



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment) Instrument 2020/242

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2020/242*.

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 conditional exemptions from the *ASIC Derivative Transaction Rules (Reporting) 2013 (Rules)* with respect to the reporting of trade identifiers and entity information 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. Reporting Entities are required to report common data elements listed in Table S2.1(1) of the Rules. Data item 1, Unique Transaction Identifier (**UTI**), requires the reporting of the universal transaction identifier, single transaction identifier, the identifier used by the trading venue (if applicable), or an internal identifier.
4. The first purpose of the Legislative Instrument is to amend the Exemption Instrument to extend relief from reporting a 'universal transaction identifier' or a 'single transaction identifier' (**Trade Identifier relief**) and insert a new condition, only applicable to Reporting Entities who are party to Reportable Transactions that are also reportable under the Commodity Futures Trading Commission Swap Data Recordkeeping and Reporting Requirements (**CFTC rules**), to align ASIC UTI requirements with proposed CFTC UTI requirements, should they come into force.
5. The relief is necessary to provide time for ASIC to propose and finalise UTI requirements within amended Rules. New UTI requirements will be developed to implement the CPMI IOSCO Technical Guidance on Harmonisation of the Unique Transaction Identifier (**UTI Technical Guidance**) and, where possible,

align with the requirements of key jurisdictions. The period of relief aims to provide enough time for a package of amendments to the Rules to be implemented, which will likely include Critical Data Elements and Unique Product Identifier requirements.

6. Also, under Rule 2.2.1 of the Rules, Reporting Entities are required to report information as specified identifiers (**Entity Information**) for counterparties, beneficiaries, brokers and clearing members.
7. 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.
8. The second purpose of the instrument is to provide ongoing relief to Reporting Entities that are New Zealand registered banks from the requirement to report Entity Information in certain circumstances. Broadly, the relief is available for Reportable Transactions or Reportable Positions of the Reporting Entity where their counterparty in the transaction is not an Australian entity and is not an entity for whom regulatory margining and risk mitigation applies to the Reporting Entity and with whom the Reporting Entity does not have a credit support annex (or other industry standard credit support arrangement) in place.

Consultation

9. In making this Legislative Instrument, in relation to the Trade Identifier relief, ASIC consulted industry groups including the International Swaps and Derivatives Association (**ISDA**), Global Financial Markets Association – Global Foreign Exchange Division (**GFXD**) and the Australian Financial Markets Association (**AFMA**). ASIC also invited comment from the Association of Superannuation Funds of Australia (**ASFA**), the Australian Institute of Superannuation Trustees (**AIST**) and the Financial Services Council (**FSC**). The members of the industry working groups are current or prospective Reporting Entities, including Phase 1, Phase 2 and Phase 3 Reporting Entities. ASIC considered the feedback provided by these bodies, together with ASIC's regulatory objectives, in the final terms of the Legislative Instrument.
10. In relation to the Entity Information relief, ASIC consulted with the New Zealand Financial Markets Association (**NZFMA**) in relation to their application for relief on behalf of two New Zealand banks.
11. 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 extends a number of commencement dates set out in ASIC Instrument 2015/844, again with a minor impact on business.

Operation of the instrument

Commencement

12. Section 2 of the instrument provides that the instrument commences on the later of the day after it is registered on the Federal Register of Legislation and 1 April 2020.

Amendments to the Principal Instrument

13. Section 4 of the instrument provides the instrument specified in Schedule 1 of the instrument (the Principal Instrument) is amended as specified in Schedule 1.

Entity Information

14. Item 1 of Schedule 1 to the instrument repeals subsection 6(1) of the Principal Instrument as the period of time referred to in subsection 6(1) ends on 31 March 2020. Items 2 to 4 make consequential amendments to the Principal Instrument.
15. Section 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.
16. The relief in section 6 of the Principal Instrument is conditional on the Reporting Entity using best efforts to obtain and report the Entity Information as soon as reasonably practicable, and providing ASIC on request with a written statement about compliance with that condition.
17. Item 7 of Schedule 1 to the instrument, and the consequential amendments in items 4 to 6, amend the Principal Instrument to exclude certain counterparties from the requirement for Reporting Entities that are New Zealand registered banks to obtain and report Entity Information in relation to transactions with those counterparties.
18. These certain counterparties are intended to be smaller NZ companies that do not necessarily regularly trade in derivatives and who do not have their own reporting obligations. These counterparties are Relevant Entities whose Entity Information is not available and who:
 - (a) are not Australian entities;
 - (b) are not covered counterparties under APRA's *Prudential Standard CPS 226 Margining and risk mitigation for non-centrally cleared derivatives (CPS 226)*; and
 - (c) do not have in place a credit support annex (or other industry standard credit support documents) in place with the relevant Reporting Entity.
19. Under CPS 226, a covered counterparty is a financial institution with whom a covered entity is required to exchange variation margin and post and collect

