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31 July 2018

Dear Oliver,

Re: Policy submission from ISDA, AFMA and GFXD on the importance of maintaining the exemptions found in ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844

The International Swaps and Derivatives Association, Inc. ("**ISDA**"), the Australian Financial Markets Association ("**AFMA**") and the Global Foreign Exchange Division ("**GFXD**") of the Global Financial Markets Association ("**GFMA**") (collectively, the "**Associations**") and their members consider that there are important policy reasons justifying the ongoing continuation of certain exemptions from the *ASIC Derivative Transaction Rules (Reporting) 2013* ("**Rules**") found in ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844 (the "**Instrument**"). This submission sets out those reasons, for ASIC to consider further and take action upon.

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter @ISDA.

AFMA is a member-driven and policy-focused industry body that represents participants in Australia's financial markets and providers of wholesale banking services. AFMA has a broad church membership that reflects the spectrum of industry participants including wholesale

banks, traders, brokers, market makers, fund managers, market infrastructure providers and treasury corporations, many of which make use of derivatives for risk mitigation purposes.

The GFXD was formed in co-operation with the Association for Financial Markets in Europe (AFME), the Securities Industry and Financial Markets Association (SIFMA) and the Asia Securities Industry and Financial Markets Association (ASIFMA). Its members comprise 25 global foreign exchange ("**FX**") market participants, collectively representing around 80% of the FX inter-dealer market. Both the GFXD and its members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators.

The Associations are actively engaged with providing input on regulatory proposals in the United States (the "**US**"), Canada, the European Union (the "**EU**") and Asian jurisdictions. The Associations' comments are derived from this international experience and constant dialogue, and reflect the views of both firms in the Asia-Pacific region and from further afield. As OTC derivatives tend to be cross-border in nature, we wish to highlight the importance of ensuring that regulatory requirements have a consistent domestic and cross-border effect, so as to not disproportionately impact any one sector of what is a global market.

Exemption 1 (Exchange-traded derivatives)

Problem

The definition of 'OTC Derivative' in the Rules captures exchange-traded derivative ("**ETD**") transactions which are not over-the-counter ("**OTC**") derivatives. The underlying policy intent of the regime is that the reporting of ETD transactions, such as futures and options, is not needed because the transactions are otherwise recorded and available for review. As was noted in paragraph 42 of ASIC Consultation Paper 221[1]:

ASIC's transaction reporting regime is an OTC derivatives regime and, as such, exchange-traded derivatives (e.g. futures and options) do not need to be reported. This presents the challenge of defining 'exchange-traded derivatives' for the purposes of the derivative transaction rules (reporting).

Reflecting this, the Rules create exclusions from the definition of "OTC Derivative" for derivatives traded on:

1. a Part 7.2A Markets (principally the ASX24 market);

[1] https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-221-otc-derivatives-reform-proposed-amendments-to-the-asic-derivative-transaction-rules-reporting-2013/

2. a US Designated Contract Market ("**DCM**");
3. a European Regulated Market;
4. a market in respect of which ASIC has made a "Regulated Foreign Market Determination" (this includes approximately 50 markets listed in ASIC Regulated Foreign Markets Determination [OTC DET 13/1145][2]); and
5. a market in respect of which ASIC has provided exemptive relief from the reporting obligation (this currently includes approximately 60 markets listed in the Instrument).

Problems with the current approach to ETDs include that the current five-exclusion approach:

1. requires a lot of work on the part of ASIC and industry to meet and maintain the regulatory objective of excluding ETDs;
2. still captures some ETDs (i.e. futures traded on a market which is not within any of the five exclusions); and
3. presents an unnecessary barrier to new market trading.

The Associations believe that the focus of an exclusion should not be on the markets on which derivatives are traded (DCM versus non-DCM, for example), but rather on the specific product which an individual derivative traded on a market constitutes (i.e. futures versus OTC). The listing of venues is an inefficient mechanism by which to achieve the desired regulatory outcome to exclude ETDs. It also fails to capture the fact that the list of markets will change over time, which presents operational problems to Reporting Entities seeking to legitimately trade derivatives on exchange markets which are not nominated.

