

**EXPLANATORY STATEMENT for**  
**ASIC Market Integrity Rules (Securities Markets and Futures Markets)**  
**Amendment 2018 (No.1)**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**), acting with the written consent of the Minister, makes ASIC Market Integrity Rules (Securities Markets and Futures Markets) Amendment 2018 (No.1) (**Amendment Instrument**) under subsection 798G(1) of the *Corporations Act 2001* (**Corporations Act**).

Subsection 798G(1) of the Corporations Act provides that ASIC may, by legislative instrument, make rules (the **market integrity 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(3) of the Corporations Act provides that ASIC must not make a market integrity rule unless the Minister has consented, in writing, to the making of the rule.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Accordingly, the power under subsection 798G(1) of the Corporations Act to make the market integrity rules includes a power to amend those rules.

The Amendment Instrument amends the:

- (a) ASIC Market Integrity Rules (Securities Markets) 2017 (**Securities Markets Rules**);  
and
- (b) ASIC Market Integrity Rules (Futures Markets) 2017 (**Futures Markets Rules**).

Unless otherwise indicated, capitalised terms in this Explanatory Statement have the same meaning as in the Securities Markets Rules.

## 1. Background

In November 2017, ASIC merged 13 market integrity rule books into four market integrity rule books, including the Securities Markets Rules and the Futures Markets Rules, to create a single point of reference for market integrity rules that are common between domestic licensed markets.

The Securities Markets Rules commenced on 4 December 2017, however Market operators and Market Participants (other than NSXA AOP Participants) do not have to comply with the Securities Markets Rules until 7 May 2018. NSXA Participants who do not use their systems for Automated Order Processing will have further transitional relief until November 2018.

The Futures Markets Rules will commence on 7 May 2018.

The Senate Standing Committee on Regulations and Ordinances (the **Committee**), in the Committee's *Delegated Legislation Monitor No.1 of 2018*, outlined several concerns in relation to the Securities Markets Rules and Futures Markets Rules, and requested the Minister's advice:

- (a) as to whether decisions made by ASIC relating to accreditation of advisers under Rules 2.4.10, 2.4.15 and 2.4.19 of the Securities Markets Rules are subject to independent merits review; and if not, the characteristics of each of those decisions that would justify their exclusion from merits review;
- (b) in relation to why a \$1 million penalty has been included in Rule 5A.3.3 of the Securities Markets Rules and Rule 5.3.3 of the Futures Markets Rules, when those rules only set out factors relevant to conduct already subject to a penalty under Rules 5A.3.2 and 5.3.2 respectively.

In the Minister's response to the Committee (published with the Committee's *Delegated Legislation Monitor No.3 of 2018*), the Minister undertook that ASIC would amend:

- (a) Rules 2.4.10, 2.4.15 and 2.4.19 of the Securities Markets Rules to provide that applications may be made to the Administrative Appeals Tribunal (**AAT**) for review of decisions made by ASIC relating to accreditation of advisers under those rules; and
- (b) Rule 5A.3.3 of the Securities Markets Rules and Rule 5.3.3 of the Futures Markets Rules to remove the unnecessary penalty amounts.

The Amendment Instrument amends the Securities Markets Rules and the Futures Markets Rules to implement the undertakings made by the Minister.

Separately, since making the Securities Markets Rules in November 2017, ASIC has identified that Rule 1.4.5 does not provide for a default Responsible Market Operator for administering Anomalous Order controls in relation to an Equity Market Product that is able to be traded on more than one Market, where ASIC has not made a determination under Rule 1.4.5(1)(b). The Amendment Instrument amends the Securities Markets Rules to insert provisions providing for resolution of a default Responsible Market Operator in these circumstances.

The Minister consented to the making of the Amendment Instrument by written notice to ASIC dated 30 April 2018.

