



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 342

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

June 2021

About this paper

This paper sets out our proposals to amend the ASIC Market Integrity Rules (Securities Markets) 2017 and the ASIC Market Integrity Rules (Futures Markets) 2017, and make other machinery amendments to market integrity rules made under s798G of the *Corporations Act 2001*. We are seeking the views of interested stakeholders on our proposals.

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 30 June 2021 and is based on the 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 the content and form of amendments to market integrity rules made under s798G of the Corporations Act. 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 F, 'Regulatory and financial impact'.

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](#) for more information on 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 6 August 2021 to:

David Dworjanyn, Senior Specialist, Markets
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
email: MIRsubmissions@asic.gov.au

What will happen next?

Stage 1	30 June 2021	ASIC consultation paper released
Stage 2	6 August 2021	Comments due on the consultation paper
Stage 3	Q4 2021	Amended rules made, feedback report released and regulatory guides amended

A Background to the proposals

Key points

ASIC is responsible for supervising domestic licensed markets and making market integrity rules. In 2017, we consolidated 13 of 14 market integrity rule books into four rule books and announced that we would begin a review of the consolidated rules and prioritise areas for potential amendment.

The ASIC Market Integrity Rules (Securities Markets) 2017 (Securities Markets Rules) apply to five securities markets, competition between those markets and participants of those markets. We have identified four priority areas in these rules that require amendment to clarify the operation of the rules: see Section B.

We also propose to make three amendments to the ASIC Market Integrity Rules (Futures Markets) 2017 (Futures Markets Rules): see Section C.

In addition, we propose to amend the Securities Markets Rules and the Futures Markets Rules to provide that certain decisions made by ASIC are subject to merits review by the Administrative Appeals Tribunal (AAT): see Section D.

Further, we propose to amend the market integrity rules, being the rules that deal with trading on domestic licensed markets made by ASIC under s798G of the Corporations Act, to clarify ASIC's power to grant waivers to relieve a person from the obligation to comply with the market integrity rules: see Section E.

Finally, recent amendments to the Corporations Act mean that penalty amounts specified in rules made by ASIC no longer apply to a contravention of a rule which occurs after the amendments commenced. We are proposing to remove the superseded penalty provisions from all ASIC-made rules: see Section E.

ASIC's market supervision function

- 1 On 24 August 2009, the Australian Government announced its decision to transfer the responsibility for supervising Australia's domestic licensed financial markets from market operators to the Australian Securities and Investments Commission (ASIC).
- 2 Under Pt 7.2A of the *Corporations Act 2001* (Corporations Act), which commenced on 1 August 2010, we assumed responsibility for supervising domestic licensed markets and were given the power to make market integrity rules.
- 3 Market integrity rules are legislative instruments subject to parliamentary scrutiny and possible disallowance by parliament. We cannot make a market integrity rule unless we have the written consent of the Minister. An

exception applies for making emergency rules that are necessary, or in the public interest, to protect people dealing in a financial product.

- 4 Over time, the number of domestic licensed financial markets in Australia has grown. At present, there are five domestic licensed markets for securities, operated by:
- (a) ASX Limited (ASX);
 - (b) Chi-X Australia Pty Limited (Chi-X);
 - (c) IMB Limited (IMB);
 - (d) National Stock Exchange of Australia Limited (NSXA); and
 - (e) Sydney Stock Exchange Limited (SSX) (formerly Asia Pacific Stock Exchange Limited (APX)).
- 5 Prior to 2017, each of the above markets had a market integrity rule book that applied to the market operator and its participants. A separate rule book addressed competition between markets. In 2017, ASIC consulted on consolidating the market integrity rule books: see [Consultation Paper 277](#) *Proposals to consolidate the ASIC market integrity rules* (CP 277).
- 6 On 16 May 2017, the Securities Markets Rules were made and, subject to some limited exceptions, came into effect on 7 May 2018. These rules apply to ASX, Chi-X, NSXA and SSX.

Note: IMB was not included in the consolidation project because of the unique nature of the IMB market (i.e. offers trading solely in IMB securities) and the bespoke nature of the ASIC Market Integrity Rules (IMB Market) 2010.

What we are doing now

- 7 In [CP 277](#), we announced that we would review the ASIC market integrity rules in detail to make any further adjustments required as a result of:
- (a) our experience in administering the ASIC market integrity rules;
 - (b) developments in the market;
 - (c) evolving international regulatory requirements; and
 - (d) feedback from market operators and participants (including feedback and proposals we received before this consultation).
- 8 We have identified four priority areas unique to the Securities Markets Rules for consultation to amend the rules in line with the above objectives. Details are in Section B. These amendments concern:
- (a) accredited derivatives advisers (see paragraphs 16–33);
 - (b) pre-trade transparency exceptions—trades with price improvement (see paragraphs 34–41);

- (c) confirmations to non-retail clients in respect of derivatives market contracts (see paragraphs 42–56); and
- (d) regulatory data—intermediary ID (see paragraphs 57–64).

9 Likewise, we have identified three priority areas in the Futures Markets Rules for consultation. Details are in Section C. These amendments concern:

- (a) replacing the prohibited employment rule with a fit and proper person test (see paragraphs 65–82);
- (b) incorporating suspicious activity reporting (see paragraphs 83–93); and
- (c) amending client authorisation rules for block trade and exchange for physical orders (see paragraphs 94–100).

10 We are also proposing that certain decisions made by ASIC under the Securities Markets Rules and the Futures Markets Rules will be subject to merits review by the AAT: see Section D.

11 Further, we propose to amend all rule books made by ASIC under s798G of the Corporations Act to clarify ASIC’s power to grant waivers to relieve a person from the obligation to comply with the market integrity rules: see Section E.

Note 1: Due to the machinery nature of the proposed amendments, we do not intend to consult separately in relation to each market integrity rule book.

Note 2: When referring to ‘market integrity rules’ in this paper we are referring to more than one of the sets of rules made under s798G of the Corporations Act. When referring to a single set of rules we will use the full legislative instrument name or an abbreviation of that name.

12 Finally, amendments to the Corporations Act have resulted in changes to the way that penalties are determined for breaches of ASIC-made rules. As a result, we propose to remove the references to penalties contained in all rule books made by ASIC: see Section E.

13 Some of the proposals will, of course, require consequential changes to the rules—in particular, definitions within the rules.

14 We welcome your feedback on the proposals in this consultation paper. We also welcome your feedback on any additional proposals you may have to improve the market integrity rules, particularly where:

- (a) further clarity is needed;
- (b) a rule requires strengthening in order to achieve its objectives; or
- (c) the amendment or repeal of a rule would provide a demonstrated commercial benefit without unduly reducing the fairness and efficiency of Australia’s financial markets.

15 Your feedback and additional proposals (including those already given to ASIC) will assist in planning and prioritising our work in the future.

B Amending the Securities Markets Rules

Key points

We have identified four priority areas for potential amendment of the Securities Markets Rules. The proposed amendments either clarify the operation of existing rules, fill a regulatory gap in the existing rules or reduce the administrative burden and subsequent costs for both market participants and ASIC.

The proposed areas for amendment considered in this consultation paper concern:

- accredited derivatives advisers (see paragraphs 16–33);
- pre-trade transparency exceptions—trades with price improvement (see paragraphs 34–41);
- confirmations for non-retail clients in respect of derivatives market contracts (see paragraphs: 42–56); and
- regulatory data—intermediary ID (see paragraphs 57–64).

