6 August 2021

David Dworjanyn
Senior Specialist, Markets
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

By email: MIRsubmissions@asic.gov.au

Dear Mr Dworjanyn

**RE: Proposed amendments to the ASIC market integrity rules and other ASIC-made rules**

AFMA supports ASIC's efforts to update and tidy-up the Market Integrity Rules (MIRs) and other ASIC-made rules as an important part of the good management of the financial markets.

Many of the proposals are unalloyed goods for the market and are welcomed by the industry.

AFMA believes there are significant efficiency and risk gains to be made for the good of the economy in more regular MIR reviews of the type ASIC is now undertaking. Many of these issues are long-standing concerns.

We suggest that a biannual process is established for MIR review that takes input from industry as a key starting point. A regular process would provide more time for deeper consideration of optimization and drafting clarification options. There are many improvements that could be considered. For example, members would support a review of the timelines imposed by the MIRs. Currently completing a full investigation and reaching a complete understanding within some of the required strict timeframes can require undesirable expedition for firms operating on a global basis.

We understand that our materials in relation to client money streamlining matters are being considered separately by a different team. As such in this letter we respond solely to the matters raised in the consultation paper. We note our strong support for ASIC's work in relation to streamlining client money rules. The desired outcomes can be achieved with much lower complexity, risk and cost which can only benefit investors.

Thank you for considering our comments in relation to the Proposed amendments to the ASIC MIRs and other ASIC-made rules.

Please do not hesitate to contact us if you require more information or further elucidation of any matters raised below.

Yours sincerely

Damian Jeffree

**Senior Director of Policy**

B1 We propose to replace Part 2.4 of the Securities Markets Rules with principles-based rules (see Attachment 1) that require market participants to ensure that:

1. (a) their financial advisers are suitably qualified and experienced before providing personal advice to retail clients in relation to derivatives; and
2. (b) their qualifications relevant to providing advice on derivatives is noted on ASIC's Financial Advisers Register.

Note: Under this proposal, ASIC will no longer be required to approve examinations written by training providers that assess the knowledge and competency of derivatives advisers. Instead, a market participant will need to satisfy itself that, at all times, any individual involved in providing derivatives advice on its behalf to retail clients has the relevant skills, knowledge and experience for the role they are performing.

B1Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.

AFMA agrees with the proposal.

The proposed revisions will simplify the process for maintaining adviser details by removing product-specific requirement, with the result that these advisers will be treated much like other RG146 categories.

We note that AFMA is working to propose to Government more appropriate pathways for retail advisors of SMEs in relation to FX. AFMA would be pleased to provide more details of this work to ensure ASIC's proposed changes are in alignment.

We received a minor clarification query as to why derivatives have been called out as a sub-product in the MIRs whilst the Corporations Act is deferred to for all other products.

B1Q2 What regulatory benefit, if any, do you believe would arise from maintaining (in the Securities Markets Rules) a separate set of training and qualification obligations for financial advisers who provide personal advice to retail clients in relation to derivatives—beyond what is already provided for in the FA standards, s912A(1)(e)–(f) of the Corporations Act and RG 146? In your response, please give detailed reasons for your answer.

AFMA does not see any regulatory benefit to be derived by maintaining a separate set of training and qualification obligations in relation to derivatives as part of the MIRs.

B1Q3 What cost savings do you believe would arise from this proposal (e.g. savings resulting from the removal of procedural elements such as submitting new accreditation applications, reaccreditation applications, renewals and other related notifications)? Please provide an estimate of future cost savings.

AFMA fully supports this proposal as decreasing compliance burden but putting a firm dollar figure on savings is difficult.

B1Q4 Do you think the additional training and qualification obligations should be expanded to include other complex product classes traded on a licensed market (e.g. hybrids)? Please give detailed reasons for your answer.

AFMA does not support expanding MIR training and qualification obligations to other licenced market complex product classes. The case has not been made for expansion and it is likely to decrease efficiency.

B1Q5 Do you consider that it would be preferable for ASIC to repeal Part 2.4 in its entirety and rely solely on the Corporations Act in the regulation of these matters?

