

Class Rule Waiver CW 12-1144

Explanatory Statement

Prepared by the Australian Securities and Investments Commission

ASIC Market Integrity Rules (Chi-X Australia Market) 2011

The Australian Securities and Investments Commission (**ASIC**) makes this instrument under Rule 1.2.1(1) of the *ASIC Market Integrity Rules (Chi-X Australia Market) 2011 (Chi-X Rules)*.

Under that rule, ASIC may relieve any person or class of persons from the obligation to comply with a provision of the Chi-X Rules either generally or in a particular case or category, and either unconditionally or subject to such conditions as ASIC thinks fit.

Background

On 12 July 2012, ASIC made the *ASIC Market Integrity Rules (Chi-X Australia Market) Amendment 2012 (No. 1)* which inserted Part 5.11 "Suspicious activity reporting" into the Chi-X Rules.

Rule 5.11.1(1) provides that, subject to subrules (2) and (3), if a Market Participant has reasonable grounds to suspect that:

- (a) a person (**the Insider**) has placed an order into or entered into a transaction on the Market in relation to a financial product while in possession of inside information (within the meaning of section 1042A of the Corporations Act), whether or not the Market Participant is aware of:
 - (i) the identity of the Insider; or
 - (ii) all of the details of the order or transaction; or
- (b) a transaction or an order transmitted to a Trading Platform has or is likely to have the effect of:
 - (i) creating an artificial price for trading in financial products on the Market;
 - (ii) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on the Market;
 - (iii) creating, or causing the creation of, a false or misleading appearance of active trading in financial products on the Market; or
 - (iv) creating, or causing the creation of, a false or misleading appearance with respect to the market for, or the price for trading in, financial products on the Market, whether or not the Market Participant is aware of:
 - (v) the intention of any party to the transaction or order; or
 - (vi) all of the details of the transaction or order,

the Market Participant must, as soon as practicable, notify ASIC in writing of the details of the transaction or order (to the extent known to the Market Participant) and the reasons it suspects the matter set out in paragraphs (a) and/or (b).

Rule 5.11.1(2) provides that a Market Participant is not required to notify ASIC under Rule 5.11.1(1) if the Market Participant has reported the information that would otherwise be contained in the notification to ASIC, to AUSTRAC.

Rule 5.11.1(3) provides that a Market Participant is not required to comply with subrule (1) until 1 November 2012.

Rule 5.11.2 provides for confidentiality.

This class rule waiver

As noted below, in consultation prior to the making of the Chi-X Rules in Part 5.11 ASIC indicated that it would allow Market Participants a period of approximately six months from commencement of Part 5.11 of the Chi-X Rules to allow Market Participants to prepare for compliance with Part 5.11 the Rules. This would allow sufficient time to change their processes and procedures to ensure compliance with Part 5.11 of the Chi-X Rules.

This class rule waiver gives effect to that transitional implementation period for Market Participants by waiving the obligation to comply with Part 5.11 of the Chi-X Rules until 20 January 2013.

Consultation

ASIC did not consult specifically on the making of this class rule waiver. However, Consultation Paper 145 *Australian equity market structure: Proposals (CP 145)* which included proposals about suspicious activity reporting, was released on 4 November 2010. As a result of ASIC's consideration of the submissions and feedback on CP145, ASIC decided to allow an implementation period of approximately 6 months from the commencement of Part 5.11 of the Chi-X Rules.

Statement of Compatibility with Human Rights

This statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Specifically, this Legislative Instrument affects, by extending to 20 January 2012, the time by which a Market Participant must comply with the obligations in Part 5.11 of the Chi-X Rules. Part 5.11 of the Chi-X Rules was inserted into the Chi-X Rules by a Legislative Instrument – the *ASIC Market Integrity Rules (Chi-X Australia Market) Amendment 2012 (No. 1)* (the Part 5.11 Amendment).

To the extent the Part 5.11 Amendment engages the right to privacy and reputation in Article 17 of the International Covenant on Civil and Political Rights, this Legislative Instrument may have the same effect. Accordingly, the statements in the Statement of Compatibility with Human Rights contained in the Explanatory Statement for the Part 5.11 Amendment (reproduced as Attachment A to this Explanatory Statement) also apply to this Legislative Instrument.

ATTACHMENT A

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Market Integrity Rules (Chi-X Australia Market) Amendment 2012 (No. 1)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Legislative Instrument amends the *ASIC Market Integrity Rules (Chi-X Australia Market) 2011* to impose obligations on a Chi-X Market Participant to notify ASIC where the Chi-X Market Participant has reasonable grounds to suspect that a matter (“Reportable Matter”) referred to in paragraph Rule 5.11.1(1)(a) or (b) has arisen (referred to as “Suspicious Activity Reporting”). The purpose of these amendments is to enhance ASIC’s market surveillance capability by providing a further source of intelligence in respect of possible cases of market misconduct and in particular misconduct known in the market as insider trading, front-running or market manipulation. These amendments will bring ASIC further into line with international regulatory practice particularly in the UK, US, Germany and Canada.

