



ASIC
Australian Securities &
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2 February 2024

Class no-action letter – s12BF(2A) and (2C) of the Australian Securities and Investments Commission Act 2001 and s912A(1)(c) and 912D(1) of the Corporations Act 2001

We refer to the Australian Financial Markets Association (**AFMA**) application to the Australian Securities and Investments Commission (**ASIC**) dated 29 September 2023, requesting a class no-action letter in accordance with ASIC Regulatory Guide 108 *No-action letters* (**RG108**). We also refer to further AFMA correspondence dated 20 October 2023, 1 December 2023 and 14 December 2023 (the **Application**). We note ASIC also considered submissions from other industry participants in relation to the Application (the **further submissions**).

The Application concerns sophisticated participants in financial markets impacted by Subdivision BA of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) as amended by the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) (**UCT Reforms**) (together the **amended UCT regime**). The amended UCT regime commenced on 9 November 2023.

AFMA cited concerns on behalf of industry that the amended UCT regime would apply to certain sophisticated participants in financial markets who are not consumers or small businesses intended to be covered by the UCT regime.

In the Application, AFMA requested a class no-action letter in respect of any potential non-compliance by certain sophisticated participants in financial markets with:

- (a) section 12BF(2A) or (2C) of the ASIC Act;
- (b) section 912A(1)(c) of the *Corporations Act 2001* (**Corporations Act**); and
- (c) section 912D(1) of the Corporations Act.

After targeted consultation with AFMA, Treasury and industry participants, ASIC has decided to give this limited class no-action letter.

ASIC's Decision

Based on the information in the Application and the further submissions:

1. ASIC does not intend to take action for a contravention of section 12BF(2A) or (2C) of the ASIC Act:
 - (A) where each counterparty to a standard form contract is an **Institutional Investor**; or
 - (B) where each counterparty to an **Industry Standard Form Contract** is a Wholesale Client (as defined in section 761G of the Corporations Act) and the contract is used for the purpose of a dealing in, or related to a dealing in, financial markets.
2. ASIC does not intend to take action where an Australian financial services licensee who has the benefit of the no-action position specified in paragraph 1(A) or 1(B) above does not report under section 912DAA of the Corporations Act, a contravention of subsections 12BF(2A) or (2C) of the ASIC Act.
3. ASIC does not intend to take action for a contravention of s912A(1)(c) by an Australian financial services licensee who has the benefit of the no-action position specified in paragraph 1(A) or 1(B), where that contravention is:
 - (A) non-compliance with subsections 12BF(2A) or (2C) of the ASIC Act; or
 - (B) non-compliance with section 912DAA constituted by failing to report a contravention of subsections 12BF(2A) or (2C) of the ASIC Act in reliance on paragraph 2 above.

In this letter:

Institutional Investor means:

- (a) a professional investor as defined in section 9 of the Corporations Act excluding paragraph (e);
- (b) a fund (including the trustee or investment manager acting on behalf of that fund) or an unlisted investment company:
 - i. with funds under management of at least \$50 million, including any amount held or managed by an associate; and
 - ii. that is solely or principally engaged in the provision of financial services;
- (c) a special purpose vehicle or entity that is principally engaged in securitisation, structured financing or project financing;
- (d) an Australian market licensee;
- (e) a clearing and settlement facility licensee;
- (f) a related body corporate of an entity mentioned in paragraphs (a) – (e) above; or
- (g) a body that, if established or incorporated in Australia, would be covered by one of the preceding paragraphs.

Industry Standard Form Contract means any of the following (including their related or ancillary documents):

- (a) International Swaps and Derivatives Association (ISDA) Master Agreements;
- (b) International Securities Lending Association (ISLA) or Bond Market Association Global Master Securities Lending Agreements (GMSLA);

