

## **EXPLANATORY GUIDE**

### **OTC derivatives - Central clearing**

#### *Background*

Extensive consultation occurred in 2014 on a proposed central clearing mandate for over-the-counter (OTC) interest rate derivatives (IRD) denominated in Australian dollars and four global currencies (US dollars, euro, Japanese yen and British pounds), limited to trades between internationally active dealers.

In December 2014 the Government announced that it would proceed with implementing a central clearing mandate, largely as proposed during the consultation process.

Drafts of a Ministerial determination (the Determination) and of a set of amendments to the *Corporations Regulations 2001* (the Corporations Regulations) implementing the proposed mandate have been developed and are being provided for final public consultation.

The Australian Securities and Investments Commission (ASIC) is at the same time developing its central clearing derivative transaction rules (DTRs) which will set out a range of detailed matters relating to the mandate, including the precise scope of products covered and the timeline leading to the mandate coming into effect. ASIC will separately release its draft central clearing DTRs for public consultation.

#### *Ministerial determination*

The proposed Determination would authorise ASIC to make DTRs covering IRD denominated in Australian dollars and four global currencies (US dollars, euro, Japanese yen and British pounds).

It is not proposed to specify in further detail the types of IRD covered by the Determination. This would allow the detailed list of products falling within the scope of the clearing mandate to be specified in ASIC's central clearing DTRs.

#### *Regulations*

In addition to the Determination a number of proposed amendments to the Corporations Regulations would be made setting key parameters for the clearing mandate.

It is proposed to define the entity scope of the central clearing mandate in a manner that limits it to a small number of major domestic and foreign banks that act as dealers in the Australian OTC derivatives market. Smaller financial institutions and all corporate end users would not be affected.

The proposed mandate would also not allow central clearing requirements to be imposed on foreign entities that are not active in Australia. This ensures that there is no inappropriate extraterritorial reach of the proposed mandate.

To achieve this outcome the proposed amendments would provide that the central clearing mandate would only apply to two types of entities called ***Australian clearing entities*** and ***foreign clearing entities*** as defined in detail in the regulations. A key element of the two definitions is that they only capture financial entities with total gross notional OTC derivatives outstanding above a threshold of \$100 billion.

These definitions would ensure that only the major domestic and foreign banks active in Australian OTC derivatives markets are captured. Smaller financial entities would not be affected by the mandate as they would not be expected to reach the level of the threshold. Corporate end users would be carved out because the mandate would only apply to financial entities, defined as APRA-regulated banks, entities holding an Australian Financial Services Licence (AFSL) and certain foreign financial institutions that operate in Australia but are exempt from licensing requirements.

The proposed amendments would clarify that transactions conducted between Australian clearing entities and foreign clearing entities with smaller financial institutions or corporate end users would not be subject to the central clearing mandate.

The large financial institutions that are captured by the mandate are in reality largely already centrally clearing the OTC derivatives transactions that are proposed to be subject to the central clearing mandate. One of the main reasons is that prudential capital standards being implemented globally make it very expensive to conduct uncleared transactions.

The key benefit of implementing an Australian central clearing mandate is that it may allow Australian-regulated financial institutions to clear their cross-border OTC derivatives transactions under Australian rules, subject to appropriate regulatory recognition (for example ‘substituted compliance’) being given by overseas regulators. Without an Australian mandate Australian-regulated financial institutions would have no choice but to clear in accordance with the foreign rules applying to the transaction (including where foreign rules apply to their counterparts). Clearing under local rules may result in considerable savings in compliance costs for Australian financial institutions active in global OTC derivatives markets.

The regulations would therefore prescribe that Australian and foreign clearing entities engaging in cross-border OTC derivatives transactions with major global financial institutions would be subject to the Australian clearing mandate. These global financial institutions are likely to be subject to a foreign central clearing mandate with which the Australian-regulated counterparty would have to comply if no Australian mandate applied.