Only the European Regulated Market list includes a reference to the Market Identifier Code ("**MIC**") for each approved market, to enable automation. The MIC is an international standard which specifies a universal method of identifying exchanges, trading platforms, regulated or non-regulated markets and trade reporting facilities as sources of prices and related information in order to facilitate automated processing. Accordingly, putting in place a generic definition which would capture the relevant venues on which derivatives are exchange-traded is a preferred solution.

Futures markets are subject to constant changes of their names, activities and existence, and new futures markets may come into existence. ASIC's exemption solution power currently provides for the supplementation of the above Regulated Foreign Markets Determination in the interests of market certainty, however this is not a sustainable long-term solution to the problem. The Associations propose that a policy review is desirable to formulate a definition of

[2] https://www.legislation.gov.au/Details/F2013L01710

'exchange-traded derivative' that has regard to the common characteristics of products that should be out-of-scope for OTC derivative transaction reporting.

Long-term solution needed

We consider a long-term solution lies in defining ETDs, or for ASIC to provide guidance, similar to the taxonomy approach taken in RG 251 Derivative transaction reporting ("**RG 251**"), to confirm that ASIC does not expect that non-OTC derivatives are to be reported.

It should be possible to define ETDs themselves, and to then very simply and neatly exclude such derivatives from the reporting requirement. A starting point for a definition is set out below, which the Associations would be pleased to discuss further:

An 'Exchange-Traded Derivative' is an option or future that is:

(a) traded on or pursuant to the rules of an exchange;

(b) traded on terms prescribed by the relevant exchange for options or futures (as applicable) in the relevant series, category or class of contracts, as prescribed by the relevant exchange (the "**series**"), to which such option or future corresponds;

(c) fungible with every other bought or sold (as the case may be) option or future (as applicable) in the relevant series;

(d) identical to every option or future in the relevant series, and where none of the terms of such option or future may be negotiated, other than price; and

(e) required to be centrally cleared on the central counterparty that corresponds to the relevant exchange on which such option or future may be traded; or

(f) any derivatives contract which ASIC determines is an Exchange-Traded Derivative.

In the Associations' view, it would be consistent with the Government's policy approach to implementing the law, for ASIC to put in place an explicit carve-out in the Rules for reporting of any futures transactions, rather than periodically consuming limited resources to consider whether new or different exchanges identified by participants should be added to the list currently maintained by ASIC.

In the absence of a generic definition to exclude ETDs from the reporting obligation, the Associations consider it would be necessary to do one of the following:

1. continue to maintain an additional listing of Relevant Financial Markets following on from the current exemption solution. This would require a revised list of Relevant Financial Markets to be prepared, as the current names have been affected by commercial developments since 2015 and are not all still relevant, with the addition to include a reference to the MIC for each Relevant Financial Market;

2. replace the current exemptive relief with exemptive relief which utilises, on a trial basis, the definitional approach; or
3. replace the current exemptive relief with an exemption that applies simply in relation to derivatives which constitute "futures or options on futures".

Why the Rules should be revised

An exemption solution should be allowed for the following reasons:

a) ETDs are not able to be reported under the Rules as they are currently drafted. OTC derivative transaction reporting has not developed in a manner that can accommodate the characteristics of ETDs, and it is not possible to identify a reporting party's counterparty to an ETD trade, due to the anonymity of exchange order books. It is also not possible to have attributes of ETDs represented in the fields set out in the Rules, as these fields were designed in contemplation of the characteristics of OTC products and transactions.
b) Reporting entities trying to shoehorn futures trade data into reporting fields designed for OTC derivatives will result in the futures trades being not at all well represented in trade repository data, and will adversely impact the quality of that data as consumed by regulators.
c) The exemption solution is in line with ASIC's policy to capture only OTC derivatives and to exclude futures and options (referred to above). The Associations consider that the optimal way forward would be for ASIC to grant this exemption solution, as it is in line with current ASIC policy.

