20 August 2015

Mr Oliver Harvey
Senior Executive Leader
Financial Market Infrastructure
Australian Securities and Investments Commission
Level 5 100 Market Street
SYDNEY NSW 2000

Cc: Mr Benjamin Cohn-Urbach, Senior Manager, Post-trading and OTC Derivatives

By email: OTCD@asic.gov.au

Dear Mr Harvey

Derivative Transaction Rules Application for Class Relief Extensions

The Australian Financial Markets Association (**AFMA**) and the International Swaps and Derivatives Association (**ISDA**) (**the Associations**) have facilitated member discussions over the last two months regarding the need for an extension to current transitional relief measures affecting Reporting Entities under ASIC Instrument 14/0952 (**Relief Instrument**).

In previous relief applications we have specifically identified particular classes of reporting entities as defined by ASIC. In this instance we are making a class relief application (**Relief Application**) as representative industry bodies for the benefit of all 'Reporting Entities' as defined under the *ASIC Derivative Transaction Rules (Reporting) 2013* (**DTRs**).

All terms undefined in this Application have the same meaning as in the DTRs.

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This application covers 7 items which are generally requests for extension of reliefs which are currently in place:

1. Exchange Traded Derivatives – Additional Markets
2. Identifying Information – Government Entities
3. Privacy – Foreign Privacy Restrictions
4. Privacy – Counterparty Consents and Notices for Historical Transactions
5. UTI Pairing and Sharing
6. Entity Information and Name Information
7. Collateral Testing Window

1. Exchange Traded Derivatives – Additional Markets

Problem

The definition of 'OTC Derivative' in the DTRs captures exchange-traded derivative (**ETD**) transactions which are not over-the-counter (**OTC**) derivatives. Consistent with the underlying law and policy intent, the reporting of ETD transactions is not required, and therefore ASIC may exclude derivative transactions entered into on markets with sufficiently equivalent supervision and reporting requirements to a Part 7.2A market in respect of market integrity and transparency.

What is the impact of the problem?

Without continuation of the current relief, the DTRs would require the reporting of ETDs that are traded on foreign markets which are currently determined by ASIC to be Regulated Foreign Markets (as defined in the DTRs). The ASIC Regulated Foreign Markets Determination [OTC DET 13/1145] individually sets out markets that are permanently scoped out from reporting, however the list of markets included under Exemption 1 of the Relief Instrument will expire on 30 September 2015.

The commercial environment is dynamic and such markets are subject to constant changes of their names, activities and existence, and new markets may list additional derivative products in line with the global policy of G-20 governments to promote the standardised trading of derivatives. Our members feel, therefore, that the list of markets under Exemption 1 of the Relief Instrument is too limited in the context of market activity. ASIC's relief power currently provides for the supplementation of the Regulated Foreign Markets Determination in the interests of market certainty.

While the Associations continue to seek extension of the current relief for practical reasons, we do not consider this to be a sustainable long term solution to the problem. We continue to propose that a policy review is desirable to formulate a definition of 'exchange-traded derivative' that has regard to the common characteristics of products that should be out-of-scope for OTC trade reporting.

The listing of venues as done under Exemption 1 of the Relief Instrument 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. Accordingly, putting in place a generic definition which would capture the relevant venues on which derivatives are exchange-traded is a preferred long term solution. However, it is recognised that no straightforward solution has been devised so far to establish a generic definition, given the current wording of the Corporations Act. This is an issue on which further dialogue with ASIC beyond this Relief Application is needed.

Long term solution needed

As mentioned above, notwithstanding this Relief Application, we consider a long term solution lies in defining ETDs. Beyond merely identifying the characteristics of exchanges on which they are traded, 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 we would be pleased to discuss:

An 'Exchange-Traded Derivative' is an option or forward 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 forwards (as applicable) in the relevant series, category or class of contracts, as prescribed by the relevant exchange (the "series"), to which such option or forward corresponds;

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

(d) identical to every option or forward in the relevant series, and where none of the terms of such option or forward 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 forward may be traded, or

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

In our view, it would be consistent with the Government and ASIC's policy approach to implementing the Government's broad strategic direction, 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.

Relief sought

In the absence of a generic definition of a regulated foreign market for the purposes of the Regulated Foreign Markets Determination made under subrule 1.2.4(3) of the DTRs, the Associations consider it will be necessary to continue to maintain an additional listing of Relevant Financial Markets following on from the current relief. Therefore, the Reporting Entities seek relief from the obligation to report transactions executed on any market listed below which are neither on the CFTC list of "Swap Execution Facilities" as defined under US law or the ESMA list "Multilateral Trading Facilities" as defined under EU law:

Relevant Financial Markets:

(a) BATS Options
(b) BSE Limited (Bombay Stock Exchange);
(c) Boston Options Exchange;
(d) Borsa Istanbul;
(e) Bursa Malaysia - Bursa Malaysia Derivatives;

(f) CEGH Gas Exchange of Vienna Stock Exchange;

(g) Chicago Mercantile Exchange;

(h) China Financial Futures Exchange;

(i) Dalian Commodities Exchange;

(j) Dubai Gold & Commodities Exchange;

(k) Dubai Mercantile Exchange;

(l) EDGX Exchange, Inc -

(m) Electronic Liquidity Exchange operated by ELX Futures LP;

(n) EPEX Spot SE;

(o) European Climate Exchange;

(p) European Energy Exchange;

(q) European Exchange;

