting Requirements, between July 2015 and September 2015, along with other meetings and discussions with particular Reporting Entities on elements of the relief sought.

ASIC has also held various bilateral discussions with Reporting Entities, Trade Repositories, the CoFR agencies, and regulators in other jurisdictions, in connection with issues dealt with under the Principal Legislative Instrument.

#### **5. Regulation Impact Statement**

A Regulation Impact Statement (*G-20 OTC derivatives trade reporting regime*<sup>[6]</sup>) was prepared in relation to the Rules and approved by Office of Best Practice Regulation (*OBPR*). OBPR has previously advised that no further Regulatory Impact Statement is required for the Principal Legislative Instrument because it assessed the proposal as having a minor impact on business.

The Principal Legislative Instrument substantially reduces the short-term regulatory impact of the Rules on Reporting Entities. The impact on ASIC's regulatory objectives is considered to be minimal.

#### **6. 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 legislative instruments**

Capitalised terms used in this Attachment have the same meaning as in the Rules.

### **Principal Legislative Instrument**

#### **Section 1 – Name of legislative instrument**

This section provides that the title of the instrument is the *ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844*.

#### **Section 2 – Commencement**

This section provides that the instrument commences on the later of the day after it is registered and 1 October 2015.

#### **Section 3 - Authority**

This section provides that ASIC makes the instrument under paragraph 907D(2)(a) of the Act.

#### **Section 4 Definitions**

Section 4 of the instrument provides for definitions of terms used in the instrument.

#### **Sections 5 to 14 – Exemptions and conditions**

Sections 5 to 14 set out the exemptions from the Rules, and associated conditions that apply to 'Reporting Entities' as defined in the Rules.

##### **Exemption 1 (Exchange-traded derivatives)**

Subsection 5(1) of the instrument provides that, from 1 October 2015 to 30 September 2018, a Reporting Entity does not have to comply with Rule 2.2.1 of the Rules in relation to a Derivative (referred to in the instrument as an 'Exchange-Traded Derivative') where the Derivative is able to be traded (within the meaning of section 761A of the Act) on a 'Relevant Financial Market' and the entry into of the arrangement that is the Derivative takes place on the Relevant Financial Market.

Subsection 5(2) of the instrument provides that a Reporting Entity does not have to comply with subsection 907D(3) of the Act in relation to the condition in paragraph 7 of ASIC Instrument [14/0952].

Subsection 5(4) of the instrument specifies the financial markets that are 'Relevant Financial Markets' for the purposes of the exemption in subsection 5(1). The list includes specified financial markets in Armenia, Canada, the European Union, Hong Kong, Iceland, India, Indonesia, Israel, Japan, Korea, Malaysia, Mexico, New Zealand, People's Republic of China, Russia, Singapore, South Africa, Thailand, Turkey, United Arab Emirates and United States of America.

The exemption continues existing relief granted under the Phase 1 and 2 Exemptions and ASIC Instrument [14/0952]. The specification of 'Relevant Financial Markets' in subsection 5(4) is designed to supplement, on a time-limited basis, the ASIC Regulated Foreign Markets Determination [OTC DET 13/1145]. The exemption in relation to the 'Relevant Financial Markets' recognises that some Reporting Entities may not be able to comply with their obligation to report Derivatives entered into on those financial markets under the current trade reporting regime, because of the nature of trading on those financial markets.

The time-limited exemption will apply while ASIC considers whether it is of the opinion that the specified financial markets are suitable to be determined as 'Regulated Foreign Markets', and whether any changes to the test for determining a 'Regulated Foreign Market' should be

made.<sup>[8]</sup> Accordingly, subsection 5(5) of the instrument provides that a financial market is not a Relevant Financial Market if ASIC determines that the financial market is a Regulated Foreign Market for the purposes of the Rules.

If ASIC does not make a determination in relation to one of the Relevant Financial Markets specified in subsection 5(4) prior to the expiry of the exemption in subsection 5(1), Reporting Entities will be required to commence reporting their Reportable Transactions and Reportable Positions executed on those financial markets, after that date. Accordingly, under paragraph 5(3) of the instrument, it is a condition that the Reporting Entity must report in accordance with the Rules:

- (a) information about each of its Reportable Transactions in an Exchange-Traded Derivative starting from no later than 1 October 2018; and
- (b) the Derivative Position Information set out in Part S2.2 of Schedule 2 of the Rules, about each of its outstanding positions in an Exchange-Traded Derivative as at 1 October 2018 or such earlier date as the Reporting Entity starts to report its Reportable Transactions in the Exchange-Traded Derivative.

