22 November 2019

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Notice of Proposed Rulemaking on Exemption from Derivatives Clearing Organization Registration (RIN 3038-AE65)

ASX Clear (Futures) Pty Ltd[1] ("**ASX**") welcomes the opportunity to comment on the U.S. Commodity Futures Trading Commission's ("**CFTC**") Supplemental Notice of Proposed Rulemaking: Exemption from Derivatives Clearing Organization Registration (RIN 3038-AE65) (the "**SNPR**").

ASX supports the CFTC's efforts to combat market fragmentation by facilitating U.S. customer access to global derivatives markets and clearinghouses; and to codify the existing regulatory framework for exempting clearinghouses from the DCO registration requirements. Such changes have the potential to greatly enhance transparency and certainty regarding the exempt DCO process and provide greater flexibility and choice for U.S. customers.

However, ASX believes that the SNPR as currently proposed may not have the intended effect of facilitating appropriate access to foreign cleared markets by U.S. customers. The SNPR limits the choice of intermediaries which may be used to access exempt non-U.S. DCOs, and would also create inefficiencies for customers by requiring them to access cleared OTC markets using different intermediaries, documentation and clearing flows from those used to access foreign futures markets. ASX therefore also requests that the CFTC creates or extends a Part 30-type regime for swaps in addition to proceeding with the SNPR. A Part 30-type regime could achieve cost savings and improved customer experience for some U.S. customers, who would then be able to access foreign futures markets and exempt DCOs for swaps under an aligned framework and structure, eliminating the need for them to potentially enter into duplicative or new relationships with alternative non-U.S. affiliated clearing members.

The rest of this letter provides comments on specific sections of the SNPR.

Proposed Amendments to Part 3 – (3.10 (c) (7) (i))

ASX is supportive of the proposal to permit foreign intermediaries to clear swaps for U.S. persons directly without registering as an FCM.

However, there are some practical constraints which may make the outlined approach less useful on its own. Clearers who clear for U.S. clients in foreign futures markets currently use an FCM entity to face those customers. Having to have a separate entity face U.S. clients for swaps clearing would be costly for clearers, especially when that entity may therefore be used only for a small amount of overseas exempt DCO clearing, making the barriers to entry high. For example, the clearer would

[1] The ASX Clear (Futures) clearing house currently provides central clearing for exchange traded futures and options products (traded via the ASX 24 market), and OTC interest rate swaps. ASX 24 was granted an Order of Registration as a Foreign Board of Trade ("FBOT") by the CFTC on 15 May 2018. The CFTC issued an Order of Exemption from registration as a DCO to ASX Clear (Futures) Pty Limited on 18 August 2015.

need to create new client documentation, new clearing flows, new margin flows and get new legal opinions.

As a result of high barriers to entry, few – if any – clearers are likely to find that the economics for such clearing arrangements are viable, limiting the clearing and/or portability options available to U.S. customers under the proposed SNPR.

ASX requests that the CFTC create a model for the clearing of foreign swaps which is based on the Part 30 regime for futures. This would allow FCMs to provide swap clearing to U.S. customers by clearing indirectly, via a foreign intermediary (see diagrams in Appendix 2 for how this might work for U.S. customers clearing via an FCM and affiliate clearer at ASX).

The ASX Clear (Futures) clearing house currently provides central clearing for exchange traded futures and options products (traded via the ASX 24 market) and OTC swaps. ASX 24 was granted an Order of Registration as a Foreign Board of Trade ("FBOT") by the CFTC on 15 May 2018. Under the FBOT model, U.S. customers currently access the ASX 24 market (and central clearing of exchange traded futures and options products) by documenting directly with an FCM, who in turn is documented with a non-U.S. affiliated clearing member of ASX Clear (Futures).

A Part 30-type regime could achieve cost savings and improved customer experience for U.S. customers. It would enable customers to access foreign futures markets and exempt DCOs such as ASX under an aligned framework and structure, eliminating the need for them to enter into duplicative or new relationships with the non-U.S. affiliate of the FCM. Creating a Part 30-type regime for swaps would enable U.S. customers to continue to document directly with an FCM, who in turn documented with their non-U.S. affiliated clearing member at an exempt DCO for swaps clearing. As this model aligns with the access model used by U.S. customers to access non-U.S. futures markets under the part-30 regime, cost-saving mechanisms such as cross-product margin offsets available at some exempt DCOs (including ASX) could also then be made available to U.S. customers.