AFMA supports ASIC repealing section 2.4 in its entirety and relying solely on the Corporations Act.

B2 We propose to amend Rule 6.2.3 of the Securities Markets Rules (see Attachment 1) to clarify that a trade with price improvement:

1. (a) cannot include orders from more than one client on both sides of the transaction (i.e. it will be possible to have one client to one client or one client to multiple clients); and
2. (b) where the participant is acting as 'principal', there cannot be multiple parties on both sides of the transaction (i.e. it will be possible to have multiple clients to principal or one client to principal aggregated with one or more clients).

B2Q1 Do you agree with our proposal? Please give reasons for your answer.

AFMA supports creating an even playing field by ensuring rule changes go through a proper process and all participants are advised of the changes at the same time. We understand ASIC has informally advised some firms of their interpretation of Rule 6.2.3 that did not accord with previous standard interpretations.

We note the flexibility in the rule as previously understood in relation to 1(a) in allowing multiple clients on both sides of a crossing transaction. This facilitates easier finding of liquidity and execution for investors.

Investors could be disadvantaged if they cannot be included in crossings, and breaking crossings up into multiple smaller crossings could increase the complexity and difficulty of getting trades executed for investors in the Australian markets, for a policy benefit that is unclear.

If there are to be substantive changes in the approach to make the restriction proposed in 1(a) then there should be a clear policy rationale for doing so that explicates the benefit to investors of the change.

In relation to the proposal in 2(b) contrast accords with long-standing practice.

B2Q2 Do you consider the proposal will alleviate any uncertainty participants have about how this exception applies to aggregated orders?

While certainty is welcome, it is not in itself a rationale for substantive policy change.

B3 We propose to amend Rule 3.4.3 of the Securities Markets Rules (see Attachment 1) to provide that a market participant is not required to give the notifications required by Rule 3.4.3(1)(b) if the market transaction is in respect of a financial product which is a derivatives market contract.

B3Q1 Do you agree with our proposal? Please give reasons for your answer.

AFMA strongly supports the proposal.

A confirmation to non-retail clients for derivatives transactions would not provide demonstrable regulatory benefit. There is a fundamental difference in the cash equities and derivative market space noting the following:

As noted in the consultation paper, the derivatives market is largely conducted on an RFQ basis, market makers being an integral feature and liquidity provider to an often-illiquid market. The involvement of market makers is expected in such an environment and indeed actively sought.

The majority of public crossing systems disclosures posted on the ASIC website are for the offering of Equity Market Products, which do not include derivatives. Chi-X Hidden and Centrepoint do not include derivative products in their execution. Accordingly, notification of the execution venue for products that are primarily only traded on one venue (ASX) is not of any assistance to investors.

In the interest of further efficiency AFMA requests ASIC to consider implementation of this proposal for cash orders as well, as members report there have been limited queries received since the rule came into effect. Some members note no access of these reports by any client for three years.

B3Q2 Have changes in market liquidity, alternative trading venues or product innovation made the notification in Rule 3.4.3(1)(b) necessary?

From a historical perspective, we note that when the rule was drafted, there were a much larger number of dark pools and issues centred around conflicts of interest. The vast majority of these have now ceased operation, and, coupled with enhanced trading systems, performance is a more key consideration than the trading venue itself. These fundamental changes now make the requirement far less relevant for investors.

B3Q3 Are you able to point to any information asymmetry or other issues that have become evident during the time that the waivers from providing the information in Rule 3.4.3(1)(b) have been in place?

We are not aware of any negative outcomes.

B3Q4 If we do not proceed with the proposal, will you be in a position to comply with Rule 3.4.3 when the class waiver expires? If not, what are the estimated compliance costs (both one- off and ongoing), costs of any IT build and lead time for you to be able to comply with the rule?

We also note that if ASIC did not proceed with the proposal firms would need significant time to implement required systems changes were the class orders to expire. The costs associated would not bring any benefit for investors. AFMA members report that the previous implementation was difficult and only possible with the assistance of the exchange.

