



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Regulated Foreign Markets Determination (Amendment) Instrument 2020/828

This is the Explanatory Statement for *ASIC Regulated Foreign Markets Determination (Amendment) Instrument 2020/828 (instrument)*.

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

Summary

1. The instrument amends *ASIC Regulated Foreign Markets Determination [OTC DET 13/1145]* (the *ASIC Determination*) to update the following determinations for the purposes of Rule 1.2.4(2) of the *ASIC Derivative Transaction Rules (Reporting) 2013 (Reporting Rules)*:
 - (a) that financial markets registered by the Securities and Exchange Commission of the United States of America as national securities exchanges are Regulated Foreign Markets; and
 - (b) that certain financial markets that were Relevant Financial Markets under *ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844* (the *Exemption*) prior to 1 October 2020, are now Regulated Foreign Markets.
2. The instrument also amends the *ASIC Determination* by removing the specific identification of certain financial markets that are Regulated Foreign Markets under the general categories in subrules 1.2.4(2A)(a) & (b) of the *Reporting Rules* or new paragraphs 4(w) & 4(hh) of the *ASIC Determination*. In addition, the list of Regulated Foreign Markets within the *ASIC Determination* were reassessed and amended by the instrument, in regards to name updates and duplicates.
3. Amending the *ASIC Determination* by updating the Regulated Foreign Markets list, also affects the *ASIC Derivative Transaction Rules (Clearing) 2015 (Clearing Rules)* which contains an exclusion from the clearing requirements under the *Clearing Rules* that applies in relation to Regulated Foreign Markets that are determined by ASIC under subrule 1.2.4(3) of the *Reporting Rules*.

Purpose of the instrument

4. The purpose of the instrument is to update what is classified as a Regulated Foreign Market for the purposes of Rule 1.2.4(3) of the Reporting Rules. The effect of the ASIC Determination is that derivatives that are entered into, and able to be traded, on those financial markets that are Regulated Foreign Markets will be carved out of the reporting requirements in the Reporting Rules and carved out of the clearing requirements in the Clearing Rules.
5. The Reporting Rules and Clearing Rules together form part of Australia's implementation of the Group of Twenty (**G20**) commitment to substantially reform practices in over-the-counter (**OTC**) derivatives markets following the global financial crisis in 2008.

Reporting Rules

6. The Reporting Rules, made under section 901A of the *Corporations Act 2001 (Act)*, impose requirements (referred to as 'reporting requirements') for information about derivative transactions and positions to be reported to a licensed or prescribed derivative trade repository.
7. The Reporting Rules generally apply to transactions and positions in relation to "OTC Derivatives" as defined under Rule 1.2.4 of the Reporting Rules. Subrule 1.2.4(2) of the Reporting Rules carves out certain exchange-traded derivatives from the definition of "OTC Derivatives", being derivatives entered into on or are reported to a licensed Australian market (referred to as "Part 7.2A market") or entered into on a "Regulated Foreign Market" as defined in the Reporting Rules and that are able to be traded on a Part 7.2A market or a Regulated Foreign Market.
8. Subrule 1.2.4(2A) provides that the following are Regulated Foreign Markets:
 - (a) a financial market that is registered by the United States Commodity Futures Trading Commission as a "Designated Contract Market" under section 5h of Commodity Exchange Act 1936 (US) (a **CFTC Regulated Market**);
 - (b) a financial market that is a "Regulated market" as defined in Article 4(1)(21) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (an **EU Regulated Market**); and
 - (c) a financial market that is a financial market, or is in a class of financial markets, that has been determined by ASIC as a Regulated Foreign Market under subrule 1.2.4(3) of the Reporting Rules.
9. Under subrule 1.2.4(3) of the Reporting Rules, ASIC may determine that a financial market in a foreign jurisdiction is a "Regulated Foreign Market" for the purposes of subrule 1.2.4(2), where, in the opinion of ASIC, the operation of the financial market in the foreign jurisdiction is subject to requirements and

supervision that are sufficiently equivalent, in relation to market integrity and market transparency, to the requirements and supervision to which:

- (a) a CFTC Regulated Market is subject to in the United States of America;
 - (b) an EU Regulated Market is subject in the European Union; or
 - (c) a Part 7.2A Market is subject in this jurisdiction.
10. A determination by ASIC for the purposes of subrule 1.2.4(3) of the Reporting Rules will be published on ASIC's website and takes effect on the day specified in the determination (see subrule 1.2.4(4) of the Reporting Rules).