(r) Hong Kong Exchanges & Clearing Ltd;

(s) HUPX Ltd Hungarian Power Exchange;

(t) ICE Endex;

(u) Jakarta Futures Exchange;

(v) Johannesberg Stock Exchange;

(w) Korea Exchange;

(x) LSE Derivatives Market;

(y) Mexican Derivatives Exchange;

(z) Minneapolis Grain Exchange;

(aa) Montreal Exchange;

(bb) Montreal Climate Exchange;

(cc) Moscow Stock Exchange;

(dd) NASDAQ OMX Armenia;

(ee) NASDAQ OMX NLX

(ff) NASDAQ OMX Iceland;

(gg) National Stock Exchange of India;

(hh) New York Mercantile Exchange;

(ii) NYSE Amex LLC

(jj) NYSE Amex Option

(kk) New Zealand Exchange;

(ll) Nodal Exchange;

(mm) NYSE Arca

(nn) NYSE Arca Europe;

(oo) OneChicago (Single stock futures);

(pp) Power Exchange Central Europe;

(qq) Powernext;

(rr) Moscow Exchange MICEX-RTS (Moscow Exchange) [*updates reference to Russian Trading System*];

(ss) Shanghai Futures Exchange

(tt) Singapore Commodity Exchange SGX-DT;

(uu) South African Futures Exchange (SAFEX), including SAFEX APD Agricultural Products as part of JSE Limited;

(vv) Taiwan Futures Exchange;

(ww) Tel Aviv Stock Exchange Ltd;

(xx) Thailand Futures Exchange as part of Stock Exchange of Thailand;

(yy) Tokyo Commodity Exchange;

(zz) Tokyo Financial Exchange;
(aaa) Chicago Climate Futures Exchange
(bbb) NYMEX Emissions;
(ccc) New York Stock Exchange;
(ddd) NYSE Brussels;
(eee) NYSE LIFFE Paris;
(fff) NYSE LIFFE Amsterdam;
(ggg) Oslo Børs;
(hhh) NYSE LIFFE London.

Why should relief be granted?

Relief should be granted for the following reasons:

a) ETDs are not able to be reported under the DTRs as they are currently drafted. OTC 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 DTRs, as these fields were designed in contemplation of the characteristics of OTC products and transactions.
b) The relief is in line with ASIC's policy to not capture transactions which have been traded on a financial market in a foreign jurisdiction that 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 (as defined under the *Corporations Act 2001*) is subject in this jurisdiction. In line with RG 51, we request ASIC to consider granting this relief as it is in line with current ASIC policy.

Cost of not granting relief

It is estimated in aggregate that if these exchanges could not be traded on there would be foregone revenue of $ 8 million.

What relief is sought?

Indefinite continuation of the relief relating to ETDs in the form currently available under the Relief Instrument.

2. Identifying Information – Government Entities

Each of the Reporting Entities transacts derivatives with clients which function as a central banks, or a public bodies performing functions similar to those of a central bank in any jurisdiction, development and/or reconstruction banks, supra-national financial institutions and other governments or government institutions or entities (defined more specifically below as Government Entities).

Reporting Entities have undertaken significant efforts to seek express consent from such Government Entities to the reporting of Identifying Information (as defined in the Relief Instrument). However, Reporting Entities have encountered significant resistance from such Government Entities, which have been declining to provide consent to disclosure of Identifying Information, resulting in Reporting Entities being unable to trade with Government Entities. This is an undesirable outcome which results in significant commercial disadvantage to the Reporting Entities, affecting their international competitiveness.

Accordingly, this Relief Application seeks permanent exemptive relief under Section 907D(2)(a) of the Act, such that Reporting Entities will not be required to report Identifying Information under the Rules in respect of derivative transactions or derivative positions with Government Entities, or for or on behalf of, Government Entities.

This Application is a minor and technical application in accordance with RG 51 as it involves the application of existing policy to new situations.

What are the facts?

Under Rule 2.2.1, Reporting Entities are subject to reporting and other obligations in respect of derivative transactions with all counterparties. Where Reporting Entities have determined that they are required to obtain express consent of the counterparty, whether on the basis that there may be a breach of the laws of the relevant foreign jurisdiction of the counterparty or breach of laws that apply to the reporting entity in its dealings with the party, or on the basis of a contractual duty or duty of confidence which is owed by the Reporting Entity to the counterparty, the Reporting Entities must obtain the prior consent of the counterparties to disclosure of their information, including Identifying Information.

Reporting Entities continue to progress well in obtaining consents to disclosure from all relevant counterparties and, in certain cases, relying on existing ASIC relief. This involves significant work and commitment of financial resources and personnel in planning and administering a program for requesting, following-up, obtaining and monitoring the receipt of consents (and obtaining any associated external legal advice).

However, the Reporting Entities are encountering significant difficulties in obtaining express consent from Government Entities in many jurisdictions, despite using all reasonable efforts to obtain this consent as soon as reasonably practicable. Government Entities represent a relatively small sub-set of the total number of counterparties whose consent the Reporting Entities require.