Exemption 2 (Entity Information)

Problem

The Rules require derivative transactions to be reported by Australian entities and foreign subsidiaries of Australian entities, as well as by foreign branches and companies where they trade or book into an Australian entity.

The OTC derivatives market is extremely large and diverse, with a significant proportion of trades entered into on a cross-border basis. The reports made to trade repositories under the Rules therefore relate to a broad range of counterparties, many of which are smaller, less sophisticated entities that are likely to be less familiar with entity identifiers, and/or may not be subject to specific requirements to obtain a relevant identifier.

Current requirements under the Rules

The tables set out in Parts S2.1 and S2.2 of the Rules include many fields where data on entities is to be reported, with the following formats specified:

"…in the case of an entity, a Legal Entity Identifier (LEI) or interim entity identifier or, if no LEI or interim entity identifier is available for the entity, a Designated Business Identifier or, if no Designated Business Identifier is available, a Business Identifier Code (BIC code)"

For some counterparties, particularly smaller or less sophisticated entities, none of these identifiers currently exist.

Solution needed

The Associations submit that the optimal exemption solution would be for ASIC to grant a further, time-limited extension until September 2020 of the Entity Information exemption as set out in the Instrument. The Associations suggest an extension of 2 years at a minimum.

This application is a minor and technical application in accordance with Regulatory Guide 51, as it involves the application of existing policy to existing situations.

Why the extension should be considered

The Associations are supportive of the use of LEIs as the international standard for counterparty identification, and note that regulators in some jurisdictions require market participants to obtain a LEI, either in order to be able to trade, or for transaction reporting purposes. Indeed, regulators in the Asia-Pacific region have recently considered moving from recommended use of the LEI, to required use of the LEI. However, this is not the case for all jurisdictions, including Australia. The OTC derivatives market is extremely large and diverse, with a significant proportion of trading occurring on a cross-border basis[3]. Many smaller counterparties in jurisdictions where LEIs are not mandated have yet to obtain one. For further detail, see 'Exemption 3' below.

Similarly, the alternative identifiers (Designated Business Identifier and BIC codes), are not used universally. The Designated Business Identifier, produced by Avox Limited, was primarily utilised before the creation of the LEI standard, and has limited application today. In addition, it is a proprietary standard, whereas the industry is moving towards the use of LEIs which are open to all. BIC codes are generally (although not exclusively) obtained by

[3] For example, the BIS 2016 Triennial Central Bank Survey found that 65% of FX turnover is cross-border https://www.bis.org/publ/rpfx16fx.pdf

counterparties using SWIFT[4] messages for their transactions. Therefore, counterparties which are not part of the SWIFT network are unlikely to have a BIC code, as are certain counterparty types such as funds.

As outlined above, the three permitted entity identifiers (LEI, Designated Business Identifier and BIC code) are not available for all counterparties. While the industry supports the use of LEIs and is working to educate a wide range of counterparties on the uses and benefits of the LEI framework[5], significant work remains to be done to ensure full coverage.

Therefore, the Associations consider that the optimal approach would be for ASIC to extend the relief granted in Exemption 2 and allow an internal identifier to be used for such counterparties in transaction reports.

Exemption 3 (Name Information)

Problem

Under section 7 of the Instrument, a Reporting Entity does 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 LEI, interim entity identifier, Designated Business Identifier or BIC code.

Reporting Entities are required to report both the non-reporting counterparty identifier and its legal entity name. However, this is not consistent with other major equivalent transaction reporting regimes, in particular those in other jurisdictions such as the US (CFTC) and Canada, which only require the LEI of the non-reporting counterparty. The European Market Infrastructure Regulation ("**EMIR**") reporting rules do not require the name field to be separately populated in the case of coverage by the LEI. Any workaround by individual Reporting Entities to provide a name to ASIC which is not linked to (and thus automatically populated from) the identifier will lead to inconsistent, inaccurate and possibly out of date (due to name changes) legal name data.

