

28 March 2024

Mr Craig McBurnie  
Senior Analyst, Market Infrastructure  
Australian Securities and Investments Commission GPO Box 9827  
Melbourne, VIC 3001  
By email: [otcd@asic.gov.au](mailto:otcd@asic.gov.au)

**Re: Consultation Paper 375 Proposed changes to the ASIC Derivative Transaction Rules (Reporting): Third consultation**

Dear Craig,

The International Swaps and Derivatives Association (**ISDA**), the Australian Financial Markets Association (**AFMA**) and the Global Foreign Markets Association (**GFMA**) appreciate the opportunity to provide comments to the Australian Securities and Investments Commission (**ASIC**) on Consultation Paper 375 (**CP**).

**Section B - Excluding exchange-traded derivatives**

2. Our members generally agree with the proposal to permanently exclude exchange-traded derivatives wholly by provisions within the 2024 ASIC Rules. However, there are views that the proposed wording in rule 1.2.4(2)(b) seems complex, and we would like to offer the following suggestion for simplification:

(2) In these Rules a Derivative is not an *OTC Derivative* if:

(a)...

(b) the entry into of the arrangement that is the Derivative:

(i) takes place on an authorised financial market; and

(ii) is in accordance with the operating rules of the authorised financial market; and

(iii) the terms of the other than in relation to price, derivatives within the same series are subject to standard terms, including as to amount or size, are documented under or prescribed by the operating rules of the authorised financial market; and

~~(iv) the Derivative is made available in one or more series in accordance with the operating rules of the authorised financial market and the terms of the arrangement constituting the Derivative, including the amount or size of the Derivative specified by the operator of the authorised~~

~~financial market, are the same as for every other Derivative in the same series, with the exception of the price; and~~

(iv) is not specified in a determination made by ASIC under subrule (3) for the purposes of this paragraph.

3. Our members believe that simplifying the wording in rule 1.2.4(2)(b) would enhance clarity and ease of understanding for market participants. We believe this simplification would contribute to better comprehension and implementation of the rules.

### **Section C - Simplifying the Scope of Foreign Entity Reporting**

4. There is strong consensus amongst our members to ask ASIC to reconsider the proposed definition of “nexus derivative” and harmonise reporting scope regionally.

5. First, we would like to point out that APAC jurisdictions, namely Australia, Singapore and Hong Kong SAR, have been unique amongst global jurisdictions in scoping in “traded in” nexus derivative trades. This has added an additional burden on reporting parties in these jurisdictions over the past decade, and it is unclear if the reported “traded in” trades in these APAC jurisdictions would be comparable and aggregable with the reported trades of other global jurisdictions that do not require the “traded in” nexus reporting, which is the main aim of the rewrite exercise this time<sup>1</sup>.

6. While we would strongly advocate APAC regulators to contemplate aligning reporting scope with other global regulators, focusing solely on “booked in” trades for OTC derivatives reporting, we acknowledge that APAC regulators may have their unique reasons for imposing the additional in-scope requirements. At the very least, our members would like APAC regulators to harmonize the scope and terms of “traded in” derivative trades, thereby fostering a unified approach across the region despite the apparent divergence with other global regulators. Not only would that allow data amongst the jurisdictions that require the additional “traded in” nexus trades to be comparable and aggregable, it would also alleviate reporting and compliance burden on reporting entities given the cross-border nature of the OTC derivatives market.

7. In this regard, our members are concerned that ASIC’s proposed definition is broader than the “traded in” nexus as defined by MAS and HK regulators. In particular, there are certain proposed limbs in Para 60 that may be performed not just by a trader in Australia, but by personnel in the sales and risk desks too, as it was not specified that these are functions performed by traders but by potentially any person resident and employed by the reporting party in Australia. Specifically,

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<sup>1</sup> Financial Stability Board, “Feasibility study on approaches to aggregate OTC derivatives data”, Sep 2014.

with reference to Para 60 limbs, we would like to highlight the following functions could be performed by non-trader roles, i.e., sales and risk personnel:

- Communicating to the proposed counterparty one or more of the terms on which the Reporting Entity is willing to enter into the OTC Derivative.
- Offering to enter into the OTC Derivative with the proposed counterparty or inviting the proposed counterparty to offer to enter into the OTC Derivative with the Reporting Entity.
- Agreeing to enter into the OTC Derivative with the proposed counterparty.
- Managing the financial risk arising from the OTC derivative (*for some industry participants, this is performed by the risk team, while for some, traders*).

8. As such, ASIC’s proposed scope can be interpreted as broader than that of these other APAC jurisdictions, which do not scope in sales and risk management activities. In the spirit of harmonisation and for better comparability of data across these APAC jurisdictions, we would like to ask ASIC to consider omitting the Para 60 limbs from the list of functions under nexus derivative and keep the scope to the “traded in” nexus.

