20 August 2019

To
Australia Securities and Investment Commission

By e-mail
applications@asic.gov.au

Attention: Ben Durnford and Alex Orgaz-Barnier

From
Paul Atmore

WITHOUT PREJUDICE

ASIC Derivative Transaction Rules (Reporting) 2013 – Rule 2.2.1 and Specified Entity Information

APPLICATION FOR RELIEF UNDER ASIC REGULATORY GUIDE 51

1. INTRODUCTION

1.1 This is an application by the New Zealand Financial Markets Association ("NZFMA") on behalf of three of its New Zealand registered bank members (named below) ("NZ Banks") for ASIC to grant exemption relief subject to conditions from the requirement to provide the following identifier information for certain specified entities under Rule 2.2.1 of the ASIC Derivatives Transaction Rules (Reporting) 2013 (the "Rules"): (a) a Legal Entity Identifier ("LEI") or interim entity identifier; or

(b) if no LEI or interim entity identifier is available for the entity, a Designated Business Identifier; or,

(c) if no Designated Business Identifier is available, a Business Identifier Code (BIC code),

(the “Specified Entity Information”).

In summary, the NZ Banks are seeking conditional exemption relief from ASIC from the requirement to provide the Specified Entity Information for their smaller New Zealand counterparties (e.g., small and medium enterprises that are not Australian Entities and are not entering into transactions with the NZ Banks that are captured by Prudential Standard CPS 226 or require a credit support annex (CSA) (or similar). We set out below the scope of the proposed exemption relief (with supporting analysis and reasoning).
2. STRUCTURE OF THIS APPLICATION

2.1 This application is in three parts as follows:

(d) Part 1: Background information to the application;

(e) Part 2: RG 51, Section B requirements; and

Part 3: Supporting analysis for RG 51 Section B requirements.
PART 1

BACKGROUND TO THIS APPLICATION

3. THIS IS A REVISED APPLICATION

3.1 This is a revised application for relief from the Rules.

3.2 The first application was made on 16 April 2019 (the “First Application”). A call between ASIC representatives (Ben Durnford and Alex Orgaz-Barnier) and NZFMA representatives (John Groom (NZFMA)), together with representatives from the NZ Banks and Buddle Findlay) was held on 11 June 2019. On that call, the ASIC representatives confirmed that the First Application should be re-submitted in accordance with ASIC Regulatory Guide 51 Applications for Relief, December 2009 (“RG 51”).

3.3 The NZFMA (John Groom) sent an e-mail to the ASIC representatives following the 11 June call to clarify how the revised application should deal with Section E of RG 51.

3.4 Ben Durnford (ASIC) subsequently advised that the revised application should focus on the criteria in Section B of RG 51 and that there was no need to address Section E of RG 51.

4. THE APPLICANT

4.1 The NZFMA is the professional body for wholesale institutional banking in New Zealand. The NZFMA promotes the efficient operation of the over the counter markets, advocating high professional standards for financial markets organisations and their staff, representing the interests of members and advocating sensible and proportionate regulation for the wholesale financial markets.

4.2 The NZ Banks are:

(a) ANZ Bank New Zealand Limited ("ANZ NZ");
(b) ASB Bank Limited ("ASB"); and
(c) Bank of New Zealand ("BNZ").

4.3 Each NZ Bank is incorporated in New Zealand and is a subsidiary of an Australian ADI (namely, Australia and New Zealand Banking Group Limited, Commonwealth Bank of Australia and National Australia Bank Limited respectively). Each NZ Bank is subject to direct prudential supervision, oversight and regulation in New Zealand by the Reserve Bank of New Zealand ("RBNZ"). As part of New Zealand’s ‘twin peaks’ regulator model, the NZ Banks are also subject to oversight and regulation by the Financial Markets Authority (the “FMA”).

4.4 With respect to certain of their business activities, the NZ Banks comply with ASIC requirements principally because their parents are subject to ASIC oversight as Australian ADIs. One such requirement is compliance with Rule 2.2.1 of the Rules as ‘Reporting
Entities' by virtue of being "a foreign subsidiary of an Australian Entity where that Australian Entity is an Australian ADI..." (Table 1, Rule 1.2.5 of the Rules).

4.5 Westpac New Zealand Limited (being the other 'big four' New Zealand registered bank with an Australian ADI parent) is not a party to this application. It is understood that Westpac New Zealand Limited conducts the relevant financial markets activity through Westpac Banking Corporation, New Zealand branch and so would not benefit in practice from the relief requested in this letter.

