

**ASIC MARKET INTEGRITY RULES (COMPETITION IN EXCHANGE MARKETS)
AMENDMENT 2017 (NO. 1)**

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

Enabling Legislation

The Australian Securities and Investments Commission (**ASIC**) makes the *ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2017 (No. 1)* (the **Amending Instrument**) under subsection 798G(1) of the *Corporations Act 2001* (the **Act**). The Amending Instrument amends the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011* (the **ASIC Market Integrity Rules (Competition)**).

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

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

Subsection 798G(1) of the Act was inserted by Schedule 1 of the *Corporations Amendment (Financial Market Supervision) Act 2010*.

Unless otherwise indicated, capitalised terms in this Explanatory Statement refer to defined terms in the ASIC Market Integrity Rules (Competition).

Background and rationale

On 29 April 2011, ASIC made the ASIC Market Integrity Rules (Competition).

The ASIC Market Integrity Rules (Competition) apply to:

- (a) the activities and conduct of a Market;
- (b) the activities or conduct of persons in relation to a Market; and
- (c) the activities or conduct of persons in relation to financial products,

as specified in each Chapter, Part or Rule.

The purpose of the Amending Instrument is to amend the ASIC Market Integrity Rules (Competition) to facilitate a proposal by Chi-X Australia Pty Ltd (**Chi-X Australia**) to admit a new class of financial product to quotation on the Chi-X Market under the Chi-X Operating Rules—Transferable Custody Receipts (**TraCRs**). The amendments made by the Amending

Instrument will ensure that the regulatory settings applied to TraCRs are consistent with existing settings for other financial products admitted to quotation on the ASX Market or the Chi-X Market, such as exchange traded funds (ETFs).

The Amending Instrument amends the definition of “Equity Market Product” in Rule 1.4.3 of the ASIC Market Integrity Rules (Competition) so that it includes “Transferable Custody Receipts”.

The Amending Instrument also inserts new definitions for “Foreign Quoted Shares” and “Transferable Custody Receipts”.

These amendments have the effect of extending the application of Chapters 2-4, and 5, 6 and 7 of the ASIC Market Integrity Rules (Competition), which apply in relation to Equity Market Products, to TraCRs that are able to be traded on the Chi-X Market.

Without further amendment, Chapters 4A (*Crossing Systems*) and 5A (*Regulatory Data*) of the ASIC Market Integrity Rules (Competition) will apply in relation to TraCRs able to be traded on the Chi-X Market because Chapter 4A applies to Orders and Transactions in Financial Products able to be traded on the Chi-X Market and Chapter 5A applies to Orders and Transactions in Financial Products admitted to quotation on the Chi-X Market.

Details of the Amending Instrument are contained in **Attachment A**.

1. Consultation

ASIC conducted targeted consultation on the amendments in the Amending Instrument with a product issuer, market operators and industry bodies.

Chi-X Australia supported the proposed amendments. We did not receive any other substantive feedback on the proposals.

We have taken the results of the consultation process into account in preparing the Amending Instrument, and we have decided to proceed as proposed.

Penalties

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

Subsection 798G(2) of the 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.

The Amending Instrument does not amend any penalty amount for any Rule.

Commencement of the Amending Instrument

The Amending Instrument will commence on the day after the day it is registered on the Federal Register of Legislative Instruments.

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights is included in this Explanatory Statement at **Attachment B**.

Regulation Impact Statement

A Regulation Impact Statement is not required for the Amending Instrument because it will have a minor regulatory impact.

ATTACHMENT A

Paragraph 1 – Name of legislative instrument

This paragraph provides that the title of the Amending Instrument is the *ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2017 (No.1)*.

Paragraph 2 – Commencement

This paragraph provides that the Amending Instrument commences on the day after it is registered on the Federal Register of Legislative Instruments.

Paragraph 3 – Authority

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

Paragraph 4 – Amendments

This paragraph provides that Schedule 1 to the Amending Instrument amends the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011*.

Schedule 1 - Amendments

Items [1] and [2] Rule 1.4.3, definition of “Equity Market Product”

Items [1] and [2] of Schedule 1 to the Amending Instrument make amendments consequential to the amendment in Item [3] below, to ensure the punctuation and formatting of the definition of “Equity Market Product” in Rule 1.4.3” is appropriate for the amendment made by Item [3].

Item [3] Rule 1.4.3, definition of “Equity Market Product”

Item [3] of Schedule 1 to the Amending Instrument amends the definition of “Equity Market Product” by introducing paragraph (e). New paragraph (e) expands the definition of “Equity Market Product” to include a Transferable Custody Receipt.

Item [4] Rule 1.4.3, after the definition of “Financial Product”

Item [4] of Schedule 1 to the Amending Instrument inserts a new definition of “Foreign Quoted Shares”. “Foreign Quoted Shares”, in relation to a Transferable Custody Receipt, means shares of a foreign company that is listed on the New York Stock Exchange, NASDAQ Global Market or NASDAQ Global Select Market, where the shares are in a class of shares that is able to be traded on at least one of those financial markets.