The Government Entities currently expected to be the subject of this relief are relatively few in number. Equally, the terminology used to describe such entities should be sufficiently general to take account of the different name types used for such trading entities across different jurisdictions and the fact that different jurisdictions transact through different counterparties such as the sovereign itself, the central bank or a governmental agency. Accordingly, for the purpose of this Relief Application, it is submitted that Government Entities be comprised of the following:

I. Sovereign entities or central governments of the sovereign entity and sovereign wealth funds;

II. central banks and their agencies, or public bodies performing functions similar to those of a central bank

III. public bodies charged with the management of public debt;

IV. supra-national financial institutions, multi-lateral financial institutions and banks, and their respective agencies, funds, organisations and entities;

V. development and/or reconstruction banks and their respective agencies, funds, organisations and entities;

VI. Any entity, body, agency, person or vehicle (howsoever named or legally structured) that perform functions or pursue policy objectives similar or analogous to those of any of the entities, bodies or persons described in paragraphs (i) to (v) above,

(each, a "Government Entity").

Government Entities variously indicate that in receiving requests for consent from institutions subject to the Rules, the Reporting Entities are imposing requirements that their competitor financial institutions subject to reporting regulations in other jurisdictions are not. In a context in which Government Entities deal with Reporting Entities trading from Australia largely as a means of spreading their country risk and credit risk, rather than for pricing reasons, allocating a portion of their trades to Australian-based financial institutions is a discretionary portfolio allocation. The additional regulatory requirement imposed on them as a result of the Reporting Entities seeking consent to disclosure, is therefore proving to be a sufficient disincentive to such Government Entities to trade with the Reporting Entities, resulting in significant commercial disadvantage to the Reporting Entities.

Accordingly, the Reporting Entities are requesting permanent relief from the obligation to report Identifying Information in respect of derivative transactions and derivative positions in respect to their dealings with, for, or on behalf of, all Government Entities.

We note that, in recognition of the challenges faced by reporting entities in obtaining counterparty consents from government-type entities, the Monetary Authority of Singapore has exempted Government Entities from reporting and the transactions entered into between reporting entities with Government Entities from being reported under their reporting rules. [1]

What is the impact of legislative provisions or existing ASIC policy?

The reporting of Identifying Information of the Government Entities under the Rules without their prior consent may:

a) expose the Reporting Entities to liability for breach of foreign laws and/or breach of laws that apply to the reporting entity in its dealings with the Government Entities; and/or

b) result in the Reporting Entities not being able to conduct any Reportable Transactions with the Government Entities (including the modification or termination of existing OTC Derivatives).

Based on aggregated figures, the Reporting Entities have calculated the potential revenue impact from a failure to grant the relief sought under this Relief Application to be AUD 270,000 per month. The figure has been determined on the basis of ongoing administrative and legal costs to pursue Government Entities to receive consent, and the

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[1] See the Fourth Schedule of the Securities and Futures (Reporting of Derivatives Contracts) Regulations 2013, under the Singapore regime.

loss of business revenue for not being able to continue to trade, or create a trading relationship in OTC derivatives with these entities.

Providing relief would not only be consistent with the Australian Government's deregulatory agenda, but it would also serve to harmonise ASIC's DTRs in respect of transactions with Government Entities with those of foreign jurisdictions, thus promoting cross-border harmonisation of rules and international regulatory consistency. It would also remove a competitive disadvantage experienced by the Reporting Entities, impacting negatively on the international competitiveness of Australia's markets. Given this, in our view the regulatory impact of granting relief is low.

What relief is sought?

The Reporting Entities acknowledge the importance of the reporting of Identifying Information to ASIC's regulation of the OTC markets and the imperative to drive regulatory transparency outcomes, and the Reporting Entities are committed to assisting ASIC to achieve those desired outcomes.

Equally, Reporting Entities are facing the practical difficulties described above in complying fully with the Rules, despite undertaking all reasonable efforts to obtain consents from Government Entities.

Accordingly, in this Relief Application the Reporting Entities request permanent exemptive relief under Section 907D(2)(a) of the Act such that the Reporting Entities will not be required to report the Identifying Information of Government Entities under the DTRs, in respect of derivative transactions and derivative positions with, for or on behalf of, Government Entities. As Government Entities are relatively few in number, the reporting of certain other fields could, in certain cases, disclose sufficient identifying characteristics as might allow the Government Entity to be identified. This is particularly so with the reporting of a Government Entity's domicile.

Accordingly, for the purposes of this Relief Application, the Associations submit that 'Identifying Information' should be taken to include the following information, or substantially equivalent information:

Table in DTRs	*Items in Table*
Table S2.1(1) (Derivative Transaction Information – Common data)	7, 8, 10 and 11
Table S2.1(3) (Derivative Transaction Information – Equity derivative and credit derivative data)	1, 2, 3 and 4
Table S2.1(5) (Derivative Transaction Information – Interest rate derivative data)	6, 7, 8, 9, 10 and 11
Table S2.2(1) (Derivative Position Information – Common data)	6, 7, 8 and 9
Table S2.2(3) (Derivative Position Information – Equity derivative and credit derivative data)	1, 2, 3, and 4
Table S2.2(5) (Derivative Position Information – Interest rate derivative data)	5, 6, 7, 8, 9 and 10

The Reporting Entities propose that all other obligations in respect to transactions with such Government Entities remain. Accordingly, as fields other than those containing Identifying Information would continue to be reported, in the view of the Reporting Entities this should continue to achieve substantial compliance with the Rules.

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

Why should the relief be granted?