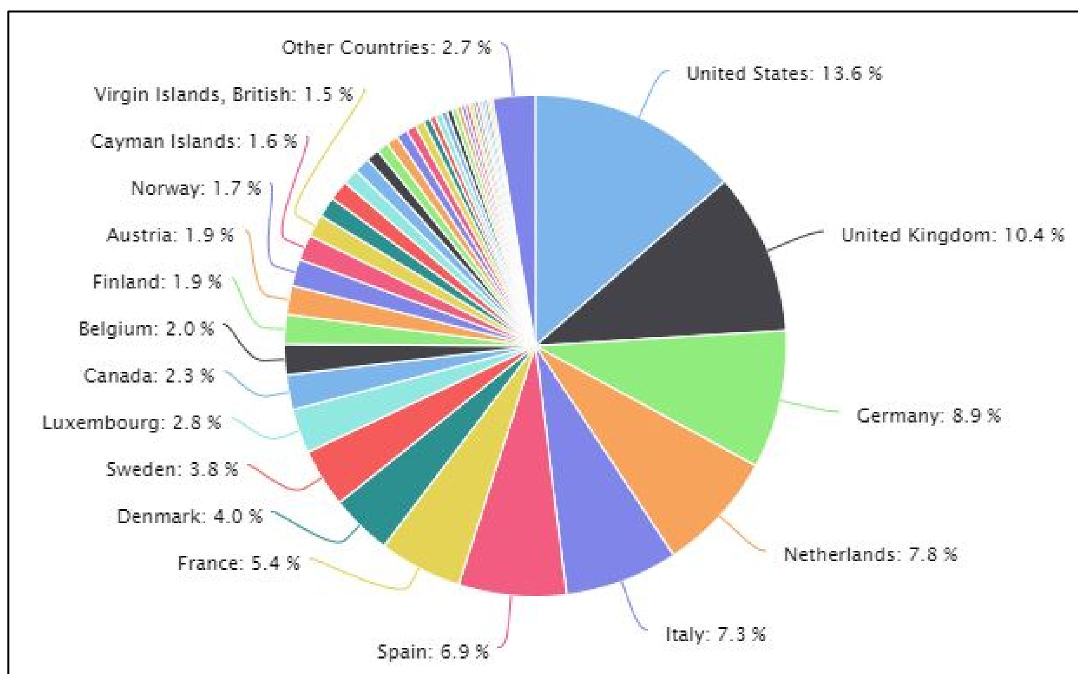
While it is the position of the Associations to strongly support the uptake of LEIs, and there is reasonable industry uptake within Australia, as noted earlier it is also the case that increasing the level of uptake of LEIs across the Asia-Pacific region has been a challenge to date.

[4] https://www.swift.com/

[5] See, for example, https://www.isda.org/a/c0IDE/ISDA_GFMA_LEI_FAQ_Outreach_2017_PUBLIC_ENGLISH.pdf

Transactions reported in Australia have a significant proportion of counterparties in the Asia-Pacific region, creating a practical problem in that LEIs are frequently not available for the counterparties. The Asia-Pacific region represents less than 3.2% of total LEI issuance globally, and with no Asia-Pacific jurisdictions featuring in the top 18 jurisdictions by LEI issuance, as shown in the following chart:

LEIs by Country



Source: GLEIF LEI statistics: https://www.gleif.org/en/lei-data/global-lei-index/lei-statistics

Despite the impact of the "No LEI No Trade" requirement associated with implementation of the revised EU Markets in Financial Instruments Directive ("**MiFID II**"), the number of LEIs in the Asia-Pacific region has not increased dramatically. To this end, we would encourage ASIC to engage in discussion with its regional peers with a view to harmonising the requirement for an LEI, and to discuss a possible coordinated approach to implementation and implementation timeline for requiring the LEI.

The Associations further note that the Depositary Trust and Clearing Corporation ("**DTCC**") allows only specific identifier data to be submitted, and uses it to populate the name to report to ASIC. However, DTCC cannot accept some of the prescribed identifiers (namely the Australian Business Number ("**ABN**")), and for those identifiers which it can accept, it can only populate the name field for ASIC reporting if the counterparty data exists in the DTCC database. This is only the case if the counterparty has separately onboarded with DTCC. A large number of non-reporting counterparties do not have a prescribed identifier and do not onboard with DTCC, as there is no incentive to do so.