5. COPY OF THE APPLICATION HAS BEEN SHARED WITH RELEVANT CONTACTS

5.1 We note that the NZFMA has provided a copy of the First Application and this revised application to the Australian Financial Markets Association ("AFMA"). The NZFMA understands that the AFMA is a strong advocate for the adoption of Specified Entity Information by entities operating in the Australian market. The NZFMA does not disagree with this policy position. However, it believes that the position of the NZ Banks is different from the ADIs (and other Australian-based Reporting Entities under the Rules) and is seeking the requested NZ Bank relief for the New Zealand-specific reasons outlined in this letter.

5.2 The NZFMA has also shared and discussed this application with the FMA and the RBNZ.
6. RG 51, SECTION B REQUIREMENTS

This is “new policy application”

6.1 Based on the information in Section B of RG51, we consider this application for relief to be a “new policy application”. Accordingly, we set out below the information required under RG 51.25 and RG 51.26.

Information required for standard applications (RG 51.25)

6.2 The table below sets out the information required for standard applications:

<table>
<thead>
<tr>
<th>What relief is sought?</th>
<th>The NZ Banks are seeking conditional exemption relief from ASIC from the requirement to provide the Specified Entity Information for their smaller New Zealand counterparties (e.g., small and medium enterprises that are not Australian Entities and are not entering into transactions with the NZ Banks that are captured by CPS 226 or require a CSA (or similar) – and referred to generally in this application as &quot;Smaller NZ Counterparties&quot;). See paragraph 7.1 below for the scope of the proposed relief (the “Proposed NZ Bank Relief”).</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>We do not believe there is any directly applicable relevant published policy that deals with ASIC’s (or the Australian Government’s) policy position with regards to the application of the Rules to the NZ Banks.</td>
</tr>
<tr>
<td></td>
<td>However, we submit that certain New Zealand-specific factors and policies should be considered by ASIC when determining how the Rules should apply to the NZ Banks.</td>
</tr>
<tr>
<td></td>
<td>- New Zealand is not a G20 country and does not have trade repository reporting requirements, meaning that there is no requirement under <em>New Zealand law</em> for NZ Bank counterparties to obtain or hold Specified Entity Information;</td>
</tr>
<tr>
<td></td>
<td>- The NZ Banks act in accordance with certain codes of ethics / fair dealing principles when dealing with their customers. It will be difficult</td>
</tr>
</tbody>
</table>
for the NZ Banks to reconcile compliance with certain of these rules/principles with an Australian law-imposed requirement for Specified Entity Identifiers under the Rules. These difficulties are discussed further in paragraphs 8.7 - 8.10 below.

- Furthermore, as an overlay to the New Zealand-specific factors mentioned above, it is noted that both the Australian and New Zealand government are committed to a process called the Single Economic Market agenda which includes two key priorities of:
  - improving the business environment through regulatory coordination; and
  - improving regulatory effectiveness.

In addition, ASIC itself has a memorandum of understanding with the FMA which specifically recognises the need for cooperation between national authorities (and in particularly ASIC and the New Zealand FMA).

If it has not done so, it is submitted that these Trans-Tasman matters should be considered by ASIC when determining its response to this application.

- Further information on why the relief should be granted, in view of the above information on relevant published policy and the relevant facts, is set out in paragraph 8.

- The Proposed NZ Bank Relief is being sought under paragraph 907D(2)(a) of the Corporations Act 2001.

### Other relevant information

As we mention above, we do not believe there is any directly applicable relevant published policy that specifically deals with ASIC’s (or the Australian Government’s) policy position with regards to the application of the Rules to the NZ Banks.

Enclosed with this application is a copy of the NZFMA Code of Conduct & Principles. We expect that ASIC already has access to the relevant Trans-Tasman information mentioned above.

### Relevant contacts

Ben Durnford (ASIC Analyst – Market Infrastructure Team)
Alex Orgaz-Barnier (ASIC Senior Manager – Market Infrastructure Team)
This application has also been shared with AFMA, the FMA and the RBNZ (see paragraph 5.1 and 5.2 above).

### Relevant interests

We are of the view that no third parties would be adversely affected if the application was granted. Accordingly, we believe that ASIC Regulatory Guide 92 “Procedural fairness to third parties” is not applicable to this application.

