



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Derivative Transaction Rules (Clearing) Amendment Instrument 2023/726

This is the Explanatory Statement for *ASIC Derivative Transaction Rules (Clearing) Amendment Instrument 2023/726* (the **Instrument**).

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

Glossary

The following definition is used in the Instrument:

SOFR means Secured Overnight Financing 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 near risk-free rates (**RFRs**). This transition has necessitated 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 commitments.
2. The Instrument makes consequential amendments to the Rules by removing products referencing the London Interbank Offered Rate for US dollars (**USD LIBOR**) from the definition of a Clearing Derivative in Rule 1.2.3 of the Rules and replacing these with a new item in the Overnight Index Swaps (**OIS**) class referencing the Secured Overnight Financing Rate (**SOFR**).
3. The Instrument also makes one unrelated amendment by removing contracts denominated in Australian dollars in the Forward Rate Agreements class (**AUD FRAs**) from the definition of a Clearing Derivative in Rule 1.2.3 of the Rules. The purpose of this amendment is to formalise an existing exemption arrangement that is in place because these products have never become suitable for mandatory central clearing as was expected at the time the Rules were originally made, despite the passage of time.
4. Unless explained otherwise, capitalised terms in this Explanatory Statement have the meaning given by the Rules.

Purpose of the instrument

5. In 2009, the Leaders of the Group of Twenty Nations (**G20**), including Australia, committed to reforming over-the-counter (**OTC**) derivatives markets. One of the key commitments was to require all standardised OTC derivative transactions to be cleared through central counterparties (**CCPs**). The Rules implement this G20 commitment in Australia.
6. In 2015, the Minister made a determination under section 901B of the *Corporations Act 2001 (Act)* empowering ASIC to make rules imposing Clearing Requirements for interest rate derivatives denominated in any of the following currencies:
 - (a) Australian dollars (**AUD**);
 - (b) US dollars (**USD**);
 - (c) euros;
 - (d) British pounds;
 - (e) Japanese yen.
7. The Rules specify which products within these ‘Determined Clearing Classes’ may be subject to the clearing requirement in Rule 2.1.1 by reference to certain additional characteristics, such as the Floating Rate Index (**FRI**) on which each floating rate for the derivative transaction is based.
8. 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 products which are required to be centrally cleared 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.
9. The Instrument makes consequential amendments to the Rules by removing products referencing USD LIBOR from the definition of a Clearing Derivative in Rule 1.2.3 of the Rules, as these can no longer be traded or cleared. The Instrument introduces a new class of Clearing Derivative to replace these products, namely USD-denominated OIS contracts referencing SOFR, the replacement RFR selected for USD LIBOR. These amendments are necessary to ensure that the Rules remain fit for purpose and that Australia continues to meet its G20 commitment.
10. Separately, when ASIC established the Clearing Rules on 3 December 2015, it delayed the implementation of the requirement to centrally clear AUD FRAs until 2 April 2018. ASIC subsequently granted relief from compliance with the Clearing Requirement in Rule 2.1.1 of the Rules for AUD FRAs through an exemption. The exemption instrument has been amended on a number of occasions to extend the duration of this relief. The clearing

requirement has accordingly never commenced in respect of AUD FRAs. The rationale for this relief is that these products have never become suitable for mandatory central clearing, because:

- (a) only one CCP clears AUD FRAs, so imposing a clearing requirement may constrain participants' choices;
 - (b) the policy rationale for mandatory clearing is tied to systemic risk, which is not materially affected by transactions in AUD FRAs; and
 - (c) AUD FRAs are not subject to a clearing mandate in any other major jurisdiction, so international consistency considerations do not arise.
11. The Instrument makes consequential amendments to the Rules by removing AUD FRAs from the definition of a Clearing Derivative in Rule 1.2.3 of the Rules. This amendment will provide industry with more certainty on the application of the clearing requirements to AUD-denominated products. It is also necessary to ensure that the clearing mandate will apply only to products that satisfy the preconditions for central clearing and are suitable for mandatory central clearing based on the analytical approach outlined in the regulators' statement.

Consultation

CP 366

12. On 15 February 2023, ASIC released [*Consultation Paper 366: Proposed amendments to the ASIC Derivative Transaction Rules \(Clearing\) 2015: Second consultation \(CP 366\)*](#). CP 366 proposed amendments to the Rules to update the product scope of the clearing requirement with respect to contracts denominated in US dollars. This was to reflect market developments related to global benchmark reforms and the final rule issued by the US Commodity Futures Trading Commission (CFTC) on 12 August 2022. CP 366 also sought feedback on the separate proposal to remove AUD-denominated products from the FRA class – for which the clearing requirement has never commenced.
13. ASIC received 3 written submissions to CP 366 (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.
14. In CP 366, an implementation period of three months was proposed for the introduction of the new SOFR OIS class. Following feedback from industry, the implementation period has been extended to 6 months from when the Instrument is registered on the Federal Register of Legislation to give industry sufficient time to prepare for the technical commencement of the new obligations.