Proposed exemption solution

The Associations propose:

a) permanent removal of the ABN identifier from Tables S2.1 and S2.2 of the Reporting Rules; and
b) continuance for a finite period of:
    i) a LEI or interim entity identifier (CICI / pre-LEI),
    ii) Designated Business Identifier, or
    iii) BIC Code.

The use of the 'Relevant Entity' continues to be needed, as in addition to the Non-Reporting Counterparty identifiers, it picks up other identifier fields, including (without limitation):

- Identifier of beneficiary;
- Identifier of broker;
- Identifier of clearing member;
- Identifier of counterparty purchasing protection; and
- Identifier of counterparty selling protection.

Exemption 4 (Privacy – Consent for historical counterparties)

Problem

The Rules will require Reporting Entities to report Identifying Information (as defined in the Rules), or 'unmask', historical transactions with clients for which no express consent to unmask has been obtained, and where unmasking would breach:

a) a duty of confidence owed by the Reporting Entity to the Relevant Counterparty which is actionable at law by the Relevant Counterparty;
b) a contractual duty owed by the Reporting Entity to the Relevant Counterparty; or
c) a provision of a law or regulation of a foreign jurisdiction that applies to the Reporting Entity in its dealings with the Relevant Counterparty.

The OTC derivatives market is extremely large and diverse, with a significant proportion of trades entered into on a cross-border basis. The reports made to trade repositories under the Rules therefore relate to a broad range of counterparties, some of which will not be willing or able to consider providing express consent to unmask, for a variety of reasons.

Why the extension should be considered

The Associations note that ASIC has recently been participating in a Workstream on Trade Reporting Legal Barriers ("**Workstream**") led by the Financial Stability Board ("**FSB**") OTC

Derivatives Working Group ("**ODWG**") and its official sector representatives, including a round table on trade reporting legal barriers ("**Round Table**") in Hong Kong on 23 May 2018. Indeed at this Round Table, many of the critical issues around non-provision of client consent and the associated reasons were discussed, with acknowledgment by the Workstream of the difficult legal, policy and operational issues associated with obtaining client consent for a set of historical transactions. In this regard, ISDA recently sent a follow-up submission to the Workstream further setting out these issues, and would be happy to provide a copy of this submission to ASIC to aid its consideration of an extension of Exemption 4.

The Associations nevertheless consider it useful to highlight the operational burden and challenges of obtaining client consent here, and the resulting negative impact to the broader client relationship. The process of trying to obtain client consent is time-consuming, repetitive, resource-heavy, documentation-intensive and in some cases futile. While members will strive to use standard ISDA documentation to obtain consent wherever possible, the client may not be willing to adhere to an ISDA protocol, and an ISDA Master Agreement may be specific to the counterparty, branch, client and/or product type. This creates significant complexity, exacerbating the fact that in many reporting regimes now (including Australia), the derivatives trading relationship is required to cease unless and until consent is obtained.

It is important to note that ASIC has already built robust conditions and exclusions into Exemption 4, which should give confidence that Reporting Entities have strong controls and governance around using all reasonable endeavours to obtain client consent for these historical trades, and being able to demonstrate this to ASIC. Additionally, the exclusion specified in subsection (5) effectively means that this relief is not available for any transactions entered into after 1 January 2015. This means that the population of impacted transactions cannot grow larger, but rather only smaller in number.

Removal of the relief would require identifying and re-reporting all outstanding masked trades, which would constitute a massive operational challenge, given the amount of entities involved across the entire post-trade reporting chain and the volume of data to be analysed. Reporting Entities, middlewares, service providers, trade repositories and other market participants would need to identify the population of historical transactions to be unmasked, conduct due diligence on each trade or trading pattern, exit every position, re-report each position unmasked, validate each submission to ensure it is acknowledged and accepted by the trade repository, potentially update any other trade details at the same time as required by new regulatory requirements, manage and remediate any errors, and follow up on any queries. Any entity that delegates its reporting to another entity is likely to face an even more complicated scenario.

