



**ASIC**  
Australian Securities &  
Investments Commission

# Explanatory Statement

## *ASIC Regulated Foreign Markets Determination 2023/346*

This is the Explanatory Statement for ASIC Regulated Foreign Markets Determination 2023/346 (the *Instrument*).

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

### Summary

1. This instrument determines the financial markets that are Regulated Foreign Markets for the purposes of subrule 1.2.4(3) of the *ASIC Derivative Transaction Rules (Reporting) 2022 (2022 TRRs)* and the *ASIC Derivative Transaction Rules (Reporting) 2024 (2024 TRRs)*.

### Purpose of the instrument

2. The purpose of the instrument is to determine 35 Regulated Foreign Markets, along with SEC Regulated Markets and UK Regulated Markets, as Regulated Foreign Markets for the purposes of subrule 1.2.4(3) of the 2022 TRRs and 2024 TRRs.
3. The 2022 TRRs commenced on 21 December 2022 and repealed and replaced the *ASIC Derivative Transaction Rules (Reporting) 2013 (2013 TRRs)*. The 2024 TRRs will commence on 21 October 2024, at which time they will repeal and replace the 2022 TRRs.
4. Prior to the making of the 2022 TRRs and the 2024 TRRs, the ASIC Regulated Foreign Markets Determination [OTC DET 13/1145] (*2013 Determination*) determined the same Regulated Foreign Markets that are covered by the Instrument for the purposes of subrule 1.2.4(3) of the 2013 TRRs. It was intended that the 2013 Determination would remain in force for the purposes of the 2022 Rules following the repeal of the 2013 TRRs, but it is likely that the 2013 Determination was repealed as a result of the repeal of the 2013 TRRs.
5. Accordingly, it is necessary to determine the relevant Regulated Foreign Markets for the purposes of the 2022 TRRs and the 2024 TRRs.

### Reporting Rules

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6. The 2022 TRRs and 2024 TRRs (see Rule 1.2.5), made under section 901A of the Corporations Act 2001 (*Act*), each impose reporting requirements on ‘Reporting Entities’ to report information about their Derivative Transactions in ‘OTC Derivatives’ (referred to in the 2022 TRRs and 2024 TRRs as ‘Reportable Transactions’), and for the 2022 TRRs only, positions in relation to ‘OTC Derivatives’ (referred to in the 2022 TRRs as ‘Reportable Positions’).
  7. Rule 1.2.4 provides a definition of ‘OTC Derivative’ for the purposes of the 2022 TRRs and 2024 TRRs.
  8. Subrule 1.2.4(2) of the 2022 TRRs and 2024 TRRs carves out certain exchange-traded Derivatives from the definition of ‘OTC Derivatives’ for the purposes of the Rules. Under that subrule, a Derivative is not an OTC Derivative if it is able to be traded (within the meaning of section 761A of the Act):
    - (a) on a Part 7.2A Market and the entry into the arrangement that is the Derivative takes place on the Part 7.2A Market, or is reported to the operator of the Part 7.2A Market in its capacity as operator of the Part 7.2A Market, in accordance with the Operating Rules of the Part 7.2A Market; or
    - (b) on a Regulated Foreign Market and the entry into of the arrangement that is the Derivative takes place on the Regulated Foreign Market.
  9. 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 2022 TRRs or 2024 TRRs.
  10. ‘Part 7.2A Market’ is defined in Rule 1.2.3 of the 2022 TRRs as:
    - (a) ‘a financial market the operator of which is licensed under subsection 795B(1) of the Act, but does not include a financial market operated by an operator specified in regulation 10.15.02 of the Regulations or any other financial market that ASIC does not have the function of supervising under section 798F of the Act.’
  11. ‘Part 7.2A Market’ is defined in Rule 1.2.3 of the 2024 TRRs as:

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- (a) ‘a financial market to which an instrument made under subsection 798G(1) of the Act applies.’
    - (b) The note to this definition explains that instruments made under subsection 798G(1) of the Act are market integrity rules made by ASIC.
  12. Under subrule 1.2.4(3) of each of the 2022 TRRs and 2024 TRRs, ASIC may determine from time to time that a financial market in a foreign jurisdiction is a ‘Regulated Foreign Market’ 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 Part 7.2A Market is subject in this jurisdiction.
  13. The consequence of a financial market being a Regulated Foreign Market is that Derivatives entered into on the Regulated Foreign Market are not OTC Derivatives under the Rules and do not need to be reported by Reporting Entities under the 2022 TRRs and 2024 TRRs.