Accredited derivatives advisers

Existing retail client adviser accreditation requirements

- 16 Part 2.4 of the Securities Markets Rules sets out the accredited derivatives adviser framework. ASIC inherited the rules and the responsibility for administering the accreditation and training framework from ASX. In summary:
- (a) representatives of market participants are required to be appropriately accredited by ASIC before providing advice to retail clients in relation to options market contracts, futures market contracts or warrants;
 - (b) ASIC may accredit a person for a period of time if, among other things:
 - (i) the person is a representative of a market participant; and
 - (ii) the person has passed an accreditation examination that has been approved by ASIC (unless the person has been granted an exemption); and
 - (c) accreditations are required to be renewed by ASIC on a regular basis—generally every three years.
- 17 There are three levels of accreditation that can be obtained, with each level dictating the nature of advice the adviser is authorised to provide.

- 18 Part 2.4 of the Securities Markets Rules is highly prescriptive and procedural in nature, imposing undue administrative requirements on both ASIC and market participants with respect to the accreditation process. Also, a number of rules are of limited regulatory value, do not promote market integrity, are repetitive, or are no longer relevant.
- 19 Furthermore, we understand that some representatives seek accreditation or renewal without any intention of providing derivatives advice to retail clients. These applications consume ASIC's resources without serving any regulatory purpose.

Enhancements to training and professional standards for financial advisers

- 20 There have been significant changes to the professional standards regime applying to financial advisers, including stockbrokers, since the transfer of supervision to ASIC.
- 21 The *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017*, which commenced on 15 March 2017, introduced several amendments to the Corporations Act to raise the education, training and ethical standards of financial advisers providing personal advice to retail clients on relevant financial products.
- 22 These measures apply to all relevant providers, including financial advisers employed by market participants. For further details on these enhanced standards, see [Professional standards for financial advisers](#) (FA standards) on our website.
- 23 Our records indicate that most advisers accredited under Part 2.4 are captured by the FA standards. They are therefore already recorded on the [Financial Advisers Register](#) and are required to comply with a higher educational and training standard (albeit with transitional arrangements available for existing advisers).
- 24 For advisers who do not provide personal advice, obligations under s912A(1)(e)–(f) of the Corporations Act, which require licensees to ensure their representatives are adequately trained and competent, would still apply. We have indicated that we will be updating guidance on training for financial advisers who are not considered to be relevant providers under the FA standards (e.g. advisers providing general financial product advice or advice on products other than relevant financial products). [Regulatory Guide 146 Licensing: Training of financial product advisers](#) (RG 146) will be reviewed and updated as part of this process.

Proposal

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:

- (a) their financial advisers are suitably qualified and experienced before providing personal advice to retail clients in relation to derivatives; and
- (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.

Your feedback

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

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.

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.

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.

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?

Rationale

25 Part 2.4 outlines several prescriptive requirements that market participants and representatives must adhere to, including the types of accreditation applications, examinations, renewal processes, withdrawal and continuing professional education requirements. Many of these provisions are

- procedural in nature and impose an administrative burden on both market participants and ASIC, with respect to the accreditation process.
- 26 Furthermore, the current framework relies on a list of accreditation examinations (and other recognised courses) that was transferred—with the responsibility for market supervision—to ASIC from ASX in 2010. This list has remained substantially unchanged since that time and is out of date.
- 27 Our proposal maintains an express obligation for market participants to ensure that their derivatives advisers are adequately trained, while reducing the administrative burden currently placed on market participants and ASIC. By illustration:
- (a) market participants would no longer be required to submit accreditation applications, exemption requests and notifications required by Part 2.4 of the Securities Markets Rules and would be required to update the details of their financial advisers on one register only—the Financial Advisers Register; and
 - (b) ASIC would no longer need to process the applications and notifications required by Part 2.4, including the periodic renewal of accreditations.
- 28 Removing the requirement for derivatives advisers to sit a prescribed exam (or seek an exemption) will also provide market participants with greater flexibility as to the manner of compliance with the education and training aspects of their regulatory obligations.
- 29 The proposed principles-based requirements would supplement the FA standards. Our records indicate that most accredited derivatives advisers are captured by the FA standards, and therefore are already required to comply with a higher educational and training standard.
- 30 Arguably, general advice should not be given in relation to derivatives. However, for the subset of accredited derivatives advisers that do not provide personal advice (and may not be captured by these standards), the overarching obligation under s912A(1)(e)–(f) of the Corporations Act, which requires a licensee to ensure that their representatives are adequately trained and competent, would still apply, in addition to the principles-based rules.
- 31 We note there is a risk that some participants may fail to introduce adequate arrangements for ensuring their derivatives advisers are suitably trained, potentially resulting in a fall in standards among those derivatives advisers. However, given the number of well-established industry courses currently available and the extent to which we understand they are used, we believe this risk is minimal. It also creates an opportunity for industry bodies to expand their role in setting professional standards and training.

- 32 The risk of non-compliance is also reduced by the significant increase in penalties applicable to breaches of market integrity rules following the passage of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*: see paragraph 130.
- 33 Our oversight of derivatives advisers would not be diminished by the removal of the requirement for derivatives advisers to sit an approved exam and be accredited by ASIC. We will continue to take a risk-based approach to our surveillance activities and use our powers to gather information about these matters (including requesting a participant to demonstrate how they have complied with these obligations), as necessary.

Pre-trade transparency exception—Trades with price improvement

- 34 Pre-trade transparency refers to information on bids and offers being made publicly available before trades occur. Together with post-trade information, it is generally regarded as central to both the fairness and efficiency of a financial market, particularly to the market's liquidity and quality of price formation.
- 35 Some exceptions to pre-trade transparency apply where we thought there was some benefit in permitting non-pre-trade transparent trading because it:
- (a) may limit market impact and provide access to more liquidity, particularly in less liquid products;
 - (b) may incentivise innovation in trading strategies and order types, as has been the case overseas; and
 - (c) in some circumstances, provides an opportunity to achieve meaningful price improvement (compared to the market order book).
- 36 Rule 6.1.1(2) provides certain exceptions to the requirement for transactions to be pre-trade transparent, which includes 'a trade with price improvement': Rule 6.1.1(2)(c). Rule 6.2.3 provides the definition of 'a trade with price improvement'.

Aggregation of client orders for trades with price improvement

- 37 Under Rule 6.2.3, a trade with price improvement is a transaction where:
- (a) the transaction is executed at a price which is:
 - (i) higher than the best available bid and lower than the best available offer by one or more price steps; or
 - (ii) at the best mid-point;

- (b) if the transaction is entered into other than by matching orders on an order book, the participant acts:
 - (i) on behalf of both buying and selling clients to that transaction; or
 - (ii) on behalf of a buying or selling client on one side of that transaction and as principal on the other side; and
- (c) the consideration for the transaction is greater than \$0.

38 There is some ambiguity in the definition of a trade with price improvement as to whether the participant, not acting as principal, may execute a transaction with multiple clients on only one of the buy or sell side, or multiple clients on both sides of the transaction.

39 There is also some ambiguity as to whether the participant, acting as principal, may execute a transaction with only one or with more than one client on the other side of the transaction.

Proposal

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:

- (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
- (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).

Your feedback

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

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

Rationale

40 Our proposal to clarify the definition of a trade with price improvement will provide greater certainty to participants and reduce the risk of inconsistent application of the rule.

