Oliver Harvey
Senior Executive Leader
Financial Markets Infrastructure
ASIC
Level 5, 100 Market Street
Sydney NSW 2000

Email: oliver.harvey@asic.gov.au

14 September 2016

Dear Oliver,

Re: Exemption 5 of ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844

The International Swaps and Derivatives Association, Inc. ("**ISDA**") and the Global Foreign Exchange Division of the Global Financial Markets Association ("**GFMA**") (the **"Associations**") are submitting a request for the continuation of certain relief provided in the above instrument ("**Instrument**") which exempts reporting entities from having to report information relating to certain counterparties.

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 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. Information about ISDA and its activities is available on ISDA's web site: www.isda.org.

The GFXD was formed in co-operation 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"). Our members

comprise 24 global foreign exchange ("**FX**") market participants, collectively representing approximately 85% of the FX inter-dealer market.[1]

ISDA is actively engaged with providing input on regulatory proposals in the United States (the "**US**"), Canada, the European Union (the "**EU**") and Asian jurisdictions, including Japan, Korea, Singapore and Hong Kong, among others. The Associations' comments are derived from this international experience and constant dialogue, and reflect the views of both firms in the Asia-Pacific region and from further afield. As OTC derivatives tend to be cross-border in nature, we wish to highlight the importance of ensuring that regulatory requirements have a consistent domestic and cross-border effect, so as to not disproportionately impact any one sector or jurisdiction of what is a global market.

We set out our reasoning for this request below.

Problem

The problem is that in the absence of an extension of relief beyond the current expiry date of 30 September 2016, Reporting Entities (as defined in the *ASIC Derivative Transaction Rules (Reporting) 2013* (**DTRs**)) would no longer be able to rely on Exemption 5 (Privacy – Foreign Privacy Restrictions) of the Instrument, which provides the ability for Reporting Entities to withhold, or 'mask', Identifying Information relating to counterparties where the three conditions in Exemption 5 are met. This is of concern to Reporting Entities, as despite some progress and increased regulatory attention, many of the foreign privacy restrictions which justified the granting of the current relief have not been fully removed, and remain in place today.

What are the Facts?

ASIC has previously helpfully provided identical relief in response to industry requests an applications over a number of years, including under ASIC Instruments 14/0234, 14/0952 and 2015/844, as well as to Phase 1 Reporting Entities under multiple individual instruments. We also note that a number of regulators globally have considered the issue of masking where foreign blocking statutes and/or privacy restrictions exist, and have granted continuing relief.

[1] According to the 2016 Euromoney league tables.

This includes jurisdictions within the Asia-Pacific region such as Singapore[2] and Hong Kong[3], but also from other regions such as the US[4] and Canada,[5] which renewed such relief as recently as earlier this year.

As we approach the expiry date of the current Australian relief, the below quote from a recent Financial Stability Board ("**FSB**") report demonstrates that the fact unfortunately remains that there is still significant work to be completed at the legislative level in many jurisdictions before the issues related to foreign privacy restrictions and blocking statutes can be considered resolved:

"In summary, while some work is in process to remove barriers to both reporting of complete OTC derivatives transaction information to TRs and authorities' access to TR-held data, significant work remains across FSB member jurisdictions to achieve this and concrete plans to address the barriers have not been formulated in a number of cases. Therefore, based on the reports received to date, it appears that, across FSB member jurisdictions, further significant planning and implementation efforts will be needed in order to meet the agreed June 2018 deadlines...Globally, significant work is still needed in a number of jurisdictions to remove barriers to full reporting of trade information." [6]

Adding further to the complexity is the fact that barriers to the reporting of counterparty information also exist in a number of non-FSB member jurisdictions, as was referenced in the same report:

"The US also noted that even if all relevant FSB member jurisdictions remove reporting restrictions by the end of 2018, certain jurisdictions that are not represented in the FSB are the subject of the CFTC's existing masking relief." [7]

While the impact of this problem is felt by Reporting Entities when they are forced to invest considerable resources in legal analysis and masking Identifying Information, the source of the problem is not something within the Reporting Entities' power or capability to address. It is legislative provisions, laws, regulations and other statutes which prohibit disclosure of

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[2] Reg. 11, *Securities and Futures (Reporting of Derivatives Contracts) Regulations 2013*.

[3] Rule 26(1)(a), *Securities and Futures (OTC Derivative Transactions – Reporting and Record Keeping Obligations) Rules*.