#### **Exemption 2 (Entity Information)**

Subsection 6(1) of the instrument provides that, from 1 October 2015 to 30 September 2018, a Reporting Entity does not have to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report Entity Information about an entity (referred to in section 6 of the instrument as a 'Relevant Entity') in relation to a Reportable Transaction or Reportable Position to a Trade Repository and the Entity Information is not available for the Relevant Entity. The relief in subsection 6(1) applies where the Reporting Entity reports to the Trade Repository the internal entity identifier for the Relevant Entity used by the Reporting Entity.

For the purposes of this exemption, 'Entity Information' is defined in section 4 of the instrument.

This exemption responds to concerns raised by Reporting Entities that at this time the Licensed Repository is unable to populate Name Information from Entity Information unless the Relevant Entity has 'on-boarded' with the Licensed Repository.

#### **Exemption 3 (Name Information)**

Section 7 of the instrument provides that, from 1 October 2015 to 30 September 2016, a Reporting Entity does not have to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report Name Information about an entity (referred to in the paragraph as a 'Relevant Entity') in relation to a Reportable Transaction or Reportable Position to a Trade Repository, in the case where the Reporting Entity reports to the Trade Repository an identifier for the Relevant Entity that is a Legal Entity Identifier (**LEI**), interim entity identifier, Designated Business Identifier or Business Identifier Code (**BIC Code**).

#### **Exemption 4 (Privacy – Consent for historical counterparties)**

Subsection 8(1) of the instrument provides that, from 1 October 2015 to 30 September 2018, a Reporting Entity does not have to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report Identifying Information in relation to a Historic Reportable Position to a Trade Repository, where at the time the Identifying Information is required to be reported:

- (a) the Reporting Entity has not obtained the express consent (Consent) of the counterparty (Relevant Counterparty) to which the Identifying Information relates before it reports the Identifying Information to the Trade Repository; and

- (b) the Reporting Entity is of the reasonable view that if the Reporting Entity reported the Identifying Information without obtaining the Consent, the Reporting Entity may breach:
  - (i) a duty of confidence owed by the Reporting Entity to the Relevant Counterparty which is actionable at law by the Relevant Counterparty;
  - (ii) a contractual duty owed by the Reporting Entity to the Relevant Counterparty;  
or
  - (iii) a provision of a law or regulation of a foreign jurisdiction that applies to the Reporting Entity in its dealings with the Relevant Counterparty.

‘Identifying Information’ is defined in section 4 of the instrument to encompass the items in the Tables of Derivative Transaction Information and Derivative Position Information in Schedules S2.1 and S2.2 of the Rules, that require reporting of information concerning counterparties and beneficiaries to the Reportable Transaction or Reportable Position.

The exemption recognises the scale and complexity of the task of obtaining Consents from multiple counterparties in order to report Identifying Information about those counterparties to a Trade Repository.

Under subsection 8(5) of the instrument, the exemption does not apply if the Reporting Entity has entered into one or more OTC Derivatives with the Relevant Counterparty on or after 1 January 2015.

A 'Historic Reportable Position' is defined in subsection 8(6) to mean a Reportable Position that was entered into:

- (a) before 1 January 2015; and
- (b) pursuant to:
  - (i) an Historic OTC Derivatives Agreement between the Relevant Counterparty and the Reporting Entity; or
  - (ii) an Agency Agreement that was in place as at 31 July 2014, under which the Relevant Counterparty had entered into one or more OTC Derivatives with the Reporting Entity through the Intermediary on or before 31 July 2014.

Subsection 8(6) of the instrument defines 'Agency Agreement', 'Historic OTC Derivatives Agreement', and 'Historic OTC Derivatives (Intermediary) Agreement' for the purposes the definition of 'Historic Reportable Position'. 'Agency Agreement' means a legally binding agreement between the Relevant Counterparty and an Intermediary that has an Historic OTC Derivatives (Intermediary) Agreement with the Reporting Entity.

