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Dear Sir/Madam,

Submission to the Australian Securities and Investments Commission ("ASIC") relating to OTC derivatives trade reporting

1 Introduction

1.1 We are pleased to be given the opportunity to make submissions to ASIC in relation to:

- Consultation Paper 205: Derivative transaction reporting (**Consultation Paper**); and
- the draft ASIC Derivative Transaction Rules (Reporting) 2013 (**Draft TR Rules**) attached to that Consultation Paper.

1.2 By way of background, lawyers at Norton Rose Australia have extensive experience advising financial institutions, asset managers and corporates regarding the application of Australian laws and regulations (such as Australian licensing requirements) to their activities in the OTC derivatives market and the legal documentation for both OTC and exchange-traded derivatives.

1.3 Our colleagues at Norton Rose LLP in Europe have also been involved in helping clients to understand and, in some places, shape, the Regulation on OTC Derivative Transactions, Central Counterparties and Trade Repositories (**EMIR**), including by assisting clients in preparing submissions on particular aspects of the draft legislation. Please refer to the "OTC Oracle" microsite on the Norton Rose website (which can be found at <http://www.nortonrose.com/knowledge/technical-resources/oracle/>) for further information and technical resources developed by the Norton Rose Group in relation to its involvement in OTC derivatives regulation reform in other jurisdictions.

1.4 A reference to a "Rule" in this submission is a reference to a rule in the Draft TR Rules.

1.5 We make the following submissions for your consideration.

2 Definitions

2.1 A foreign bank that has been authorised as an authorised deposit-taking institution seems to be captured by the definition of "Australian ADI", as well as the definition of "Foreign ADI". The

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distinction is relevant as to when a foreign bank would be required to report under Phase 1, Phase 2 or Phase 3 (as it seems that a Foreign ADI would not be required to report until Phase 3). Is this outcome intended?, We submit that the definition of Australian ADI should be amended to read as follows:

“Australian ADI means an Australian Entity that is an Australian ADI within the meaning of section 9 of the Act.”

3 **Reporting Entities and Reportable Transactions**

- 3.1 Under Rule 1.2.5, a Reportable Transaction in relation to a Reporting Entity includes an assignment by a party of some or all of the party’s rights and obligations under an OTC Derivative. A Reporting Entity must then report that assignment in accordance with Rule 2.2.1(c).
- 3.2 We note that whilst many standardised derivatives documents may prohibit a party from assigning its rights under an OTC Derivative, in some circumstances, a party may assign some or all of its rights under an OTC Derivative without the knowledge of the Reporting Entity. In this circumstance, the Reporting Entity will potentially be placed in breach of Rule 2.2.1(c) by the actions of its counterparties (which may or may not be in contravention of the Draft TR Rules). We submit that the following options should be considered:
- an assignment of an OTC Derivative should only be a Reportable Transaction if the relevant Reporting Entity has actual knowledge of the assignment;
 - the obligation to report information in relation to an assignment of a Reportable Transaction should only arise once the relevant Reporting Entity has actual knowledge of the assignment.
- 3.3 We query whether the reference to “a Derivative Transaction” in Rule 1.2.5(b)(iii) should be replaced with reference to “an OTC Derivative”, so that it is clear that only Derivative Transactions in a Prescribed Class are captured by this provision. In other words, we assume that the intention of this provision is **not** to extend the meaning of Reportable Transaction for a responsible entity of a managed investment scheme or trustee of a trust to include all derivatives entered into by it.
- 3.4 Certain foreign entities are Reporting Entities under Rule 1.2.5. If such a foreign entity is not an AFS Licensee, an Exempt Foreign Licensee or a CS Facility Licensee and it has not “opted in”, it appears that it will only be required to commence reporting in Phase 3 (ie. from 31 December 2014). We query whether this is ASIC’s intention as it would appear to leave foreign counterparties that do not hold such a licence in a more favourable position as to timing of reporting obligations.

4 **Use of agents**

- 4.1 We welcome the ability for Reporting Entities to satisfy their reporting obligations under the Draft TR Rules through the use of agents. In light of this, we submit the following:
- Consideration should be given to excusing a Reporting Entity from liability for breach of Rules 2.2.1(1) and 2.2.2(1) if it can establish to the satisfaction of ASIC that it appointed an agent to report the information on its behalf, it was not negligent in the selection of that agent and that it did not have any reason to believe that the agent would not (or would not be in a position to) report the information as required by the Draft TR Rules.
 - Rule 2.2.6 should acknowledge that a Reporting Entity shall be taken to have satisfied its obligation to take all reasonable steps to ensure that information reported is complete and accurate if:
 1. it has appointed an agent to report on its behalf and it can establish to the satisfaction of ASIC that it has provided the agent with the relevant information; and
 2. it did not have any reason to believe that the agent would not report the information completely and accurately as required by the Draft TR Rules.

- Rule 2.3.1 should acknowledge that the record keeping obligations of a Reporting Entity may be satisfied through the use of an agent.


5 Transaction Reporting Requirements – Schedule 1, Table 1


- 5.1 Consideration should be given to clarifying how the \$50 billion test will be calculated. For example, will derivative transactions entered into by a subsidiary of an Australian ADI be included in determining whether an Australian ADI falls within Phase 1?

We would be pleased to discuss further with you any aspects of our above comments. Please do not hesitate to contact Vittorio Casamento , Petar Kuessner or Tessa Hoser

Yours faithfully



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