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# ASIC Corporations (Amendment) Instrument 2019/169

## EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Amendment) Instrument 2019/169* (the **Legislative Instrument**) under paragraph 907D(2)(a) of the *Corporations Act 2001* (the **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 (see subsection 907D(3) of the Act). An exemption under paragraph 907D(2)(a) is a legislative instrument if it is expressed to apply in relation to a class of persons (see subsection 907D(4) of the Act).

Under subsection 33(3) of the *Acts Interpretations Act 1901* (as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

The Legislative Instrument amends the *ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844* (the **Exemption Instrument**).

### 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 derivatives trade reporting regime.<sup>1</sup>

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<sup>1</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.

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ASIC has also previously granted time-limited transitional exemptions (*Phase 2 Exemptions*) to all Phase 2 Reporting Entities.<sup>2</sup>

In September 2014, ASIC provided further time-limited exemptive relief extending elements of the Phase 1 Exemptions and Phase 2 Exemptions through a legislative instrument applying to all Reporting Entities, ASIC Instrument [14/0952] (*All Reporting Entity Exemptions*).<sup>3</sup> The majority of the relief under ASIC Instrument [14/0952] expired on 30 September 2015.

In September 2015, ASIC provided further time-limited exemptive relief extending elements of the All Reporting Entity Exemptions through a legislative instrument (the Exemption Instrument) applying to all Reporting Entities. ASIC also issued a Repealing Legislative Instrument that repealed ASIC Instrument [14/0952] given that the relief in ASIC Instrument [14/0952] was superseded by the relief in the Exemption Instrument. In September 2016, ASIC granted ASIC Corporations (Amendment) Instrument 2016/913<sup>4</sup> further extending three of the time-limited exemptive relief extending elements in the Exemption Instrument. In September 2018, ASIC issued ASIC Corporations (Amendment) Instrument 2018/810<sup>5</sup> providing extensions to six elements of relief in the Exemption Instrument.

The Legislative Instrument provides conditional extension of relief under the Exemption Instrument from the requirement to report 'Entity Information' that was due to expire on 31 March 2019 for a further six months or twelve months, depending on the location of the Relevant Party. The Legislative Instrument also extends relief with regards to Identity Information for Transactions requiring consent for historical counterparties and Relevant Foreign Jurisdictions from 31 March 2019 until 30 September 2020. The Legislative Instrument also amends Exemption 1 (Exchange-traded derivatives) of the Exemption Instrument to provide conditional relief excluding derivatives that have certain characteristics.

### **Purpose of the Legislative Instrument**

The purpose of the Legislative Instrument is to amend the Exemption Instrument to extend some elements of the existing relief under the Exemption Instrument, to address ongoing implementation issues.

Broadly, the Legislative Instrument extends the transitional time-limited exemptive relief provided under the Exemption Instrument in the following areas:

- relief to report an internal identifier where an identifier required under the Rules is not available for the relevant entity, conditional upon the Reporting Entity using its best efforts to obtain the Entity Information as soon as reasonably practicable;
- 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;

The Legislative Instrument also amends the transitional time-limited exemptive relief provided under the Exemption Instrument for Exchange Traded Derivatives, effectively inserting a new

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<sup>2</sup> See ASIC Instrument [14/0234], registered on the Federal Register of Legislative Instruments (FRLI).

<sup>3</sup> See ASIC Instrument [14/0952], registered on FRLI.

<sup>4</sup> See ASIC Corporations (Amendment) Instrument 2016/913, registered on FRLI.

<sup>5</sup> See ASIC Corporations (Amendment) Instrument 2018/810, registered on FRLI.

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limb that enables derivatives with certain characteristics to be excluded from reporting, conditional upon Reporting Entity providing an Opt-In Notice to ASIC with certain information including the market identification code (under *ISO 10383:2012*)<sup>6</sup> for the financial market that the derivatives are traded on.

