



**ASIC**

Australian Securities & Investments Commission

## CONSULTATION PAPER 175

# Carbon markets: Training and financial requirements

March 2012

### About this paper

This consultation paper is for persons likely to require an Australian financial services (AFS) licence to provide financial services in relation to the carbon pricing mechanism established under the Clean Energy Legislative Package (including the Carbon Farming Initiative) as well as other carbon markets.

We invite feedback on our proposals for applying our current policies on training for financial product advisers and on financial requirements to those persons.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This paper was issued on 9 March 2012 and is based on the Corporations Act as at the date of issue, and the draft Corporations Amendment Regulation 2012, released as an exposure draft on 17 February 2012.

### Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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## The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on representative training and financial requirements for persons providing financial services for regulated emissions units under Australia's new carbon pricing mechanism. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section D, 'Regulatory and financial impact', p. 21.

### Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 10 April 2012 to:

Chloe Youl  
Senior Lawyer  
Strategic Policy  
Australian Securities and Investments Commission  
email: [policy.submissions@asic.gov.au](mailto:policy.submissions@asic.gov.au)

Comments received after this date may not be able to be taken into account in developing our final policy.

## What will happen next?

<b>Stage 1</b>	9 March 2012	ASIC consultation paper released
<b>Stage 2</b>	10 April 2012	Comments due on the consultation paper
	April 2012	Amendments to existing Regulatory Guide 146 <i>Licensing: Training of financial product advisers</i> (RG 146)
<b>Stage 3</b>	Week commencing 30 April 2012	Updated regulatory guide released

## A Australia's new carbon pricing mechanism

### Key points

Australia's carbon pricing mechanism will operate from 1 July 2012.  
A variety of other carbon markets operate in Australia and overseas.

Emissions units recognised under the Clean Energy Legislative Package are financial products under the *Corporations Act 2001* (Corporations Act).

Therefore, persons will require an Australian financial services (AFS) licence to carry on a financial services business in relation to those emissions units, unless exempt.

As part of our role as regulator of the financial services industry, ASIC is responsible for setting policies on the standards of conduct that AFS licensees must meet. This consultation paper sets out our proposals for applying our current policies on training for financial product advisers and on financial requirements to persons providing financial services for emissions units regulated under the Corporations Act.

### The Clean Energy Legislative Package

- 1 Through its Clean Energy Legislative Package, the Government has introduced a carbon pricing mechanism, which will operate from 1 July 2012. Under the carbon pricing mechanism, certain entities (liable entities) will face a charge for their carbon emissions, unless they acquire and surrender the number of emissions units that represents their total annual emissions.

Note: The Clean Energy Legislative Package includes the *Clean Energy Act 2011* (Clean Energy Act), the *Carbon Credits (Carbon Farming Initiative) Act 2011* (CFI Act), and the *Australian National Registry of Emissions Units Act 2011* (ANREU Act).

- 2 The Clean Energy Legislative Package also implements the Carbon Farming Initiative, a scheme allowing persons to generate emissions units through domestic emissions offset projects that reduce or sequester carbon emissions.
- 3 From 2 April 2012, the Clean Energy Regulator will be responsible for administering the carbon pricing mechanism and the Carbon Farming Initiative.

Note: The Clean Energy Regulator is a statutory entity, with responsibility for administering the carbon pricing mechanism and Carbon Farming Initiative from 2 April 2012. As of that date, ASIC will be empowered to disclose relevant confidential information to the Clean Energy Regulator under the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

- 4 Three types of emissions units are recognised under the carbon pricing mechanism:
- (a) carbon units issued by the Clean Energy Regulator under the Clean Energy Act;
  - (b) Australian carbon credit units (ACCUs), which may be generated via carbon offset projects under the Carbon Farming Initiative; and
  - (c) eligible international emissions units (EIEUs)—various types of internationally traded units that meet the requirements of the ANREU Act, including certain units issued in accordance with the rules of the Kyoto Protocol.

In this paper, we refer to these types of emissions units recognised under the carbon pricing mechanism as ‘regulated emissions units’.

- 5 In addition to the carbon pricing mechanism, markets through which participants make voluntary commitments to offset carbon emissions (voluntary carbon markets) also operate in Australia and overseas. In this paper, we refer to activities involving emissions units, including those generated through the carbon pricing mechanism and the Carbon Farming Initiative, as well as voluntary carbon markets, as the ‘carbon markets’, collectively.

## The carbon pricing mechanism and the financial services regime

- 6 ASIC is an independent agency of the Australian Government that regulates registered companies, financial markets and financial and credit services providers. Among other things, we license and monitor financial services businesses (i.e. businesses that provide financial services for financial products) to ensure that they operate efficiently, honestly and fairly through the Australian financial services (AFS) licensing system. However, ASIC is not a prudential supervisor of entities that provide financial services.