In the regulations these major global financial institutions are called ***foreign internationally active dealers***, defined as foreign entities (other than foreign clearing entities) that are registered or provisionally registered as swap dealers with the US Commodity Futures Trading Commission (CFTC) or the Securities and Exchange Commission (SEC).<sup>1</sup> This class of entities includes most if not all global financial institutions active in OTC derivatives markets.

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<sup>1</sup> This definition is not intended to target US dealers, but rather to serve as a proxy for globally active dealers, most if not all of which are CFTC-registered swap dealers (or SEC-registered, once the SEC has imposed its own security-related swap clearing mandate). Using these publicly available lists of

The amendments would explicitly provide that Australian central clearing requirements can only be imposed on an Australian clearing entity or a foreign clearing entity, and therefore cannot be imposed on these foreign internationally active dealers. This ensures that the legislation does not inappropriately impose Australian obligations on foreign entities that are not operating in Australia.<sup>2</sup>

Under the legislation central clearing can occur through all central counterparties (CCPs) licensed in Australia<sup>3</sup>. To provide some flexibility with respect to overseas CCPs that are not required to be licensed in Australia, but through which Australian dealers may wish to clear, there is also provision in the legislation to prescribe such CCPs so that they can be used to fulfil mandatory clearing requirements.<sup>4</sup>

A further number of overseas CCPs may therefore be prescribed by name in the proposed amendments.<sup>5</sup> A general power for ASIC to prescribe additional CCPs would also be provided, subject to a number of conditions.

Details of the proposed Determination and of the proposed amendments to the Corporations Regulations are set out in the Attachment.

## **OTC derivatives trade reporting – single-sided reporting**

### *Background – Trade reporting rules*

In July 2013 ASIC made trade reporting DTRs under which the trade reporting obligation is being implemented in 3 phases. Phase 1 and 2 entities have started reporting.

Phase 3 entities were originally due to begin reporting on 1 October 2014. In June 2014 ASIC made a class order splitting phase 3 into two subphases (3A and 3B) and delaying the start of reporting requirements by up to 12 months.

The DTRs require both sides of a transaction to report (so-called ‘double-sided reporting’).

In December 2014 the Government announced that it would provide relief from the trade reporting requirements by allowing ‘single-sided reporting’ for entities with low

counterparties has the additional advantage of providing industry with certainty and clarity as to which transactions may potentially fall under the mandate.

<sup>2</sup> A foreign entity that is operating in Australia would likely be subject to the central clearing mandate as a foreign clearing entity, and would therefore not be classified as a foreign internationally active dealer.

<sup>3</sup> There are currently three licensed CCPs in Australia clearing OTC derivatives, including a subsidiary of the ASX.

<sup>4</sup> There are a number of reasons why Australian dealers may wish or have to use overseas CCPs. For example, some countries make it mandatory for their regulated entities to use a domestic CCP for clearing transactions denominated in their currencies.

<sup>5</sup> The draft regulations contain four names of overseas CCPs interested in acting as prescribed CCPs in Australia. Discussions are ongoing with a number of further overseas CCPs to ascertain whether they wish to be prescribed by name in the proposed regulations. If so their names would be added to the final regulations.

levels of OTC derivatives transactions, provided they conclude their derivatives transactions with counterparties that are already required to report the trade.

It is proposed to implement this relief by introducing single-sided reporting for phase 3B entities as defined in the ASIC class order. Phase 3B entities have less than \$5 billion gross notional OTC derivatives positions outstanding.

Draft amendments to the Corporations Regulations implementing this measure have been developed and are being made available for public consultation.

#### *Regulations – single-sided reporting*

Under single-sided reporting only one side of an OTC derivative transaction is required to report. This ensures that regulators still have access to the information concerning the transaction, while relieving the other party to the transaction of the obligation to report.

This relief would accordingly be subject to the condition that the counterparty to the transaction is an entity that is required to report the transaction. This would, for example, be the case where the counterparty is a phase 1, 2 or 3A entity. If the counterparty is another phase 3B entity, one of the two parties to the transaction will have to agree to report.

