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Financial Market Infrastructure
Australian Securities and Investment Commission
Level 5, 100 Market Street
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By e-mail: OTCD@asic.gov.au

Dear Sir / Madam,

Consultation Paper 205: Derivative Transaction Reporting

Thank you for the opportunity to comment on Consultation Paper 205.

We are a group of Australian banks (together the "Group") that has significant operations in Australian derivatives, as well as an interest in ensuring that G20 OTC derivative commitments are implemented in Australia in the best possible way. We welcome the Consultation Paper and appreciate the receptiveness of Australian regulators to discussions with a wide range of market participants about OTC reform implementation in Australia.

Before we respond to the specific questions raised in the paper, we would like to make few high-level points.

(a) *Relevance of Dodd Frank experience*. Each of our banks is also registered with the CFTC as a "swap dealer" under the Wall Street Reform and Consumer Protection Act 2010 (the "Dodd Frank Act"). As we have noted previously, we have each made significant investments adapting our front and back office systems to comply with US legal requirements under the Dodd Frank Act, particularly in relation to transaction reporting. Each of us can attest that transaction reporting compliance is a very significant, expensive and generally resource-intensive obligation, which has given rise to considerable problems. We are keen to, individually or as our Group, continue to provide detail about these problems, and the resources that are required to give practical effect to reporting mandates. We hope that the Australian regime can benefit from lessons learned in the US to achieve an efficient regime.

(b) *Which regime to follow?* Our Group shares ASIC's view that looking offshore for insight into how to best construct a reporting regime is not just advisable but essential. Despite US reporting having (somewhat expectedly, as the first regime) given rise to problems, we would still note the following:

   (i) Looking for guidance to regimes that have functioning reporting (currently this set includes only the US and Japan) will generally be more instructive than looking at regimes where implementation problems are yet to be encountered, let alone solved;

(ii) Our Group represents a large proportion of total derivatives activity in Australia. Each of our banks is currently only reporting under the US regime. Given tight timing for implementation of Australian reporting, as well as limited spare capacity / resources available to be allocated to Australian reporting by (among others) transaction repositories and middleware providers, a regime that is operationally aligned with the CFTC regime (including the exemptions applying to that regime) would seem to represent the efficient and more speedy of the available options; and

(iii) while ASIC may be in a better position to assess this, it may be that closer conformity of the Australian regime to the CFTC regime could assist in obtaining a substituted compliance determination from the CFTC. As our Group submitted in response to the Treasury's December 2012 consultation paper, we think that, in developing an Australian reporting regime, a high priority is to assist Australian banks to be able to comply with the Australian reporting regime (and not additionally the Dodd Frank regime) in relation to non-US counterparties. In the attachment in response to question E1Q2 we explain why this may also assist Australian counterparties of Australian swap dealers (i.e. Australian corporate and fund users of OTC derivatives).

(c) *Costs of reporting*. Costs associated with transaction reporting can be looked at in different categories. Reporting imposes compliance costs on:

(i) financial intermediaries that are providers of derivatives, who pass on costs;

(ii) real economy participants directly; and

(iii) regulatory agencies, who must develop, at presumably significant cost, the ability to analyse all of the data that they have requested.

We think that even if we are able to select the most efficient routes in construction of an Australian reporting regime, these costs are going to be sizeable. For this reason, we would encourage the agencies to not try to "future proof" the reporting regime by asking now for elements and coverage whose inclusion cannot yet be thoroughly justified based on a clear current need for the data.

We are also concerned that a "future proofing" objective could result in Australian agencies unnecessarily incurring expenditure on analytical tools for reviewing data, if the data is available. We think in designing the regime ASIC should recognise that too much data may give rise to problems, both in terms of efficiently developing analytical tools to review it all and potentially also in creating unrealistic expectations as to what regulators can achieve through having access to the data. While we are unaware of how ASIC and the other agencies plan to analyse the data, and what software and other tools they may use to do so, we support the agencies' efforts in designing a regime which will result in efficient data analysis. We encourage ASIC and the other agencies to explore as fully as possible available options for data analysis with foreign regulators, data vendors and repositories, before committing to a particular design for its regime. We support the G20 objectives and believe

that to achieve them efficiently it is desirable to learn from others where possible, rather than lead.

In looking at foreign regimes, we also urge agencies to consider to what extent, if any, it is really necessary to require elements and coverage that are not required in each of the main regimes? We would also discourage "cherry-picking" elements of other regimes (in set theory: taking a union of sets, as opposed to the intersection of sets). Requirements that are "add-on" to other regimes, particularly the US one, will be associated with:

(i) disproportionate increases in compliance costs;

(ii) push-outs to dates by which delivery can occur due to constraints on industry and third parties such as repositories; and

(iii) barriers to entry of repositories and middleware providers that can fully service Australian participants, on the basis that too much investment specific to Australia is required, with limited potential return.

Additionally, where foreign subsidiaries of Australian ADIs (here termed "Foreign ADI Subsidiaries") that are not reporting entities under the CFTC regime are required to report under the proposed regime, systems will need to be designed from the ground up. The costs of developing and implementing such systems will be very significant

(d) *Privacy / confidentiality concerns*. As our Group has noted in previous submissions made to Australian agencies, an unqualified obligation to report trade data to authorities in one jurisdiction, may give rise to legal claims on the part of entities and / or authorities in another jurisdiction. Our Group is of the firm view that this risk cannot be disregarded, and any regime that imposes reporting obligations cannot require regulated entities to expose themselves to offshore liability. We were pleased to note that Greg Medcraft and Steven Bardy of ASIC, as part of the OTC Derivatives Regulators Group,

> "*…agreed to identify, as a matter of urgency, issues with respect to producing information to trade repositories, and access by regulators from a trade repository, and to develop further possible options* [in addition to consent or a combination of recognition and access arrangements] *to overcome such barriers."*[1]

Our Group is keen to understand what possible solutions ASIC is considering above those already highlighted. In particular, this Group believes that a sensible solution would be to issue a broad class order no-action relief allowing Reporting Entities to mask any data where such a privacy issues exists in a way that is practical and does not leave residual conflict.

(e) *Importance of international harmonisation*. Before responding to the specific questions ASIC has posed in its paper, we would like to note our support for the positions that have to-date

[1] http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/130418_odrg-report-g20_en.pdf. OTC Derivatives Regulators Group Report to the G-20 Meeting Of Finance Ministers and Central Bank Governors of 18 - 19 April 2013.

consistently been taken by Australian regulators in relation to the importance of international harmonisation and consistency regarding OTC derivatives reform. For a smaller jurisdiction like Australia particularly, we think this is critical. We note as just one example of this a recent speech by the ASIC and IOSCO Chairman, Greg Medcraft in Dublin, where he spoke of the importance of consistency in global financial regulation.[2] We urge ASIC and the other Australian regulators to approach the Australian transaction reporting regime with international harmony in mind.

Please see attached detailed answers to the questions posed in the consultation paper.

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[2] http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/speech-medcraft-improving-the-global-consistency-of-financial-regulation.pdf/$file/speech-medcraft-improving-the-global-consistency-of-financial-regulation.pdf

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Attachment: Responses to questions raised in ASIC CP 205

Part B: General reporting obligation

1 [B1Q1] ***Do you support the overall scope of the reporting obligation?***

We see the overall scope of the reporting obligation set out in Consultation Paper 205 as too wide in a number of respects. Specifically we have concerns about the way the regime:

(a) captures certain transaction types;

(b) captures certain entity types; and

(c) asserts its territorial reach.

