

## ADMISSION AS A PARTICIPANT

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>To outline to applicants the requirements they must meet to be admitted as a participant in the ASX Clear (Futures) facility and to assist them in preparing their application</li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>The application process generally</li> <li>The common admission requirements that apply to most applicants seeking admission to an ASX market or clearing and settlement facility and how they are applied in the context of applicants seeking admission as a participant in the ASX Clear (Futures) facility</li> <li>The additional admission requirements that apply to applicants seeking admission as a participant in the ASX Clear (Futures) facility</li> <li>Further admission requirements that apply to applicants incorporated or carrying on business outside Australia</li> <li>The ongoing obligation of participants to comply with the admission requirements</li> <li>Rights of appeal on admission decisions</li> </ul>
<p><b>Related materials you should read</b></p>	<ul style="list-style-type: none"> <li>Guidance Note 3 <i>Changes in Participation</i></li> <li>Guidance Note 4 <i>Waivers and in Principle Advice</i></li> <li>Guidance Note 7 <i>Client Agreements</i></li> <li>Guidance Note 9 <i>Offshoring and Outsourcing</i></li> <li>Guidance Note 10 <i>Business Continuity and Disaster Recovery</i></li> <li>ASIC Regulatory Guide 104 <i>Licensing: Meeting the general obligations</i></li> <li>ASIC Regulatory Guide 105 <i>Licensing: Organisational competence</i></li> </ul>

**History:** Guidance Note 1 amended 05/08/19. Previous versions of this Guidance Note were issued in 06/15, 10/15, 01/19 and 06/19.

**Important notice:** ASX has published this Guidance Note to assist applicants considering a participation in ASX Clear (Futures) to understand the applicable admission requirements. It sets out ASX's interpretation of the ASX Clear (Futures) Operating Rules and how ASX is likely to enforce those rules. Nothing in this Guidance Note necessarily binds ASX in the application of the ASX Clear (Futures) Operating Rules in a particular case. In issuing this Guidance Note, ASX is not providing legal advice and applicants should obtain their own advice from a qualified professional person in respect of their obligations. ASX may withdraw or replace this Guidance Note at any time without further notice to any person.

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## 1. Introduction

This Guidance Note is published by ASX Clear (Futures) Pty Limited ("ASX") to outline to applicants the requirements they must meet to be admitted as a participant in the ASX Clear (Futures) clearing and settlement facility and to assist them in preparing their application.

## 2. The application process generally

### 2.1 The role of ASX Participant Transitions

The receipt and processing of applications for admission as a participant in the ASX Clear (Futures) facility are co-ordinated within ASX by a team known as "Participant Transitions".

Before submitting an application for admission as a participant, ASX recommends that applicants first discuss the matter with Participant Transitions at the earliest opportunity.

Participant Transitions will be able to provide general advice on the application process, the business models supported by ASX, the requirements for admission as a participant and the expected timeframe for completion of the admission process, given the nature and complexity of the application and the current workloads within ASX.

Participant Transitions can be contacted by telephone on 1300 735 713 for domestic calls and on +61 2 8298 8249 for international calls or by email at [participant.transitions@asx.com.au](mailto:participant.transitions@asx.com.au).

## 2.2 The admission application

To apply for admission as a participant in the ASX Clear (Futures) facility, the applicant must complete an application in the prescribed form and give it to ASX.<sup>1</sup> An editable version of the application form can be downloaded from:

[www.asx.com.au/regulation/compliance/compliance-downloads.htm](http://www.asx.com.au/regulation/compliance/compliance-downloads.htm).

ASX uses a common application form<sup>2</sup> for applicants seeking admission as:

- a participant in the ASX market operated by ASX Limited;
- a participant in the ASX Clear facility operated by ASX Clear Pty Limited;
- a general settlement participant, account participant or product issuer settlement participant in the ASX Settlement facility operated by ASX Settlement Pty Limited;<sup>3</sup>
- a participant in the ASX 24 market operated by Australian Securities Exchange Limited; and
- a participant in the ASX Clear (Futures) facility operated by ASX Clear (Futures) Pty Limited.

The application form is divided into separate parts. Part A applies to all of the above markets and facilities and must be completed by all applicants. Parts B through F respectively apply to each of the markets and facilities mentioned above and must be completed by applicants seeking admission to those markets and facilities. Hence, applicants seeking admission to the ASX Clear (Futures) facility must complete Parts A and F of the application.<sup>4</sup>

The application must be properly completed, dated and executed by the applicant.<sup>5</sup> It must also be accompanied by the annexures specified in the application form. ASX may reject or defer consideration of an application for admission as a participant that is not properly completed and executed or that is not accompanied by all of the required annexures.