ASX notes that the introduction of a Part 30-type regime for swaps may also present the CFTC with an opportunity to make enhancements to the current Part 30 regime for foreign futures. In particular, it would be beneficial to enable U.S. customers to use PFMI-compliant account structures in foreign jurisdictions that provide segregation and enhanced client protection features. An example of this is the Individual Client Account offered by ASX Clear (Futures) **(see Appendix 2).**

Proposed Amendments to Part 39 (Disclosure regarding applicability of U.S. Bankruptcy Code)

ASX agrees that a disclosure and acknowledgement requirement to and from U.S. customers (by their Clearing Member) would be appropriate. It would be appropriate to ensure that U.S. customers are aware that the protections of the U.S. Bankruptcy Code may not apply to the U.S. customer's funds – instead, the Exempt DCO's rules and home country regime would apply.

ASX has implemented a PMFI-compliant Client Protection Model. Appendix 1 provides more details of the regulatory framework for ASX Clear (Futures) and the Client Protection Model. Clearing Participants of ASX Clear (Futures) are obliged to disclose details of the Client Protection Model provisions to their customers.

Proposed Amendments to Part 39 (39.2) – "Substantial Risk to the U.S. Financial System" test

"Substantial Risk to the U.S. Financial System means, with respect to a DCO organized outside of the U.S. that (1) the DCO holds 20% or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt DCOs; and (2) 20% or more of the initial margin requirements

for swaps at the DCO is attributable to U.S. clearing members; provided, however, where one or both of these thresholds are close to 20%, the Commission may exercise discretion in determining whether the DCO poses substantial risk to the U.S. financial system."

ASX has concerns with the test as proposed, and suggests the following changes:

The second prong of the test should be eliminated; or alternatively, the test should allow the CFTC to determine when a CCP poses "substantial risk" only if *both* of the two thresholds exceed 20%. This would more accurately address risks to the U.S. financial system.

As currently outlined, the second prong of the test does not gauge the risk of the relevant CCP to the U.S. financial system, but rather signifies the importance of U.S. clearing members to a particular CCP. Therefore, it may capture smaller-sized exempt DCOs due to the large global presence of U.S. banking groups, including foreign branches of U.S. banking groups. A small CCP with very few clearing members and minimum exposure to the U.S. financial system may be deemed as having "substantial risk" simply because 20% or more of the initial margin collected is attributed to U.S. clearing members. For example, a DCO may have a total of $250 million in initial margin with $51 million initial margin attributed to U.S. clearing members. In this case, the U.S. clearing member's positions does not pose systemic risk to U.S. markets.

In addition, we believe that the final rule should be revised to exclude foreign subsidiaries of U.S. swap dealers from the definition of U.S. clearing members to align with the treatment of foreign subsidiaries under the CFTC cross-border guidance.

U.S. clearing members are defined in the Supplemental Proposal as "clearing members organized in the United States or whose ultimate parent company is organized in the United States, or an FCM." Under CFTC Cross-border Guidance, however, subsidiaries of U.S. swap dealers are not considered U.S. persons simply by virtue of being a part of a U.S. banking group.

Definition of good regulatory standing

ASX supports the definition outlined in the paper, which defines "good regulatory standing" to mean, with respect to a DCO organized outside of the U.S. that is licensed, registered or otherwise authorized to act as a clearing organization in its home country, that either there has been no finding by the home country regulator of material non-observance of the PFMIs or other relevant home country legal requirements, or there has been a finding by the home country regulator of material non-observance of the PFMIs or other relevant home country legal requirements but any such finding has been or is being resolved to the satisfaction of the home country regulatory by means of corrective action taken by the DCO.

Transfer of U.S. customer positions upon termination of exemption from DCO registration

If an exempt DCO has their exemptions terminated, sufficient time should be made available for the exempt DCO to continue offering services to U.S. customers under a transition period to enable the orderly transfer of U.S. customers positions from the exempt DCO to an alternative clearing house.

To ensure an orderly transfer, we request that the CFTC provides a minimum of 6 months upon notice of termination of exemption from DCO registration to enable orderly transfer to take place. We suggest that the CFTC also have provision to negotiate a longer transition timeframe in the case where an exempt DCO has had their exemption terminated and is intending to apply for DCO status directly or under the Alternative Compliance framework.