initial margin. This applies for covered counterparty whose aggregate notional of uncleared derivatives outstanding exceeds a threshold amount of AUD 3 billion. Covered entities include certain entities of a corporate group, such as New Zealand subsidiaries of Australian entities.

20. New Zealand entities that are not covered counterparties are likely to be entities that are not financial institutions or are financial institutions with aggregate uncleared derivatives notional outstandings of less than AUD 3 billion.
21. Where two entities have in place between them, a credit support annex (such as an annex to an ISDA Master Agreement) or other industry standard credit support document, this would generally indicate a material scale or intensity in their bilateral derivatives dealings.
22. New Zealand entities that do not have such credit support arrangements or have credit support arrangements that are not industry standard are likely to be entities that do not necessarily regularly trade in derivatives.
23. ASIC's analysis of data reported by NZ registered banks under the Rules is that Entity Information is already available for the majority of their Relevant Entities. This exemption would apply to Relevant Entities that comprise approximately 31% of the number of such entities but only approximately 6% of the value of aggregate notional outstandings.
24. This exemption responds to concerns raised by the NZFMA in its application for relief. These concerns include that:
 - (a) there is a burden on smaller NZ companies to obtain Entity Information where this is not otherwise required in New Zealand;
 - (b) the majority of NZ registered banks are not Reporting Entities under the Rules and are not required to obtain Entity Information about their counterparties in derivatives transactions;
 - (c) NZ registered banks who are Reporting Entities face some potential conflicts or inconsistencies between the requirement in the Rules to obtain Entity Information and the requirements under the NZFMA Code of Conduct & Principles to, for example, provide advice to clients that is in their best interests; and
 - (d) there is limited utility to Australian regulators to have reported Entity Information for transactions entered into in a foreign jurisdiction between entities that are both domiciled in that foreign jurisdiction.

Trade Identifier Relief

25. Section 11 of the Principal Instrument provides relief to Reporting Entities from the requirement to report a Unique Transaction Identifier that is a 'universal transaction identifier' or a single transaction identifier'. The relief applies where the Reporting Entity instead reports the trade identifier created by the Swap

Execution Facility, by the provider of any Confirmation Platforms or an internal trade identifier (each a **Trade Identifier**).

26. Item 8 of Schedule 1 amends subsection 11(1) of the Principal Instrument so that it provides continuing relief from the requirement to report a ‘universal transaction identifier’ or a ‘single transaction identifier’ until 30 September 2022 where an alternative Trade Identifier is reported.
27. On 20 February 2020 a package of proposed amendments to the CFTC rules were published including UTI requirements, commencing from 31 December 2020, and separately, changes to the reporting deadline. These proposed amendments would, in the view of the CFTC, implement guidance contained in the UTI Technical Guidance published by the Bank for International Settlements and IOSCO in February 2017. Item 9 of Schedule 1 amends subsection 11(2) of the Principal Instrument to take account of these changes. New paragraph 11(2)(a) introduces a condition requiring that if a Reporting Entity reasonably believes a UTI must be reported under the CFTC rules, it must also report that UTI as the trade identifier under the ASIC Rules. The effect of subparagraph 11(2)(a)(ii) is to ensure that the UTI that must be reported in these circumstances is not affected by any other requirements of the ASIC Rules or the Principal Instrument. Within the proposed amendments to the CFTC rules, part 45.5(h) introduces a cross-jurisdictional earliest reporting deadline test to resolve which jurisdiction’s UTI rules to follow in determining the UTI generator counterparty in the case of a cross-jurisdiction transaction. If the CFTC’s reporting deadline moves to T+1 as is currently proposed within the package of CFTC rule changes then Australia could be the jurisdiction with the earliest reporting deadline. Since the Rules do not yet implement the UTI Technical Guidance, the amendment instrument points Reporting Entities back into the CFTC rules as though Australia is not the earliest reporting deadline jurisdiction.
28. This exemption responds to concerns raised by Reporting Entities that more time is required to resolve implementation matters and facilitate harmonisation across key jurisdictions. The UTI Technical Guidance provides guidance to authorities in each jurisdiction on the definition, format and usage of the UTI. At the time of writing, CFTC are the first major jurisdiction to publish proposed amendments to their rules to incorporate UTI reporting that respects the UTI Technical Guidance. Benefits to UTI users are likely increased with greater consistency of reporting requirements.
29. The amendments to the Principal Instrument give effect to the proposed introduction of UTI reporting within the CFTC rules. Should other jurisdictions release proposed amendments to facilitate UTI Technical Guidance implementation, ASIC will review the Principal Instrument for any further amendments that would facilitate alignment of reporting requirements for Reporting Entities.

