



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment) Instrument 2022/206

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2022/206*.

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

Summary

1. The instrument delays the commencement of central clearing requirements in Rule 2.1.1 of the *ASIC Derivative Transaction Rules (Clearing) 2015* (the **Rules**) in relation to Australian dollar-denominated forward rate agreements (**AUD FRAs**) until 2 April 2024.
2. Unless explained otherwise, capitalised terms used in this Explanatory Statement have the meaning given by the Rules and the *Corporations Act 2001* (the **Act**).

Purpose of the instrument

3. In May 2013, ASIC, the Reserve Bank of Australia (**RBA**) and the Australian Prudential Regulation Authority (**APRA**) (together, the **Regulators**) published the *Australian regulators' statement on assessing the case for mandatory clearing obligations*, which gave details of the analysis the Regulators would apply when assessing the case for introducing clearing mandates. In this statement, the Regulators indicated that where there was no Clearing Facility available to clear a particular product, or only one Clearing Facility was available, the issuance of a mandate would constrain Australian participants' choices.
4. In December 2015, ASIC made the Rules under section 901A of the Act after obtaining the consent of the Minister under section 901K of the Act. The Rules impose clearing requirements in relation to certain Derivative Transactions in specific circumstances. Rule 2.1.1 of the Rules provides that a Clearing Entity must ensure that each of its Clearing Transactions (being Clearing Derivatives entered into in the circumstances outlined in Rule 1.2.5 of the Rules) is Cleared

Through a Clearing Facility as soon as reasonably practicable after the Clearing Transaction is entered into. This is the principal Clearing Requirement.

5. In making the Rules, ASIC inserted Subrule 1.2.3(8) into the Rules, which excluded AUD FRAs entered into before 2 April 2018 from the definition of a Clearing Derivative, thereby delaying the commencement of the Clearing Requirement with respect to AUD FRAs until 2 April 2018. In the Regulation Impact Statement accompanying the Rules, ASIC indicated that, due to the lack of market infrastructure in place to clear AUD FRAs, ASIC would delay the commencement of the mandatory clearing of AUD FRAs for a period of two years. ASIC also indicated that should no additional Clearing Facilities enter the market to clear AUD FRAs, ASIC would consider further delaying the commencement of the Clearing Requirement in order to ensure that the preconditions for mandatory central clearing expressed by the Regulators could be met.
6. In 2018, ASIC made the *ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209* (the **Exemption**) which relieved Clearing Entities from the obligation to comply with Rule 2.1.1 of the Rules in respect of AUD FRAs entered into before 2 April 2019. The Exemption effectively delaying the commencement of the Clearing Requirement with respect to AUD FRAs for a further 12 months. In 2019, ASIC made *ASIC Corporations (Amendment) Instrument 2019/202*, which extended the Exemption for a further 12 months to 2 April 2020. In 2020, ASIC made *ASIC Corporations (Amendment) Instrument 2020/149*, which extended the Exemption for a further 24 months to 2 April 2022.
7. Currently, there is only one Clearing Facility that clears AUD FRAs, and ASIC does not believe that any other Clearing Facility is likely to begin clearing AUD FRAs in the near future. In January 2022, ASIC consulted with other Clearing Facilities who have confirmed that they do not have plans to begin clearing AUD FRAs. Given that the circumstances which gave rise to the inclusion of Subrule 1.2.3(8) in the Rules, the Exemption and the subsequent extensions have not changed, and appear unlikely to change, ASIC intends to undertake a further consultation to remove AUD FRAs from the scope of the Rules. Given that such amendments will not take effect prior to 2 April 2022 (which is the date on which *ASIC Corporations (Amendment) Instrument 2020/149* expires), ASIC is of the view that it would be appropriate to extend the Exemption for a further 24 months to provide certainty to stakeholders and to allow ASIC to undertake a further consultation to remove AUD FRAs from the scope of the Rules.
8. The purpose of this instrument is to amend *ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209* so that Clearing Entities are not required to comply with Rule 2.1.1 of the Rules in respect of AUD FRAs entered into before 2 April 2024.

