Explanatory Statement

ASIC Derivative Transaction Rules (ADI Foreign Subsidiaries) Class Exemption 2021/51

This is the Explanatory Statement for *ASIC Derivative Transaction Rules (ADI Foreign Subsidiaries) Class Exemption 2021/51 (*the ***Instrument***).

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

Summary

1. The Instrument provides conditional exemptive relief from the *ASIC Derivative Transaction Rules (Reporting) 2013* (**Rules**) with respect to the reporting of Reportable Transactions and Reportable Positions to a Licensed Repository or a Prescribed Repository (**Trade Repository**), by a foreign subsidiary of an Australian Entity where that Australian Entity is an Australian ADI (**Relevant Reporting Entity**).

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. Broadly, the purpose of the Instrument is to provide conditional relief to Reporting Entities that are Relevant Reporting Entities from the requirement to report Reportable Transactions and Reportable Positions or changes to previously reported Reportable Transactions and Reportable Positions in OTC Derivatives under the Rules, in certain circumstances. The relief is limited to OTC Derivative transactions or positions of the Relevant Reporting Entity that are not booked to the profit or loss account of a branch of the Relevant Reporting Entity located in this jurisdiction, regardless of whether it is entered into or not entered into by the Relevant Reporting Entity in this jurisdiction.

4. Relevant Reporting Entities will be required to continue to report all Reportable Transactions or Reportable Positions and changes about a Reportable Transaction or Reportable Position that has been previously reported, in an OTC Derivative that was booked to the profit or loss account of a branch of the Relevant Reporting Entity located in this jurisdiction, as required under the Rules.

5. To rely on the relief, Relevant Reporting Entities are required to provide ASIC with a written notice (**Opt-In Notice**) that meets the requirements set out in the Instrument. The Opt-In Notice requirement is intended to provide certainty to ASIC and the Relevant Reporting Entity as to when a Relevant Reporting Entity is relying on the exemption in section 5 of the Instrument, and when the Relevant Reporting Entity is required to comply with the conditions in section 8 of the Instrument.

6. The relief is conditional on reporting certain transactions that have a certain geographic nexus with Australia ("sales or trader basis").

Consultation

7. In making the Instrument, ASIC consulted with an industry association in relation to their application for relief on behalf of the New Zealand subsidiaries of Australian ADIs.

8. The Instrument responds to concerns raised by the industry association in its application for relief. These concerns include that:

   (a) There is a significant burden on New Zealand subsidiaries of Australian ADIs in terms of compliance costs for satisfying current requirements to report Reportable Transactions or Reportable Positions under the Rules;

   (b) There is limited utility to Australian regulators in requiring New Zealand subsidiaries of Australian ADIs to report OTC Derivatives that are not conducted in Australian markets; and

   (c) The New Zealand subsidiaries of Australian ADIs have a limited connection with the Australian market as they do not have branches or offices with Australia.

9. This exemption is intended to bring the position of foreign subsidiaries of Australian ADIs in line with the position of foreign ADIs or foreign companies that currently rely on the relief granted by the *ASIC Derivative Transaction Rules (Nexus Derivatives) Class Exemption 2015* (Nexus Instrument).

10. ASIC has not undertaken any further consultation as the industry association has already undertaken appropriate industry consultation in relation to this matter.

Regulation Impact Statement

11. The Office of Best Practice Regulation (**OBPR**) has determined that a regulation impact statement need not be prepared in relation to the Legislative Instrument, on the basis that the impact of the Legislative Instrument is minor in nature.

12. The OBPR's determination was reached on the basis of a preliminary assessment conducted by ASIC, which found that overall, the impact of the proposed relief on the policy objectives of financial stability and market

transparency was not considered material and the regulatory impact of receiving trades under the alternative definition of 'entered into' was considered minimal.

13. As opting into the Instrument is optional, there is no Relevant Reporting Entity that ASIC expects to incur a regulatory burden from the Legislative Instrument relative to the current framework, as Relevant Reporting Entities who would incur a higher cost from opting into the Instrument could elect to continue to use the existing approach.

