

## ASIC INSTRUMENT [14/0234]

### EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Instrument [14/0234] (the **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 derivative transaction rules. ‘Derivative transaction rules’ are rules made by ASIC under subsection 901A(1) of the Act.

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).

#### 1. Background

In July 2013, ASIC, acting with the consent of the Minister under section 901K of the Act, made the *ASIC Derivative Transaction Rules (Reporting) 2013 (Rules)* under subsection 901A(1) 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’.

The Rules seek to:

- give effect to one of the key commitments<sup>1</sup> made by the Australian Government at the Group of Twenty (**G20**) summit in Pittsburgh in 2009, namely 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 Council of Financial Regulators (**CoFR**) 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.

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<sup>1</sup> Australia is implementing the G20 commitments to OTC derivative reforms in close coordination with peer jurisdictions. Transaction reporting regimes are being developed concurrently by regulators overseas, including the US Commodity Futures Trading Commission (**CFTC**), the US Securities and Exchange Commission (SEC), the European Securities and Markets Authority, the Hong Kong Securities and Futures Commission (HK SFC) and the Monetary Authority of Singapore (MAS), for their respective jurisdictions.

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

Rule 1.2.4 provides a definition of ‘OTC Derivative’ for the purposes of the Rules. A Derivative is an ‘OTC Derivative’ if the Derivative is in a Prescribed Class (i.e. in the 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>2</sup>. However, a Derivative is not an ‘OTC Derivative’ if it is traded on a ‘Part 7.2A Market’ (i.e. a financial market subject to ‘frontline’ supervision by ASIC under Part 7.2A of the Act), or a financial market in a foreign jurisdiction (referred to in the Rules as a ‘Regulated Foreign Market’) that ASIC has determined is subject to supervision and requirements that are sufficiently equivalent, in relation to market integrity and market transparency, to the supervision and requirements to which a Part 7.2A Market is subject. On 13 September 2013, ASIC made a determination of 51 Regulated Foreign Markets under Rule 1.2.4 (see the ASIC Regulated Foreign Markets Determination [OTC DET 13/1145]).

Rule 1.2.5 defines ‘Reportable Transaction’ in relation to each kind of Reporting Entity. Table 1 below summarises the definitions in Rule 1.2.5.

**Table 1 – Reporting Entities and Reportable Transactions**

Reporting Entity	Reportable Transactions
<p>An Australian Entity<sup>3</sup>.</p> <hr/> <p>A foreign subsidiary of an Australian Entity where that Australian Entity is an Australian ADI<sup>5</sup> or an AFS Licensee<sup>6</sup>.</p>	<p>Entry into, modification, termination or assignment of an OTC Derivative to which the Reporting Entity is a counterparty, regardless of where the OTC Derivative is entered into<sup>4</sup></p>
<p>A Foreign ADI that has a branch located in this jurisdiction</p> <hr/> <p>A foreign company that is required to be registered under Division 2 of Part 5B.2 of the Act</p>	<p>Entry into, modification, termination or assignment of an OTC Derivative:</p> <ul style="list-style-type: none"> <li>• booked to the profit or loss account of a branch of the Reporting Entity located in this jurisdiction; or</li> <li>• entered into by the Reporting Entity in this jurisdiction</li> </ul>

Part S1.1 of Schedule 1 provides for phased implementation of the Transaction Reporting Requirements for different kinds of Reporting Entities and Part S1.2 of Schedule 2 provides for the Derivative Transaction Information to be reported. Part S1.2 of Schedule 1 provides for

<sup>2</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>3</sup> Defined in Rule 1.2.3 as an entity (including a corporation, partnership, managed investment scheme or trust) that is incorporated or formed in this jurisdiction.  
<sup>4</sup> A Reporting Entity that is, for example, both a foreign subsidiary of an Australian Entity and is also required to be registered under Division 2 of Part 5B.2 of the Act, would be required to report all Derivative Transactions in OTC Derivatives to which it is a counterparty, and not just those booked to the profit and loss account of a branch of the Reporting Entity located in this jurisdiction, or entered into by the Reporting Entity in this jurisdiction.  
<sup>5</sup> Defined in Rule 1.2.3 as an Australian Entity that is an Australian ADI as defined in section 9 of the Act.  
<sup>6</sup> Defined in Rule 1.2.3 as a holder of an Australian financial services licence granted under section 913B of the Act.

phased implementation of the Position Reporting Requirements for different kinds of Reporting Entities and Part S2.2 of Schedule 2 provides for the Derivative Position Information to be reported.

