10 September 2014

Mr Laurence White
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Financial Market Infrastructure
Australian Securities and Investments Commission
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Dear Mr White

ASIC Derivative Transaction Rules (Reporting) 2013 (CP 221)

The Australian Financial Markets Association (AFMA) welcomes the opportunity to comment on consultation paper on the proposed amendments to ASIC Derivative Transaction Rules (Reporting) 2013 (CP 221).

These comments follow the format of responses to the questions set out in CP221, with an additional commentary on the need to address the problem of FX Securities Conversion Transactions, a matter which has been previously raised with you.

Section A – Overview of Options

Question A1Q1: Do you agree with our recommended option (Option 2)? If not, why not?

> Please refer to our proposal for alternative proposals around this option which proposes a modified Option 2.

Question A1Q2: Will Option 2 reduce the compliance costs that you will incur in implementing OTC derivative transaction reporting? If so, please provide details.

> We believe the Industry Alternative Option will reduce the compliance costs for implementing OTC derivative transaction reporting as it addresses a few challenges the industry faces in complying with the current reporting requirements.

Question A1Q3: Please provide your specific feedback in relation to Option 2 by responding to the detailed proposals set out in Sections B-D of this paper.

The response to this question is dealt with in the discussion in Sections B-D dealing with the modified Option 2.

Question A1Q4: Do you think we should adopt Option 1? Please give reasons for your answer.

AFMA does not support adoption of Option 1.

Transaction reporting is a new and evolving system, in which a range behavioural and technical interactions need to be taken into account. The reporting regime is without precedent in its global scale and complex depth of data being required. It is by its nature a grand experiment which will need to undergo development and refinement based on experience and feedback. It is important that the system be able to undergo change so as to make the system more efficient and to take account of reviews and improvements in other jurisdictions.

Question A1Q5: Do you think that we should adopt Option 3? Please give reasons for your answer.

The response to this question is dealt with in the discussion in Sections B-D proposing the modified Option 2.

Question A1Q6: Are there any other options we should consider to meet our regulatory objective of minimizing compliance costs while ensuring that trade data is comprehensive and complete?

Yes, see the additional submission in Section E dealing with Foreign exchange securities conversion transactions.

Section B1 – Rule 2.2.1

Question B1Q1: Do you agree with the proposal? If not, why not?

AFMA agrees with the proposal for ‘snapshot reporting’.

Clarification is sought on subrule 2.2.6 of CP 221 which states that the “information it reports under subrule 2.2.1(1) and any change that information it reports under subrule 2.2.2(1) is and remains at all times complete, accurate and current”. Clarification is being sought because under ‘snapshot reporting’, any amendments to the transaction after the ‘snapshot reporting’ cycle has been completed and submitted to the trade repository, will be reported on the next day. As such, the information that is reported, under ‘snapshot reporting’ will be complete, accurate and current at the time the ‘snapshot reporting’ was completed and sent to the trade repository.

Also is regard to drafting the use of the words “substantially equivalent” information is the same terminology used in subrule 2.2.1(3) and could cause potential confusion.

Question B1Q2: Will this proposal reduce your costs of implementing transaction reporting? If so, please provide details.

The option of providing daily open position reporting would reduce the costs of transaction reporting. Generally firms are setup to report based on ‘snapshot reporting’ in the majority of other jurisdictions. The extension of this infrastructure to cover the Australian reporting regime would result in lower implementation costs as it does not require a separate build and will allow firms to leverage off their current solution that is being used for trade reporting in Hong Kong and Singapore.

The measured nature of trading on OTC derivatives markets is fundamentally different to the high velocity trading that occurs in equity exchange traded markets so that intraday transactions, i.e., transactions that are opened and closed on the same day, are not crucial from a market integrity surveillance perspective as they do not provide any additional information. Intraday transaction report therefore does not provide a public benefit in regard to detection of market misconduct that would provide a counterweight to the additional compliance costs a firm will incur to provide this information. From a risk management perspective as well transactions that are opened and closed on the same day means that no position held or risk for these transactions for a firm.