41 Similar amendments were made to the definition of 'block trade' in Rule 6.2.1 following consultation in [CP 277](#).

Confirmation to non-retail clients—Derivatives market contracts

Current rule

- 42 Rule 3.4.1 requires a market participant to give a client a confirmation, containing prescribed details, in respect of a market transaction entered into for the client.
- 43 Rule 3.4.3 provides an alternative reporting regime to Rule 3.4.1, whereby a market participant is not required to give a confirmation to a client that is not a retail client, provided the market participant notifies the client of certain matters before entering into the market transaction and then notifies the client of prescribed details as soon as practicable after the market transaction.
- 44 Specifically, under Rule 3.4.3(1)(a) the client must be notified, before entering into the market transaction, that market transactions effected for the client are subject to:
- (a) the directions, decisions and requirements of the relevant market operator, these rules, the operating rules of the relevant market, the clearing rules and where relevant, the settlement rules;
 - (b) the customs and usages of the relevant market; and
 - (c) the correction of errors and omissions.
- 45 Rule 3.4.3(1)(b) further provides that the market participant must notify the client as soon as practicable:
- (a) if the market participant entered into the client's market transaction as principal—that the market participant entered into the market transaction as principal; and
 - (b) if the client's market transaction was executed as a crossing, the execution code of the execution venue for the crossing.

History of class waivers

- 46 ASIC issued [ASIC Class Rule Waiver \[CW 14/1091\]](#) to relieve a market participant of the primary client reporting obligations in Rule 3.4.1 (and the alternative arrangement obligations under Rule 3.4.3(1)(b), if applicable) under the former ASIC Market Integrity Rules (ASX Market) 2010, in circumstances where the client is not a retail client and the market transaction relates to a derivatives market contract.
- 47 [CW 14/1091] was originally intended to operate from 28 October 2014 until 30 April 2016 (inclusive). Following further consultation, this conditional relief was extended to 30 June 2017 by [ASIC Class Rule Waiver](#)

[\[CW 16/0359\]](#) and then to 30 June 2020 by [ASIC Class Rule Waiver \[CW 17/0617\]](#).

- 48 As stated in the [Explanatory Statement to \[CW 14/1091\]](#), the purpose of the waiver was to allow for further consultation to determine whether a notification is appropriate for derivatives market contracts, and to allow sufficient technology build time if it is found to be appropriate.
- 49 In [CP 277](#), we consulted on a proposal to revoke the relief in [\[CW 14/1091\]](#), which would occur with the repeal of the pre-commencement market integrity rules.
- 50 Following this consultation, we announced in [Report 547 Response to submissions on CP 277 Proposals to consolidate the ASIC market integrity rules \(REP 547\)](#) that it would not revoke the relief in [\[CW 14/1091\]](#) and would extend the relief to 30 June 2020. This resulted in [ASIC Market Integrity Rules \(Securities Markets\) Class Waiver 2018/303](#).
- 51 This relief was subsequently extended by an additional 19 months (to 31 January 2022) by [ASIC Market Integrity Rules \(Securities Markets\) Class Waiver Amendment Instrument 2020/586](#).
- 52 The [Explanatory Statement to ASIC Market Integrity Rules \(Securities Markets\) Class Waiver Amendment Instrument 2020/586](#) states that this further extension of relief is intended to:
- (a) allow ASIC and market participants to devote their resources to matters raised by the COVID-19 pandemic;
 - (b) provide sufficient time for ASIC to review the circumstances of the market for derivatives market contracts; and
 - (c) consider whether the disclosure obligations in Rule 3.4.1 should now apply in the context of derivatives market contracts.

Current proposal

- 53 The current proposal is to make permanent the effect of [ASIC Market Integrity Rules \(Securities Markets\) Class Waiver 2018/303](#).
- 54 That is, a market participant relying on Rule 3.4.3, as an alternative to providing client confirmations to non-retail clients under Rule 3.4.1, will no longer need to give non-retail clients the notifications required by Rule 3.4.3(1)(b) in respect of derivatives market contracts.

Proposal

- 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.

Your feedback

- B3Q1 Do you agree with our proposal? Please give reasons for your answer.
- B3Q2 Have changes in market liquidity, alternative trading venues or product innovation made the notification in Rule 3.4.3(1)(b) necessary?
- 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?
- 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?

Rationale

- 55 The current proposal aims to ensure that market participants do not incur unnecessary costs or regulatory burden associated with complying with client reporting obligations that have no demonstrable regulatory benefit.
- 56 We do not consider that the costs of IT builds to comply with the rule are justified where there is no clear regulatory benefit or detriment to buy-side clients.

Regulatory data reporting—Intermediary ID

- 57 Under Rule 7.4.2 of the Securities Markets Rules, a market participant is required to provide regulatory data to a market operator in an order transmitted to an order book or in a trade report made to the market operator. Regulatory data is defined in Rule 7.4.4 and itemised in the table in that rule. Regulatory data provided by participants is subsequently provided to ASIC for market supervision purposes. Regulatory data includes, among other things, intermediary ID data as described in item 4 of the table under Rule 7.4.4 of the Securities Markets Rules.
- 58 Item 4 of the table in Rule 7.4.4 requires a participant to provide the Australian financial services (AFS) licence number of the AFS licence holder, labelled ‘intermediary ID’, for each side (buy and/or sell) of the order or transaction on which:
- (a) the participant acts as agent for an automated order processing (AOP) client that is an AFS licence holder; and
 - (b) the participant has an arrangement with the AFS licence holder under which the AFS licence holder submits trading messages into the participant’s system as intermediary for its own clients.

- 59 To comply with item 4, a participant must provide the AFS licence number for each order placed by, or transaction executed for, AFS licence holders, including AFS licence holders who facilitate trading of securities on licensed markets for their clients through an arrangement with that participant. These ‘intermediaries’ are commonly referred to as ‘securities dealers’.
- 60 The current language of Rule 7.4.4 in relation to intermediary ID may be ambiguous as participants are populating these fields in inconsistent ways. This inconsistent application of the rule affects the accuracy and effectiveness of ASIC’s surveillance.
- 61 Our proposal seeks to clarify our expectations around when the intermediary ID, in the form of an AFS licence number, is required to be provided by a market participant. The aim of the revised wording of Rule 7.4.4 is to provide certainty in its application, and ensure that ASIC captures accurate data for its surveillance.

Proposal

- B4** We propose to amend Rule 7.4.4 of the Securities Markets Rules (see [Attachment 1](#)) to clarify that intermediary ID data is required for all orders and transactions:
- (a) submitted by the AFS licence holder as intermediary for the underlying client; and
 - (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.

Your feedback

- B4Q1 Do you agree with our proposal? Please give reasons for your answer.
- B4Q2 Do you consider that the proposal will remove any existing uncertainty that participants have about when the intermediary ID is required?

Rationale

- 62 Our proposal to clarify when the intermediary ID is required to be provided by participants will give greater certainty to participants and reduce the risk of inconsistent application of the rule.
- 63 Accurate intermediary ID data on orders and trade reports originating from AFS licensees who are not market participants allows ASIC to map this market intermediary segment, and provides efficiencies for ASIC’s trading inquiries. Identification of active indirect market participants will also assist ASIC to assess compliance with AFS obligations by securities dealers.

- 64 Having access to intermediary ID obviates the need for ASIC to exercise alternative compulsory information-gathering powers, resulting in reduced costs to market participants and ASIC.

C Amending the Futures Markets Rules

Key points

We have identified three priority areas for potential amendment of the Futures Markets Rules. The proposed amendments are deregulatory in nature or seek to enhance ASIC's surveillance capabilities.