## **2. Purpose of the instrument**

The purpose of the Amendment Instrument is to amend:

- (a) Rule 1.4.5 of the Securities Markets Rules, to provide for a default Responsible Market Operator to administer Anomalous Order controls in relation to an Equity Market Product that is able to be traded on more than one Market and for which ASIC has not made a determination of the Responsible Market Operator under Rule 1.4.5(1)(b);
- (b) Part 2.4 of the Securities Markets Rules to provide that an application may be made to the AAT for review of certain decisions made by ASIC under that Part concerning accreditation or renewal of accreditation of derivatives advisers and futures advisers; and
- (c) Rule 5A.3.3 of the Securities Markets Rules and Rule 5.3.3 of the Futures Markets Rules, to remove unnecessary penalty provisions in those rules.

### **Definition of Responsible Market Operator for the Anomalous Order controls**

In Chapter 8 of the Securities Markets Rules, a Responsible Market Operator has obligations relating to administration of Anomalous Order controls, including:

- (a) determining a Reference Price for an Equity Market Product after each Trading Reset;
- (b) using the Reference Price to determine the Extreme Trade Range;
- (c) imposing a Trading Pause in the event of an ETR Event; and
- (d) notifying and receiving various notifications from the Operator of each other Market on which the product is quoted.

In making the Securities Markets Rules, ASIC changed the definition of Responsible Market Operator in relation to Equity Market Products to remove express references to ASX Limited (**ASX**) and Chi-X Australia Pty Ltd (**Chi-X**).

Under paragraph 1.4.5(1)(b) of the Securities Markets Rules, the Responsible Market Operator in relation to an Equity Market Product that is able to be traded on more than one Market, is the Market operator determined by ASIC in writing. Under subrule 1.4.5(2), an instrument referred to in paragraph 1.4.5(1)(b) takes effect on the later of the date specified in the instrument or 60 Business Days after the instrument is registered.

Since making the Securities Market Rules in November 2017, ASIC has identified a flaw in Rule 1.4.5 whereby the rule does not provide a ‘default’ position where ASIC has not made a determination of the Responsible Market Operator before the product is quoted on more than one Market.

As an interim measure, on 29 March 2018 ASIC made ASIC Market Integrity Rules (Securities Markets) Determination 2018/208 (the **Determination Instrument**), under paragraph 1.4.5(1)(b) of the Securities Markets Rules. The Determination Instrument addresses this issue in a manner that is consistent with the existing policy settings in the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011 (**Competition Rules**), however by operation of paragraph 1.4.5(1)(b) it does not commence until 60 Business Days after registration (i.e. 27 June 2018).

The Amendment Instrument resolves the flaw in Rule 1.4.5 and overcomes the delayed commencement of the Determination Instrument, by amending Rule 1.4.5 of the Securities Markets Rules to provide a default definition of Responsible Market Operator, which would apply in circumstances where there is no ASIC determination in force.

### **AAT review of certain decisions under Part 2.4 of the Securities Markets Rules**

The Amendment Instrument amends Part 2.4 of the Securities Markets Rules, to provide that an application may be made to the AAT for review of certain decisions made by ASIC under that Part, relating to accreditation or renewal of accreditation of derivatives advisers and futures advisers.

#### *Decisions that are subject to review by the AAT*

In determining which decisions made under Part 2.4 of the Securities Markets Rules should be subject to merits review, ASIC has considered the guidance provided in the Australian Administrative Law Policy Guide (**the Guide**) issued by the Attorney-General’s Department, and the 1999 Administrative Review Council (**ARC**) publication referred to in the Guide.

ASIC has formed the view that the decisions to which the new Rule 2.4.23 of the Securities Markets Rules (as inserted by the Amendment Instrument) applies should be subject to merits review, on the basis that these decisions:

- (a) will, or are likely to, affect the interests of a person;
- (b) are made under a specific grant of power;

- (c) do not fall within either of the two categories referred to in Chapter 3 of the ARC publication, and therefore are not decisions that, by their nature, are unsuitable for merits review; and
- (d) do not demonstrate any of the factors, referred to in Chapter 4 of the ARC publication, which may exclude merits review.