Clearing Rules

11. The Clearing Rules, also made under section 901A of the Act, impose requirements (referred to as 'clearing requirements') for derivative transactions to be cleared through a licensed or prescribed clearing and settlement facility.
12. The Clearing Rules generally apply to transactions in relation to "Clearing Derivatives" as defined in Rule 1.2.3 of the Clearing Rules. Subrule 1.2.3(7) of the Clearing Rules carves out certain exchange-traded derivatives from the definition of "Clearing Derivative" for the purposes of the Clearing Rules, being derivatives entered into on or reported to a "Part 7.2A Market" or entered into on a "Regulated Foreign Market" or an "Exempt Financial Market" and that are able to be traded on a Part 7.2A Market, a Regulated Foreign Market or an Exempt Financial Market. For this purpose, Rule 1.2.1 defines "Regulated Foreign Market" to mean:
- (a) a CFTC Regulated Market;
 - (b) an EU Regulated Market;
 - (c) a financial market that is a financial market, or is in a class of financial markets, that has been determined by ASIC as a Regulated Foreign Market under subrule 1.2.4(3) of the Reporting Rules.
13. Accordingly, any determination of a Regulated Foreign Market for the purposes of subrule 1.2.4(3) of the Reporting Rules also affects the operation of the Clearing Rules.

SEC Regulated Markets

14. The instrument amends the ASIC Determination to include a SEC Regulated Market as a Regulated Foreign Market. A 'SEC Regulated Market' is a financial market that is a national securities exchange that is registered with the Securities and Exchange Commission (SEC) of the United States of America as a national securities exchange under section 6 of the Securities Exchange Act of 1934 of the United States of America.
15. There were 6 such financial markets that were Regulated Foreign Markets under the ASIC Determination and 6 such financial markets that were Relevant

Financial Markets under the Exemption as at the date before the instrument came into effect.

16. ASIC is of the opinion that the operation of a SEC Regulated Market is subject to requirements and supervision that are sufficiently equivalent, in relation to market integrity and market transparency to which a Part 7.2A Market is subject in this jurisdiction and to which an EU Regulated Market is subject to in the European Union.
17. ASIC's opinion is supported by the decision made by the European Union,¹ that the legal and supervisory framework in the United States of America that is applicable to national securities exchanges are equivalent to the requirements for European Union regulated markets.
18. The instrument further amends the ASIC Determination by removing the 6 specifically identified financial markets that are SEC regulated. This is because the inclusion of 'SEC Regulated Market' will now automatically capture all national securities exchanges that are registered with SEC, without needing to list each one individually, or remove those that are delisted, from the ASIC Determination.

'Relevant Financial Markets' under the Exemption

19. ASIC has determined that 22 financial markets that were Relevant Financial Markets under the Exemption prior to 1 October 2020, are financial markets that, in ASIC's opinion at the time of making the amendment to the Determination, meet the criteria in subrule 1.2.4(3).
20. Ten of these financial markets are operated by members of the World Federation of Exchanges (WFE). The WFE's membership criteria are published on its website.
21. Broadly, WFE members are expected to:
 - (a) be significant within their country of origin, based on their size and their role in supporting, the formation of investment capital or the management of investment and economic risks, and should be an important factor within the home country's economy;
 - (b) be licensed as an exchange and regulated and supervised by an independent, public authority that is in turn a member of IOSCO, and should also have their own specific responsibilities to regulate the markets and market participants;
 - (c) operate an active platform for raising initial and secondary capital, and provide options or futures contracts for managing risk; and

¹ COMMISSION IMPLEMENTING DECISION (EU) 2017/2320 of 13 December 2017 on the equivalence of the legal and supervisory framework of the United States of America for national securities exchanges and alternative trading systems in accordance with Directive 2014/65/EU of the European Parliament and of the Council

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- (d) pursue purposes that are in the public interest, having as a goal to be fair, orderly and neutral to protect all public participants.
22. Additionally, all of these financial markets are based in jurisdictions with which ASIC has existing formal regulatory cooperation arrangements under one or more memoranda of understanding (**MOU**). Information on ASIC's MOUs and other international agreements can be found on ASIC's website.
23. The other twelve of these 22 financial markets have provisions in their rule books and/or legislative or regulatory provisions to which they are subject that promotes or requires outcomes that are sufficiently equivalent to the market integrity outcomes that we seek from Part 7.2A Markets – specifically, as expressed in the ASIC Market Integrity Rules (Futures Markets) 2017.
24. These are outcomes in terms of:
- (a) Participants' risk management and supervisory policies and procedures;
 - (b) Participants' handling of client money and margins;
 - (c) Participants' fair order handling;
 - (d) The market operator's mechanisms to maintain orderly markets, including, if applicable to key contracts, the operation of volatility controls;
 - (e) Transparent trade cancellation policies; and
 - (f) The provision of surveillance and supervision data to regulators
25. ASIC has therefore decided to amend the ASIC Determination to determine that these 22 financial markets are each a "Regulated Foreign Market" for the purposes of the Reporting Rules (and therefore also the Clearing Rules).