#### Clearing Rules

14. The *ASIC Derivative Transaction Rules (Clearing) 2015 (Clearing Rules)*, 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.
15. 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 of the Clearing Rules 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 2022 TRRs or 2024 TRRs.
16. Accordingly, any determination of a Regulated Foreign Market for the purposes of subrule 1.2.4(3) of each of the 2022 TRRs and 2024 TRRs also affects the operation of the Clearing Rules.

#### **Consultation**

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17. ASIC has consulted bilaterally with industry associations on ASIC's proposal to remake the ASIC Regulated Foreign Markets Determination [OTC DET 13/1145], in its current state with no changes. There were no objections raised by the industry associations to the proposal.
  18. ASIC has consulted with the Office of Impact Analysis (*OIA*) in relation to whether an Impact Analysis (*IA*) would be required. OIA advised that the preparation of an IA was not required because it assessed the proposal as unlikely to have a more than minor regulatory impact.

## **Operation of the instrument**

### **Part 1 – Preliminary**

19. Section 2 of the instrument provides for a staggered and partly retrospective commencement of the instrument such that:
  - (a) The instrument (other than section 5) commences on the day after it is registered on the Federal Register of Legislation;
  - (b) Subsections 5(1) and (3) of the instrument retrospectively commence on 21 December 2022 (being the day the 2022 TRRs commenced); and
  - (c) Subsection 5(2) commences on 21 October 2024 upon the commencement of the 2024 TRRs.
20. The retrospective commencement in subsection 5(1) of the instrument is discussed in paragraph 25 below and addresses the likely repeal of the 2013 Determination as a result of the repeal and replacement of the 2013 TRRs with the 2022 TRRs.
21. Section 3 of the instrument provides that this instrument is made under subrules 1.2.4(3) and (5) of the 2022 TRRs and subrules 1.2.4(3) and (5) of the 2024 TRRs.

### **Part 2 – Determination**

22. Section 5 of the instrument sets out the list of financial markets that are specified as Regulated Foreign Markets for the purposes of subrule 1.2.4(3) of each of the 2022 TRRs and 2024 TRRs as follows:
  - (a) Subsection 5(1) (which commences on 21 December 2022) determines the Regulated Foreign Markets specified in subsection 5(3) for the purposes of subrule 1.2.4(3) of the 2022 TRRs; and
  - (b) Subsection 5(2) (which commences on 21 October 2024) determines the Regulated Foreign Markets specified in subsection 5(3) for the purposes of subrule 1.2.4(3) of the 2024 TRRs.

### **Part 3 – Notice of Withdrawal**

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23. Section 6 of the instrument sets out the notice of withdrawal as required under subrule 1.2.4(5) of the 2022 TRRs and 2024 TRRs (which require a minimum of one month's notice of withdrawal):
- (a) To the extent that it is still in force, the 2013 Determination is withdrawn at the start of the day that is one month after the day the instrument is registered on the Federal Register of Legislation;
  - (b) The determination in subsection 5(1) of the instrument is withdrawn at the start of 21 October 2024 (being the time the 2024 TRRs commence); and
  - (c) The determination in subsection 5(2) is withdrawn at the start of 1 April 2033 (being the time the 2024 TRRs sunset).

#### **Part 4 – Repeal**

24. Section 7 of Part 4 of the instrument sets out that:
- (a) To the extent that it is still in force, the 2013 Determination is repealed at the start of the day that is one month after the day the instrument is registered on the Federal Register of Legislation;
  - (b) Subsection 5(1) is repealed at the start of 21 October 2024 (being the time the 2024 TRRs commence); and
  - (c) This instrument is repealed at the start of 1 April 2033 (being the time the 2024 TRRs sunset).

