



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 378

Safeguard mechanism reforms: Updates to RG 236

May 2024

About this paper

This consultation paper seeks views from safeguard facilities, advisers, intermediaries and participants in the carbon markets on proposed updates to ASIC's regulatory guidance in the current version of Regulatory Guide 236 *Do I need an AFS licence to participate in carbon markets?* ([RG 236](#)).

In particular, we are seeking feedback on our proposal to update RG 236 to address the safeguard mechanism reforms that commenced on 1 July 2023.

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 6 May 2024 and is based on legislation as at the date of issue.

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 licensing in carbon markets, particularly as a result of trading in and providing certain financial services with respect to Australian carbon credit units (ACCUs) and safeguard mechanism credit units (SMCs).

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

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

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 3 June 2024 to:

Regulatory Reform and Implementation
Australian Securities and Investments Commission
email: RG236.Feedback@asic.gov.au

What will happen next?

Stage 1	6 May 2024	ASIC consultation paper released
Stage 2	3 June 2024	Comments due on the consultation paper
Stage 3	Second half of 2024	ASIC will update RG 236 and Information Sheet 156 <i>Regulated emissions units: Applying for or varying an AFS licence</i> (INFO 156).

A Background to the proposals

Key points

ASIC regulates emissions units that are financial products, supervises businesses that have an Australian financial services (AFS) licence and regulates financial markets operating in Australia.

We first published Regulatory Guide 236 *Do I need an AFS licence to participate in carbon markets?* ([RG 236](#)) in March 2012. The regulatory guide was reissued with substantive changes in May 2015.

The safeguard mechanism reforms commenced on 1 July 2023 and will allow the Clean Energy Regulator to issue a new type of carbon product—safeguard mechanism credit units (SMCs)—from January 2025. SMCs are a type of eligible international emissions unit (EIEU) and therefore regulated as a financial product under the *Corporations Act 2001* (Corporations Act).

We are proposing to update RG 236 to reflect the implications of legislative changes arising from the safeguard mechanism reforms that commenced last year.

ASIC's role in the carbon markets

- 1 ASIC regulates financial products, financial markets, providers of financial services and credit providers, among other activities. Some emissions units—that is, units recognised under schemes that are associated with greenhouse gas emissions or carbon abatement—traded in Australia are regulated as financial products, including ACCUs and EIEUs. Other products such as derivatives over emissions units and interests in managed investment schemes involving carbon abatement are also regulated as financial products.
- 2 ASIC issued [RG 236](#) in 2012 to provide guidance to carbon market participants and their advisers and intermediaries about whether they need an AFS licence to participate in or provide financial services in relation to the carbon market. In 2013, RG 236 was reissued to reflect legislative changes around the types of units under the scheme. In 2015, RG 236 was reissued again to reflect changes to legislation and regulations at that time, including the introduction of the 'emissions reduction safeguard mechanism', which commenced in July 2016.

The safeguard mechanism reforms

- 3 The safeguard mechanism reforms set out legislated targets, known as baselines, for the net greenhouse gas emissions of certain large industrial facilities, known as safeguard facilities. The *Safeguard Mechanism (Crediting) Amendment Act 2023* implements reforms to the safeguard mechanism by amending the *National Greenhouse and Energy Reporting Act 2007* (NGER Act) and other legislation.
- 4 Under the NGER Act, if a safeguard facility's net emissions exceed its baseline for a monitoring period, it may be liable for a civil penalty.
- 5 The safeguard mechanism reforms are designed to ensure that baselines for safeguard facilities decrease in a predictable and gradual way, so that emissions from these facilities lessen over time and contribute to Australia's Nationally Determined Contribution under the Paris Agreement.

Note 1: The Paris Agreement is a legally binding treaty which was adopted by 196 parties at the United Nations Climate Change Conference in Paris, France, on 12 December 2015. Australia announced its ratification of the Paris Agreement on 10 November 2016. The agreement aims to strengthen the global response to climate change by holding the increase in the global average temperature to well below 2°C above pre-industrial levels, and pursuing efforts to limit the increase in temperature to 1.5°C.

Note 2: Additional information about the safeguard mechanism is available on the [Department of Climate Change, Energy, the Environment and Water](#) and the [Clean Energy Regulator](#) websites.