## **2. Commencement of Legislative Instrument**

The Legislative Instrument commences on the day after it is registered on the Federal Register of Legislation.

## **3. Consultation**

In making this Legislative Instrument, ASIC considered two applications for relief from parties that did not wish to be disclosed. ASIC also took account of the recommendations in the Financial Stability Board November 2018 report ‘Trade reporting legal barriers - Follow-up of 2015 peer review recommendations’, discussions with overseas regulators and industry associations and participants, together with ASIC's regulatory objectives, in the final terms of the Legislative Instrument.

## **4. Regulation Impact Statement**

A Regulation Impact Statement (*G-20 OTC derivatives trade reporting regime*) was prepared in relation to the Rules and approved by Office of Best Practice Regulation (*OBPR*). OBPR advised that no further Regulatory Impact Statement (RIS) was required for the Exemption Instrument because it assessed the proposal as having a minor impact on business. OBPR has advised that no further RIS is required for this Legislative Instrument as it extends a number of commencement dates set out in the Exemption Instrument, again with a minor impact on business.

## **5. Detailed operation of the Instrument**

Attachment A provides a detailed explanation of the changes made to the Exemption Instrument by this Legislative Instrument.

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

A Statement of Compatibility with Human Rights is included in this Explanatory Statement at Attachment B.

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<sup>6</sup> *ISO 10383:2012* means ISO 10383:2012 *Securities and related financial instruments—Codes for exchanges and market identification (MIC)* published by the International Organisation for Standardization as in force on the date of this instrument. MIC codes can be accessed on <https://www.iso20022.org/10383/iso-10383-market-identifier-codes>.

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## **ATTACHMENT A – Provision-by-provision description of the legislative instruments**

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

### **Legislative Instrument**

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

This section provides that the title of the Legislative Instrument is the *ASIC Corporations (Amendment) Instrument 2019/169*

#### **Section 2 – Commencement**

This section provides that the Legislative Instrument commences on the day after it is registered on the Federal Register of Legislation.

#### **Section 3 – Authority**

This section provides that the Legislative Instrument is made under subsection 907D(2)(a) of the Act.

#### **Section 4 – Amendments**

This section provides that Schedule 1 amends ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844.

### **Schedule 1 - Amendments**

#### **Item 1 – Subsection 4(1)**

Item 1 of Schedule 1 of the Legislative Instrument repeals the definition of “Relevant Foreign Jurisdiction” in subsection 4(1) of the Exemption Instrument, substituting a new definition comprising two jurisdictions (People’s Republic of China and Saudi Arabia).

#### **Item 2 – Subsection 5(1)**

Item 2 of Schedule 1 of the Legislative Instrument repeals the paragraphs (a) and (b) in Subsection 5(1) of the Exemption Instrument, substituting new paragraphs (a) and (b). The effect of the repeal and substitution is to add a new limb (a) to Subsection 5(1) which includes Derivatives that have characteristics for a derivative that meet the specifications in Subsection 5(1)(a) as an Exchange-Traded Derivative (and accordingly are subject to conditional time limited relief from reporting until 30 September 2020). The repeal and substitution also have the effect of reordering paragraph 5(1)(a) in the Exemption Instrument as Subsection 5(1)(b).

#### **Item 3 – After Subsection 5(3)**

Item 3 of Schedule 1 of the Legislative Instrument inserts a new subsection (3A) after Subsection 5(3) of the Exemption Instrument, that requires a Reporting Entity that relies on the new exemption in paragraph 5(1)(a), within 10 business days after entering into the derivative, to give ASIC a written notice (***Opt-In Notice***) with the name of the Reporting Entity, the name of the financial market, the Market Identifier Code (MIC) issued in accordance with ISO 10383:2012 for the financial market that the derivative was traded on and the date the Reporting Entity entered into the derivative.