Each of these points is covered in more specific responses below.

2 [B1Q2] ***Where both reporting entities entering into a reportable transaction are required to report the details of the transaction to a trade repository, should each reporting entity be required to report, or should only one reporting entity be required to report?***

Our Group is united in relation to a few points relating to single versus double-sided reporting:

(a) **Clear assignment of responsibility**. This point is valid irrespective of whether ASIC selects single or double-sided reporting for its reporting regime. It is essential for efficiency that it be clear under the rules, in relation to a specific transaction between specific counterparty types, what responsibility the parties to a transaction have in relation to reporting and "Unique transaction identifier" (UTI) generation.

(b) **Counterparty agreement inefficient**. Requiring trade-by-trade agreements about reporting and / or UTI generation or linking is inadvisable. Reporting should operate in a "straight-through processing" fashion, which operates on very clear programmable parameters, and requires no negotiation or communication between the parties. No communication should be required either at the point of the trade by traders, or by back-office personnel after the trade. Only minimal and very occasional human interaction in the process should be necessary. Achieving this in the Australian regime will add to (or at least not detract from) the relative efficiency of the Australian derivatives market.

(c) **Over-reporting and under-reporting**. From a regime-design perspective, ASIC has mentioned that it views single-sided reporting as associated with a risk of certain trades not being captured at all. Double-sided reporting is associated with a risk of duplicative reporting, or reporting which over-states total activity. Taking each of these considerations in turn:

(i) *Under-reporting (single-sided)*. Our Group cannot see what trades single-sided reporting could fail to pick up, if all participants whose transactions ASIC wants captured are brought within the scope of the regime as "Reporting Entities". There is not a concern that a trade executed by an Australian ADI will not be reported, for example, as an Australian ADI will always be required to a report its trades, unless another Australian ADI is reporting the same trade.

(ii) *Over-reporting (double-sided)*. It is difficult to avoid the risk that a trade between two ADIs would show double the derivatives activity that is actually occurring. The ways to avoid notional amounts being doubled in ASIC's data are for:

(1) a single UTI to be used, and for the parties to agree who generates it, and how it is to be notified to the non-generating party;

(2) a single UTI to be used, with responsibility for generating it and notifying the parties of it being allocated to the repository;

(2) the parties to somehow be obligated to link the trades in the records of the repository; or

(3) the repository or ASIC's systems to link the trades.

For double-sided reporting we note that there seems to be, at least to our Group, no approach in any other jurisdiction that overcomes very well the challenges associated with it. Our Group takes the view that the difficulties inherent in handling deal duplication in double-sided reporting create more problems than single-sided reporting (with tie-break reporting party being determined by industry conventions).

In summary, we would encourage ASIC to investigate and discuss with us (and other stakeholders, such as the DTCC, other repositories and middleware providers) the problems associated with:

(a) single-sided reporting in the US, and how they are being resolved currently practically; and

(b) double-sided reporting in the EU and Hong Kong regimes, neither of which is yet operational, and the issues that stakeholders like the HKMA, ESMA, the DTCC, industry and industry bodies are discussing as to how these might be resolved. We are particularly concerned about the problems that are being presented, and the complexity of some of the solutions that are being proposed.

(d) **Application to Foreign Subsidiaries**. If, as is proposed, all Foreign ADI Subsidiaries are also included in the regime, there will be a risk of the duplication of reporting.

This risk arises from the fact that Foreign ADI Subsidiaries will enter into derivative transactions with:

(i) Australian entities subject to the proposed regime, including Australian ADIs;

(ii) other Foreign ADI Subsidiaries; and

(iii) other entities that are not subject to the regime.

Systems will need to be developed to ensure that transactions are reported either by only one of the reporting entities (if both are reporting entities), or by both reporting entities but with reference to a single UTI.

(e) **Interim regime and single –v– double-sided reporting**. We query the usefulness, to Australian or foreign regulators, of the data resulting from the proposed "opt in" regime. This data would be available in a single-sided format for a short period before a final Australian regime, currently proposed to require two-sided reporting, would be operational. We discuss this further in response to question E1Q2 below, but in short our view is that any interim reporting could be more useful to regulators, both foreign and Australian, if it was reported on the same broad basis as will apply under the final regime.

(f) **Practical application of double-sided reporting.** We also query the usefulness of double-sided reporting given how such reporting would be likely to occur in practice in the Australian market. Where a derivative trade is required to be reported under the proposed Australian reporting regime, we consider it likely that the majority of our Group's clients would seek to have Group members report on their behalf. This will effectively result in single-sided reporting, but with an additional ongoing administrative burden as counterparties seek to ascertain whether they need to report on someone else's behalf each time they enter into a trade. Reporting on another counterparty's behalf will also require additional technological build. Finally, trading done by members of the Group with:

(i) end-users below the relevant threshold;

(ii) (during the phase-in periods) counterparties who are in a class of participants that have not yet been phased-in; or

(ii) counterparties that are not subject to ASIC / Australian jurisdiction,

will mean that single-sided data is all that will exist in relation to such trades. It may be that consistency and ease of manipulating the data in the repository would be served by all reports being single-sided reports.

3 **[B1Q3]** ***If only one reporting entity were required to report the details of a reportable transaction to a trade repository, how should it be determined which reporting entity is required to report?***

If single-sided reporting were adopted by ASIC in its regime:

(a) *Counterparty hierarchy*. We would support a hierarchy of entity types, similar to the US regime (i.e. swap dealer > major swap participant > financial entity > ordinary corporate), that would be used to determine which of the parties is to report a trade. This might use entity classifications like ADI > AFSL-holder > Australian company, etc.

(b) *Tie-breaker logic required*. Where entity types are in the same category (e.g. an ADI trading with an ADI), tie-breaker logic should be applied. This should be permitted to be determined by industry itself, so that established conventions developed in other regimes can be adopted if most efficient (e.g. the seller of protection in a credit swap is the reporting party, the fixed rate payer in a fixed-float IRS is the reporting party, etc).

(c) *ASIC role in conventions required*. If an industry tie-breaker convention were a feature of the regime (as in the US), ASIC should have a role in this, which is the most minimal role that will still ensure that such conventions are operating optimally. This could possibly be, say, by way of endorsement of conventions. In the US, the status of industry conventions, their availability to all participants, and even in some cases (e.g. prime broker trading) what the conventions are, is not entirely clear. Australia could learn from these experiences.

(d) *Regulatory status of conventions*. It should be a defence to any non-reporting charge that such non-reporting was as a result of compliance with such industry convention. This is a lacuna in the US regime that could be remedied in Australia.

4 **[B1Q4]** ***What is the likely impact of our proposals? (Please see page 4 for the information required.)***

We have limited our response here to the impact of single versus double-sided reporting. Impact related to the width of the regime (the points referred to in our response to question 1 above) we have covered in more specific responses below.

The impact of the ASIC proposal of double-sided reporting will be entirely manageable for participants in our Group if ASIC is able to follow the principles set out in B1Q2 above. If on the other hand ASIC were to, for example, require that its double-sided regime includes a requirement that UTI is populated by:

(a) the parties agreeing which party generates the UTI;

(b) the generating party provides it to the other party; and then

(c) both parties report the UTI to the repository,

then few of the problems associated with reporting-party determination in single-sided reporting would seem to have been avoided. Consequently, such a regime would be less efficient than the US single-sided one. If two-sided reporting is to remain, we would ask ASIC to ensure that requirements under CP 201 ensure that repositories are able to perform trade matching.

