

From the Desk of Director Marija Pajeska



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Response to Consultation Paper 342 – Proposed amendments to the ASIC market integrity rules and other ASIC-made rules

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to ASIC in respect of Consultation Paper (CP) 342 – Proposed amendments to the ASIC market integrity rules and other ASIC-made rules.

ASDAA represents the interests of its members, who are from the Securities and Derivatives advisory profession. Its members are comprised of individuals who are either directors, or employees, of small to medium sized firms which hold an Australian Financial Services Licence (AFSL), but are not a Participant Members of an Exchange.

Even though, our members are not Participant Members of an Exchange, there are likely to be flow on effects to our members who have the direct relationship with clients.

We would like to take this opportunity to first remind ASIC of its consultation regarding promoting access to affordable advice for consumers (Consultation Paper CP 332) published in November 2020. We are of the view that if ASIC, industry and clients work together then we as a community can achieve an environment whereby advice for clients is both accessible and affordable.

The process however starts with ASIC as the rule maker. We are of the view that wherever rules can be simplified and/ or repealed as they overlap with other existing rules and/ or laws then every effort should be made to simplify and/ or repeal such rules and/ or laws.

We do not feel that ASIC is in a position to make comments such as 'Arguably, general advice should not be given in relation to derivatives' especially when such comments are not supported by law. The provision of general advice in relation to derivatives is an important mechanism within the derivatives markets, it gives

clients information about the conditions of the current market, relevant economic information, and price information. There are many people who trade derivatives for speculative and/ or hedging purposes who are not wholesale clients and who rely on general advice in order to make their own trading decisions. In order to ensure that advice remains affordable these advice models need to remain.

Our specific comments to each of ASIC's proposals in the Consultation Paper are detailed in Annexure A of this letter.

ASDAA appreciates the opportunity to provide this Submission to Treasury on these significant proposals. We would be happy to discuss any issues arising from our submissions on this issue, or to provide any further material that may assist. Should you require any further information, please contact Brad Smoling, Director of Communications, on [REDACTED]

Yours Sincerely

[REDACTED]
Marija Pajeska
Compliance Director

ANNEXURE A: RESPONSE TO ASIC QUESTIONS

B. AMENDING THE SECURITIES MARKETS RULES

Accredited derivatives advisers

B1 proposal: ASIC proposes 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.

ASIC Question		Response
B1Q1	Do you agree with this proposal? In your response, please give detailed reasons for your answer.	<p>Part 2.4 should be repealed in its entirety and reliance should solely be placed on the Corporations Act 2001 in the regulation of these matters.</p> <p>Currently, there is so much confusion in the industry, with regards to education and training, resulting from the different standards set under the different laws, rules and standards, to name a few:</p> <ul style="list-style-type: none"> • the Corporations Act • FASEA Education Standards • ASIC Regulatory Guide RG146 • Qualifications and experience for tax (financial) advisers defined by TPB <p>Market Participants and their representatives do not need an additional layer of complexity as a result of requirements set under the ASIC Market Integrity Rules which only apply to them and no other licensees or representatives in the securities market.</p> <p>An additional set of rules would not add value or be of any benefit to clients.</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.	
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?	

Pre-trade transparency exception—Trades with price improvement

B2 proposal: ASIC proposes 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).

ASIC Question		Response
B2Q1	Do you agree with our proposal? Please give reasons for your answer.	We have no comments.
B2Q2	Do you consider the proposal will alleviate any uncertainty participants have about how this exception applies to aggregated orders?	

Confirmation to non-retail clients—Derivatives market contracts

B3 proposal: ASIC proposes 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.

ASIC Question		Response
B3Q1	Do you agree with our proposal? Please give reasons for your answer.	We have no comments.
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?	

Regulatory data reporting—Intermediary ID

B5 proposal: ASIC 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.

ASIC Question		Response
B4Q1	Do you agree with our proposal? Please give reasons for your answer.	We have no objection to the proposed changes however, ASIC needs to consider whether the data it has collected to date with regards to Intermediary ID is reliable especially if such data has been used for the purpose of calculating ASIC Industry funding fees for Securities dealers.
B4Q2	Do you consider that the proposal will remove any existing uncertainty that participants have about when the intermediary ID is required?	

C. AMENDING THE FUTURES MARKETS RULES

Prohibited employment

C1 proposal: ASIC proposes 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)

ASIC Question		Response
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.	We agree with the proposal as the 'good fame and character' test is reasonable.
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.	As the good fame and character test is an ongoing obligation, it will increase the ongoing compliance monitoring requirements but not to an extent which is unbearable.