Under “Phase 2” Reporting Requirements, Australian ADIs, AFS Licensees, CS Facility Licensees, Exempt Foreign Licensees and Foreign ADIs, that have total gross notional outstanding of \$50 billion or more as at 31 December 2013, and that were not required to report as part of “Phase 1”, are required to start reporting from 1 April 2014. Table 2 summarises the Reporting Requirements that apply to Reporting Entities in Phase 2.

**Table 2 – Reporting Requirements that apply in Phase 2**

Phase 2	Summary of requirements
Stage 1 - Transaction Reporting	From 1 April 2014 to 30 September 2014 (inclusive), Phase 2 Reporting Entities must report their Reportable Transactions in credit derivatives and interest rate derivatives to a Licensed Repository or a Prescribed Repository.
Stage 1 - Position Reporting	By 1 October 2014, Phase 2 Reporting Entities must report outstanding positions as at 1 April 2014 in OTC Derivatives that are credit derivatives and interest rates derivatives to a Licensed Repository.
Stage 2 – Transaction Reporting	From 1 October 2014, Phase 2 Reporting Entities must start reporting their Reportable Transactions in all asset classes (credit derivatives, equity derivatives, foreign exchange derivatives, interest rate derivatives and commodity derivatives that are not electricity derivatives) to a Licensed Repository.
Stage 2 – Position Reporting	By 1 April 2015, Phase 2 Reporting Entities must report outstanding positions as at 1 October 2014 in OTC Derivatives that are equity derivatives, foreign exchange derivatives and commodity derivatives that are not electricity derivatives to a Licensed Repository.

## 2. Purpose of this Legislative Instrument

The purpose of the Legislative Instrument is to provide limited transitional relief, for varying periods, to Reporting Entities that are subject to “Phase 2” Reporting Requirements (referred to in the Legislative Instrument as “Phase 2 Reporting Entities”).

The relief will provide the Phase 2 Reporting Entities with additional time to start complying with certain aspects of the Reporting Requirements, subject to specified conditions being met. The relief recognises that a number of Phase 2 Reporting Entities are experiencing practical limitations in their efforts to achieve compliance with the Rules in the timeframes set out in Table 2 above. Broadly, the Legislative Instrument provides transitional exemptive relief relating to:

- reporting of certain Derivatives traded on foreign financial markets;
- reporting of ‘Identifying Information’ in relation to counterparties and beneficiaries of OTC Derivatives, where such reporting would breach a foreign law or regulation, an actionable a duty of confidence owed to the client, or a contractual duty owed to the client;
- reporting of ‘intra-day’ modifications to Derivatives (i.e. ‘lifecycle’ reporting), where only ‘snapshot’ reporting is available;

- reporting of trade identifiers that are “shared” between the counterparties or “paired” in the records of the Trade Repository;
- for certain foreign reporting entities, reporting of transactions “entered into” in this jurisdiction.

The Legislative Instrument is described in more detail in Attachment A.

### 3. Commencement of Legislative Instrument

The Legislative Instrument commences on the later of 1 April 2014 and the day on which the instrument is registered under the *Legislative Instruments Act 2003*. The relief under the Legislative Instrument applies during the periods specified in the Legislative Instrument

### 4. Consultation

#### Consultation on Legislative Instrument

ASIC consulted at length on the proposed Legislative Instrument through regular discussions with an industry working group facilitated by the Australian Financial Markets Association (*AFMA*) and International Swaps and Derivatives Association (*ISDA*). The members of the industry working group are current or prospective Reporting Entities, including Phase 2 Reporting Entities. Nine meetings were held between ASIC, AFMA and members of the industry working group, to discuss the proposed Legislative Instrument and various matters relating to the implementation of the Reporting Requirements, between October 2013 and March 2014. AFMA submitted a formal application for relief to ASIC on behalf of the Phase 2 Reporting Entities on 7 March 2014.

ASIC has also held various bilateral discussions with Phase 2 Reporting Entities, Trade Repositories, the CoFR agencies, and Regulators in other jurisdictions, in connection with issues dealt with under the Legislative Instrument.