#### **Retrospective application**

25. Subsections 5(1) and (3) of the instrument (which determine Regulated Foreign Markets for the purposes of subrule 1.2.4(3) of the 2022 TRRs) have retrospective application from 21 December 2022, which is the commencement date of the 2022 TRRs.
26. The effect of subsections 5(1) and (3) is to give effect to the intention that, from commencement of the 2022 TRRs, the Regulated Foreign Markets specified in the 2013 Determination for the purposes of subrule 1.2.4(3) of the TRRs would continue be Regulated Foreign Markets, but for the purposes of subrule 1.2.4(3) of the 2022 TRRs.
27. The effect of determining financial markets as Regulated Foreign Markets for the purposes of the 2022 TRRs is that derivatives that are entered into, and able to traded, on those Regulated Foreign Markets will not be subject to reporting requirements under the 2022 TRRs. Accordingly, the determination in subsections 5(1) and (3) will relieve entities that are subject to the 2022 TRRs from reporting obligations that would otherwise apply to the entities in relation to such derivatives.

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28. Consequently, the retrospective operation of subsections 5(1) and (3) of the instrument will not:
- (a) affect a person's rights as at the time the instrument is registered so as to disadvantage the person; or
  - (b) impose liabilities on a person in respect of anything done or omitted to be done before registration of the instrument.

### **Legislative instrument and primary legislation**

29. 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 exemptions from requirements in the 2022 TRRs and 2024 TRRs. The 2022 TRRs and 2024 TRRs themselves are a legislative instrument rather than primary legislation; and
  - (b) the matters contained in the instrument are designed to ensure the application of the 2022 TRRs and 2024 TRRs remains flexible to adapt to market developments (in particular, excluding exchange-traded derivatives from reporting requirements) and applied in a way consistent with the intended policy of the 2022 TRRs and 2024 TRRs and the enabling provisions in the primary legislation.

### **Duration of the instrument**

30. The Instrument is repealed at the start of 1 April 2033, by subsection 7(2) of the Instrument. This repeal date aligns with the 1 April 2033 sunset date of the 2024 TRR.
31. This duration is appropriate because:
- (a) The Instrument is made under delegated legislation (being the 2022 TRRs and 2024 TRRs) and as such it is appropriate that the duration of the Instrument aligns with the duration of the 2024 TRRs; and
  - (b) The Instrument deals with confined and unique circumstances affecting a particular class of products, specifically exchanged-traded derivatives, which do not fit within the strict operation of the 2022 TRRs and 2024 TRRs but would result in anomalous or inconsistent outcomes given the intent of the 2022 TRRs and 2024 TRRs is to require reporting of information about over-the-counter derivatives transactions.

### **Legislative authority**

32. ASIC makes the Instrument under subrules 1.2.4(3) and (5) of the 2022 TRRs and subrules 1.2.4(3) and (5) of the 2024 TRRs.

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## Statement of Compatibility with Human Rights

33. 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 2023/346***

#### Overview

34. The *ASIC Regulated Foreign Markets Determination 2023/346* (the ***Instrument***) replaces the ASIC Regulated Foreign Markets Determination [OTC DET 13/1145] to determine 36 Regulated Foreign Markets, along with SEC Regulated Markets and UK Regulated Markets, as Regulated Foreign Markets for the purposes of subrule 1.2.4(2A) of each of the *ASIC Derivative Transaction Rules (Reporting) 2022 (2022 TRRs)* and the *ASIC Derivative Transaction Rules (Reporting) 2024 (2024 TRRs)*.
35. The effect of a financial market being determined as a Regulated Foreign Market is that Derivatives entered into on the Regulated Foreign Market are not OTC Derivatives under the Rules and do not need to be reported by Reporting Entities under the 2022 TRRs and 2024 TRRs.
36. The determination of a financial market as a Regulated Foreign Market 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 2022 TRRs and 2024 TRRs.

#### Assessment of human rights implications

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

#### Conclusion

38. 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*.