Question B1Q3: Taking into account the varying record-keeping practices and requirements applicable to relevant OTC derivatives market participants, are records currently maintained in a form that would support accurate recording of transactions (including ‘time stamping’) to facilitate investigations by financial regulators into (for example) market abuse in OTC derivatives markets (in absence of a transaction-by-transaction reporting obligation)?

It is common for the current record keeping of firms to be able to provide an extract of all the transactions that are booked in their systems. This will include trades that are opened and closed on the same day on a T+1 basis. Generally, changes to records are time-stamped in the source transaction recording system. Audit histories on individual transactions are created which provides a trail of information on amendments to a transaction with dates and times.

Question B1Q4: Do you support an exception snapshot reporting being made for intraday trades (i.e. trades that are opened and closed on the same day, leaving no net end-of-day position)? What would the costs and benefits of such an exception be?

Consistent with the view provided in response to B1Q2 exception snapshot reporting is not a good idea. As noted in the response to B1Q2, it would be costly for a firm to build a separate solution to report intraday trades or implement a manual solution as the current reporting infrastructure does not support it. It is

common for firms to have record keeping practices that allow them to provide a list of all transactions on a T+1 basis, including those that are opened and closed on the same day. This information would be available to the regulators without a need to impose an exception to 'snapshot reporting' for such reporting entities.

Question B1Q5: Would you support a reversion to transaction-by-transaction reporting at some point in the future (e.g. if ASIC were in a position to undertake proactive and automated analysis of data in its supervision of market conduct)?

As there are substantial build costs and reporting entities involved, the cost implications of reverting to a transaction-by-transaction reporting regime would be high and greatly increase the regulatory burden. As we have already noted, the nature of market surveillance information flows for OTC derivatives markets is fundamentally different to those relevant to high velocity exchange traded markets.

Other existing avenues for investigating possible market misconduct, such as approaching the relevant firm for their books and records which form part of their record keeping requirement makes more sense in the context of this market.

Section B2 – Alternative reporting

Question B2Q1: Do you agree with this proposal? If not, why not?

AFMA supports this proposal.

The preparation of list of foreign jurisdictions that have reporting requirements ASIC considers to be substantially equivalent to the Australian reporting regime would be a desirable development.

Question B2Q2: Will allowing the use of alternative reporting reduce your costs of implementing transaction reporting? If so, please provide details.

Yes, the use of alternative reporting will reduce the costs for implementing transaction reporting as it allows the reporting entity to use its existing reporting infrastructure and reporting obligations in another jurisdiction to meet its reporting obligations in Australia.

Section B3 - Tagging

Question B3Q1: Do you agree with this proposal? If not, why not?

AFMA does not agree with this proposal.

Rule 2.2.1(3) should remain unchanged because the requirement to 'tag' transactions would require a firm to build a reporting solution to identify which transactions should be 'tagged' as ASIC reportable transactions. As the concept of alternative reporting is to reduce the need for multiple builds and to reduce the

compliance costs for firms, the condition for 'tagging' would require a system build and correspondingly result in compliance costs.

It should also be noted that Australian reporting entities would likely bear the additional costs of any ASIC regime specific development work incurred by a trade repository.

Question B3Q2: Do you anticipate any practical difficulties with implementing 'tagging'? If so, please provide details.

The way DTCC reporting currently works is that once a trade is tagged with "ASIC" as regulator, unless all the ASIC-reportable fields in a transaction report are populated in the reporting counterparty's messages to DTCC, the trade can fail the DTCC jurisdictional validation process and be "WACKed" (a "warning acknowledgement" provided) and thousands of WACKs would be sent to reporting parties – impacting the controls that banks have to ensure that all fields required are received. To permit alternate reporting by reporting only the fields required under the foreign jurisdiction, in order for ASIC to also receive these reports by tagging ASIC in the messages, a change would be required by DTCC. This potentially could involve having the counterparty tag their local reporting jurisdiction (as is currently done) and it being on this basis that the validation process of the message submitted is undertaken, and that a validation process for ASIC reporting is not undertaken. For example if a Phase 2 reporting entity were a US swap dealer reporting to the CFTC, in their reporting obligation field they would populate it with "CFTC" and "ASIC". If a potential new field "Local Jurisdiction" were populated with CFTC, the message could then validate only the CFTC required fields. This could allow the message to still be reported if the ASIC fields are not completed, and for both ASIC and CFTC to receive the messages.

