



16 June 2014

Mr Adam Coleman  
Senior Analyst  
Financial Markets Infrastructure  
Australian Securities and Investments Commission

By email: [otcd@asic.gov.au](mailto:otcd@asic.gov.au)

Dear Adam

### **Derivatives Trade Reporting – Phase 3 Delayed Start**

This letter concerns the proposal for a staggered and delayed start to Phase 3 of the OTC derivative transaction reporting obligations set out in the draft exemption circulated in May 2014 (Draft Exemption).

The AFMA/ISDA Trade Reporting Group met on 12 June 2014 to consider amongst other matters the proposed Draft Exemption. These comments reflect the views of the group.

#### **Summary**

1. AFMA supports the staggered start of Phase 3 Reporting Entities and the splitting of entities into two groups dependent on a threshold test.
2. AFMA supports the option of an earlier opt-in start subject to notice being given to ASIC.
3. AFMA considers the characterisation of the proposed delayed start instrument as “relief” with significant conditionality as inappropriate.
4. The start date(s) for Phase 3 should be changed simply in the Derivative Transaction Rules.
5. AFMA members consider that working towards the proposed delayed start timetable should go forward on a best endeavours basis without conditions.
6. AFMA would be willing to cooperate with ASIC in supporting an industry best endeavours approach to implementation of the delayed start.

#### **Support for a delayed start**

We agree with the reasoning set out in the summary note about the Draft Exemption that there are a number of barriers to implementation that warrant additional time for industry to resolve.

In addition to the points noted by ASIC, we also note that industry is in policy consultation with the Group regarding the broad class of entities captured by the Phase 3 entities definition because it is dependent on whether an entity is an Australian Financial Services Licensee, especially since end-users are likely to be permanently exempted from the regime.

AFMA has proposed to the Government that a de minimis threshold might be a mechanism to define which entities are within scope of Phase 3. This means that issues around how single-sided reporting will work in practice also need to be thought through, which will take additional time. In this regard, ASIC should consider the implications of a single-sided reporting regime for some entities that may no longer be classed as Phase 3 reporting entities. This approach would balance the policy intent with the additional compliance costs for all entities. It would also more readily enable larger banks and financial institutions to facilitate trade reporting across the market without the imposition of confusing legal positions (i.e. liabilities associated with delegated reporting).

Accordingly, the staggered start of Phase 3 Reporting Entities and the splitting of entities into two groups dependent on a threshold test is supported. Further consultation with industry and the government on appropriate thresholds is desired to achieve broad industry and public policy consensus. As a result we leave open the question of whether the \$5 billion threshold in total gross notional reportable OTC positions is appropriate for further consultation.

#### **Opt-in**

AFMA supports the proposed option of an earlier opt-in start subject to notice being given to ASIC. AFMA members are working hard towards the goal of derivatives trade reporting. Opt-in would allow for systems to be effectively tested before compliance obligations set in.

#### **Delay should be unconditional**

The delayed the start of Phase 3 is proposed to be achieved through the mechanism of a relief exemption. AFMA believes that delay should be achieved through changing the start date in the Derivative Transaction Rules which is in the discretionary power of ASIC and not just as a relief instrument.

It is a factual situation recognised by ASIC in the background note about the Draft Exemption that many Phase 3 reporting entities are simply not in a position to comply with the law. While the class of Phase 3 reporting entities goes well beyond the membership of AFMA we are nevertheless concerned that many businesses are being expected to do the impossible because of the short implementation timeframe and continuing policy uncertainty. Given this situation Phase 3 reporting entities should be granted a delay not as if were transitional relief along the lines of class waivers granted in respect of Phase 1 and 2 reporting entities but an unconditional delay.

We draw your attention to the Australian Government's commitment to reducing red tape and compliance costs for business and the community as a critical step towards improving Australia's productivity.

The Government has stated that it expects that ASIC will look for opportunities to reduce compliance costs for business and the community. The Government also expects that ASIC will comply with the Government's enhanced Regulatory Impact Analysis requirements for all regulatory proposals, including considering the impacts of regulation

on business and the community and costing proposals before they are introduced using the Regulatory Burden Measurement framework.

The Government has a preference for principles-based regulation that identifies the desired outcomes rather than prescribing how to achieve them. An outcomes-based approach is more likely to accommodate change within the economy, allow for innovation and enterprise and reduce compliance costs by allowing regulated entities to determine the best way of meeting regulatory objectives.

We do not consider it appropriate to apply a range of conditions in respect of the delay. Beyond the general reason set out above the Draft Exemption sets out conditions which would impose an additional regulatory burden on Phase 3 reporting entities in respect of tagging and porting and compliance plan and record keeping obligations. These conditions have not been subject to a regulatory impact assessment. Their imposition would therefore not be in accordance with the Government's above stated policy.

AFMA members consider that working towards the proposed delayed start timetable should go forward on a best endeavours basis without conditions.

#### **Industry cooperative best endeavours approach**

In the context of the above comments about not imposing black letter law conditions, AFMA appreciates that ASIC has concerns about maintaining the implementation momentum and the need for Phase 3 reporting entities to keep working assiduously on making necessary arrangements to meet obligations such as obtaining consents from counterparties.

In order to keep industry momentum up to achieve implementation by the delayed start date AFMA would be willing to cooperate with ASIC in supporting an industry best endeavours approach to implementation of the delayed start.

#### **Technical drafting comment**

The penultimate paragraph of part 21 of the Draft Exemption entitled "Phase 3 Reporting Entity" attempts to define a part 3A entity. That paragraph concludes with the words "calculated in accordance with paras 15 to 16 of this instrument." We suggest that the correct wording should be "calculated in accordance with paras 14 to 16 of this instrument."

If you have any queries about these comments I can be contacted at [dlove@afma.com.au](mailto:dlove@afma.com.au) or (02) 9776 7995.

Yours sincerely



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**Director Policy and International Affairs**