#### Consultation on Rules

ASIC also consulted on the Rules to which the Legislative Instrument applies, through Consultation Paper 205 *Derivative transaction reporting (CP 205)*<sup>7</sup> released on 28 March 2013, and a series of meetings with stakeholders, including the Australian Bankers’ Association (*ABA*), AFMA, the Global Financial Markets Association (*GFMA*), the Finance and Treasury Association (*FTA*), the Financial Services Council (*FSC*) and ISDA. ASIC has worked closely with the CoFR agencies, particularly the RBA and APRA, in the overall design and implementation of the Rules.

### 5. Regulation Impact Statement

A Regulation Impact Statement (*G-20 OTC derivatives trade reporting regime*<sup>8</sup>) was prepared in relation to the Rules and approved by Office of Best Practice Regulation (*OBPR*). OBPR has advised that no further Regulatory Impact Statement is required for the Legislative Instrument because it assessed the proposal as having a minor impact on business.

<sup>7</sup> [http://www.asic.gov.au/asic/pdf/lib.nsf/lookupByFileName/cp205-published-28-March-2013.pdf/\\$file/cp205-published-28-March-2013.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/lookupByFileName/cp205-published-28-March-2013.pdf/$file/cp205-published-28-March-2013.pdf)

<sup>8</sup> <http://www.comlaw.gov.au/Details/F2013L01345/Supporting%20Material/Text>

The Legislative Instrument, in conjunction with a number of existing transitional provisions in the Rules<sup>9</sup>, will in ASIC's estimation substantially reduce the short-term regulatory impact of the Rules on Reporting Entities. In addition, 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.

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<sup>9</sup> These include the availability of "one-sided" reporting, the ability for Reporting Entities to report to prescribed derivative trade repositories overseas, and delayed reporting of certain fields including valuations, collateral and information about "barriers".

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

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

### **Paragraph 1 - Enabling legislation**

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

### **Paragraph 2 - Title**

This paragraph provides that the title of the instrument is ASIC Instrument 14/0234.

### **Paragraph 3 - Commencement**

This paragraph provides that the instrument commences on the later of 1 April 2014 and the date the instrument is registered under the *Legislative Instruments Act 2003*. The note to this paragraph explains that an instrument is registered when it is recorded on the Federal Register of Legislative Instruments (FRLI) in electronic form.

### **Paragraphs 4 to 24 – Exemptions and conditions**

Paragraphs 4 to 24 set out the exemptions from the Rules, and associated conditions, that apply to 'Phase 2 Reporting Entities'. 'Phase 2 Reporting Entity' is defined in paragraph 26 of the instrument to mean a Reporting Entity that:

- (a) a Reporting Entity that:
  - (i) is an Australian ADI, an AFS Licensee, a CS Facility Licensee, an Exempt Foreign Licensee or a Foreign ADI;
  - (ii) as at 31 December 2013 held total gross notional outstanding of AUD \$50 billion or more; and
  - (iii) was not required to report under Phase 1; or
- (b) a Reporting Entity that was granted an exemption from the requirement to report information about each of its Reportable Transactions and Reportable Positions under Phase 1 on condition that the Reporting Entity must comply with the Rules as if it is a Phase 2 Reporting Entity; or
- (c) a Reporting Entity that has lodged with ASIC an Opt-In Notice which provides for an Effective Date of on or prior to 30 September 2014.

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

Paragraph 4 of the instrument provides an exemption, from 1 April 2014 to 2 March 2015 (inclusive), to a Phase 2 Reporting Entity from Rule 2.2.1 of the Rules to the extent that Rule requires the Phase 2 Reporting Entity to report a Reportable Transaction or Reportable Position 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.

Paragraph 5 of the instrument specifies the financial markets that are ‘Relevant Financial Markets’ for the purposes of the exemption in paragraph 4. 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 specification of ‘Relevant Financial Markets’ in paragraph 5 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 Phase 2 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 subject to requirements and supervision that are sufficiently equivalent to a Part 7.2A Market, and therefore suitable to be determined as ‘Regulated Foreign Markets’. Accordingly, paragraph 6 of the instrument provides that a financial market is not a Relevant Financial Market for the purposes of paragraphs 4 and 5 if ASIC determines that the financial market is a Regulated Foreign Market for the purposes of subrule 1.2.4(2) of the Rules and such determination has not been withdrawn.

If ASIC does not make a determination in relation to one of the Relevant Financial Markets specified in paragraph 5 prior to the expiry of the exemption in paragraph 4, Phase 2 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 7 of the instrument, it is a condition of the exemption in paragraph 4 that the Phase 2 Reporting Entity must report in accordance with the Rules:

- (a) information about each of its Reportable Transactions in an Exchange-Traded Derivative as defined in paragraph 4, starting from no later than 3 March 2015; 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 3 March 2015 or such earlier date as the Phase 2 Reporting Entity starts to report its Reportable Transactions in the Exchange-Traded Derivative, to a Licensed Repository by or on 2 September 2015.