From AFMA's understanding, where a foreign subsidiary is already reporting to another equivalent jurisdiction they can apply alternative reporting, but under ASIC's proposal would be required to 'tag' trades. Tagging trades, thus making them reportable to ASIC, requires foreign subsidiaries to obtain consent from their clients to be able to report such clients' identifying information. This would add a significant cost and administrative burden to the foreign subsidiaries. In some instances, such as for European subsidiaries where consent to report identifying information is not required under the EMIR regulation, this will be a significant undertaking. There is also a high risk that there will be instances where express consent is required to report the counterparty's details to ASIC, but not for ESMA, and such consent may not be able to be obtained either in a timely manner or potentially at all. In these cases, foreign subsidiaries will either need to breach EMIR regulations by masking to ESMA and ASIC, or to breach the privacy laws of the jurisdiction. It not be fair or reasonable to enforce a 'do not trade' policy on foreign subsidiaries to mitigate this risk in order to meet the requirements of a regulator that is not their own. Firms also need to consider other local obligations that may be breached in trying to enforce express consent such as 'treat customers fairly' policies. A requirement to obtain such consent

may put foreign subsidiaries at a competitive disadvantage compared to local financial institutions which have no need to obtain consent from their clients.

A foreign entity currently utilising rule 2.2.1(3) would need a grace period to allow time to obtain appropriate consents prior to the commencement of tagging substituted compliance reports.

Question B3Q3: Are there any alternative approaches that may meet our regulatory objective of ensuring that regulators have prompt and complete access to derivative trade data reporting under alternative reporting arrangements?

AFMA along with other industry groups internationally has been urging authorities to coordinate their data collection efforts at a global level. It is not the responsibility of industry to fix or to bear the additional burden resulting from dysfunctionality in the design of the system. As noted by the Financial Stability Board earlier this year, it is the responsibility of authorities to improve their performance in their coordination efforts on data collection.

Section B4 - Regulated foreign market definition

Question B4Q1: Do you agree with this proposal? If not, why not?

The proposal could assist in reducing the time and administrative process for determining Regulated Foreign Markets in the United States (US) and Europe.

For Regulated Foreign Markets located in jurisdictions outside the US and Europe, clarification is sought on whether this determination process will be changed or would it remain as it currently stands?

Question B4Q2: Are there any alternative proposals that may meet our regulatory objective of excluding exchange-traded derivatives from the derivative transaction reporting regime (while ensuing that OTC derivatives executed on trading platforms are included)? If so, please provide details.

A simpler approach would be to define what an exchange traded market is at a general level by its characteristics and not by reference to particular form of market regulation here or overseas. This would be entirely consistent with the enabling legislation, which intentionally excludes exchanged-trade derivatives, and avoid the convoluted process behind the current arrangement.

The Companies and Securities Advisory Committee Final Report on 'Regulation of On-exchange and OTC Derivatives Markets, June 1997' may assist in this regard through its general definition of an 'on-exchange' derivatives transaction.

Section B5 – Prescribed repositories

Question B5Q1: Do you agree with this proposal? If not, why not?

AFMA agrees with this proposal.

Section B6 - Removal of ABN reference

Question B6Q1: Do you agree with this proposal? If not, why not?

AFMA agrees with this proposal. ABNs are not used in other jurisdictions and trade repositories, such as DTCC, do not support the use of ABNs.

Beyond this proposal further more hierarchy components than just LEIs and BICs should be added. This is because not all counterparties possess these identifiers It is proposed the model developed by ISDA (ISDA Identifier Waterfall), which is being endorsed in other regimes, would achieve this and bring the Australian regime into line with international standards, and reduce implementation costs for participants (i.e. permit a cross-regime build and avoid ASIC-specific work).