### Information required for new policy applications (RG 51.26)

6.3 The table below sets out the information required for new policy applications.

<table>
<thead>
<tr>
<th><strong>What are the facts?</strong></th>
<th>Each NZ Bank is a ‘Reporting Entity’ under the Rules by virtue of being &quot;a foreign subsidiary of an Australian Entity where that Australian Entity is an Australian ADI...&quot;¹</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The NZ Banks currently have the benefit of the Specified Entity Information relief contained in ASIC Corporations (Amendment) Instrument 2019/169 (the “Current Relief”). The Current Relief amends the instrument that provided initial relief from the LEI requirements (among other things) under the Rules (namely, ASIC Corporations (Derivatives Transaction Reporting Exemption) Instrument 2015/844). The Current Relief expires on 31 March 2020 and it is understood that ASIC does not intend to further extend the Current Relief. This is why the NZ Banks are now seeking the Proposed NZ Bank Relief set out in this application. The factual matters that could reasonably be considered to be relevant for the application or may have implications for how the relevant legislative provisions or existing ASIC Policy is applied are discussed in paragraph 8.</td>
</tr>
</tbody>
</table>

| **What is the impact of legislative provisions or existing ASIC policy?** | **Impact on NZ Banks** A requirement for the NZ Banks to comply with Rule 2.2.1 in the absence of the Current Relief or the Proposed NZ Bank Relief would impede the NZ Banks business activities for the following reasons: • Negative customer impact (as discussed further in paragraphs 8.1 to 8.12). |

---

¹ Table 1, Rule 1.2.5 of the Rules.
• Negative impact on competitive position of the NZ Banks (as discussed further in paragraphs 8.16 to 8.18).
• Furthermore, it is submitted that there is seemingly little or no value in the extra data that would be generated by imposing the Rules (without relief) on the Banks (as discussed further in paragraphs 8.13 to 8.15).

The NZ Banks could adapt their current operations to comply with the Rules (without relief). However, a number of New Zealand-specific matters would need to be worked through in order to do this, especially in light of the enhanced focus on conduct by financial institutions in New Zealand (which have, at least in part, flowed from the Australian Royal Commission on these matters in the Australian market). See paragraph 8.9 for more information.

How the proposed relief would operate to facilitate the NZ Bank’s proposal

The scope of the Proposed NZ Bank Relief is set out in paragraph 7.1.

In preparing this application (and in suggesting the parameters for the Proposed NZ Bank Relief), the NZFMA and the NZ Banks have endeavoured to weigh-up:

• ASIC’s need to collect information under Rule 2.2.1 of the Rules (which includes Specified Entity Information) to bring transparency to the Australian OTC derivatives markets and improve systemic risk management practices and, moreover, to meet its obligations as a regulator in a G20 country; against
• the New Zealand-specific features of the regulatory environment and market conditions in which the NZ Banks are operating.

The NZFMA and the NZ Banks believe the proposed CPS 226 / CSA (or equivalent) requirement (as set out in paragraphs (a)(iii) and (a)(iv) of the Proposed NZ Bank Relief), together with the requirement for NZ Banks to continue to provide internal entity identifiers for Smaller NZ Counterparties (as set out in paragraph (a)(v) of the Proposed NZ Bank Relief) provides a reasonable solution to resolving the competing tensions between the matters described above.
| What relief is sought? | The NZ Banks are seeking conditional exemption relief from ASIC from the requirement to provide the Specified Entity Information for their Smaller NZ Counterparties (e.g., small and medium enterprises that are not Australian Entities and are not entering into transactions with the NZ Banks that are captured by CPS 226 or require a CSA (or similar). See paragraph 7.1 below for the scope of the Proposed NZ Bank Relief.

The Proposed NZ Bank Relief is being sought under paragraph 907D(2)(a) of the Corporations Act 2001. |
|-----------------------|---------------------------------------------------------------------------------------------------|
| Why should the relief be granted? | Legal reasons why the relief should be granted:

- New Zealand is not a G20 country and does not have trade repository reporting requirements, meaning that there is no requirement under New Zealand law for the NZ Banks to obtain or hold Specified Entity Information.

- NZ Banks act in accordance with certain codes of ethics / fair dealing principles when dealing with their customers. It will be difficult to reconcile compliance with certain of these rules/principles with imposing the requirement for Specified Entity Identifiers under the Rules. An example to illustrate these difficulties is set out in paragraph 8.9 below.