## **Exemption 2 (Privacy – Foreign privacy restrictions)**

Paragraph 8 of the instrument provides an exemption, from 1 April 2014 to 30 September 2014 (inclusive), to a Phase 2 Reporting Entity from Rule 2.2.1 of the Rules to the extent that Rule requires the Phase 2 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 paragraph 26 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 paragraph 8 applies where at the time the Identifying Information is required to be reported:

- (a) the Phase 2 Reporting Entity is of the reasonable view that the Phase 2 Reporting Entity would breach a law or regulation of a Relevant Foreign Jurisdiction if the Phase 2 Reporting Entity reported the Identifying Information to the Trade Repository;
- (b) the Phase 2 Reporting Entity has a written opinion of external legal counsel that supports the view referred to in paragraph (a); and
- (c) the Phase 2 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 paragraph 26 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 Phase 2 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 Phase 2 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 Phase 2 Reporting Entity may otherwise need to cease entering into Derivative Transactions with those counterparties. The exemption is also consistent with the policy in Section F of ASIC Regulatory Guide 251 *Derivative transaction reporting*, on foreign privacy restrictions and applications for relief.

The time-limited exemption will allow Phase 2 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 Phase 2 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, paragraph 9 of the instrument provides that it is a condition of the exemption in paragraph 8 that:

- (a) the Phase 2 Reporting Entity reports all Derivative Transaction Information in relation to the Reportable Transaction or all Derivative Position Information in relation to the Reportable Position (as applicable) other than the Identifying Information, in accordance with the Rules;
- (b) as soon as reasonably practicable after the Phase 2 Reporting Entity becomes reasonably satisfied that the Phase 2 Reporting Entity would no longer breach the law or regulation of the Relevant Foreign Jurisdiction if the Phase 2 Reporting Entity reported the Identifying Information to the Trade Repository, the Phase 2 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; and



- (c) the Phase 2 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 8(b) in respect of the Relevant Foreign Jurisdiction.

### **Exemption 3 (Privacy – Counterparty consents and notices)**

The exemption in paragraph 10 of the instrument provides that a Phase 2 Reporting Entity does not have to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Phase 2 Reporting Entity to report Identifying Information in relation to a Reportable Transaction or Reportable Position to a Trade Repository in certain circumstances.

As noted in relation to Exemption 2, ‘Identifying Information’ is defined in paragraph 26 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 in paragraph 10 applies where at the time the Identifying Information is required to be reported:

- (a) the Phase 2 Reporting Entity is required to:
- (i) obtain 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; or
  - (ii) give the Relevant Counterparty a notice (Notice) before it reports the Identifying Information to the Trade Repository;
- (b) if the Phase 2 Reporting Entity does not obtain the Consent or give the Notice before it reports the Identifying Information to the Trade Repository, a Phase 2 Reporting Entity may breach:
- (i) a duty of confidence owed by the Phase 2 Reporting Entity to the Relevant Counterparty which is actionable at law by the Relevant Counterparty;
  - (ii) a contractual duty owed by the Phase 2 Reporting Entity to the Relevant Counterparty; or
  - (iii) a provision of a law or regulation of a foreign jurisdiction that applies to the Phase 2 Reporting Entity in its dealings with the Relevant Counterparty; and
- (c) the Phase 2 Reporting Entity has not obtained the Consent of the Relevant Counterparty, or has not given the Relevant Counterparty the Notice (as applicable).

Under paragraph 11 of the instrument, the exemption in paragraph 10 applies from 1 April 2014 to the earlier of 1 October 2014 and the date the Phase 2 Reporting Entity obtains the Consent of the Relevant Counterparty, or gives the Relevant Counterparty the Notice (as applicable).

The exemption recognises the scale and complexity of the task of obtaining Consents from, or providing Notices to, multiple counterparties in order to report Identifying Information about those counterparties to a Trade Repository. In circumstances where a counterparty has not yet given Consent or been sent a Notice, the Phase 2 Reporting Entity may not be able to comply with their obligation to report Identifying Information about the counterparty without breaching a duty of confidence, or contractual duty, or law or regulation of a foreign jurisdiction. In those

circumstances the Phase 2 Reporting Entity may otherwise need to cease entering into Derivative Transactions with those counterparties.

