

# ASIC MARKET INTEGRITY RULES (ASX MARKET) AMENDMENT 2011 (NO. 3)

## EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes the *ASIC Market Integrity Rules (ASX Market) Amendment 2011 (No. 3)* (the **Instrument**) under subsection 798G(1) of the *Corporations Act 2001* (the **Corporations Act**).

### 1. Enabling legislation

Subsection 798G(1) of the Corporations Act provides that ASIC may, by legislative instrument, make rules that deal with the following:

- (a) the activities or conduct of licensed markets;
- (b) the activities or conduct of persons in relation to licensed markets;
- (c) the activities or conduct of persons in relation to financial products traded on licensed markets.

The *ASIC Market Integrity Rules (ASX Market) 2010 (Rules)* were made under subsection 798G(1) of the Corporations Act on 1 August 2010.

### 2. Background

In April 2011, ASIC made the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011* (the **Competition Rules**) which form part of the regulatory framework for competition between exchange markets. The Competition Rules apply to:

- (a) the operators of licensed financial markets on or through which offers to acquire or dispose of certain financial products (defined in Rule 1.4.3 of the Competition Rules as **Equity Market Products**) are made or accepted, including the financial market (**ASX Market**) operated by ASX Limited; and
- (b) participants of those markets that deal in Equity Market Products.

Some of the Competition Rules commenced on 5 May 2011 and the remainder will commence on 31 October 2011.

The Competition Rules supplement the Rules, which commenced on 1 August 2010.

Participants of the ASX Market that deal in Equity Market Products need to comply with the

Rules and the Competition Rules.

### **3. Purpose of the legislative instrument**

The purpose of the Instrument is to:

- (a) impose minimum presence requirements for foreign entities that are participants of the ASX Market and that are not required to hold an Australian financial services licence (*AFSL*). This will facilitate enforcement actions in Australia for breaches by those entities of the *Australian Securities and Investments Commission Act 2001*, the *Corporations Act* and the *Corporations (Fees) Act 2001* (see new Rule 2.6.1); and
- (b) make minor consequential amendments to the Rules to ensure consistency of operation between the Rules and the Competition Rules. This is because the Rules were made before the Competition Rules (see amended Rules 1.4.3, 3.3.1, 5.10.4, 6.4.1 and 6.4.3).

Details of the Instrument are contained in the Attachment.

### **4. Consultation**

In August 2011, ASIC consulted on the substance of the amendments to be made by the Instrument in Consultation Paper 166 *Market integrity rules for non-AFS licensee foreign participants and consequential amendments (CP 166)*. ASIC received four submissions in response to CP 166. There were no material issues raised in the submissions in relation to the substance of the amendments to be made by the Instrument.

### **5. Penalties**

Subsection 798G(1) of the *Corporations Act* provides that market integrity rules are legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

Subsection 798G(2) of the *Corporations Act* provides that market integrity rules may include a penalty amount for a rule. A penalty amount must not exceed \$1,000,000. The penalty amount set out below a Rule is the penalty amount for that Rule.

### **6. Commencement of the Instrument**

The Instrument will commence on the later of 31 October 2011 or the day after it is registered under the *Legislative Instruments Act 2003*. This is to ensure the Rules and the Competition Rules are consistent with each other when competition between exchange markets commences on or after 31 October 2011.

## **ATTACHMENT**

### **Paragraph 1 – Enabling Legislation**

This paragraph provides that the Instrument is made under subsection 798G(1) of the *Corporations Act 2001*.

### **Paragraph 2 – Title**

This paragraph provides that the title of the Instrument is the *ASIC Market Integrity Rules (ASX Market) Amendment 2011 (No. 3)*.

### **Paragraph 3 – Commencement**

This paragraph provides that the Instrument commences on the later of 31 October 2011 and the day after the instrument is registered under the *Legislative Instruments Act 2003*.

### **Paragraph 4 – Amendments**

This paragraph provides that Schedule 1 amends the *ASIC Market Integrity Rules (ASX Market) 2010*.

### **Schedule - Amendments**

#### **Items [1] to [12] – Rule 1.4.3**

Rule 1.4.3 provides definitions for terms used in the Rules.

Items [1] to [5], [9], [11] and [12] of Schedule 1 to the Instrument amend Rule 1.4.3 to insert new definitions for:

- “ASIC Act”;
- “CHESS Depository Interest”;
- “Competition Market Integrity Rules”;
- “Equity Market”;
- “Equity Market Operator”;
- “Equity Market Product”;
- “Financial Market”;
- “Order Book”;
- “Trading Hours”; and
- “Trading Suspension”.

These definitions are included for the purposes of terms used in new Rule 2.6.1 and in the amendments to Rules 3.3.1, 5.10.4, 6.4.1 and 6.4.3 (see items [13] to [21] below).