‘Historic OTC Derivatives Agreement’ means a legally binding agreement between the Relevant Counterparty and the Reporting Entity that was in place as at 31 May 2014, under which the Relevant Counterparty:

- (a) may enter into OTC Derivatives with the Reporting Entity; or
- (b) had entered into one or more OTC Derivatives with the Reporting Entity on or before 31 May 2014.

‘Historic OTC Derivatives (Intermediary) Agreement’ means a legally binding agreement between a person (the Intermediary) and the Reporting Entity that was in place as at 31 May 2014, under which the Intermediary:

- (a) may enter into OTC Derivatives with the Reporting Entity on behalf of other persons, pursuant to legally binding agreements between the Intermediary and those other persons; or
- (b) had entered into one or more OTC Derivatives with the Reporting Entity on behalf of other persons, on or before 31 May 2014.

Subsection 8(6) of the exemption therefore ensures that a Reporting Entity is not able to rely on the exemption unless the Relevant Counterparty on-boarded directly with the Reporting Entity on or before 31 May 2014 or on-boarded through an intermediary on or before 31 July 2014 (where the Reporting Entity's agreement with the intermediary was in place on or before 31 May 2014). The Reporting Entity would have been expected to obtain Consent from new clients as part of the on-boarding process. Paragraph 8(6) further ensures that from 1 January 2015, the relief will only apply in relation to Relevant Counterparties that do not maintain an active trading relationship with the Reporting Entity.

Subsections 8(2) to 8(4) of the instrument provide that it is a condition of the exemption that:

- (a) the Reporting Entity must use all reasonable endeavours to obtain the Consent from the Relevant Counterparty, as soon as reasonably practicable;
- (b) as soon as reasonably practicable after the Relevant Counterparty gives the Consent a Reporting Entity must use all reasonable endeavours to report the Identifying Information to the Trade Repository to which the Historic Reportable Position was reported, unless the OTC Derivative the subject of the Historic Reportable Position has been terminated or has expired; and
- (c) the Reporting Entity must, on written request by ASIC, provide ASIC with a document reporting on the Reporting Entity's reasonable endeavours to obtain the Consent from the Relevant Counterparty, within the time specified in the request or if no time is specified, within a reasonable time, covering the period up to the time of the request.

#### **Exemption 5 (Privacy – Foreign privacy restrictions)**

Subsection 9(1) of the instrument provides that, from 1 October 2015 to 30 September 2016, a Reporting Entity is not required to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report ‘Identifying Information’ in relation to a Reportable Transaction or Reportable Position to a Trade Repository in certain circumstances.

For the purposes of this exemption, ‘Identifying Information’ is defined in section 4 of the instrument to encompass the items of Derivative Transaction Information and Derivative Position Information in Schedules S2.1 and S2.2 of the Rules, that require reporting of information about the identity of counterparties and beneficiaries to the Reportable Transaction or Reportable Position.

The exemption in subsection 9(1) applies where at the time the Identifying Information is required to be reported:

- (a) the Reporting Entity is of the reasonable view that the Reporting Entity would breach a law or regulation of a Relevant Foreign Jurisdiction if the Reporting Entity reported the Identifying Information to the Trade Repository;

- (b) the Reporting Entity has a written opinion of external legal counsel that supports the view referred to in paragraph (a); and
- (c) the Reporting Entity is reasonably satisfied that the law or regulation the subject of the written legal opinion referred to in paragraph (b) has not changed in any relevant respect since the date the opinion was issued.

‘Relevant Foreign Jurisdiction’ is defined in section 4 of the instrument to mean each of Algeria, Argentina, Austria, Bahrain, Belgium, France, Hungary, India, Indonesia, Israel, Luxembourg, Pakistan, People’s Republic of China, Samoa, Saudi Arabia, Singapore, South Korea, Switzerland and Taiwan. A number of Reporting Entities have identified these as jurisdictions which may have in place laws or regulation which would prevent the reporting of Identifying Information to a Trade Repository, even with the consent of the person to which the information relates.

The exemption recognises that some Reporting Entities may not be able to comply with their obligation to report Identifying Information without breaching the laws and regulations in place in the Relevant Foreign Jurisdiction. In those circumstances the Reporting Entity may otherwise need to cease entering into Derivative Transactions with those counterparties.