The time-limited exemption will allow Phase 2 Reporting Entities to continue to enter into Derivative Transactions with affected counterparties while they complete the process of obtaining Consent from, and providing Notices to, affected counterparties.

Paragraphs 10 and 11 are subject to paragraphs 12, 12A and 12B. Under paragraph 12 of the instrument, from 1 June 2014 to 31 July 2014, the exemption in paragraph 10 does not apply unless the Relevant Counterparty enters into the Reportable Transaction or Reportable Position pursuant to:

- (a) an Existing OTC Derivatives Agreement between the Relevant Counterparty and the Phase 2 Reporting Entity; or
- (b) a legally binding agreement (Agency Agreement) between the Relevant Counterparty and an Intermediary that has an Existing OTC Derivatives (Intermediary) Agreement with the Phase 2 Reporting Entity.

This aspect of the exemption ensures that a Phase 2 Reporting Entity is not able to rely on the exemption in relation to new clients on-boarded directly with the Phase 2 Reporting Entity after 31 May 2014. The Phase 2 Reporting Entity would be expected to obtain Consent from, or provide Notice to, such counterparties as part of the on-boarding process. However, the Phase 2 Reporting Entity is able to continue to rely on the exemption in relation to new clients on-boarded through an existing intermediary, up until 31 July 2014.

Under paragraph 12A of the instrument, from 1 August 2014, the exemption in paragraph 10 does not apply unless the Relevant Counterparty enters into the Reportable Transaction or Reportable Position pursuant to:

- (a) an Existing OTC Derivatives Agreement between the Relevant Counterparty and the Phase 2 Reporting Entity; or
- (b) 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 Phase 2 Reporting Entity through the Intermediary on or before 31 July 2014.

Paragraph 12B of the instrument defines 'Existing OTC Derivatives Agreement' and 'Existing OTC Derivatives (Intermediary) Agreement' for the purposes of paragraphs 12 and 12A. Under paragraph 12B, 'Existing OTC Derivatives Agreement' means a legally binding agreement between the Relevant Counterparty and the Phase 2 Reporting Entity that was in place as at 31 May 2014, under which the Relevant Counterparty:

- (a) may enter into OTC Derivatives with the Phase 2 Reporting Entity; or
- (b) had entered into one or more OTC Derivatives with the Phase 2 Reporting Entity on or before 31 May 2014.

'Existing OTC Derivatives (Intermediary) Agreement' means a legally binding agreement between a person (the Intermediary) and the Phase 2 Reporting Entity that was in place as at 31 May 2014, under which the Intermediary:

- (a) may enter into OTC Derivatives with the Phase 2 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 Phase 2 Reporting Entity on behalf of other persons, on or before 31 May 2014.

Paragraph 13 of the instrument provides that it is a condition of the exemption in paragraph 10 that:

- (a) the Phase 2 Reporting Entity reports all Derivative Transaction Information in relation to the Reportable Transaction or all Derivative Position Information in relation to the Reportable Position (as applicable) other than the Identifying Information, in accordance with the Rules;
- (b) the Phase 2 Reporting Entity must use all reasonable endeavours to obtain the Consent from, or give the Notice to, the Relevant Counterparty, as soon as reasonably practicable; and
- (c) as soon as reasonably practicable after the Relevant Counterparty gives the Consent, or is given the Notice, a Phase 2 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.

Paragraph 14 of the instrument provides that, from 1 April 2014, it is an additional condition to the exemption in paragraph 10 that where the Phase 2 Reporting Entity has determined that the exemption in paragraph 10 applies only because of subparagraph 10(a)(ii), the Phase 2 Reporting Entity must give the Relevant Counterparty the Notice by the later of 30 April 2014 and the date which is one calendar month after the date on which the Phase 2 Reporting Entity determines that the exemption in paragraph 10 applies only because of subparagraph 10(a)(ii). This aspect of the exemption recognises that a requirement to give a Notice to a counterparty (rather than obtain the counterparty's consent) is more readily fulfilled and ensures that such requirement is fulfilled by the Phase 2 Reporting Entity expediently.