In our view the relief is appropriate from a legal, commercial and policy perspective for the following reasons:

1) Legal perspective

   a) The DTRs currently require the reporting of Identifying Information in respect of transactions and positions with Government Entities, creating a conflict of laws. As noted above the reporting of transactions and positions in respect of Government Entities. We respectfully submit that the Reporting Entities therefore face a potential breach of applicable laws where the Rules require the reporting of the Identifying Information of the Government Entities from foreign jurisdictions where the Government Entity's express consent is required, and the counterparty has not provided that consent. Effectively this means that without relief from the requirement to report the Identifying Information of the Government Entities, the Reporting Entities would not be able to trade with the Government Entities.

2) Commercial and policy perspective

   a) *Revenue foregone.* As noted above, based on aggregated figures, Reporting Entities have calculated the potential revenue impact from a failure to grant the relief sought under this Relief Application to be AUD 250,000 per month.

   b) *Cost.* The additional cost of administering a consent program in respect of the Government Entities is significant, given the extra financial resources and personnel required to seek consents, monitor feed-back, follow-up outstanding requests and enter into discussions and negotiation with Government Entities to try to obtain a mutually acceptable form of consent, while also addressing any legal and compliance issues with legal advice as necessary. Whilst it is inherently difficult to estimate the overall costs, the Reporting Entities calculate a cost of AUD 20,000 per month. In the view of the Reporting Entities, this represents a significant cost to them, with little, if any, corresponding regulatory benefit. Providing the requested relief in respect of Government Entities would not only be consistent with the Australian Government's deregulatory agenda, but it would also be consistent with the February 2014 G-20 communique, in which the Finance Ministers and Central Bank Governors of Australia and the other G20 nations noted that they wished to implement the G20 derivatives reforms "in a way that promotes an integrated global financial system, reduces harmful fragmentation and avoids unintended costs for business."[2]

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[2] Communique from the G20 Meeting of Finance Ministers and Central Bank Governors in Sydney on 22-23 February 2014.

c) *International competitiveness.* Without the same exemptions as those currently applicable to other foreign participants under their respective reporting regimes, the Reporting Entities will be required to forego significant revenue and incur significant personnel and advice costs in their trade reporting for Government Entities, whilst foreign entities not based in Australia, who can report under foreign requirements, will not be subject to the same costs and loss of revenue. Without relief, the Reporting Entities will therefore be subject to more onerous and costly regulatory requirements than their foreign competitors, despite the Reporting Entities and their competitors operating in the same jurisdiction (Australia). This outcome arguably results in an uneven playing field, being one of the areas the Financial System Inquiry (FSI) is looking to examine through the Inquiry.

3) Public Policy and Deregulation

In creating the Australian trade reporting requirements, ASIC noted its first objective was to address the systemic issues within OTC derivatives markets, by requiring transparency through reporting of OTC derivative trading activity to trade repositories.[3]

In our view, the policy value of these transactions to ASIC is likely to be low and would be significantly outweighed by the anticipated financial and business burdens on the Reporting Entities

We note that granting permanent exemptive relief to the Reporting Entities is also in line with the current Commonwealth Government's policies and reform agenda to cut red tape, reduce regulatory burden and contribute to improving business opportunities in Australia.[4]

Regulatory Impact

In the view of the Reporting Entities, the policy benefit to ASIC of receiving Identifying Information in respect of trades with Government Entities is likely to be low and would be significantly outweighed by the anticipated financial and business burdens on those Reporting Entities. In addition, as these types of transactions are not currently required to be reported at all.

Providing relief would not only be consistent with the Australian Government's deregulatory agenda, but it would also serve to harmonise ASIC's trade reporting rules in respect of Government Entity transactions with those of foreign jurisdictions. Given this, in our view the regulatory impact of granting relief is low.

Effect on third parties

The Reporting Entities believe that no third party should be directly, materially and adversely affected by a decision from ASIC in favour of this relief application.

What conditions should be imposed on the relief?

We submit that that relief should be permanent, but subject to the following conditions:

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3 ASIC, Regulatory Impact Statement: G20 OTC derivatives transaction reporting regime, July 2013 at [48].

4 Arthur Sinodinos, 'Consultation on Central Clearing of OTC Derivatives - Next Step for G20 Reform', (Media Release, 27 February 2014).

(i) that the relevant Reporting Entity has made reasonable efforts to seek the required consent from the relevant Government Entity;

(ii) that the relevant Reporting Entity reports all Derivative Transaction Information in relation to the Reportable Transaction or all Derivative Position Information in relation to the Reportable Position (as applicable) other than the Identifying Information, in accordance with the Rules;

(iii) that the Reporting Entity may give to ASIC a written notice (an **Opt-In Notice**) setting out all of the following:

1. the name of the relevant Reporting Entity;
2. in respect of the relevant Government Entity for which the relevant Reporting Entity is giving the written notice, the paragraph of the definition of "Government Entity" applicable to the relevant Government Entity (each, **an Opt-In Class**); and
3. the date (**Effective Date**) from which the relevant Reporting Entity will rely on this exemption in relation to the relevant Government Entity named in the written notice, being a date no earlier than [the date the Opt-In Notice is given to ASIC;

(iv) that on receipt by the Reporting Entity of the appropriate consent from a Government Entity the subject of an Opt-In Notice, the relevant Reporting Entity will promptly report the Identifying Information of that Government Entity in relation to the Reportable Transaction or Reportable Position (as applicable), in accordance with the Rules.

In our view, a number of the arguments detailed above provide a good basis for permanent relief. We also submit that the relief should then be made permanent through appropriate amendment of the Rules.

3. Privacy – Foreign Privacy Restrictions

What are the facts?