B4 We propose to amend Rule 7.4.4 of the B4Q1 Securities Markets Rules (see Attachment 1) to clarify that intermediary ID data is required for all orders and transactions:

1. (a) submitted by the AFS licence holder as intermediary for the underlying client; and
2. (b) if there is an arrangement in place under which the AFS licence holder is permitted to submit trading messages into the market participant's system as intermediary for its own clients.

B4Q1 Do you agree with our proposal? Please give reasons for your answer.

AFMA is not opposed to the proposed amendment but believes that further refinement to the drafting may be necessary to make the intent clearer. We would also suggest you consider including some worked examples to assist further with clarity, including around terms such as 'arrangement'.

AFMA also asks whether this change in wording (or as adjusted) will require going forward i) an intermediary ID for a special crossing that a firm executes on behalf of that intermediary ii) secondary order ID's for underlying retail clients for orders placed by a fund manager client from a systematic platform.

B4Q2 Do you consider that the proposal will remove any existing uncertainty that participants have about when the intermediary ID is required?

We encourage ASIC to work with the industry to find revised wording to ensure clarity.

C1 We propose to replace the prohibited C1Q1 employment condition in Rule 2.2.3 of the Futures Markets Rules with a 'good fame and character' test that mirrors Rule 2.1.4 of the Securities Market Rules.

C1Q1 Do you agree with our proposal to replace the prohibited employment rule with a 'good fame and character' test? Please give reasons for your answer.

AFMA agrees with the proposal for the reasons provided by ASIC and to provide consistency with the current Market Integrity Rules.

We do have concerns, however, with the proposed drafting for Rule 2.2.3(2)(b)(i) – ASIC's draft language may not be aligned with its intention as it could have the effect of banning any individual employed by a market participant or otherwise prevent a market participant from employing an individual that has been convicted of a minor offence such as a parking offence or a traffic offence.

It would seem more appropriate to frame the proposed 'good fame and character' test by reference to a conviction for a "serious offence" (ie. indictable offences such as for example dishonesty, fraud, insider trading offences). This is consistent with similar tests set out under US regulations relating to employment of persons in the US securities trading or financial markets industries. Accordingly, we suggest that the first limb of the good fame and character test be qualified by reference to "any indictable or serious offence".

C1Q2 Will the proposal result in any changes to your systems and procedures or increased one-off or ongoing compliance or administrative costs? Please give an estimate of those costs

We are advised this proposal will not result in any changes to systems or procedures as new staff are already subject to rigorous vetting and assessment prior to being on-boarded.

C2 We also propose to extend the 'good fame C2Q1 and character' test to include employees and other persons involved in the business of a market operator with the addition of Rule 4.4.1 which has the same drafting as the proposed Rule 2.2.3

C2Q1 Do you agree that the 'good fame and character' requirement should also extend to employees and other persons involved in the business of a market operator? Please give reasons for your answer.

AFMA makes no comment.

C2Q2 Will the proposal result in any changes to your systems and procedures or increased one-off or ongoing compliance or administrative costs? Please give an estimate of those costs.

AFMA makes no comment.

C3 We propose to add Rules 3.6.1 and 3.6.2 to the Futures Markets Rules (see Attachment 2), requiring a market participant to notify ASIC (unless the same information has already been reported to AUSTRAC) in a form prescribed by ASIC as soon as practicable if it has reasonable grounds to suspect that a person is:
(a) trading with inside information; or

(b) engaging in manipulative trading.

A market participant must not disclose to other parties that it has notified ASIC of suspicious activity.

C3Q1 What are your views on our proposed approach to requiring suspicious activity reporting? Are there other avenues for obtaining this information?

AFMA supports consistency in across market reporting requirements.

AFMA opposes mandating specific information for the suspicious activity report as a market participant may have formed a reasonable suspicion without knowing certain information about the activity such as the details of the transaction, order or persons involved, for example.

C3Q2 Will compliance with this proposed obligation require any changes to your systems or procedures? What are the likely costs of such changes (where possible, please identify the nature of likely costs, quantify the estimated costs and indicate whether such costs will be one-off or ongoing)? Are there likely to be any significant impediments to making these changes?