The proposed areas for amendment considered in this consultation paper concern:

- replacing the prohibited employment rule with a 'good fame and character' test (see paragraphs 65–82);
- inclusion of suspicious activity reporting (see paragraphs 83–93); and
- amending client authorisation rules for block trade and exchange for physical transactions (see paragraphs 94–100).

Prohibited employment

Existing prohibition

- 65 Rule 2.2.3 of the Futures Markets Rules prohibits a market participant from employing a person who has been a director, partner, employee or representative of another market participant and has 'taken part or been concerned in' a breach of the market integrity rules or operating rules.
- 66 The rule was drafted to substantially reflect the prior Rule 2.2.22 of the Operating Rules of Sydney Futures Exchange Limited, in line with the approach taken at the time market supervision was transferred from market operators to ASIC. However, it was always our intention that the rules would be reassessed for refinement or, where necessary, repealed.
- 67 The objective of Rule 2.2.3 is to ensure that market participants conduct appropriate due diligence and refrain from employing a person who is unfit to take up a position in the industry.

Current concerns

- 68 In its current form, we are concerned that the prohibition on employment under Rule 2.2.3 is unduly onerous and its effect may be disproportionate to the misconduct in question. This is because the prohibition on employment is not limited by a materiality threshold, nor is there a time limitation on the conduct.

- 69 From the perspective of the market participant, strict compliance with the rule would render certain individuals unemployable, and may also leave the market participant open to an action for restraint of trade.
- 70 Strict application of the rule would amount to a de facto permanent banning of an individual without due process being afforded to that individual.
- 71 For these reasons, we do not believe that Rule 2.2.3 in its current form is fit for purpose.

‘Good fame and character’ requirement

- 72 We propose that the current Rule 2.2.3 ‘Prohibited employment’ be amended to substitute a ‘good fame and character’ test for current and prospective staff. This will strike a more appropriate balance between ensuring the integrity of the market through due diligence by employers and imposing a de facto life ban on certain individuals without due process.
- 73 The proposed new Rule 2.2.3 will substitute the prohibition on employment with the ‘good fame and character’ requirement already in place for securities market participants (found in Rule 2.1.4 of the Securities Markets Rules).
- 74 We also propose to extend the application of the proposed new Rule 2.2.3 to employees and other persons who are or will be involved in the business of a market operator in connection with that market by adding Rule 4.4.1 in the same terms as the new Rule 2.2.3.
- 75 Under the proposed new Rules 2.2.3 and 4.4.1, a market participant or market operator must ensure that a person who is employed or otherwise involved in the business of the market participant is of good fame and character and high business integrity.
- 76 A person will not be of good fame and character and high business integrity if they are disqualified from managing a corporation, or if they are insolvent under administration or its equivalent, either under the laws of Australia or another country.
- 77 In assessing whether a person is of good fame and character and high business integrity, the market participant must have regard to whether the person has been:
- (a) convicted of any offence;
 - (b) disciplined by or adversely mentioned in a report made by or at the request of any government or governmental authority or agency;
 - (c) adversely mentioned in a report made by or at the request of a market operator, an exchange, or a clearing or settlement facility; or
 - (d) disciplined by a market operator, an exchange, or a clearing or settlement facility.

Proposal

- c1** We propose to replace the prohibited 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 Markets Rules (see [Attachment 2](#)).

Your feedback

- 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.
- 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.

- c2** We also propose to extend the ‘good fame 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 (see [Attachment 2](#)).

Your feedback

- 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.
- 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 these costs.

Rationale

- 78 As noted above, the objective of Rule 2.2.3 and Rule 4.4.1—to promote due diligence by market participants and market operators in the employment of their staff—is not being met by the current wording of the rule.
- 79 We believe that the proposed ‘good fame and character’ test will better satisfy the objective of Rule 2.2.3 and ensure that appropriate obligations attach to futures markets participants in the employment and retention of staff.
- 80 [Regulatory Guide 172](#) *Financial markets: Domestic and overseas operators* (RG 172) sets out ASIC’s expectations with respect to the suitability of people with influence and senior managers of market operators. This includes, at the time of appointment and on an ongoing basis, consideration of the person’s fame, character and integrity (see RG 172.110).
- 81 Extension of the ‘good fame and character’ test to market operators formalises ASIC’s expectations with respect to market operators and provides consistency in our approach across market participants and market operators.

- 82 We believe that ASIC's power under the Corporations Act to suspend or ban people while affording due process, and not the existing prohibited employment rule, is the appropriate mechanism to achieve that outcome.

Suspicious activity reporting

Overseas regulation

- 83 Regulators in Germany, the United Kingdom and Canada have cited enhanced supervision capabilities through receiving information about suspicious activity and find the reporting very valuable. The 2017 annual report of Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin), the federal financial supervisory authority in Germany, disclosed that the majority of the 811 analyses of suspected insider trading or market manipulation in 2017 were triggered by suspicious activity reports (of which BaFin received around 2,830). An obligation to report a suspected breach of key market integrity rules is critical to protect the integrity of markets.

Current obligation to report suspicious activity

- 84 We note that the amended s912D of the Corporations Act, which comes into force on 1 October 2021, contains a breach reporting obligation. However, it is limited to a licensee's own breaches, without capturing clients' or other market participants' trading activities.
- 85 Also commencing on 1 October 2021 is the new s912DAB of the Corporations Act which imposes on licensees an obligation to report certain situations in relation to other financial services licensees. However, that obligation will only arise where the individual engaged in the conduct is a licensee or representative of the licensee and has provided personal advice to retail clients.
- 86 The proposed new Part 3.6 aims to capture the more immediate reporting of matters involving potential insider trading or market manipulation, where the identity or all of the details of the transaction may not be known by the market participant. Such notifications will be covered by the qualified privilege protections of s1100A of the Corporations Act.
- 87 The proposed new Rules 3.6.1 and 3.6.2 extend the suspicious activity reporting obligation currently in place for participants of securities markets (found in Rules 5.11.1 and 5.11.2 of the Securities Markets Rules) to futures market participants. From the beginning of FY2017–18 to the end of April 2021, ASIC received 518 suspicious activity reports from securities market participants in relation to market manipulation, insider trading and other misconduct. This is in addition to the suspicious matter reports that are not required to be reported to ASIC because the same information has been

provided to the Australian Transaction Reports and Analysis Centre (AUSTRAC).

Suspicious activity reporting—Notification requirements

- 88 The suspicious activity reporting required under new Rule 3.6.1 does not require market participants to form a view on whether a breach has or may have occurred. Market participants are not expected to engage in detailed legal analysis to determine whether a particular law applies to the facts or whether they are aware of the knowledge or intention of the relevant person.
- 89 However, where there is sufficient reason for a market participant to suspect that prohibited conduct is occurring, new Rule 3.6.1 requires the market participant to notify ASIC of the details around this suspicious activity. This may include the market participant’s key concerns and specific trading or order book activity for ASIC to review. Participants should have in place arrangements to ensure that employees within the organisation escalate all observed instances of suspicious activity.
- 90 A market participant that notifies ASIC would be expected not to disclose to others that it has done so. This draws on similar requirements overseas, and other laws in Australia. This expectation of confidentiality will be required by new Rule 3.6.2.
- 91 New Rule 3.6.1 provides that, to the extent that a market participant has already reported the same information to AUSTRAC, the market participant is not required to notify ASIC. AUSTRAC and ASIC will continue to work together to minimise duplication.

Proposal

- 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.

Your feedback

- c3Q1 What are your views on our proposed approach to requiring suspicious activity reporting? Are there other avenues for obtaining this information?