The proposed amendments contain provisions determining when and how a phase 3B entity would become subject to the double-sided reporting regime if its OTC derivatives positions increased to the point that it exceeded the \$5 billion threshold. Conversely, phase 3A entities could over time reduce their OTC derivatives trading activities and become eligible for the single-sided reporting relief. Amendments would be included setting out the details of how these situations would be handled.

Transitional arrangements would address a range of circumstances that may arise when the reporting regime applying to phase 3B entities and the single-sided reporting relief commence in October 2015.

#### **OTC derivatives trade reporting - Amendment to the scope of the trade reporting DTRs**

It is proposed to make an amendment clarifying that the DTRs can only impose requirements relating to a particular class of derivatives on AFSL holders who are specifically authorised to provide financial services in relation to that class of derivatives.

Details of the proposed amendments to the Corporations Regulations are set out in the [Attachment](#).

**ATTACHMENT****Details of the Corporations (Derivatives) Amendment Determination 2015 (No. 1)****Section 1 – Name**

This section would provide that the title of the Determination is the *Corporations (Derivatives) Amendment Determination 2015 (No. 1)* (the proposed Determination).

**Section 2 – Commencement**

This section would provide that the proposed Determination commences on the day after it is registered.

**Section 3 – Authority**

This section would provide that the proposed Determination is made under the *Corporations Act 2001* (the Corporations Act).

**Section 4 – Schedules**

This section would provide that each instrument that is specified in a Schedule to the proposed Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

**Amendments****Schedule 1 – Amendments****Item [1]**

Item 1 would add a new section 5 to the *Corporations (Derivatives) Determination 2013* which contains the Ministerial determination made in May 2013 allowing the Australian Securities and Investments Commission (ASIC) to make derivative transaction rules (DTRs) with regard to certain classes of derivatives.

This section would provide that the Minister, under the power provided in subsection 901B(2) of the Corporations Act, has made a determination allowing ASIC to make DTRs imposing central clearing requirements on interest rate derivatives denominated in Australian dollars, US dollars, euros, British pounds and Japanese yen.

**Details of the Corporations Amendment (Central Clearing and Single-Sided Reporting) Regulation 2015****Section 1 – Name**

This section would provide that the title of the Regulation is the *Corporations Amendment (Central Clearing and Single-Sided Reporting) Regulation 2015* (the proposed Regulation).

## Section 2 – Commencement

This section would set out the commencement dates for the various parts of the proposed Regulation.

Schedule 1, Part 1 containing the amendments relating to central clearing would commence the day after the proposed Regulation is registered.

Schedule 1, Parts 2 and 3 containing the amendments relating to single-sided reporting and their application arrangements would commence on 1 October 2015. This aligns with the commencement of the phase 3B trade reporting regime in October 2015 under the trade reporting DTRs.

Schedule 1, Part 4 contains provisions relating to notifiable instruments which can only commence once the *Acts and Instruments (Framework Reform) Act 2015* commences, as provided in this section. Please refer to the discussion below for a detailed explanation of these provisions.

## Section 3 – Authority

This section would provide that the proposed Regulation is made under the Corporations Act.

## Section 4 – Schedules

This section would provide that each instrument that is specified in a Schedule to the proposed Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

## **Amendments**

### Schedule 1 – Amendments

#### **Part 1 – Amendments commencing day after registration**

##### **Item [1] – Regulation 7.5A.30 (heading)**

Item 1 would amend the heading of regulation 7.5A.30 to “Reporting requirements – prescribed facilities”, in order to better reflect its contents which relate to prescribed trade repositories.

##### **Item [2] – After subregulation 7.5A.50(2)**

Item 2 would insert a new subregulation 7.5A.50(2A) in regulation 7.5A.50. The new subregulation would provide that the DTRs can only impose requirements on financial services licensees for classes of derivatives for which they are explicitly authorised to provide financial services.