Removal of Regulated Foreign Markets

26. Five financial markets that were Regulated Foreign Markets prior to the instrument coming into effect, did not appear to be names of currently operating financial markets.
27. The instrument therefore amends the ASIC Determination to omit these financial markets.

Renamed Regulated Foreign Markets

28. The instrument amends the ASIC Determination by updating the names of three financial markets listed as a Regulated Foreign Market.

Regulated Foreign Markets that are CFTC, EU, UK or SEC Regulated Markets

30. Thirty-six financial markets that were Regulated Foreign Markets under the ASIC Determination, were also Regulated Foreign Markets because they were either a

CFTC or EU Regulated market under Rule 1.2.4 (2A)(a) & (b) of the Rules or a UK Regulated Market or a SEC Regulated Market.

31. For simplicity, the instrument amends the ASIC Determination so that it no longer specifically identifies these financial markets. They are still Regulated Foreign Markets under either Rule 1.2.4 (2A)(a) & (b) of the Rules or a UK Regulated Market or a SEC Regulated Market.

Summary of changes to the Determination

32. The following listings set out, for each financial market, whether this instrument does not amend, renames within, adds to or deletes from the Determination.

33. Financial markets in the Determination which continue to be treated in the same manner following the amendments made by this instrument:

Bourse de Montreal	CME Globex
The financial market operated by Hong Kong Futures Exchange Limited	ICE Futures Canada
The financial market operated by The Stock Exchange of Hong Kong Limited	Tokyo Stock Exchange
Toronto Stock Exchange	a UK Regulated Market

34. Financial markets in the Determination that are renamed by this instrument:

the BM&FBOVESPA Segment of B3 - Brasil Bolsa Balcão S.A;	<i>Renamed from BM&FBOVESPA</i>
Osaka Exchange	<i>Renamed from Osaka Securities Exchange</i>
Singapore Exchange Derivatives	<i>Renamed from SGX-DT</i>

35. Financial markets in the Determination that are added by this instrument:

an SEC Regulated Market	Borsa Istanbul – Futures and Options Market
BSE Limited (Bombay Stock Exchange)	Bursa Malaysia Derivatives Market
China Financial Futures Exchange	Dalian Commodity Exchange
Dubai Gold & Commodities Exchange	Dubai Mercantile Exchange
EPEX Spot SE	HUPX Ltd Hungarian Power Exchange
the following financial markets operated by the Johannesburg Stock Exchange:	Korea Exchange
(i) JSE Commodity Derivatives Market	
(ii) JSE Currency Derivatives Market	
(iii) JSE Equity Derivatives Market	
(iv) JSE Interest Rate Derivatives Market	
Mexican Derivatives Exchange	Moscow Exchange – Derivatives Market

National Stock Exchange of India	NZX Derivatives Market
Power Exchange Central Europe	Shanghai Futures Exchange
Taiwan Futures Exchange	Tel Aviv Stock Exchange
Thailand Futures Exchange as part of Stock Exchange of Thailand	Tokyo Commodity Exchange
Tokyo Financial Exchange	

36. Financial markets in the Determination that are deleted because they are not a currently operating financial market name:

CME Direct	Kansas City Board of Trade
NASDAQ OMX Nordic Derivatives Markets	NYSE Liffe US
NYSE.Liffe	

37. Financial markets in the Determination that are no longer specifically identified because they are Regulated Foreign Markets by virtue of being a CFTC Regulated Market, an EU Regulated Market, a UK Regulated Market or an SEC Regulated Market:

Athens Exchange Derivatives Market;	Budapesti Értéktözsde (Budapest Stock Exchange);
CBOE Futures Exchange	Chicago Board of Trade
Chicago Board Options Exchange	The Commodity Exchange, operated by Commodity Exchange, Inc. (US)
Eurex Deutschland	Euronext Paris MATIF (Marché à Terme International de France)
Euronext Paris MONEP (Marche des Options Negociables de Paris)	ICE Futures Europe
ICE Futures U.S.	International Securities Exchange
Italian Derivatives Market	London Metal Exchange
London Stock Exchange	Mercado Español de Futuros Financieros
NASDAQ OMX BX	NASDAQ OMX Commodities
NASDAQ OMX Copenhagen	NASDAQ OMX Futures Exchange
NASDAQ OMX Helsinki	NASDAQ OMX PHLX
NASDAQ OMX PSX	NASDAQ OMX Riga
NASDAQ OMX Stockholm	NASDAQ OMX Tallinn
NASDAQ OMX Vilnius	NASDAQ Options Market
NYSE Euronext Amsterdam	NYSE Euronext Brussels
NYSE Euronext Lisbon	NYSE Euronext London
NYSE Euronext Paris	Oslo Børs ASA