If the applicant is seeking a waiver from, or in-principle advice about the application of, any Operating Rule, the application should also attach a letter from the applicant or its advisers detailing the waiver or advice sought and providing the information set out in ASX Clear (Futures) Operating Rules Guidance Note 4 *Waivers and in Principle Advice*.

All applications for admission as a participant and accompanying annexures should be lodged with Participant Transitions. They can be provided either in hard copy to:

ASX Participant Transitions  
Exchange Centre

<sup>1</sup> ASX Clear (Futures) Operating Rule 4.1(a).

<sup>2</sup> The ASX markets and facilities referred to in the text have a significant number of common admission requirements. Using a common application form therefore simplifies and streamlines the admission process for those applicants seeking admission to multiple ASX markets and/or facilities.

<sup>3</sup> The common application form does not apply to applicants seeking to be admitted as a specialist settlement participant in the ASX Settlement facility. Specialist settlement participants are generally only admitted as participants of ASX Settlement for a short period and for a specific purpose. They are subject to a different, more streamlined, admission process and must complete a different application form. It is also available online at: [www.asx.com.au/regulation/compliance/compliance-downloads.htm](http://www.asx.com.au/regulation/compliance/compliance-downloads.htm).

<sup>4</sup> An applicant will also have to complete Part B if they are seeking admission as a participant in the ASX market, Part C if they are seeking admission as a participant in the ASX Clear facility, Part D if they are seeking admission as a general settlement participant, account participant or product issuer settlement participant in the ASX Settlement facility, and/or Part E if they are seeking admission as a participant in the ASX 24 market.

<sup>5</sup> The cover page of the application form has instructions for its completion. The form is signed at the foot of Section 2 of Part A (just above the shaded box with the instructions on how to sign the form).

20 Bridge Street  
Sydney NSW 2000

or in soft copy to [participant.transitions@asx.com.au](mailto:participant.transitions@asx.com.au).

If the annexures to the application are provided in hard copy, ASX would appreciate them being placed into a folder and separated by dividers that are marked with the applicable annexure number. If the annexures are provided in soft copy in a merged file, ASX would appreciate separator pages being included which identify where each annexure begins. If the annexures are provided in soft copy in separate files, ASX would appreciate each separate file having a name that incorporates the applicable annexure number.

### 2.3 Payment of application fee

An application for admission to the ASX Clear (Futures) facility must be accompanied by the relevant application fee set out in ASX's published schedule of fees.<sup>6</sup>

Payment can be made either by cheque made payable to ASX Operations Pty Ltd or by electronic funds transfer to the following account:

Bank: National Australia Bank  
Account Name: ASX Operations Pty Ltd  
BSB: 082 057  
A/C: 494728375  
Swift Code (Overseas Customers): NATAAU3302S

If payment is made by electronic funds transfer, the applicant should email its remittance advice to [ar@asx.com.au](mailto:ar@asx.com.au) or fax it to (612) 9227-0553, describing the payment as "participant application fee" and including the name of the applicant and the amount paid.

### 2.4 Pre-acceptance validation

Upon receipt, Participant Transitions will check that an application for admission to the ASX Clear (Futures) facility has been properly completed and executed and attaches all of the required documents. If it is and does, Participant Transitions will then forward the application to two other ASX business units, Counterparty Risk Assessment (CRA) and Participants Compliance, for an initial pre-acceptance review.

CRA will validate that the application contains sufficient information to assess whether the applicant will meet ASX's capital requirements for admission as a participant in the ASX Clear (Futures) facility. Participants Compliance will do likewise in terms of ASX's other requirements for admission. Usually this review takes no more than 5 business days.

If an application passes these pre-acceptance validation checks, Participant Transitions will notify the applicant in writing that the application has been accepted and ASX will commence its formal review of the application. If it does not pass these pre-acceptance validation checks, Participant Transitions will discuss with the applicant what additional information or documentation is required before the application can be accepted.

At the same time as notifying the applicant that it has accepted its application, ASX will also notify the Australian Securities and Investments Commission (ASIC)<sup>7</sup> of the receipt and acceptance of the application.