5 **[B2Q1]** ***Do you agree with the proposed four categories of OTC derivative transaction that are a reportable transaction?***

Based on the "Proposal" and "Your Feedback" columns as they apply to section B2, we have interpreted this question as relating to the concept of "Reportable Transaction", and not (despite the wording in the question) to the concept of "Reportable Entity" (each as defined in rule 1.2.5). If we have misinterpreted the intention of the question, please let us know.

We have concerns about the entities that ASIC is firstly asserting jurisdiction over, and / or imposing obligations on, as "Reporting Entities".

Our concerns, in relation to the categories of "Reporting Entities", are as follows:

(a) *Extra-territorial nature of the obligation on foreign subsidiaries*

We have significant reservations about the inclusion, as a Reporting Entity, of: "A foreign subsidiary of an Australian Entity".

We noted that in meetings with ASIC recently, ASIC expressed a possibility that capture of foreign subsidiaries could be scaled back to being foreign subsidiaries of Australian *financial entities*, such as authorized deposit-taking institutions (ADIs). Our comments below assume for the moment that this will be the case.

Our comments on this area do not consider in any way the legality of imposing such an extra-territorial obligation. We would merely suggest that if such a policy approach is to be retained, it would be in the interests of industry as well as the Australian agencies for the legal basis of the rule to be absolutely clear.

Our comments on this area are:

(i) *Comity*

Our Group views the proposal as casting a very wide net in terms of entities captured, in a way that does not respect international principles of comity. As a contrast, a limit on the extra-territorial reach of relevant Dodd Frank Act provisions was provided by Section 2(i) of the Commodity Exchange Act, which requires that rules enacted "have a direct and significant connection with activities in, or effect on, commerce of the United States". The CFTC has provided detail about this limit, and in doing so, was roundly accused of regulating beyond it. Critics included Commissioner Jill Sommers, who referred to the initial drafting approach behind the CFTC issuance as having been "guided by what could only be called the "Intergalactic Commerce

Clause" of the United States Constitution".[3] Australian and other Asian regulators, in their well-considered letter to the CFTC dated 27 August 2012, also publicly expressed concern about the potential extra-territorial impact of Dodd Frank regulation. Despite this, the transaction reporting obligations introduced by the CFTC only apply to non-US persons to the extent that their US client activity is sufficient to require them to become CFTC registrants (you will be aware that the five members of our Group are the only such Australian registrants). The ASIC proposal, however, actually goes beyond the limits of the US regime, in that it imposes direct reporting obligations on foreign entities that may have a small or no impact on commerce in Australia.

Similarly, the approach of the EU regime to territoriality in relation to transaction reporting is to not subject an entity other than a European one to reporting obligations. Note that not even our London branches have mandatory reporting obligations based on the current EMIR text.

Extra-territorial application of derivatives regulation is a factor that, as Chairman Medcraft noted recently (in his Dublin speech referred to above) complicates challenges associated with achieving regulators' goals of "thinking globally while acting locally", by imposing two sets of laws on the one set of activities. Our view is that the approach set out in the proposal is inconsistent with principles publicly espoused by Australian regulatory agencies, and could possibly undo a lot of the good work that ASIC and other Australian regulators have done on the international stage.

(ii) *Uneven playing field.*

To take an example, a Japanese company that is owned by an Australian ADI will incur, under the proposal, a rather resource-intensive obligation to report its derivatives to ASIC (with ASIC of course representing to the Japanese company, a foreign regulator administering a foreign regime). By contrast, a Japanese company that is owned by anyone other than an Australian ADI will not have such a reporting obligation. Viewed simply, a starting assumption has to be that if compliance with ASIC's reporting regime has a cost to a Japanese business of ¥X, all other things being equal, such Japanese business would be worth ¥X less to an Australian ADI investor than:

(1) a US or a European investor (or an investor located in any other jurisdiction other than Australia); or

(2) an Australian managed investment scheme investor.

[3] http://www.cftc.gov/PressRoom/SpeechesTestimony/sommersstatement062912

Additionally we have concerns about reporting by subsidiaries (or potentially even branches) of an Australian ADI operating in 'emerging markets'. A distinction should be made between operations in developed and emerging markets. It will be extremely challenging to comply with reporting requirements in the case of operations in emerging markets until local regulators in those jurisdictions mandate trade reporting. Extending ASIC's requirements to these emerging markets will impact the competitiveness of these businesses.

These scenarios identify how the proposed rules might create an uneven playing field. The sizeable additional cost burden on the Japanese subsidiary, in the example above, or on an operation in an emerging market, and in turn on its Australian ADI owner we think should be required to be justified by benefits to be obtained by Australian regulators in having access to such data. The potential distortionary impact this could have on Australian ADIs' investments offshore should also be considered. If this element of the proposal is to remain, we would respectfully ask to be provided with some further detail in relation to this justification. Further, we would note that operations in emerging markets would have to develop systems from a zero base, and implementing changes to comply with the requirements of a sophisticated market like that in Australia would be a huge challenge.

(iii) *Systemic risk*. The justification presented in the paper for a reporting obligation being imposed on foreign subsidiaries of Australian entities is mitigation of systemic risk. Effectively this is saying that systemic risk is presented by the risk of derivatives exposure of a subsidiary causing losses to a parent, through nothing more than a loss of the value of the parent's shareholding. If we conceded that this represented systemic risk, we would have to note that it is a very different sort of systemic risk to the sort that is normally raised in discussions about systemic risk associated with derivatives exposures. Transmission of derivatives risk is normally focused on risk of exposure to *counterparties*, and not to *subsidiaries*. A true derivatives exposure can result (theoretically at least) in unlimited liability. A derivative, carelessly used by a subsidiary, cannot destroy any more than the subsidiary itself – unless the connection between the entities involves more than an equity relationship. Offshore investments that are owned by members of our Group often use subsidiaries for the very purpose of limiting exposure to the markets in which the subsidiaries operate. Given the cost and other implications associated with compliance with this aspect of the proposal, we would respectfully ask to be provided with more detail about the justification for it.

(iv) *Systemic risk and ADIs*

We also believe that the systemic risk argument is addressed somewhat by APRA's regulation of traded market risk. Specifically, APRA's regulatory standard APS 116 outlines the requirements of an ADI to calculate regulatory capital, which is comprised of various amounts related to traded market risk exposures and includes:

- Value-at-Risk (VaR) calculated by a market risk system;
- Additional VaR related to risk exposures not captured by the risk system;
- Stressed VaR calculated using the worst case stress period (such as the Global Financial Crisis); and
- Specific risk exposures related to credit and equity derivatives.

Additionally, APRA regularly receives specific reports related to market risk exposures, such as a report on structured credit derivatives, underwriting activity, wrong-way risk exposures (e.g. bought credit default protection on a bank from a bank), stress testing analysis of FX, commodities and interest rates, credit risk in the banking book (under APS 112), and the back-testing results of the VaR.

APRA has the power to investigate and challenge an ADI's risk system, assumptions, outputs and its regulatory capital calculation. In the event APRA considers it prudent or necessary, it can impose an additional regulatory capital requirement.

This highlights that, while transaction reporting can serve to reduce systemic risk, it is helpful to focus on exactly why and how transaction reporting can best promote that outcome. That is, the availability of particular types of data in repositories is not necessarily essential for the broader regulatory objective to be achieved.

