



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Derivative Transaction Rules (Clearing) Amendment Instrument 2022/224

This is the Explanatory Statement for *ASIC Derivative Transaction Rules (Clearing) Amendment Instrument 2022/224* (the **Instrument**).

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

Glossary

The following definitions are used in the Instrument:

APRA means the Australian Prudential Regulation Authority.

CCP means central counterparty.

G20 means the Group of Twenty Nations.

LIBOR means the London Interbank Offered Rate.

OTC means over-the-counter.

RBA means the Reserve Bank of Australia.

RFR means near risk-free rate.

Summary

1. Since the global financial crisis, global regulators and industry have undertaken work to strengthen confidence in interest rate benchmarks and identify alternatives based on RFRs. This transition necessitates updates to the *ASIC Derivative Transaction Rules (Clearing) 2015* (the **Rules**) to reflect these market developments and ensure that Australia continues to meet its international obligations and that the Rules remain fit for purpose.
2. The instrument makes consequential amendments to the Rules by removing products which can no longer be traded or cleared from the definition of a Clearing Derivative in Rule 1.2.3 of the Rules and replacing them with contracts referencing the replacement RFR selected for each currency.

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3. Unless explained otherwise, capitalised terms in this Explanatory Statement have the meaning given by the Rules.

Purpose of the instrument

4. In 2009, the Leaders of the G20, including Australia, committed to reforming OTC derivatives markets. One of the key commitments was to require all standardised OTC derivative transactions to be cleared through CCPs. The Rules implement this G20 commitment in Australia.
5. In 2015, the Minister made a determination under section 901B of the Corporations Act (**Act**) empowering ASIC to make rules imposing central clearing requirements for interest rate derivatives denominated in any of the following currencies:
 - (a) Australian dollars;
 - (b) US dollars;
 - (c) euros;
 - (d) British pounds;
 - (e) Japanese yen.
6. The Rules specify which products within these ‘determined clearing classes’ may be subject to the clearing requirement by reference to certain additional characteristics, such as the ‘Floating Rate Index’ (**FRI**) on which each floating rate for the derivative transaction is based.
7. In tandem with these developments, global regulators and industry have undertaken work to strengthen confidence in interest rate benchmarks and identify alternatives based on RFRs. As a result of this transition, certain Derivatives which are subject to central clearing requirements under the Rules (known as Clearing Derivatives) are no longer able to be traded or cleared, necessitating updates to the product scope of the Rules.
8. The instrument makes consequential amendments to the Rules by removing products which can no longer be traded or cleared from the definition of a Clearing Derivative in Rule 1.2.3 of the Rules and replacing them with contracts referencing the replacement RFR selected for each currency. These amendments are necessary to ensure that the Rules remain fit for purpose, reflect developments in the market and ensure that Australia continues to meet its G20 commitment.

Consultation

CP 353

9. On 6 December 2021, ASIC released [*Consultation Paper 353 Proposed amendments to the ASIC Derivative Transaction Rules \(Clearing\) 2015 \(CP 353\)*](#) proposing amendments to the Rules to update the product scope of the

clearing requirement to reflect market developments related to global benchmark reforms.

10. ASIC received 4 written submissions to CP 353 (including two confidential submissions and one joint submission on behalf of the Australian Financial Markets Association and the International Swaps and Derivatives Association). These respondents were broadly representative of the group of stakeholders directly or indirectly impacted by the Rules and were broadly supportive of the amendments.
11. We note that in CP 353, we proposed a Termination Date Range of 7 days to 2 years for the new euro short-term rate (€STR) OIS class to match that of the outgoing Euro Overnight Index Average (EONIA) OIS class. However, following feedback from industry, we extended the maximum maturity for the €STR OIS class out to 3 years to align with the final policy announced by the European Securities and Markets Association (ESMA) (the relevant home regulator) and the requirement in force in the United Kingdom.

Other consultation

12. ASIC has also consulted with the RBA and APRA about the proposed amendments and took into account feedback provided by these bodies, together with ASIC's regulatory objectives, in the final terms of the amendments.