*Deemed decisions where ASIC does not renew accreditation by prescribed time*

Under Rule 2.4.16 of the Securities Markets Rules, an Accredited Adviser will cease to hold accreditation if, by one Business Day after the Renewal Date, ASIC has not renewed the adviser's accreditation.

The Amendment Instrument amends subrule 2.4.14(1) and paragraph 2.4.15(1)(d) of the Securities Markets Rules, by inserting a prescribed time (being 'by one Business Day after the Renewal Date') by which ASIC will decide to renew an adviser's accreditation.

The purpose and effect of this amendment is that, if a decision is not made by ASIC in the time prescribed, this is deemed to be a decision by ASIC under paragraph 2.4.15(1)(c) to reject an application to renew the adviser's accreditation. This is due to the operation of subsection 25(5) of the *Administrative Appeals Tribunal Act 1975* (the **AAT Act**).

Where this occurs, an application may be made under the new subrule 2.4.23(2) of the Securities Markets Rules (as inserted by the Amendment Instrument) for review by the AAT of this decision.

*Persons that may apply to the AAT for review*

Under section 27 of the AAT Act, where an enactment provides that an application may be made to the AAT for review of a decision, the application may be made by, or on behalf of, any person or persons whose interests are affected by the decision. However, section 25(6) of the AAT Act provides that the enactment may also include provisions which modify the operation of section 27 in relation to applications which are provided for under that enactment.

The Amending Instrument amends the Securities Markets Rules by inserting a new subrule 2.4.23(3), the purpose of which is to modify the operation of section 27 of the AAT Act. Subrule 2.4.23(3) provides that the only persons that may make an application to the AAT under the new subrules 2.4.23(1) or (2) (as inserted by the Amendment Instrument) in relation to a decision, are the relevant adviser or Market Participant affected by that decision.

This amendment seeks to remove any potential ambiguity that another third party indirectly affected by the accreditation decision could apply for review of the decision. ASIC's view is that the indirect impact of any relevant decision on a third party would be limited, the efficacy of the review would be limited and the costs of a review by the AAT cannot be justified.

An example of a third party that may be indirectly affected by a decision is a client of an adviser affected by an accreditation decision. The indirect impact of that decision on the client would be limited, on the basis that another Accredited Adviser of the Market Participant could advise the client. Further, ASIC considers there would be no efficacy in an application by the client to the AAT in circumstances where the client would not be in a position to make

submissions or provide any necessary supporting material to the AAT for the purposes of a review of the merits of ASIC's decision relating to the Market Participant's application and the adviser's qualifications. Therefore, in ASIC's view the costs associated with that client seeking a review of that decision by the AAT, cannot be justified.

### **Unnecessary penalty provisions**

The Amendment Instrument amends Rule 5A.3.3 of the Securities Markets Rules and Rule 5.3.3 of the Futures Markets Rules to remove unnecessary penalty provisions in those rules.

Rule 5A.3.3 of the Securities Markets Rules sets out factors that are relevant in considering whether a Market Participant has complied with Rule 5A.3.2 of the Securities Markets Rules.

Similarly, Rule 5.3.3 of the Futures Markets Rules sets out factors that are relevant in considering whether a Market Participant has complied with Rule 5.3.2 of the Futures Markets Rules.

Rule 5A.3.3 of the Securities Markets Rules and Rule 5.3.3 of the Futures Markets Rules both include a penalty amount of \$1 million. The inclusion of this penalty amount is the result of a drafting error, carried over from the equivalent, pre-existing Rule 4A.4.3 of the Competition Rules.