Where Foreign ADI Subsidiaries are regulated entities in their own jurisdictions and are subject to prudential regulation similar to that applying in Australia, the level of "systemic risk" (as envisaged above) arising from derivatives transactions will be further limited by the level of prudential capital that such entities are required to hold.

(v) *APRA's existing Banking Act powers*. Each of the members of our Group is an APRA-regulated authorised deposit-taking institution (ADI). As such:

(1) Information that is relevant to the exposure that an ADI has to its subsidiaries, including derivatives, is already provided to APRA;

(2) Information that is relevant to the exposure that the banking group (i.e. level 2) has to external counterparties, including derivatives, is also provided; and

(3) Even where this information is not provided, APRA requires ADIs to hold capital against all risks (including derivatives risk), for its entire group activities, under economic capital models, and APRA has the power to investigate and challenge the models, their inputs, and assumptions underlying them.

We are interested in the extent to which the inclusion as a reporting party of foreign subsidiaries is being led by APRA's requirements. The view of our Group is that before introducing a more detailed and very much more costly transaction reporting obligation in relation to subsidiary activity, a comparison should be made of the difference between the data currently obtained, and the data to be obtained. The value of the difference in the data should be assessed against the additional costs of obtaining it and (as relevant) analysing it.

(b) *Width of capture of Australian entities*.

The scope of the "Reporting Party" concept, in terms of Australian entities, includes every corporation, trust and partnership (subject to a threshold that is not identified yet). The members of our Group each accept that compliance costs associated with Australian reporting are necessary, given the Government's commitment made at the Pittsburgh G20 Summit in 2009. However, as noted above, the magnitude of such compliance costs should not be underestimated. Based on the Dodd Frank experience, members of our Group are well-placed to confirm that reporting is anything but a simple and inexpensive exercise. As sophisticated financial market participants we suspect that we are going to be better placed than other derivatives participants to cope with reporting obligations, and we also have international experience to draw from. We would note in this regard that while the draft rules permit agents to be appointed, that is unlikely to completely remove the burden on counterparties who agree that their dealer will report transactions for them, as the counterparty will still need to report valuation and collateral data. This feature of EMIR is currently drawing comment as implementation efforts in Europe advance.

By way of contrast, the considerations from the point of view of other Australian participants could be rather different. We would like to note that the proposed ASIC regime's:

(i) two-sided reporting;

(ii) absence of any end-user exemption; and

(iii) resort to the definition of "derivative" in our corporations legislation (discussed below),

will likely result in some very significant "real economy" costs and impacts. By way of contrast, the CFTC:

(i) has imposed single-sided reporting, in a deliberate attempt to ameliorate the impact of reporting on end-users;

(ii) while not creating an end-user exemption as such, has made a number of efforts to reduce the reporting burden on end-users, in those situations where they do report; and

(iii) has used a definition of "swap" which excludes some significant directly real-economy derivatives, including physical transactions and futures and options on futures. You may be aware that significant migration of derivatives from swaps to futures has occurred in the US recently (so-called "futurization" of swaps).

Our submission here is that some quantitative consideration of the risk of very significant economy-wide compliance costs is advisable.

(c) *Increased risk of privacy barriers*

Imposing reporting obligations on foreign entities is subject to a higher risk of foreign law privacy or confidentiality barriers than reporting obligations on Australian entities / Australian branches of foreign entities. International attention is being focused on barriers to transaction reporting caused by privacy and confidentiality laws.[4] Foreign law reform is needed, which requires sound policy reasons to support such reform. In the case of Australian reporting requirements being imposed on foreign branches of Australian banks, we think there is a strong argument that foreign jurisdictions should remove obstacles to reporting in Australia, as the Financial Stability Board has encouraged (although we note that this is currently problematic for our branches in a number of jurisdictions). However, if the reporting regime was to extend to foreign subsidiaries of Australian entities, we see little justification for foreign jurisdictions to facilitate reporting by such entities, given the lack of connection to Australia that such entities have.

6 [B2Q2] *What is the likely impact of our proposals? (Please see page 4 for the information required.)*

Please see response to B1Q1 above.

[4] For example, see the FSB's OTC Derivatives Market Reforms Fifth Progress Report on Implementation, 15 April 2013, at 3.2.1.1: http://www.financialstabilityboard.org/publications/r_130415.pdf

7 [B3Q1] ***Do you agree with the proposal to limit the reporting obligation to OTC derivative transactions?***

Yes, we strongly agree that the proposal should be limited to OTC derivatives transactions. In our view, and we believe consistently with previous statements by Treasury and the Council of Financial Regulators in earlier consultations, it is important as a priority that Australia implements the G20 commitments on transaction reporting in an internationally consistent manner. The G20 commitments relate to OTC derivatives. While a small number of regimes (notably the EU) have proposed trade reporting of a broader class of transaction, we do not believe this is because of a perception that this is in any way required by the G20 commitment. Given the significant burden on industry in implementing reporting and reporting on an ongoing basis, and the subsequent burden on regulatory authorities in developing tools to effectively review and analyse data, we strongly encourage ASIC to develop its rules with the primary short term objective of ensuring satisfaction of Australia's international commitment. This approach would of course not prevent an extension of reporting requirements beyond OTC derivatives if that was justified at a later time by policy requirements.

Our concern therefore is not with the proposal to limit reporting requirements to OTC derivatives transactions, but with the broad definition proposed for that term.

Our primary comments in relation to of the definition "OTC derivative transactions" fall into two categories.

Firstly, we think it is helpful to highlight some of the deficiencies with the 761D definition. The comments we make about the width and legal uncertainty surrounding the definition are not new, however, in the context of transaction reporting particularly we think it is critical that Australia not resort to this definition. This section ends with a discussion of a solution that we would like to consider further with you.

Secondly, we discuss briefly some considerations in relation to problematic transaction types which have not been excluded which may need to be, or in relation to which industry may need more time to achieve compliance with the reporting obligation.

1. Inappropriateness of the s761D definition for reporting

(a) *Introduction*. The view of our Group is that the definition of "derivative" in section 761D of the Corporations Act 2001 is inappropriate as a basis for reporting because of its width. The use of the term in the Corporations Act currently serves a very specific and limited purpose, which is nothing like the purpose to which the proposal in CP 205 would put it. We propose in this submission to not list products that fall within the definition of "derivative" which are patently not in the nature of what transaction reporting should capture (e.g. a future transfer of an intellectual property right). We expect this to be covered by other submissions with a more legal focus. If required

we could however provide examples (not exhaustive of course) of such products.

(b) *761D "minus exclusions" is the wrong approach*. Our Group is also of the view that it would not be appropriate to try to use the derivatives definition as a starting point and then *exclude* certain products. This would be a very laborious process, which would combine an unwieldy definition with an unworkable list of exceptions, and in the implementing phase would make determining what is reportable in Australia a very legal process. The list of exceptions would also need to be continually updated, to include products ASIC did not intend to capture, as such products were identified. There would be regulatory uncertainty in relation to products that were, at any particular time, not on the list of exceptions but that which needed to be.

(c) *Technical problems caused by s761D*. Our systems do not represent even derivative transactions in a standard format, and this has been a large part of the challenge presented by regulatory reforms like transaction reporting. However, the lack of standardisation is even more marked when what is captured in reporting includes a set of products and arrangements that are represented in systems in a way which is completely unlike the way derivatives are represented in systems. Normalising the data associated with a loan sub-participation, for example, to get it into a repository as though it were a credit derivative, would be particularly challenging.