The time-limited exemption will allow Reporting Entities to continue to enter into Derivative Transactions while they work with overseas authorities and affected clients to resolve issues arising from cross-border trade reporting requirements that are incompatible with jurisdiction-specific privacy laws and regulations. The Reporting Entity must in the meantime continue to report all information other than the Identifying Information, and must ‘backload’ the Identifying Information once these issues are resolved.

Accordingly, subsection 9(2) of the instrument provides that as soon as reasonably practicable after the Reporting Entity becomes reasonably satisfied that the Reporting Entity would no longer breach the law or regulation of the Relevant Foreign Jurisdiction if the Reporting Entity reported the Identifying Information to the Trade Repository, the Reporting Entity must use all reasonable endeavours to report the Identifying Information to the Trade Repository to which the Reportable Transaction or Reportable Position was reported, unless the OTC Derivative the subject of the Reportable Transaction or Reportable Position has been terminated or has expired.

Subsection 9(3) of the instrument provides that the Reporting Entity must, on request by ASIC and as soon as reasonably practicable following such request, give ASIC a copy of the written legal opinion referred to in paragraph (1)(b) in respect of the Relevant Foreign Jurisdiction.

#### **Exemption 6 (Privacy – Identifying Information of Government Entities)**

Subsection 10(1) of the instrument provides that, from 1 October 2015 to 30 September 2016, a Reporting Entity does not have to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report ‘Identifying Information’ about a Government Entity in relation to a Reportable Transaction or Reportable Position to a Trade Repository where at the time the Identifying Information is required to be reported, the Reporting Entity has not obtained the consent of the Government Entity to the Identifying Information being reported.

For the purposes of this exemption, ‘Identifying Information’ is defined in section 4 of the instrument to encompass the items of Derivative Transaction Information and Derivative Position Information in Schedules S2.1 and S2.2 of the Rules, that require reporting of information about the identity of counterparties and beneficiaries to the Reportable Transaction or Reportable Position.



In addition, for the purposes of this exemption, 'Government Entity' is defined in subsection 10(6) to encompass:

- (a) a government;
- (b) a sovereign wealth fund;
- (c) a central bank;
- (d) an agency of a government whose functions include managing public debt or providing funds for development or reconstruction purposes; or
- (e) a financial institution of which:
  - (i) 2 or more countries; or
  - (ii) the governments of 2 or more countries; or
  - (iii) 2 or more agencies of the governments of 2 or more countries;are members.

The time-limited exemption recognises that some Reporting Entities may not be able to comply with their obligation to report Identifying Information of counterparties that are Government Entities where those counterparties do not provide consent for their Identifying Information being reported. In those circumstances the Reporting Entity may otherwise need to cease entering into Derivative Transactions with those counterparties. ASIC will monitor the extent to which this exemption is necessary and used by Reporting Entities through information gathered in a notification provided to ASIC. The notification will need to be provided to ASIC prior to relying on the exemption.

Accordingly, subsection 10(2) of the instrument provides that before relying on the exemption, the Reporting Entity must have given ASIC a written notice (referred to in the exemption as an Opt-In Notice) containing certain information, including the total number of Government Entities for which the Reporting Entity intends to rely on the exemption.

Subsection 10(3) of the instrument requires the Reporting Entity to give ASIC a replacement Opt-In Notice as soon as practicable after it becomes aware that the information in its most recent Opt-In Notice is no longer up to date.

It remains an obligation on the Reporting Entities to use all reasonable endeavours to obtain the Consent from the Government Entity, as soon as soon as reasonably practicable. This is reflected in subsection 10(4) of the instrument.

If the Government Entity gives Consent, subsection 10(5) of the instrument requires as soon as reasonably practicable after Consent is given:

- (a) the Reporting Entity must use all reasonable endeavours to report the Identifying Information to the Trade Repository to which the Reportable Position or Reportable Position was reported, unless the OTC Derivative the subject of the Reportable Transaction or Reportable Position has been terminated or has expired; and
- (b) the Reporting Entity must give ASIC written notice that the Government Entity has given the Consent.

### **Exemption 7 (Trade identifiers)**

Subsection 11(1) of the instrument provides that, from 1 October 2015 to 31 January 2016, a Reporting Entity does not have to comply with paragraphs 2.2.1(1)(a) and (c) of the Rules to the extent those paragraphs require the Reporting Entity to report, for a Reportable Transaction, Derivative Transaction Information referred to in Item 1 of Table S2.1(1) of the Rules that is a 'universal transaction identifier' or a 'single transaction identifier'.