- 7 Regulated emissions units (as outlined at paragraph 4) will be financial products under the *Corporations Act 2001* (Corporations Act).

Note: The *Clean Energy (Consequential Amendments) Act 2011* deems that carbon units are financial products for the purposes of the Corporations Act and the ASIC Act. Similarly, the *Carbon Credits (Consequential Amendments) Act 2011* deems that ACCUs and EIEUs are financial products.

- 8 Regulations amending the Corporations Regulations 2001 (Corporations Regulations) and the Australian Securities and Investments Commission Regulations 2001 (ASIC Regulations) will set a transitional period, during which time regulated emissions units will not be financial products. While these regulations are still to be finalised, at this stage, the draft Corporation Amendment Regulation 2012, released as an exposure draft on 17 February 2012 (exposure draft regulation), proposes a transitional period of until 1 July 2012.

- 9 Once this transitional period ends, some persons may require an AFS licence to carry on a financial services business for regulated emissions units, unless exempt. ‘Financial services’ include:
- (a) providing financial product advice;
  - (b) dealing in a financial product;
  - (c) making a market for a financial product;
  - (d) operating a registered scheme;
  - (e) providing a custodial or depository service; and
  - (f) providing traditional trustee company services.
- Note: See Div 4 of Pt 7.1 of the Corporations Act for provisions on when a person provides a financial service.
- 10 The types of persons that may be providing financial services for regulated emissions units include both those participating in or providing advice about the carbon pricing mechanism, and those participating in voluntary carbon markets: see Regulatory Guide 236 *Do I need an AFS licence to participate in carbon markets?* (RG 236) for more details about when an AFS licence may be required to participate in or provide financial product advice and other financial services related to carbon markets.
- 11 AFS licensees are required to meet a range of conduct and disclosure obligations under legislation and the conditions of their licence. We have provided general guidance on these obligations, which will be relevant to those providing financial services for regulated emissions units: see Table 1.

**Table 1: ASIC guidance for AFS licensees and licence applicants**

<b>Preparing your licence application</b>	Regulatory Guide 1 <i>AFS Licensing Kit: Part 1—Applying for and varying an AFS licence</i> (RG 1) Regulatory Guide 2 <i>AFS Licensing Kit: Part 2—Preparing your AFS licence or variation application</i> (RG 2) Regulatory Guide 3 <i>AFS Licensing Kit: Part 3—Preparing your additional proofs</i> (RG 3) Pro Forma 209 <i>Australian financial services licence conditions</i> (PF 209)
<b>Meeting your licensing, conduct and disclosure obligations</b>	Regulatory Guide 36 <i>Licensing: Financial product advice and dealing</i> (RG 36) Regulatory Guide 104 <i>Licensing: Meeting the general obligations</i> (RG 104) Regulatory Guide 105 <i>Licensing: Organisational competence</i> (RG 105) Regulatory Guide 126 <i>Compensation and insurance arrangements for AFS licensees</i> (RG 126) Regulatory Guide 146 <i>Licensing: Training of financial product advisers</i> (RG 146): Regulatory Guide 165 <i>Licensing: Internal and external dispute resolution</i> (RG 165) Regulatory Guide 166 <i>Licensing: Financial requirements</i> (RG 166) Regulatory Guide 167 <i>Licensing: Discretionary powers</i> (RG 167) Regulatory Guide 175 <i>Licensing: Financial product advisers—Conduct and disclosure</i> (RG 175) Regulatory Guide 181 <i>Licensing: Managing conflicts of interest</i> (RG 181)



- 12 Many of the guides listed in Table 1 provide general guidance that applies to all AFS licensees, and will not require any amendments specifically relating to carbon trading. However, this paper seeks feedback on our proposed approach to applying our current policies on training for financial product advisers and on financial requirements to persons providing financial services for regulated emissions units.
- 13 The exposure draft regulation proposes a licensing exemption for a person dealing in regulated emissions units, derivatives over emissions units, or foreign exchange contracts, where:
- (a) the dealing is done to manage a person's own financial risk in relation to the surrender, cancellation or relinquishment of emissions units (or that of a related body corporate or associated entity); and
  - (b) that person does not undertake such dealings as the principal purpose of their business: exposure draft regulation, Sch 1, item 8.
- 14 More generally, persons dealing on their own behalf in regulated emission units will generally not require an AFS licence, unless they are also making a market in emissions units. Persons to whom these, or any other licensing exemptions, apply will not need to meet the requirements we have proposed in this consultation paper.