(d) *761D deficiencies not remedied by Rule 2.2.1(2)*. Our Group takes the view that it is not acceptable that the inappropriate width of the derivatives definition can be effectively remedied by Rule 2.2.1(2), which provides that we are only required to report trades to the extent that there is a repository able to accept the trade report. Our view is that, particularly given the high costs of transaction reporting (including also the significant cost to the agencies of analysis of the data) no more should be reported than is actually desired by regulators. Therefore it is inappropriate, and bad from a policy perspective, that what is to be reported is determined by what commercial repositories may be willing to accept.

(e) *Legalistic approaches are undesirable*. In the US, the definitions of "swap" and "security-based swap" are set out in just a few pages. However, the joint CFTC / SEC release, that then elucidates in more detail what these terms mean, runs to more than 150 pages. This release is in turn linked to legal / regulatory principles going back decades like the "Brent Interpretation", and brings in whole bodies of US precedent - like the one distinguishing forwards from futures. There are a number of products where we and industry have not been certain about their correct characterisation, and the assistance of external lawyers has been required. The advice is often that the correct characterization is uncertain. We would very much like to

avoid such an approach in Australia. A legalistic approach in Australia would be particularly unfortunate given the Australian regulators' stated goal of making the Australian reporting regime efficient, fitting in as much as possible with the global reporting initiative, and minimising as far as possible the need for Australian-specific investment.

(f) *A suggested solution*. Our Group would like to suggest that what is reportable is narrowed by the Minister under Section 901B of the Corporations Act to an enumerated set of classes or products. These could be created by reference to market-understood terms, and not given further legal meaning. They would be worded along the lines of the terms in the ISDA derivatives taxonomies, and include in the interest rate class for example (among others):

- fixed / floating swap;
- overnight index swap; and
- swaption.

In the FX asset class they would include (among others):

- non-deliverable forwards;
- deliverable forwards; and
- deliverable options.

The attraction of this approach is that it captures every derivative the regulators want to capture, and none that it does not (e.g. the sale of an intellectual property right that settles a week later). The market would know exactly what was required to be reported, because market terms would be utilised. There would be considerable efficiencies and certainty engendered by such an approach. As new products are developed by industry, we believe the rules could be constructed in a way which readily enables those products to be added to the list of products required to be reported. The power of regulators to take action for non-compliance would not be diminished at all by such a solution.

This approach has some, albeit limited, precedent in the Dodd Frank Act, where in the definition of "swap" there is a reference to:

> *"any … transaction* ***commonly known as*** *– (I) an interest rate swap …".*

The difference would be that our proposed solution would create an exhaustive list. We believe that this could be easily done, and we would propose that ASIC work with industry to achieve this.

2. *Problematic transaction types*

Beyond rectifying the deficiencies of the s761D definition, as it would apply to transaction reporting, ASIC may wish to consider carving out certain derivatives, or derivatives traded in certain circumstances, from the reporting obligation. This would be to reflect certain policy goals such as:

(a) achieving a swift implementation of the regime;

(b) ensuring that the regime can function well before adding trade types that might be overly burdensome for industry;

(c) allowing problems associated with certain products and regime elements to be resolved in more influential jurisdictions (i.e. a form of jurisdictional "free-riding");

(d) ensuring that end-users and the "real economy" are not overly burdened by reform. While acknowledging that ASIC's proposal to enable agents to report is likely to serve as a mitigant to the immediate direct impact on end-users, requiring reporting of valuation and collateral information means that counterparties cannot completely outsource their obligations.

Such exclusions could be temporary or permanent.

We would like to draw your attention to the following products / problems in this regard:

(a) *Foreign futures and options / listed products*

In relation to listed products, we believe similar considerations will apply in Australia to those in Europe. We would be happy to discuss further the challenges currently being faced in Europe in implementing the EMIR requirements, which we understand to be very significant. We believe that if ASIC does consider the policy objective compelling, it would at least be desirable to wait to assess how the European requirements are met. We think that being a first mover, or one of the first movers, on this sort of reform, is unlikely to lead to the most efficient, long lasting outcome.

(b) *Differences to the Dodd Frank "swap" definition*. Beyond futures and options on futures, there are other products that are not reported under Dodd Frank that would be required to be reported under the Australian regime. In relation to these products we note merely that they will require extra work, and that waivers or concessions may be warranted to permit an earlier achievable start date for the overall regime. Products in this category include certain physical derivatives and "security-based swaps".

(c) *Consumer and commercial products*. Under the Dodd Frank Act, consumer and commercial agreements are not "swaps". The Australian regime

proposes no such exclusion, and in so doing is entirely dependent on thresholds for removing an extremely onerous reporting obligation on sectors of the economy that, we believe, should not be swept up into G20 derivatives reforms. There could particularly be inadvertent capture of small FX and agricultural transactions. If ASIC feels that the impact on such participants is not adequately addressed by submissions made by them directly or on their behalf, we would be happy to consider this further with ASIC.

(d) *FX transactions*. We suggest that there might be a case for excluding (in addition to spot trades which are not captured by the derivatives definition), short-dated FX forward transactions. Given the volume of FX trades, and the fact that FX forwards arguably present few if any systemic risk concerns, an exclusion may provide a way of removing unnecessary data from the reporting obligation. Additionally it would be assist market certainty for historic rate rolls to be clearly carved out of the regime.

8 [B3Q2] ***Do you agree with the proposed definition of OTC derivative transaction?***

Discussed above.

9 [B3Q3] ***Do you agree that both centrally cleared and non-centrally cleared OTC derivative transactions should be required to be reported?***

We agree that both cleared and uncleared derivatives should be reported. Further, where a trade is cleared, or is executed through a settlement facility, we see no reason why the Australian rules should not impose reporting requirements on an Australian licensed clearing or settlement facility. We think that doing so could generate efficiencies and be consistent with overseas mandates. We would be happy to discuss this further with ASIC.

10 [B3Q4] ***What is the likely impact of our proposals? (Please see page 4 for the information required.)*** Please see response to B3Q1.

11 [B4Q1] ***Do you agree with the proposed timing of reporting?***

Yes. We think that T+1 reporting represents a global "best practice" standard. Reporting in tight timeframes we view as associated with increased operational risk, and impaired data quality (with resultant requirements for error reporting). In the interests of certainty, we recommend that ASIC stipulate an actual time cut off rather than "end of next business day". For example, a time set by reference to AEDT.

12 **[B4Q2]** ***Should a shorter reporting deadline be set for those reporting entities that are subject to a shorter deadline for reporting to a trade repository under an overseas reporting obligation, or for particular types of reportable transaction (e.g. modifications or cancellations)?***

No. We see no basis in terms of regulatory benefit, or fairness to participants, in creating differential obligations.

13 **[B4Q3]** ***Do you think a longer deadline is needed for reportable transactions executed outside Australia?***

There could be a case for distinguishing between developed and emerging markets. A longer timeframe may be desirable for reporting trades booked in offshore branches and subsidiaries in emerging markets. Due to the nature of financial markets in these jurisdictions, it is not practical to report through trade repositories at this time. We therefore recommend the timeframe be T+2 (in the relevant time zone) as reporting to ASIC will be based on data in the parent ADI's data warehouse (information for branches is available in such a data warehouse on T+1). Feeds into the data warehouse for offshore subsidiaries will need to be built from a zero base.