[4] CFTC Letter No. 16-03.

[5] Alberta Securities Commission Blanket Order 96-501 and Canadian Securities Administrators Multilateral CSA Staff Notice 96-301.

[6] FSB, *Report on FSB Members' Plans to Address Legal Barriers to Reporting and Accessing OTC Derivatives Transaction Data*, 26 August 2016.

[7] Ibid.

counterparty information (in some cases irrespective of consent received from counterparties), and thus, efforts to remediate such problems and effect change must originate from regulators and the legislature of each jurisdiction itself.

What is the Impact of the Problem?

The primary impact of the problem is that in the absence of a continuation of the relief under Exemption 5, after 30 September 2016 Reporting Entities would find themselves in the difficult situation of being forced to:

- unmask transactions with clients in the Relevant Foreign Jurisdictions (thereby breaching foreign privacy laws and other blocking statutes);
- report transactions with masked Identifying Information (thereby breaching the DTRs);
- cease sales and trading relationships with these clients out of Australia; or
- consider shifting trading relationships to a jurisdiction which continues to permit ongoing masking.

The Associations submit that none of these actions lead to improved regulatory outcomes, foster growth in market liquidity, permit existing important client relationships to continue or further Australia's standing as a regional financial centre.

This issue also impacts a large number of clients of members, at a significant cross-border level – making estimates of the potential impact and associated risk of relief not being granted difficult to quantify for members. We have been advised that in the case of at least two members, the number of clients with whom trading relationships would need to be re-examined is well in excess of 100. One of those members also advised that in aggregate, there would be approximately AUD 1 million in potential revenue which would need to be foregone (by not trading with clients in Relevant Foreign Jurisdictions) or maintained by trading through another regional branch, if relief were not granted by ASIC. A separate member estimated that the total cost of relief not being extended may extend into the tens of millions of dollars.

What is the Impact of Legislative Provisions or ASIC Policy?

We consider that ASIC policy, and indeed the policy of regulators globally, has consistently been to promote a practical, pragmatic approach to transaction reporting which allows reporting entities to mask Identifying Information, where failure to do so would breach a law or regulation of a foreign jurisdiction. In this regard, we also note the commitment by FSB member jurisdictions that, "by June 2018, at the latest, all (FSB member) jurisdictions should remove barriers to full reporting of trade information (including counterparty

information)...and that masking of newly reported transactions should be discontinued by end-2018 once barriers to reporting are removed."[8] We thus submit that optimal ASIC policy would be to permit an extension of the relief and align its expiry with the end-2018 date, assuming FSB member jurisdictions are in fact able to remove their foreign privacy restrictions by that date.

We submit that to not provide continued relief until such time as the problematic laws or regulations of foreign jurisdictions have been removed or remediated would represent a departure from existing ASIC policy, particularly given ASIC first provided relief in 2013 and has renewed the relief a number of times since.

Relief Sought

The Associations respectfully seek an extension of the relief provided in Exemption 5 of the Instrument, for all Relevant Foreign Jurisdictions, until 31 December 2018. The Associations consider that the 31 December 2018 requested backstop date aligns with the internationally-coordinated timeframe first set out in the 2015 FSB Thematic Review on OTC Derivatives Trade Reporting, which recommends that:

"Masking of newly reported transactions should be discontinued by end-2018 once barriers to reporting are removed, since masking prevents comprehensive reporting." [9]

The Associations do note that in referencing the end-2018 commitment in the FSB report, this would only be applicable to FSB member jurisdictions, thus exposing Reporting Entities to the risk of longer time taken by non-FSB member jurisdictions to remove such privacy restrictions. We would propose another round of engagement with ASIC regarding any late jurisdictions approaching the end-2018 date, and would encourage ASIC to give due thought to crafting an instrument which takes account of the potentially longer timeframe for non-FSB member jurisdictions, and which optimally balances the needs of the market against the effort associated with seeking relief again for these jurisdictions at a later point.

For clarity, the FSB member jurisdictions who are Relevant Foreign Jurisdictions in the Instrument for which members are seeking relief include:

- Argentina;
- China;

[8] FSB, *Report on FSB Members' Plans to Address Legal Barriers to Reporting and Accessing OTC Derivatives Transaction Data*, 26 August 2016.

[9] FSB, *Thematic Review on OTC Derivatives Trade Reporting*, 4 November 2015.