- 6 The safeguard mechanism reforms commenced on 1 July 2023 and will allow the Clean Energy Regulator to issue SMCs from January 2025 to safeguard facilities whose net emissions are below their baselines. SMCs are a type of EIEU and so are regulated as a financial product under the Corporations Act.
- 7 The regulation of SMCs as a financial product has implications if you are a safeguard facility, provide advice to a safeguard facility or deal in or make a market in SMCs. For example, you may require an AFS licence to provide financial product advice in relation to SMCs as part of a financial services business you provide in Australia.
- 8 ASIC is proposing to update RG 236 to address the implications of the safeguard mechanism reforms under the Corporations Act. The proposed updates also address changes in the regulatory landscape for carbon markets that have occurred since RG 236 was last issued in May 2015 and simplify some explanations in RG 236 to improve readability.

B Our proposed guidance on emissions units that are financial products

Key points

SMCs are a type of EIEU. They are regulated as financial products under the Corporations Act. We are updating RG 236 to cover this specific type of financial product.

We propose to update our guidance in relation to derivatives over emissions units and interests in managed investment schemes to provide more up-to-date examples relevant to participants in carbon markets.

Safeguard mechanism credit units as a type of EIEU

- 9 Certain types of products are declared to be a financial product under s764A of the Corporations Act, including ACCUs and EIEUs. Under the safeguard mechanism reforms, the definition of an EIEU was amended to include an SMC.
- 10 We propose to update RG 236 to provide guidance as a result of SMCs being financial products.

AFS licensing implications in relation to SMCs

- 11 Generally, a person carrying on a financial services business in relation to SMCs (for example, providing financial product advice) must hold an AFS licence with an authorisation to provide the relevant financial service in relation to EIEUs.
- 12 Existing AFS licensees with an authorisation to provide particular financial services in relation to EIEUs will not be required to vary their AFS licence to provide those financial services in relation to SMCs.
- 13 If you need to apply for a new AFS licence or to vary your AFS licence because you intend to provide financial services in relation to SMCs, you should refer to Information Sheet 156 *Regulated emissions units: Applying for or varying an AFS licence* ([INFO 156](#)).

Note: We are updating INFO 156 to reflect that SMCs are a type of EIEU. This update will be released when we reissue RG 236 (see page 5).

Proposal

- B1** We propose to update our guidance to include SMCs as a type of EIEU, to reflect that they are financial products, and to provide guidance on how the relevant parts of Ch 7 of the Corporations Act involving licensing, financial services and product disclosure apply to activities involving SMCs.

Your feedback

- B1Q1** Do you think that any additional guidance is needed to assist financial services providers in applying for or varying an AFS licence so that they are authorised to provide financial services in relation to SMCs? If so, please detail the additional guidance required.

Rationale

- 14 The revised guidance would help you to consider whether you need an AFS licence to provide financial services in relation to SMCs.

Updated examples of other types of financial products

Proposal

- B2** We propose to provide examples of types of financial products other than ACCUs and SMCs that may involve emissions units. We are providing more explanatory material about derivatives and interests in managed investment schemes involving emission units (see draft RG 236.98–RG 236.118):
- (a) In draft RG 236, our proposed updated guidance provides a new example about an options contract for SMCs (see Example 2) and further guidance regarding the application of s761D(3)(b), which exempts contracts for the future provision of services from falling within the definition of a 'derivative'.
 - (b) In draft RG 236 our proposed guidance updates the example of an ACCU Scheme carbon aggregator arrangement that is a managed investment scheme (see Example 3). It also updates the example of an arrangement to fulfil a carbon abatement contract that is not a managed investment scheme (see Example 4).
 - (c) For both derivatives and interests in managed investments schemes, in draft RG 236, we have refined and simplified the explanation for why the examples are or are not financial products.

Your feedback

- B2Q1 Is the updated example provided for derivatives practical and useful in understanding when there may be a derivative involving an emissions unit? If not, how can the example be improved or made clearer?
- B2Q2 Are there any other common real-world scenarios where there may be a derivative involving an emissions unit that would further assist in understanding the application of s761D for ASIC to provide guidance on? If so, briefly describe other relevant scenarios.
- B2Q3 Is the updated example for an ACCU Scheme aggregated project at Example 3 useful in understanding when such an arrangement may involve the operation of a managed investment scheme? If not, how can this example be enhanced to provide improved guidance?
- B2Q4 Is the updated example of ACCUs generated from multiple ACCU Scheme projects to fulfil a single carbon abatement contract at Example 4 useful to demonstrate circumstances where such an arrangement may not be a managed investment scheme? If not, how can this example be enhanced to provide improved guidance?