14 **[B4Q4]** ***What is the likely impact of our proposals? (Please see page 4 for the information required.)***

None, other than the observation that any uncertainty in relation to where "T+1" is determined will have an adverse impact (axiomatically, uncertainty is not in any participant's interests).

Part C: Reporting to overseas trade repositories (overseas reporting)

15 [C1Q1] ***Do you consider an alternative reporting regime would assist in allowing reporting entities to meet their reporting obligation?***

We consider the alternative reporting regime (ARR) a commendable goal for ASIC to pursue in relation to various foreign states. International approaches to international commitments assist greatly. However, in too many instances, such harmonisation has not occurred. To take just one example, there is not any supra-national arrangement that avoids the consequence that an Australian bank can be potentially subject to prosecution, or regulator or counterparty action in a G20 member state by transaction reporting (in accordance with the G20 commitment) to a regulator in another G20 member state.

In terms of the ARR, we see this as unlikely to ameliorate the significant extra-territorial impact of imposition of Australian reporting obligations on foreign entities.

Take for example a corporate entity (Company F) in a foreign jurisdiction (Jurisdiction F) owned by an Australian super fund or ADI. Barriers to ARR utilisation that Company F will need to overcome to benefit from reporting to a local repository (Repository F) include:

(i) A reporting regime in Jurisdiction F has to exist.

(ii) Data sharing permits ASIC to have details of Company F's trades. An MoU between ASIC and Regulator F, or ASIC supervision of Repository F will be necessary.

(iii) Appropriate cooperation arrangements are in place between ASIC and the alternative repository's regulator in Jurisdiction F (Regulator F).

(iv) The reporting regime in Jurisdiction F is determined by ASIC to be substantially equivalent to the ASIC regime.

(v) ASIC must be satisfied with the regulations that Repository F is subject to and the way that Regulator F monitors and enforces them.

(vi) The relevant facts above are gazetted / published or somehow made known to Company F.

(vii) To avoid wasted effort, the above all needs to have happened at a point before Company F has commenced preparations for ASIC reporting – which preparations might prudently commence some months before its reporting obligation actually commences. We would note that compliance costs of reporting are weighted heavily towards preparation for reporting, and not towards "business-as-usual" post-start-date reporting.

As well as barriers to use of ARR being high, we are unsure how it would work practically in certain situations. For example:

(a) Say that, roughly, half of the trades between US Bank, Sydney branch and other swap dealers are reported to the CFTC by US Bank, and the other half by the swap dealer counterparty it has traded with. Can US Bank utilise ARR in relation to all its Sydney branch trades, or just those it has itself reported to the CFTC?

(b) Along similar lines, can US Bank utilising ARR avoid an obligation to report its US futures trades to ASIC, on the basis that it is complying with a regime that has been assessed as equivalent, despite such regime not requiring the reporting of futures?

16 **[C1Q2]** ***Do you agree with the scope of entities that should be able to access alternative reporting, or do you consider it should be broader or narrower? (In responding to this question, please include any cost–benefit analysis of your suggested approach.)***

Our view is that a transaction that an Australian entity is required to report to the CFTC, for example, should also be eligible to utilise the ARR. Each member of our Group currently reports trades with US persons to the CFTC. If a trade that 'Aussie Bank' does with 'US Bank, Sydney branch', is assessed suitable for ARR utilisation in relation to US Bank Sydney branch, on the basis that US Bank Sydney branch reports to the CFTC, it is not clear why Aussie Bank is not afforded the same concession.

17 **[C1Q3]** ***What is the likely impact of our proposals? (Please see page 4 for the information required.)***

Covered in responses above.

18 **[C2Q1]** ***Do you agree with the criteria we are proposing be used to determine that a trade repository can be used for reporting under an alternative reporting framework?***

As noted in response to C1Q1, the only point we would note is that the criteria seem unlikely to be satisfied easily or quickly, and this reduces the benefit of the relief.

19 **[C2Q2]** ***What is the likely impact of our proposals? (Please see page 4 for the information required.)***

Covered in response to Part C questions above.

Part D: Information to be reported to trade repositories

20 **[D1Q1]** ***Do you have any comments on the proposed data fields in Part S2.1 of Schedule 2 that will need to be reported to trade repositories? Are there any data fields that it will be particularly burdensome to report?***

Our Group had been hoping that fields required to be reported would be those common to foreign regimes (an intersection of the sets), and not include fields additional to foreign regimes. Particularly given that Dodd Frank reporting is the only reporting regime operating besides the Japanese regime, in assessing how quickly and efficiently we are able to master Australian transaction reporting, our focus has been on the differences between the Dodd Frank regime and the proposed Australian regime.

The view of our Group is that there would be a lot to be gained by both participants and Australian agencies if the Australian regime is commenced with the reporting of just Dodd Frank fields. If anything additional is required, this can be added later. To do this would:

- permit a faster and more efficient start to the regime;
- enable the interim regime to be fitted with the final regime and permit a smooth transition to ongoing reporting;
- permit teething problems with additional fields (e.g. collateral fields under EMIR) to be resolved in other regimes before they are imported into the Australian regime;
- align with statements Australian regulators have consistently made previously about intending to harmonise Australia's implementation of reforms with international ones.

In relation to the speed and efficiency with which the Australian reporting regime can commence, we would note that what can be put in place will be very much constrained by what existing repository providers (e.g. DTCC) are capable of achieving within the relevant time periods. The limited capacity of such organisations to support Australian reporting, given other regimes to which they have to allocate resources, should not be underestimated, and we would encourage ASIC to discuss frankly with DTCC what it is capable of delivering and by what time. In discussions between our Group and the DTCC, DTCC has indicated that its strategy is to support development of FpML message formats for Dodd Frank and also EMIR. DTCC has suggested that the optimal approach for Australian reporting in the short to medium term would be to not extend or vary the message formats from what Dodd Frank prescribes, and that variation or extension beyond EMIR would be certainly inadvisable. Alignment of fields with Dodd Frank would assist tremendously with implementation of the Australian regime.

In relation specifically to unique product identifier (UPI), we would like ASIC to endorse the UPI system used in global reporting, which has been created by ISDA. Similar comments can be made in relation to LEI / CICI and UTI. Consistency with international models is critical for certainty and efficiency.

21 **[D1Q2]** ***What is the likely impact of our proposals? (Please see page 4 for information required.)***

The requirement for reporting of fields that are additional to ones being used in existing, currently-operating regimes will be associated with marked increases in demands for resources and time required to get to the start of reporting. In particular, some of our Group would be unable to complete the necessary technological build by July and would therefore not be in a position to opt-in where doing so would be based on opting-in to uniquely Australian reporting regime requirements. We would ask ASIC to consider with participants and third party providers like DTCC how disproportionately the addition of such fields delay achievable start-dates and increase required compliance efforts.

22 **[D2Q1]** ***Do you agree with the data formats we are proposing to specify, and agree that the other data formats should not be specified in the derivative transaction rules (reporting)?***

Please see above responses.

In addition, we also ask that ASIC ensure that reporting entities have the option to report data relating to the amendment, termination or assignment of a derivative transaction via either life cycle or snapshot reports.

23 **[D2Q2]** ***What is the likely impact of our proposals? (Please see page 4 for the information required.)***

Please see above responses.

