June 26, 2015

Manager

Banking and Capital Markets Regulation Unit

Financial Systems and Services Division

The Treasury

Langton Crescent

PARKES ACT 2600

**JSCC Response to Consultation on OTC Derivatives Central Clearing and Singled-Sided Trade Reporting**

Dear Sir/Madam,

JSCC is pleased to respond to the Treasury consultation on proposed amendments to various legislation regarding OTC derivatives central clearing and single-sided trade reporting in Australia.

In particular, JSCC is supportive of the Australian authorities’ approach to cross-border trading and central clearing, being one which recognises the potential impact where foreign entities may be subject to mandates in their own domestic jurisdiction. Potential regulatory conflicts are thus minimised.

Here also the concept of prescribed foreign CCPs enables regulation appropriate to the scale and nature of their respective activities in Australia. JSCC expresses its views in these responses from the standpoint of a prospective prescribed CCP, as described in the draft.

For ease of reference, responses in Annex 1 are made directly to the items scheduled in the Attachment to the Explanatory Guide published on the Treasury website. Please contact us should you have any questions. We would be happy to discuss any of our responses.

Yours sincerely,

Mitsuhiro Hasegawa

Managing Director

Japan Securities Clearing Corporation

**Annex 1**

| Australian Treasury Proposed Amendments | JSCC Response |
| --- | --- |
| **Details of the *Corporations (Derivatives) Amendment Determination 2015 (No. 1)***Section 1 – NameThis section would provide that the title of the Determination is the *Corporations (Derivatives) Amendment Determination 2015 (No. 1)* (the proposed Determination). Section 2 – CommencementThis section would provide that the proposed Determination commences on the day after it is registered. Section 3 – AuthorityThis section would provide that the proposed Determination is made under the *Corporations Act 2001* (the Corporations Act). Section 4 – SchedulesThis section would provide that each instrument that is specified in a Schedule to the proposed Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.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* whichcontains 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. | JSCC is in agreement with the proposals within this item.For the time being, central clearing requirements on interest rate derivatives denominated in AUD, USD, GBP and JPY would appear to cover the vast majority of instruments currently likely to have an impact on the Australian market or economy. JSCC hopes that any expansion of the scope of instruments would be conducted in coordination with other global regulators. In JSCC’s opinion, for greater clarity and ease of understanding, such instruments should – as far as is reasonably possible – mirror those selected for similar treatment in other jurisdictions. Alignment, both in terms of instruments and timing, is in our view vitally important for the smooth operation of the global markets. |
| **Details of the *Corporations Amendment (Central Clearing and Single-Sided Reporting) Regulation 2015***Section 1 – NameThis 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 – CommencementThis 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 – AuthorityThis section would provide that the proposed Regulation is made under the Corporations Act. Section 4 – SchedulesThis 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. | JSCC has no specific comment on this item.  |
| **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. | JSCC has no specific comment on this item. |
| **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. | JSCC is in agreement with the proposals within this item. |
| **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.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. | JSCC is in agreement with the proposals within this item.With specific reference to 7.5A.63, JSCC supports the concept of prescribed CCPs and is pleased to be among those already prepared to provide the relevant services in this capacity.JSCC agrees with the criteria by which prescribed CCPs may be deemed operable, but suggests that notice of any changes to the list of prescribed CCPs should, for the benefit of all market participants, be as long a period as is reasonably possible.Regarding 7.5A.65, JSCC recognizes there is a possibility for regulatory conflict to arise due to the cross-border application of the Australian clearing mandate. However, JSCC understands that the framework for prescribed CCPs will provide adequate means to mitigate such conflict. |
| **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.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. | JSCC has no specific comment on this item. |
| **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). | JSCC has no specific comment on this item. |
| **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. | JSCC is in agreement with the proposals within this item.Again, the notice period applying to notification of any changes in the list of facilities satisfying the criteria should in our opinion give all market participants as long as is reasonably possible in order to make any necessary changes to their own legal, regulatory and technical arrangements.  |
| **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. | JSCC is in agreement with the proposals within this item. |