- 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?
- 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?
- C3Q4 Are transitional arrangements necessary? What are your views on what the transitional time period and arrangements should be?

Rationale

- 92 We believe that suspicious activity reporting greatly enhances our surveillance functions in an ever-changing market environment. Suspicious activity reporting provides information that may initiate a course of inquiry, as well as corroborate information in an existing inquiry.
- 93 Reproducing the current suspicious activity reporting requirements across both the securities and futures markets will result in standardised reporting requirements for participants of both markets.

Client authorisation—Block trade and exchange for physical orders

Existing rules

- 94 Rule 3.4.4 of the Futures Markets Rules requires a participant to obtain specific or general authorisation in writing from the client before executing a block trade order. The authorisation must include an acknowledgement from the client that:
- (a) the price quoted may or may not be the prevailing market price;
 - (b) the price at which the block trade is executed will not be used in establishing the price of a contract when it is settled in accordance with the operating rules of the relevant market;
 - (c) the block trades will have no impact on the trading platform market data; and
 - (d) block trades will be separately reported to the market.

- 95 Rule 3.5.3 of the Futures Markets Rules requires a participant to obtain specific or general authorisation in writing from the client before executing an exchange for physical order.
- 96 Separate to these requirements, Rule 2.2.4 of the Futures Markets Rules details the record-keeping requirements in relation to client orders and Rule 2.2.7 of the Futures Markets Rules mandates the recording and maintenance of all conversations with clients and other parties in relation to client instructions.

Proposal

- c4 We propose to amend Rule 3.4.4 of the Futures Markets Rules (see [Attachment 2](#)) to remove the requirement that:
- client authorisations must be 'in writing'; and
 - the authorisation must include acknowledgments from the client.

Your feedback

- C4Q1 Does the requirement, under Rule 3.3.4, that client instructions must be 'in writing' serve any regulatory or business purpose in light of mandatory recording and record-keeping requirements?
- C4Q2 Does the requirement, under Rule 3.3.4, that client instructions must be 'in writing' create inefficiencies in the operation of the market or the facilitation of client instructions?
- C4Q3 Do the client acknowledgments in Rule 3.4.4(a)–(d) serve any regulatory purpose not already covered by the operating rules of the market or the Corporations Act?

- 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'.

Your feedback

- C5Q1 Does the requirement, under Rule 3.5.3, that client instructions must be 'in writing' serve any regulatory or business purpose in light of mandatory recording and record-keeping requirements?
- C5Q2 Does the requirement, under Rule 3.5.3, that client instructions must be 'in writing' create inefficiencies in the operation of the market or the facilitation of client instructions?

Rationale

- 97 These are legacy rules which find their origin in the operating rules of the Sydney Futures Exchange ([SFE Operating Rules](#) PDF 4 MB) in relation to the pre-negotiated business rules which provided participants 'with the

opportunity to facilitate client business in order to obtain the best price for that business at that time' (p. 82).

- 98 Rule 3.4.4 of the Futures Markets Rules reproduces Rule 3.4.9 of the SFE Operating Rules and Rule 3.5.3.
- 99 The original rules were in place and appropriate for the traditional 'open outcry' system which has been replaced with 24-hour screen trading and a range of electronic and telephonic means by which participants may receive orders.
- 100 By requiring authorisation 'in writing', these rules present an unnecessary impediment to efficient operation of the market in circumstances where other means of communication may be used by a client to provide instructions.

D Merits review of ASIC decisions under the Securities and Futures Markets Rules

Key points

We propose to make rules to provide that an application may be made to the AAT for review (merits review) of certain decisions ASIC makes under the Securities Markets Rules and Futures Markets Rules.

We have conducted a review of all types of decisions that ASIC is empowered to make under the Securities Markets Rules and the Futures Markets Rules for the purposes of determining whether they should be reviewed by the AAT.

The review was conducted with reference to guidance published in 1999 by the Administrative Review Council and the Attorney-General's Department: see [What decisions should be subject to merit review?](#)

What are reviewable decisions?

- 101 Merits review is a process by which a person or body, other than the primary decision-maker, reconsiders the facts, law and policy aspects of a government decision and determines whether it is the correct and preferable decision. This results in the decision being affirmed, varied, set aside or remitted back to the original decision-maker.
- 102 Decisions made by ASIC under the Securities Markets Rules and the Futures Markets Rules are not generally subject to merits review by the AAT. However, certain decisions made under Part 2.4 of the Securities Markets Rules have already been determined to be subject to merits review: see Rule 2.4.23. The decisions made under Part 2.4 will be impacted by the outcome of consultation in Section B 'Accredited derivatives advisers' (see paragraphs 16–33). Under the proposed amendments to Part 2.4 no decisions are made by ASIC and, as a result, there will be no need for merits review in relation to the proposed amended Part 2.4.
- 103 The Futures Markets Rules currently make no provision for merits review of ASIC decisions made under it.
- 104 Some additional decisions made by ASIC under the Securities Markets Rules, and some decisions made by ASIC under the Futures Markets Rules, may affect the interests of a person and therefore should be subject to merits review by the AAT.

- 105 On 22 February 2018, the Minister advised the Senate Standing Committee on Regulations and Ordinances that ASIC would conduct a review of decisions made by it under the Securities Markets Rules other than those already subject to merits review: see [Monitor 3 of 2018](#). The purpose of the review was to determine whether other decisions should be subject to merits review.
- 106 We have conducted a review of decisions made by ASIC under the Securities Markets Rules, as foreshadowed by the Minister, and determined that most decisions should be subject to merits review: see Appendix 1.
- 107 There is a smaller group of decisions under the Securities Markets Rules that we do not propose will be subject to merits review: see Appendix 2. These decisions fall within exceptions recognised in the guidance published by the Administrative Review Council. Again, the decisions made under Part 2.4 will be impacted by the outcome of consultation in Section B ‘Accredited derivatives advisers’ (see paragraphs 16–33).
- 108 We have also conducted a review of decisions made by ASIC under the Futures Markets Rules, and determined that most decisions made by ASIC should be subject to merits review: see Appendix 3. There is a smaller group of decisions made by ASIC under the Futures Markets Rules that we do not propose will be subject to merits review as they fall within exceptions recognised in the guidance published by the Administrative Review Council: see Appendix 4.
- 109 We are continuing to conduct similar reviews of other rules made by ASIC under the Corporations Act.

Proposal

- 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.

Your feedback

- D1Q1 Do you think there are any omissions from the proposed list of decisions under the Securities Markets Rules? Please give reasons why.

- 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.

Your feedback

- D2Q1 Do you think there are any omissions from the proposed list of decisions? Please give reasons why.

- 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.

Your feedback

D3Q1 Do you think there are any omissions from the proposed list of decisions under the Futures Markets Rules? Please give reasons why.

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.

Your feedback

D4Q1 Do you think there are any omissions from the proposed list of decisions? Please give reasons why.

Rationale

- 110 Our review of decisions that we may make under the Securities Markets Rules and the Futures Markets Rules is consistent with guidance issued in 1999 by the Administrative Review Council and the Attorney-General's Department: see *What decisions should be subject to merit review?*
- 111 In accordance with that guidance, the starting point of our review was that administrative decisions that will, or are likely to, affect the interests of a person should be subject to merits review: see *What decisions should be subject to merit review?*, paragraph 2.1. We are proposing that most decisions made by ASIC under the Securities Markets Rules and the Futures Markets Rules will be subject to merits review.