Future consultation

13. In CP 353, we indicated that we would revisit the removal and replacement of contracts referencing USD LIBOR once the US authorities settled their approach. We note in this regard that the Commodity Futures and Trading Commission (CFTC) recently approved a notice of proposed rulemaking to modify the CFTC's clearing requirement.

Operation of the instrument

Part 1 – Preliminary

14. Section 1 provides that the name of the Instrument is the *ASIC Derivative Transaction Rules (Clearing) Amendment Instrument 2022/224*.
15. Section 2 provides that the Instrument commences on the day that is 3 months after the day it is registered on the Federal Register of Legislation.
16. Section 3 provides that the Instrument is made under sections 901A and 901M of the *Corporations Act 2001*.

Schedule 1 – Amendments

17. Items 1 to 8 in Schedule 1 make amendments to the Rules to modify the Derivatives which fall within the definition of a Clearing Derivative in Rule 1.2.3 of the Rules as set out in that schedule and below:

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- (a) removing contracts referencing GBP LIBOR, JPY LIBOR, and EONIA from Rule 1.2.3 (*Meaning of Clearing Derivative*) by deleting:
- (i) items 3 and 4 in the table at subrule (2) (*IRD Class Specifications for Basis Swaps and Fixed-to-Floating Swaps*); and
 - (ii) items 3 and 4 in the table at subrule (3) (*IRD Class Specifications for Forward Rate Agreements*); and
 - (iii) item 2 in the table at subrule (4) (*IRD Class Specifications for Overnight Index Swaps*);
- (b) replacing these contracts by:
- (i) adding an item to the table at subrule (4) for EUR-denominated contracts referencing the Euro Short-Term Rate (**€STR**) with a Termination Date Range of 7 days to 3 years;
 - (ii) amending the Termination Date Range of item 3 in the table at subrule (4), i.e. GBP-denominated contracts referencing the Sterling Overnight Index Average (**SONIA**), to 7 days to 50 years (previously 7 days to 2 years); and
 - (iii) adding an item to the table at subrule (4) for JPY-denominated contracts referencing the Tokyo Overnight Average Rate (**TONA**) with a Termination Date Range of 7 days to 30 years.

Legislative instrument and primary legislation

18. The subject matter and policy implemented by this Instrument is more appropriate for a legislative instrument rather than primary legislation because:
- (a) The Rules are made by ASIC utilising powers given by Parliament to ASIC that allow ASIC to make, amend or revoke derivative transaction rules. This Instrument amends the Rules.
 - (b) The Instrument, and the Rules more broadly, contain technical detail that would otherwise introduce unnecessary complexity to the primary legislation. As a consequence, if the matters in the Instrument (or the Rules) were to be inserted into the primary legislation, they would insert, into an already complex statutory framework, a set of provisions that are highly specific in nature and may become redundant over time due to the pace of technological and market developments.
19. The duration of the amendments made by this Instrument align with the duration of the Rules, which this Instrument amends.

Legislative authority

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20. The Instrument is made under sections 901A and 901M of the *Corporations Act 2001* (the **Act**).
 21. Subsection 901A(1) of the Act provides that, subject to Division 2 of Part 7.5A of the Act, ASIC may, by legislative instrument, make rules (referred to in the Act as ‘derivative transaction rules’) dealing with matters as permitted by that section. Relevantly, the derivative transaction rules may specify the classes of derivative transactions in relation to which particular requirements apply (see paragraph 901A(3)(a) of the Act).
 22. Subsection 901M(1) of the Act provides that ASIC may amend or revoke a derivative transaction rule in like manner and subject to like conditions (see subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901*).
 23. Subsection 901K(1) of the Act provides that ASIC must not make a derivative transaction rule unless the Minister has consented, in writing, to the making of the rule. The Minister consented to the making of the Instrument by written notice to ASIC dated 25 March 2022.
 24. Section 901A of the Act provides that rules made under this section are by way of legislative instrument. This means that such rules are subject to disallowance in accordance with section 42 of the *Legislation Act 2003*. Section 44 of the *Legislation Act 2003* does not apply to this Instrument. This Instrument is subject to disallowance.
 25. The Office of Best Practice Regulation has advised ASIC that a Regulation Impact Statement (**RIS**) is not required in relation to the Instrument because the proposed amendments are unlikely to have more than minor impacts.

