
ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209 (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 (Clearing) 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).

1. Background

In December 2015, 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 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’.

Under Rule 1.2.3(8)(b)(ii) of the Rules, Clearing entities are not required to clear Forward Rate Agreements that were entered into before 2 April 2018.

2. Purpose of the Legislative Instrument

The purpose of the Legislative Instrument is to delay the commencement of Clearing Requirements in Australian Dollar Forward Rate Agreements (**AUD FRAs**) until 2 April 2019.

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.

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 any 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.

At present only one Clearing Facility has been licensed to clear AUD FRAs, and ASIC does not believe any other Clearing Facility is likely to clear AUD FRAs in the near future. As the Regulators stated, 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 12 months to allow time to see if a second Clearing Facility begins to clear these products.

On 23 March 2018, the International Swaps and Derivatives Association, Inc. (*ISDA*) and the Australian Financial Markets Association (*AFMA*) submitted a request for relief to delay the Clearing Requirement for AUD FRAs.

3. Commencement of Legislative Instrument

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

4. Consultation

Following receipt of the application for relief from ISDA and AFMA, ASIC consulted with the RBA and APRA. ISDA and AFMA consulted with the Clearing Facilities to determine the likelihood that additional Clearing Facilities would begin clearing AUD FRAs. 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

Based on information provided by ASIC, the Office of Best Practice Regulation (*OBPR*) advised that the proposal is likely to have a minor regulatory impact on business, community organisations or individuals, as the proposal does not substantially alter existing arrangements. Accordingly, a Regulation Impact Statement (*RIS*) was not prepared.

6. Detailed operation of the Instrument

The Legislative Instrument is described in more detail in [Attachment A](#).

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

Part 1

Section 1 – Name of legislative instrument

This section provides that the title of the Legislative Instrument is *ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209*.

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 – Definitions

Section 4 provides that, in the Legislative Instrument, capitalised terms have the meaning given by the Rules. Paragraph 4 also provides that, in the Legislative Instrument, 'Rules' means the ASIC Derivative Transaction Rules (Clearing) 2015, as amended from time to time.

Part 2

Section 5 – Exemption

Section 5 of the Legislative Instrument provides that from 2 April 2018 to 1 April 2019, a Clearing Entity does not have to comply with Rule 2.1.1 of the Rules in relation to a Forward Rate Agreement if the notional principal amount and payments under the Forward Rate Agreement are denominated in Australian dollars.

ATTACHMENT B – Statement of Compatibility with Human Rights

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

ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209

The *ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209* (the **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 Legislative Instrument, made by ASIC under paragraph 907D(2)(a) of the *Corporations Act 2001* (the **Act**), delays the requirement to clear Australian Dollar Forward Rate agreement by one year to 2 April 2019, given there is only one Clearing Facility licensed to clear these products.

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.