Items [6] to [8] and [10] of Schedule 1 to the Instrument also amend Rule 1.4.3 to amend the

definition of “On-Market” and substitute the definition of “Special Crossing”, to more closely align those definitions with the pre-trade transparency requirements in the Competition Rules.

### **Item [13] – After Part 2.5**

Item [13] of Schedule 1 to the Instrument inserts a new Part 2.6 and Rule 2.6.1 into the Rules.

New Rule 2.6.1 provides that a Market Participant (*Foreign Market Participant*) that is a foreign entity and does not hold an AFSL must provide ASIC with a deed of the Foreign Market Participant for the benefit of and enforceable by ASIC and the other persons referred to in subsection 659B(1) of the Corporations Act, before entering into a transaction on the ASX Market.

The deed must provide that:

- (a) the deed is irrevocable except with the prior written consent of ASIC;
- (b) the Foreign Market Participant 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 Corporations Act and whether brought in the name of ASIC or the Crown or otherwise;
- (c) the Foreign Market Participant covenants to comply with any order of an Australian court in respect of any matter relating to the activities or conduct of the Foreign Market Participant in relation to the ASX Market or in relation to Financial Products traded on the ASX Market, including but not limited to any matter relating to the Foreign Market Participant’s obligations under:
  - (i) the ASIC Act;
  - (ii) the Corporations Act; and
  - (iii) the *Corporations (Fees) Act 2001*;
- (d) if the Foreign Market Participant is not registered under Division 2 of Part 5B.2 of the Corporations Act:
  - (i) the Foreign Market Participant must have at all times an agent who is:
    - (A) a natural person or a company;
    - (B) resident in this jurisdiction; and
    - (C) authorised to accept, on behalf of the Foreign Market Participant, service of process and notices; and
  - (ii) the Foreign Market Participant must notify ASIC of any change to:
    - (A) the agent; or
    - (B) the name and address of the agent (if the agent is a company, address means the address of the registered office of the company); and

- (iii) service of process on the Foreign Market Participant 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 Corporations Act and whether brought in the name of ASIC or the Crown or otherwise, can be effected by service on the agent;
- (e) the deed applies notwithstanding that the Foreign Market Participant may have ceased to be a Market Participant; and
- (f) such additional terms notified by ASIC to the Foreign Market Participant.

The minimum presence requirements in the deed are based on ASIC's Class Orders exempting certain foreign financial services providers from the requirement to hold an AFSL (see for example ASIC Class Orders CO 03/1099, CO 03/1101 and CO 03/1102). The requirements of the foreign financial services provider deeds have been adapted to reflect the regulatory framework and the nature of activities and conduct of Foreign Market Participants in relation to the ASX Market and financial products traded on the ASX Market.

#### **Items [14] and [15] – Rule 3.3.1**

Items [14] and [15] of Schedule 1 to the Instrument amend Rules 3.3.1(a) and (d) to acknowledge the existence of obligations in the Competition Rules in relation to executing client instructions (in particular under the best execution requirements in Chapter 3 of the Competition Rules) and in relation to entering into a Market Transaction other than on a Trading Platform (in particular under the pre-trade transparency requirements in Chapter 4 of the Competition Rules).

#### **Item [16] – Rule 5.10.4**

Item [16] of Schedule 1 to the Instrument amends Rule 5.10.4 to clarify that a participant of the ASX Market must not deal in Equity Market Products that are suspended from quotation or trading on the ASX Market if those products are also suspended from quotation or trading on all licensed financial markets on which they are quoted. The amendment also removes the ability of a participant to obtain written approval from the operator of the ASX Market to deal in a Cash Market Product during a suspension from quotation or trading.

Rule 7.2.1 of the Competition Rules will apply where an Equity Market Product is suspended from quotation or trading on all licensed financial markets.

#### **Items [17] to [19] – Part 6.4**

Items [17] to [19] of Schedule 1 to the Instrument amend the headings to Part 6.4 and Rule 6.4.1 and the text of Rule 6.4.1(2) to refer to crossings outside of Trading Hours. This aligns Rule 6.4.1 with the concepts in the pre-trade transparency requirements in the Competition Rules and ensures that restrictions on trading outside of normal trading hours during takeovers and buybacks operate effectively in the context of a multi-market environment.

**Items [20] and [21] – Rule 6.4.3**

Items [20] and [21] of Schedule 1 to the Instrument amend the heading to Rule 6.4.3 and the text of Rule 6.4.3(2) to refer to crossings outside of Trading Hours. This aligns Rule 6.4.3 with the concepts in the pre-trade transparency requirements in the Competition Rules and ensures that restrictions on trading outside of normal trading hours during takeovers and buybacks operate effectively in the context of a multi-market environment.