



**ASIC**  
Australian Securities &  
Investments Commission

# Explanatory Statement

## ASIC Corporations (Amendment) Instrument 2019/958

This is the Explanatory Statement for the *ASIC Corporations (Amendment) Instrument 2019/958*.

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

### Summary

1. The instrument amends the *ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844 (Principal Instrument)* to provide exemptions from the *ASIC Derivative Transaction Rules (Reporting) 2013 (Rules)* with respect to the reporting of derivative transactions to a Licensed Repository or a Prescribed Repository (**Trade Repository**).

### Purpose of the instrument

2. Under Rule 2.2.1 of the Rules, Reporting Entities are required to report information about their Reportable Transactions and Reportable Positions in OTC Derivatives to a Trade Repository.
3. The information that Reporting Entities are required to report includes specified identifiers (**Entity Information**) for brokers, clearing members, counterparties and beneficiaries involved in the OTC Derivative transaction. In the case of a Credit Derivative, the Entity Information includes an identifier of the entity (**Reference Entity**) that is the subject of the protection being purchased and sold.
4. Where the entity is not an individual, the identifier that must be reported is the Legal Entity Identifier (**LEI**), interim entity identifier, Designated Business Identifier or Business Identifier Code.
5. The purpose of the instrument is to provide ongoing relief to Reporting Entities from the requirement to report Entity Information in certain circumstances. Broadly, the relief is available where the Reporting Entity is unable to report the Entity Information due to circumstances beyond the control of the Reporting Entity, or where the market convention is to report different information.

### Consultation

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6. ASIC consulted with the International Swaps and Derivatives Association (**ISDA**) on the relief granted by the instrument. ISDA consulted with its members on the relief.
  7. The Office of Best Practice Regulation has assessed that a Regulatory Impact Statement is not required in relation to the making of the instrument.

## **Operation of the instrument**

### *Entity Information*

8. Paragraph 6 of the Principal Instrument provides relief to Reporting Entities from the requirement to report Entity Information about an entity (**Relevant Entity**) where Entity Information is not available for the Relevant Entity. The relief applies where the Reporting Entity instead reports the Reporting Entity's internal entity identifier for the Relevant Entity.
9. The relief in paragraph 6 of the Principal Instrument is conditional on the Reporting Entity using best efforts to obtain and report the Entity Information as soon as reasonable practicable, and providing ASIC on request with a written statement about compliance with that condition.
10. The relief in paragraph 6 of the Principal Instrument applies from 1 October 2015 to the Exemption End Date. The Exemption End Date is:
  - (a) 30 September 2019 if the Relevant Entity is an Australian entity or a foreign entity that entered into the OTC Derivative through its Australian branch;
  - (b) otherwise, 31 March 2020.
11. Paragraphs 1 to 7 of the instrument amend the Principal Instrument to provide a more limited form of relief commencing from the day after the applicable Exemption End Date, with respect to historical transactions and also new transactions involving smaller counterparties.

### *Historical transactions*

12. New subsection 6(1A) of the Principal Instrument provides continuing relief from the requirement to report Entity Information after the Exemption End Date, in relation to OTC Derivatives entered into on or before the Exemption End Date. The relief applies where the Reporting Entity instead reports the Reporting Entity's internal entity identifier for the Relevant Entity.
13. The relief is intended to apply where the Reporting Entity is required to report the assignment, modification or termination of an existing OTC Derivative and has not yet been able to obtain Entity Information for the Relevant Entity despite using best efforts to do so. The relief is subject to the same conditions as the existing relief in section 6 of the Principal Instrument.
14. This exemption responds to concerns raised by Reporting Entities that despite their best efforts to obtain Entity Information for their clients, there were still likely to be instances where they were unable to obtain Entity Information for some transactions

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that were entered into before the Exemption End Date and that will remain open after the Exemption End Date.