Consultation

38. In early May 2020, ASIC wrote to a number of Australian and overseas industry associations setting out ASIC's proposals in relation to the various exemptions within the Exemption that would expire on 30 September 2020.
39. These industry associations were the Australian Financial Markets Association, International Swaps and Derivatives Association, Global Financial Markets Association, Financial Services Council, Association of Superannuation Funds of Australia and the Australian Institute of Superannuation Trustees. ASIC also wrote to the ASIC-licensed trade repositories requesting that they bring this to the attention of their participants.
40. The ASIC letter included that "Across these instruments [i.e. the Reporting Rules, Determination and Exemption], there are a number of named financial markets that are also within a class of financial market definition or are not the name of an existing financial market. There are also named financial markets for whom a class of financial market could be defined. ASIC proposes to update and simplify the Determination and the exemption for the duplications of named financial markets already with a class definition and for inaccuracies in their names. The exemption would be extended to 30 September 2022. ASIC is also minded to consider introducing further classes of financial markets definitions in the Determination where there are multiple named financial markets that would be within such a definition and to consider assessing financial markets named in the exemption for inclusion in the Determination".
41. In response, one association formally said they supported the above proposals and another association said that their members were broadly comfortable with the proposals.
42. In early August 2020, ASIC posted to its website a document setting out our specific, to-date proposals for changes to the listings of financial markets in the ASIC Determination and the Exemption.
43. In early September 2020, ASIC posted to its website an update to the above document setting out our specific, final proposals for changes to the listings of financial markets in the ASIC Determination and the Exemption.
44. ASIC has not received any submissions expressing any objections to these proposals.

Operation of the instrument

45. The instrument, named the *ASIC Regulated Foreign Markets Determination (Amendment) Instrument 2019/324*, will commence on the day after it is registered on the Federal Register of Legislation and amends the ASIC Determination as set out in Schedule 1 to the instrument (see sections 1 to 4 of the instrument).

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46. The instrument introduces into the ASIC Determination a definition for “SEC Regulated Market” (see item 1 of Schedule 1 to the instrument).
 47. The instrument amends the ASIC Determination to determine an updated list of financial markets as Regulated Foreign Markets in substitute of the previous listing of such financial markets, including the inclusion of an SEC Regulated Market (see item 2 of Schedule 1 to the instrument).

Incorporation by reference

48. The Securities Exchange Act of 1934 of the United States of America, while mentioned in the instrument, is not incorporated by reference for the purposes of section 14 of the *Legislation Act 2003*.

Legislative authority

49. Subrule 1.2.4(3) of the Reporting Rules provides the authority for making the instrument.
50. Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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. Under subsection 13(1) of the *Legislation Act 2003*, subsection 33(3) of the *Acts Interpretation Act 1901* applies to a legislative instrument made under enabling legislation as if each provision of the legislative instrument were a section of an Act.
51. The instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

52. 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 Regulated Foreign Markets Determination (Amendment) Instrument 2020/828

Overview

1. The instrument amends *ASIC Regulated Foreign Markets Determination [OTC DET 13/1145]* (the **ASIC Determination**) to update the following determinations for the purposes of Rule 1.2.4(2) of the *ASIC Derivative Transaction Rules (Reporting) 2013 (Reporting Rules)*:
 - (a) that financial markets registered by the Securities and Exchange Commission of the United States of America as national securities exchanges are Regulated Foreign Markets; and
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2. The instrument also amends the ASIC Determination by removing the specific identification of certain financial markets that are Regulated Foreign Markets under the general categories in subrules 1.2.4(2A)(a) & (b) of the Reporting Rules or new paragraphs 4(w) & 4(hh) of the ASIC Determination. In addition, the list of Regulated Foreign Markets within the ASIC Determination were reassessed and amended by the instrument, in regards to name updates and duplicates.
3. Amending the ASIC Determination by updating the Regulated Foreign Markets list, also affects the *ASIC Derivative Transaction Rules (Clearing) 2015 (Clearing Rules)* which contains an exclusion from the clearing requirements under the Clearing Rules that applies in relation to Regulated Foreign Markets that are determined by ASIC under subrule 1.2.4(3) of the Reporting Rules.

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*.