The ISDA Identifier Waterfall is as follows:

1. LEI / CICI / pre-LEI
2. DTCC / AVID / SWIFT BIC
3. Internal identifier

Section C1 – Financial foreign subsidiary report

Question C1Q1: Do you agree with this proposal? If not, why not?

AFMA does not agree with this proposal. Transaction reporting is an onerous and expensive obligation and has extra-territorial impact on foreign subsidiaries that may not have any systemic impact on the Australian derivatives market.

AFMA does not support the proposal because it:

1. represents an extra-territorial reach by ASIC as regulator that is considered too expansive;
2. takes an approach to extra-territorial reach that is not aligned with the regimes of foreign regulators;
3. seems inconsistent with the intention of Part 7.5A;
4. imposes significant and ongoing costs and complexity on both industry and regulators
5. has not been supported by a case presented publicly by ASIC;
6. presents a barrier to certain offshore investments;
7. presents costs and hurdles not removed sufficiently by "alternative reporting";
8. presents costs and hurdles not removed sufficiently by proposed thresholds;

9. is inconsistent with the Government's deregulatory agenda and ASIC's adoption of that agenda;
10. is inconsistent with the Government's intention, and ASIC's support of such intention, for ASIC to adopt a risk-based approach to its activities; and
11. (even if all the other points were disregarded) is not a change that should be implemented at this time.

The extension of the reporting regime to bring into scope foreign subsidiaries of Australian entities, where such Australian entity is an ADI or AFSL holder (Foreign Subsidiaries of Financials - FSFs) is an additional unnecessary overlay to the requirements.

AFMA has raised in a number of contexts our concerns and objections to the extraterritorial impact of offshore jurisdictions rules in Australia. The imposition of a requirement for FSF reporting represents a farreaching extraterritorial expansion of the Australian regime.

FSF reporting effectively results in market supervision of derivatives activity that takes place outside of the Australian market, and by derivatives market participants that are not under Australian jurisdiction.

AFMA disagrees with ASIC's proposition articulated in REP 357 and CP 221 that foreign subsidiary reporting is justified by reference to international consistency. A survey of key jurisdictions on this point produces the following results.

United States

The United States law has generally greatest extraterritorial in the area of derivatives regulation. The Dodd Frank Act through Section 2(i) of the Commodity Exchange Act requires that rules enacted must "have a direct and significant connection with activities in, or effect on, commerce of the United States".

CFTC's approach can be characterised as explicit support with no recourse and the type of reporting that it actually captures has been reduced to such an extent that we would imagine that the level of trades in this category would be minimal. The SEC has debated, in the context of cross-border rules, how far its reach should be outside of the US in terms of subsidiary activity. It is yet to make final reporting rules, but from issuances so far, the SEC seems to be proposing an approach a notch further down than the CFTC (i.e. explicit support with recourse).

European Union

The approach of the EU reporting regime to territoriality is to not subject an entity other than a European one to reporting obligations. In addition, London branches of member firms do not have mandatory reporting obligations under the EU regime. In summary, subsidiaries are not caught by the EU reporting regime as a consequence of any affiliation / shareholding.

Singapore

While the Singaporean reporting regime imposes a reporting obligation on subsidiaries of Singaporean-incorporated banks their acceptance can be explained by the small number of banks, as well as the small number of subsidiaries held by each of them that deal in derivatives. By way of contrast, some Australian financial entities have a large number of foreign subsidiaries. Singapore's trade reporting regime is still in the relatively early stages of implementation, with interest rates and credit derivatives the only products currently mandated, with FX to be introduced in 2015.

Japan

Japanese reporting obligations only apply to certain broker/dealers and banks registered under the Financial Instruments and Exchange Act of Japan. Offshore affiliates of these entities are not required to report.