9. Removing these sales and risk management functions would largely align ASIC with the provisions and approach taken in other jurisdictions, such as Singapore and Hong Kong SAR, where the nexus focuses on the functions *traders* typically perform to determine in-scope reportable transactions as per ASIC’s reference in Para 63. We also note that there are other separate surveys such as the Bank for International Settlement triennial FX and OTC derivatives survey which collects turnover data by sales desk location<sup>2</sup>, as well as the Australian Foreign Exchange Committee’s semi-annual survey<sup>3</sup>, so ASIC could retrieve data by sales desks via these surveys.

10. Our members would like to ask ASIC to consider adopting the same definition as MAS as our members felt that MAS’ definition of the “traded in” nexus approach is specific and more clearly interpreted as it is based on derivative trades executed by a *trader* who is employed in Singapore. (see Annex A for an extract of MAS’ FAQ which clarifies this). We would also like to point out that in HKMA’s FAQ, it was explicitly mentioned that pure sales activities are not considered as “traded in” (see Annex B).

11. If ASIC were to decide to proceed with the proposed Para 60 limbs, market participants would appreciate if ASIC could confirm the intent is to scope in these functions performed by *traders*, and specifically regarding “managing the financial risk arising from the OTC Derivative”, it is not to incorporate post-trade risk management function other than that typically performed by *traders*.

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<sup>2</sup> [https://www.bis.org/statistics/triennialrep/2022survey\\_guidelineturnover.pdf](https://www.bis.org/statistics/triennialrep/2022survey_guidelineturnover.pdf)

<sup>3</sup> <https://afxc.rba.gov.au/statistics/>

12. In addition, Para 60 mentioned “performed by a person ordinarily resident or employed in this jurisdiction or acting as part of a desk, office or branch, located in this jurisdiction, of the reporting entity or *an associate of the reporting entity*”, members would appreciate if ASIC could clarify the definition of “*an associate of the reporting entity*”.

13. In addition, our members would like ASIC to contemplate a more extended implementation timeline, extending the effective/implementation date to at least 12 to 18 months following the finalization of the proposed changes. Notwithstanding the above, members also would also appreciate if ASIC could offer flexibility by allowing reporting entities to adopt the amended 'nexus derivative' scope prior to the eventual implementation date, starting as early as the go-live date of 21 October 2024, if their systems and resources permit. Industry would appreciate if changes could apply to new trades executed from the effective implementation date, and there would be no requirement to re-report legacy trades.

#### **Section D: Removing Alternative Reporting**

14. Generally, our members agree with the removal of alternative reporting in the spirit of harmonisation of rules across jurisdictions as other jurisdictions do not allow alternative reporting.

15. If ASIC were to proceed with this removal, members would appreciate if ASIC could clarify if the same amendment would also be made to the Corporations Regulations to remove the single-sided reporting exemption of reporting entities who are facing counterparties that are foreign entities and report to one or more foreign jurisdictions that are substantially equivalent to requirements under the ASIC Rules. The Corporations Regulations retain the single-sided reporting exemption under reg 7.5A.71. Under reg 7.5A.72(4)(b)(iii) of the Corporations Regulations, the requirement to designate a trade as information which has been reported in accordance with the ASIC Rules remains. We would hence like ASIC to clarify if the same amendments would also be made to the Corporations Regulations.

16. Members noted that those that are relying on alternative reporting would be impacted and would like ASIC to consider the following suggestions to allow a smoother transition for the impacted entities:

- a) Extension of implementation date: Extend the effective/implementation date to at least one year after the proposed changes are finalized.
- b) Application to new trades: Apply the proposed changes only to new trades executed from the effective implementation date of the removal.
- c) No requirement of re-reporting of legacy trades: Do not require re-reporting of trades that are already reported via existing alternative reporting.

17. The main reason for the above suggestions is resource constraint. Resources are currently fully focused on the implementation (and post-implementation) of various overlapping regulatory changes from April to Oct, and potentially with other jurisdictions such as Japan (phase 2 delta and UPI reporting), Hong Kong SAR, South Korea, and India implementing the CPMI-IOSCO technical guidances on UTI, UPI and CDE, be it partially or fully, from Q4 2024 to Q1 2025. Switching from the current alternative reporting to an entity reporting solution requires significant system enhancement, resources, and time to implement. Impacted entities envisaged substantial time and resources would need to be expended to retrieve these transaction details for re-reporting.

### **Section E – Other Matters Raised by Industry**

18. Our members support the continued exemption of security conversion transactions, the proposal for ‘reasonable belief’ and not to impose any additional obligations or effort on reporting entities to determine the purpose. This will ensure continued alignment with the derivative transaction reporting requirements of the other main regional and global jurisdictions.