This exemption continues existing relief granted under the Phase 1 and 2 Exemptions and ASIC Instrument [14/0952]. The exemption recognises that some Reporting Entities may experience practical limitations in reporting Derivative Transactions using either a single (i.e. "shared") trade identification reference, or two separate references which the counterparties arrange to be linked (i.e. "paired") in the records of the Trade Repository.

Subsection 11(2) of the instrument provides that it is a condition that the Reporting Entity report, for the Reportable Transaction:

- (a) the trade identifier created by the Swap Execution Facility on which the Reportable Transaction was executed (if applicable);
- (b) the trade identifier created by the provider of any of the Confirmation Platforms on which the Reportable Transaction was confirmed (if applicable); or
- (c) if the information in paragraphs (a) and (b) is not available, the internal trade identifier used by the Reporting Counterparty,

(each, a 'Trade Identifier') and must report the Trade Identifier otherwise in accordance with the Rules as if the Trade Identifier was information reported under paragraph 2.2.1(1)(a) or (c) of the Rules (as applicable).

'Confirmation Platform' is defined in section 4 of the instrument to mean an electronic trade confirmation platform. 'Swap Execution' Facility is defined in section 4 to mean a 'swap execution facility' as defined in section 1a(50) of the *Commodity Exchange Act 1936* (US).

### **Exemption 8 (Collateral Reporting)**

Subsection 12(1) of the instrument provides that, from 1 October 2015 to 30 October 2015 (inclusive), a Reporting Entity does not have to comply with subrules 2.2.1(1) or 2.2.2(1) of the Rules to the extent those subrules require the Reporting Entity to report:

- (a) the Derivative Transaction Information in items 40–44 (collateral) of Table S2.1(1) of the Rules, or any changes to that information; or
- (b) the Derivative Position Information in items 27-31 (collateral) of Table S2.2(1) of the Rules, or changes to that information.

The exemption allows Reporting Entities additional time for user acceptance testing before they are strictly required to commence reporting of collateral information, and extend the period available for user acceptance testing with the Licensed Repository. This delay in commencing collateral information reporting will provide for a smoother implementation in Australia.

Under subsection 12(2), a Reporting Entity that relies on the relief will be required to use best endeavours to continue that reporting during the period of the relief.

### **Exemption 9 (FX Securities Conversion Transactions)**

Section 13 of the instrument provides that, from 1 October 2015 to 30 September 2016, a Reporting Entity does not have to comply with Rule 2.2.1 of the Rules to the extent that Rule

requires the Reporting Entity to report a Reportable Transaction or Reportable Position in a foreign exchange contract:

- (a) that is entered into by the Reporting Entity solely to facilitate the settlement of a transaction for the purchase or sale of a foreign currency denominated security; and
- (b) under which consideration is provided to settle the transaction not more than 7 business days after the day on which the transaction is entered into.

Paragraphs 13(a) and (b) describe the characteristics of an OTC Derivative commonly known as a 'Foreign Exchange Securities Conversion Transaction'. The exemption recognises that Foreign Exchange Security Conversion Transactions are typically not required to be reported to Trade Repositories in other jurisdictions. Requiring Reporting Entities to report these transactions would incur substantial costs to the Reporting Entities, and ASIC believes the regulatory cost of not requiring these trades to be reported is likely to be low. This temporary relief will allow ASIC time to see what final decisions are taken on reporting these transactions in other jurisdictions.

#### **Exemptions 1 to 9 – Other conditions (Record-keeping)**

Section 14 of the instrument provides that it is a condition of each exemption in the instrument that a Reporting Entity must:

- (a) keep records that enable the Reporting Entity to demonstrate it has complied with the conditions of the instrument;
- (b) keep the records referred to in paragraph (a) for a period of at least five years from the date the record is made or amended; and
- (c) on written request by ASIC, provide ASIC with records or other information relating to compliance with or determining whether there has been compliance with the conditions referred to paragraph (a), within the time specified in the request or if no time is specified, within a reasonable time.

The condition in section 14 ensures a Reporting Entity is required to keep and provide to ASIC records and information relating to compliance with the conditions of the exemption in the same way that the Reporting Entity would be required to keep and provide records and information to ASIC relating to compliance with the Rules.