*New transactions*

15. New subsection 6(1B) of the Principal Instrument provides relief from the requirement to report Entity Information in relation to OTC Derivatives entered into after the Exemption End Date where the Relevant Entity is not a Phase 1, 2 or 3 Reporting Entity under the Rules. The relief applies where the Reporting Entity instead reports the Reporting Entity's internal entity identifier for the Relevant Entity.
16. The relief will apply where, for example, the Reporting Entity wishes to enter a new trade on behalf of a smaller client who does not regularly trade derivatives and who does not have their own reporting obligations. The relief is subject to stricter conditions than the existing relief in section 6 of the Principal Instrument. A Reporting Entity wishing to rely on the relief must use its best efforts to obtain the Entity Information as soon as reasonably practicable, including by maintaining and following documented procedures designed to ensure an application is made for the issue of Entity Information to the Relevant Entity within 2 Business Days after the requirement to report the Entity Information arises. For this purpose, the requirement to report the Entity Information arises at the time the OTC Derivative is entered into, assigned, modified or terminated.
17. The relief will cease to apply in relation to a Reporting Entity and a Relevant Entity where an application for the issue of Entity Information in relation to the Relevant Entity has not been made within 2 Business Days after the first occasion on which the Reporting Entity seeks to rely on the relief in relation to the Relevant Entity.
18. This exemption responds to concerns raised by Reporting Entities that despite their best efforts to obtain Entity Information for their clients, there were still likely to be instances where they were unable to obtain Entity Information before the Exemption End Date for some clients, particularly smaller entities that do not regularly transact in derivatives markets.

***Reference Entity Information***

19. Paragraph 8 of the instrument amends the Principal Instrument to insert a new section 6A.
20. New section 6A of the Principal Instrument provides relief to Reporting Entities from the requirement to report Entity Information in relation to the Reference Entity for a credit default swap or total return swap. The relief applies where the Reporting Entity instead reports the CDS Reference Entity Database code (also known as a "RED code") issued by IHS Markit for the Reference Entity.
21. The relief is granted in recognition that RED codes are an adequate substitute for Entity Information with respect to credit default swaps and total return swaps, and that the current market convention is to use RED codes when reporting those swaps to the Trade Repository.

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22. This exemption recognises that the reporting of RED Codes in relation to the Reference Entity for a credit default swap or total return swap is consistent with current market conventions and reporting requirements in other jurisdictions.

### ***Joint Counterparties***

23. Paragraph 8 of the instrument amends the Principal Instrument to insert a new section 6B.
24. New section 6B of the Principal Instrument provides relief to Reporting Entities from the requirement to report Entity Information about a Relevant Entity that is comprised of two or more counterparties that entered into the OTC Derivative as joint or joint and several counterparties, where Entity Information is not available for the Relevant Entity. The relief applies where the Reporting Entity instead reports the Reporting Entity's internal entity identifier for the joint or joint and several counterparties as a group.
25. The relief is conditional on the Reporting Entity maintaining records of the counterparties that comprise the joint or joint and several counterparties to the OTC Derivative, being able to link those counterparties to the internal entity identifier reported by the Reporting Entity to the Trade Repository, and providing ASIC on request with a written statement about compliance with those conditions.
26. This exemption responds to concerns raised by Reporting Entities that it is not possible to obtain Entity Information about a Relevant Entity where that Relevant Entity is comprised of two or more counterparties that entered into a OTC Derivative as joint or joint and several counterparties.

### **Incorporation by reference**

27. The instrument does not incorporate matter by reference.

### **Retrospective application**

28. The instrument commences on 1 October 2019. The instrument provides relief from the obligations under the Rules. A Reporting Entity may elect to comply with the Rules or avail itself of the relief. Accordingly, for the purposes of subsection 12(2) of the *Legislation Act 2003* the instrument does not:
- (a) affect a person's rights as at the time the instrument is registered so as to disadvantage the person; or
  - (b) impose liabilities on a person in respect of anything done or omitted to be done before the instrument is registered.

### **Legislative authority**

29. Under paragraph 907D(2)(a) of the Act, ASIC may exempt a person or class of persons from all or specified provisions of the Rules.
30. 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

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condition (see subsection 907D(3) of the Act). An exemption under paragraph 907D(2)(a) of the Act is a disallowable legislative instrument if it is expressed to apply in relation to a class of persons (see subsection 907D(4) of the Act).

31. 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..

### **Statement of Compatibility with Human Rights**

32. 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 2019/958*

#### Overview

1. The instrument amends the *ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844* to provide exemptions from the *ASIC Derivative Transaction Rules (Reporting) 2013 (Rules)* with respect to the reporting of derivative transactions to a Licensed Repository or a Prescribed Repository (**Trade Repository**).
2. The purpose of the instrument is to provide ongoing relief to Reporting Entities from the requirement to report to a Trade Repository specified codes identifying an entity that is a counterparty, beneficiary, broker, clearing member or reference entity in relation to an OTC Derivative transaction. The relief applies where the Reporting Entity reports an alternative code.
3. Broadly, the relief is available where the Reporting Entity is unable to report the specified code due to circumstances beyond the control of the Reporting Entity, or where the market convention is to report different a different code.

#### Assessment of human rights implications

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

#### Conclusion

5. 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*.