<sup>6</sup> Available online at:

[https://www.asxonline.com/intradoc-cgi/groups/participant\\_services/documents/information/asx\\_027373.pdf](https://www.asxonline.com/intradoc-cgi/groups/participant_services/documents/information/asx_027373.pdf).

<sup>7</sup> The primary regulator of the ASX Clear (Futures) facility.

### 2.5 Detailed assessment

Upon acceptance of an application, CRA and Participants Compliance respectively will conduct a detailed review of the application to assess whether it conforms to the capital and other admission requirements in the ASX Clear (Futures) Operating Rules.

CRA (in the case of a waiver relating to ASX's capital requirements) and Participants Compliance (in the case of any other waiver) will also review any waiver requested from the ASX Clear (Futures) Operating Rules to assess whether it conforms to the underlying principles of the Rules<sup>8</sup> and ASX policy.

If the application does not fully conform to the requirements of the ASX Clear (Futures) Operating Rules and a specific waiver has not been sought by the applicant, CRA or Participants Compliance (as the case may be) will contact the applicant to discuss amendments to the application to meet those requirements or, in an appropriate case, whether the applicant should apply for a waiver.

Other ASX teams will also review the application to assess whether it conforms to ASX's operational, technology, risk and legal requirements and liaise with the applicant in relation to those issues.

The assessment process is generally an iterative and collaborative one, where ASX endeavours to address issues with the participant as they arise and to resolve them to everyone's satisfaction.

### 2.6 ASX's admission decision

Once the assessment of the application has progressed sufficiently, ASX will notify the applicant that it is ready to make a decision on the application.<sup>9</sup> At that stage, ASX may make a decision:

- if the applicant is ready to commence operations and has met all of ASX's requirements, to approve the application and admit the applicant as a participant in the ASX Clear (Futures) facility;
- if the applicant is not ready to commence operations or has not met all of ASX's requirements, to approve the application in-principle but to defer the formal decision to admit the applicant as a participant until the applicant is ready to commence operations and has met all of ASX's requirements; or
- to reject the application.<sup>10</sup>

The decision on whether or not to admit a participant is made by ASX's Participant Admission Committee on the advice and recommendation of the various ASX business units involved in the process. Such a decision is at the absolute discretion of ASX and ASX may grant or refuse admission without giving any reasons.<sup>11</sup>

Where ASX admits an applicant as a participant, it may at that time, or at any later time, impose any conditions on the participant's admission it considers appropriate.<sup>12</sup> ASX will invariably impose a standard condition specifying the categories of market contracts (including, if applicable, OTC transactions) that the applicant is authorised to clear.<sup>13</sup>

<sup>8</sup> The fundamental principle underlying all ASX Clear (Futures) Operating Rules is that the ASX Clear (Futures) facility should be fair and efficient.

<sup>9</sup> ASX will use all reasonable endeavours to make its decision whether to accept or reject an application for admission within a reasonable time following the receipt of the application: ASX Clear (Futures) Operating Rule 4.4.

<sup>10</sup> Given the iterative and collaborative nature of the application process, this would be a relatively rare occurrence. If an applicant is unable to meet all of ASX's requirements for admission, ASX will usually encourage the applicant to withdraw its application rather than have it formally rejected.

<sup>11</sup> ASX Clear (Futures) Operating Rule 4.4A.

<sup>12</sup> ASX Clear (Futures) Operating Rule 4.5.

<sup>13</sup> ASX Clear (Futures) Operating Rule 4.7A.

### 2.7 Notification of decision to applicant

Once ASX has made a decision on an admission application, Participant Transitions will communicate that decision to the applicant. If ASX decides formally or in-principle to admit an applicant as a participant, the communication will state what (if any) further requirements the applicant must satisfy:

- in the case of a formal decision to admit the applicant as a participant, to commence its activities in the ASX Clear (Futures) facility; or
- in the case of an in-principle decision to approve the admission of the applicant, before a formal decision to admit the applicant will be made.

Thereafter Participant Transitions will act as a point of liaison between the applicant and the relevant ASX business units in working towards satisfying those requirements in a timely manner.

Participant Transitions will notify the applicant of the date on which all of ASX's requirements have been met and when it can commence its activities in the ASX Clear (Futures) facility.

## 3. Common admission requirements for most ASX markets and facilities

The following admission requirements are common to most applicants seeking to be admitted as a participant in the ASX markets and clearing and settlement facilities mentioned under heading 2.2 above. They are addressed in Part A of ASX's standard application form. The guidance below addresses how an applicant seeking admission as a participant in the ASX Clear (Futures) facility should complete Part A.