This amendment would ensure that licensees whose Australian Financial Services Licence (AFSL) only covers one or more specific types of derivatives (e.g. electricity

derivatives) would not have to comply with DTRs imposing requirements with respect to other types of OTC derivatives, for example interest rate derivatives.

Paragraph (2A)(a) clarifies that a person who, for example, is both an Australian ADI and an AFSL holder does not fall within the scope of this provision.

### **Item [3] – At the end of subregulation 7.5A.50**

Item 3 would insert a new subregulation 7.5A.50(4) in regulation 7.5A.50. The proposed new subregulation would provide that the exemptions provided in regulation 7.5A.50 do not apply to clearing or clearing-related DTRs. The reason for this provision is that these exemptions are incorporated in the regulations which set out which entities are affected by the central clearing mandate.

Thus, for example, the definition of *Australian clearing entity* in proposed regulation 7.5A.61 would have the effect that among domestic Australian entities only authorised deposit-taking institutions (ADIs) and financial services licensees can be affected by the mandate. For foreign entities, the central clearing mandate would similarly only apply to either ADIs or AFSL holders, or to entities providing derivatives-related services to wholesale clients in Australia.

Other entities, including all corporates that do not hold AFSLs, would not be subject to the central clearing mandate.

### **Item [4] After Subdivision 2.1 of Division 2 of Part 7.5A**

Item 4 would insert new subdivision 2.1A into Division 2 of Part 7.5A of the Corporations Regulations. New subdivision 2.1A would follow existing subdivision 2.1 and would contain the amendments relating to central clearing.

#### ***Subdivision 2.1A – Derivative transaction rules imposing clearing requirements***

##### *Proposed regulation 7.5A.60 – Definitions for Subdivision*

This proposed regulation contains a number of definitions used in determining the scope of the proposed central clearing mandate.

Important terms include the term *representative capacity*, which would assist in clarifying how the central clearing amendments apply with respect to transactions concluded or held on an entity's own account, as well as transactions concluded or held by an entity acting as responsible entity of a registered scheme or as trustee of a trust.

Subregulation (2) of the proposed regulation would provide that the DTRs can set out the detailed method of calculating the level of an entity's total gross notional outstanding OTC derivatives held on its own account and on behalf of a registered scheme or a trust. The DTRs may also include transitional measures addressing situations when an entity's total rises above or falls below the threshold set out in proposed regulations 7.5A.61 and 7.5A.62.

##### *Proposed regulation 7.5A.61 – Definition of Australian clearing entity*

This proposed regulation would define the term ***Australian clearing entity*** as domestic ADIs or AFSL holders with \$100 billion or more total gross notional outstanding OTC derivatives. The term also includes entities that have opted to be treated as Australian clearing entities in accordance with ASIC's central clearing DTRs.

Subregulation (2) allows ASIC's DTRs to determine under what circumstances entities acting as responsible entities for registered schemes and as trustees of a trust are Australian clearing entities.

As mentioned above, this definition, in conjunction with the definition of foreign clearing entity (see below), would in effect replicate the scope of the end user exemption in current regulation 7.5A.50 with respect to central clearing. In combination with the level of the threshold it would ensure that only major financial institutions would be included in the scope of the mandate.

*Proposed regulation 7.5A.62 – Definition of foreign clearing entity*

The definition of ***foreign clearing entity*** would include foreign ADIs or AFSL holders with \$100 billion or more total gross notional outstanding OTC derivatives, as well as overseas-regulated foreign entities that exceed the threshold of \$100 billion, provide derivatives-related services to wholesale clients in Australia and are exempt from the licensing requirements in the Corporations Act. It also includes entities that opt in to the regime in accordance with the central clearing DTRs.

The central clearing DTRs would be allowed under subregulation (2) to determine under what circumstances this term applies to entities acting as responsible entities for registered schemes and as trustees of a trust.

*Proposed regulation 7.5A.63 – Clearing requirements-prescribed facilities*

This proposed regulation would prescribe a number of central counterparties (CCPs) that could be used to satisfy an entity's central clearing obligations in addition to CCPs licensed in Australia, as provided for in subsection 901A(7) of the Corporations Act.

