STATE STREET.

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Via electronic submission to: OTCD@asic.gov.au

Response to Consultation Paper 221: OTC derivatives reform: Proposed amendments to ASIC Derivatives Transaction Rules (Reporting) 2013

Dear Sir/Madam:

State Street Corporation ("State Street") appreciates the opportunity to comment on the proposed amendments to the Derivative Transaction Rules (Reporting) 2013 ("the Rules") set out in *Consultation Paper 221: OTC derivatives reform: Proposed amendments to ASIC Derivative Transaction Rules (Reporting) 2013* ("CP 221").

State Street Bank and Trust Company ("SSBT") is a foreign company (incorporated in the Commonwealth of Massachusetts, United States of America) that is registered under Division 2 of Part 5B.2 of the Corporations Act 2001 (Cth) as a foreign company in Australia (ARBN 062 819 630) and authorised to conduct banking business as a foreign ADI under the Banking Act 1959 (Cth). SSBT is wholly owned by State Street, which is headquartered in Boston, Massachusetts, with branches and subsidiaries throughout the Asia-Pacific (APAC) region, State Street specializes in providing institutional investors with investment servicing, investment management and investment research and trading. With USD 27.47 trillion in assets under custody administration and USD 2.38 trillion in assets under management, State Street operates in 29 countries and in more than 100 markets worldwide.[1] Since our entry into the APAC region more than 25 years ago, today we have more than 3,900 employees in ten jurisdictions in Australia, Brunei, China, Hong Kong, India, Japan, Malaysia, Singapore, South Korea, and Taiwan, servicing our clients throughout the region.

[1] As of March 31, 2014.

SSBT is a "Reporting Entity" under the Rules (as a foreign ADI that has a branch located in this jurisdiction). Based on the total gross notional outstanding positions held by SSBT as of June 30, 2014, SSBT is a Phase 3A Reporting Entity. As a Phase 3A Reporting Entity and because SSBT currently enters into only one class of derivative transactions (foreign exchange contracts), the impact on SSBT of the proposed amendments to the Rules is limited. Therefore, in this letter, SSBT comments only on those parts of CP 221 that affect it – the proposed amendments on alternative and delegated reporting. Also, SSBT recommends that ASIC further amend the Rules to provide an exception from the obligation to report transaction data for a particular subset of foreign exchange derivatives that are functionally equivalent to "spot FX contracts" (as used in the heading to regulation 7.1.04(1)(a) of the Corporations Regulations 2001 [Cth]).

Please find below State Street's comments in response to specific questions raised in the Paper.

B2: We propose to amend Rule 2.2.1(3) to allow foreign reporting entities that use alternative reporting under that rule to report to prescribed trade repositories in jurisdictions other than the jurisdiction in which the foreign reporting entity is incorporated or formed. (pg. 15)

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

We agree with the proposed amendment to Rule 2.2.1(3).

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

No, this proposal alone will not result in a reduction of costs because of the compliance costs associated with the separate "tagging" requirement (see detailed response below).

B3: We propose to amend Rule 2.2.1(3) to require foreign reporting entities that use alternative reporting under that rule to designate (or 'tag') the transactions as being reported under the derivative transaction rules (reporting). (pg. 16)

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

We do not agree with this proposal due to the practical anticipated difficulties in trying to implement "tagging". SSBT is registered as a swap dealer with the U.S. Commodity Futures Trading Commission (CFTC) and is currently reporting all OTC derivative transactions on a global basis to the CFTC. We understand that ASIC regards the CFTC's reporting rules as "substantially equivalent" to Australia's.[2] However, for the amendments proposed by ASIC, SSBT (and any entity in a similar position) already fulfills these reporting obligations under the existing rule 2.2.1(3). Therefore, we recommend leaving rule 2.2.1(3) unamended.

[2] RG 251.57

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

We believe the contract law principle of "entered into" is too broad and at a practical level, we are unsure how to access information which will allow us to conclusively determine whether a derivative transaction is "entered into in Australia". We understand the intention of contemplating an alternative reporting approach under the Rules is to reduce duplicative obligations on market participants (especially those that operate globally like SSBT), and avoid the undue administrative burden from complying with various overlapping reporting regimes. If "entered into in Australia" remains as a nexus requirement for "tagging", the intention to reduce duplicative obligations and undue administrative burden will be negated.

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 reported under alternative reporting arrangements?

We believe if a participant is already reporting derivative transaction data under an alternative regime that satisfies the "substantially equivalent" test as determined by ASIC, then there should be no obligation on the participant to "tag" trades that have been "entered into in Australia". As an workable alterative, given the CFTC fields will enable SSBT to identify all derivative transactions to which SSBT Sydney Branch is the counterparty, we have no issue 'tagging' those derivative transactions, which are booked to the Sydney Branch's profit or loss account. We also note that the feasibility of the proposed tagging arrangement will be dependent on the infrastructure provided by relevant trade repositories.

D1: We propose to amend Rules 2.2.6 and 2.2.7 in relation to delegated reporting to provide a 'safe harbour' from enforcement action if certain conditions are met – that is, a reporting entity is not responsible for a breach of the relevant rules for a reportable transaction or reportable position, provided that the reporting entity delegates the reporting obligation to another entity (the "delegate")… (pg. 24)

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

We do not agree with ASIC's proposed amendments to the Rules concerning delegated reporting. While ASIC's proposed amendments will ease the regulatory burden on the market's demand side for delegated reporting, they will increase the regulatory burden on the supply side of the market. This will likely deter potential suppliers from offering this service in Australia. As a condition for attracting the benefit of the "safe harbor", the proposed amendments require (in part) the reporting delegate to take all *reasonable steps to ensure* that information and any changes to information reported on behalf of the reporting entity is complete, accurate and up-to-date pursuant to a written contract. The absence of further regulatory guidance on what "take all reasonable steps to ensure" means as required by the Rules will create regulatory barriers to entry for potential suppliers in this market. It may result in the delegating party seeking to assign all of their responsibility to the service provider while also seeking extensive indemnification.