Exemption 3 of ASIC Instrument 14/0952 extended relief to Reporting Entities from obligations to report Identifying Information in Relevant Jurisdictions, where such reporting could breach a law or require regulatory authorisation, notwithstanding that the relevant counterparty had granted a general consent.

Since the publication of ASIC Instrument 14/0952 there has been little progress in law reform in Relevant Jurisdictions towards removing the barriers to reporting of Identifying Information. This lack of progress is highlighted in the letter[5] dated August 12, 2014, from the members of the OTC Derivatives Regulators Group to the Chairman of the Financial Stability Board ("FSB"), which emphasised the need for an international regulatory effort to resolve the issues. We note that the FSB's forthcoming peer report on trade reporting is expected to include a report on legal barriers to reporting to trade repositories[6], and may propose a deadline for appropriate law reform. Earlier this year, the U.S. Commodity

[5] http://www.esma.europa.eu/system/files/letter_to_fsb_08122014.pdf

[6] Financial Stability Board, OTC Derivatives Market Reforms, Eight Progress Report on Implementation dated 7 November 2014, paragraph 3.1.2.3 at http://www.financialstabilityboard.org/wp-content/uploads/r_141107.pdf?page_moved=1

Futures Trading Commission extended its equivalent relief[7] to January 16, 2016, and the Monetary Authority of Singapore has also extended its equivalent relief to 1 November 2015[8].

What is the impact of legislative provisions or existing ASIC policy?

Upon expiry of the current relief, the Reporting Rules would create obligations that may conflict with local privacy obligations in Relevant Jurisdictions.

What relief is sought?

The Reporting Entities seek a time extension of the existing relief for a further 12 months.

Why should the relief be granted?

The Reporting Entities respectfully submit that the slow pace of reform in this area warrants the extension of relief. As originally stated in the Australian Bankers' Association letter to you requesting relief dated 24 September 2013, Reporting Entities have no ability to avoid a conflict with relevant laws and obligations in Relevant Jurisdictions other than by ceasing to enter into OTC Derivatives. Ceasing to trade OTC Derivatives would cause commercial harm to Reporting Entities and potentially reduce their ability to manage risk. There could also be a negative impact on local markets should Reporting Entities cease trading OTC Derivatives in Relevant Jurisdictions.

What conditions should be imposed on the relief?

In addition to the conditions in ASIC Instrument 14/0952 which remain appropriate and prevent Reporting Entities from improper reliance on the relief, Reporting Entities would advise ASIC on the actual specific jurisdictions to which transactions relate requiring reliance on this relief.

Cost of not granting relief

It is estimated in aggregate that if transactions with counterparties in the Relevant Jurisdictions could not take place on there would be foregone revenue of $ 40,000.

4. Privacy – Counterparty consents and notices for historical transactions

What are the facts?

Exemption 4 of ASIC Instrument 14/0952 extended relief from the obligation to report counterparties' Identifying Information where a Reporting Entity is required to obtain express consent of such counterparty, not obtaining the consent means the Reporting Entity may breach a duty of confidence owed to the counterparty, a contractual duty owed to the counterparty or a provision of law or regulation of a foreign jurisdiction that applies to the Reporting Entity in its dealings with the counterparty, and such consent has not been obtained. This relief applies only where the Reportable Transaction or Reportable Position has been entered into pursuant to an Historic OTC Derivatives Agreement or an Agency Agreement in place as at 31 July 2014 under which the counterparty had entered into the OTC Derivative through the Intermediary on or before

[7] U.S. Commodity Futures Trading Commission – CFTC Letter No. 15-01, No-Action dated January 08, 2015 at http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/15-01.pdf

[8] Response to Feedback Received – draft regulations pursuant to the Securities and Futures Act for the Reporting of Derivatives Contracts http://www.mas.gov.sg/~/media/MAS/News%20and%20Publications/Consultation%20Papers/Response%20to%20Consultation%20Paper_Reporting%20of%20Derivatives%20Contracts.pdf

31 July 2014 (each of Historic OTC Derivatives Agreement, Agency Agreement and Intermediary as defined in the ASIC Instrument 14/0952) and ceased to apply upon a Reporting Entity entering into a new transaction with affected counterparties from 1 January 2015. There are a number of outstanding transactions entered into prior to 1 January 2015 between Reporting Entities and counterparties to which the relief applies where the counterparty has not responded to requests to provide the required consent ("Historical Transactions"). The current relief with respect to such Historical Transactions expires on 30 September 2015.

What is the impact of legislative provisions or existing ASIC policy?

Upon expiry of the current relief, the Reporting Rules would create an obligation that may conflict with local privacy and confidentiality obligations that the Reporting Entities may incur in various jurisdictions.

What relief is sought?

The Reporting Entities seek indefinite relief in relation to reporting Identifying Information with existing counterparties to which the relief applies for Historical Transactions, where (i) the Reporting Entity is required to obtain the express consent of a counterparty other than a Government Entity to which the Identifying Information relates before it reports the identifying Information, (ii) the counterparty has not provided the required consent, and (iii) the Reporting Entity has not entered into a new OTC Derivative with the relevant counterparty after 1 January 2015. Indefinite relief is warranted as the relevant counterparties have generally been unresponsive to repeated requests to provide consent to reporting of Identifying Information, and the Reporting Entities have ceased trading with such counterparties unless the required consent is granted.

Why should the relief be granted?