Rationale

- 15 We have updated our guidance to provide more useful examples of financial products other than ACCUs and SMCs that involve emissions units.

C Our proposed guidance on providing financial services in relation to regulated emissions units

Key points

We are proposing to amend RG 236 to:

- provide additional guidance on when an entity will provide financial product advice in relation to ACCUs;
- provide guidance on when an entity will provide financial product advice in relation to SMCs; and
- update our guidance on when a person will be making a market, in relation to ACCUs or SMCs.

Updated guidance on financial product advice

Proposal

- c1 We propose to update RG 236 to provide more detailed guidance on when a person may be providing financial product advice in relation to offset projects related to regulated emissions units.

In relation to when an adviser may be providing financial product advice to a safeguard facility, our guidance at draft RG 236.140–RG 236.143 provides that:

- advice that is purely technical in nature, and is not intended to influence the safeguard facility's decision about ACCUs or SMCs **will not be** financial product advice;
- advice about strategies for buying, selling or holding ACCUs or SMCs **will be** financial product advice; and
- advice that includes a comparison between the costs of avoiding an excess emissions situation through operational changes at a facility and the costs of buying and surrendering SMCs and ACCUs to meet the facility's baseline **is likely to be** financial product advice.

Your feedback

- C1Q1 Does our updated guidance assist your understanding of whether you may be providing financial product advice? If not, briefly describe any additional guidance that would enhance your understanding of when financial advice relating to regulated emission units is being provided.

Rationale

- 16 Our updated guidance addresses circumstances when advisers to safeguard facilities may be providing financial product advice, and therefore, may require an AFS licence. It relies on the definition of financial product advice in s766B(1) of the Corporations Act to determine whether an adviser or other person is providing financial product advice. If advice is not limited to advice of a technical nature about operational changes, but could be, or could reasonably be regarded as being, intended to influence the safeguard facility to make a decision in relation to buying or selling an ACCU or an SMC, then that advice is financial product advice.

Updated guidance on ‘making a market’

- 17 A person will be making a market in ACCUs or SMCs if:
- (a) they regularly state the prices at which they propose to buy or sell these units on their own behalf;
 - (b) other people can reasonably expect to be able to enter into transactions at the stated prices; and
 - (c) the actions of the person do not constitute operating a financial market because of the effect of s767A(2)(a) of the Corporations Act.

Proposal

- c2 We propose to include in our guidance on making a market additional explanatory material and an example of when:
- (a) a project proponent may be making a market in relation to ACCUs; and
 - (b) a safeguard facility may be making a market in relation to SMCs (see draft RG 236.152–RG 236.154).

Your feedback

C2Q1 Does our proposed additional guidance assist your understanding of when you may be making a market? If not, what further explanation may assist your understanding of when a person is making a market in ACCUs or SMCs?

Rationale

- 18 We have updated our guidance in relation to making a market specifically to include an example with respect to safeguard facilities and their trading in SMCs. This example relies on:
- (a) the regularity with which a safeguard facility states prices at which it is prepared to buy or sell SMCs; and
 - (b) circumstances where other people have a reasonable expectation that they will be able to regularly effect transactions at that price.

