

ASIC CLASS RULE WAIVER [CW 11/734]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

ASIC Market Integrity Rules (ASX 24 Market) 2010

The Australian Securities and Investments Commission (*ASIC*) makes this instrument under Rule 1.2.1(1) of the *ASIC Market Integrity Rules (ASX 24 Market) 2010* (the *ASX 24 Rules*).

Under that rule, ASIC may relieve any person or class of persons from the obligation to comply with a provision of the ASX 24 Rules.

1. Background

Rule 2.2.5(1) of the ASX 24 Rules requires a market participant to have in force, prior to the commencement of trading of contracts (eg futures contracts) on behalf of a client, an agreement with that client, containing certain minimum requirements.

Rule 2.2.5(1)(b)(vi) of the ASX 24 Rules 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 has granted a number of individual waivers from Rule 2.2.5(1)(b)(vi) of the ASX 24 Rules to allow market participants to insert a limitation of liability (**LOL**) clause in their client agreements with trustees.

Where a market participant is acquiring and disposing of futures contracts on the ASX 24 market on behalf of a trustee client, the effect of a LOL 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.

ASIC's decisions to grant individual waivers were not dependent on information specific to particular trusts or funds, or specific to the particular market participant. Accordingly, ASIC decided to grant a class waiver to ASX 24 market participants generally to permit the inclusion of LOL clauses for trustee clients, subject to certain conditions, to create a level of consistency for all ASX 24 market participants.

2. Purpose of the class rule waiver

The purpose of this Class Rule Waiver is to relieve an ASX 24 market participant from the obligation to have in force a client agreement containing a term to the effect of the acknowledgement specified in Rule 2.2.5(1)(b)(vi) of the ASX 24 Rules in

respect of certain kinds of clients on whose behalf they acquire and dispose of contracts on the ASX 24 market.

Relieving an ASX 24 market participant from this obligation will allow the inclusion of a LOL clause in an ASX 24 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 Class Rule Waiver 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.

This Class Rule Waiver has been made on the grounds that:

- The risk associated with ASX 24 market participants limiting their ability to seek recourse from a trustee-like client for the payment of margins primarily relates to that of default by the client. As 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.
- The Class Rule Waiver also generates a consistency of approach by ASIC for ASX 24 market participants who may rely on the Class Rule Waiver with no need to apply to ASIC for individual relief for each client.

3. Operation of the class rule waiver

An ASX 24 market participant will only be able to rely on the Class Rule Waiver if the market participant has an agreement in place with a client to the effect that the client will reimburse the market participant for liabilities incurred through trading on behalf of the client where, as a result of an act or omission of the client, the client does not have a right of indemnification out of the assets of the relevant trust or fund.

In addition, the class rule waiver is subject to conditions that:

- (i) the market participant keep a written record of each client for whom the market participant relies on this Class Rule Waiver to include a LOL clause in the client agreement; and
- (ii) the market participant has an agreement in place that gives the market participant 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 assess its exposure to the trust or fund.

4. Consultation

ASIC consulted with 4 market participants and the Australian Financial Markets Association (AFMA) before making this class rule waiver. Feedback was overwhelmingly in support of the proposal.