## Our proposed guidance on training for financial product advisers

- 15 AFS licensees are subject to the conduct obligations of Ch 7 of the Corporations Act, including to:
- (a) maintain the competence to provide the financial services covered by their licence (s912A(1)(e)); and
  - (b) ensure that their representatives are adequately trained and competent to provide these financial services (s912A(1)(f)).
- 16 As part of our role as regulator of the financial services industry, we are responsible for providing guidance on the training advisers should undertake before providing financial product advice to retail clients.
- 17 We have set minimum standards for the training of all advisers providing financial product advice to retail clients, as described in Regulatory Guide 146 *Licensing: Training of financial product advisers* (RG 146).
- 18 Emissions units have not previously been regulated under the Corporations Act. Accordingly, no training requirements are currently in place for advisers who provide financial product advice on these products. However, after the commencement of the new legislation, advisers who provide financial product advice on regulated emissions units to retail clients will need to meet particular training requirements under RG 146.

- 19 We have set out our proposed training requirements for advisers providing financial product advice on regulated emissions units in Section B of this paper. We propose that:
- (a) regulated emissions units should be treated as Tier 1 financial products for the purposes of the training requirements: see proposal B1; and
  - (b) advisers who provide financial product advice to retail clients on regulated emissions units will need to meet the relevant Tier 1 training requirements, including acquiring the specialist product knowledge set out in Table 1: see proposal B2.

### **Our broader review of the adviser training requirements**

- 20 We have recently consulted on changes to RG 146, through Consultation Paper 153 *Licensing: Assessment and professional development framework for financial advisers* (CP 153). This broader review of RG 146 is independent of our current consultation.
- 21 In CP 153, we proposed an assessment and professional development framework that seeks to build on and complement the training and competence requirements in RG 146. We are proposing a four-stage assessment and professional development framework for financial advisers involving:
- (a) adviser certification, where a financial adviser would need to pass a national examination before providing personal or general advice on Tier 1 products to retail clients;
  - (b) monitoring and supervision, through which a new financial adviser would need to complete 12 months of full-time (or equivalent) monitoring and supervision under a supervisor with at least five years' relevant experience;
  - (c) a regular knowledge update review, in which a financial adviser would need to undertake an online learning module within two years of passing the adviser certification examination, and then, subsequently, every three years; and
  - (d) a centralised record of adviser certification and the completion of knowledge update reviews, created and kept by ASIC for each person advising on Tier 1 products.
- 22 Our review of RG 146 is ongoing. If we implement the approach proposed in CP 153, this would include a transition period to minimise disruption to industry. During this period, any guidance that we develop on training for regulated emissions units, as a result of our current consultation, will still be relevant for advisers preparing to complete adviser certification through a national examination in order to continue to provide financial product advice in this area.

## Our proposed policy on financial requirements

- 23 In addition to the obligations described in paragraph 15, AFS licensees are required to maintain:
- (a) adequate resources to provide the financial services covered by their licence and to carry out supervisory arrangements (s912A(1)(d)); and
  - (b) adequate risk management systems (s912A(1)(h)).
- 24 As part of our role as regulator of the financial services industry, we are responsible for setting the financial requirements that an AFS licensee must meet. These are set out in Regulatory Guide 166 *Licensing: Financial requirements* (RG 166) and apply to AFS licensees by way of conditions on their AFS licence.
- 25 RG 166 states that ASIC imposes financial requirements on AFS licensees to ensure that:
- (a) they have sufficient financial resources to conduct their financial services business in compliance with the Corporations Act (including carrying out supervisory arrangements);
  - (b) there is a financial buffer that decreases the risk of a disorderly or non-compliant wind-up if the business fails; and
  - (c) there are incentives for owners to comply with the Corporations Act through risk of financial loss.
- 26 We have set out our proposed approach to financial requirements in relation to regulated emissions units in Section C of this paper. We propose that AFS licensees providing financial services for regulated emissions units should meet the current requirements of RG 166: see proposal C1.
- 27 In developing these proposals, we have been mindful of the fundamental purpose of the financial requirements for AFS licensees, and have focused on the most suitable mechanisms for achieving this purpose in the context of carbon markets. These proposals align with the underlying principles outlined in paragraph 25 and seek to ensure that AFS licensees make adequate provision for expected expenses and carry sufficient financial resources against operational risk that could lead to unexpected losses or expenses. They seek to set minimum standards that are framed as clearly and simply as possible to provide certainty.
- 28 These proposals do not seek to:
- (a) prevent AFS licensees from becoming insolvent;
  - (b) prevent AFS licensees from failing because of poor business models or cash flow problems; or
  - (c) provide compensation to retail clients dealing with AFS licensees that suffer a loss because the licensee fails.

- 29 The proposals do not apply to bodies regulated by the Australian Prudential Regulation Authority (APRA). Nor do they apply to participants in a licensed market, or a clearing participant in a licensed clearing and settlement facility, as long as we are satisfied that:
- (a) the market's or facility's financial requirements are an adequate substitute for our financial requirements; or
  - (b) the participants are required to meet the financial requirements in any relevant market integrity rules that we have issued for the participants of that licensed market.

