



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment) Instrument 2020/149

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2020/149*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Summary

1. The instrument delays the commencement of central clearing requirements under the *ASIC Derivative Transaction Rules (Clearing) 2015* (the **Rules**) in relation to Australian dollar forward rate agreements (**AUD FRAs**) until 2 April 2022.
2. Unless explained otherwise, capitalised terms used in this Explanatory Statement have the meaning given by the Rules.

Purpose of the instrument

3. In May 2013, ASIC, the Reserve Bank of Australia (**RBA**) and the Australian Prudential Regulation Authority (**APRA**) (collectively, the **Regulators**) published the *Australian regulators' statement on assessing the case for mandatory clearing obligations*, which gave details of the analysis the Regulators would apply when assessing the case for mandatory central clearing of particular derivative products. In this statement, the Regulators stated that where no Clearing Facility has yet been licensed to clear a particular product, or only one Clearing Facility has been licensed, the issuance of a mandate would constrain Australian participants' choices.
4. In December 2015, ASIC, acting with the consent of the Minister under section 901K of the Act, made the Rules. The Rules impose clearing requirements in relation to OTC Derivatives on 'Clearing Entities'. Under Rule 2.1.1 of the Rules, 'Clearing Entities' are required to clear certain Derivative Transactions in 'OTC Derivatives' (referred to in the Rules as 'Cleared Derivatives') to a Clearing Facility. These requirements are referred to in the Rules as the 'Clearing Requirements'.

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5. In making the Rules, ASIC delayed the implementation date of the Clearing Requirement for AUD FRAs until 2 April 2018. In the Regulation Impact Statement addressing ASIC's proposals to implement Clearing Requirements, ASIC stated that due to the lack of market infrastructure in place to clear AUD FRAs, ASIC would delay the commencement of the mandatory clearing of AUD FRAs for a period of two years. ASIC further stated that should no additional Clearing Facilities enter the market to clear AUD FRAs, ASIC would consider further delaying the start dates to ensure the preconditions for mandatory clearing expressed by the Regulators have been met.
 6. In 2018, ASIC *ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209* which extended the relief for 12 months. From 2 April 2018 to 1 April 2019, a Clearing Entity was not required to clear a Forward Rate Agreement if the notional principal amount and payments under the Forward Rate Agreement were denominated in Australian dollars. In 2019, ASIC made *ASIC Corporations (Amendment) Instrument 2019/202* which extended relief for a further 12 months to 1 April 2020.
 7. At present only one Clearing Facility is licensed to clear AUD FRAs, and ASIC does not believe any other Clearing Facility is likely to clear AUD FRAs in the near future. ASIC believes that given there is only one Clearing Facility licensed to clear AUD FRAs, it would be appropriate to extend the delayed implementation date by 24 months to allow time to see if a second Clearing Facility begins to clear these products.
 8. The purpose of this instrument is to amend *ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209* so that Clearing Entities are not required to clear AUD FRAs that were entered into before 2 April 2022.

Consultation

9. ASIC consulted with the RBA, APRA, Australian Financial Markets Association and the International Swaps and Derivatives Association, Inc. and took into account the feedback provided by these bodies, together with ASIC's regulatory objectives, in the final terms of the instrument. ASIC also consulted with Australian CS facility licensees which do not clear AUD FRAs to determine the likelihood that an additional CS facility would begin clearing AUD FRAs.

Operation of the instrument

10. Section 1 of the instrument provides that the title of the instrument is *ASIC Corporations (Amendment) Instrument 2020/149*.
11. Section 2 provides that the instrument commences on the day after it is registered on the Federal Register of Legislation.
12. Section 3 provides that the instrument is made under paragraph 907D(2)(a) of the *Corporations Act 2001* (the ***Corporations Act***).

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13. Section 4 provides that each instrument that is specified in the Schedule (i.e. the *ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209*) is amended as set out in the applicable items in the Schedule.
 14. Schedule 1 makes amendments to *ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209* so that a Clearing Entity does not have to comply with Rule 2.1.1 of the Rules in relation to a Forward Rate Agreement that was entered into before 2 April 2022 if the notional principal amount and payments under the Forward Rate Agreement are denominated in Australian dollars.
 15. Based on information provided by ASIC, the Office of Best Practice Regulation considers the proposal is likely to have no more than minor impacts on businesses, community organisations or individuals. A Regulation Impact Statement is not required.

Legislative instrument and primary legislation

16. The subject matter and policy implemented by this instrument is more appropriate for a legislative instrument rather than primary legislation because:
 - (a) *Minor, technical, tailor and flexible regulatory approach*: the instrument utilises powers given by Parliament to ASIC that allow ASIC to modify or affect the operation of clearing requirements to provide a tailored and flexible regulatory environment that is fit for purpose for certain derivative transactions.

Legislative authority

17. ASIC makes the instrument under paragraph 907D(2)(a) of the Corporations Act.
18. Under paragraph 907D(2)(a) of the Corporations Act, ASIC may exempt a person or class of persons from all or specified provisions of the Rules.
19. 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 Corporations 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 Corporations Act).
20. Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Corporations Act), where an Act confers a power to make an instrument, the power is construed as including a power exercisable in the like manner to amend the instrument.
21. The instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

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22. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Amendment) Instrument 2020/149

Overview

1. *ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209* as amended by *ASIC Corporations (Amendment) Instrument 2019/202 (Exemption Instrument)* delayed the commencement of central clearing requirements under the *ASIC Derivative Transaction Rules (Clearing) 2015* in relation to Australian dollar forward rate agreements (**AUD FRAs**) until 2 April 2020. *ASIC Corporations (Amendment) Instrument 2020/149* amends the Exemption Instrument so that the clearing requirements for AUD FRAs are delayed for an additional 24 months to 2 April 2022, given there is only one Clearing Facility currently licensed to clear these products.

Assessment of human rights implications

2. This instrument does not engage any of the applicable rights or freedoms.

Conclusion

3. This 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*.