### 3.1 Corporate capacity

An applicant seeking admission as a participant in the ASX or ASX 24 markets or the ASX Clear or ASX Clear (Futures) facilities must be a body corporate carrying on business in its own right and not as a trustee of a trust.<sup>14</sup> The applicant must confirm this fact by checking the "Confirmed" box as its response to question A.1.9 of the application form. The applicant must also list the exchanges to which it holds existing memberships in response to question A.1.10.

### 3.2 Proposed business activities and structure

An applicant seeking admission as a participant in any ASX market or facility must annex to its application:

- a statement outlining the applicant's objectives for becoming a participant, including the types of business it wishes to conduct, the types of products in which it wishes to transact, and its target clients (including whether they are retail and/or wholesale and where they are, or are likely to be, located);<sup>15</sup>
- a group structure chart showing the applicant's corporate ownership structure from its ultimate holding company to the applicant and from the applicant to all of its subsidiaries (including any nominee company). It must also show the relationship between the applicant and any other group entity with which it has, or proposes to have, inter-group balances;<sup>16</sup>
- a management structure chart showing the key personnel involved in managing the applicant's proposed ASX activities and their titles, roles and reporting lines;<sup>17</sup> and

<sup>14</sup> In the case of the ASX Clear (Futures) facility, see ASX Clear (Futures) Operating Rule 4.2(a). This requirement does not apply to an applicant seeking admission as a participant in the ASX Settlement facility.

<sup>15</sup> Question A.2.1 and Annexure A1 to the application form.

<sup>16</sup> Question A.2.2 and Annexure A2 to the application form.

<sup>17</sup> Question A.2.3 and Annexure A3 to the application form.

- a technology process flow diagram showing the key systems that the applicant intends to use to conduct its proposed ASX activities and the process flows between those systems and ASX's systems.<sup>18</sup>

In the case of an applicant seeking admission to ASX Clear (Futures), its technology process flow diagram should contain sufficient information to allow ASX to assess whether the applicant will have the necessary technical resources to communicate reliably with the clearing system and correctly process clearing messages.

In particular, the process flow diagram should identify:

- where the applicant's infrastructure is or will be located (eg, in ASX's Australian Liquidity Centre in Sydney or in ASX's data centre in Singapore or Chicago);
- how the applicant's systems will connect to ASX's systems;
- the number and location of access points for the entry of trading orders and/or clearing and settlement instructions;
- to the extent applicable, the transaction flow from the receipt of an order to its execution, clearing and settlement;
- which of the applicant's systems are proprietary and which are provided by third party vendors; and
- in the case of trading systems, whether the system is automated or requires the manual input of orders.

### 3.3 AFSL

For most participation types in most ASX markets and facilities,<sup>19</sup> an applicant seeking admission as a participant must hold an Australian financial services licence (AFSL) that authorises the applicant to carry on its business as a participant,<sup>20</sup> unless it can demonstrate to ASX's satisfaction that such a licence is not required by the Corporations Act 2001 (Cth).<sup>21</sup>

ASX would generally expect a participant in the ASX Clear (Futures) facility to require an AFSL authorising it to deal in derivatives<sup>22</sup> unless:

- its financial services activities in Australia are confined to dealing on its own account – that is, its only financial services activities in Australia are:
  - acting as a proprietary trader on its own account; and/or
  - clearing and settling market transactions on its own account;<sup>23</sup>
- it intends to deal exclusively for wholesale clients, it is regulated by an approved overseas regulatory authority and it has relief from ASIC to hold such an AFSL under section 911A(2)(h) of the Corporations Act

<sup>18</sup> Question A.2.4 and Annexure A4 to the application form.

<sup>19</sup> There is no specific requirement for an applicant for admission as a product issuer settlement participant or specialist settlement participant in the ASX Settlement facility to hold an AFSL (although they may well do so, depending on their other business activities).

<sup>20</sup> In the case of the ASX Clear (Futures) facility, see ASX Clear (Futures) Operating Rule 4.2(b).

<sup>21</sup> Referred to in this Guidance Note as the "Corporations Act". Unless otherwise indicated, a reference to a section of an Act is a reference to a section of the Corporations Act.

<sup>22</sup> See sections 766A(1)(b) and 911A(1) and the definition of "dealing" in section 766C.