At this stage agreement has been reached with four overseas CCPs on including them in the list of prescribed CCPs (CME Clearing Europe Limited, Eurex Clearing AG, Japan Securities Clearing Corporation and NASDAQ OMX Clearing AB). Discussions are ongoing with a number of further CCPs that may have an interest in being prescribed. Subject to these discussions being successfully concluded, the Government would ensure that their names are listed in the final version of the proposed Regulation.

In addition, subregulations (3) to (6) of the proposed regulation would allow ASIC to determine further CCPs to be added to the list of prescribed CCPs, subject to these CCPs meeting a number of conditions set out in the proposed regulation. These conditions would be that the CCP is authorised to provide central clearing services in its home jurisdiction; that the home jurisdiction substantially complies with key international standards applying to the regulation of CCPs; and that ASIC and the Reserve Bank of Australia (RBA) have access to an adequate level of information



about the activity of Australian participants in the CCP. ASIC would have to publish any determinations it makes on its website.

*Proposed regulation 7.5A.64 – Persons on whom clearing requirements cannot be imposed*

This proposed regulation would state that the central clearing requirements can only apply to Australian clearing entities and foreign clearing entities, as defined in proposed regulations 7.5A.61 and 7.5A.62. A note to the proposed regulation would clarify that this provision in effect carves out, among others, a wide range of international bodies such as central banks, multilateral development banks, the Bank for International Settlements and other similar organisations, as they would not meet the two definitions of entities that are covered by the central clearing mandate.

*Proposed regulation 7.5A.65 – Circumstances in which clearing requirements can be imposed*

This proposed regulation would clarify, in relation to Australian clearing entities and foreign clearing entities, which OTC derivatives transactions are subject to the central clearing mandate. It would state that only transactions with other Australian clearing entities, other foreign clearing entities and an additional category of international financial institutions called *foreign internationally active dealers* must be centrally cleared.

Importantly, this provision would ensure that all other transactions do not have to be centrally cleared. Thus, if a major Australian bank (which is likely to be an Australian clearing entity) concluded an OTC derivatives transaction with a corporate client, or with a small financial institution that did not have OTC derivatives positions that meet the \$100 billion threshold, that transaction would not have to be centrally cleared.

The reason for the inclusion of the additional category of foreign internationally active dealers is to ensure that Australian entities can to the extent possible benefit from substituted compliance arrangements under which they may be allowed to centrally clear OTC derivatives transactions with overseas financial institutions in accordance with Australian rules, rather than with the rules governing the clearing activities of the overseas counterparty to the transaction.

Foreign internationally active dealers would be defined in subregulation (4) as entities that are not foreign clearing entities and are listed as swap dealers by the US Commodity Futures Trading Commission (CFTC) or, in future, as security-based swap dealers with the US Securities Exchange Commission (SEC). This definition is not intended to target US financial institutions; rather it aims to capture the population of all large internationally active financial institutions, because most of these entities are likely to have registered with the CFTC (and, in future, the SEC). These institutions will by virtue of their status as registered swap dealers be subject to the CFTC's clearing mandate and, in many cases, may also be or become subject to further clearing mandates such as the proposed EU central clearing regime.

If no Australian clearing mandate applied to transactions between Australian-regulated entities and these foreign internationally active dealers then the transaction would automatically have to be centrally cleared according to the US central clearing rules (or, in future, other international central clearing regimes such as that proposed

in the EU). Making the Australian clearing mandate apply to these transactions would leave open the possibility, where the necessary substituted compliance arrangements were in place, of the transaction being cleared in accordance with Australian central clearing rules. This would provide significant benefits to the Australian-regulated party to the transaction as it would avoid the significant compliance costs associated with clearing under a foreign regime.