Paragraph 14A of the instrument provides that, from 30 April 2014, it is an additional condition of the exemption in paragraph 10 that the Phase 2 Reporting Entity must:

- (a) have in place a written compliance plan which describes how the Phase 2 Reporting Entity will use all reasonable endeavours to obtain the Consent from, or give the Notice to, Relevant Counterparties as soon as reasonably practicable, as required by paragraph 13(b);
- (b) on request by ASIC, provide ASIC with a copy of the compliance plan referred to in paragraph (a), within the time specified in the request or if no time is specified, within a reasonable time; and
- (c) on request by ASIC, provide ASIC with a document reporting on the Phase 2 Reporting Entity's implementation of the compliance plan referred to in paragraph (a), 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 4 (Intra-day modification reporting)**

Paragraph 15(a) of the instrument provides that, from 1 April 2014 to 30 September 2014 (inclusive), a Phase 2 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 a Phase 2 Reporting Entity to report information about a Reportable Transaction that is a modification of an OTC Derivative (Relevant

OTC Derivative) on a day (the Relevant Day), to a Trade Repository by no later than the end of the next Business Day following the Relevant Day.

The exemption in paragraph 15(a) is designed to provide relief from the requirement to report modifications of OTC Derivatives that occur on an intra-day basis (i.e. 'lifecycle reporting'). The exemption recognises that intra-day modification reporting is not required under some other regulatory regimes and that the functionality for such reporting may not be available to Phase 2 Reporting Entities at some Prescribed Repositories. In accordance with their existing obligations under US trade reporting requirements, some Phase 2 Reporting Entities are currently providing reports of their end-of-day position (referred to as 'snapshot reporting'). Accordingly, paragraph 16 of the instrument provides that it is a condition of the exemption in paragraph 15(a) that a Phase 2 Reporting Entity reports, for the Relevant OTC Derivative, information (State Data) about the Relevant OTC Derivative that is the same as, or substantially equivalent to, the Derivative Transaction Information set out in Part S2.1 of Schedule 2 of the Rules, and reports the State Data to a Trade Repository:

(a) as at the end of the Relevant Day, by no later than the end of the next Business Day following the Relevant Day; and (b) otherwise in accordance with the Rules as if the State Data was information reported under paragraph 2.2.1(1)(a) or (c) of the Rules (as applicable). Paragraph 15(b) of the instrument provides that, from 1 April 2014 to 30 September 2014 (inclusive), a Phase 2 Reporting Entity does not have to comply with Rule 2.2.6 to the extent that Rule requires a Phase 2 Reporting Entity to report an error or omission in information reported by the Phase 2 Reporting Entity pursuant to the Rules at any time prior to the end of the next Business Day following the day on which the Phase 2 Reporting Entity became aware of the error or omission.

The exemption in paragraph 15(b) is designed to provide relief from any requirement in Rule 2.2.6 to report errors or omissions in information reported by a Phase 2 Reporting Entity pursuant to the Rules by any time which is earlier than the end of the next Business Day following the day on which the Phase 2 Reporting Entity became aware of the error or omission. Rule 2.2.6 imposes a requirement on a Reporting Entity to take all reasonable steps to ensure that information it reports under subrule 2.2.1(1) of the Rules is and remains at all times complete, accurate and current. The exemption in paragraph 15(b) recognises that the timing of the reporting of errors or omissions should be consistent with the timing of reporting of modifications of OTC Derivatives pursuant to the exemption in paragraph 15(a).

Accordingly, paragraph 16A of the instrument provides that it is a condition of the exemption in paragraph 15(b) that the Phase 2 Reporting Entity reports the error or omission by no later than the end of the next Business Day after the day on which the Phase 2 Reporting Entity has become aware of the error or omission.

Paragraph 17 of the instrument provides that the Phase 2 Reporting Entity is not required to comply with the condition in paragraph 16 to the extent that condition requires a Phase 2 Reporting Entity to report:

- (a) the Derivative Transaction Information in Items 30–32 (mark-to-market, mark-to-model, or other valuation), Items 40–44 (collateral) and Items 51–52 (barrier type and value) in Table S2.1(1) of the Rules, or substantially equivalent information; and
- (b) 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', subject to a Phase 2 Reporting Entity reporting a Trade Identifier within the meaning of paragraph 19 of this instrument.

Paragraph 17 ensures that the condition in paragraph 16 does not require the Phase 2 Reporting Entity to report certain Derivative Transaction Information that it would not otherwise be required to report under the Rules (because of existing exemptions in Part 2.4 of the Rules or under the exemption in paragraph 18 this instrument) during the same period.

#### **Exemption 5 (Trade identifiers)**

Paragraph 18 of the instrument provides that, from 1 April 2014 to 30 September 2014 (inclusive), a Phase 2 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 Phase 2 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’.

