



ASIC

Australian Securities & Investments Commission

REPORT 257

Response to submissions on CP 166 Market integrity rules for non-AFS licensee foreign participants and consequential amendments

October 2011

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 166 *Market integrity rules for non-AFS licensee foreign participants and consequential amendments* (CP 166) and details our responses in relation to those issues.

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.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy.

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A Overview/Consultation process

- 1 In April 2011, ASIC made market integrity rules forming the regulatory framework for the competition in exchange markets: see ASIC Market Integrity Rules (Competition in Exchange Markets) 2011. Participants of ASX and Chi-X markets need to comply with the market integrity rules for competition in exchange markets as well as the ASIC Market Integrity Rules (ASX Market) 2010 and ASIC Market Integrity Rules (Chi-X Australia Market) 2011, respectively.

Note: In this document ‘ASIC Market Integrity Rules (Competition)’ refers to the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011, ‘ASIC Market Integrity Rules (ASX)’ refers to the ASIC Market Integrity Rules (ASX Market) 2010 and ‘ASIC Market Integrity Rules (Chi-X)’ refers to the ASIC Market Integrity Rules (Chi-X Australia Market) 2011.

- 2 On 17 August 2011, ASIC released Consultation Paper 166 *Market integrity rules for non-AFS licensee foreign participants and consequential amendments* (CP 166), including draft versions of our proposed amendments to the ASIC Market Integrity Rules (ASX) and ASIC Market Integrity Rules (Chi-X).
- 3 In CP 166, we consulted on a small number of proposals to:
- (a) impose minimum presence requirements on foreign market participants—that is, market participants trading on the ASX and/or Chi-X markets who are foreign entities and do not hold an Australian financial services (AFS) licence; and
 - (b) ensure consistency of operation between the ASIC Market Integrity Rules (ASX) and ASIC Market Integrity Rules (Chi-X), resulting from the introduction of the ASIC Market Integrity Rules (Competition).
- 4 The market integrity rules proposed in CP 166 were to amend the existing market integrity rules for the ASX and Chi-X markets, with effect from 31 October 2011.
- 5 This report highlights the key issues that arose out of the submissions received on CP 166 and our response to those issues. It is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 166. We have limited this report to the key issues.

Responses to consultation

- 6 We received four responses to CP 166 from various stakeholders, including market operators, market participants and industry bodies. Generally, respondents supported the proposed amendments, subject to the feedback about crossings: see paragraph 7(b).

For a list of the non-confidential respondents to CP 166, see the appendix. Copies of these submissions are on the ASIC website at www.asic.gov.au/cp under CP 166. We are grateful to respondents for taking the time to send us their comments.

- 7 Generally, respondents supported the proposed amendments, with the following feedback:
- (a) No significant concerns were expressed about the proposal to impose minimum presence requirements on non-AFS licensee foreign market participants—however, the issue was raised about how existing ASIC class orders would interact with the proposed market integrity rule.
 - (b) Concern was expressed that our proposed approach in extending restrictions to activities during takeovers and buybacks would prevent current market practice in a multimarket environment.

B Minimum presence requirements for foreign market participants

Key points

In CP 166, we proposed to impose minimum presence requirements on foreign market participants that do not hold an AFS licence.

Respondents raised no objections to this proposal—however, they queried how existing ASIC class orders would interact with the proposed market integrity rule.

- 8 In CP 166, we proposed to impose minimum presence requirements on foreign market participants that do not hold an AFS licence to facilitate enforcement actions in Australia for breaches of the *Australian Securities and Investments Commission Act 2001*, the *Corporations Act 2001*, and the *Corporations (Fees) Act 2001*.
- 9 The minimum presence requirements are based on ASIC’s class orders exempting certain foreign financial services providers from the requirement to hold an AFS licence (e.g. see ASIC Class Order [CO 03/1103] *Hong Kong SFC regulated financial service providers*). The requirements of the proposed deed have been amended from existing ASIC class orders to reflect the regulatory framework and the nature of activities and conduct of foreign market participants in relation to the market and financial products traded on the market.
- 10 Respondents did not raise concerns about the proposed minimum presence requirements for foreign market participants—however, one respondent expressed uncertainty about how the proposed market integrity rule would interact with existing ASIC class orders (e.g. [CO 03/1103]).

ASIC’s response

We have proceeded with making a market integrity rule for the ASX and Chi-X markets, requiring foreign entities that do not hold an AFS licence, before entering into a market transaction, to provide to ASIC an irrevocable deed, which provides, among other things, that a foreign market participant agrees to comply with Australian court orders and maintains an agent in this jurisdiction authorised to accept service of process.

The AFS licensing relief provided under ASIC class orders for wholesale foreign financial service providers is different from the issue of minimum presence requirements for foreign market

participants that do not hold an AFS licence. Therefore, the deed required under the market integrity rule is different in its scope to that required under existing ASIC class orders dealing with foreign financial service providers.

C Consequential amendments to market integrity rules for ASX and Chi-X markets

Key points

In CP 166, we proposed amendments to existing market integrity rules to ensure consistency of operation between the ASIC Market Integrity Rules (ASX), ASIC Market Integrity Rules (Chi-X), and ASIC Market Integrity Rules (Competition).

Respondents generally supported our proposals to make minor consequential amendments to the ASIC Market Integrity Rules (ASX) and ASIC Market Integrity Rules (Chi-X), necessitated by the ASIC Market Integrity Rules (Competition). However, industry expressed concern with our proposal to extend the restrictions to activities during takeovers and buybacks to 'trades at or within the spread'.

- 11 In CP 166, we consulted on proposals to make minor amendments to the ASIC Market Integrity Rules (ASX) and ASIC Market Integrity Rules (Chi-X) to:
- (a) ensure that restrictions on trading outside of normal hours during buybacks and takeovers operate effectively in the context of a multimarket environment;
 - (b) clarify that a market participant may deal in products unless those products are suspended on both markets on which they are quoted, and remove a participant's ability to obtain written approval from the market operator to deal during a trading suspension;
 - (c) acknowledge the existence of the obligations under the ASIC Market Integrity Rules (Competition) (in particular, the best execution rule) dealing with client instructions; and
 - (d) extend the restrictions currently applying to special crossings (trades conducted off-market between two separate clients of a broker, and reported to the market after the event) during takeovers and buybacks to a new type of crossing—trades at or within the spread—that are conducted off-market.
- 12 No material issues were raised with the proposals described in paragraphs 11(a)–11(c). Industry did, however, express concerns that our proposed approach in extending the restrictions to activities during takeovers and buybacks (described in paragraph 11(d)) would prevent current market practice in a multimarket environment.

ASIC's response

We have proceeded with making most of the amendments to the market integrity rules for the ASX and Chi-X markets, as proposed in CP 166.

We have not proceeded with our proposal to extend the restrictions currently applying to special crossings during takeovers and buybacks to 'trades at or within the spread' conducted off-market.

We intend to revisit our approach to 'trades at or within the spread' conducted off-market, once the pre-trade transparency regime (contained in Consultation Paper 168 *Australian equity market structure: Further proposals* (CP 168)) has been finalised. At this later time, we will address the need for consequential amendments to Chapter 6 of the ASIC Market Integrity Rules (ASX) and ASIC Market Integrity Rules (Chi-X). In the interim, we intend to implement a regime reflecting existing market practice.

Appendix: List of non-confidential respondents

- Australian Financial Markets Association (AFMA)
 - Chi-X Australia
 - National Stock Exchange of Australia (NSX)
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