## **3. Operation of the instrument**

### **Part 1 – Preliminary**

#### **Name of legislative instrument**

Section 1 of Part 1 of the Amendment Instrument provides that the name of the Amendment Instrument is ASIC Market Integrity Rules (Securities Markets and Futures Markets) Amendment 2018 (No.1).

#### **Commencement**

Section 2 of Part 1 of the Amendment Instrument provides that the Amendment Instrument commences on the day after it is registered on the Federal Register of Legislation.

#### **Authority**

Section 3 of Part 1 of the Amendment Instrument provides that the Amendment Instrument is made under subsection 798G(1) of the Corporations Act 2001.

#### **Schedules**

Section 4 of Part 1 of the Amendment Instrument provides that each instrument that is specified in a Schedule to the Amendment Instrument is amended as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Amendment Instrument has effect according to its terms.

## Schedule 1—Amendments

### Securities Markets Rules

#### Paragraph 1.4.5(1)(b)

Item 1 of Schedule 1 of the Amendment Instrument omits paragraph 1.4.5(1)(b) and substitutes the following provisions:

“(b) if the Equity Market Product is able to be traded on more than one Market:

- (i) the Market operator determined by ASIC in writing; or
- (ii) if there is no determination under subparagraph (i) that applies in relation to the Equity Market Product, the Market operator determined under subrules (3) and (4).”

Item 1 of Schedule 1 of the Amendment Instrument also inserts, after subrule 1.4.5(2), the following provisions:

“(3) Subject to paragraph (1)(b), the Responsible Market Operator in relation to an Equity Market Product that is able to be traded on more than one Market and is a quoted ED security is the operator of the listing market in relation to:

- (a) if the Equity Market Product is a quoted ED security because of subsection 111AE(1) of the Corporations Act—the Issuer of the Equity Market Product; and
- (b) if the Equity Market Product is a quoted ED security because of subsection 111AE(1A) of the Corporations Act—the undertaking to which the Equity Market Product relates.

(4) Subject to paragraph (1)(b), the Responsible Market Operator in relation to an Equity Market Product that is able to be traded on more than one Market and is not a quoted ED security is:

- (a) the Market operator (and if more than one, the first such Market operator) with whom:
  - (i) if the Equity Market Product is an interest in a managed investment scheme—the operator of the scheme;
  - (ii) otherwise—the Issuer of the Equity Market Product;

has an agreement in force under which the Issuer or operator of the scheme agrees to be bound by operating rules of the Market that deal with admission of that class of financial product to quotation; or

- (b) otherwise, the operator of the first of those Markets on which the Equity Market Product is admitted to quotation.”

Subrules 1.4.5(3) and (4) inserted by the Amendment Instrument closely follow the drafting in the Determination Instrument.

## **Part 2.4 Retail client Adviser Accreditation**

Item 2 of Schedule 1 of the Amendment Instrument amends Part 2.4 of the Securities Markets Rules by inserting Rule 2.4.23 and Rule 2.4.24 after Rule 2.4.22:

### **“Rule 2.4.23 Application for review by Administrative Appeals Tribunal of certain decisions made under this Part**

- (1) Subject to this Rule, applications may be made to the Tribunal for review of a decision made by ASIC under:
  - (a) subrule 2.4.9(1) to accredit a person subject to conditions; or
  - (b) subrule 2.4.10(1) to reject an application for accreditation of a person; or
  - (c) in respect of a person nominated for an exemption under subrule 2.4.11(1) from the requirement to sit an Accreditation Examination:
    - (i) subrule 2.4.11(1) to refuse the exemption; or
    - (ii) subrule 2.4.11(3) to require the person to complete and pass a modified version of an Accreditation Examination; or
  - (d) subrule 2.4.12(5) to refuse an application for permission to sit an Accreditation Examination again; or
  - (e) paragraph 2.4.15(1)(c) to reject an application to renew the accreditation of a person; or
  - (f) paragraph 2.4.15(1)(d) to renew the accreditation of a person subject to conditions; or
  - (g) subrule 2.4.19(1) to suspend or withdraw the accreditation of a person; or
  - (h) subrule 2.4.20(4) to re-accredit a person subject to conditions.
- (2) Subject to this Rule, applications may be made to the Tribunal for review of a decision deemed to have been made by ASIC under subrule 2.4.14(1) or paragraph 2.4.15(1)(d) because of the operation of subsection 25(5) of the *Administrative Appeals Tribunal Act 1975*.
- (3) An application made under subrule (1) or (2) may only be made by:
  - (a) in relation to paragraphs (1)(a) and (b):
    - (i) the Market Participant that made the application for accreditation under Rule 2.4.6, 2.4.7 or 2.4.8; or