Hong Kong

Hong Kong's reporting regime proposes a reporting obligation in relation to derivatives activities of subsidiaries. However, on close inspection, the Hong Kong regime's approach is rather different to what ASIC is proposing. Further, the Hong Kong regime is in its infancy in terms of implementation, and it is possible that elements of the regime will be modified before they are implemented. A couple of differences between the Hong Kong and proposed ASIC capture of subsidiary derivatives activity are as follows:

1. The Hong Kong regime's interest in derivatives activity of subsidiaries is limited. The reporting regime will not require reporting of all transactions of all subsidiaries, nor all subsidiaries in a jurisdiction. Rather, "the HKMA may require a locally-incorporated AI to procure that one or more of its subsidiaries (as specified by the HKMA) comply with the mandatory reporting requirement".

2. Consistent with the above, the intention behind this requirement is focused solely on preventing the circumvention of mandatory reporting obligations (e.g. by booking transactions through different subsidiaries to avoid reporting obligations), and this is why such reporting would take place on only an exception basis.

Canada

The Canadian reporting regimes are still to be implemented in all Provinces. However, based on model regulations and the regulations finalised in Quebec, Ontario and Manitoba, Canadian regimes will not impose a per se reporting obligations on the subsidiaries of any specific entity type. The closest the regimes come to this is to impose a reporting requirement in relation to transactions

involving an affiliate of a Canadian person solely in situations where the Canadian person has guaranteed all or substantially all of the liabilities of the affiliate.

Question C1Q2: Is the proposed threshold of $5 billion appropriate? If not, what threshold or trigger would be more appropriate?

The threshold could be considered low given that it is aggregated across all subsidiaries and that intra-group transactions are included (i.e. double-counting transactions which it may be argued should not be counted at all).

The jurisdictional-aggregate concept would bring in non-financial companies. It seems odd that an Australian non-financial subsidiary would not be required to report to ASIC, but an American non-financial subsidiary would be included.

Whether or not the threshold is appropriate requires a balancing of cost of providing the data against the benefit Australian regulators will receive in having the data. Given that the case supporting the benefit of the data reported to trade repositories, the costs Australian regulators will incur in reviewing the data, and whether there are lower cost alternatives (potentially to Australian regulators and participants) for Australian regulators to obtain timely and comprehensive data which would provide the same regulatory benefit, and the use to which it would be put, has not been publicly put forward, it is hard to say whether or not the threshold is appropriate.

Question C1Q3: If a foreign subsidiary starts (or ceases) to hold $5 billion in gross notional outstanding OTC derivative positions, should the foreign subsidiary be required to start (or be permitted to cease) reporting transactions? If not, why not?

Carrying out an initial determination represents a significant compliance cost, and will only be of transitory usefulness. If ongoing assessments and monitoring had to be carried out this would represent an increased regulatory burden.

Question C1Q4: Is the proposed timeframe for implementing reporting obligations for foreign subsidiaries of Australian entities appropriate? If not, what timeframe would be more appropriate?

The consultation paper does not articulate what regulatory benefit would be gained from the proposed extension of the regime. On the other, there is a significant additional regulatory burden that would be added. Before considering timetables the regulatory impact needs to be justified.

Section D – Delegated reporting safe harbour

Question D1Q1: Do you agree with this proposal? If not, why not?

AFMA does not agree with this proposal.

It imposes the responsibility of ensuring the information reported on behalf of the Reporting Entity/client is complete, accurate and current to the delegate. This creates a burden and open-ended liability for potential non-compliance on the part of the delegate which may have the unintended consequence of preventing any delegate from offering delegated reporting services in order to limit their liability.

The premise behind the proposal provides a clear illustration of why AFMA is saying that delegated reporting is unworkable, and we should move to a single-sided reporting regime.

Question D1Q2: Do you consider that this proposal will encourage the use of delegated reporting? If not, why not?

We do not believe this proposal will encourage the use of delegated reporting because in the current proposal, when a reporting entity delegates its reporting obligation to another entity (the 'delegate'), the delegate needs to report the reportable transactions and positions in accordance with Rules 2.2.1 and 2.2.5. Additionally, the delegate needs to ensure the information, and any changes to the information, is complete, accurate and up-to-date. The reporting obligation of ensuring the information is complete, accurate and up-to-date should remain with the reporting entity as it is their regulatory obligation to ensure the information reported to a trade repository is true and accurate. In such an instance, the delegate is performing a service on behalf of the reporting entity/client and should not be held responsible, on a regulatory level, for ensuring all information is complete, accurate and up-to-date.