Operation of the instrument

Commencement

14. Section 2 of the Instrument provides that the Instrument commences on the day after it is registered on the Federal Register of Legislation.

Reportable Transactions and Reportable Positions not booked to the profit or loss account of a branch located in this jurisdiction

15. Subsection 5(1) of the Instrument provides that a Relevant Reporting Entity does not have to comply with subrule 2.2.1(1) of the Rules to the extent that subrule requires the Relevant Reporting Entity to report a Reportable Transaction or Reportable Position that is not booked to the profit or loss account of a branch of the Relevant Reporting Entity located in this jurisdiction.

16. Subsection 5(2) of the Instrument provides that a Relevant Reporting Entity does not have to comply with rule 2.2.2 of the Rules to the extent that rule requires the Relevant Reporting Entity to report changes to information about a Reportable Transaction or Reportable Position that is not booked to the profit or loss account of a branch of the Relevant Reporting Entity located in this jurisdiction.

Where Exemption applies

17. Section 6 of the Instrument provides that the exemption in section 5 of the Instrument applies to a Relevant Reporting Entity in relation to an Opt-In Class from the Effective Date specified in the Opt-In Notice given by the Relevant Reporting Entity in accordance with subsection 7(1) in relation to that Opt-In Class, until the Withdrawal Effective Date specified in the Withdrawal Notice (if any) given in accordance subsection 7(2) of the Instrument in relation to that Opt-In Class.

Opt-In to and Withdrawal from Exemption

18. Subsection 7(1) of the Instrument provides that a Relevant Reporting Entity that seeks to rely on the exemptions in section 5 of the Instrument may give to ASIC a written notice (an ***Opt-In Notice***) that sets out all of the following:

    (a) the name of the Relevant Reporting Entity;

(b) the Prescribed Class or Prescribed Classes (each, an ***Opt-In Class***) for which the Relevant Reporting Entity is giving the Opt-In Notice (e.g. commodity derivatives that are not electricity derivatives, credit derivatives, equity derivatives, foreign exchange derivatives and interest rate derivatives).

(c) the date (***Effective Date***) from which the Relevant Reporting Entity will rely on the exemptions in in section 5 in relation to each Opt-In Class named in the Opt-In Notice, being a date no earlier than the date the Opt-In Notice is given to ASIC.

19. After subsection 6(1)(c) of the Instrument, there is a note that states that the Prescribed Classes as at the date of this Instrument are commodity derivatives that are not electricity derivatives, credit derivatives, equity derivatives, foreign exchange derivatives and interest rate derivatives.

20. Subsection 6(2) of the Instrument provides that a Relevant Reporting Entity that has given an Opt-In Notice to ASIC under subsection 6(1) of the Instrument may withdraw the Opt-In Notice in relation to one or more Opt-In Classes, by lodging a written notice (the ***Withdrawal Notice***) with ASIC setting out all of the following:

(a) the name of the Relevant Reporting Entity;

(b) the name of each Opt-In Class for which the Relevant Reporting Entity is giving the Withdrawal Notice; and

(c) the date (***Withdrawal Effective Date***) from which the Relevant Reporting Entity will cease to rely on the exemption in section 5 of the Instrument in relation to each Opt-In Class named in the Withdrawal Notice, being a date not less than 30 calendar days from the date the Withdrawal Notice is given.

Conditions of Exemption

Requirement to report certain transactions having a certain geographic nexus with Australia ("sales or trader basis")

21. Subject to subsection 8(3), section 8 of the Instrument requires that Relevant Reporting Entities to which the exemption in section 5 of the Instrument applies must, commencing from the Effective Date specified in the Opt-In Notice in relation to the Opt-in Class, report Derivative Transaction Information about each of the Derivative Transactions, as described in subsection (8)(1) of the Instrument, in the Opt-In Class (each, a Nexus Transaction) that was entered into in this jurisdiction and not booked to the profit or loss account of a branch of the Relevant Reporting Entity located in this jurisdiction, as if the Nexus Transaction was a Reportable Transaction under the Rules.