- In addition, the imposition of a requirement to comply with the Rules arguably creates tricky ‘conflicts of law’ compliance issues for the boards of NZ Banks. This is considered further in paragraphs 8.19 and 8.20.

Commercial reasons why the relief should be granted

- Negative customer impact (as discussed further in paragraphs 8.1 to 8.12).

- Negative impact on competitive position of the NZ Banks (as discussed further in paragraphs 8.16 to 8.18).

- Furthermore, it is submitted that there is seemingly little or no value in the extra data that would be generated by imposing the Rules (without relief) on the Banks (as discussed further in paragraphs 8.13 to 8.15).

Policy reasons why the relief should be granted

- The legal and commercial reasons outlined above also constitute policy reasons why the relief should be granted. |
What conditions should be imposed on the relief?

As indicated in paragraphs (a)(ii) to (v) of the Proposed NZ Bank Relief (set out in paragraph 7.1 below), the NZ Banks are comfortable for ASIC to make the relief conditional so that a NZ Bank would be required to report Specified Entity Information under Rule 2.2.1 in certain circumstances, namely for Relevant Entities (as that term is defined in paragraph (a) of the Proposed NZ Bank Relief) that:

1.

(a) are "Australian Entities" (as that term is defined in Rule 1.2.3 of the Rules); or

(b) already have a LEI, Designated Business Identifier or BIC,

(see paragraph (a)(ii) of the Proposed NZ Bank Relief); and

2.

enter into transactions of a size and/or nature such that providing the Specific Entity Information is necessary for meeting the regulatory objective of trade reporting (e.g., those that have a credit support annex ("CSA") (or other industry standard credit support document) in place with the NZ Bank and/or those that enter into transactions that are subject to the margining and risk mitigation requirements under Prudential Standard CPS 226 ("CPS 226") (see paragraphs (a)(iii) and (a)(iv) of the Proposed NZ Bank Relief).

As a further condition, it is suggested that where Specified Entity Information is not required to be reported for the Relevant Entity, the NZ Banks would provide an internal entity identifier - which is consistent with the Current Relief. See paragraph (a)(v) of the Proposed NZ Bank Relief.

The NZFMA and the NZ Banks also wish to make it clear that it is not their intention that foreign entities trading through an Australian branch should be in-scope of the Proposed NZ Bank Relief.

The NZFMA and the NZ Banks understand that the collection of Specified Entity Information for the types of Relevant Entities specified in (1) and (2) above (covered in paragraphs (a)(ii) – (a)(iv) of the Proposed NZ Bank Relief) is important in terms of the key underlying policies behind the establishment of trade repositories globally.
However, the NZFMA and the NZ Banks submit that the reporting (and collection) of Specified Entity Information for Reportable Transactions entered into between NZ Banks and their Relevant Entity customers that are: (a) not Australian entities; and (b) not entering into transactions that are captured by CPS 226 or require a CSA (or similar) (referred to generally in this application as "Smaller NZ Counterparties") is of little value from an overall policy perspective. See paragraphs 8.13 to 8.15 for further analysis of this point.

In addition, the application of this Australian law reporting requirement on transactions between the NZ Banks and Smaller NZ Counterparties presents challenging issues for the NZ Banks both from a customer relationship and conduct perspective and for maintaining their competitive position in the New Zealand market for these types of transactions, when compared to other New Zealand banks that are not subject to the Rules. See paragraphs 8.1 to 8.12 for further analysis of this point.

In this regard, as indicated in paragraph (a)(iii) and (a)(iv) of the Proposed NZ Bank Relief, the NZFMA and the NZ Banks suggest that an appropriate trigger for the application of the Specified Entity Information requirement for the NZ Banks would be the existence of a CSA (or other industry standard credit support document) with the Relevant Entity, or the underlying relationship between the NZ Bank and the Relevant Entity otherwise being subject to CPS 226, as a margining covered counterparty.

CPS 226 obliges the Australian Prudential Regulation Authority covered entities (which include the NZ Banks) to impose variation and initial margin requirements on covered counterparties in relation to non-centrally cleared derivatives, which are triggered at certain qualifying levels. However, given that not all systemic customers of the NZ Banks will be subject to CPS 226 (as the "covered counterparty" definition is subject to certain exclusions e.g., sovereigns, centrals banks etc.), the NZFMA and the NZ Banks believe it is reasonable to impose the CSA (or

---

2 Paragraphs 11, 12, 17 and 18 of CPS 226.
3 Paragraph 9(f) of CPS 226.
equivalent) requirement, outlined in paragraph (a)(iii) of the Proposed NZ Bank Relief.