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

In assessing the likely regulatory impact of the Rules, ASIC noted that the availability of delegated reporting[3] under the Rules may cause a number of suppliers to emerge to provide this service to reporting entities on a competitive basis, including price, which may lead to decreased compliance costs for reporting entities that are able to discharge their reporting obligations through delegation.[4] However, the increased regulatory burden imposed by the uncertain standard of responsibility that would shift to delegates under the proposed amendments is likely to exacerbate the existing reluctance of potential suppliers to provide delegated reporting.

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

We support the Australian Financial Markets Association's July 30, 2014 letter to the Parliament, recommending a "singled-sided" reporting regime. However, if a "singled-sided" reporting regime is not feasible, we suggest only the *performance* of the reporting obligation is assigned to the reporting delegate with regulatory responsibility for the completeness and accuracy of the data to remain with the reporting entity. This will be consistent with other APAC jurisdictions (e.g. Singapore), which allow similar delegated reporting arrangements.

Given that the parties required to undertake reporting are all likely institutional entities, we suggest leaving market participants to allocate liability for performance of delegated reporting services to commercial negotiations and contracts between relevant parties. Service providers should be allowed to differentiate their offerings from those of other providers, including through different liability standards.

Proposed Exceptions from Reporting Certain FX Derivative Transactions

We understand ASIC is engaging various industry groups on the issue of whether "securities conversion transactions" should be reportable under the Rules.[5] We believe this is an important issue and recommend amending the Rules to accommodate concerns shared by a number of industry participants including SSBT. Also, our suggestion aligns Australia's position with emerging international consensus on this topic. In this regard, we recommend introducing an exception to the obligation to report transaction data for the subset of foreign exchange derivatives.

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[3] Referred to as "agency reporting" in Regulation Impact Statement: G20 OTC derivatives transaction reporting regime (July 2013).

[4] Ibid, paragraphs 74 – 75.

[5] That is, an FX contract entered into solely to effect settlement of a securities trade that falls outside the existing definition of "spot" definition, due to a need to align the FX transaction with the settlement period for the relevant security.

Foreign exchange derivatives (**FX contracts**) that fall outside the prescribed period in regulation 7.1.04(1)(a) of the *Corporations Regulations 2001* (Cth) for a "spot FX contract"[6] (being not less than three business days after the day on which the arrangement is entered into) provided that the relevant FX contract is executed solely:

(a) To effect settlement of the purchase or sale of a security where the settlement period for the underlying security (and therefore the delivery date for the currency the subject of the corresponding FX contract) is equal to or greater than 3 business days (T+ 2) provided that such FX contract settles no later than the "accepted market settlement period" of the transferable security to which the FX contract corresponds (Type 1 FX contract)

(b) As a consequence of a 'corporate action', initial public offering, tender offer, etc.; in other words, the need to convert currency arises solely because of owning securities. Such actions should include the receipt of dividends, distributions or coupon payments and participation in mergers, takeovers etc. (Type 2 FX contract),

The definition of "derivative" in section 761D(1)(b) of the Corporations Act 2001 (Cth) excludes spot FX contracts by reference to the settlement period (T+2) that is considered as being market standard for spot transactions in foreign currencies. This exclusion means that spot FX contracts are not reportable under the Rules. It is notable that spot FX contracts are the only kind of transactions expressly excluded from the definition of a "derivative" in the Corporations Act. It can be inferred that Parliament has determined such transactions are sufficiently distinct from those which are caught by the expansive definition of a "derivative" as to warrant special treatment. We believe the same conclusion should apply to Securities-linked FX contracts (Type 1 and Type 2 FX contracts combined).

Type 1 FX Contracts
The settlement period for transactions in securities may differ depending on factors such as jurisdiction of the issuer, the type of security and the exchange on which the security is listed (if any). For example, the "standard delivery period" for currency pairs that do not settle within a T+2 timeframe include non-EUR denominated securities where settlement cycle is T+3 and South African securities where the settlement cycle can take up to T+7. If it is accepted that FX contracts, the sole purpose of which is to effect settlement of the purchase or sale of securities, are sufficiently analogous to spot FX contracts such that there is no requirement to report, then it is important to ensure that a principle-based approach (rather than a capped time limit) is adopted to ensure all such FX transactions be excluded from the reporting requirement.

Type 2 FX Contracts
These types of FX contracts are executed solely to allow a security holder to participate in a corporate action by a foreign[7] issuer, such as the payment of dividends, distributions, coupons, consequent upon takeover or merger activity, or as a result of initial public offering or tender offer. They are not entered into and cannot be entered into, for speculative purposes in order to profit from changes in FX rates. Rather, the need to convert currency arises solely as an incident of

[6] The term used in the heading to regulation 7.1.04(1)(a) of the *Corporations Regulations 2001* (Cth).
[7] "Foreign" from the perspective of the domicile (or operating currency) of the security holder.

holding international securities and the event that precipitates the need is within the control of the issuer (rather than the holder) of the relevant security.

Overall, the effect of excluding Securities-Linked FX Contracts from reporting rules will exempt smaller, buy-side firms from reporting transactions which are not commonly viewed as derivatives. Without this exclusion, impacted participants will have to undertake reporting which will introduce additional compliance costs for such affected participants.

Thank you again for the opportunity to comment on the important matter raised within this consultation paper. If you have any questions about this letter, please feel free to me at

Sincerely,

Steven X. Chan
Vice President and Head of Regulatory,
Industry & Government Affairs, Asia Pacific