- France;
- India;
- Indonesia;
- Saudi Arabia;
- Singapore;
- South Korea; and
- Switzerland.

The non-FSB member jurisdictions who are Relevant Foreign Jurisdictions in the Instrument for which members are seeking relief include:

- Algeria;
- Austria;
- Bahrain;
- Belgium;
- Hungary;
- Israel;
- Luxembourg;
- Pakistan;
- Samoa; and
- Taiwan.

Members of the Associations are also mindful that the relief is subject to conditions, including those in sub-paragraph 2 of Exemption 5, which require a Reporting Entity to use all reasonable endeavours to report Identifying Information as soon as reasonably practicable after the Reporting Entity becomes reasonably satisfied that it would no longer breach the law or regulation of the Relevant Foreign Jurisdiction by reporting the Identifying Information. This puts an inherent onus on Reporting Entities to remain satisfied that blocking statutes still exist, and to take appropriate remedial action once this is no longer the case. We submit that this provides the impetus for Reporting Entities to continue to conduct due diligence to ensure that Identifying Information is reported once foreign privacy restrictions are removed in any particular jurisdiction.

We believe keeping the original list of Relevant Foreign Jurisdictions unchanged will enable greater regulatory certainty around the requirement for the time being, while reporting parties continue with their efforts to obtain necessary consent and conduct legal due diligence to keep abreast of any developments/changes in the laws and regulations of the Relevant Foreign Jurisdictions. One of our members advised that it has refreshed its advice from external counsel reaffirming the existence of blocking statutes for certain jurisdictions as recently as Spring 2016, while another advised that as at the beginning of this month, it has supporting legal opinions for all Relevant Foreign Jurisdictions, except two (in which it does not trade).

If ASIC is minded to remove any Relevant Foreign Jurisdictions from the list, members would greatly appreciate an opportunity to provide input into the process, as there may be sensitivities or particular legal considerations which members would consider important to discuss. We would also welcome the opportunity to discuss any questions ASIC may have within an industry forum, if that would be helpful.

We are grateful to ASIC for its consideration of this request.

Why Should Relief be Granted?

Reporting Entities respectfully submit that the slow pace of reform in this area warrants the extension of relief. There are still jurisdictions which do not fully permit the disclosure of Identifying Information, and others that, although in the process, have not finished the task of removing legal barriers. Until these jurisdictions take remedial and/or legislative action to fully remove their privacy restrictions for trade reporting (both domestic and foreign), there will continue to be a need for masking relief. Reporting Entities do not believe that it would be in the best interests of the Australian OTC derivatives market for their ability to maintain business relationships to be penalised due to legislative factors which are beyond their control.

The Associations also importantly note the avoidance of the potential for regulatory arbitrage which is achieved by granting relief. As stated above, a number of jurisdictions both near and further afield have provided similar relief permitting masking, and therefore if ASIC were not minded to extend this relief, it may result in:

- Australia being perceived as an outlier in recognition of and action on this issue; and
- the inability for reporting entities to continue trading through their Australian branches and/or staff with clients in Relevant Foreign Jurisdictions, potentially leading to a need to shift sales and trading activity with such clients to other jurisdictions which do permit masking.

We note that the inability for reporting entities to trade through their Australian branches and/or staff with certain clients would be felt with almost immediate effect, and could be expected to have a material impact on domestic trading levels. Other reasons in support of the continuation of relief include the avoidance of:

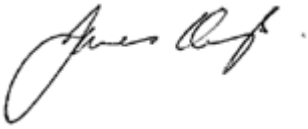
- A detrimental effect in the form of commercial harm to Reporting Entities through loss of operating revenue, reputational risks and damaged business relationships;
- A potential reduction in the ability for Reporting Entities to manage risk effectively; and
- Market dislocation and an adverse change in market liquidity and the general level of Australian market access overseas.

What Conditions Should be Imposed on the Relief?

The Associations submit that the existing conditions, as detailed in the sub-paragraphs of Exemption 5 of the Instrument, remain appropriate.

We thank you for your consideration of this request, and would be very happy to discuss it further at your convenience. Please do not hesitate to contact Rishi Kapoor at rkapoor@isda.org or John Ball at jball@gfma.org.

Yours faithfully,



Rishi Kapoor

Director, Policy, Asia-Pacific

ISDA

James Kemp

MD, Global Foreign Exchange Division

GFMA