
ASIC Corporations (Amendment) Instrument 2017/0723

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 2016/913 (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.¹

¹ 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.

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

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*).³ 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 applying to all Reporting Entities, Instrument 2015/844. 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 ASIC Instrument 2015/844.

ASIC Instrument 2015/844 included an exemption (Exemption1) providing relief from reporting of OTC Derivatives entered on certain foreign financial markets ('Relevant Financial Markets'). Exemption 1 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]. Exemption 1 of Class Order 2015/844 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 (including 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. A review of the ASIC Regulated Foreign Markets Determination is planned prior to 30 September 2018, the expiry of relief provided by Class Order 2015/844.

2. Purpose of the Legislative Instrument

The purpose of the Legislative Instrument is to amend ASIC Instrument 2015/844 to include Eurex Zurich in the list of 'Relevant Financial Markets' subsection 5(4) of ASIC Instrument 2015/844, and provide class order relief to all Reporting Entities from obligations to comply with subrule 2.2.1(1) of the Australian Derivatives Transaction Rules (Reporting) 2013 (the Rules) for transactions in Swiss futures contracts traded on Eurex Zurich. Eurex Zurich is regulated by the Swiss Financial Market Authority (FINMA), and is a long-standing member of the International Organization of Securities Commissions (IOSCO). Transactions traded on Eurex Zurich are centrally cleared. According to the International Monetary Fund (IMF) report "Technical Note: Oversight, Supervision, and Risk Management of Financial Market Infrastructure" (September 2014) financial market infrastructures in Switzerland are well-developed and stable, and that supervision by FINMA is appropriate and effective. The granting of the Legislative Instrument follows an application for relief submitted in accordance with Regulatory Guide 51 from a reporting entity.

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

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

3. Commencement of Legislative Instrument

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

4. Consultation

In making this Legislative Instrument, ASIC has consulted with industry groups including the Australian Financial Markets Association (*AFMA*), Global Financial Market Association (*GFMA*) and the International Swaps and Derivatives Association (*ISDA*) and Financial Services Council (FSC). The members of the industry groups are current or prospective Reporting Entities. ASIC took into account the feedback provided by these bodies, together with ASIC's regulatory objectives, in the final terms of the Legislative Instrument.

5. 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 ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844 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 amends an existing exemption set out in ASIC Instrument 2015/844, again with a minor impact on business.

6. Detailed operation of the Instrument

Attachment A provides a detailed explanation of the changes made to ASIC Instrument 2015/844 by this Legislative Instrument.

7. 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.

Legislative Instrument

Paragraph 1 – Name of legislative instrument

This paragraph provides that the title of the Legislative Instrument is the *ASIC Corporations (Amendment) Instrument 2017/0723*

Paragraph 2 – Commencement

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

Paragraph 3 – Authority

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

Paragraph 4 – Amendments

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

Schedule 1 - Amendments

Item 1 – Paragraph 5, subsection (4)

Item 1 of Schedule 1 to the Legislative Instrument amends subsection 5(4) of the Exemption Instrument by inserting the words "(jjj) Eurex Zurich" after the words "(iii) Turkish Derivatives Exchange".

The amendment to the Exemption Instrument expands the list of specified financial markets that are 'Relevant Financial Markets' under subsection 5(4) for the purposes of the exemption in subsection 5(1).

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.

ATTACHMENT B – Statement of Compatibility with Human Rights

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

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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 2017/0723* (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.

Among other things, the Exemption Instrument provided transitional time-limited exemptive relief from the requirement for a Reporting Entity to report information in relation to OTC Derivatives entered on certain foreign financial markets.

The Legislative Instrument amends the Exemption Instrument by inserting Eurex Zurich in the list of 'Relevant Financial Markets' subsection 5(4) of ASIC Instrument 2015/844, provide class order relief to all Reporting Entities from obligations to comply with subrule 2.2.1(1) of the Australian Derivatives Transaction Rules (Reporting) 2013 (the Rules) for transactions in Swiss futures contracts traded on Eurex Zurich.

2. Human rights implications

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

3. Human rights implications

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