For firms that are already providing such reports there will be no increase in costs. For firms that are not there may be increases.

C3Q3 Do you have views on whether this proposal is likely to impose any other additional costs or burdens on any class of stakeholder? Where possible, please identify the nature of the likely costs/burdens, quantify the estimated costs (including any assumptions and relevant data) and indicate whether such costs/burdens will be one-off or ongoing. What other information should be encapsulated in suspicious activity reporting?

AFMA makes no comment.

C4 We propose to amend Rule 3.4.4 of the Futures Markets Rules (see Attachment 2) to remove the requirement that:
(a) client authorisations must be 'in writing'; and
(b) the authorisation must include acknowledgments from the client.

AFMA supports the proposal and is of the view there is no regulatory or business purpose to the requirement for the instructions to be 'in writing'.

C5 We propose to amend Rule 3.5.3 of the Futures Markets Rules to remove the requirement that client authorisations must be 'in writing'.

AFMA supports the proposal and is of the view there is no regulatory or business purpose to the requirement for the authorisations to be 'in writing'.

In relation to both C4 and C5 we are supportive of the drafting as proposed and would seek consultation of any changes.

D1 We propose to amend the Securities Markets Rules to provide that a decision listed in Appendix 1 would be subject to merits review by the AAT.

D2 We propose that a decision under the Securities Markets Rules which is listed in Appendix 2 would not be subject to merits review by the AAT.

D3 We propose to amend the Futures Markets Rules to provide that a decision listed in Appendix 3 would be subject to merits review by the AAT.

D4 We propose that a decision under the Futures Markets Rules which is listed in Appendix 4 would not be subject to merits review by the AAT.

We answer all questions relating to proposals D1-D4 together:

AFMA is generally supportive of the split in elements subject to AAT review. We note that rule 1.2.3 is captured in both Appendix 1 and 2. We seek to understand the rationale for some rules (e.g. 1.2.2) being captured in neither.

AFMA also seeks more clarity on the right of appeal that market participants have against an ASIC decision under the Market Disciplinary Panel (MDP) process for the unlisted rules. We would further like to understand whether ASIC would consider allowing rights of appeal rather than relying on the court process to initiate civil penalty procedures following an MDP decision which is not legally enforceable.

ASIC's current proposals to the MIR's seek to promote market integrity and a level playing field for all participants, alongside procedural fairness. This includes per CP342.70 a due process being afforded to an individual; and is also consistent with the recission of the 'prohibited employment' concept under CP342.72 and 'affording due process' under CP342.82. The inability to appeal against an MDP decision would be inconsistent with the spirit of these amendments.

We seek ASIC’s views on this proposal.

E1 We propose to amend Rule 1.2.1 of the market integrity rule books made under s798G to clarify that ASIC may, by way of disallowable legislative instrument, relieve a person from the obligation to comply with the market integrity rules or withdraw that relief (see Attachment 3).

AFMA does not agree with the proposal for all waivers to be made public. Concerns centre around the individual waivers on grounds of confidentiality - individual waivers are often sought based on specific circumstances and may encompass proprietary information (for example trade capture, booking models, securities lending margin advice etc). The disclosure of such information may be of competitive disadvantage if made publicly available to industry peers. We believe the disadvantages of this proposal with respect to confidentiality outweigh the advantages of market transparency and does not contribute to the promotion of a flat structure for market participants.

E2 We propose to repeal the penalty amounts specified under each of the ASIC-made rules and all notes stating that there is no penalty for breach of an ASIC-made rule.

We support this change to bring consistency with the Corporations Act following the amendments contained in Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018.

However, AFMA expressed serious concerns about the, in some cases, quite radical changes to penalty levels contained in that Bill. It is fair to say the resulting penalty regime is now at odds with the recommendation of the Murray Financial System Inquiry's recommendation against 'extreme penalties'. In relation to the MIRs AFMA would support the reintroduction of maximums for individual offences through a legislative process to return proportion to the penalty provisions.