19. We also agree with ASIC’s proposal to add these additional allowable values which will further harmonise ASIC’s reporting requirements with other global jurisdictions’ rules.

20. Thank you for your consideration of our members’ feedback. Should ASIC wish to discuss our response, please do not hesitate to contact the undersigned.

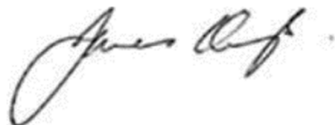
Yours sincerely,



**Xiangjing Ng**  
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## Background of the Associations

- **ISDA** has worked to make the global derivatives markets safer and more efficient since 1985. Today, ISDA has over 1,000 member institutions from 77 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers.
- **AFMA** represents the interests of over 110 participants in Australia's wholesale banking and financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. Our members are the major providers of services to Australian businesses and retail investors who use the financial markets.
- **GFMA's** Global Foreign Exchange Division (GFXD) was formed in cooperation with the Association for Financial Markets in Europe (AFME), the Securities Industry and Financial Markets Association (SIFMA) and the Asia Securities Industry and Financial Markets Association (ASIFMA). Its members comprise 23 global foreign exchange (FX) market participants<sup>4</sup>, collectively representing the majority of the FX inter-dealer market<sup>5</sup>. Both the GFXD and its members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators.

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<sup>4</sup> Bank of America, Bank of New York Mellon, Barclays, BNP Paribas, Citi, Credit Agricole, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, ING, JP Morgan, Lloyds, Mizuho, Morgan Stanley, MUFG Bank, NatWest Markets, Nomura, Northern Trust, RBC, Standard Chartered Bank, State Street, UBS and Wells Fargo.

<sup>5</sup> According to Euromoney league tables.

## **Annex A – Extract of MAS’ FAQs on the Securities and Futures (Reporting of Derivatives Contracts) Regulations 2013 on “traded in” nexus**

### **Q2.4 When is a trade considered to be traded in Singapore?**

A2.4: The “traded in Singapore” definition is set out in regulation 2 of the SF(RDC)R. Generally, a derivatives contract is considered to be traded in Singapore if a contract is executed by a trader who is employed in Singapore. Please refer to Q2.5 for more information on what constitutes a “trader”.

In the event where the firm is unable to clearly identify whether the trader is employed in Singapore, the firm will have to report contracts which are entered into by a trader from the 31<sup>st</sup> calendar day, if the trader is in Singapore for more than 30 calendar days.

In the case where a trader is seconded to Singapore, all trades that were entered into by the trader during his secondment in Singapore needs to be reported if it is clear that his place of employment is in Singapore during that period. Otherwise, trades entered into by the trader from the 31<sup>st</sup> calendar day onwards will have to be reported if the trader is in Singapore for more than 30 calendar days.

In the case where a trader is seconded out of Singapore, trades that were entered into by the trader would not need to be reported as these trades would not be deemed as “traded in Singapore”. However, if these trades are “booked in Singapore”, they would still need to be reported accordingly.

### **Q2.5 When is a person considered a trader for the purposes of the definition of “traded in Singapore”?**

A2.5: A trader is the person who conducts activities relating to the execution of trades in Singapore. Examples of such activities could include the offering of quotes, or making decisions to enter into trades. The trader should also be the person bearing responsibility for or who is able to address any queries from MAS relating to details of the trade.

Accordingly, specified persons should assess whether there are such traders executing trades in Singapore, whether electronic or otherwise.

[FAQs on the Securities and Futures \(Reporting of Derivatives Contracts\) Regulations 2013](#)

**Annex B – Extract of HK’s FAQ where pure sales activities will not be regarded as “traded in”**

**Q21. We have OTC derivative transactions that originated in Hong Kong but were booked in an affiliate in London. It is the staff in Hong Kong that contacts the clients, giving them price quotations and accepting their orders. Are these “conducted in Hong Kong” transactions that are required to be reported?**

A key characteristic of a “conducted in Hong Kong” transaction is that a Hong Kong trader is involved in making the decision of entering into the transaction. A person who only undertakes pure sales activities (i.e. whose role is only that of a salesman negotiating between a client and a trader) will not be regarded as a trader, even if the person is able to adjust the price offered to the client to achieve a desired sales credit.

If the Hong Kong staff only negotiate the transactions between clients and traders, and the traders responsible for the decision to enter into the transactions are not Hong Kong traders, the transactions will not be regarded as “conducted in Hong Kong” transactions. If the traders that the Hong Kong staff negotiate with are Hong Kong traders, or if the Hong Kong staff that are client facing are also the traders, or act or perform the functions of traders even though they are employed as sales persons, the transactions will be regarded as “conducted in Hong Kong” and will have to be reported.

[Frequently Asked Questions on the mandatory reporting regime](#)