As part of its responsibilities, a delegate would ensure it has reported the information as true and correct, on a best efforts basis, on behalf of the reporting entity/client. This has historically been a contractual obligation between the delegate and the reporting entity/client. We believe this should remain as a contractual obligation to be agreed on a bilateral basis between the delegate and reporting entity/client and should not become a regulatory obligation for the delegate.

Question D1Q3: Will a 'safe harbour' for delegated reporting reduce your costs if implementing transaction reporting? If so, please provide details.

The current proposal for a 'safe harbour' for delegated reporting will not encourage firms to offer delegated reporting to other reporting entities. Under the current rule all reporting entities, particularly Phase 3 reporting entities, will need to build their own systems to carry out their own reporting requirements.

Question D1Q4: Are there any other proposals that may meet our regulatory objective of encouraging the use of delegated reporting? If so please provide details.

As ASIC is aware, AFMA has requested the Government to conduct a policy review of the Phase 3 reporting requirements and is advocating for single-sided

reporting. This is a better solution than the delegated reporting proposals set out in the consulatation paper.

Section E - Foreign Exchange Securities Conversion Transactions

AFMA wishes to raise an additional matter in the context of this consultation. AFMA and the Australian Bankers' Association have previously raised with ASIC a problem associated in conjunction with the Application for Relief relating to Phase 1 Banks and Phase 2 Reporting Entities under the Derivatives Transaction Reporting Rules.

The problem arises for Reporting Entities when they transact foreign exchange trades for clients to facilitate the settlement of the purchase or sale of a foreign currency-denominated security or equity (FX Securities Conversion Transactions). Under a FX Securities Conversion Transaction, a client will settle the cash payment/receipt for the purchase/sale of a foreign currency security by executing a FX trade to settle in their base currency, usually AUD. These trades are entered into solely to effect the purchase of a foreign security.

The settlement of these FX Securities Conversion Transactions occurs at the same time as the related securities transaction, which may take up to 7 days after the day on which the relevant arrangement was entered into. However, the majority of the FX Securities Conversion Transactions are settled between 3 and 5 days. The FX Securities Conversion Transaction settles at the same time as the related securities transaction in order to ensure the customer is best able to reduce their exposure to currency risk between the date the trade is entered into and the settlement date. On this basis, FX Securities Conversion Transactions are usually considered, from an industry perspective, to be 'spot' transactions. However, if their settlement takes more than three days they fall under the definition of a 'derivative in the Corporations Act 2001.

Section 761D(1)(b) of the Corporations Act and the corresponding Corporations Regulation 7.1.04(1)(a), foreign exchange contracts settled not less than 3 business days after the day on which the arrangement is entered into are classified as "derivatives" and are subject to the Reporting Rules.

However, on the basis that FX Securities Conversion Transactions are considered, from an industry perspective, to be 'spot' transactions, they are not listed in the "Products that must be reported" in Table 2 of the Appendix to Regulatory Guide 251 nor would they commercially be considered to be a 'forward' for the purposes of that tables.

FX Securities Conversion Transactions are not intended to be captured within the policy objectives of derivatives trade reporting. FX Securities Conversion Transactions are treated commercially as 'spot' transactions. On this basis they are not listed in the "Products that must be reported" in Table 2 of the Appendix to Regulatory Guide 251 nor would they commercially be considered to be a 'forward' for the purposes of that table.

Reporting Entities are not required to report FX Securities Conversion Transactions in other jurisdictions (including the US, Canada and the EU). As result, a significant system build would be required for most of the Reporting Entities to do so. The cost of this build

would be significant and would include the cost of hiring external consultants, undertaking urgent system modification and integration with existing systems and platforms, meeting the required legal and compliance issues, testing and training, seeking consent as appropriate from counterparties and technical support.

