

**Australian Securities and Investments Commission
Corporations Act 2001- Paragraph 911A(2)(l) - Exemption**

Under paragraph 911A(2)(l) of the *Corporations Act 2001* (the *Act*) the Australian Securities and Investments Commission (*ASIC*) exempts the persons referred to in Schedule A from the requirement to hold an Australian financial services licence in the case referred to in Schedule B.

Schedule A

A foreign company (the *body*) to which all of the following apply:

- (a) the body is:
 - (i) a registered futures commission merchant; or
 - (ii) a registered introducing broker; or
 - (iii) a registered commodity pool operator; or
 - (iv) a registered commodity trading advisor;
- (b) the body is either:
 - (i) a body corporate incorporated in the US or a State of the US; or
 - (ii) a partnership formed in the US or a State of the US;
- (c) the body:
 - (i) is registered under Division 2 of Part 5B.2 of the Act; or
 - (ii) has not failed for more than the last 10 business days to have an Agent;
- (d) the body's primary business is the provision of financial services;
- (e) neither the body nor its Agent has been notified by ASIC that the body is excluded from relying on this instrument;
- (f) 10 business days have not elapsed since the body became or should reasonably have become aware of matters that give it reason to believe that it has failed, other than in an immaterial respect, to comply with a requirement set out in Schedule C without full particulars of the failure having been provided to ASIC (to the extent that the body knows those particulars or would have known them if it had undertaken reasonable enquiries) and ASIC having notified the body or its Agent that the body may continue to rely on this instrument; and
- (g) the body has not notified ASIC that it will not rely on this instrument.

Schedule B

Where:

1. the body provides any of the following financial services (the *financial services*) in this jurisdiction to wholesale clients:
 - (a) providing financial product advice;
 - (b) dealing in a financial product;
 - (c) making a market for a financial product; or
 - (d) providing a custodial or depository service;in respect of any of the following financial products:
 - (e) derivatives;
 - (f) foreign exchange contracts; or
 - (g) interests in a managed investment scheme that is not required to be registered under Chapter 5C of the Act; and
2. the body has provided ASIC with:
 - (a) evidence that paragraph (a) of Schedule A is satisfied that ASIC has stated in writing is adequate;
 - (b) a notice that it will provide financial services in this jurisdiction in reliance on this instrument;
 - (c) a deed of the body for the benefit of and enforceable by ASIC and the other persons referred to in subsection 659B(1) of the Act that applies notwithstanding that the body may have ceased to rely, or never have relied, on this instrument, which deed provides that:
 - (i) the deed is irrevocable except with the prior written consent of ASIC;
 - (ii) the body submits to the non-exclusive jurisdiction of the Australian courts in legal proceedings conducted by ASIC (including under section 50 of the ASIC Act) and, in relation to proceedings relating to a financial services law, by any person referred to in subsection 659B(1) of the Act and whether brought in the name of ASIC or the Crown or otherwise;
 - (iii) the body covenants to comply with any order of an Australian court in respect of any matter relating to the provision of the financial

services;

- (iv) if the body is not registered under Division 2 of Part 5B.2 of the Act, service of process on the body in relation to legal proceedings conducted by ASIC (including under section 50 of the ASIC Act) and, in relation to proceedings relating to a financial services law, by any person referred to in subsection 659B(1) of the Act and whether brought in the name of ASIC or the Crown or otherwise can be effected by service on the Agent; and
 - (v) the body covenants that, on written request of either the CFTC or ASIC, it will give or vary written consent and take all other practicable steps to enable and assist the CFTC to disclose to ASIC and ASIC to disclose to the CFTC any information or document that the CFTC or ASIC has that relates to the body;
- (d) written consents to the disclosure by the CFTC to ASIC and ASIC to the CFTC of any information or document that the CFTC or ASIC has that relates to the body (being consents in such form (if any) as ASIC specifies in writing); and
- (e) if the body is a registered commodity pool operator or a registered commodity trading advisor - written certification, provided annually or more frequently if notified by ASIC, that it is has adequate resources to provide the financial services it provides and intends to provide in this jurisdiction.