### **Our broader review of the financial requirements for AFS licensees**

- 30 We are progressively reviewing the financial requirements applying to all AFS licensees. This process is independent of our current consultation.
- 31 In September 2010, we consulted on revised financial requirements for responsible entities of registered managed investment schemes: see Consultation Paper 140 *Responsible entities: Financial requirements* (CP 140). Our amended requirements for responsible entities will commence in November 2012: see draft RG 166 *Financial requirements, including requirements for responsible entities that will apply from November 2012* at Appendix 1 to Report 259 *Response to submissions on CP 140 Responsible entities: Financial requirements* (REP 259).
- 32 Additionally, we are currently finalising revised financial requirements for issuers of retail over-the-counter (OTC) derivatives: see Consultation Paper 156 *Retail OTC derivative issuers: Financial requirements* (CP 156).
- 33 These consultations form part of our broader project to ensure that the financial requirements applying to each industry sector are appropriate and represent the most suitable mechanisms for achieving the objectives set out in paragraph 26.
- 34 Depending on the types of financial services they provide, AFS licensees providing financial services for regulated emissions units may need to meet the revised requirements outlined in paragraphs 31–32 (e.g. if they operate a registered managed investment scheme that holds regulated emissions units as scheme property).

## **About this consultation**

- 35 This consultation paper is based on the draft Corporations Amendment Regulation 2012, released as an exposure draft on 17 February 2012 (exposure draft regulation). We will consider all submissions to this paper before reaching a final view on whether our proposed approach is the most appropriate solution. Our final position will be based on the final regulations made, and our revised training requirements will be set out in published amendments to RG 146 later in 2012.

## B Our proposals on adviser training

### Key points

While all AFS licensees are required to ensure that their representatives are adequately trained, we have set specific requirements for advisers who provide financial product advice to retail clients. These are set out in RG 146.

RG 146 distinguishes between two types of products for the purposes of the training requirements—‘Tier 2’ products, which are relatively simple and well understood, and ‘Tier 1’ products, which are more complex.

We propose that regulated emissions units are characterised as Tier 1 products for the purposes of RG 146. Therefore, advisers who provide financial product advice on regulated emissions units will need to meet the relevant Tier 1 training requirements, including acquiring the specialist product knowledge we set for this product.

### Overview of our guidance on training for financial product advisers

- 36 Generally, advisers who provide financial product advice to retail clients need to meet the minimum standards of training we have set out in RG 146. These requirements will usually be met by advisers undertaking a course listed in the ASIC Training Register.

#### Tier 1 and Tier 2 standards

- 37 Under RG 146, financial products are divided into two groups—Tier 1 and Tier 2 products. The former category comprises products that are more complex than the latter, while Tier 2 products are relatively simple and well understood.
- 38 We have generally taken the view that, where a product is market-linked, it should belong to the more complex Tier 1 category. Generally, the program content of Tier 1 training courses is at a more advanced level than that of Tier 2 courses.

Note 1: Tier 1 courses are at the ‘Diploma’ level under the Australian Qualifications Framework; Tier 2 courses are equivalent to the Certificate III level.

Note 2: Tier 2 products include general insurance products, consumer credit insurance, basic deposit products, non-cash payment products, and First Home Saver Account (FHSA) deposit accounts. All other products are Tier 1: see Table 3 of RG 146.

#### Meeting the training requirements

- 39 Advising on Tier 1 products attracts more onerous knowledge requirements than advising on Tier 2 products. An adviser who provides advice on Tier 1 products must undertake:

- (a) training in generic knowledge of the economic environment in which the products operate; and
- (b) specialist knowledge training on the financial products on which advice is provided.

40 An adviser who provides advice on Tier 2 products is only required to undertake the relevant specialist knowledge training. Generic knowledge about the economic environment in which a product operates is less relevant to Tier 2 products because these products do not have an investment component where the return is subject to market fluctuations.

41 If an adviser provides personal advice, they are also required to complete approved training courses covering relevant skill requirements (e.g. establishing a relationship with the client, and identifying and analysing the client's objectives, needs, financial situation and risk profile).

42 Training courses may be delivered by registered training organisations, self-accrediting organisations (i.e. universities and higher education institutions) and professional and industry associations that have been accredited by ASIC. Courses must be registered on the ASIC Training Register.

Note: See Section D of RG 146 for more detail about the required content and delivery of training programs.

### Who must meet the training standards?

43 All persons who provide general or personal financial product advice to retail clients must meet the training standards, including both natural person licensees and their representatives.

Note: Limited exceptions to the training standards are also available: see Section B of RG 146 for further information on who must meet the training standards.

## Our proposed approach to adviser training on emissions units

### Proposal

- B1** We propose that regulated emissions units are characterised as Tier 1 products for the purposes of RG 146. Therefore, advisers who provide financial product advice to retail clients on regulated emissions units will need to meet the relevant Tier 1 training requirements, including acquiring the specialist product knowledge we set for this product.