22. Using the same definition in the Nexus Instrument, section 8 of the Instrument defines a 'Nexus Transaction' as the entry into, modification, termination or assignment of an arrangement that is a 'Nexus Derivative'. Using the same test

in the Nexus Instrument, the test in subsection 8(1)(a) of the Instrument for determining whether an OTC Derivative is a Nexus Derivative is based on the functions performed by the persons involved in executing the relevant Derivative Transactions. The test is designed to capture functions which would typically be performed by a person who is commonly referred to as a 'salesperson' or 'trader'. The test is not intended to capture functions performed by persons sitting in non-sales or trader functions such as management, counterparty risk, operational risk, finance and treasury. The person's role in the organisation or job title is not definitive in determining whether an OTC Derivative is a 'Nexus Derivative'.

23. Subsection (8)(1)(a) of the Instrument defines a 'Nexus Derivative' as an OTC Derivative to which the Relevant Reporting Entity is a counterparty and describes the following Derivative Transactions for the purposes of reporting Derivative Transaction Information as required under subsection (8)(1) of the Instrument:

- where one or more of the following functions in relation to the OTC Derivative:
    - o determining the price, level, rate or other economic terms (collectively, ***Terms***) on which the Relevant Reporting Entity is willing to enter into the OTC Derivative, including by determining the proposed Terms or range of proposed Terms which may be communicated to the proposed counterparty or agreeing the final Terms on which the Relevant Reporting Entity will enter into the OTC Derivative with the proposed counterparty;
    - o communicating to the proposed counterparty one or more of the Terms on which the Relevant Reporting Entity is willing to enter into the OTC Derivative
    - o offering to enter into the OTC Derivative with the proposed counterparty or inviting the proposed counterparty to offer to enter into the OTC Derivative with the Relevant Reporting Entity;
    - o agreeing to enter into the OTC Derivative with the proposed counterparty;
    - o managing the financial risk arising from the OTC Derivative;

  is or in the case of the function referred to in sub-subparagraph (E) of the Instrument, will be, performed on behalf of the Relevant Reporting Entity by a person who is:

    - o ordinarily resident or employed in this jurisdiction; or
    - o acting as part of a desk, office or branch of the Relevant Reporting Entity or an entity that is an associate of the Relevant Reporting Entity;

  where that desk, office or branch is located in this jurisdiction; and

- if the OTC Derivative was executed through an automated electronic trading facility, one or more of the functions referred to in sub-subparagraphs (i)(A) and (E) of the Instrument in relation to the OTC Derivative, is, or in the case of the function referred to in sub-subparagraph (E) of the Instrument, will be, performed on behalf of the Relevant Reporting Entity by a person who is:
    - ordinarily resident or employed in this jurisdiction; or
    - acting as part of a desk, office or branch of the Relevant Reporting Entity, or of an entity that is an associate of the Relevant Reporting Entity;

  where that desk, office or branch is located in this jurisdiction.

24. Subsection 8(1)(b) of the Instrument requires that Relevant Reporting Entities report Derivative Transaction Information about the modification or termination of an arrangement that is a Nexus Derivative that was entered into in this jurisdiction and not booked to the profit or loss account of a branch of the Relevant Reporting Entity located in this jurisdiction, as if the Nexus Transaction was a Reportable Transaction under the Rules.

25. Subsection 8(1)(c) of the Instrument requires that Relevant Reporting Entities report the assignment, by a party to an arrangement that is a Nexus Derivative, of some or all of the party's rights and obligations under the arrangement, where the Relevant Reporting Entity has actual knowledge of the assignment, that was entered into in this jurisdiction and not booked to the profit or loss account of a branch of the Relevant Reporting Entity located in this jurisdiction, as if the Nexus Transaction was a Reportable Transaction under the Rules.