'Legislation-like' decisions

- 112 In its guidance, the Administrative Review Council recognised that decisions that are 'legislation-like' are generally not suited to merits review. Such decisions will affect community members more broadly and are therefore considered less likely to affect the interests of any one person. Furthermore, they have already been subject to a separate regime of scrutiny which applies to legislative instruments: see *What decisions should be subject to merit review?*, paragraphs 3.3–3.4.
- 113 Decisions made under the Securities Markets Rules which are listed in Appendix 2 will be made by legislative instrument and, accordingly, fall into the category of decisions which the Administrative Review Council refers to as 'legislation-like'. We do not propose that they will be subject to merits review.

E Amending ASIC-made rules—Power to grant waivers

Key points

We propose to amend Rule 1.2.1 of all rule books made by ASIC under s798G of the Corporations Act to clarify ASIC’s power to grant waivers to relieve a person from the obligation to comply with the market integrity rules.

The amendment requires relief to be made only by way of registered legislative instrument. This will remove any doubt as to whether s14(2) of the Legislation Act is engaged.

We are also proposing to remove the superseded penalty provisions from the ASIC-made rules.

The *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* strengthens existing penalties and introduces new penalties for those who have breached the corporations legislation.

This includes the provision of a new method for calculating the maximum civil penalty applicable to a contravention of a civil penalty provision.

The amendments do not apply retrospectively.

As a consequence of these legislative changes, the penalty amounts specified in rules made by ASIC will not apply to a contravention of a rule which occurs after the amendments commenced.

Waivers under the ASIC market integrity rules

Current scheme

- 114 Currently, the following market integrity rules made under s798G of the Corporations Act are in force:
- (a) ASIC Market Integrity Rules (Securities Markets) 2017;
 - (b) ASIC Market Integrity Rules (Futures Markets) 2017;
 - (c) ASIC Market Integrity Rules (Capital) 2021; and
 - (d) ASIC Market Integrity Rules (IMB Market) 2010.
- 115 Rule 1.2.1 of each of those sets of rules empowers ASIC to waive persons or classes of persons from compliance with the Rules. As currently drafted, the waiver must be in writing: Rule 1.2.1(5). Rule 1.2.2 provides that failure to comply with a condition in a waiver is a contravention of Rule 1.2.2.

- 116 Section 14 of the *Legislation Act 2003* (Legislation Act) sets out rules about the circumstances in which a legislative instrument (such as the market integrity rules) may make provision in relation to a matter by incorporating material from another written document (such as a written waiver granted by ASIC). This is commonly referred to as ‘incorporation by reference’.
- 117 After close consideration of the drafting of the market integrity rules and the Corporations Act, it is arguable that ‘incorporation by reference’ issues could potentially be raised in relation to waivers granted by ASIC, along with any conditions placed on those waivers.
- 118 Section 14(2) of the Legislation Act prohibits incorporation by reference ‘unless the contrary intention appears’. There is no contrary intention to the prohibition on incorporation by reference in the empowering provision in s798G of the Corporations Act and no express contrary intention to the prohibition in Pt 7.2A generally. However, incorporation by reference is allowed under s14(1) of the Legislation Act if the matter incorporated into the first legislative instrument (such as the market integrity rules) is made by way of a legislative instrument.
- 119 Currently, individual waivers are not made by way of legislative instrument whereas class waivers are made by way of legislative instrument.
- 120 If all waivers are made as disallowable legislative instruments, any issues around the validity of any waivers, or conditions attached to those waivers, will be resolved because such an incorporation by reference would be permitted by s14(1) of the Legislation Act.

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](#)).

Your feedback

- E1Q1 Do you agree with our proposal? In your response, please give detailed reasons for your answer.
- E1Q2 Do you have any concerns that individual waivers made under Rule 1.2.1 will now be made by way of disallowable legislative instruments which will be publicly available?
- E1Q3 Do you have concerns that full details of individual waivers are not publicly available?

Note: See the [register of waivers](#) granted under the ASIC market integrity rules.

Rationale

- 121 Amending the rule to require relief to be made only by way of registered legislative instrument will remove any doubt as to whether s14(2) of the Legislation Act is engaged. This approach will also provide greater transparency around waivers granted by ASIC as they will be publicly available.

Removing superseded penalty rules from ASIC-made rules

ASIC's powers to make rules

- 122 ASIC has the power to make:
- (a) market integrity rules under s798G of the Corporations Act;
 - (b) derivative transaction rules under s901A of the Corporations Act;
 - (c) derivative trade repository rules under s903A of the Corporations Act;
 - (d) client money rules under s981J of the Corporations Act; and
 - (e) financial benchmark rules and compelled financial benchmark rules under s908CA and 908CD of the Corporations Act.

Together, these are referred to in this section as the 'ASIC-made rules'.

- 123 The ASIC-made rules are made by legislative instruments, which are subject to parliamentary scrutiny and possible disallowance by parliament. We cannot make or amend an ASIC-made rule (other than a client money rule) unless we have the written consent of the Minister. An exception applies for making emergency rules that are necessary, or in the public interest, to protect people dealing in a financial product.

- 124 Currently, the following ASIC-made rules are in force:
- (a) ASIC Market Integrity Rules (Securities Markets) 2017;
 - (b) ASIC Market Integrity Rules (Futures Markets) 2017;
 - (c) ASIC Market Integrity Rules (Capital) 2021;
 - (d) ASIC Market Integrity Rules (IMB Market) 2010;
 - (e) ASIC Derivative Transaction Rules (Clearing) 2015;
 - (f) ASIC Derivative Transaction Rules (Reporting) 2013;
 - (g) ASIC Derivative Trade Repository Rules 2013;
 - (h) ASIC Client Money Reporting Rules 2017;
 - (i) ASIC Financial Benchmark (Administration) Rules 2018; and
 - (j) ASIC Financial Benchmark (Compelled) Rules 2018.

125 Failure to comply with an obligation under these ASIC-made rules is a contravention of a civil penalty provision.

126 Each ASIC-made rule, save for the ASIC Market Integrity Rules (Capital) 2021, specifies a maximum penalty amount (if any) for that rule, up to a statutory cap.

Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019

127 On 19 October 2016, the Government set up the ASIC Enforcement Review Taskforce in response to the Financial System Inquiry. The taskforce was asked to review ASIC's enforcement regime and assess the suitability of the existing regulatory tools available to ASIC to perform its functions.

128 The *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (amending Act) implemented recommendations of the ASIC Enforcement Review Taskforce by amending the Corporations Act, the *Australian Securities and Investments Commission Act 2001*, the *National Consumer Credit Protection Act 2009* and the *Insurance Contracts Act 1994*. It strengthened existing penalties and introduced new penalties for those who breach the corporate laws of Australia designed to protect its citizens.

129 Relevantly, the amending Act:

- (a) amended s1317G of the Corporations Act to set out a new method for calculating the maximum civil penalty applicable to a contravention of a civil penalty provision;
- (b) removed ASIC's powers to specify the maximum penalty amount for an ASIC-made rule; and
- (c) amended the Corporations Act to provide for maximum penalty amounts that can be specified by ASIC as an alternative to civil penalty proceedings for an alleged contravention of an ASIC-made rule (e.g. in an infringement notice).

130 Requirements to comply with the ASIC-made rules are civil penalty provisions and therefore will be subject to the new civil penalty calculation methods set out in s1317G of the Corporations Act. In summary, the maximum civil penalty will be:

- (a) for individuals, the greater of:
 - (i) 5,000 penalty units; and
 - (ii) if the Court can determine—the benefit derived or detriment avoided because of the contravention, multiplied by three;
- (b) for bodies corporate, the greater of:
 - (i) 50,000 penalty units;

- (ii) if the Court can determine—the benefit derived or detriment avoided by the body corporate because of the contravention, multiplied by three; and
- (iii) 10% of the annual turnover of the body corporate, but to a maximum monetary value of 2.5 million penalty units.