For other Reportable Transactions where there is no CSA (or equivalent) in place between the NZ Bank and the Relevant Entity and CPS 226 does not otherwise impose margining and risk mitigation requirements on the relationship, the NZFMA and the NZ Banks consider it is reasonable for the NZ Banks to continue to report to the Trade Repository the internal entity identifier for the Relevant Entity used by the NZ Bank. In practice, this would mean that NZ Banks would not be required to ask Smaller NZ Counterparties to obtain the Specified Entity Information (and would continue their current practice for reporting internal entity identifiers for these Relevant Entities under the Rules).

NZFMA and the NZ Banks submit that this achieves the most appropriate balance between the underlying policy objective and the value of providing Specified Entity information to a licenced Trade Repository.

The NZFMA and the NZ Banks submit that the Proposed NZ Bank Relief should not have an expiry date (i.e., the Proposed NZ Bank Relief should continue to apply post the expiry of the Current Relief).

Although the Proposed NZ Bank Relief differs from the terms of the Current Relief and its permanence, the NZFMA submits that the Proposed NZ Bank Relief is more appropriate for the NZ Banks.
PART 3

RG 51 SECTION B REQUIREMENTS – SUPPORTING ANALYSIS

7. THE PROPOSED NZ BANK RELIEF

7.1 The NZ Banks are seeking exemption relief from ASIC from the requirement under Rule 2.2.1 to report the Specified Entity Information on the following terms:

(a) A New Zealand registered bank that is a Reporting Entity pursuant to Table 1, Rule 1.2.5 of the Rules ("NZ Bank Reporting Entity") does not have to comply with Rule 2.2.1 of the Rules to the extent that:

(i) Rules 2.2.1 requires the NZ Bank Reporting Entity to report the information listed in paragraph (b) below about an entity ("Relevant Entity"); and

(ii) the Relevant Entity:

(1) is not an Australian Entity (as that term is defined in Rule 1.2.3 of the Rules); and

(2) does not have a Legal Entity Identifier (LEI), or a Designated Business Identifier, or a Business Identifier Code (BIC); and

(iii) the NZ Bank Reporting Entity is not subject to margining and risk mitigation requirements under Prudential Standard CPS 226 in respect of that Relevant Entity; and

(iv) the NZ Bank Reporting Entity does not have a credit support annex (or other industry standard credit support documents) in place with the Relevant Entity; and

(v) the NZ Bank Reporting Entity reports to the Trade Repository an internal entity identifier for the Relevant Entity used by the NZ Bank Reporting Entity.

(b) TABLE IN RULES | ITEMS IN TABLE
--- | ---
Table S2.1(1) (Derivative Transaction Information – Common data) | Part (a) of Items 7, 10, 15 and 19
Table S2.1(3) (Equity derivative and credit derivative Data) | Part (a) of Items 1, 3 and 5
Table S2.1(5) (Interest rate derivative data) | Part (a) of Items 6, 8 and 10
Table S2.2(1) (Derivative Position Information – Common data) | Part (a) of Items 6, 8 and 15
Table S2.2(3) (Credit derivative and equity derivative Data) | Part (a) of Items 1, 3 and 5
8. WHY SHOULD RELIEF BE GRANTED?

Negative customer impact

8.1 The primary basis upon which relief is sought is customer impact.

8.2 Based on data provided by the NZ Banks, it is understood that at least 90% of each NZ Bank’s total dollar notional position of Reportable Transactions are with counterparties who have a CSA with the relevant NZ Bank. Relevant Entities entering into these significant Reportable Transactions with the NZ Banks are very likely to already have the Specified Entity Information, and the NZ Banks are comfortable to comply with Rule 2.2.1 without any further ASIC exemption or relief for these types of Reportable Transactions (as reflected in the terms of the Proposed NZ Bank Relief). The balance of Reportable Transactions entered into by the NZ Banks are currently reported under the Rules with internal entity identifiers (in accordance with the Current Relief).

8.3 There is very limited use of the Specified Entity Information by smaller entities in the New Zealand market, given that the New Zealand regulators do not require Specified Entity Information to be reported.