24 **[D3Q1]** ***Do you agree with the mechanism by which we are proposing to obtain information about mark-to-market valuations and collateral?***

We have some significant reservations about collateral reporting, for a variety of reasons. Not the least of these is that collateral reporting, we understand, is causing major problems under the EU reporting regime. As noted above, our Group suggests that the Australian regime is commenced with just Dodd Frank fields being reportable, and expanded, if required, following the establishment of the regime.

25 **[D3Q2]** ***What is the likely impact of our proposals? (Please see page 4 for the information required.)***

Requiring the reporting of fields that are required in EMIR, and giving rise to problems there, essentially imports such problems into Australia. The hope would be that solutions to such problems, when and to the extent that they emerge in Europe, will also be able to be brought into Australia. The Group suggests however that reliance on this is risky.

Part E: Implementation of the reporting obligation

26 **[E1Q1]** ***Do you have any comments on the proposed timetable for the implementation of the reporting obligation for different categories of reporting entity?***

We would make two points here:

(a) *Appropriateness of 31 December*. This date is inappropriate, as it falls within the time period when system freezes are typical and staff members are on leave for the December holiday period. Additionally, each departure from the CFTC regime will push out the earliest possible date by which members of our Group, and third parties such as middleware providers and repositories, are able to comply with Australian reporting obligations. We encourage ASIC to set 28 February 2014 as the commencement date for the phase 1 reporting obligations.

(b) *Industry resource constraints*. We encourage ASIC to continue to discuss with potential repositories, middleware providers and other offshore regulators, how they each view compliance by industry with ASIC timelines, when there are likely to be concurrent, or near concurrent, implementation requirements for foreign regimes. Members of our Group are still devoting significant project resources (well after the relevant compliance dates) to the complexities and challenges of Dodd Frank reporting. We also face challenges in managing resources required to develop reporting solutions to meet foreign requirements, including those under EMIR, in Hong Kong and Singapore. Having these regimes not appropriately spaced or scheduled will expose internationally active institutions to some compliance and possibly operational risk. We would encourage ASIC to engage with foreign regulators in relation to the concerns that internationally active participants have about scheduling.

27 **[E1Q2]** ***Do you believe the interim reporting phase will be helpful to your entity, and are you likely to opt in to this phase?***

We think the interim reporting phase could be helpful, in relation to Australian confidentiality and privacy law, if the CFTC does not grant to Australian swap dealers:

(a) substituted compliance for CFTC reporting, before 12 July 2013 when its current exemptive order expires; or

(b) an extension of the existing exemptive relief until such time as it has either assessed Australia's reporting regime or Australia's reporting regime has commenced.

However, interim reporting would not be a complete solution to problems that we have with US reporting. This is because Australian reporting (both interim and final) does not yet address privacy and confidentiality constraints that arise under certain foreign laws.

As our Group has previously submitted to Treasury in early 2013, we strongly encourage the Australian authorities to take all steps they can to ensure that Australian banks will not need

to report all transactions (i.e. transactions with *all* counterparties, and not just those with *US persons*) under the CFTC's reporting regime.

Some considerations in relation to the interim regime are as follows:

(a) *Legal protection under Australian law*

We are concerned that the way the interim reporting proposal is designed could result in a contravention of Australian privacy law, by banks who freely elect to report during the interim reporting phase. We would be grateful for a clear indication from Government that an ASIC rule of this type is intended to override Australian confidentiality and privacy law. If the interim regime is not to be altered in a way which shores this up (say for example in accordance with the response to question E1Q2 (see part (e), *A proposed model for discussion with ASIC* as well as the Appendix), we would appreciate more time to consider this legal aspect.

(b) *Potential impact on Australian counterparties of those who opt in*

We are also concerned about the potential US legal impact of Australian banks reporting transactions involving Australian counterparties under the Dodd Frank Act, on those counterparties. US counterparties of swap dealers are required to obtain a "CICI" to facilitate reporting, and while we do not suggest the position is at all clear, we think there is an argument that any counterparty whose trade is reported under the Dodd Frank Act has an obligation to obtain a "CICI". We would encourage ASIC to clarify CFTC's expectations in this regard, and also obtain independent US legal advice, on any potential US legal or regulatory risk which the interim reporting regime could create for Australian counterparties of Australian banks.

(c) *Regulatory benefit in opt in regime?*

Finally, if Australia's reporting regime is ultimately assessed by the CFTC as comparable and comprehensive with the US reporting regime, we query the regulatory benefit - to either the CFTC or the Australian authorities - in having an interim period of reporting of all transactions involving Australian swap dealers under Dodd Frank requirements (i.e. from 13 July to 31 December), to be followed by reporting under a regime which requires different fields of data and, at least based on ASIC's proposal, two-sided as opposed to one-sided reporting. We are concerned that in that scenario the proposal will not result in any real mitigation of systemic risk, given that it seems to us that it is likely to be more complicated for regulators to effectively evaluate time series data involving information reported under two regimes which appear to have significant differences.

(d) *Inefficiency and undue cost in preparing counterparty data twice*

One of our primary objectives in making submissions to Treasury and ASIC on the desirability of obtaining substituted compliance was to avoid a situation where we would need to set up all our systems and/or counterparty data to facilitate reporting

first under Dodd Frank, and subsequently potentially incurring the additional cost of making changes to that data to enable reporting under an Australian final reporting regime. We think the interim proposal could result in Australian banks incurring unnecessary costs, which could be passed on to Australian users of derivatives, associated with preparing counterparty data.

(e) *A proposed model for discussion with ASIC*

As a Group we have set out in the Appendix to this submission an outline of a reporting model that we think could achieve a set of objectives in relation to reporting. We would like to use this as the basis of a discussion with ASIC and other stakeholders (e.g. DTCC, MarkitWire) about how quickly and efficiently an Australian regime, to be adhered to by at least the Australian swap dealers in the first wave, could be put in place. A significant hope our Group has is that in constructing this regime, Australian agencies are able to facilitate a CFTC finding of "substituted compliance". Our proposed model sets out a way we think this could be possible, and in a short time frame. We believe that having an Australian regime which is assessed as achieving substituted compliance is more likely to succeed than removing barriers to full compliance by Australian swap dealers with the Dodd Frank reporting regime.

28 **[E1Q3]** ***In the event your entity is considering opting in to the interim reporting phase, do you support the approach of applying a reporting obligation to these entities, or do you consider more legal certainty would be provided through a broad reporting obligation combined with a class order exemption?***

Given that, as noted above, ASIC does not have an intention of facilitating substituted compliance through an interim regime, we assume that the reference to "more legal certainty" relates to Australian privacy concerns only, and not to "more legal certainty" in relation to substituted compliance. As also noted above, we would appreciate ASIC reconsidering this intention, and strongly advocate substituted compliance. (As noted above, Australian counterparties of Australian swap dealers may also benefit from this outcome, if it removes the risk of any Dodd Frank requirements being imposed on them, directly or indirectly). We repeat that obtaining substituted compliance is a critical focus of the members of our Group, and in that regard, we would appreciate a discussion about how the prospects of a positive substituted compliance determination could be improved through means such a "broad reporting obligation combined with a class order exemption".

In terms of legal certainty in relation to Australian privacy concerns, any method of shoring up legal certainty could only assist.