It is important to note that subregulations (2) and (3) of the proposed regulation would not impose the Australian central clearing obligation on the foreign party to the transaction, but only on the Australian-regulated party. This prevents the inappropriate application of Australian regulatory requirements to foreign entities that are not active and regulated in Australia.<sup>6</sup>

In addition, the use of the public CFTC list of swap dealers (and, in future, of the public SEC list of security-based swap dealers) would provide clarity and certainty to Australian and foreign clearing entities as to whether a transaction with a foreign international institution is subject to the Australian central clearing mandate or not.

## **Part 2 – Amendments commencing 1 October 2015**

### **Item [5] After Subdivision 2.1A of Division 2 of Part 7.5A**

Item 5 would insert new subdivision 2.1B into Division 2 of Part 7.5A of the Corporations Regulations. New subdivision 2.1B would contain the amendments relating to single-sided reporting.

#### ***Subdivision 2.1B – Phase 3 reporting entities: exemption from OTC derivative reporting requirements***

##### *Proposed regulation 7.5A.70 – Definitions for Subdivision*

Proposed regulation 7.5A.70 would contain a number of definitions of terms used in Subdivision 2.1A. In particular, it would contain the key definition of a ***phase 3 reporting entity***, stating that this term has the same meaning as in the ASIC Instrument [14/0633] (the ASIC Instrument). Other definitions, for example of ***OTC derivative*** and related terms, reflect the *ASIC Derivative Transaction Rules (Reporting) 2013* (the reporting DTRs). The use of common definitions is intended to ensure consistency between these amendments and the trade reporting requirements imposed by ASIC in the reporting DTRs as amended by the ASIC Instrument.

The ASIC Instrument was made on 27 June 2014 and introduced the split between phase 3A and phase 3B reporting entities, as well as amended starting dates for the reporting requirements for these two classes of entities.

It is noted that some of the definitions refer to the meaning of those terms on the day these amendments commence, i.e. they will not change even if those provisions are subsequently amended.

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<sup>6</sup> If such an entity was active and regulated in Australia it would likely be captured by the definition of a foreign clearing entity.

The definition of *representative capacity* would assist in clarifying how the proposed amendments apply to responsible entities of registered schemes and trustees of a trust when they enter into or hold OTC derivatives transactions and positions on behalf of the registered schemes or trusts, rather than for their own account.

*Proposed regulation 7.5A.71 – Exemption-single-sided transaction reporting*

This proposed regulation would provide an exemption from the trade reporting requirements in the reporting DTRs for a phase 3 reporting entity concluding an OTC derivatives transaction if proposed regulation 7.5.73 applies to it, and if the counterparty is required to report the transaction (i.e. is a phase 1, 2 or 3A entity) or agrees to report the transaction.

Proposed regulation 7.5.73 (see below) provides further detail on when it is taken to apply to a phase 3 reporting entity with total gross notional outstanding positions of less than 5 billion Australian dollars, which is the threshold used to define phase 3B entities in the ASIC Instrument.

Subregulation (3) provides that the exemption would also be available to a phase 3 entity to which proposed regulation 7.5.73 applies and that concludes a transaction with a foreign entity that reports the transaction using the substituted compliance provisions in the reporting DTRs. This would require the foreign entity to be subject to reporting requirements that are substantially equivalent to those applying in Australia, to report the transaction to a trade repository prescribed in or under regulation 7.5A.30(2), and to designate or ‘tag’ the information so that the trade repository knows that it can be provided to ASIC.

Subsections (4) and (5) would ensure that conditions set out in the ASIC Instrument imposing certain reporting requirements do not apply to an entity that is exempt under this regulation. Subsection 907D(3) would otherwise require compliance with those requirements.

*Proposed regulation 7.5A.72 – Exemption-single-sided position reporting*

This proposed regulation would provide similar relief with respect to reporting of OTC derivatives positions as provided by proposed regulation 7.5A.71 with regard to reporting of OTC derivatives transactions, subject to similar conditions. This means that historical positions would not have to be reported by a phase 3 reporting entity where proposed regulation 7.5A.73 applied to the entity and where the original transaction was concluded with a reporting entity or a foreign entity as outlined under proposed regulation 7.5A.71 above.