#### *Your feedback*

- B1Q1 Do you agree that regulated emissions units should be treated as Tier 1 products? If not, why not?
- B1Q2 Can you quantify any costs that may be associated with the implementation of this proposal?
- B1Q3 Do you anticipate that there will be a significant need for financial product advice on regulated emissions units among retail clients?

## Proposal

- B2** We propose that advisers who provide financial product advice on regulated emissions units will need to acquire the specialist knowledge set out in Table 2.

**Table 2: Regulated emissions units (specialist knowledge)**

<b>Types of products and their characteristics</b>	<ul style="list-style-type: none"> <li>types of regulated emissions units, how they are derived, and their characteristics (encompassing carbon units, Australian carbon credit units, and eligible international emissions units), including their status as personal property</li> <li>risks associated with each type of regulated emission unit, including restrictions on their use, transfer, and bankability for future use</li> <li>processes for acquiring, transferring and surrendering regulated emissions units, including compliance with the requirements of the Australian National Registry of Emissions Units</li> </ul>
<b>Operation of carbon markets</b>	<ul style="list-style-type: none"> <li>operation of both carbon pricing mechanism and voluntary carbon markets</li> <li>issue of carbon units via auction</li> <li>understanding of issues relating to the secondary trading of regulated emissions units, including internationally</li> </ul>
<b>Legal environment—disclosure and compliance</b>	<ul style="list-style-type: none"> <li>understanding of the domestic regulatory framework for the carbon pricing mechanism, including the role of the Clean Energy Regulator and the Australian National Registry of Emissions Units</li> <li>understanding of the domestic regulatory framework for the Carbon Farming Initiative, including the role of the Clean Energy Regulator and the Australian National Registry of Emissions Units</li> <li>understanding of the international regulatory framework for carbon trading, including the Clean Development Mechanism</li> <li>relevant legal principles (e.g. Corporations Act, ASIC Act, <i>Privacy Amendment (Private Sector) Act</i>)</li> <li>the relationship between ethics and regulatory requirements (e.g. good faith, utmost good faith, full disclosure of remuneration/fees and any other conflicts of interest which may influence the adviser's recommendation)</li> <li>relevant industry standards and codes of conduct</li> <li>regulators' guidelines, including our requirements in this policy</li> <li>complaints resolution procedures (external and internal)</li> </ul>
<b>Taxation</b>	<ul style="list-style-type: none"> <li>awareness of taxation issues relating to regulated emissions units</li> <li>deductibility of costs associated with regulated emissions units</li> </ul>

## Your feedback

- B2Q1** Do you agree that the specialist knowledge set out in Table 2 is appropriate to prepare advisers to provide financial product advice on regulated emissions units? If not, why not?
- B2Q2** Is there any area of guidance you would add to the specialist knowledge set out in Table 2?



## Rationale

- 44 Emissions units that will be regulated as financial products under Ch 7 of the Corporations Act will be valuable, tradeable instruments, with many of the other characteristics of market-linked financial products. They also have the status of personal property. Treating regulated emissions units as Tier 1 products is consistent with ASIC's general approach that market-linked products should be categorised in this way.
- 45 Under proposal B1, an adviser who provides financial product advice to retail clients on regulated emissions units will need to meet the Tier 1 training requirements of RG 146—that is, they will need to have undertaken, at the Tier 1 level:
- (a) generic knowledge training about the economic environment: see Table A1 in Appendix A of RG 146;
  - (b) specialist knowledge training on the actual features of regulated emissions units: see proposed Table 2 in this paper; and
  - (c) if the adviser provides personal financial product advice—skills training that complies with Appendix B of RG 146.
- 46 As described in paragraph 4, there will be three main types of regulated emissions units, each of which is created in a different way, with different characteristics and risks. It is appropriate that advisers who provide financial product advice on regulated emissions units have a good understanding of this context, through meeting specialist knowledge requirements.
- 47 Many advisers who already provide financial product advice on Tier 1 products will have already undertaken the generic knowledge training as part of their licensing requirements. Such advisers may only need to undertake specialist training on the specific features of regulated emissions units to upgrade their training in this area. Where advisers have already completed relevant training—including through completion of courses not listed on the ASIC Training Register—it may be possible for this prior training to be recognised: see RG 146.74–RG 146.83.

## Transition period for training requirements

### Proposal

- B3** We propose that advisers will be required to complete the training requirements within the shorter period of:
- (a) 18 months from the commencement of the regulation of emissions units under Ch 7 of the Corporations Act (date yet to be settled by regulation); or
  - (b) 18 months from the date they are granted a new AFS licence, or variation to their existing licence (authorising them to provide financial services for regulated emissions units).



This means that all new AFS licences or licence variations offered during the first 18 months of the regulation of emissions units under Ch 7 of the Corporations Act would be offered on condition that applicants and/or their representatives complete the full training requirements by the required date.