Limitations on rule-making power

26. ASIC’s power to make derivative transaction rules imposing clearing requirements is subject to a number of limitations.

Ministerial determination

27. Subsection 901B(1) of the Act provides that the derivative transaction rules cannot impose clearing requirements in relation to derivative transactions unless the derivatives to which the transactions relate are covered by a determination under section 901B of the Act that relates to requirements of that kind.
28. On 22 August 2015, the Minister made the *Corporations (Derivatives) Amendment Determination 2015 (No. 1)* under subsection 901B(2) of the Act (the **Ministerial Determination**), determining the classes of derivatives in relation to which ASIC may impose clearing requirements, namely interest rate derivatives denominated in any of the following currencies:
 - (a) Australian dollars;
 - (b) US dollars;

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- (c) euros;
 - (d) British pounds;
 - (e) Japanese yen.
29. These are the Determined Clearing Classes (as the Ministerial Determination has not been revoked: see Rule 1.2.1 of the Rules).
30. The Rules (as amended by the Instrument) apply only to derivative transactions in the Determined Clearing Classes.

Regulations

31. Under section 901C of the Act, the regulations may provide that the derivative transaction rules:
- (a) cannot impose requirements (or certain kinds of requirements) in relation to certain kinds of derivative transactions; or
 - (b) can only impose requirements (or certain kinds of requirements) in relation to certain kinds of derivative transactions in certain circumstances.
32. As at the date of making the Instrument, there are no relevant regulations made under section 901C of the Act.

Consultation

33. Subsection 901J(1) of the Act provides that ASIC must not make a derivative transaction rule unless ASIC:
- (a) has consulted with the public about the proposed rule; and
 - (b) has also consulted with the following about the proposed rule
 - (i) APRA;
 - (ii) the RBA; and
 - (iii) any other person or body as required by regulations made for the purpose of subparagraph 901J(1)(b)(iii).
34. To date no regulations have been made under subparagraph 901J(1)(b)(iii).
35. ASIC has satisfied the above consultation requirements in respect of the proposed amendments, as set out under the heading 'Consultation' above (see also subsection 901J(2) of the Act).

Ministerial consent

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36. As noted above, subsection 901K(1) of the Act provides that ASIC must not make a derivative transaction rule unless the Minister has consented, in writing, to the making of the rule. The Minister consented to the making of the Instrument by written notice to ASIC dated 25 March 2022.

Relevant considerations in making derivative transaction rules

37. In accordance with section 901H of the Act, ASIC has had regard to the following matters in considering whether to make the Instrument:
- (a) the likely effect of the proposed amendments on the Australian economy, and on the efficiency, integrity, and stability of the Australian financial system;
 - (b) the likely regulatory impact of the proposed amendments;
 - (c) relevant international standards and commitments; and
 - (d) matters raised in response to CP 353.

Statement of Compatibility with Human Rights

38. 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 Derivative Transaction Rules (Clearing) Amendment Instrument 2022/224

Overview

1. The *ASIC Derivative Transaction Rules (Clearing) 2015* (the **Rules**) impose central clearing requirements for certain derivative transactions (referred to as ‘Clearing Derivatives’) in certain circumstances.
2. Since the global financial crisis, global regulators and industry have undertaken work to strengthen confidence in interest rate benchmarks and identify alternatives based on near risk-free rates (**RFRs**). As a result of this transition, certain Clearing Derivatives which are subject to central clearing requirements under the Rules are no longer able to be traded or cleared, necessitating updates to the product scope of the Rules.
3. The *ASIC Derivative Transaction Rules (Clearing) Amendment Instrument 2022/224* (the **Instrument**) modifies the types of derivative transactions which are subject to these requirements by making consequential amendments to the Rules. The amendments remove products which can no longer be traded or cleared from the definition of a Clearing Derivative in Rule 1.2.3 of the Rules and replace them with contracts referencing the replacement RFR selected for each currency.
4. The amendments in the Instrument are necessary to ensure that the Rules remain fit for purpose, reflect developments in the market and ensure that Australia continues to meet its G20 commitment and international obligations.

Assessment of human rights implications

5. This Instrument does not engage any of the applicable rights or freedoms.

Conclusion

6. 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*.