Item [5] Rule 1.4.3, after the definition of “Transaction Costs”

Item [5] of Schedule 1 to the Amending Instrument inserts a new definition of “Transferable Custody Receipt”. “Transferable Custody Receipt” means units of beneficial ownership in Foreign Quoted Shares where the units:

- (a) arise from a custodial and sub-custodial arrangement under which:
 - (i) a custodian holds, directly or indirectly, the Foreign Quoted Shares on behalf of, or in trust for, an AFSL holder that holds an AFSL that covers the provision of a custodial or depository service; and
 - (ii) the AFSL holder holds their equitable rights or interests in the Foreign Quoted Shares arising from the custodial arrangement mentioned in subparagraph (i) on behalf of, or in trust for, a person; and
- (b) are issued without the involvement of the issuer of the Foreign Quoted Shares; and
- (c) are able to be traded on the Chi-X Market.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2017 (No.1)

*ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2017 (No. 1) (**the 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*.*

A. Overview of this Instrument

1. The Instrument is made under subsection 798G(1) of the *Corporations Act 2001* (**Corporations Act**) and amends the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011* (**ASIC Market Integrity Rules (Competition)**).
2. The ASIC Market Integrity Rules (Competition) apply to:
 - (a) the activities and conduct of a financial market operated by an Australian market licensee;
 - (b) the activities or conduct of persons in relation to a financial market; and
 - (c) the activities or conduct of persons in relation to financial products, as specified in each Chapter, Part or Rule.
3. Unless otherwise indicated, capitalised terms in this Statement refer to defined terms in the ASIC Market Integrity Rules (Competition).
4. The purpose of the Instrument is to amend the ASIC Market Integrity Rules (Competition) to facilitate a proposal by Chi-X Australia Pty Ltd (**Chi-X**) to admit a new class of financial product to quotation on the Chi-X Market under the Chi-X Operating Rules—Transferable Custody Receipts (**TraCRs**). The amendments made by the Amending Instrument will ensure that the regulatory settings applied to TraCRs are consistent with existing settings for other financial products admitted to quotation on the ASX Market or the Chi-X Market, such as exchange traded funds (ETFs).
5. The Amending Instrument amends the definition of “Equity Market Product” in Rule 1.4.3 of the ASIC Market Integrity Rules (Competition) so that it includes “Transferable Custody Receipts”.
6. The Amending Instrument also inserts new definitions for “Foreign Quoted Shares” and “Transferable Custody Receipts”.
7. These amendments have the effect of extending the application of Chapters 2-4, and 5, 6 and 7 of the ASIC Market Integrity Rules (Competition), which apply in relation to Equity Market Products, to TraCRs that are able to be traded on the Chi-X Market.

8. Without further amendment, Chapters 4A (*Crossing Systems*) and 5A (*Regulatory Data*) of the ASIC Market Integrity Rules (Competition) will apply in relation to TraCRs able to be traded on the Chi-X Market because Chapter 4A applies to Orders and Transactions in Financial Products able to be traded on the Chi-X Market and Chapter 5A applies to Orders and Transactions in Financial Products admitted to quotation on the Chi-X Market.

B. Human rights implications

Article 17 of the International Covenant on Civil and Political Rights

9. The Instrument may engage 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 circumstances.¹
10. The Instrument has the effect of applying a range of obligations imposed on market participants in respect of Equity Market Products to TraCRs. The obligations include obligations to notify ASIC about aspects of trading activity by individuals in relation to TraCRs, to keep records of trading activity in relation to TraCRs, and to provide trading data to ASIC to enable it to supervise trading in TraCRs as required by the Corporations Act. These obligations may engage the right to privacy and reputation in Article 17.
11. The records and notifications relating to TraCRs required by the ASIC Market Integrity Rules (Competition) as a result of the amendments in the Instrument 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. This may be the case where the person to whom the record relates (e.g. an employee or representative of the market participant or a client) is an individual.
12. The 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 rules affected by the Instrument will be lawful and not arbitrary. In particular:
 - (a) the Instrument is made in accordance with ASIC's power to make market integrity rules

¹ Australian Government Attorney-General's Department : *Privacy and Reputation*
<http://www.ag.gov.au/Humanrightsandantidiscrimination/Humanrightsandthepublicsector/Humanrightsguidancesheets/Pages/Privacyandreputation.aspx>

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 Corporations Act), and with the consent of the Minister;

- (b) the Instrument will assist ASIC to perform its function of supervising the domestic financial markets, the operators of which are licensed under subsection 795B(1) of the Act (see section 798F of the Act);
- (c) the Instrument will further the objects of Chapter 7 of the Act, including promoting fair, orderly and transparent markets for financial products, including TraCRs (see paragraph 760A(c) of the Act);
- (d) the Instrument will assist ASIC to perform its function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system (see paragraph 12A(2) of the *Australian Securities and Investments Commission Act 2001 (the ASIC Act)*); and
- (e) information relating to TraCRs required to be provided under the ASIC Market Integrity Rules (Competition) as a result of the amendments in the Instrument will be protected in accordance with ASIC's legislative obligations under s127 of the ASIC Act and, to the extent the information is personal information, under the *Privacy Act 1988*.

C. Consultation

- 13. ASIC publicly consulted on the proposed amendments effected in this Instrument by way of targeted consultation with a product issuer, market operators and industry bodies.
- 14. Chi-X supported the proposed amendments. We did not receive any other substantive feedback on the proposals. No human rights issues were raised.

D. Conclusion

- 15. If the Instrument were considered to limit the right in Article 17 of the ICCPR, ASIC considers that the 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.

Australian Securities and Investments Commission