Note: ‘Penalty unit’ is defined in s4AA of the *Crimes Act 1914*. Effective from 1 July 2020, the value of a Commonwealth penalty unit is \$222 and is subject to indexation every three years thereafter.

131 The Explanatory Memorandum for the amending Act explains at paragraph 1.208:

This does not mean the new maximum penalty will be sought for every breach of a rule. The Court or the appropriate panel will consider the appropriate penalty for each contravention of the rule, taking into account the breach and severity of the misconduct. ASIC may make submissions to the Court or the appropriate panel on the amount of penalty that is appropriate in the matter. Ultimately, however, the Court or appropriate panel will decide the penalty amount. Consequential amendments are made to remove the existing penalty amounts. ASIC is still able to make rules, but the maximum penalty amounts are now set in the legislation.

132 The amendments do not have retrospective effect. They only apply in relation to a contravention of a civil penalty provision if the conduct constituting the contravention of the provision occurs wholly on or after 13 March 2019.

133 The penalty amounts specified in the ASIC-made rules have therefore been superseded by the passage of the amending Act. They will not apply to a contravention of an ASIC-made rule which occurs wholly on or after 13 March 2019. Accordingly, we propose to remove the reference to these penalties from the ASIC-made rules.

134 This proposed amendment to the ASIC-made rules will have no legal or policy effect as the amending Act already operates to determine the penalty for breaches of ASIC-made rules. We are consulting on this amendment as a matter of transparency and to ensure that affected parties are aware of our proposed amendment. We are also conducting this consultation in order to comply with statutory obligations to consult which are contained in the Corporations Act: s901J, 903G, 981L and 908CL.

Proposal

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.

Your feedback

E2Q1 You are invited to comment on our proposal to remove the superseded penalty amounts specified in the ASIC-made rules.

Rationale

- 135 This proposal is consequential to the amendments made in the amending Act. The amending Act removes ASIC's power to specify penalty amounts for the ASIC-made rules. The penalty amounts specified in the ASIC-made rules are superseded by the penalties legislated in the Corporations Act.

F Regulatory and financial impact

136 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:

- (a) provide an appropriate blend of prescriptive and principles-based rules;
- (b) remove any ambiguity in relation to the operation of existing rules and rights of review in relation to ASIC decisions under those rules; and
- (c) ensure that market participants do not adversely affect the integrity and efficiency of the markets.

137 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 that 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 a minor or machinery impact on business or on the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

138 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.

139 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

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

See 'The consultation process', p. 4.

Appendix 1: Securities Markets Rules proposed to be reviewable

Table 1: Securities Markets Rules subject to merits review by the AAT

Rule number	Decision
1.2.1(1)	Refusal of application to grant a waiver of rule
1.2.1(3)	Withdraw a waiver of rule
1.2.3	Specify the period of application for a waiver of rule
2.6.1(2)(f)	Require additional terms to be included in deed provided by Foreign Market Participant
3.3.1(d)	Permit a market transaction to be entered into/arranged upon clients' instructions other than by entering it on the trading platform
3.4.1(2)(c)	Permitting an alternative form of confirmation
3.5.4(1)	Approve foreign bank for client money
3.5.4(2)	Conditions on approval of foreign bank
3.7.3(2)(a)	Approval for securities to be registered in the name of a nominee company where that company does not have the word 'nominee' in its title
4.3.1(2)	Direction to convert Market Participant records into English
4.3.1(3)	Direct the time in which direction above to be complied with
4.3.2(1)	Direct that Market Participant records be produced in Australia
4.3.2(2)	Direct the time in which direction above to be complied with
5.6.6(1)(b)	Provide written confirmation that automated order processing Initial Certification complies with subrule (2)
5.6.11(1)	Direction to provide further certification of Automated Order Processing (includes acceptance of the form of certification and the person providing certification)
5.6.12(2)	Direction to cease/suspend/limit or prohibit automated order processing
5.9.2	Determination that Trading Participant need not ensure they have a representative available to receive communications as required in rule
7.1.1(1)	Nomination of service provider for data feed
7.1.1(2)(h)	Notification of additional items which must be included in Market Operator's data feed
7.1.1(3)	Notification of format of Market Operator's data feed
7.1.1(4)(a)	Notification of data security requirements of Market Operator's data feed
7.1.1(4)(b)	Requirement that Market Operator re-deliver data feed
7.1.1(5)	Manner and location of delivery of data feed
8.1.1(3)	Notification to Market Operator that an Anomalous Order Threshold is not appropriate
8.1.4(3)	Notification to Operator that its arrangements for determining Anomalous Order Thresholds are not appropriate
9.5.3	Direct that Market Operator records be produced in Australia

Appendix 2: Securities Markets Rules proposed not to be reviewable

Table 2: Securities Markets Rules not subject to merits review by the AAT

Rule number	Decision	Why not?
1.2.1(1)	Grant a waiver of a rule (including conditions)	Legislative instrument
1.2.3	Specify the period of application for a waiver of rule	Legislative instrument
1.2.4	Establish and publish a register of rule waivers	Procedural; unlikely to affect the interests of a person; as legislative instruments, will be publicly available
1.3.2	Specify how to give notice	Procedural; unlikely to affect the interests of a person
1.4.4	Determination of the 'Responsible Market Operator' with respect to a CGS Depository Interest	Legislative instrument
1.4.5	Determination of the 'Responsible Market Operator' with respect to an Equity Market Product	Legislative instrument
2.4.6(4)	Determine in writing approved education modules and reading materials	Legislative instrument
2.4.7(4)	Determine in writing approved education modules and reading materials	Legislative instrument
2.4.8(4)	Determine in writing approved education modules and reading materials	Legislative instrument
2.4.12	Continued Professional Development requirements	Legislative instrument
3.4.3(4)	Determination of execution venue codes	Legislative instrument
5A.2.1(5)	Determination of crossing system codes	Legislative instrument
6.2.1(4)	Block Trade Tiers	Legislative instrument
7.4.4(3)	Format or content requirements for regulatory data code	Legislative instrument
7.4.4(4)	Timing for provision of regulatory data	Legislative instrument

Appendix 3: Futures Markets Rules proposed to be reviewable

Table 3: Futures Markets Rules subject to merits review by the AAT

Rule number	Decision
1.2.1(1)	Refusal of application to grant a waiver of rule
1.2.1(3)	Withdraw a waiver of rule
2.2.1(2)(b)	Notify a market participant that it is required to terminate a connection to a terminal
2.4.1(2)(f)	Notify a foreign market participant of the inclusion of additional terms in its foreign market participant deed
4.1.1(1)	Nomination of a service provider for delivery of data items
4.1.1(1)(g)(vi)	Notify the market operator of the inclusion of additional data items
4.1.1(2)	Notify the market operator of the format of data
4.3.3	Direction to produce records in Australia
8.1.1(3)	Notify a market operator that the anomalous order threshold is not appropriate
8.1.4(3)	Notify a market operator that its arrangements for determining anomalous order thresholds are not appropriate