## **Repealing Legislative Instrument**

### **Section 1 – Name of legislative instrument**

This section provides that the title of the instrument is the *ASIC Corporations (Repeal) Instrument 2015/889*.

### **Section 2 – Commencement**

This section provides that the instrument commences on the later of the day after it is registered and 1 October 2015.

### **Section 3 - Authority**

This section provides that ASIC makes the instrument under paragraph 907D(2)(a) of the Act.

### **Section 4 - Schedules**

This section provides that each instrument that is specified in a Schedule to this instrument is repealed as set out in the applicable items in the Schedule concerned.

### **Schedule 1 Repeal, Section 1**

This section provides that the whole of the ASIC Instrument [14/0952] will be repealed.

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

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

### **ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844**

### **ASIC Corporations (Repeal) Instrument 2015/859**

The above legislative instruments are 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 Instruments**

The *ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844* (the **Principal Legislative Instrument**), made by ASIC under paragraph 907D(2)(a) of the *Corporations Act 2001* (the **Act**), provides a number of exemptions from the reporting requirements under the *ASIC Derivative Transaction Rules (Reporting) 2013* (the **Rules**).

The Rules impose requirements (referred to in the Rules as 'Reporting Requirements') on 'Reporting Entities' to report their 'Reportable Transactions' and 'Reportable Positions' in relation to OTC Derivatives to Licensed Repositories or Prescribed Repositories. Compliance with the Reporting Requirements under the Rules is being implemented in phases (referred to in the Rules as 'Phase 1', 'Phase 2' and 'Phase 3').

The purpose of the Legislative Instrument is to provide limited transitional exemptions from the Reporting Requirements under the Rules, for varying periods, to all Reporting Entities. The Legislative Instrument extends some elements of the existing relief that have been previously granted under ASIC Instrument [14/0952], to address ongoing implementation issues.

The *ASIC Corporations (Repeal) Instrument 2015/859* (the **Repealing Legislative Instrument**) repeals ASIC Instrument [14/0952], as the relief previously provided by ASIC Instrument [14/0952] is now provided by the Principal Legislative Instrument.

#### **2. Human rights implications**

The Principal Legislative Instrument may engage the right to privacy and reputation in Article 17 of the International Covenant on Civil and Political Rights (**ICCPR**) (**Article 17**). Article 17 prohibits unlawful or arbitrary interferences with a person's privacy, family, home (which the UN Human Rights Committee has interpreted as including a person's workplace) and correspondence. It also prohibits unlawful attacks on a person's reputation. It provides that persons have the right to the protection of the law against such interference or attacks. The UN Human Rights Committee has not defined 'privacy'. The Commonwealth Attorney-General's Department has provided guidance that privacy should be understood to comprise freedom from unwarranted and unreasonable intrusion into activities that society recognises as falling into the individual sphere of autonomy. To avoid being considered arbitrary, any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.

The Repealing Legislative Instrument is of a minor or machinery nature and does not engage any of the applicable rights or freedoms.

### The Principal Legislative Instrument may engage the right to privacy and reputation in Article 17

The right in Article 17 is engaged by the Principal Legislative Instrument by reason that the Principal Legislative Instrument deals with matters involving the collection, storage, security, use or disclosure of personal information.

Derivative trade data required to be reported under the Rules includes, for each side of an OTC Derivative transaction, information that identifies or is capable of identifying the counterparty or beneficiary to the OTC Derivative (referred to in the Principal Legislative Instrument as ‘Identifying Information’).

‘Identifying Information’ may contain ‘personal information’ as defined in the *Privacy Act 1988*, being information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. This may be the case where the counterparty or beneficiary is an individual and the Reporting Entity reporting the OTC Derivative elects to provide a code to identify the individual from which the identity of the individual is apparent or can reasonably be ascertained.

### Compatibility of Principal Legislative Instrument with the rights recognised in Article 17

The Principal Legislative Instrument is compatible with the rights recognised in Article 17 of the ICCPR by reason that it advances those rights. The Principal Legislative Instrument applies in circumstances where a Reporting Entity is required to report ‘Identifying Information’ in relation to counterparties and beneficiaries of OTC Derivatives, but where such reporting would breach a foreign law or regulation, an actionable duty of confidence owed to the client, or a contractual duty owed to the client.