Human rights implications

The Legislative Instrument engages the right to privacy and reputation in Article 17 of the International Covenant on Civil and Political Rights (“Article 17”). Article 17 prohibits unlawful or arbitrary interferences with a person's privacy, family, home (which the UN Human Rights Committee has interpreted as including a person’s workplace) and correspondence. It also prohibits unlawful attacks on a person’s reputation. It provides that persons have the right to the protection of the law against such interference or attacks. The UN Human Rights Committee has not defined ‘privacy’. The Commonwealth Attorney-General’s Department has provided guidance that privacy should be understood to comprise freedom from unwarranted and unreasonable intrusion into activities that society recognises as falling into the individual sphere of autonomy. To avoid being considered arbitrary, any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances¹.

A Suspicious Activity Report may contain ‘personal information’ as defined in the *Privacy Act 1988*, being information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

The right in Article 17 is engaged by the Legislative Instrument by reason that it:

- (a) involves the collection, storage, security, use or disclosure of personal information;

¹ Australian Government Attorney-General’s Department : *Privacy and Reputation*

<http://www.ag.gov.au/Humanrightsandantidiscrimination/Humanrightsandthepublicsector/Humanrightsguidancesheets/Pages/Privacyandreputation.aspx>

- (b) creates confidentiality or secrecy provisions relating to personal information; and
- (c) provides for mandatory disclosure or reporting of information.

The Legislative Instrument is compatible with the rights recognised in Article 17 of the ICCPR by reason that any interference with a person's privacy or reputation resulting from compliance with the Suspicious Activity Reporting rule will be lawful and not arbitrary. In particular:

- (a) The Suspicious Activity Reporting rule is made in accordance with ASIC's power to make market integrity rules dealing with the activities or conduct of persons in relation to licensed markets and in relation to financial products traded on licensed markets (see subsection 798G(1) of the Act).
- (b) The Suspicious Activity Reporting rule will assist ASIC to perform its function of supervising financial markets, the operators of which are licensed under subsection 795B(1) of the Act (see section 798F of the Act). Supervision of the financial markets must include more than mere observation – it extends to detection and deterrence of misconduct.
- (c) The Suspicious Activity Reporting rule will further the objects of Chapter 7 of the Act, including promoting fair, orderly and transparent markets for financial products (see paragraph 760A(c) of the Act). A fair, orderly and transparent market is one in which market misconduct is minimised. Detection and deterrence of market misconduct contribute to minimising that misconduct, and the Suspicious Activity Reporting rule will assist ASIC in detecting and deterring that misconduct.
- (d) The Suspicious Activity Reporting rule is subject to a number of safeguards, including:
 - (i) The obligation to notify ASIC under the rule is limited to matters that may indicate a person is engaging in, or may have engaged in, market misconduct of a kind known in the market as insider trading, front-running or market manipulation. Before notifying ASIC under the rule, the Chi-X Market Participant must have "reasonable grounds to suspect" (i.e. facts that would support the truth of the assertion) that a Reportable Matter has arisen;
 - (ii) Information provided to ASIC under the rule will be protected in accordance with ASIC's legislative obligations under s127 of the *Australian Securities and Investments Commission Act 2001*, and to, the extent the information is personal information, under the *Privacy Act 1988*; and
 - (iii) Chi-X Market Participants will be required to maintain the confidentiality of the notification and the information contained in it in accordance with Rule 5.11.2.

If the Legislative Instrument was considered to limit the right in Article 17 of the ICCPR, ASIC considers that the Legislative Instrument is nevertheless compatible with that right. The right in Article 17 is not absolute. As noted, the right has implied limitations ('unlawful' and 'arbitrary') and may be subject to a permissible limitation where that limitation aims to achieve a legitimate objective, there is a rational connection between the limitation and the objective and the limitation is reasonable, necessary and proportionate. Any limitation imposed on the right by the Legislative Instrument has a clear legal basis, in that it:

- (a) *Aims to achieve a legitimate objective.* The rule will assist ASIC to perform its function of supervising financial markets under Part 7.2A of the Act, and to further the statutory objects of

Chapter 7 of the Act by promoting fair, orderly and transparent markets for all investors and participants.

(b) *Has a rational connection with the objective* – By ensuring that suspicious activity is notified to ASIC, the rule will enhance ASIC’s ability to detect, pursue and deter misconduct which may have an impact on the fairness, orderliness and transparency of Australia’s markets.

(c) *Is reasonable, necessary and proportionate* – The rule is necessary to achieve the legitimate objective described above because it provides ASIC with a significant additional source of market intelligence, recognised in overseas jurisdictions as imperative to market integrity. The rule contains adequate safeguards by requiring an objective threshold to be met before a Suspicious Activity Reporting notification is made, and by requiring a Chi-X Market Participant to maintain the confidentiality of any such notification. Further safeguards are provided by ASIC’s statutory obligations to protect confidential and personal information contained in the notification.