Appendix 4: Futures Markets Rules proposed not to be reviewable

Table 4: Futures Markets Rules not subject to merits review by the AAT

Rule number	Decision	Why not?
1.2.1(1)	Grant a waiver of rule (includes conditions)	Legislative instrument
1.2.3	Specify a period during which relief applies	Legislative instrument
1.3.2	Specify how to give notice	Procedural; unlikely to affect the interests of a person
1.4.4	Determination of responsible market operator	Legislative instrument
5.2.1(5)	Specify crossing system codes	Legislative instrument

Key terms

Term	Meaning in this document
AAT	Administrative Appeals Tribunal
accredited derivatives adviser	A person accredited under Part 2.4 of the Securities Markets Rules
AFS licence	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 Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
ASIC-made rules	Collectively: <ul style="list-style-type: none"> • market integrity rules made under s798G of the Corporations Act; • derivative transaction rules made under s901A of the Corporations Act; • derivative trade repository rules made under s903A of the Corporations Act; • client money rules made under s981J of the Corporations Act; and • financial benchmark rules and compelled financial benchmark rules made under s908CA and 908CD of the Corporations Act
ASX	ASX Limited or the exchange market operated by ASX Limited
AUSTRAC	Australian Transaction Reports and Analysis Centre
Australian domestic licensed financial market	A financial market licensed under s795B(1) of the Corporations Act
Ch 6 (for example)	A chapter of the Corporations Act (in this example numbered 6), unless otherwise specified
Chi-X	Chi-X Australia Pty Limited or the exchange market operated by Chi-X
Corporations Act	<i>Corporations Act 2001</i> (Cth), including regulations made for the purposes of that Act
CP 277 (for example)	An ASIC consultation paper (in this example numbered 277)

Term	Meaning in this document
financial market	As defined in s767A of the Corporations Act. It encompasses facilities through which offers to acquire or dispose of financial products are regularly made or accepted
Futures Markets Rules	ASIC Market Integrity Rules (Futures Markets) 2017—rules made by ASIC under s798G of the Corporations Act
Legislation Act	<i>Legislation Act 2003</i>
market	Any of: <ul style="list-style-type: none"> • the ASX market; • the Chi-X market; • the IMB market; • the NSXA market; or • the SSX market
market integrity rules	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestic licensed markets
market participant	A participant of a market Note: Participant has the meaning given by s761A of the Corporations Act.
NSXA	National Stock Exchange of Australia Limited or the exchange market operated by NSXA
Part 2.4 (for example)	A part of the market integrity rules (in this example numbered 2.4), unless otherwise specified
pre-trade transparency	Information on bids and offers being made publicly available before transactions occur (i.e. displayed liquidity)
price formation	The process determining price for a listed product through the bid and offer trading process of a market
Pt 7.2A (for example)	A part of the Corporations Act (in this example numbered 7.2A), unless otherwise specified
REP 432 (for example)	An ASIC report (in this example numbered 432)
retail client	A retail client as defined in s761G of the Corporations Act
RG 146 (for example)	An ASIC regulatory guide (in this example numbered 146)
s912A (for example)	A section of the Corporations Act (in this example numbered 912A), unless otherwise specified
Securities Markets Rules	ASIC Market Integrity Rules (Securities Markets) 2017—rules made by ASIC under s798G of the Corporations Act
SSX	Sydney Stock Exchange Limited or the exchange market operated by SSX

List of proposals and questions

Proposal	Your feedback
<p>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:</p> <ul style="list-style-type: none"> (a) their financial advisers are suitably qualified and experienced before providing personal advice to retail clients in relation to derivatives; and (b) their qualifications relevant to providing advice on derivatives is noted on ASIC's Financial Advisers Register. <p>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.</p>	<p>B1Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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?</p>
<p>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:</p> <ul style="list-style-type: none"> (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 (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). 	<p>B2Q1 Do you agree with our proposal? Please give reasons for your answer.</p> <p>B2Q2 Do you consider the proposal will alleviate any uncertainty participants have about how this exception applies to aggregated orders?</p>

Proposal	Your feedback
<p>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.</p>	<p>B3Q1 Do you agree with our proposal? Please give reasons for your answer.</p> <p>B3Q2 Have changes in market liquidity, alternative trading venues or product innovation made the notification in Rule 3.4.3(1)(b) necessary?</p> <p>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?</p> <p>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?</p>
<p>B4 We propose to amend Rule 7.4.4 of the Securities Markets Rules (see Attachment 1) to clarify that intermediary ID data is required for all orders and transactions:</p> <p>(a) submitted by the AFS licence holder as intermediary for the underlying client; and</p> <p>(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.</p>	<p>B4Q1 Do you agree with our proposal? Please give reasons for your answer.</p> <p>B4Q2 Do you consider that the proposal will remove any existing uncertainty that participants have about when the intermediary ID is required?</p>
<p>C1 We propose to replace the prohibited 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 Markets Rules (see Attachment 2).</p>	<p>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.</p> <p>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.</p>
<p>C2 We also propose to extend the 'good fame 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 (see Attachment 2).</p>	<p>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.</p> <p>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.</p>

Proposal	Your feedback
<p>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:</p> <p>(a) trading with inside information; or</p> <p>(b) engaging in manipulative trading.</p> <p>A market participant must not disclose to other parties that it has notified ASIC of suspicious activity.</p>	<p>C3Q1 What are your views on our proposed approach to requiring suspicious activity reporting? Are there other avenues for obtaining this information?</p> <p>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?</p> <p>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?</p> <p>C3Q4 Are transitional arrangements necessary? What are your views on what the transitional time period and arrangements should be?</p>
<p>C4 We propose to amend Rule 3.4.4 of the Futures Markets Rules (see Attachment 2) to remove the requirement that:</p> <p>(a) client authorisations must be 'in writing'; and</p> <p>(b) the authorisation must include acknowledgments from the client.</p>	<p>C4Q1 Does the requirement, under Rule 3.3.4, that client instructions must be 'in writing' serve any regulatory or business purpose in light of mandatory recording and record-keeping requirements?</p> <p>C4Q2 Does the requirement, under Rule 3.3.4, that client instructions must be 'in writing' create inefficiencies in the operation of the market or the facilitation of client instructions?</p> <p>C4Q3 Do the client acknowledgements in Rule 3.4.4 (a)–(d) serve any regulatory purpose not already covered by the operating rules of the market or the Corporations Act?</p>
<p>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'.</p>	<p>C5Q1 Does the requirement, under Rule 3.5.3, that client instructions must be 'in writing' serve any regulatory or business purpose in light of mandatory recording and record-keeping requirements?</p> <p>C5Q2 Does the requirement, under Rule 3.5.3, that client instructions must be 'in writing' create inefficiencies in the operation of the market or the facilitation of client instructions?</p>

Proposal	Your feedback
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.	D1Q1 Do you think there are any omissions from the proposed list of decisions under the Securities Markets Rules? Please give reasons why.
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.	D2Q1 Do you think there are any omissions from the proposed list of decisions? Please give reasons why.
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.	D3Q1 Do you think there are any omissions from the proposed list of decisions under the Futures Markets Rules? Please give reasons why.
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.	D4Q1 Do you think there are any omissions from the proposed list of decisions? Please give reasons why.
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).	<p>E1Q1 Do you agree with our proposal? In your response, please give detailed reasons for your answer.</p> <p>E1Q2 Do you have any concerns that individual waivers made under Rule 1.2.1 will now be made by way of disallowable legislative instruments which will be publicly available?</p> <p>E1Q3 Do you have concerns that full details of individual waivers are not publicly available?</p> <p>Note: See the register of waivers granted under the ASIC market integrity rules.</p>
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.	E2Q1 You are invited to comment on our proposal to remove the superseded penalty amounts specified in the ASIC-made rules.