#### *Your feedback*

- B3Q1 Do you agree with this proposal? If not, why not?
- B3Q2 Is 18 months from the commencement of the regulation of emissions units as financial products a sufficient period of time:
- (a) for course providers to develop training courses?
  - (b) for advisers to complete the training?
- B3Q3 Can you foresee any issues that may delay the process of developing training courses for trainers, or the process of completing training for advisers?

### **Rationale**

- 48 We recognise that advisers may not be ready to meet the training requirements immediately, either at the commencement of the regulation of emissions units as financial products, or at the point at which they lodge their application for a new AFS licence or licence variation.

Note: See paragraphs 8–9 for more information about the transitional arrangements that may apply under the new legislation.

- 49 Because emissions units have not previously been regulated under Ch 7, appropriate training courses may not currently be in place. Providers will require time to develop these courses and ensure that they are registered on the ASIC Training Register. Advisers will also need time to complete the required training.
- 50 For this reason, we think it is appropriate to allow advisers a period of time to complete the training requirements. However, given that, in some cases, advisers will probably only require additional training to augment their current qualifications (see paragraph 47), we think that the proposed arrangements allow an adequate period of time for advisers to meet the requirements.
- 51 By setting out our proposals on training requirements now, we hope that this will give advisers some certainty, at an early stage, about what they will need to do to prepare for meeting the training requirements, and also allow providers to begin to develop courses as soon as possible.
- 52 We understand that industry has itself initiated the process of developing courses relating to carbon markets. Our proposals on training requirements for advisers who provide financial product advice on regulated emission units aim to assist industry in this process.

## C Our proposals on financial requirements

### Key points

Most AFS licensees need to meet financial requirements as a condition of their licence.

The financial requirements that apply to AFS licensees in various situations are set out in RG 166.

We propose that AFS licensees providing financial services for regulated emissions units should generally meet the current requirements of RG 166: see proposal C1.

### Overview of the financial requirements for AFS licensees

- 53 Generally, AFS licensees need to meet the financial requirements we have set out in RG 166, unless they are a body regulated by APRA, as defined in s3(2) of the *Australian Prudential Regulation Authority Act 1998*, or, in some cases, a participant in a licensed market or a clearing participant in a licensed clearing and settlement facility (CS facility) subject to adequate alternative financial requirements.

#### Base level financial requirements

- 54 Unless they are exempt from meeting the financial requirements, all AFS licensees must meet the base level financial requirements set out in Section B of RG 166, including:
- (a) remaining solvent at all times, and having total assets that exceed total liabilities;
  - (b) meeting the cash needs requirements we have set out in RG 166.23–RG 166.41; and
  - (c) meeting the audit requirement in RG 166.43–RG 166.44.

#### Financial requirements for specific financial products and services

- 55 In addition to the base level requirements, we have set further financial requirements for specific types of AFS licensees, including:
- (a) responsible entities of managed investment schemes;
  - (b) licensees that are authorised to provide a custodial or depository service (other than incidentally to another financial services business);
  - (c) licensees that hold client money or property;
  - (d) licensees that transact with clients as principal; and
  - (e) foreign exchange dealers.

Note: See Sections C–G of RG 166 for further details.

## Our proposed approach to financial requirements for regulated emissions units

### Proposal

- c1** We propose to apply the current requirements set out in RG 166 to AFS licensees providing financial services for regulated emissions units, unless they are exempt (i.e. because they are regulated by APRA, or follow the financial requirements applying to a participant of a licensed market or CS facility).

#### *Your feedback*

- C1Q1** Do you agree with this proposal? If not, what alternative financial requirements should apply?
- C1Q2** Can you quantify any costs that may be associated with the implementation of this proposal?
- C1Q3** Are there any practical problems with the implementation of this proposal? Please give details.

### Rationale

- 56 The rationale for imposing financial requirements on AFS licensees is to help ensure that insufficient financial resources do not put compliance with the legislation and a licensee's licence obligations at risk. Our financial requirements are not intended to prevent an AFS licensee's failure, but to provide a financial buffer that decreases the risk of a disorderly or non-compliant wind-up if the business fails.
- 57 We think that our financial requirements are appropriate for persons providing a range of financial services for regulated emissions units. That is, unless exempt, all such persons will need to meet the base level financial requirements set out in Section B of RG 166, and any other additional requirements triggered by the type of financial service they provide. Table 3 provides a non-exhaustive list of examples of the financial requirements that are likely to apply to different types of AFS licensee.
- 58 Existing AFS licensees that currently provide financial services for other types of financial products may be able to continue to meet the same financial requirements in relation to regulated emissions units, depending on the types of services they provide.
- 59 We are keen to ensure that our financial requirements apply consistently to all financial service providers that provide the same type of financial services for the same financial products. Our proposed approach would mean that AFS licensees that only provide financial services for regulated emission units would meet the same requirements as licensees that provide similar types of financial services for other financial products.

