Explanatory Statement

ASIC Corporations (Amendment) Instrument 2022/775

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2022/775* (***Legislative Instrument***).

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

Summary

1. The Legislative Instrument is made under paragraph 907D(2)(a) of the *Corporations Act 2001* (the ***Act***) and amends the *ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844* (***Principal Instrument***). The purpose of the Principal Instrument is to provide transitional relief (conditional exemptions) to reporting entities from certain reporting requirements under the *ASIC Derivative Transaction Rules (Reporting) 2013* (***Rules***). The Legislative Instrument extends the operation of these conditional exemptions from 30 September 2022 to 30 September 2023 and exempts spot settlement transactions from transaction reporting requirements and position reporting requirements under the Rules.

Purpose of the instrument

2. The Rules impose ***Reporting Requirements*** in relation to over-the-counter (***OTC***) derivatives on ***Reporting Entities***. Under Rule 2.2.1 of the Rules, Reporting Entities are required to report information (***Reportable Transactions***) about their ***Derivative Transactions*** in ***OTC Derivatives*** to a ***Licensed Repository*** or a ***Prescribed Repository***. Certain phrases and words are defined in the Rules.

3. The Principal Instrument provides transitional relief from certain Reporting Requirements under the Rules, for varying periods, to Reporting Entities. The purpose of the Legislative Instrument is to amend the Principal Instrument to extend some elements of the existing relief under the Principal Instrument and to introduce exemptive relief under the Principal Instrument for spot settlement transactions.

4. Broadly, the Legislative Instrument extends time-limited exemptive relief provided under the Principal Instrument and introduces exemptive relief for spot settlement transactions as follows:

(a) extends conditional relief in section 5 of the Principal Instrument from Rule 2.2.1 of the Rules (***Exemption 1***) in relation to the reporting of ***Exchange-Traded Derivatives*** so that the relief continues until 30 September 2023. Under this relief, a Reporting Entity must report on 1 October 2023:

   a. information about each of its Reportable Transactions in an Exchange-Traded Derivative; and

   b. Derivative Position Information set out in Part S2.2 of Schedule 2 of the Rules, about each of its outstanding positions in an Exchange-Traded Derivative.

(b) extends conditional relief in section 7 (***Exemption 3***) of the Principal Instrument until 30 September 2023. Under this relief, Reporting Entities do not have to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report Name Information about an entity (referred to in the paragraph as a 'Relevant Entity') in relation to a Reportable Transaction or Reportable Position to a Trade Repository, in the case where the Reporting Entity reports to the Trade Repository an identifier for the Relevant Entity that is a Legal Entity Identifier (***LEI***), interim entity identifier, Designated Business Identifier or Business Identifier Code (***BIC Code***); and

(c) extends conditional relief in section 11 (***Exemption 7***) of the Principal Instrument until 30 September 2023. Under this relief, a Reporting Entity does not need to comply with paragraphs 2.2.1(a) and (c) of the Rules to the extent that Rule require the Reporting Entity to report, for a Reportable Transaction, Derivative Transaction Information referred to in Item 1 of Table S2.1(1) of the Rules that is a 'universal transaction identifier' or a 'single transaction identifier'.

(d) extends conditional relief in section 13 (***Exemption 9***) of the Principal Instrument until 30 September 2023. Under this relief, a Reporting Entity does not need to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report a Reportable Transaction or Reportable position in a foreign exchange contract, the relief being limited to certain circumstances set out in paragraphs 13(a) and (b) of the Principal Instrument.

(e) introduces exemptive relief in new section 13A (***Exemption 10***) of the Principal Instrument. ASIC has determined that there is insufficient regulatory benefit in requiring reporting of spot settlement transactions under the Rules, with other overseas jurisdictions also excluding reporting of spot settlement transactions from their reporting regime. Under this relief, Reporting Entities do not have to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report a Reportable Transaction or Reportable Position about an OTC Derivative that is an arrangement in relation to which the following are satisfied:

   a. a party has obligation to buy, and another party has an obligation to sell, intangible property at a price and within a period of no longer than the shortest period determined by usual market practice for delivery of the property;

b. the arrangement does not permit the seller's obligations to be wholly settled by cash, or by set- off between the parties, rather than by delivery of the property;

c. is not a foreign exchange contract or an option.

but only to the extent that the arrangement deals with that purchase and sale.

5. In the interim, ASIC will continue with work on consolidating the exemptions into the Rules as part of its review and rewrite of the Rules. It is noted that, unless repealed earlier, the Principal Instrument will sunset on 1 October 2025.