29 **[E1Q4]** ***Do you agree with the proposed phased implementation by asset class?***

Yes. We also note that there are some products within some asset classes where further relief may be necessary to ensure that participants, using reasonable endeavours to comply

with obligations, are not able to report such products by the relevant time. Reporting problems could be caused by, for example:

(a) interpretative uncertainty about whether or not a particular product is a derivative or not, or whether it constitutes one or several reportable "derivatives"; or

(b) participants not having the ability operationally to report trades, where due to the omission or act of third parties (e.g. lack of needed support by repositories or middleware providers).

It may be necessary for us to explain in detail to ASIC how different products are practically reported, in the context of possible requests by industry for extensions of time. One particularly relevant practical issue which significantly impacts the ability to report a product is whether or not it is supported by FpML.[5]

Additionally, there may be a need to phase-in the reporting of fields, in addition to phasing-in in relation to asset classes. For example, if collateral reporting is to be retained, there would be a strong case to support this being phased-in later, so as to benefit from experiences learned from the EMIR implementation. We note that in the European regime, collateral reporting is being delayed by six months from each asset class compliance date.

30 **[E2Q1]** ***Do you agree with the proposed requirements for derivative position information?***

The members of the Group would make the following comments in relation to backloading of outstanding transactions:

(a) *Relevance of s901A(8)*. We are unsure of how this requirement is consistent with this section of the Corporations Act.

(b) *Extensive obligations*. The volume of trades that each member of our Group conducts with US persons is very small proportion of total derivatives activity. Backloading of transactions with US persons, in compliance with Dodd Frank obligations, was a significant task, and due to factors outside of our control, we did not view it as having gone very smoothly. Only trades in our swap dealer entities have so far been required to be backloaded (i.e. excluding so far other US group companies and certainly not including trades of foreign subsidiaries, unless they are themselves registered swap dealers). The point we would like to make here is that backloading of all trades that are within scope under the ASIC framework will be a significant undertaking, and we would appreciate discussing with you some of the technical and resource challenges that this is associated with.

[5] See for background: http://www.fpml.org/about/faq.html

31 **[E2Q2]** ***Are there particular challenges in reporting derivative position information as at the date the reporting obligation takes effect for a particular counterparty in a particular asset class?***

We would note that retention of the required information for all historic deals is not always guaranteed. Information required should be limited to information "in our possession".

32 **[E2Q3]** ***What is the likely impact of our proposals? (Please see page 4 for the information required.)***

Please see above response to E2Q1.

Additional point: record-keeping

One point we would like to raise relates to record-keeping, and this did not correspond to any particular question. The proposed record keeping rules would require that records are kept for five years after the date the swap was originated or last amended. This requirement does not seem consistent with any other Australian record keeping requirements that we are aware of, and consequently would require new compliance processes.

Appendix: Outline of Reporting Model

A ***Dodd Frank initial basis***.

We believe it is very likely:

(a) to be significantly faster for Australian swap dealers to commence Australian reporting;

(b) to be significantly faster for entities supporting Australian reporting (e.g. repositories like DTCC and middleware providers like MarkitWire) to begin facilitating Australian reporting;

(c) that data reported to ASIC will be able to be more easily processed and analysed; and

(d) that the start of Australian reporting will be more likely to have been achieved more efficiently, in terms of costs to Australian regulators, participants as well as entities supporting reporting (i.e. Australian industry generally),

if the Dodd Frank regime, including reportable fields, are used as the basis for the Australian reporting regime, as opposed to any other regime – particularly one that is not yet operational.

Additionally, on balance we think it will be easier for the CFTC to make a determination that the Australian regime is comparable and comprehensive with the Dodd Frank regime if the Australian regime adopts similar design principles to those used in Dodd Frank.

B Elements of our proposed model*:*

Single-sided reporting	This is the most obvious of the CFTC regime's features. Its operation in the US was not problem-free. However, it now functions relatively smoothly, and we understand that there are some rather intractable problems with double-sided reporting under the European and Hong Kong regimes that are currently being worked through.
Reporting party hierarchy	The US-style reporting-party hierarchy should be utilised – adapted as needed to Australian concepts (i.e. counterparty types). See our response above to B1Q3.
Utilisation of industry "tie-breaker conventions"	See also our response to B1Q3.

Product scope	At least initially, the product scope is restricted as suggested in 1(f) in the response to question B3Q1 to more conventional OTC products. Non-OTC products (including for example foreign listed products) are excluded. Note that it would be open to ASIC to make subsequent changes, after it has given appropriate consideration to the implications, costs and benefits.
*30 September / 1 October start date**	If the CFTC indicates that it will not extend exemptive relief to Australian swap dealers until 31 December, but will be prepared to grant substituted compliance at that time based on it accepting that the Australian regime is comparable and comprehensive, we would encourage ASIC to explore with the CFTC the possibility of introducing part of the Australian regime earlier than 31 December. This would obviously also require discussion with DTCC. Please see below some further considerations in relation to such a start date.
T+1 reporting	We mention this element merely to note that we are admittedly "cherry-picking" this element from the EMIR requirements that the ASIC rule seems to closely correspond to. However, our justification for doing this is that the US is quite alone on requiring such swift reporting of trade data, and there are sound reasons why T+1 reporting is better than more instantaneous reporting (see our response to B4Q1 above).
Entity capture of interim regime	This interim regime could be imposed on Australian Swap Dealers and Australian branches of other Swap Dealers - either by reference to the term or simply by naming the entities in a schedule to the rule.
Concessions in relation to foreign confidentiality / privacy concerns	Please see paragraph (d) in our cover letter.

Implementation concessions	Depending on the scope of the initial reporting requirements and what DTCC and the relevant banks are able to achieve in terms of effective implementation by the commencement date, we would encourage ASIC to make use of the waiver powers it has in respect of its rule making. This would be similar to the approach taken by the CFTC, in imposing a reporting regime, but then stating a no action position where affected entities have a practical or technical implementation challenge they are working to rectify.
Reportable fields	To begin with, reportable fields should align with Dodd Frank fields. Some of the more challenging features of the EMIR regime which appear in the draft rules, such as collateral information, could in our view be introduced at a later date. This date would ideally be a period of time (e.g. six months) after implementation challenges have been overcome and lessons learnt from Europe. This would not jeopardise a finding of substituted compliance by the CFTC. We do not believe that waiting to see how foreign jurisdictions can overcome challenges unnecessarily slows down the implementation in Australia.

* In relation to the start date, and the seemingly arbitrary date selected here, we make the following points:

- Given that apart from Japan (and the US itself), no other major jurisdiction is actually reporting yet, and the earliest mandatory start date for any of the EU, Canada, HK and Singapore is toward the end of Q3 2013, we think a commencement date for an interim Australian reporting regime in early Q4 2013 is reasonable, and there would hopefully be good grounds for arguing this with the CFTC.

- We do wonder whether a start date of 1 October or 31 December should objectively make any difference to the CFTC's preparedness to grant substituted compliance, as it will make little practical difference from a systemic risk perspective. If it would not, a later date would be preferable. If a few months is considered important to them we believe the option of a 30 September / 1 October date should be explored.

- Again we note that such an early date assumes the mode of reporting would be Dodd Frank reporting. EMIR-style reporting might not even be operational in Europe by this date (let alone July).

- Again we note that banks (and certainly other participants in the derivatives markets in Australia) will almost certainly find any date in or near 2013 very challenging, and we again request that ASIC inform itself of practical difficulties being faced by participants and not set unrealistic dates. Also, that it consider class order exemptions based on ‘good faith’ efforts where ASIC considers this reasonable.