**Table 3: Financial requirements that may apply to persons providing financial services for regulated emissions units**

Type of AFS licensee	Financial requirements
Licensees that provide financial product advice only	<p>Base level financial requirements in Section B of RG 166, including:</p> <ul style="list-style-type: none"> <li>• having positive net assets and being solvent;</li> <li>• having sufficient cash resources to cover the next three months' expenses with adequate cover for contingencies; and</li> <li>• meeting an audit compliance annually and when we ask</li> </ul>
Licensees that provide financial product advice and hold client money or property	In addition to base level financial requirements, and any other applicable financial requirements, the surplus liquid funds (SLF) requirement of \$50,000, where client assets are over \$100,000: see Section E of RG 166
Responsible entities of managed investment schemes holding regulated emissions units as scheme assets, or that otherwise trade in regulated emissions units	<p>In addition to base level financial requirements, further requirements for responsible entities, including a net tangible assets (NTA) requirement: see Section C of RG 166</p> <p>Note: New financial requirements will apply to responsible entities from 1 November 2012: see Appendix 1 to REP 259.</p>
Licensees that hold client money or property while dealing in regulated emissions units	In addition to base level financial requirements, and any other applicable financial requirements, the SLF requirement of \$50,000, where client assets are over \$100,000: see Section E of RG 166
Licensees that make a market for regulated emission units, or that make a market for, or deal in, derivatives over emissions units	<p>As these licensees are likely to incur financial obligations from transacting with clients as principal, these licensees may need to meet the adjusted surplus liquid funds (ASLF) requirement, which is scaled from \$50,000 to \$100 million, in addition to the base level financial requirements, and any other applicable financial requirements: see Section F of RG 166</p> <p>Note: The financial requirements that apply to issuers of OTC derivatives to retail clients are currently under review: see CP 156.</p>
Licensees operating as a foreign exchange dealer in transactions connected with regulated emissions units	In addition to base level financial requirements, and any other applicable financial requirements, a requirement to hold \$10 million tier one capital: see Section G of RG 166
Licensees that provide custodial or depository services for regulated emissions units	In addition to base level financial requirements, further requirements that apply to custodial or depository services, including a requirement to hold at least \$5 million NTA: see RG 166.82

## D Regulatory and financial impact

60 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us, we think they will strike an appropriate balance between:

- (a) setting appropriate compliance requirements in relation to regulated emissions units to achieve the aims of the AFS licensing regime; and
- (b) implementing the AFS licensing regime in a way that is not overly burdensome.

61 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

62 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

63 To ensure that we are in a position to properly complete any required RIS, we ask you to provide us with as much information as you can about our proposals or any alternative approaches:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process' p. 4.

## Key terms

Term	Meaning in this document
ACCU	Australian carbon credit unit
adviser	A natural person who provides financial product advice to a retail client and is: <ul style="list-style-type: none"> <li>• an AFS licensee; or</li> <li>• a representative of an AFS licensee</li> </ul>
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
ANREU Act	<i>Australian National Registry of Emissions Units Act 2011</i>
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASIC Regulations	Australian Securities and Investments Commission Regulations 2001
ASIC Training Register	The register that contains details of training courses and individual assessment services that have been approved by ASIC authorised assessors as meeting the training requirements in RG 146
ASLF	Adjusted surplus liquid funds, as defined in RG 166
Australian carbon credit unit (ACCU)	A unit issued under s147 of the CFI Act
Carbon Farming Initiative	A scheme administered by the Clean Energy Regulator, allowing persons to generate emissions units through domestic emissions offset projects
carbon markets	Activities involving emissions units, including those generated through the carbon pricing mechanism and the Carbon Farming Initiative, as well as voluntary carbon markets
carbon pricing mechanism	A scheme administered by the Clean Energy Regulator under which certain entities (liable entities) will face a charge for their carbon emissions unless they acquire and surrender the number of emissions units that represents their total annual emissions

Term	Meaning in this document
CFI Act	<i>Carbon Credits (Carbon Farming Initiative) Act 2011</i>
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7)
Clean Energy Act	<i>Clean Energy Act 2011</i>
Clean Energy Legislative Package	The Clean Energy Legislative Package includes the Clean Energy Act, the CFI Act, and the ANREU Act
clearing participant	A clearing participant in a licensed clearing and settlement facility (CS facility), as defined in the operating rules of the licensed CS facility, which complies with the operating rules of the CS facility operated by the CS facility licensee for financial requirements, taking into account any waiver by the CS facility licensee
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
CS facility	A clearing and settlement facility
CS facility licensee	A person who holds an Australian CS facility licence Note: This is a definition contained in s761A.
EIEU	Eligible international emissions unit
eligible international emissions unit (EIEU)	Means: <ul style="list-style-type: none"> <li>• a certified emission reduction (other than a temporary certified emission reduction or a long-term certified emission reduction);</li> <li>• an emission reduction unit;</li> <li>• a removal unit;</li> <li>• a prescribed unit issued in accordance with the Kyoto rules; or</li> <li>• a non-Kyoto international emissions unit</li> </ul> Note: This is a definition contained in s4 of the ANREU Act.
exposure draft regulation	Draft Corporations Amendment Regulation 2012, released as an exposure draft on 17 February 2012
financial product	Generally a facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> <li>• makes a financial investment (see s763B);</li> <li>• manages financial risk (see s763C);</li> <li>• makes non-cash payments (see s763D)</li> </ul> Note: See Div 3 of Pt 7.1 of the Corporations Act for the exact definition.