8.4 With this in mind, the Proposed NZ Bank Relief has been framed so that Specified Entity Information will not be required for the majority of these Smaller NZ Counterparties (and that the NZ Banks will continue to provide internal entity identifiers for these Relevant Entities under the Rules).

Resistance from Smaller NZ Counterparties

8.5 If the Proposed NZ Bank Relief is not granted by ASIC (and the NZ Banks are required to seek Specified Entity Information for Smaller NZ Counterparties), the NZFMA expects that there to be significant resistance from affected Smaller NZ Counterparties. Those customers are likely to question the cost and effort of obtaining Specified Entity Information particularly given that it is a requirement imposed by an offshore regulator. A number of the Smaller NZ Counterparties (in particular, those that are private trusts and partnerships) may also question and/or resist their information being held by a third-party LEI (or similar) provider and, potentially, becoming publicly available.

8.6 The NZFMA and the NZ Banks anticipate that this will likely result in material customer dissatisfaction amongst Smaller NZ Counterparties for little or any prudential benefit. The NZFMA submits that this point is particularly pertinent at a time when the banks and their regulators are focussed on ensuring better outcomes for bank customers.

Application of codes of ethics and fair dealing principles
8.7 A different but related negative customer impact point stems from the fact that the NZ Banks act in accordance with certain codes of ethics / fair dealing principles when dealing with their customers.

8.8 Rigorous compliance with conduct rules and principles by financial institutions is now in the spotlight New Zealand. This, at least in part, results from the findings of the Australian Royal Commission on conduct. It will be difficult for the NZ Banks to reconcile compliance with certain of these rules/principles with an Australian law-imposed requirement for Specified Entity Identifiers under the Rules. In particular, if the Proposed NZ Bank Relief is not granted by ASIC, in addition to operational requirements (e.g., obtaining Specified Entity Identifiers for all affected counterparties), each NZ Bank will need to consider closely how to message this requirement to those affected counterparties (in particular, Smaller NZ Counterparties). This may require changes to the terms and conditions of the affected derivatives products, front-office training on how to best communicate with affected customers in respect of these foreign law requirements and could necessitate engagement with the FMA and the RBNZ.

8.9 An example of this tension can be drawn from the NZFMA Code of Conduct & Principles (to which all NZ Banks adhere as NZFMA members):

(a) Ethical principle 4 ("EP 4") of the Code provides that Members are expected to “Act fairly and honestly when dealing with clients and counterparties”. The Code discusses EP 4 and provides that “all clients should receive advice that is in their best interests and explain to them the benefit, risks, characteristics, and direct or indirect costs of any investment choice offered to them”. Enclosed with this application is a copy of the NZFMA Code of Conduct & Principles.

(b) If the NZ Banks are required to comply with the Rules (without relief), they will need to consider how to ensure compliance with EP 4 when communicating with a client (especially a Smaller NZ Counterparty) about a potential trade. Examples of the issues/questions that the NZ Banks will likely need to deal with are as follows:

(i) Is it in the client’s best interest to require them, as a term of doing business with the NZ Bank, to obtain (or hold) Specified Entity Information when that requirement is not a New Zealand law requirement, especially when other New Zealand banks (that are not subject to the Rules) are likely to be able to offer materially the same trade without the Specified Entity Information requirement?

(ii) Even if the NZ Bank were to absorb the cost of obtaining a LEI (or AVID) for the client, what are the “direct or indirect costs” to the client of that Specified Entity Information being required as a term of that contract (again, considering that another New Zealand bank is likely to be able to offer the same trade without that Australian law requirement being imposed). How should the NZ Bank communicate the requirement (and the direct and indirect costs of that requirement) to the client – especially if that client is not familiar with G20 Trade Repository requirements (which is likely to be the case, more often than not, in respect of Smaller NZ Counterparties)? If, for example, an AVID is to
be obtained for a client, what types of disclosures should be made to that client by the NZ Banks to deal with the potential 'side effects' of that particular AVID (e.g., that client's information potentially becoming publicly available, when this would not have otherwise been the case)?

8.10 For completeness, the NZFMA Code of Conduct & Principles is one of a number of fair dealing / good conduct requirements imposed on the NZ Banks (both under legislative instruments, such as Part 2 of the Financial Markets Conduct Act 2013 and ‘quasi-legislative’ instruments such as conduct guidelines issued by the FMA and other industry bodies).