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Item 3 of Schedule 1 of the Legislative Instrument also inserts a new subsection (3B) after new Subsection 5(3A) into the Exemption Instrument, that has the effect that condition at subsection (3A) does not apply to a Reporting Entity in relation to a financial market if the Reporting Entity has previously given ASIC an Opt-in Notice in relation to the financial market or the financial market is a Relevant Financial Market or a Regulated Foreign Market for the purposes of the Rules.

#### Item 4 –Subsection 6(1)

Item 4 of Schedule 1 of the Legislative Instrument replaces “31 March 2019” in subsection 6(1) of the Exemption Instrument with “the Exemption End Date”.

#### Item 5 –Subsection 6(1)

Item 5 of Schedule 1 of the Legislative Instrument also inserts a new subsection (1A) after Subsection 6(1) of the Exemption Instrument defines “the Exemption End Date” as 30 September 2019 if the Relevant Entity is:

- incorporated or formed in this jurisdiction; or
- is a counterparty to the OTC Derivative to which the Reportable Transaction or Reportable Position relates as the result of a transaction entered into by a branch of the Relevant Entity that is located in this jurisdiction; and

otherwise defines “the Exemption End Date” as 31 March 2020.

#### Item 6 –After Subsection 6(1)

Item 6 of Schedule 1 of the Legislative Instrument inserts a new Subsection (3) after Subsection 6(2) of the Exemption Instrument, that requires a Reporting Entity that relies on the new exemption in paragraph 6(1) to use its best efforts to obtain the Entity Information as soon as reasonably practicable, including by maintaining and following documented procedures for one or both of the following:

- requesting that Relevant Entities obtain Entity Information and provide it to the Reporting Entity;
- obtaining the Entity Information on behalf of Relevant Entities.

Item 6 of Schedule 1 of the Legislative Instrument also inserts a new Subsection (4) that requires the Reporting Entity to use all reasonable endeavours to report the Entity Information to the Trade Repository the Reporting Entity as soon as reasonably practicable after Entity Information for a Relevant Entity is available, including on a public website, unless the Derivative to which the Entity Information relates has been terminated or has expired.

Item 6 of Schedule 1 of the Legislative Instrument also inserts a new Subsection (5) that requires the Reporting Entity to, on written request by ASIC, provide ASIC with a written statement reporting on the Reporting Entity’s compliance with the conditions in subsections (3) and (4) during the period specified in the request.

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#### Item 7 – Subsection 8(1)

Item 7 of Schedule 1 of the Legislative Instrument replaces “31 March 2019” in subsection 8(1) of the Exemption Instrument with “30 September 2020”, extending the relief in Exemption 4 (Privacy – Consent for historical counterparties) of Exemption Instrument to that date.

#### Item 7 – Subsection 9(1)

Item 8 of Schedule 1 of the Legislative Instrument replaces “31 March 2019” in subsection 9(1) of the Exemption Instrument with “30 September 2020”, extending the relief in Exemption 5 (Privacy – Foreign privacy restrictions) of Exemption Instrument to that date.

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

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

#### **ASIC Corporations (Amendment) Instrument 2019/169**

The above 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 *ASIC Corporations (Amendment) Instrument 2019/169* (the **Legislative Instrument**), made by ASIC under paragraph 907D(2)(a) of the *Corporations Act 2001* (the **Act**), amends the *ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844* (the **Exemption Instrument**).

The Exemption Instrument was made on 21 September 2015 and provided time-limited exemptive relief from the requirement, imposed on 'Reporting Entities' under Rule 2.2.1 of the *ASIC Derivative Transaction Rules (Reporting) 2013* (the **Rules**), to report information about transactions and positions in 'OTC Derivatives' to a Licensed Repository or a Prescribed Repository.

The purpose of the Legislative Instrument is to provide extensions to 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 the Exemption Instrument, to address ongoing issues, including the receipt of related recommendations from international standard setting bodies, and to provide additional time for Reporting Entities to implement requirements in relation to 'Entity Information' (including for liaison with Relevant Entities).

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

The Legislative Instrument does not engage any of the applicable rights or freedoms.