

# EXPLANATORY STATEMENT for

## ASIC Market Integrity Rules (Futures Markets) Class Waiver 2018/264

Prepared by the Australian Securities and Investments Commission

*ASIC Market Integrity Rules (Futures Markets) 2017*

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Market Integrity Rules (Futures Markets) Class Waiver 2018/264 (the *instrument*) under subrule 1.2.1(1) of the *ASIC Market Integrity Rules (Futures Markets) 2017* (the *Rules*). Under subrule 1.2.1(1), ASIC may relieve any person or class of persons from the obligation to comply with a provision of the Rules.

Unless the contrary intention appears, capitalised terms in this Explanatory Statement have the same meaning as in the Rules.

### 1. Background

As part of its supervisory responsibilities, ASIC reviewed the 14 market integrity rule books in force in late 2016 and identified the need to consolidate certain market integrity rule books which covered substantively similar existing obligations across like domestic licensed markets.

Following public consultation, ASIC made the Rules in November 2017. Generally, the Rules maintain the substance of the regulatory regime embodied in market integrity rules (the *Pre-Commencement Market Integrity Rules*) applicable prior to the commencement of the Rules, including the *ASIC Market Integrity Rules (ASX 24 Market) 2010 (ASX 24 Rules)*. The Rules will repeal the Pre-Commencement Market Integrity Rules on 7 May 2018.

Upon the repeal of the Pre-Commencement Market Integrity Rules, ASIC Waivers made under the Pre-Commencement Market Integrity Rules will also be repealed, including ASIC Class Waiver [CW 11/734].

In Report 547 *Response to submissions on CP 277 Proposals to consolidate the ASIC market integrity rules (REP 457)* ASIC announced that as part of its project to consolidate the market integrity rules it would remake existing individual and class waivers under the Rules before 7 May 2018.

Subrule 2.2.5(1) requires a market participant to have in force, prior to the commencement of trading of contracts (e.g. futures market contracts) on behalf of a client, an agreement with that client that meets certain minimum requirements.

Subparagraph 2.2.5(1)(b)(vi) imposes a requirement that the agreement must contain an acknowledgment by the client that the client is responsible to pay in cash any deficit owing in relation to a margin to the market participant after the closing out of a contract and that, if the client defaults in payment of such a deficit, the market

participant may realise any securities held by the market participant and apply the proceeds against that deficiency.

ASIC granted [CW 11/734] to permit the inclusion of limitation of liability clauses for trustee clients, subject to certain conditions. Where a market participant is acquiring and disposing of futures contracts on behalf of a trustee client, the effect of a limitation of liability clause in the client agreement is that the client's liability to pay deficits in margins is limited to the extent that the client has a right to be indemnified for that liability from the assets of the trust or fund operated by the trustee client.

## **2. Purpose of the class rule waiver**

The purpose of this instrument is to provide conditional class relief from subparagraph 2.2.5(1)(b)(vi) that is consistent with the relief given from the ASX 24 Rules in [CW 11/734] that will be repealed on 7 May 2018 upon the repeal of the Pre-Commencement Market Integrity Rules.

The instrument relieves a market participant from the obligation to have in force a client agreement containing a term to the effect of the acknowledgement specified in subparagraph 2.2.5(1)(b)(vi) in respect of certain kinds of clients on whose behalf they acquire and dispose of contracts on a futures market.

Relieving a market participant from this obligation will allow the inclusion of a limitation of liability clause in a market participant's agreement with a client who is:

- (a) a trustee of a trust; and/or
- (b) an operator of a managed investment scheme.

The instrument applies in relation to both these kinds of clients to reflect the fact that some managed investment schemes may not be structured as trusts, and some overseas jurisdictions do not recognise the legal concept of trust.

The relief in the instrument is given on the grounds that the risk associated with market participants limiting their ability to seek recourse from a trustee-like client for the payment of margins primarily relates to the risk of default by the client. As market participants have the capability to assess both the financial stability of the client, and to perform the necessary monitoring of client positions, market participants are able to determine whether they can assess and monitor the risks involved.

## **3. Operation of the class rule waiver**

### **Name of legislative instrument**

Section 1 of the instrument provides that the name of the instrument is the *ASIC Market Integrity Rules (Futures Markets) Class Waiver 2018/264*.

## **Commencement**

Section 2 of the instrument provides that the instrument commences on the later of 7 May 2018 and the day after the instrument is registered on the Federal Register of Legislation.