Consultation

6. In making this Legislative Instrument, ASIC released Consultation Paper 334 *Proposed changes to simplify the ASIC Derivative Transaction Rules (Reporting): First consultation* (***CP 334***) on 27 November 2020 and Consultation Paper 361 *Proposed changes to simplify the ASIC Derivative Transaction Rules (Reporting): Second consultation* (***CP 361***) on 16 May 2022.

7. As part of these consultation papers, ASIC published proposals to incorporate the exemptions into the Rules and to introduce an exemption for spot settlement transactions. Following the release of CP 361, ASIC has engaged in consultation with the leading industry association, International Swaps and Derivatives Association (***ISDA***) about the proposal to extend the exemptions until such time as the sunset date of the Rules. ASIC has received feedback supporting the extension of the exemptions and introduction of the exemption for spot settlement transactions, until such time as these exemptions can be consolidated into the Rules.

8. ASIC has consulted with the Office of Best Practice Regulation (***OBPR***) in relation to whether a Regulation Impact Statement (***RIS***) would be required. OBPR advised that the preparation of a RIS was not required because it assessed the proposal as unlikely to have a more than minor regulatory impact.

9. ASIC considered the feedback received, together with ASIC's regulatory objectives, in the final terms of the Legislative Instrument. ASIC intends to issue a feedback report summarising responses and feedback received to CP 361 by the end of 2022.

Operation of the instrument

Schedule 1 – Amendments

Exemption 1 (Exchange-traded derivatives)

10. Item 1 of Schedule 1 amends subsection 5(1) of the Principal Instrument to extend the expiry date for Exemption 1 from 30 September 2022 to 30 September 2023.

11. Item 2 of Schedule 1 amends paragraph 5(3)(a) of the Principal Instrument to extend the date by which Reporting Entities must report information about each of its Reportable Transaction in an Exchange-Traded Derivative from 30 September 2022 to 1 October 2023.

12. Item 2 of Schedule 1 amends paragraph 5(3)(b) of the Principal Instrument to extend the date by which Reporting Entities must report Derivative Position Information about each of its outstanding positions in an Exchange-Traded Derivative from 30 September 2022 to 1 October 2023.

Exemption 3 (Name Information)

13. Item 1 of Schedule 1 amends subsection 7(1) of the Principal Instrument to extend the expiry date for Exemption 3 from 30 September 2022 to 30 September 2023.

Exemption 7 (Trade identifiers)

14. Item 1 of Schedule 1 amends subsection 11(1) of the Principal Instrument to extend the expiry date for Exemption 7 from 30 September 2022 to 30 September 2023.

Exemption 9 (FX Securities Conversion Transactions)

15. Item 1 of Schedule 1 amends section 13 of the Principal Instrument to extend the expiry date for Exemption 9 from 30 September 2022 to 30 September 2023.

Exemption 10 (Spot Settlement Transactions)

16. Item 3 of Schedule 1 inserts new section 13A in the Principal Instrument to provide relief (Exemption 10) to a Reporting Entity from the requirement to report a Reportable Transaction or Reportable Position for an OTC Derivative that is an arrangement in relation to which the following are satisfied:

    (a) a party has obligation to buy, and another party has an obligation to sell, intangible property at a price and within a period of no longer than the shortest period determined by usual market practice for delivery of the property;

    (b) the arrangement does not permit the seller's obligations to be wholly settled by cash, or by set- off between the parties, rather than by delivery of the thing;

    (c) is not a foreign exchange contract or an option.

    but only to the extent that the arrangement deals with that purchase and sale.

Exemptions 1 to 9 – Other conditions (Record-keeping)

17. Item 4 of Schedule 1 amends the title of section 14 of the Principal Instrument to include reference to Exemption 10 inserted by new section 13A.

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 effect of the instrument is to provide new, or vary existing, 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; 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 applying in a way consistent with the intended policy of the Rules and the enabling provisions in the primary legislation.

Legislative authority

19. ASIC makes the Legislative Instrument under paragraph 907D(2)(a) of 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 made under Part 7.5A of the Act.

20. 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.

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 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

15. 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*.

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Overview

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2. The purpose of the instrument is to amend the Principal Instrument to extend relief to Reporting Entities in the following areas that were originally intended to expire on 30 September 2022:

   a. relief from reporting of over-the-counter (***OTC***) derivatives entered on certain foreign financial markets (Exemption 1);

   b. relief from reporting name information about an entity where the reporting entity reports an identifier that is a Legal Entity Identifier, interim entity identifier, Designated Business Identifier or Business Identifier Code (Exemption 3);

   c. relief from reporting trade identifiers (Exemption 7) and

   d. relief from reporting of certain OTC derivatives known as 'Foreign Exchange Security Conversion Transactions' (Exemption 9).

3. The Legislative Instrument also introduces exemptive relief under the Principal Instrument for spot settlement transactions.

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*.