The Reporting Entities may face a breach of applicable laws, a breach of a duty of confidence and/or a contractual duty or provision of law or regulation of a foreign jurisdiction that applies in its dealings with the counterparty where they are required under the Reporting Rules to report counterparties' Identifying Information, where the counterparty's express consent is required and that consent has not been obtained.

The Reporting Entities deployed substantial resources to reach out to affected counterparties to obtain their consents, and only a small proportion of counterparties were unresponsive to repeated requests for consent. Reporting Entities have ceased trading with such counterparties unless their consent to report Identifying Information was subsequently granted. Similarly, counterparties who consider their relationship with Reporting Entities to be dormant often tend to be unresponsive to requests for information, particularly where they are unfamiliar with the ASIC reporting regime.

Given the small and decreasing number of affected counterparties and transactions, the Reporting Entities respectfully submit that the granting of indefinite relief with respect to Historical Transactions would not result in any systemic or substantial risks to Reporting Entities or to the market in general. The Reporting Entities would continue to report all information in respect of Historical Transactions as required under the Reporting Rules, with the Identifying Information masked.

What conditions should be imposed on the relief?

The relief should be subject to the same conditions as in Exemption 4 of ASIC Instrument 14/0952.

Cost of not granting relief

It is estimated in aggregate that the cost or pursuing counterparties to provide consent and associated legal cost incurred in respect of alleged breaches of privacy/confidentiality could be around $ 445,000.

5. UTI Pairing and Sharing

Problem

Under Exemption 7 of the Relief Instrument, Reporting Entities are provided relief until 30 September 2015 from the requirement to report a 'universal transaction identifier' (**UTI**) for their Reportable Transactions. However, in light of recent and upcoming global and regional developments around the UTI, it is emerging that non-continuation of the relief for a limited number of months may result in the requirement to specifically build to an Australian UTI requirement, which may or may not be in line with globally-agreed standards, and ahead of an aligned UTI go-live date for other major Asia-Pacific jurisdictions which Reporting Entities trade in.

What are the facts?

To date, stakeholders within the OTC market have been preparing for a UTI 'share-and-pair' requirement at a regional level. OTC trade reporting regimes in other regions, including the EU and the US, already require counterparties to agree and report the same identifier for their OTC derivative transactions, which have been met with varying degrees of acceptance, depending on the extent to which those requirements can be leveraged internationally. In the US, implementation of the CFTC's Universal Swap Identifier (**USI**) standard has been the subject of market criticism, due to its jurisdiction-specific construct and unease of use for non-US domiciled entities. Similarly, the UTI construct prescribed by ESMA in the EU has been met with negative feedback because of the advocated use of jurisdiction-specific prefixes in the construction of a UTI which do not lend themselves easily to UTI generation and data aggregation at a global level.

However in the Asia-Pacific region, UTI requirements have yet to take effect, including in G-20 jurisdictions which are relatively advanced in their implementation of trade reporting, such as Australia, Singapore and Hong Kong. This in practice to date has meant that when facing an EU counterparty for example, that counterparty has always generated and provided the UTI to its Asian counterparty, in the absence of a local requirement. However, once UTI requirements take effect in the Asia-Pacific jurisdictions, those parties will need to renegotiate their current counterparty UTI generation arrangements, and agree which party will generate and communicate the UTI according to a decision tree and agreed logic going forward.

To assist industry in agreeing this generation logic as well as how a UTI can be constructed, ISDA has developed a standard which can be used on a global basis, for the generation, communication and matching of UTIs. These global efforts to agree a consistent, stable standard for UTI generation are progressing well, however incorporating industry guidelines into systems, educating all sectors of the industry and the resulting implications for firms agreeing arrangements with counterparties to operationalise UTIs requires time. We are cognisant that in the Asia-Pacific region particularly, these arrangements are still being developed by firms, and are not yet agreed with counterparties.

Given that a large proportion of the Associations' members trade from and across multiple jurisdictions within the Asia-Pacific region, Reporting Entities have also noted the go-live dates for UTI requirements in jurisdictions such as Singapore and Hong Kong. The Monetary Authority of Singapore (**MAS**) designated a go-live date of 1 February 2016 in an amendment to its reporting regulations which was published on 31 October 2014, while more recently, in May 2015 the Hong Kong Monetary Authority (**HKMA**) and the Hong Kong Securities and Futures Commission (**HK SFC**), in response to feedback from ISDA around the same issues of industry readiness, agreed to defer their go-live date to 1 February 2016. This means that UTI requirements under both the Singapore and Hong Kong trade reporting regimes are now synchronised to both take effect on the same date early next year.

In this respect, given the alignment of the Singaporean and Hong Kong go-live dates for UTI, our members have consistently highlighted the operational efficiencies that would be realised by also synchronising the Australian UTI go-live with these 2 jurisdictions, noting the relative proximity between 1 October 2015 and 1 February 2016, as well as significant cost savings associated with being able to leverage one build for the Asia-Pacific region, and informing EU and US counterparties of one go-live for the entire region. Indeed, our members in the EU and US have also noted the efficiencies they would realise from only having to amend current UTI generation responsibility arrangements once, which account for their branches, subsidiaries and counterparties in the Asia-Pacific.