Conclusion

ASX requests that the Commission prioritises progress of the current SNPR, but concurrently, or immediately following the implementation of the SNPR, introduces a Part 30-type regime for swaps to provide the greatest flexibility and choice for U.S. customers.

Yours faithfully,

Helen Lofthouse
Executive General Manager, Derivatives & OTC Markets, ASX Limited.

Appendix 1 – Overview of ASX's regulatory framework

Australian regulatory framework

ASX is an Australian Clearing and Settlement facility licensee ("**CS facility licensee**") that operates in a highly regulated environment overseen by two independent government agencies – the Australian Securities and Investments Commission ("**ASIC**") and the Reserve Bank of Australia ("**RBA**"). These government regulators have extensive powers to enforce the comprehensive laws and regulations that govern financial markets in Australia.

Under the *Corporations Act 2001* (Cth) ("**Corporations Act**"), the relevant Government Minister ("**the Minister**") has primary responsibility for licensing CS facilities operating in Australia and has the power to disallow amendments to the operating rules of CS facilities. ASIC assesses each CS facility licensee on its compliance with its licence obligations under the Corporations Act.

Under the Corporations Act, as a CS facility licensee, ASX must (among other things), to the extent that it is reasonably practicable to do so:

- comply with the Financial Stability Standards ("**FSS**") adopted by the RBA and do all other things necessary to reduce systemic risk. The FSS are aligned with the requirements of the CPMI-IOSCO Principles for financial market infrastructures ("**PFMIs**"). These standards address matters (including credit and liquidity risk, margining, acceptable collateral and financial resources) that promote the maintenance of a sound and efficient financial system and avoid the risk of significant damage arising from a Clearing Member failure. The RBA conducts an annual assessment of how well licensed CS facilities (including the facility operated by ASX) have complied with the RBA's FSS and done all other things necessary to reduce systemic risk. The RBA publishes its findings on its website.

- do all things necessary to ensure that its services are provided in a fair and effective way and have adequate arrangements for supervising the facility including arrangements for handling conflicts of interest between its commercial interests and regulatory obligations. ASX's transparent admission criteria (based on reasonable risk-related participation requirements), dedicated department for supervising and enforcing participant compliance with the operating rules, and arrangements for managing conflict and information handling, promote the integrity and effectiveness of the ASX CS facility and enhance the confidence of investors and other market participants.

Protections provided by Payment Systems and Netting Act

In the event that a Clearing Member in ASX's CS facility enters into external administration, Part 5 of the *Payment Systems and Netting Act 1998* (Cth) ("**PSNA**") protects:

- the termination, valuation and netting of obligations, and enforcement of security, by ASX (as an operator of an approved 'netting market'); and

- the porting of client positions and collateral by ASX to a non-defaulting Clearing Member.