Term	Meaning in this document
financial product advice	<p>A recommendation or a statement of opinion, or a report of either of those things, that:</p> <ul style="list-style-type: none"> <li>• is intended to influence a person or persons in making a decision about a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or</li> <li>• could reasonably be regarded as being intended to have such an influence.</li> </ul> <p>However, the provision or giving of an exempt document or statement is not to be taken to be a provision of financial product advice</p> <p>Note: This is a definition contained in s766B(1).</p>
financial product adviser	<p>A natural person who provides financial product advice to a retail client and is:</p> <ul style="list-style-type: none"> <li>• an AFS licensee; or</li> <li>• a representative of an AFS licensee</li> </ul>
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
financial services business	<p>A business of providing financial services</p> <p>Note: This is a definition contained in s761A. The meaning of 'carry on a financial services business' is affected by s761C.</p>
foreign exchange contract	<p>Has the same meaning as in s761A</p> <p>Note: This definition includes derivatives (as defined in s761D) that are foreign exchange contracts (as defined in s761A) and may, for example, include a contract for delivery of foreign currency, where the rate at which the exchange takes place is determined with reference to interest rates or interest rate differentials. It does not include a contract that is to be settled by adjustment rather than the delivery of any foreign currency.</p>
foreign exchange dealer	A person who carries on a business of entering, as principal, into foreign exchange contracts in Australia
investor	For an AFS licensee, includes an existing, potential or prospective client
licensed CS facility	<p>A CS facility the operation of which is authorised by an Australian CS facility licence</p> <p>Note: This is a definition contained in s761A.</p>
licensed market	<p>A financial market the operation of which is authorised by an Australian market licence</p> <p>Note: This is a definition contained in s761A.</p>
licensee obligations	The obligations of an AFS licensee as set out in s912A and 912B of the Corporations Act and the requirement to be of good fame and character as included in s913B of the Corporations Act
market integrity rules	Rules made by ASIC, under s798G, for trading on domestic licensed markets



Term	Meaning in this document
NTA (net tangible assets)	Means the AFS licensee's adjusted assets less adjusted liabilities, as defined in RG 166
personal advice	<p>Financial product advice given or directed to a person (including by electronic means) in circumstances where:</p> <ul style="list-style-type: none"> <li>the provider of the advice has considered one or more of the person's objectives, financial situation and needs; or</li> <li>a reasonable person might expect the provider to have considered one or more of those matters</li> </ul> <p>Note: This is the definition contained in s766B(3) of the Corporations Act.</p>
provide a financial service	<p>A person provides a financial service if they:</p> <ul style="list-style-type: none"> <li>provide financial product advice;</li> <li>deal in a financial product;</li> <li>make a market for a financial product;</li> <li>operate a registered scheme; or</li> <li>provide a custodial or depository service</li> </ul> <p>Note: This is a definition contained in s766A.</p>
Pt 7.9 (for example)	A part of the Corporations Act (in this example numbered 7.9)
reg 7.6.04 (for example)	A regulation of the Corporations Regulations 2001 (in this example numbered 7.6.04)
registered training organisation (RTO)	An organisation that has undergone a registration process conducted by a state/territory recognition authority and is an accredited training and assessment organisation
regulated emissions unit	<p>A carbon unit, an ACCU or an EIEU, which are:</p> <ul style="list-style-type: none"> <li>emissions units recognised under the Clean Energy Legislative Package; and</li> <li>financial products under the Corporations Act</li> </ul>
retail client	A client as defined in s761G of the Corporations Act and Ch 7, Pt 7.1, Div 2 of the Corporations Regulations
s766E (for example)	A section of the Corporations Act (in this example numbered 766E), unless otherwise specified
SLF	Surplus liquid funds, as defined in RG 166
Tier 1 products	All financial products except those listed under Tier 2
Tier 2 products	General insurance products, except for personal sickness and accident (as defined in reg 7.1.14); consumer credit insurance (as defined in reg 7.1.15); basic deposit products; non-cash payment products; and First Home Saver Account (FHSA) deposit accounts