It is also important to note that unmasking of outstanding positions may not yield data of optimal accuracy. Many jurisdictions, including Australia, do not currently require entities to be identified through the use of the LEI, and instead allow of waterfall of identifiers to be used. Therefore, unmasking of positions may only result in non-global identifiers being made

transparent, such as national business registry numbers. This would again make the task of meaningfully aggregating such entity data complex, and may not yield high-quality data.

Long-term solution needed

The Associations are of the view that a long-term solution needs to be found for such situations where a client is either unable or unwilling to provide consent for a Reporting Entity to unmask a set of historical transactions with it. Given the amount of time that has passed since such relief was first introduced, and the robust conditions and exclusions underpinning this relief, any counterparties which have not provided consent by now are unlikely to ever be in a position to provide such consent. For those reasons, simply extending the relief for a limited time may only guarantee that a subsequent submission on the same issues will be required.

ASIC may also wish to consider the ongoing work by the Workstream on these issues. It is expected that the Workstream's efforts will culminate in a report for the G20 Leaders for the November 2018 G20 Summit in Buenos Aires, Argentina. This may include proposals for G20 members and/or FSB member jurisdictions on how to permanently manage the issues around client consent for historical transactions, both outstanding and expired.

Proposed exemption solution

The Associations propose that ASIC extend this relief in its current form, with the existing conditions and exclusion, but without an end date, or with an end date that provides sufficient time for ASIC to consider, implement and align with the ultimate outcomes of the FSB recommendations to G20 Leaders. If the latter option is chosen, the Associations suggest that at least 6 months from publication of the outcomes in respect of masking from the G20 Leaders' Summit is both desirable and appropriate.

Exemption 5 (Privacy – Foreign privacy restrictions)

Problem

The Instrument requires Reporting Entities to report Identifying Information in relation to Reportable Transactions and Positions with counterparties by 31 December 2018, even where:

a) the Reporting Entity is of the reasonable view that the Reporting Entity would breach a law or regulation of a Relevant Foreign Jurisdiction if the Reporting Entity reported the Identifying Information to the Trade Repository; and
b) the Reporting Entity has a written opinion of external legal counsel that supports the view referred to in paragraph (a); and
c) the Reporting Entity is reasonably satisfied that the law or regulation the subject of the written legal opinion referred to in paragraph (b) has not changed in any relevant respect since the date the opinion was issued.

This will put Reporting Entities in the difficult position of being forced to choose whether to breach regulatory reporting requirements in Australia, or the laws of a foreign jurisdiction (such as state secrecy laws) which may have serious ramifications.

Why the extension should be considered

Reporting Entities still have significant concerns about reporting Identifying Information on transactions with clients in jurisdictions where doing so would breach a law or regulatory requirement, particularly where the extent of legal liability is either (potentially intentionally) unclear or severe. In such jurisdictions, the exact scope, interpretation and application of such state and bank secrecy laws may not be able to be determined, however reporting Identifying Information may be considered a criminal offence, and individuals may be subject to fines and/or imprisonment. For these reasons, members often cannot rule out the possibility that some trade information with entities in such jurisdictions may be regarded as non-reportable either now or in the future, and therefore cannot trade with impacted counterparties, or report such transaction data to trade repositories or authorities offshore.

In a similar vein to Exemption 4, the FSB ODWG Workstream has also been considering issues around jurisdictions which continue to have legal or regulatory barriers to reporting full information, in relation to both FSB member jurisdictions and non-member jurisdictions. This work is also expected to culminate in the previously-mentioned report to the G20 Leaders for their November 2018 Summit. Until there is removal and/or written remediation of such laws, the Associations would strongly encourage ASIC to consider an extension of the masking relief currently provided under Exemption 5.