- (ii) the person in respect of which the application was made;
  - (b) in relation to subparagraphs (1)(c)(i) and (ii):
    - (i) the Market Participant that nominated the person for the exemption under Rule 2.4.11; or
    - (ii) the person that was nominated by a Market Participant, or that applied, for the exemption;
  - (c) in relation to paragraph (1)(d):
    - (i) the Market Participant that made the application for permission for the person to sit the Accreditation Examination again under Rule 2.4.12; or
    - (ii) the person in respect of which the application was made;
  - (d) in relation to paragraphs (1)(e) and (f) and subrule (2):
    - (i) the Market Participant that made the application for renewal of accreditation under Rule 2.4.13; or
    - (ii) the person in respect of which the application was made;
  - (e) in relation to paragraph (1)(g):
    - (i) the person whose accreditation has been suspended or withdrawn; or
    - (ii) the Market Participant for which the person is a Representative;
  - (f) in relation to paragraph (1)(h):
    - (i) the Market Participant that made the application for re-accreditation under Rule 2.4.20; or
    - (ii) the person in respect of which the application was made.
- (4) In this Rule:

**decision** has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

Note: There is no penalty for this Rule.

#### **Rule 2.4.24 Notice of reviewable decision and review rights**

- (1) This Rule applies if ASIC makes a decision to which Rule 2.4.23 applies.

- (2) ASIC must take such steps as are reasonable in the circumstances to give to each person who may make an application for review of the decision under Rule 2.4.23 notice, in writing or otherwise:
  - (a) of the making of the decision; and
  - (b) of the person's right to have the decision reviewed by the Tribunal.
- (3) A failure to comply with this Rule does not affect the validity of the decision.
- (4) This Rule does not apply to a decision to which Rule 2.4.23 applies that is deemed to have been made because of the operation of subsection 25(5) of the *Administrative Appeals Tribunal Act 1975*.

Note: There is no penalty for this Rule.”

### **Subrule 2.4.14(1)**

Item 3 of the Amendment Instrument amends subrule 2.4.14(1) of the Securities Markets Rules, by inserting after “Renewal Date” a prescribed time of “by one Business Day after the Renewal Date” by which ASIC will renew an adviser's accreditation if it is satisfied of the matters in subrule 2.4.14(1).

### **Paragraph 2.4.15(1)(d)**

Item 4 of the Amendment Instrument amends paragraph 2.4.15(1)(d) of the Securities Markets Rules, by inserting “with effect from the Renewal Date by one Business Day after the Renewal Date” after “person's accreditation”.

The effect of the amendments in items 3 and 4 of the Amendment Instrument is that, if a decision is not made by ASIC in the time prescribed, this would be deemed to be a decision by ASIC under paragraph 2.4.15(1)(c) to reject an application to renew the accreditation, enabling an application to be made under subrule 2.4.23(2) (as inserted by the Amendment Instrument) for review by the AAT of the deemed decision.

### **Rule 5A.3.3 Relevant factors**

Item 5 of Schedule 1 of the Amendment Instrument amends Rule 5A.3.3 of the Securities Markets Rules by omitting “Maximum penalty: \$1,000,000”, and substituting “Note: There is no penalty for this Rule.”.