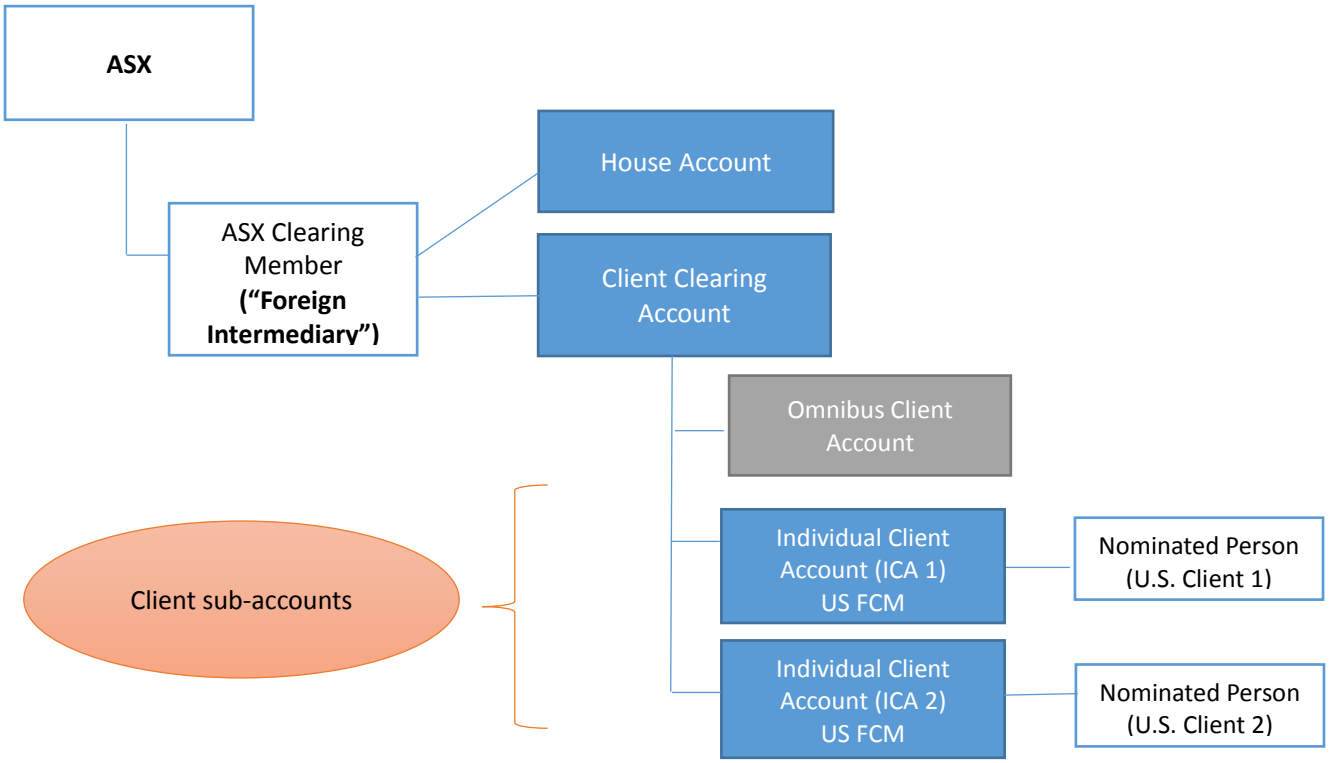
The PSNA protections apply under Australian law irrespective of the jurisdiction in which a Clearing Member in ASX may be incorporated.

ASX's Client Protection Model

The ASX Client Protection Model establishes the framework which governs ASX client clearing, and the protection of client assets under the ASX Operating Rules. An overview of the ASX Client Protection Model is available here.

Under the Client Protection Model, ASX offers both an Omnibus and ICA account structure. An overview of the key features of this account structure is available here.

Appendix 2 – Potential implementation of the correspondent clearing structure (Part 30-type regime) under ASX's Operating Rules



Client positions: Netted within each client sub-account for the purpose of calculating initial margin with respect to the client sub-account.

Client collateral: Client collateral is comingled in a single Clearing Member Client Clearing Account. Margin is calculated and recorded separately for each client sub-account (e.g. omnibus client account, ICA 1 and ICA 2).

Collateral Value: The CCP calculates a Collateral Value for each client sub-account. This is the amount which the CCP will transfer or return in respect of the client sub-account in the event of the Clearing Member's default. The Collateral Value for a client sub-account is the greater of: (i) the value determined by ASX of all collateral (if any) attributed by ASX to the client's account as at the time at which the client's Clearing Member defaults; and (ii) the value of initial margin calculated by ASX in respect of the client's account as at the last end-of day time at which the client's Clearing Member settled its initial margin obligations prior to its default.

Nominated Person: An end user client that has been designated by a client (i.e. US FCM) in respect of an Individual Client Account (ICA) and on default of the client's Clearing Member is entitled to communicate with the CCP in relation to porting or termination and receipt of Collateral Value. Client positions referable to a Nominated Person are segregated from the positions of the Clearing Member, clients and other Nominated Persons.

On a Clearing Member default: The CCP will communicate with the Nominated Person in order to port the Nominated Person's positions and Collateral Value to a non-defaulting Clearing Member under alternate clearing arrangements. If the positions and Collateral Value of the Nominated Person cannot be ported, the CCP will close-out the Nominated Person's positions and remit the Collateral Value (less the costs of close out) directly to the Nominated Person.

On a default of the US FCM (Client): Currently, the Clearing Member can require the CCP to transfer positions of a Nominated Person into the Clearing Member's House Account for the purpose of managing the client's default. Operating Rule amendments are proposed to: (i) remove the right of the Clearing Member to require the Nominated Person's positions to be transferred to the House Account; and (ii) facilitate the Clearing Member's ability to port the positions and Collateral Value of the Nominated Person to a non-defaulting client of either the Clearing Member or another Clearing Member. If porting is not available, the Clearing Member may close out the positions of the Nominated Person and remit the proceeds directly to the Nominated Person (subject to US Bankruptcy Law).