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# ASIC Corporations (Amendment) Instrument 2018/810

## 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 2018/810 (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 further extending three of the time-limited exemptive relief extending elements in the Exemption Instrument.

Many of the underlying issues which the relief in the Exemption Instrument sought to address are continuing issues. The Legislative Instrument therefore provides continued time-limited exemptive relief for the industry for four elements of relief in the Exemption Instrument set to expire on 30 September 2018 and one further element of relief set to expire on 31 December 2018, acknowledging that these issues are issues that are to be resolved with reference to recommendations published by international standard setting bodies, including the Financial Stability Board (FSB), Committee on Payments and Market Infrastructures (CPMI) and International Organisation of Securities Commissions (IOSCO). The Legislative Instrument also extends relief for one other relief element ('Entity Information') in the Exemption Instrument set to expire on 30 September 2018 to 31 March 2019 in order to provide a further six months for Reporting Entities to prepare for full implementation of the requirement, including liaison with Relevant Entities.

## **2. 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 from reporting of OTC Derivatives entered on certain foreign financial markets;
- relief to report an internal identifier where an identifier required under the Rules is not available for the relevant entity;
- relief from reporting the legal names of entities where an identifier required under the Rules is reported;
- relief from reporting of identity information (names and identifiers) in relation to counterparties and beneficiaries of OTC Derivatives, where such reporting would breach a

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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.

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foreign law or regulation, an actionable duty of confidence owed to the client, or a contractual duty owed to the client;

- relief from reporting of certain OTC Derivatives known as 'Foreign Exchange Security Conversion Transactions'.

### **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, received two applications for relief, including an application from the Australian Financial Markets Association (*AFMA*). Another application for relief was received from a party that did not wish to be disclosed. ASIC also liaised Global Financial Market Association (GFMA), International Swaps and Derivatives Association (ISDA) and held a meeting with ISDA and AFMA members. ASIC took into account the feedback provided by these bodies and industry participants, 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 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.

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

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

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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**

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

This paragraph provides that the title of the Legislative Instrument is the *ASIC Corporations (Amendment) Instrument 2018/810*

#### **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 – Subsection 5(1) and Subsection 7(1) and Section 13**

Item 1 of Schedule 1 of the Legislative Instrument amends Subsection 5(1) and Subsection 7(1) and Section 13 of the Exemption Instrument by omitting the words "30 September 2018" and substituting "30 September 2020".

This amendment to the Exemption Instrument extends the period by which a Reporting Entity does not have to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report:

- Subsection 5(1) - a transaction in 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. The extension in the Legislative Instrument is for a period of 24 months, to 30 September 2020;
- Subsection 7(1) - Name Information about an entity (***Relevant Entity***) in relation to a Reportable Transaction or Reportable Position to a Trade Repository, in the case where the Reporting Entity reports to the Trade Repository an identifier for the Relevant Entity that is a Legal Entity Identifier (***LEI***), interim entity identifier, Designated Business Identifier or Business Identifier Code (***BIC Code***). The extension in the Legislative Instrument is for a period of 24 months, to 30 September 2020;
- Section 13 - a Reportable Transaction or Reportable Position in a foreign exchange contract;

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- that is entered into by the Reporting Entity solely to facilitate the settlement of a transaction for the purchase or sale of a foreign currency denominated security; and
  - under which consideration is provided to settle the transaction not more than 7 business days after the day on which the transaction is entered into.

The extension in the Legislative Instrument is for a period of 24 months, to 30 September 2018.

#### Item 2 – Paragraph 5 subsection (3)(a) and (b)

Item 2 of Schedule 1 of the Legislative Instrument amends Paragraph 5 subsection (3)(a) and (b) of the Exemption Instrument by omitting the words "1 October 2018" and substituting "1 October 2020". This amendment to the Exemption Instrument extends the period that a Reporting Entity does not have to comply with subsection 907D(3) of the Act in relation to the condition in paragraph 7 of ASIC Instrument [14/0952] for a period of 24 months, to 1 October 2020.

#### Item 3 – Subsection 6(1) and Subsection 8(1)

Item 3 of Schedule 1 of the Legislative Instrument amends Subsection 6(1) and Subsection 8(1) of the Exemption Instrument by omitting the words "30 September 2018" and substituting "31 March 2019".

This amendment to the Exemption Instrument extends the period by which a Reporting Entity does not have to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report:

- Subsection 6(1) - 'Entity Information' in relation to a Reportable Transaction or Reportable Position to a Trade Repository where the Entity Information (for a non-natural person – a Legal Entity Identifier (*LEI*), interim entity identifier, Designated Business Identifier or Business Identifier Code (*BIC Code*)) is not available for the Relevant Entity and the Reporting Entity reports an internal identifier for the Relevant Entity. The extension in the Legislative Instrument is for a period of 6 months, to 31 March 2019;
- Subsection 8(1) - 'Identifying Information' in relation to a Reportable Transaction or Reportable Position to a Trade Repository where consent is required to report 'Identifying Information' for historical counterparties, in certain circumstances. The extension in the Legislative Instrument is for a period of 6 months, to 31 March 2019.

#### Item 4 – Subsection 9(1)

Item 4 of Schedule 1 of the Legislative Instrument amends Subsection 9(1) of the Exemption Instrument by omitting the words "31 December 2018" and substituting "31 March 2019".

This amendment to the Exemption Instrument extends the period by which a Reporting Entity does not have to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report:

- Subsection 9(1) - 'Identifying Information' in relation to a Reportable Transaction or Reportable Position to a Trade Repository due to the privacy restrictions of listed

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jurisdictions ('Relevant Foreign Jurisdiction'), in certain circumstances. The extension in the Legislative Instrument is for a period of 3 months, to 31 March 2019.

## **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 2018/810**

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 2018/810* (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.

#### **3. Human rights implications**

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