Requirement to report changes to outstanding positions

26. Subsection 8(2) of the Instrument provides that, subject to subsection 8(3) of the Instrument, a Relevant Reporting Entity to which the exemption in section 5 of the Instrument applies must, commencing from the Effective Date specified in the Opt-In Notice in relation to an Opt-In Class, report the following changes in information in accordance with rule 2.2.2 of the Rules about each outstanding position (***Nexus Position***) in a Nexus Derivative in the Opt-In Class as at the Effective Date that was entered into in this jurisdiction and not booked to the profit or loss account of a branch of the Relevant Reporting Entity located in this jurisdiction:

    (a) where the Nexus Position was reported as a Reportable Position, the changes to Derivative Position Information in relation to the Nexus Position; and

    (b) where the Nexus Position was reported as a Reportable Transaction, changes to the Derivative Transaction Information in relation to the Nexus Position.

Exception for alternative reporting

27. Subsection 8(3) of the Instrument provides that a Relevant Reporting Entity to which the exemption in section 5 of the Instrument applies is not required to comply with the conditions in subsections 8(1) and 8(2) of the Instrument that would otherwise apply to the Relevant Reporting Entity in relation to a Nexus Transaction or Nexus Position, if, at the time the Relevant Reporting Entity would otherwise be required to comply with the condition:

(a) the Relevant Reporting Entity is subject to '***Alternative Reporting Requirements***' in one or more Foreign Jurisdictions (defined in the Instrument as 'Foreign Jurisdictions') that are substantially equivalent to the Reporting Requirements under the Rules and that cover OTC derivatives of the same Prescribed Class as the Nexus Transaction or the Nexus Position and:

(b) either:

i) the Relevant Reporting Entity or another entity has reported information about the Nexus Transaction or the Nexus Position to a Prescribed Repository, in compliance with the Alternative Reporting Requirements in at least one Foreign Jurisdiction, and has designated the information so reported as information that was reported under the Rules or under the conditions of Exemption of the Instrument; or

ii) the Relevant Reporting Entity is exempt from the requirement in all of the Foreign Jurisdictions to report information about the Nexus Transaction or the Nexus Position, or there is no requirement to report information about the Nexus Transaction or Nexus Position.

<u>Legislative instrument and primary legislation</u>

28. The subject matter and policy implemented by the Instrument is more appropriate for a legislative instrument rather than primary legislation because:

(a) the effect of the Instrument is to provide new 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 modify or affect the operation of the Rules to provide a tailored and flexible regulatory environment that is fit for purpose for certain derivative 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

29. The Australian Securities and Investments Commission (ASIC) makes the *ASIC Derivative Transaction Rules (ADI Foreign Subsidiaries) Class Exemption 2021/51* (the ***Exemption 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.

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 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

31. 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.

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 Derivative Transaction Rules (ADI Foreign Subsidiaries) Class Exemption 2021/51

Overview

1. The Instrument provides conditional exemptive relief from the *ASIC Derivative Transaction Rules (Reporting) 2013* (**Rules**) with respect to the reporting of Reportable Transactions and Reportable Positions by a foreign subsidiary of an Australian Entity where that Australian Entity is an Australian ADI (**Relevant Reporting Entity**) to a Licensed Repository or a Prescribed Repository (**Trade Repository**).

2. To rely on the relief a Relevant Reporting Entity must provide an Opt-In Notice to ASIC setting out the name of the Relevant Reporting Entity, the Opt-In Classes for each product class the Relevant Reporting Entity is seeking to rely on the exemption for, and the Effective Date from which the Relevant Reporting Entity will rely on the exemption.

3. The relief provided by the exemption in relation to Reportable Transactions or Reportable Positions that was entered into by the Relevant Reporting Entity in this jurisdiction is subject to conditions based on an alternative test (**Nexus Test**), which is focused on the location of persons performing particular functions in relation to the transactions or positions of an OTC Derivative. The exemption requires that the Relevant Reporting Entity reports Reportable Transactions and Reportable Positions (or changes to Reportable Transactions or Reportable Positions) in accordance with the Nexus Test.

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*.