The Principal Legislative Instrument applies while the Reporting Entity uses all reasonable endeavours to obtain the consent of the counterparty to reporting of the counterparty’s ‘Identifying Information’. In the case of foreign jurisdictions where existing law or regulation would prevent such reporting despite the consent of the counterparty, the relief gives the Reporting Entity time to continue to work with authorities in that jurisdiction to reach a solution that paves the way for compliance with the reporting requirements or alternatively, if no such solution can be reached, to cease transacting with the counterparties in that jurisdiction.

If the Principal Legislative Instrument were considered to limit the right in Article 17 of the ICCPR in that it requires the Reporting Entity to work towards reporting of “Identifying Information”, ASIC considers that the Principal Legislative Instrument is nevertheless compatible with that right. The right in Article 17 is not absolute. As noted, the right has implied limitations (‘unlawful’ and ‘arbitrary’) and may be subject to a permissible limitation where that limitation aims to achieve a legitimate objective, there is a rational connection between the limitation, and the objective and the limitation is reasonable, necessary and proportionate.

Any limitation imposed on the right by the Principal Legislative Instrument has a clear legal basis, in that it aims to achieve a legitimate objective, has a rational connection with the objective, and is reasonable, necessary and proportionate. As noted in the CoFR Report:

‘Reporting to trade repositories should facilitate the maintenance of a reliable and comprehensive source of information on participant trading activity, which would be useful to many regulators in performing their respective functions. It is expected that this increased transparency will assist authorities in identifying vulnerabilities in the financial system and, more broadly, to develop well-informed policies to promote financial stability. Information from trade repositories will be particularly useful in times of financial distress, where rapid and reliable access to accurate data may assist prudential and systemic regulators in their functions. From a market supervision perspective, transaction information stored in trade

repositories in some product classes in particular, such as equity derivatives and credit derivatives, has the potential to assist investigations into market misconduct.’

Effective regulation of the OTC derivatives market requires regulators to have detailed data on counterparty and beneficiary exposures where these will pose a systemic risk. A requirement to report transactions, and Identifying Information in relation to those transactions, is the most effective method of achieving this legitimate objective.

Both the Rules and the requirements of the Principal Legislative Instrument are necessary to achieve the legitimate objective because they provide ASIC and other regulators with the data they need to assess counterparty exposures, and support the detection and prevention of market abuse. The Rules contain adequate safeguards by only requiring market participants to report the data necessary to achieve that objective, and, in conjunction with section 904B of the Act, to require the Licensed Repository to maintain the confidentiality, security and integrity of that information. Further safeguards are provided by statutory obligations to protect confidential and personal information contained in the data.

### 3. Conclusion

The Principal Legislative Instrument is compatible with human rights because it advances the protection of human rights and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

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

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<sup>[1]</sup> Currently, under the *Corporations (Derivatives) Determination 2013*: credit derivatives, equity derivatives, foreign exchange derivatives, interest rate derivatives, and commodity derivatives that are not electricity derivatives.

<sup>[2]</sup> See ASIC Instruments [13-1173], [13-1175], [13-1176], [13-1177] and [13-1178] published in the ASIC Gazette on 1 October 2013 and varied by ASIC Instrument [14/0232] published in the ASIC Gazette on 1 April 2014.

<sup>[3]</sup> See ASIC Instrument [14/0234], registered on the Federal Register of Legislative Instruments (*FRLI*).

<sup>[4]</sup> See ASIC Instrument [14/0633], registered on FRLI.

<sup>[5]</sup> [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp205-published-28-March-2013.pdf/\\$file/cp205-published-28-March-2013.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp205-published-28-March-2013.pdf/$file/cp205-published-28-March-2013.pdf)

<sup>[6]</sup> <http://www.comlaw.gov.au/Details/F2013L01345/Supporting%20Material/Text>

<sup>[7]</sup> These include the availability of “one-sided” reporting, and delayed reporting of collateral.

<sup>[8]</sup> Proposal B4 in CP 221, available at [www.asic.gov.au](http://www.asic.gov.au).

<sup>[9]</sup> U.S. Commodity Futures Trading Commission – CFTC Letter No. 14-89, No-Action dated June 27, 2014 at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-89.pdf>