## **Authority**

Section 3 of the instrument provides that the instrument is made under subrule 1.2.1(1) of the Rules.

## **Definitions**

Subsection 4(1) of the instrument provides that, unless the contrary intention appears, capitalised terms have the same meaning as in the Rules.

Subsection 4(2) of the instrument provides that *Client Agreement* means the agreement required by subrule 2.2.5(1) of the Rules.

## **Waiver from requirement in subparagraph 2.2.5(1)(b)(vi)**

Section 5 of the instrument provides that a Market Participant does not have to comply with subrule 2.2.5(1) of the Rules to the extent that it requires a Client Agreement with a Client that is a trustee of a trust or an operator of a managed investment scheme to contain the acknowledgment specified in subparagraph 2.2.5(1)(b)(vi) of the Rules.

## **Where this waiver applies**

Section 6 of the instrument provides that the waiver in section 5 of the instrument applies where the Market Participant and the Client have entered into an agreement (which may be the Client Agreement or another agreement) that contains provisions to the following effect:

- (a) subject to paragraph (b) of the instrument:
  - (i) the Client is responsible to pay in cash any deficit owing to the Market Participant after the Closing Out of a Contract of the Client but only to the extent the deficit can be satisfied from the assets of the trust or managed investment scheme and the Client has the right to be indemnified out of those assets; and
  - (ii) if the Client defaults in payment of such a deficit, the Market Participant may realise any securities held by the Market Participant which form part of the assets of the trust or managed investment scheme, and apply the proceeds against that deficiency; and
- (b) if, as a result of an act or omission of the Client, the Client does not have a right to be indemnified out of the assets of the trust or managed investment scheme, the Client is responsible to pay in cash any deficit

owing to the Market Participant after the Closing Out of a Contract of the Client; and

- (c) the Market Participant has a right of reasonable access to the accounts and records of the Client in its capacity as trustee or operator of a managed investment scheme, to enable the Market Participant to, at any point in time, assess its exposure to the trust or managed investment scheme.

### **Condition**

Section 7 of the instrument provides that a Market Participant must keep a written record of each Client in relation to which this instrument applies.

## **4. Consultation**

ASIC consulted with four market participants and the Australian Financial Markets Association (*AFMA*) before making ASIC Class Rule Waiver [CW 11/734]. Feedback was overwhelmingly in support of the proposal.

The instrument is part of a wider project to consolidate the market integrity rules. ASIC consulted extensively with market operators, market participants and industry bodies before making the Rules and the instrument.

The consultation period for Consultation Paper 277 *Proposals to consolidate the ASIC market integrity rules (CP 277)* occurred between 24 January 2017 and 7 March 2017. ASIC held over 25 meetings with stakeholders during and following that period. In addition, ASIC consulted ASIC's Market Advisory Panel on the proposals. ASIC received five non-confidential submissions and six confidential submissions to CP 277 from a broad range of stakeholders including from market participants, market operators and industry associations.

The Office of Best Practice Regulation has assessed the proposals implemented by the Rules and the instrument as having a minor impact on business, community organisations or individuals and confirmed that no further analysis, in the form of a Regulatory Impact Statement is required (OBPR ID 22449).

## **Statement of Compatibility with Human Rights**

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

### ***ASIC Market Integrity Rules (Futures Markets) Class Waiver 2018/264***

*ASIC Market Integrity Rules (Futures Markets) Class Waiver 2018/264* 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**

The Australian Securities and Investments Commission (**ASIC**) makes the instrument under subrule 1.2.1(1) of the *ASIC Market Integrity Rules (Futures Markets) 2017* (the **Rules**).

Under subrule 1.2.1(1) of the Rules, ASIC may relieve any person or class of persons from the obligation to comply with a provision of the Rules, either generally or in a particular case or category, and either unconditionally or subject to such conditions as ASIC thinks fit.

The purpose of this instrument is to relieve a market participant from the obligation to have in force a client agreement containing a term to the effect of the acknowledgement specified in subparagraph 2.2.5(1)(b)(vi) in respect of certain kinds of clients on whose behalf they acquire and dispose of contracts on a futures market. This will enable the inclusion of a limitation of liability clause in a market participant's agreement with a client who is a trustee of a trust and/or an operator of a managed investment scheme.

#### **Human rights implications**

This legislative instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

### **Australian Securities and Investments Commission**