Proposed exemption solution

The Associations propose that ASIC extend this relief in its current form, with the existing Relevant Foreign Jurisdictions and conditions, but without an end date, or with an end date that provides sufficient time for ASIC to consider, implement and align with the ultimate outcomes of the FSB recommendations to G20 Leaders in respect of jurisdictions where barriers to reporting continue to exist.

Exemption 9 (FX Securities Conversion Transactions)

Problem and current requirements under the Rules

Under Section 761D(1)(b) of the Corporations Act 2001 and the corresponding Corporations Regulation 7.1.04(1)(a), FX contracts with a tenor of not less than 3 business days are classified as “derivatives” and are subject to reporting under the Rules.

Many of the Associations' members act as custodians for their customers who are asset managers. Due to increased access to, and investor interest in, foreign financial markets, growing numbers of these customers are invested in foreign securities. To facilitate the purchase or sale of these foreign securities, these custodians, as part of their service offering, often enter into an FX transaction that is incidental to, and for the purpose of, effecting their customer's foreign security transaction ("**FX Security Conversion Transaction**"). For example, when a non-US customer wishes to purchase a US dollar-denominated security, its broker-dealer or bank custodian will enter into a corresponding FX transaction so that the customer has US dollars available to meet the cash currency requirements necessary to complete purchase or sale of the security. These FX transactions are, therefore, integral to the settlement of the security.

Typically, the settlement cycle for most non-Euro or US dollar denominated securities is trade date plus three days (T+3). Accordingly, the bank custodian or broker-dealer would enter into a FX transaction with its customer on a T+3 basis as well.

A number of global regulators deem FX Security Conversion Transactions to be 'FX Spot' transactions, and therefore out of scope for transaction reporting and other G20 market regulations.

Why the extension should be considered

In 2014, the CFTC considered this issue and deemed transactions for the sale or purchase of an amount of foreign currency to effect the actual delivery of a security by the relevant securities deadline to be a bona fide spot FX transaction, and therefore outside of the definition of a "swap"[6].

Since then, the EU Delegated Act[7] covering the definition of an FX Spot contract has come into force, on 3 January 2018. The Delegated Act states in Article 10(2) that an FX Spot contract includes "a contract for the exchange of one currency against another currency…where the contract for the exchange of those currencies is used for the main purpose of the sale or purchase of a transferable security or a unit in a collective investment undertaking, [and delivery is scheduled to be made within] the period generally accepted in the market for the settlement of that transferable security or a unit in a collective investment undertaking is the standard delivery period or 5 trading days, whichever is shorter."

[6] https://www.gpo.gov/fdsys/pkg/FR-2012-08-13/pdf/2012-18003.pdf

[7] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0565&from=EN

By being classified as an FX Spot transaction, these FX Security Conversion Transactions are not a "financial instrument" for the purposes of MiFID/R[8], and the provisions of MiFID/R therefore do not apply. The definition of "financial instrument" under MiFID/R is then referenced by EMIR[9], the regulation which sets out the EU derivative transaction reporting rules, meaning that FX Spot transactions, including FX Security Conversion Transactions, are not reportable under EMIR.

Similarly, the Monetary Authority of Singapore has defined transactions used solely to fund the purchase or sale of a foreign security where the settlement period is greater than T+2 days as an "excluded currency contract" [10], i.e. FX spot. They are thus outside the scope of OTC derivatives regulation within this jurisdiction.

Furthermore, in a joint Consultation conclusion and further consultation on introducing mandatory clearing and expanding mandatory reporting[11] issued in February 2016, regulators in Hong Kong recognised that the inclusion of FX Security Conversion Transactions under mandatory reporting would be of minimal value. Consequently, FX Security Conversion transactions with a T+7 day cap on the settlement period were excluded from mandatory reporting[12].

Subjecting these transactions which are purely incidental to related securities transactions to OTC derivatives regulation could expose bank custodians, broker-dealers and their customers to unnecessary operational, price, credit and other risks. As a result, participants may restrict FX Security Conversion Transactions to T+2 FX spot contracts, even when the securities settlement takes longer, thereby exposing the customer to FX risk while exposing the bank to certain operational risks, and changing the long-standing and well-functioning settlement processing for systemically relevant securities markets which exist today.