Schedule C

1. The body must provide each of the financial services in this jurisdiction in a manner which would comply, so far as is possible, with the US regulatory requirements if the financial service were provided in the US in like circumstances.
2. The body must:
 - (a) notify ASIC, as soon as practicable and in such form if any as ASIC may from time to time specify in writing, of the details of:
 - (i) each significant change to, including the termination of, the registration under the Commodity Exchange Act as a futures commission merchant, introducing broker, commodity pool operator or commodity trading advisor applying to the body relevant to the financial services the body provides or intends to provide in this jurisdiction;
 - (ii) each significant change to the US regulatory requirements (including in the power or authority of the CFTC to supervise, monitor or procure compliance by the body with the US regulatory requirements with respect to the provision of the financial services) that is relevant to the financial services the body provides or intends to provide in this jurisdiction unless ASIC has stated in writing that notice of that change is not required for the purpose of this instrument;

- (iii) each significant particular exemption or other relief which the body obtains from the US regulatory requirements; and
- (iv) each enforcement or disciplinary action taken by the CFTC or any other overseas regulatory authority against the body; and
- (b) provide written disclosure to all persons to whom the financial services are provided in this jurisdiction (before the financial services are provided) containing prominent statements to the following effect:
 - (i) the body is exempt from the requirement to hold an Australian financial services licence under the Act in respect of the financial services; and
 - (ii) the body is regulated by the CFTC under US laws, which differ from Australian laws.

Interpretation

In this instrument:

address, in relation to a company, means the address of the registered office of the company;

Agent means a natural person resident in this jurisdiction or a company, whose name and address were last notified to ASIC by the body for the purposes of this instrument, and who is authorised to accept on the body's behalf, service of process from ASIC and, in relation to proceedings relating to a financial services law, from any person referred to in subsection 659B(1) of the Act;

CFTC means the Commodity Futures Trading Commission of the US;

Commodity Exchange Act means the Commodity Exchange Act of the US;

custodial or depository service has the meaning given by section 766E of the Act;

derivative has the meaning given by section 761D of the Act;

financial product advice has the meaning given by section 766B of the Act;

financial services law has the meaning given by section 761A of the Act;

foreign exchange contract has the meaning given by section 761A of the Act;

making a market has the meaning given by section 766D of the Act;

NFA means the National Futures Association of the US;

notice and *notified* mean, respectively, written notice and notified in writing;

overseas regulatory authority means a foreign regulatory authority (other than the CFTC) which regulates financial services and which is established by or for the purposes of a foreign government or legislative body;

registered commodity pool operator means a commodity pool operator who is:

- (a) registered under section 6n(1) of the Commodity Exchange Act; and
- (b) a member of the NFA;

registered commodity trading advisor means a commodity trading advisor who is:

- (a) registered under section 6n(1) of the Commodity Exchange Act; and
- (b) a member of the NFA;

registered futures commission merchant means a person who is:

- (a) registered as a futures commission merchant under section 6f(a) of the Commodity Exchange Act; and
- (b) a member of the NFA;

registered introducing broker means a person who is:

- (a) registered as an introducing broker under section 6f(a) of the Commodity Exchange Act; and
- (b) a member of the NFA;

US means the United States of America;

US regulatory requirements means the rules that apply in relation to the financial services including any applicable legislation, instruments made under that legislation and any relevant policies or other documents (however described) issued by the CFTC and the NFA; and

wholesale client has the meaning given in section 761G of the Act.

Note: By subsection 761H(1) of the Act, the operation of this instrument in relation to partnerships is affected by section 761F and subsection 769B(4) of the Act.

Commencement

This instrument takes effect on gazettal.

Dated this 19th day of July 2004.

Signed by Brendan Byrne
as a delegate of the Australian Securities and Investments Commission