Looking to the global level, it is now widely acknowledged by regulators, Reporting Entities, infrastructures and representative associations that globally-harmonised, consistent standards around trade reporting, data and formats are paramount to any meaningful attempt to aggregate OTC derivatives data. In line with this acknowledged importance of agreeing global standards around UTI, we also note the intention of the International Organization of Securities Commissions (**IOSCO**) to consult on global UTI standards in the middle of 2015, with the aim of finalising these standards by the end of that year. These standards will serve as the basis for implementation by regulators, reporting entities, infrastructures and trade associations, and therefore market stakeholders are eager to contribute to the development and finalisation of these standards.

Accordingly, we would encourage ASIC to consider whether there would be a regulatory benefit to requiring a shared-and-paired UTI from 1 October 2015, which may prove to be out of step with these subsequently-finalised standards. The Associations submit that it would be more prudent to allow IOSCO to complete its work on UTI standards before translating these into local requirements, which would maximise the chances of alignment between ASIC's UTI requirements and the standards finalised by IOSCO. We further understand that this was one of the key considerations taken into account by the regulatory authorities of Singapore and Hong Kong in response to industry feedback when setting a delayed UTI go-live date of 1 February 2016.

What relief is sought?

We respectfully request that ASIC extend the relief provided under Exemption 7 of the Relief Instrument until 31 January 2016. This would not only allow Reporting Entities to incorporate and build to finalised UTI standards agreed at the global level through IOSCO, but also enable members who have operations and counterparties across Australia, Singapore and/or Hong Kong to realise the significant efficiencies, synergies and savings associated with only needing to manage 1 UTI implementation across those 3 jurisdictions.

Why should relief be granted?

The Associations understand the importance of having 'shared and paired' transaction identifiers to facilitate matching in trade repositories, yet are also cognisant that in the Asia-Pacific region particularly, arrangements for generating, communicating and matching UTIs in the Asia-Pacific region are still being developed by firms, and are not yet agreed with counterparties. Particularly for institutions of smaller size which may not have dedicated resources to devote to the system and process changes required to implement a UTI generation logic and construction methodology, coming to terms with the complexity of how to operationalise the UTI is a large task.

This is even more pronounced in the scenario when a firm is the consumer of a counterparty's UTI, where the firm is dependent on the counterparty to provide it with a UTI in a timely manner to fulfil its mandatory reporting obligations. The Associations believe a go-live date of 1 February 2016 would give Reporting Entities additional time to bed down processes and automate workflows, thus reducing the risk of inaccurate UTI pairing and sharing, and the consequent manual processing that would be required to rectify any incorrectly reported UTI values, a process which can itself be prone to the operational risk of manual errors.

UTI requirements are also still being discussed at a global level in terms of how they might best meet the goals of improved consistency and data aggregation. In particular, we would note that consultation on the development of a global standard for UTIs is expected to occur shortly by IOSCO, with the aim of finalising this standard by the end of 2015. We therefore submit that it would be in the interests of all stakeholders in the market to look and build to that global UTI standard once finalised, as opposed to a bespoke build which may or may not be aligned with that global standard, a matter of mere months ahead of that standard.

Costs

We also wish to restate the significant cost savings that industry would realise by ASIC adopting a unified, aligned go-live date with its Singaporean and Hong Kong peers. Members have noted the savings that would be realised across various divisions associated with OTC trading, including operations and IT, among others. Within operations, the savings that would result from a 4-month deferral of the Australian UTI requirement range from A$15,000 to A$65,000, as handling communications with counterparties, follow up, chasing and resolution of reporting issues and mismatches on a pre and post go-live basis would not be required.

Within IT, members have noted the savings from avoiding multiple testing windows for the jurisdictions, instead being able to leverage 1 consolidated testing window. Other IT-related savings would be realised in terms of system development and releases for in-house reporting engines and maintenance of static data. One member responded that these savings would range from approximately A$15,000 to A$22,000.

We would note that these figures are not exhaustive of the types of savings that could expect to be realised, and may not be representative of cost savings of other members, which may be in the order of multiples of the figures above.

What conditions should be imposed on the relief?

We consider that the same conditions as set out under paragraph 28 of Exemption 7 of the Relief Instrument remain appropriate. The industry acknowledges there will be circumstances where firms may use Swap Execution Facilities (**SEFs**) and/or confirmation platforms that provide a UTI. Accordingly, we consider that our proposal strikes an appropriate balance between requiring global UTIs where available, and allowing sufficient time for firms to take account of global standards in the most operationally-efficient manner.

6. Entity Information and Name Information

What are the facts?

Under the Relief Instrument, Reporting Entities have relief until 30 September 2015 (inclusive) under transitional arrangements subject to conditions, to be able to use an internal identifier if the LEI or Avox ID (**AVID**) is not available.

From 1 October 2014 to 30 September 2015 (inclusive), 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 Entity Information about an entity (in paragraph 9, a Relevant Entity) in relation to a Reportable Transaction or Reportable Position to a Trade Repository.

It is a condition of the exemption that the Reporting Entity reports an identifier for the Relevant Entity in relation to the Reportable Transaction or Reportable Position to the Trade Repository, using the entity identifier waterfall developed by ISDA (the **ISDA Identifier Waterfall**) being as follows:

a) a Legal Entity Identifier (LEI), CFTC Interim Compliant Identifier (CICI) or interim entity identifier;

b) if none of the identifiers listed in subparagraph (a) are available for the Relevant Entity, the entity identifier issued by the Trade Repository to which the Derivative Transaction or Derivative Position has been reported, the entity identifier issued by AVOX Limited (AVOX ID), or the Society for Worldwide Interbank Financial Telecommunication Business Identifier Code (SWIFT BIC); or

c) if none of the identifiers listed in subparagraph (a) or (b) are available for the Relevant Entity, the internal entity identifier for the Relevant Entity used by the Reporting Entity.