The exemption recognises that some Phase 2 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. The exemption will allow Phase 2 Reporting Entities additional time to continue to work with industry and authorities in jurisdictions that have two-sided reporting regimes (e.g. Australia, Hong Kong and the European Union) towards a practical solution to the barriers to “sharing” and “pairing” of transaction identifiers.

Paragraph 19 of the instrument provides that it is a condition of the exemption in paragraph 18 that the Phase 2 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 reports 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 paragraph 26 of the instrument to mean an electronic trade confirmation platform. ‘Swap Execution’ Facility is defined in paragraph 26 to mean a ‘swap execution facility’ as defined in section 1a(50) of the *Commodity Exchange Act 1936* (US).

#### **Exemption 6 (Nexus Transactions)**

Paragraph 20 of the instrument provides that, 1 April 2014 to 1 February 2015 (inclusive), a Phase 2 Reporting Entity does not have to comply with:

- (a) paragraphs 2.2.1(1)(a) and (c) of the Rules to the extent those paragraphs require a Phase 2 Reporting Entity that is:
  - (i) a Foreign ADI that has a branch located in this jurisdiction; or
  - (ii) a foreign company that is required to be registered under Division 2 of Part 5B.2 of the Act,

to report information about a Reportable Transaction in an OTC Derivative entered into by the Phase 2 Reporting Entity in this jurisdiction (**Nexus Transaction**); and

- (b) paragraph 2.2.1(1)(b) of the Rules to the extent that paragraph requires a Phase 2 Reporting Entity referred to in paragraph (a) to report information about an outstanding position in an OTC Derivative entered into by the Phase 2 Reporting Entity in this jurisdiction, by the applicable Position Reporting Date.

As noted in the background to this Explanatory Statement, Foreign ADIs that have a branch located in this jurisdiction, and foreign companies that are required to be registered under Division 2 of Part 5B.2 of the Act, must report OTC Derivatives they have “entered into by the Reporting Entity in this jurisdiction”, and OTC Derivatives “booked to the profit and loss account of a branch of the Reporting Entity located in this jurisdiction”. The exemption provides additional time for a shared understanding to be reached between affected Phase 2 Reporting Entities, ASIC and, potentially, foreign regulators with similar reporting regimes, on the identification of transactions that are “entered into by the Reporting Entity in this jurisdiction”, and for Phase 2 Reporting Entities that are Foreign ADIs or foreign companies to design, develop and implement the necessary information technology, systems and processes to identify such OTC Derivative Transactions.

Paragraph 21 of the instrument provides that the exemption in paragraph 20 does not apply to:

- (a) a Phase 2 Reporting Entity that is a foreign subsidiary of an Australian Entity where that Australian Entity is an Australian ADI or AFS Licensee; or
- (b) a Reportable Transaction in an OTC Derivative booked to the profit or loss account of a branch of the Phase 2 Reporting Entity located in this jurisdiction; or
- (c) an outstanding position in relation to an OTC Derivative booked to the profit or loss account of a branch of the Phase 2 Reporting Entity located in this jurisdiction.

Paragraph 22 of the instrument provides that it is a condition of the exemption in paragraph 20 that:

- (a) a Phase 2 Reporting Entity must
  - (i) report in accordance with the Rules information about each of its Nexus Transactions starting from no later than 2 February 2015; and
  - (ii) for the period from 2 February 2015 to 1 August 2015 (inclusive), designate the information reported in accordance with subparagraph (i) as being able to be provided to ASIC by the Trade Repository to which that information is reported;
- (b) a Phase 2 Reporting Entity must
  - (i) report in accordance with the Rules the Derivative Position Information set out in Part S2.2 of Schedule 2 of the Rules, about each of its outstanding positions as at 2 February 2015 in an OTC Derivative entered into by the Phase 2 Reporting Entity in this jurisdiction on or after 1 October 2014, by or on 1 August 2015; and
  - (ii) designate the Derivative Position Information reported in accordance with subparagraph (i) as being able to be provided to ASIC by the Trade Repository to which the Derivative Position Information is reported; and
- (c) where a Phase 2 Reporting Entity is required to report information about:

- (i) a Reportable Transaction that is entered into on or after 1 October 2014 and that is booked to the profit or loss account of a branch of the Phase 2 Reporting Entity located in this jurisdiction; or
- (ii) a Reportable Position in an OTC Derivative that was booked to the profit or loss account of a branch of the Phase 2 Reporting Entity located in this jurisdiction, the Phase 2 Reporting Entity must, commencing on 1 October 2014, designate that information as being able to be provided to ASIC by the Trade Repository to which that information is reported.