Consultation

9. ASIC consulted with the RBA, APRA, Australian Financial Markets Association and the International Swaps and Derivatives Association and took into account the feedback provided by these bodies, together with ASIC's regulatory objectives, in the final terms of the instrument. As noted above, ASIC also recently consulted with Clearing Facilities, which do not currently clear AUD FRAs, to determine the likelihood that an additional Clearing Facility would begin clearing AUD FRAs. This consultation confirmed that no other Clearing Facility had plans to begin clearing AUD FRAs.

Operation of the instrument

10. Section 1 of the instrument provides that the title of the instrument is *ASIC Corporations (Amendment) Instrument 2022/206*.
11. Section 2 provides that the instrument commences on the day after it is registered on the Federal Register of Legislation.
12. Section 3 provides that the instrument is made under paragraph 907D(2)(a) of the *Corporations Act 2001* (the ***Corporations Act***).
13. Section 4 provides that each instrument that is specified in the Schedule (i.e. the *ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209*) is amended as set out in the applicable items in the Schedule.
14. Schedule 1 makes amendments to *ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209* so that a Clearing Entity does not have to comply with Rule 2.1.1 of the Rules in relation to AUD FRAs entered into before 2 April 2024 if the notional principal amount and payments under the Forward Rate Agreement are denominated in Australian dollars.
15. Based on information provided by ASIC, the Office of Best Practice Regulation considers the proposal is likely to have no more than minor impacts on businesses, community organisations or individuals. As such, a Regulation Impact Statement is not required.

Legislative instrument and primary legislation

16. The subject matter and policy implemented by this instrument is more appropriate for a legislative instrument rather than primary legislation because the instrument extends the operation of the Exemption in circumstances where:
 - (a) the Exemption is a legislative instrument; and
 - (b) the Exemption provides relief from the requirements of another legislative instrument, namely the *ASIC Derivative Transaction Rules (Clearing) 2015*.

Further the circumstances which gave rise to the Exemption have not changed and the Exemption is due to expire on 2 April 2022.

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17. As noted above, currently there is only one Clearing Facility that clears AUD FRAs and, based on recent consultation, ASIC does not believe that any other Clearing Facility is likely to clear AUD FRAs in the near future. Due to the lack of market infrastructure in place to clear AUD FRAs, ASIC intends to undertake a further consultation to remove AUD FRAs from the scope of the Rules. However, given that such amendments will not take effect prior to 2 April 2022 (which is the date on which *ASIC Corporations (Amendment) Instrument 2020/149* expires), ASIC is of the view that it would be appropriate to extend the Exemption for a further 24 months to provide certainty to stakeholders and allow ASIC to undertake a further consultation to remove AUD FRAs from the scope of the Rules.
 18. The duration of this instrument is for a period of 24 months and will expire on 2 April 2024.

Legislative authority

19. ASIC makes the instrument under paragraph 907D(2)(a) of the Corporations Act.
20. Under paragraph 907D(2)(a) of the Corporations Act, ASIC may exempt a person or class of persons from all or specified provisions of the Rules.
21. 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 Corporations 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 Corporations Act).
22. Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Corporations Act), where an Act confers a power to make an instrument, the power is construed as including a power exercisable in the like manner to amend the instrument.
23. The instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

24. 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 2022/206

Overview

1. *ASIC Corporations (Derivative Clearing Exemption) Instrument 2018/209* as amended by *ASIC Corporations (Amendment) Instrument 2019/202* and *ASIC Corporations (Amendment) Instrument 2020/149 (Exemption Instrument)* delayed the commencement of central clearing requirements under the *ASIC Derivative Transaction Rules (Clearing) 2015* (the **Rules**) in relation to Forward Rate Agreements denominated in Australian dollars (**AUD FRAs**) until 2 April 2022. *ASIC Corporations (Amendment) Instrument 2022/206* amends the Exemption Instrument so that the clearing requirement for AUD FRAs is delayed for an additional 24 months to 2 April 2024, given that there is currently only one Clearing Facility that clears these products and to allow ASIC to undertake a further consultation to remove AUD FRAs from the scope of the Rules.

Assessment of human rights implications

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

Conclusion

3. 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*.