Name Information:

Under the Instrument from 1 October 2014 to 30 September 2015 (inclusive), a Reporting Entity does not have to comply with Rule 2.2.1 of the DTRs to the extent the Rule requires the Reporting Entity to report Name Information about an entity in relation to a Reportable Transaction or Reportable position to a Trade Repository where the Trade Repository is unable to populate the Name Information for the Relevant Entity using the Entity Information or other identifier reported by the Reporting Entity. The Reporting Entities need to continue to rely on this relief to the extent that a Reporting Entity reports Entity Information (**other than** an internal identifier).

Why should relief be granted?

Entity information:

The ISDA Identifier Waterfall is standardised across various jurisdictions and for international consistency the Reporting Entities believe it would be beneficial to align the

ASIC hierarchy of Entity information with the ISDA Identifier Waterfall and to continue to allow the reporting of an internal identifier where the other identifiers are not available. There is limited use of LEIs globally and in Australia very few counterparties have obtained LEIs. There is also limited use of AVIDs: counterparties have to onboard with Avox in order to obtain an AVID. In most cases, counterparties have little incentive to obtain either LEIs or AVIDs and so the Reporting Entities have no choice but to continue to use internal identifiers in those cases.

Name Information:

As regards the reporting of Name Information, Reporting Entities submit that the DTCC should map (or derive) the legal name and populate the Name Information field from reported entity identifiers (other than an internal identifier). Currently as a matter of practice the DTCC "model" only accepts one field for identifier and legal name. However the requirement to report Name Information separately from the Entity Identifier is in the DTRs. We submit that the requirement to report Name Information (other than where an internal identifier is reported and assuming the ISDA identifier waterfall is enshrined in the DTRs) be deleted. In addition, having regard to the current technological limitations at the DTCC level with populating legal names from identifiers, Reporting Entities should not be under an obligation to verify that the DTCC is in fact (correctly) reporting Name Information from the entity identifier.

Without such population of the Name Information from industry accepted identifiers there will be inconsistencies in the reporting of legal names between Reporting Entities.

What is the impact of legislative provisions?

The current requirements in the DTRs that the Reporting Entities report Entity Information without allowing for an internal identifier as the final fallback imposes an obligation beyond the control of Reporting Entities and the requirement to supply both Entity Information and Name Information not only imposes obligations that are beyond the control of the Reporting Entities due to current functionality limitations of DTCC but will lead to inconsistencies in the reporting of Name Information.

What relief is sought?

Permanent relief in the form of a change to the DTRs to include the ISDA Identifier Waterfall relating to Entity Information and Name Information as set out above.

What conditions should be imposed on the relief?

We submit that the relief in relation to providing Entity Information should not be subject to conditions.

7. Collateral Testing Window

What are the facts?

Under Exemption 10 of ASIC CO 14/0952, Reporting Entities from 1 October 2014 to 30 September 2015 (inclusive), do not have to comply with subrules 2.2.1(1) or 2.2.2(1) of the Rules to the extent that Rule requires the Reporting Entity to report:

a) the Derivative Transaction Information in Items 40–44 (collateral) of Table S2.1(1) of the Rules, or any changes to that information; or

b) the Derivative Position Information in Items 27-31 (collateral) of Table S2.2(1) of the Rules, or changes to that information.

The exemption was designed to allowed Reporting Entities additional time before they are required to commence reporting of collateral information, while the Licensed Repository continues to build the required technology to permit such reporting. This delay in commencing collateral information reporting will provide for a smoother implementation in Australia, building on the experience of reporting of collateral information in other jurisdictions.

Accordingly, the reporting obligation in relation to collateral begins on 1 October 2015. The Licensed Repository, DTCC, have announced that their testing start date for reporting of information relating to collateral, barriers and valuation is 26 August 2015. This leaves just over 4 weeks to test before the go-live date. The period is too short from a risk management assurance perspective for Reporting Entities.

This situation is analogous to the one which lead to the granting of the DDRS Testing Window relief under ASIC CO 14/0952. Reporting Entities will have a limited time period during which to conduct system testing. Under this earlier relief Reporting Entities were required to use best endeavours to comply with Rule 2.2.1 in the period immediately following the testing window, to reduce the risk that the information reported during that period will be incorrect or incomplete.

It is noted that for those trades which are reported under CFTC rules under alternative reporting arrangements will not include collateral information even where tagged as reportable to Australia, as collateral information fields are not required under US rules.

What relief is sought?

A Class Exemption extending Exemption 10 (Collateral Reporting) of ASIC CO 14/0952, allowing Reporting Entities (including Reporting Entities that are currently relying on alternative reporting under Rule 2.2.1(3) of the Rules) until 30 October 2015 inclusive to comply with the collateral reporting requirements under the Rules, subject to conditions including using best endeavours to comply with reporting obligations in the Rules.

Conditions

It is proposed that the same conditions apply to the proposed extension as in Exemption 9 (DDRS Testing Window) SIC CO 14/0952. The Reporting Entity use best endeavours to continue reporting under the transitional provisions of the Rules during the testing window.

Please contact David Love at dlove@afma.com.au or on +61 (02) 9776 7995 or Rishi Kapoor at rkapoor@isda.org or on +(852) 2200 5907 if further clarification or elaboration is desired.

Yours sincerely

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