Other consultation

15. ASIC 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.

Prior consultation

16. In [*Consultation Paper 353: Proposed amendments to the ASIC Derivative Transaction Rules \(Clearing\) 2015 \(CP 353\)*](#), we indicated that we would revisit the removal and replacement of contracts referencing USD LIBOR in a later round of consultation, to allow time for the US Commodity Futures Trading Commission (CFTC) – the relevant home regulator – to settle its approach.

Operation of the Instrument

Part 1 – Preliminary

17. Section 1 provides that the name of the Instrument is the *ASIC Derivative Transaction Rules (Clearing) Amendment Instrument 2023/726*.
18. Section 2 provides the commencement date for the items in the Schedule. It provides that the Instrument (other than item 7 of Schedule 1 to the Instrument) commences on the day that it is registered on the Federal Register of Legislation. It also provides that item 7 of Schedule 1 commences 6 months after the day it is registered on the Federal Register of Legislation.
19. Section 3 provides that the Instrument is made under section 901M of the Act.
20. Section 4 sets out that each instrument specified in the Schedule is amended, repealed, or has effect according to the applicable items in the Schedule.

Schedule 1 – Amendments

21. Items 1 to 7 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. The items also make amendments to renumber the modified items.
 - (a) removing contracts referencing US dollar (USD) London Interbank Offered Rate (LIBOR) from Rule 1.2.3 (*Meaning of Clearing Derivative*) by deleting:
 - (i) item 1 in the table at subrule 1.2.3(2) (*IRD Class Specifications for Basis Swaps and Fixed-to-Floating Swaps*); and
 - (ii) items 1 and 3 in the table at subrule 1.2.3(3) (*IRD Class Specifications for Forward Rate Agreements*); and

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- (b) replacing these contracts by:
 - (i) adding an item to the table at subrule 1.2.3(4) for USD-denominated contracts referencing the SOFR with a Termination Date Range of 7 days to 50 years.

Legislative instrument and primary legislation

- 22. The subject matter and policy implemented by the 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. The Instrument amends the Rules.
- 23. The duration of the amendments made by the Instrument align with the duration of the Rules, which the Instrument amends.

Legislative authority

- 24. The Instrument is made under section 901M of the Act.
- 25. 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*).
- 26. 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 7 September 2023.
- 27. Section 901A of the Act provides that rules made under this section are by way of legislative instrument. These 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 the Instrument. The Instrument is subject to disallowance.
- 28. The Office of Impact Analysis has advised ASIC that an Impact Analysis is not required in relation to the Instrument because the proposed amendments are unlikely to have more than minor and machinery impacts.

Limitations on rule-making power

- 29. ASIC's power to make derivative transaction rules imposing clearing requirements is subject to a number of limitations.

Ministerial determination

- 30. 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.

31. 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;
 - (c) euros;
 - (d) British pounds;
 - (e) Japanese yen.
32. These are the Determined Clearing Classes (as the Ministerial Determination has not been revoked: see Rule 1.2.1 of the Rules).
33. The Rules (as amended by the Instrument) apply only to derivative transactions in the Determined Clearing Classes.

Regulations

34. 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.
35. As at the date of making the Instrument, there are no relevant regulations made under section 901C of the Act.

Consultation

36. 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

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- (iii) any other person or body as required by regulations made for the purpose of subparagraph 901J(1)(b)(iii).
37. To date no regulations have been made under subparagraph 901J(1)(b)(iii).
38. 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

39. 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 7 September 2023.

Relevant considerations in making derivative transaction rules

40. 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 366.

Statement of Compatibility with Human Rights

41. 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 2023/726

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 2023/726* (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 replaces them with contracts referencing the replacement RFR selected for the US dollar – the Secured Overnight Financing Rate (**SOFR**) in this case.
4. Additionally, the Instrument removes Australian dollar denominated contracts in the Forward Rate Agreement (**FRA**) class. The clearing requirement has never applied to these products and this amendment provides industry with more certainty on the application of the clearing requirement to Australian dollar denominated products.
5. 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.

Assessment of human rights implications

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

Conclusion

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7. 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*.