*Proposed regulation 7.5A.73 – Application of exemptions*

This proposed regulation would set out when, for purposes of the exemptions provided in proposed regulations 7.5A.71 and 7.5A.72, proposed regulation 7.5A.73 applies to a phase 3 reporting entity. Key definitions provided in subregulation (3) include *qualifying quarter day* and *disqualifying quarter day*, which respectively denote quarter days on which a phase 3 reporting entity holds total gross notional outstanding positions below and above the threshold of \$5 billion (which is the threshold used to distinguish phase 3A and phase 3B entities in the ASIC Instrument).

**Quarter day** is defined as in the Corporations Act, being one of 31 March, 30 June, 30 September and 31 December.

In addition, the defined term **relevant capacity** as employed in the definitions of qualifying and disqualifying quarter day is intended to ensure that these amendments apply either to OTC derivatives transactions concluded or held on an entity's own account, as well as to transactions concluded or held by an entity on behalf of a registered scheme or trust.

In general, the proposed approach would require that an entity remains below the \$5 billion threshold for two consecutive quarters in order to gain the benefit of the exemption, but would also have to remain above the threshold for two consecutive quarters in order to lose the exemption. This approach is intended to prevent changes in status from occurring because of a short-term increase or decrease in the level of an entity's OTC derivatives activities. One further general rule is that, following two consecutive qualifying or disqualifying quarter days, the benefit of the exemption is gained or lost at the end of the following quarter.

Subregulation (1) would clarify when proposed regulation 7.5A.73 applies to a **new phase 3 reporting entity**, which is defined in subregulation (3) as an entity that becomes a phase 3 reporting entity on or after 1 October 2015. The proposed rule is that the proposed regulation starts applying on the day the entity becomes a phase 3 reporting entity and ends on the quarter day following two successive disqualifying quarter days. In other words, a newly established phase 3 reporting entity would benefit from the single-sided reporting exemption until it has exceeded the \$5 billion threshold for two successive quarters. Once that occurs, the exemption would stop applying to the entity after one further quarter has passed. The example provided illustrates how this rule would operate in practice.

Subregulation (2) would provide a corresponding rule for **continuing phase 3 reporting entities**, which are defined in subregulation (3) as entities that already are phase 3 reporting entities on 1 October 2015. The definition clarifies that the term also includes new phase 3 reporting entities once they have lost the benefit of the single-sided reporting exemption. The proposed rule is that such entities would start benefiting from the exemption on the quarter day following two successive qualifying quarter days, and would lose the benefit of the exemption on the quarter day following two successive disqualifying quarter days.

In other words, if an entity is a phase 3B reporting entity at the start of the regime in October 2015, it will only lose the benefit of the exemption if it remains above the \$5 billion threshold for two successive quarters. In that situation, the exemption would stop applying to the entity after a further quarter has passed. Going forward the entity could regain the benefit of the exemption if it remains below the \$5 billion threshold for two successive quarters. In such circumstances the exemption would start applying again to the entity after a further quarter has passed. An example is provided illustrating how this rule would operate in practice.

A crucial question for continuing phase 3 reporting entities is under what circumstances they would benefit from the exemption at the outset of the regime in October 2015. The note to the definition of **continuing phase 3 reporting entity** draws the reader's attention to the application provisions in Part 3 which clarify this

question. Please refer to the relevant paragraphs below for a detailed discussion of these provisions.

*Proposed regulation 7.5A.74 – Reporting requirement-exemption stops applying*

This proposed regulation would set out when a phase 3 reporting entity to which proposed regulation 7.5A.73 formerly applied (and which consequently benefited from the exemptions in proposed regulations 7.5A.71 and 7.5A.72) has to report its OTC derivatives positions. Subregulation (2) of the proposed regulation would provide a period of 6 months within which the entity would have to report the prescribed information relating to its OTC derivatives positions held at the time proposed regulation 7.5A.73 stops applying to the entity. Under subregulation (3) failure to do so would result in the exemptions being taken never to have applied.