Key terms

Term	Meaning in this document
ACCU	An Australian carbon credit unit issued under s147 of the CFI Act
ACCU Scheme aggregated project	<p>A project where one or more people carry out separate carbon abatement activities that could each be an ACCU Scheme project on their own but are arranged by a project proponent to be contributions of activities to a single, aggregated ACCU Scheme project.</p> <p>An ACCU Scheme aggregated project may also be arranged as contributions by one or more people of one (or more) of the means to generate carbon abatement</p>
ACCU Scheme project	A project carried out in accordance with the CFI Act that allows the project proponent to be issued with ACCUs for the carbon abatement resulting from the project's activity. These projects were formerly known as Emissions Reduction Fund Projects
AFS licence	<p>An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services</p> <p>Note: This is a definition in s9.</p>
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
ASIC	Australian Securities and Investments Commission
baseline or baseline emissions number	<p>For a safeguard facility, the number ascertained in accordance with the relevant formula set out in the NGER Act or Safeguard Rules in relation to that facility</p> <p>Note: See s22XL of the NGER Act for the precise definition and Pt 3, Div 2 to 7 of the Safeguard Rules.</p>
carbon abatement	<p>The removal of one or more greenhouse gases from the atmosphere (i.e. sequestration) or the avoidance of emissions of one or more greenhouse gases</p> <p>Note: This is a definition in s5 of the CFI Act.</p>
carbon abatement contract	<p>A contract entered into by or on behalf of the Australian Government for the purchase of ACCUs, or other eligible carbon credits, by the Australian Government</p> <p>Note: This is a definition in s20B of the CFI Act.</p>
CFI Act	<i>Carbon Credits (Carbon Farming Initiative) Act 2011</i>

Term	Meaning in this document
Clean Energy Regulator	A statutory authority established by the <i>Clean Energy Regulator Act 2011</i> that administers the ACCU Scheme, National Greenhouse and Energy Reporting Scheme, Safeguard Mechanism, the Guarantee of Origin Scheme, the Renewable Energy Target, the Australian National Registry of Emissions Units and the Nature Repair Market
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
EIEU	<p>Eligible international emissions unit—which means:</p> <ul style="list-style-type: none"> • a certified emission reduction issued outside of Australia in accordance with the relevant provisions of the Kyoto rules (other than a temporary certified emission reduction or a long-term certified emission reduction); • an emission reduction unit issued in accordance with the relevant provisions of the Kyoto rules; • a removal unit issued in accordance with the relevant provisions of the Kyoto rules; or • a prescribed unit issued in accordance with the Kyoto rules; or • an SMC <p>Note: This is the definition in s4 of the <i>Australian National Registry of Emissions Units Act 2011</i>.</p>
excess emissions situation	Where a safeguard facility's net emissions number is higher than its baseline emissions number for the monitoring period, which may result in a penalty
financial product	<p>A facility through which, or through the acquisition of which, a person does one or more of the following:</p> <ul style="list-style-type: none"> • makes a financial investment (s763B); • manages financial risk (s763C); or • makes non-cash payments (s763D) <p>Note: See Div 3 of Pt 7.1 of the Corporations Act for the exact definition. In addition to the general categories above, this specifies certain things as being included or excluded from the definition.</p>
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"> • is intended to influence a person or people 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 • could reasonably be regarded as being intended to have such an influence. <p>This does not include anything in an exempt document or statement</p> <p>Note: This is a definition in s9 of the Corporations Act.</p>

Term	Meaning in this document
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
financial services business	A business of providing financial services
monitoring period	This generally coincides with a safeguard facility's financial year Note: See s22XG of the NGER Act for more details.
net emissions number	For a safeguard facility, the number of tonnes of carbon dioxide equivalence of the total amount of covered emissions of greenhouse gases from the operation of the facility during the period less any ACCUs or SMCs surrendered. Note: See s22XK of the NGER Act for the precise definition.
NGER Act	<i>National Greenhouse and Energy Reporting Act 2007</i>
project proponent	A person responsible for, and with the legal right to, carry out an ACCU Scheme project Note: See s5 of the CFI Act for the precise definition.
provide a financial service	A person provides a financial service if they: <ul style="list-style-type: none"> • provide financial product advice; • deal in a financial product; • make a market for a financial product; • operate a registered scheme; • operate the business and conduct the affairs of a CCIV; • provide a custodial or depository service; • provide a crowd-funding service; • provide a claims handling and settling service; • provide a superannuation trustee services; or • as a trustee company, provide traditional trustee services Note: This is a definition in s766A of the Corporations Act.
regulated emissions unit	Emissions units that are financial products under the Corporations Act
safeguard facility	A facility whose total amount of covered emissions of greenhouse gases from its operation during the financial year has a carbon dioxide equivalence of more than 100,000 tonnes. The safeguard mechanism applies to safeguard facilities Note: The NGER Act uses the term 'designated large facility' where we use the term 'safeguard facility' (see s22XJ of the NGER Act). We have adopted this industry term in order to reduce complexity for readers who may not be familiar with the NGER Act.