- (c) International Capital Market Association (ICMA) Global Master Repurchase Agreements;
- (d) SIFMA Master Securities Loan Agreements, Master Repurchase Agreements or Master Securities Forward Transaction Agreements;
- (e) Trade Association for the Emerging Markets (EMTA) Master Confirmation Agreements, EMTA Agreements for FX transactions;
- (f) Futures Industry Association (FIA)-ISDA Cleared Derivatives Execution Agreements, Cleared Derivative Addendums, Master Netting Agreements;
- (g) FBF Master Agreement relating to Transactions on Forward Financial Instruments;
- (h) DRV German Master Agreement for Financial Derivatives Transactions and related annexes, addendums, appendices and collateral documentation;
- (i) International Foreign Exchange Master Agreements (IFEMA), International Currency Options Market Terms or Master Agreements, International FX and Currency Option Master Agreements, International Foreign Exchange and Options Master Agreement (FEOMA);
- (j) KOFIA Agreement on Repurchase Agreement (Repo) between Institutions;
- (k) Bankers Association for Finance and Trade (BAFT) Master Participant Agreement;
- (l) International Chamber of Commerce (ICC) Uniform Rules for Collections 522 (URC ICC Rules);
- (m) ICC Uniform Customs and Practice for Documentary Credits 600 (UCP ICC Rules);
- (n) ICC Uniform Rules for Demand Guarantees 758 (URDG ICC Rules);
- (o) ICC Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits (URR ICC Rules);
- (p) ICC International Standby Practices 98 (ISP ICC Rules);
- (q) Asia Pacific Loan Markets Association (APLMA) and Loan Markets Association (LMA) published Mandate Letters and other templates ancillary to syndicated lending as published;
- (r) Australian Financial Markets Association (AFMA) Master ECM Terms;
- (s) Australian Securities Lending Association (ASLA) Australian Master Securities Lending Agreements;
- (t) AFMA Contracts for Forward Purchase/Sale of Australian Carbon Credits or for Spot Purchase/Sale of Australian Carbon Credits, Master ACCU Transaction Agreements;
- (u) AFMA Master Agreements for Foreign Currency Transactions;
- (v) AFMA Investment Manager Supplement;
- (w) European Federation of Energy Traders (EFET) Gas Master Agreement & Annexes; Electricity Master Agreement & Annexes; Credit Support Annexes.

This no-action position applies until the earlier of:

- A. the end of 9 November 2027; and
- B. the end of the day on which any amendments to the ASIC Act commence, where those amendments respond to the review referred to in section 80 of Schedule 2 of the UCT Reforms.

General conditions

Consistent with RG108, this letter is provided on the following conditions:

1. The position set out in this letter is a policy decision, not a legal opinion and is based on information provided by you to ASIC to date.
2. This letter is given in accordance with RG 108 and is only a statement of ASIC's present regulatory intentions based on the information currently available to it.
3. Notwithstanding the issue of this letter, ASIC reserves the right to take action in relation to the matters set out above, particularly in the event that there has been incomplete disclosure at the time this no-action letter was issued.
4. ASIC reserves the right to withdraw or revise this no-action letter at any time, particularly if:
 - a. further or other information becomes available to it; or
 - b. ASIC reconsiders:
 - i. its view of the relevant provisions of the Corporations Act and, or, ASIC Act as they applied at the relevant times; or
 - ii. legislative or administrative policy.

In revising or acting contrary to this letter ASIC will give due allowance to the consequences for persons who have acted in reasonable reliance on this letter.

5. This no-action letter is specific to the facts and circumstances of the matter under consideration. It should not be viewed as a de facto 'rulings system' to indicate ASIC's view of whether the conduct or conduct of such a kind is legal. It is not to be relied on as a precedent.
6. This no-action letter does not preclude third parties (including the Director of Public Prosecutions) from taking legal action in relation to the conduct the subject of this letter. This letter will not necessarily impede a court from holding that the conduct set out in this letter infringes the relevant provisions of the Corporations Act and, or, ASIC Act.
7. ASIC does not represent that the conduct the subject of this letter will not be held to contravene the relevant provisions of the Corporations Act and, or, ASIC Act as they applied at the relevant times, nor does it undertake to intervene in an action brought by third parties in respect of such conduct.
8. ASIC reserves its rights to make publicly known its regulatory outcomes, including no-action letters.

Enquiries

Please contact me at peter.chia@asic.gov.au if you have any questions.

Yours sincerely

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