Incorporation by reference

30. New subsection 6(8) of the Principal Instrument refers to whether a person a New Zealand registered bank within the meaning of the *Banking Act 1959*

(Banking Act and on whether a person is a covered counterparty within the meaning of *Prudential Standard CPS 226 Margining and risk mitigation for non-centrally cleared derivatives (CPS 226)*. CPS 226 is the Schedule to *Banking, Insurance, Life Insurance and Superannuation (prudential standard) determination No. 1 of 2019*. These references do not raise any incorporation by reference issues under section 14(2) of the *Legislation Act 2003* since, among other matters, paragraph 14(1)(a) of the *Legislation Act* allows a legislative instrument to apply, adopt or incorporate the provisions of an Act and the provisions of a disallowable legislative instrument on an ambulatory basis. Copies of the *Banking Act 1959* and CPS 226 may be obtained from the Federal Register of Legislation.

31. Amended subsection 11(2) of the Principal Instrument refers to whether a Reporting Entity is of the reasonable view that a trade identifier for a Reportable Transaction would be required to be reported as a unique transaction identifier under requirements (*CFTC rules*) issued by the Commodity Futures Trading Commission of the United States of America. Although there is a reference to the CFTC rules, the content of the CFTC rules is not applied, adopted or incorporated into the Principal Instrument. The CFTC rules are available at the CFTC Data Recordkeeping homepage at www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_17_Recordkeeping/index.htm.

Legislative instrument and primary legislation

32. The subject matter and policy implemented by this instrument is more appropriate for a legislative instrument rather than primary legislation because:
 - (a) the effect of the instrument is to provide new, or vary existing, conditional exemptions from requirements in the Rules. The Rules themselves are a legislative instrument rather than primary legislation;
 - (b) the instrument utilises powers given by Parliament to ASIC that allow ASIC to affect the operation of the Rules to provide a tailored and flexible regulatory environment that is fit for purpose for certain derivatives transactions entered into in a foreign jurisdiction; and
 - (c) the matters contained in the instrument are a specific amendment designed to ensure the application of the Rules remained flexible to adapt to market developments, in particular international regulatory developments toward harmonising derivatives transaction information across jurisdictions and applies in a way consistent with the intended policy of the Rules and the enabling provisions in the primary legislation.

Legislative authority

33. The Australian Securities and Investments Commission (*ASIC*) makes ASIC Corporations (Amendment) Instrument 2020/242 (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 Rules.

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34. 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.
 35. 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) 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).

Statement of Compatibility with Human Rights

36. 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 2020/242

Overview

1. The instrument amends the ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844 (***Exemption 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**).
2. The purpose of the instrument is to amend the Exemption Instrument to extend relief to Reporting Entities:
 - (a) that are New Zealand registered banks from the requirement to report, for transactions with smaller NZ companies, Entity Information that is an entity identifier code of one of three specific types; and
 - (b) from the requirement to report a ‘universal transaction identifier’ or a ‘single transaction identifier’, where an alternative trade identifier is provided in certain circumstances.
3. Broadly, the relief is available where:
 - (a) a New Zealand registered bank reports internal entity identifiers for transactions with smaller NZ companies; or
 - (b) the Reporting Entity reports a specified alternative trade identifier.

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*.