Term	Meaning in this document
safeguard mechanism	A legislative framework that sets out limits on greenhouse gas emissions for Australia's largest industrial facilities. The safeguard mechanism applies to safeguard facilities
safeguard mechanism reforms	Reforms introduced to the safeguard mechanism in April 2023, primarily through the <i>Safeguard Mechanism (Crediting) Amendment Act 2023</i> that, among other things, created the legislative framework for SMCs
Safeguard Rules	<i>National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015</i>
SMC	Safeguard mechanism credit unit—a unit issued under s22XNA of the NGER Act

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to update our guidance to include SMCs as a type of EIEU, to reflect that they are financial products, and to provide guidance on how the relevant parts of Ch 7 of the Corporations Act involving licensing, financial services and product disclosure apply to activities involving SMCs.</p>	<p>B1Q1 Do you think that any additional guidance is needed to assist financial services providers in applying for or varying an AFS licence so that they are authorised to provide financial services in relation to SMCs? If so, please detail the additional guidance required.</p>
<p>B2 We propose to provide examples of types of financial products other than ACCUs and SMCs that may involve emissions units. We are providing more explanatory material about derivatives and interests in managed investment schemes involving emission units (see draft RG 236.98–RG 236.118):</p> <p>(a) In draft RG 236, our proposed updated guidance provides a new example about an options contract for SMCs (see Example 2) and further guidance regarding the application of s761D(3)(b), which exempts contracts for the future provision of services from falling within the definition of a ‘derivative’.</p> <p>(b) In draft RG 236 our proposed guidance updates the example of an ACCU Scheme carbon aggregator arrangement that is a managed investment scheme (see Example 3). It also updates the example of an arrangement to fulfil a carbon abatement contract that is not a managed investment scheme (see Example 4).</p> <p>(c) For both derivatives and interests in managed investments schemes, in draft RG 236, we have refined and simplified the explanation for why the examples are or are not financial products.</p>	<p>B2Q1 Is the updated example provided for derivatives practical and useful in understanding when there may be a derivative involving an emissions unit? If not, how can the example be improved or made clearer?</p> <p>B2Q2 Are there any other common real-world scenarios where there may be a derivative involving an emissions unit that would further assist in understanding the application of s761D for ASIC to provide guidance on? If so, briefly describe other relevant scenarios.</p> <p>B2Q3 Is the updated example for an ACCU Scheme aggregated project at Example 3 useful in understanding when such an arrangement may involve the operation of a managed investment scheme? If not, how can this example be enhanced to provide improved guidance?</p> <p>B2Q4 Is the updated example of ACCUs generated from multiple ACCU Scheme projects to fulfil a single carbon abatement contract at Example 4 useful to demonstrate circumstances where such an arrangement may not be a managed investment scheme? If not, how can this example be enhanced to provide improved guidance?</p>

Proposal	Your feedback
<p>C1 We propose to update RG 236 to provide more detailed guidance on when a person may be providing financial product advice in relation to offset projects related to regulated emissions units.</p> <p>In relation to when an adviser may be providing financial product advice to a safeguard facility, our guidance at draft RG 236.140–RG 236.143 provides that:</p> <ul style="list-style-type: none"> (a) advice that is purely technical in nature, and is not intended to influence the safeguard facility’s decision about ACCUs or SMCs will not be financial product advice; (b) advice about strategies for buying, selling or holding ACCUs or SMCs will be financial product advice; and (c) advice that includes a comparison between the costs of avoiding an excess emissions situation through operational changes at a facility and the costs of buying and surrendering SMCs and ACCUs to meet the facility’s baseline is likely to be financial product advice. 	<p>C1Q1 Does our updated guidance assist your understanding of whether you may be providing financial product advice? If not, briefly describe any additional guidance that would enhance your understanding of when financial advice relating to regulated emission units is being provided.</p>
<p>C2 We propose to include in our guidance on making a market additional explanatory material and an example of when:</p> <ul style="list-style-type: none"> (a) a project proponent may be making a market in relation to ACCUs; and (b) a safeguard facility may be making a market in relation to SMCs (see draft RG 236.152–RG 236.154). 	<p>C2Q1 Does our proposed additional guidance assist your understanding of when you may be making a market? If not, what further explanation may assist your understanding of when a person is making a market in ACCUs or SMCs?</p>