8.11 It is acknowledged that the NZ Banks will still need to work through these customer impact issues even if the Proposed NZ Bank Relief is granted by ASIC. However, given the general identity of the Smaller NZ Counterparties (e.g., less sophisticated counterparties), this exercise will be less complicated for the NZ Banks if the Proposed NZ Bank Relief is granted.

8.12 For completeness, the NZFMA and the NZ Banks would like to reserve their right to put in a further amended application under RG 51 for an extension to the Current Relief in order to give the NZ Banks time to deal with the customer impact issues identified above. Obviously, whether the NZFMA and/or the NZ Banks proceed with a further amended application will depend on the outcome of this current application for relief.

**Little or no value in the extra data**

8.13 The NZFMA and the NZ Banks are aware of and appreciate the financial and regulatory objectives behind the implementation of the Rules. 4 Furthermore, the NZFMA acknowledges the need for transparency of its members' financial position to enable regulators to monitor the risks inherent in the Australian OTC derivatives market and the wider Australian financial system.

8.14 Notwithstanding this, the NZFMA and the NZ Banks submit that the value in collecting Specified Entity Information in respect of Smaller NZ Counterparties needs to be evaluated in the context of the structure, size and separate regulatory environment of the New Zealand financial markets. The NZFMA believes that, with regards to the NZ Banks, the systemic or structural risk posed by New Zealand counterparties is being adequately captured by the application of Rule 2.2.1 as supplemented by the Current Relief (excluding the new requirements recently imposed under subsections 6(3) – (6) of the Current Relief).

8.15 Going forward (and noting that it is generally understood that ASIC does not intend to further extend the Current Relief), the NZFMA believes that the Rules as supplemented by the Proposed NZ Bank Relief would ensure the appropriate Rule 2.2.1 information is reported to the Trade Repository under the Rules by the NZ Banks.

---

4 Reference has been made to the ASIC Regulatory Impact Statement "G20 OTC derivatives transaction reporting regime" dated July 2013.
Competitive position

8.16 The Rules are stated to apply to New Zealand registered banks that are Reporting Entities by virtue of being foreign subsidiaries of their Australian Entities ADIs.\(^5\) This means that the Rules capture four of the 26 New Zealand registered banks (noting that Westpac New Zealand Limited is not a party to this application). Although those four banks are the largest New Zealand banks, they do not exclusively provide derivatives in the New Zealand market. Other registered banks as well as non-bank providers in the New Zealand market provide equivalent products and services.

8.17 Given what the NZFMA believes is likely to be a significant adverse Smaller NZ Counterparty customer reaction to the imposition of the Specified Entity Information requirement by ANZ, BNZ and ASB, the NZFMA believes the result will be to give a competitive advantage to both other New Zealand incorporated banks that do not have an ADI parent (e.g. Kiwibank Limited), non-bank providers and those banks operating in New Zealand subject to other international regulators (e.g. Citibank N.A. and Industrial and Commercial Bank of China (New Zealand) Limited).

8.18 In short, if the Proposed NZ Bank Relief is not granted, the requirement to provide Specified Entity Information will disproportionately disadvantage the NZ Banks.

Conflict of laws

8.19 The boards of the NZ Banks are required to act in the best interests of the NZ Bank (and not their Australian ADI parent).\(^6\) This stems from a very clear requirement by the RBNZ to ensure a separation between a New Zealand subsidiary and its parent to avoid a risk being transmitted from the parent to the subsidiary. New Zealand boards are expected to critically review requests from their parent entities in light of what are the best interests of the New Zealand subsidiary.

8.20 The requirement for New Zealand boards to act in the best interests of the local entity is likely to present challenges in dealing with Specified Entity Information requirements (especially for Smaller NZ Counterparties) primarily because:

(a) it results in poor outcomes for NZ Bank customers (both in terms of cost and extra work) at a time when customer outcomes is a real focus for boards; and

(b) of the potentially contentious position of having New Zealand customers’ data held by a third party LEI (or similar) provider (when a New Zealand regulator does not require the data).

Paul Atmore, Chief Executive Officer, NZFMA

\(^{5}\) Table 1, Rule 1.2.5 of the Rules.

\(^{6}\) Standard Condition of Registration 6(g) for New Zealand Incorporated Registered Banks, Appendix One, Statement of Principles, Bank Registration and Supervision, Prudential Supervision Department Documents BS1, September 2017, issued by the RBNZ.