The condition in paragraph 22(a)(i) requires the Phase 2 Reporting Entity to report each of its Nexus Transactions in accordance with the Rules from 2 February 2014. The condition in paragraph 22(b)(i) requires the Phase 2 Reporting Entity to report information about each of its outstanding positions in an OTC Derivative entered into in this jurisdiction on or after 1 October 2014.

The conditions also ensure that (i) Nexus Transactions, (ii) their related Reportable Positions and (iii) Reportable Transactions (entered into on or after 1 October 2014) and Reportable Positions which are each “booked to the profit and loss account of a branch of a Phase 2 Reporting Entity located in this jurisdiction” are appropriately designated as being able to be provided to ASIC by the Trade Repository to which that information is reported, so that the Australian regulators will be able to access information about these Reportable Transactions and Reportable Positions.

#### **Exemptions 1 to 6 – Other conditions (Record-keeping)**

Paragraph 23 of the instrument provides that it is condition of the instrument that a Phase 2 Reporting Entity must:

- (a) keep records that enable the Phase 2 Reporting Entity to demonstrate it has complied with the conditions in paragraphs 7, 9, 13, 14, 14A, 16, 19, and 22 of this 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 request by ASIC, provide ASIC with records or other information relating to compliance with or determining whether there has been compliance with the conditions in paragraphs 7, 9, 13, 14, 14A, 16, 19, and 22 of this instrument, within the time specified in the request or if no time is specified, within a reasonable time.

The condition in paragraph 23 ensures a Phase 2 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 Phase 2 Reporting Entity would be required to keep and provide records and information to ASIC relating to compliance with the Rules.

Paragraph 24 of the instrument request by ASIC under paragraph 23(c) must be in writing and give a Phase 2 Reporting Entity a reasonable time to comply.

#### **Exemptions 1 to 6 – Interaction between exemptions**

Paragraph 25 of the instrument provides that each exemption in this instrument operates on its terms and does not limit the operation of any other exemption in this instrument.

#### **Interpretation**

Paragraph 26 of the instrument provides for definitions of terms used in the instrument.

Paragraph 27 of the instrument provides that, unless otherwise specified, capitalised terms used in the instrument have the meaning given by the Rules.



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

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

### ***ASIC Instrument [14/0234]***

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**

ASIC Instrument [14/0234] (the ***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, which were made by ASIC under section 901A of the Act acting with the consent of the Minister under section 901K of the Act, impose requirements on ‘Reporting Entities’ to report their ‘Reportable Transactions’ and ‘Reportable Positions’ 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). Phase 1 of the Rules commenced on 1 October 2013, while Phase 2 is due to commence on 1 April 2014.

These exemptions in the Legislative Instrument apply to ‘Phase 2’ Reporting Entities. The exemptions are time-limited and subject to conditions. Broadly, the exemptions apply to:

- reporting of certain Derivatives traded on foreign financial markets;
- reporting of ‘Identifying Information’ in relation to counterparties and beneficiaries of OTC Derivatives, where such reporting would breach a foreign law or regulation, an actionable a duty of confidence owed to the client, or a contractual duty owed to the client;
- reporting of ‘intra-day’ modifications to Derivatives (i.e. ‘lifecycle’ reporting), where only ‘snapshot’ reporting is available;
- reporting of trade identifiers that are “shared” between the counterparties or “paired” in the records of the Trade Repository;
- for certain foreign reporting entities, reporting of transactions “entered into” in this jurisdiction.

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

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

The right in Article 17 is engaged by the Legislative Instrument by reason that the 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 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 Phase 2 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 Legislative Instrument with the rights recognised in Article 17

The Legislative Instrument is compatible with the rights recognised in Article 17 of the ICCPR by reason that it advances those rights. The Legislative Instrument applies in circumstances where a ‘Phase 2 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 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’, or, where notification of intention to report is sufficient, where such notice is given. In the case of foreign jurisdictions where existing law or regulation would prevent such reporting despite the consent of, or notification to, 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 Legislative Instrument were considered to limit the right in Article 17 of the ICCPR in that it requires the Phase 2 Reporting Entity to work towards reporting of “Identifying Information”, ASIC considers that the 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 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 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 contains 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 operators 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 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.