Without the same exemptions as those currently applicable to US, Canadian and certain EU participants under their respective reporting regimes, the Reporting Entities will be required to undertake costly systems development and trade reporting for FX Securities Conversion Transactions, whilst foreign entities based in Australia, who can report under foreign requirements, will not be subject to the same costs. The Reporting Entities will would be subject to more onerous and costly regulatory requirements than their US, Canadian and EU competitors, despite the Reporting Entities and their competitors operating in the same jurisdiction (Australia).

The CFTC considers FX Securities Conversion Transactions to be bona fide foreign exchange spot transactions for the purposes of the Dodd-Frank Act. On this basis, they are not reportable under the Dodd-Frank reporting requirements nor are they subject to other obligations applying to derivatives such as clearing and other trade obligations. The Canadian Regulatory Authorities have taken a similar approach.

Further, in the US, the CFTC has stated that it will consider "the relevant foreign exchange spot market settlement deadline to be the same as the securities settlement deadline" for securities conversion transactions.

In respect of the EU, the Reporting Entities note that the European Commission has noted the concerns of industry participants globally and acknowledged the need for the variations between EU member states' laws to be addressed to provide legal certainty. In that context, the European Commission Directorate General Internal Market and Services (DG MARKT) wrote to the European Securities and Markets Authority (ESMA) on 23 July 2014 indicating that it is not possible to address this issue by way of an implementing measure due to technical legal reasons: the powers conferred on the European Commission to adopt further implementing measures for the Markets in Financial Instruments Directive (MiFID) 1 ended on 1 December 2012. As a consistent interpretation remains necessary, the European Commission has suggested that ESMA consider whether the current approach by member states achieves a sufficiently harmonised application of the EMIR reporting obligation in the period before application of MIFID 2 in 2017 or whether further measures (e.g. guidelines) are necessary. DG MARKT notes that a broad consensus with respect to defining FX spot contracts seems to have been reached, and includes – in relation to FX Securities Conversion Transactions – the use of the accepted market settlement period of that transferable security to define an FX spot contract, subject to a cap of 5 days. Further, DG MARKT note that a proportionate approach requires consideration that any measures that are adopted now, and which might require changes by member states to legislation and by stakeholders to their practise and authorisations, may need to be changed again in 2017 if these measures are not fully aligned with the future MiFID 2 implementing measures.

Such a clarification would address variances in how individual states have translated the MiFID into their national laws and to reflect appropriately the Commission's stated policy

intention for MiFID consistently across member states and thus ensuring that FX Securities Conversion Transactions are not subject to the European Market Infrastructure Regulation (EMIR) (under which spot FX transactions are currently not intended to be reportable). Such an anticipated outcome would result in FX Securities Conversion Transactions not being reportable or subject to other clearing and trade obligations across EU member states and would be excluded from rules that rely on definitions (such as the key definition of "financial instruments") drawn from MiFID.

Classifying FX Security Conversion Transactions as derivatives could be detrimental to internal capital flows, particularly in the investment funds industry, where many funds' mandates do not permit dealing in derivatives. Accordingly, there is wide support for the classification as spot, mirroring the approaches of the US and Canada, with stakeholders keen to ensure the international approaches are aligned across North America and Europe.

ASIC has stated that it has sought, where possible, to align its trade reporting rules with the requirements of the United States, European Union and other peer jurisdictions, and more generally to follow international standards, with the aim of facilitating consistency among the regulatory regimes of markets that Australian entities may be most active in.

Australia should act in accordance with the February 2014 Group-of-Twenty (G20) communique, in which the Finance Ministers and Central Bank Governors of Australia and the other G20 nations noted 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."

Providing relief in respect of FX Securities Conversion Transactions would be consistent with this approach, as well as the approach of the Council of Financial Regulators in seeking to harmonise the Australian G20 requirements in respect of foreign exchange transactions with those of the US. In our view, it is also appropriate in ensuring Australian market participants are not subject to inadvertent, costly and unintentionally onerous reporting requirements when compared to the trade reporting requirements of other jurisdictions.

If there are questions concerning this response I can be contacted at dlove@afma.com.au or on (02) 9776 7995.

Yours sincerely

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