## **ASIC Market Integrity Rules (Futures Markets) 2017**

### **Rule 5.3.3 Relevant factors**

Item 6 of Schedule 1 of the Amendment Instrument amends Rule 5.3.3 of the Futures Markets Rules by omitting “Maximum penalty: \$1,000,000”, and substituting “Note: There is no penalty for this Rule.”.

## **4. Consultation**

### **Definition of Responsible Market Operator for the Anomalous Order controls**

ASIC consulted with ASX and Chi-X in relation to the Amendment Instrument. Presently, ASX and Chi-X are the only Market operators affected by the proposed changes to Rule 1.4.5(1). Both ASX and Chi-X supported ASIC making the Amendment Instrument.

### **AAT review of certain decisions under Part 2.4 of the Securities Markets Rules and unnecessary penalty provisions**

The purpose of these amendments is to implement the undertakings given by the Minister in response to the Committee's concerns.

ASIC consulted with the Attorney-General's Department about the amendments to Part 2.4 of the Securities Markets Rules. The Department advised that it has no concerns with the amendments in general, as it strongly supports the availability of merits review for administrative decisions that are likely to affect the interests of a person.

### **Office of Best Practice Regulation**

The Office of Best Practice Regulation has confirmed that a regulation impact statement is not required because the Amendment Instrument would impose only minor impacts on business, community organisations or individuals (OBPR ID 23763).

## Statement of Compatibility with Human Rights

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

### ASIC Market Integrity Rules (Securities Markets and Futures Markets) Amendment 2018 (No.1)

ASIC Market Integrity Rules (Securities Markets and Futures Markets) Amendment 2018 (No.1) (the **Amendment 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

In November 2017, ASIC merged 13 market integrity rule books into four rule books, including the ASIC Market Integrity Rules (Securities Markets) 2017 (**Securities Markets Rules**) and ASIC Market Integrity Rules (Futures Markets) 2017 (**Futures Markets Rules**), to create a single point of reference for market integrity rules that are common between domestic licensed markets.

The Senate Standing Committee on Regulations and Ordinances (the **Committee**), in the Committee's *Delegated Legislation Monitor No.1 of 2018*, outlined several concerns in relation to the Securities Markets Rules and Futures Markets Rules, and requested the Minister's advice:

- (a) as to whether decisions made by ASIC relating to accreditation of advisers under Rules 2.4.10, 2.4.15 and 2.4.19 of the Securities Markets Rules are subject to independent merits review; and if not, the characteristics of each of those decisions that would justify their exclusion from merits review;
- (b) in relation to why a \$1 million penalty has been included in Rule 5A.3.3 of the Securities Markets Rules and Rule 5.3.3 of the Futures Markets Rules, when those rules only set out factors relevant to conduct already subject to a penalty under Rules 5A.3.2 and 5.3.2 respectively.

The Amending Instrument implements undertakings given by the Minister to the Committee in response to the Committee's concerns (published with the Committee's *Delegated Legislation Monitor No.3 of 2018*), by amending:

- (a) Part 2.4 of the Securities Markets Rules, to provide that an application may be made to the Administrative Appeals Tribunal (AAT) for review of certain decisions made by ASIC under that Part concerning accreditation or renewal of accreditation of derivatives advisers and futures advisers; and
- (b) Rule 5A.3.3 of the Securities Markets Rules and Rule 5.3.3 of the Futures Markets Rules, to remove unnecessary penalty provisions in those rules.

Separately, since making the Securities Markets Rules in November 2017, ASIC has identified that Rule 1.4.5 does not provide for a default 'Responsible Market Operator' for administering anomalous order controls in relation to an equity market product that is able to be traded on more than one market, where ASIC has not made a determination under Rule

1.4.5(1)(b). The Amendment Instrument amends the Securities Markets Rules to insert provisions providing for resolution of a default Responsible Market Operator in these circumstances.

### **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**