As there is no requirement to report FX Security Conversion Transactions in other major jurisdictions, a system build would be required to identify and report these transactions for Reporting Entities. As previously reported, it is extremely difficult to quantify both the number of trades impacted and the cost of such a bespoke development. The situation is further complicated by the fact that some market participants act in the capacity of a custodian bank and have a material volume of FX Security Conversion Transactions, whereas others act in the

[8] Markets in Financial Instruments Directive II (2014/65) and Regulation (600/2014)

[9] European Market Infrastructure Regulation (648/2012). EMIR Article 2(5) defines derivatives in accordance with MiFID I (2004/39), which has been superseded by MiFID II and MiFIR.

[10] Securities and Futures Act (Reporting of Derivatives Contracts) Regulations 2013 – see §2 Definitions.

[11] https://www.sfc.hk/edistributionWeb/gateway/EN/consultation/conclusion?refNo=15CP4

[12] Securities and Futures (OTC Derivative Transactions—Reporting and Record Keeping Obligations) Rules – see §2 Definitions

capacity of an executing dealer servicing the requirements of their clients and so will have a much lower volume.

This build would be complex and expensive, given the diverse trade capture systems and booking methodologies and methods used by international entities. In addition, any development would be time consuming, given the need to resource the definition, development, testing and implementation of a solution for a very small number of trades that are reported globally.

Market participants have confirmed that impacted volumes are very similar to those that were reported in GFXD correspondence from September 2016, and that the volume of impacted trades can range from being very material to being insignificant. However, the cost and resources required to build a reporting solution in both circumstances would be significant. It has been estimated that to introduce this change to a firm's existing and established reporting infrastructure would cost in the region of several hundred thousand US dollars, although the actual spend and implementation timeframe would vary according to the complexity of existing solutions implemented to meet multi-jurisdictional reporting obligations.

Applying OTC derivatives regulation to this type of incidental transaction does not provide any meaningful protection to participants or meaningful information to regulatory authorities. Furthermore, inconsistent treatment of these transactions globally should be avoided, to ensure that OTC derivatives regulation in some jurisdictions does not create unnecessary disincentives from transacting, e.g. through increased transactional costs, relative to other jurisdictions where there is no requirement to report.

Proposed exemption solution

The Associations propose that ASIC extend this relief in its current form but without an end date, given the global exclusion of FX Securities Conversion Transactions from transaction reporting. If ASIC are unable to provide this indefinite extension, the Associations consider that a further 4-year exemption until September 2022 is justified, as the exemption will continue to remain relevant for the same reasons as set out in previous industry responses, including the GFMA response[13] dated 29 August 2014 to ASIC Consultation Paper 221[14].

[13] http://www.gfma.org/correspondence/item.aspx?id=621

[14] https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-221-otc-derivatives-reform-proposed-amendments-to-the-asic-derivative-transaction-rules-reporting-2013/

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Conclusion

The Associations thank ASIC for its consideration of this policy submission, and would further highlight the need and importance of clarity from ASIC as soon as possible on its policy intent with respect to these expiring exemptions. This is important so as to allow for review and assessment of applicable client education and outreach, implement any required technology changes (noting that year-end technology freezes means these changes must start as soon as possible) and remediate any issues found. The Associations would also be very happy to discuss this submission further if desired; please contact the undersigned, or Rishi Kapoor, Director, Policy, Asia-Pacific, ISDA, at rkapoor@isda.org.

Yours sincerely,

Keith Noyes

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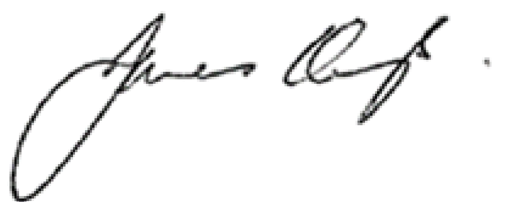
General Counsel & International Advisor

AFMA



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