C2 proposal: ASIC proposes 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).

ASIC Question		Response
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.	We agree with the proposal as the 'good fame and character' test is reasonable.
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.	

Suspicious activity reporting

C3 proposal: ASIC proposes 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.

ASIC Question		Response
C3Q1	What are your views on our proposed approach to requiring suspicious activity reporting? Are there other avenues for obtaining this information?	We have no objections with ASIC proposed changes relating to Suspicious activity reporting on the condition that there will be no duplication in reporting. ASIC should ensure that the same platform can be used to report breaches under the Corporations Act and under the Market Integrity Rules and that once a licensee reports a breach under the Corporations Act it has no obligation to submit a further report to ASIC under the ASIC Market Integrity Rules.
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?	

Client authorisation—Block trade and exchange for physical orders

C4 proposal: ASIC proposes 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.

ASIC Question		Response
C4Q1	Does the requirement, under Rule 3.4.4, that client instructions must be 'in writing' serve any regulatory or business purpose in light of mandatory recording and record-keeping requirements?	<p>We find ASIC's questions confusing as the current wording of Rule 3.4.4 of the Futures Markets Rules does not require client instructions to be 'in writing' but rather client authorization to be 'in writing'.</p> <p>Currently, client authorization is provided through the Client Agreement that is signed between the Client and the Market Participant. The process is effective and efficient, however simplification of the prescribed wording would be beneficial, ie. removal of the requirement to have the client acknowledgements in Rule 3.4.4(a) – (d).</p> <p>In terms of the proposed wording, we agree to the inclusion of Rule 3.4.4(2) however it should only be required in circumstances where a client has not agreed in writing. This will still allow for authority to be given via a Client Agreement without the Market Participant incurring additional administrative burdens and associated costs related to maintaining a register.</p> <p>The other option worth considering is to replicate the wording in Rule 3.3.2 of the Futures Markets Rules for Block Trades and Exchange for Physical. Rule 3.3.2 of the Futures Markets Rules is not administratively over bearing and achieves the intended objective to have client authorization prior to engaging in the relevant activities.</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?	
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?	

C5 proposal: ASIC proposes to amend Rule 3.5.3 of the Futures Markets Rules to remove the requirement that client authorisations must be 'in writing'.

ASIC Question		Response
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?	We find ASIC's questions confusing as the current word of Rule 3.5.3 of the Futures Markets Rules does not require client instructions to be 'in writing' but rather client authorization to be 'in writing'. Currently, client authorization is provided through the Client Agreement that is signed between the Client and the Market Participant. The process is effective and efficient. This option should remain in the rules.
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?	In terms of the proposed wording, we agree to the inclusion of 3.5.3(2) however it should only be required in circumstances where a client has not agreed in writing. This will still allow for authority to be given via a Client Agreement without the Market Participant incurring additional administrative burdens and associated costs related to maintaining a register.

D. MERITS REVIEW OF ASIC DECISIONS UNDER THE SECURITIES AND FUTURES MARKETS RULES

What are reviewable decisions?

D1 proposal: ASIC proposes to amend the Securities Markets Rules to provide that a decision listed in Appendix 1 would be subject to merits review by the AAT.

ASIC Question		Response
D1Q1	Do you think there are any omissions from the proposed list of decisions under the Securities Markets Rules? Please give reasons why.	We have no comment

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

ASIC Question		Response
D2Q1	Do you think there are any omissions from the proposed list of decisions? Please give reasons why.	If Part 2.4 of the Securities Markets Rules is repealed then all rules relating to Part 2.4 should be deleted from Appendix 2.

D3 proposal: ASIC proposes to amend the Futures Markets Rules to provide that a decision listed in Appendix 3 would be subject to merits review by the AAT.

ASIC Question		Response
D3Q1	Do you think there are any omissions from the proposed list of decisions under the Futures Markets Rules? Please give reasons why.	We have no comment

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

ASIC Question		Response
D4Q1	Do you think there are any omissions from the proposed list of decisions? Please give reasons why.	We have no comment

E. AMENDING ASIC-MADE RULES—POWER TO GRANT WAIVERS

Waivers under the ASIC market integrity rules

E1 proposal: ASIC proposes 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).

ASIC Question		Response
E1Q1	Do you agree with our proposal? In your response, please give detailed reasons for your answer.	We have no objections or concerns in this regard.
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?	