### **Part 3 – Application**

#### **Item [6] After Part 10.20**

This item would insert a new Part 10.21 following existing Part 10.20 in the Corporations Regulations. This new part would set out the application and transitional provisions relating to the proposed Regulation.

#### **Part 10.21 Application provisions relating to the Corporations Amendment (Central Clearing and Single-Sided Reporting) Regulation 2015**

*Proposed regulation 10.21.01 – First application of 7.5A.73-existing phase 3 reporting entities*

Subregulation (4) of this proposed regulation would clarify that the terms used in this regulation have the same meanings as in proposed regulation 7.5A.73. This includes the meaning of terms as defined in proposed regulation 7.5A.70.

Subregulation (1) would set out the main rule applying to phase 3 reporting entities that are in existence as of 30 September 2015. The proposed rule would be that these entities would benefit from the single-sided reporting exemption starting on 1 October 2015 and ending on the quarter day following two successive disqualifying quarter days. Importantly, all disqualifying quarter days from (and including) 30 June 2015 onwards would be taken into account when applying this rule.

This would mean that such entities would benefit from the exemption until they remain above the \$5 billion threshold for two successive quarters. Once that is the case, they would lose the benefit of the exemption after another quarter has passed. In applying this rule, the 30 June and 30 September quarter days would have to be taken into account.

As an example, such an entity would continue to benefit from the exemption if on 30 June it was above the threshold, but was below the threshold on 30 September. In that case it would need to remain above the threshold for two consecutive quarters before it loses the benefit of the exemption, which would occur after the passing of a further quarter.

If, on the other hand, such an entity was below the threshold on 30 June, but above it on 30 September, it would also continue to benefit from the exemption. Should it remain above the threshold on the next quarter day, being 31 December, it would lose the benefit of the exemption at the end of the following quarter. If on 31 December it was below the threshold, it would have to remain above the threshold for two successive future quarters before it loses the benefit of the exemption.

Subregulations (2) and (3) would address the special case of a phase 3 reporting entity that was in existence on 31 March 2015 and remained above the threshold on that day and on 30 June 2015. This entity would lose the benefit of the exemption from the end of the following quarter, i.e. from 30 September 2015. In order to regain the exemption it would have to remain below the threshold for two successive quarters (which could include the 30 September quarter day), in which case the exemption would apply again after a further quarter had passed.

All other circumstances that could arise in relation to these entities would be adequately covered by the rule set out in subregulation (1).

#### **Part 4 - Amendments relating to notifiable instruments**

##### **Item [7] Subsection 7.5A.63(4)**

Proposed subsection 7.5A.63(4) allows ASIC to determine in writing whether a facility satisfies the criteria set out in that subregulation. If so ASIC may determine that the facility is a prescribed CCP which may be used to satisfy an entity's central clearing obligations.

This item provides a contingent amendment to this subregulation allowing ASIC to make the determination in the form of a notifiable instrument, subject to the *Acts and Instruments (Framework Reform) Act 2015* coming into effect (as provided for in the commencement provisions for this part in Section 2). Under the provisions of that Act this will occur at some time before 5 March 2016. The *Acts and Instruments (Framework Reform) Act 2015* will allow determinations such as these to be made in the form of notifiable instruments, which will be non-legislative instruments listed on the Federal Register of Legislative Instruments.

ASIC determinations of prescribed CCPs are not legislative instruments because they do not determine or alter the law. They are the outcomes of assessments by ASIC whether the criteria set out in the proposed regulation apply to specific CCPs.

##### **Item [8] Subsection 7.5A.63(5)**

This proposed subregulation requires ASIC to publish any determinations of prescribed CCPs it makes on its website. This item would remove this requirement as it would no longer be necessary once the amendment in Item [5] takes effect, since all notifiable instruments will be publicly available on the Federal Register of Legislative Instruments.