<sup>23</sup> Participants who deal solely on their own account typically would not require an AFSL by virtue of the operation of section 766C(3) (the exclusion of dealing on one's own behalf from the definition of "dealing"). Note that this exclusion does not apply if and to the extent that a person is an issuer of financial products. A participant who enters into an over-the-counter derivative with another person is taken to be an issuer of that derivative under section 761E(5) and hence this exclusion does not apply to participants who issue over-the-counter derivatives.

and ASIC Regulatory Guide 176 *Licensing: Discretionary powers - wholesale foreign financial services providers*;<sup>24</sup> or

- its operations (including its staff, premises, technology and clients) are based wholly offshore and it is not otherwise carrying on a financial services business in Australia.<sup>25</sup>

The applicant must indicate in its response to question A.3.1 of the application form whether it:

- has an existing AFSL – in which case it must attach a full copy of its AFSL (including any variations) as Annexure A5 to its application;
- is seeking a variation to an existing AFSL – in which case, it must state in its response to question A.3.1 the date it lodged its application for a variation of its AFSL with ASIC and then lodge a full copy of its new AFSL, including the variation, with ASX when it has been issued by ASIC;
- is obtaining a new AFSL – in which case, it must state in its response to question A.3.1 the date it lodged its application for an AFSL with ASIC and then lodge a full copy of its new AFSL with ASX when it has been issued by ASIC;
- has ASIC relief from the requirement to hold an AFSL – in which case, it must attach a copy of the relief as Annexure A5 to its application;
- is seeking ASIC relief from the requirement to hold an AFSL – in which case, it must state in its response to question A.3.1 the date it lodged its application for relief with ASIC and then lodge a full copy of the relief with ASX when it has been issued by ASIC; or
- is not required to hold an AFSL – in which case, it must indicate (relevantly) whether that is:
  - because it will only be dealing on its own account; or
  - for some other reason, in which case, it must attach a copy of a legal opinion from a recognised Australian law firm confirming that the applicant is not required to hold an AFSL as Annexure A5 to its application.

The requirement for an applicant to have an AFSL authorising it to carry on its business as a participant can lead to a circularity in those cases where ASIC makes it a condition to the issue of an AFSL, or of a variation to an AFSL, that the applicant has been admitted as a participant in the ASX Clear (Futures) facility. To address this circularity, if the applicant meets all of ASX's other requirements for admission as a participant apart from holding an AFSL that authorises it to carry on its business as a participant, ASX will usually admit the applicant on condition that it obtain the requisite AFSL or variation and provide a copy to ASX before it commences any activities in the ASX Clear (Futures) facility.

An applicant seeking admission as a participant in an ASX market or facility should take its own legal advice on whether it needs to hold an AFSL, which takes account of its particular business model and its proposed activities in Australia.

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<sup>24</sup> Section 911A(2)(h) requires a written exemption from ASIC before it applies. This may be granted on a one-off basis or to a category of offshore service providers under a class order. See ASIC Corporations (Foreign Financial Services Providers - Limited Connection) Instrument 2017/182 and ASIC Corporations (Repeal and Transitional) Instrument 2016/396.

<sup>25</sup> Section 911A(1) only requires a person to hold an AFSL if and to the extent that they are carrying on a financial services business in Australia. Note that if an ASX Clear (Futures) participant clears market transactions for an ASX 24 trading participant or underlying client based in Australia then, under section 911D, it runs a significant risk of being considered to be carrying on a financial services business in Australia and therefore requiring an AFSL authorising that activity. Accordingly, any applicant that is seeking to be admitted as a participant in the ASX Clear (Futures) facility on the basis that it does not require an AFSL because it is not carrying on a financial services business in Australia must have robust systems and processes in place to ensure that it does not clear market transactions for any ASX 24 trading participant or underlying client based in Australia except where it is permitted by law to do so.



It should be noted that issues about the requirement to hold an AFSL are within the regulatory remit of ASIC. Any questions about that requirement should be directed to ASIC rather than ASX.

### 3.4 High business integrity

An applicant seeking admission as a participant in any ASX market or facility must satisfy ASX that it is of high business integrity.<sup>26</sup> There are three ways in which the applicant may provide evidence of its high business integrity:

- if the applicant is an ADI,<sup>27</sup> it may simply confirm to ASX that it has in place a 'fit and proper' policy that meets the requirements of the Australian Prudential Regulation Authority Prudential Standard CPS 520;<sup>28</sup>
- if the applicant holds an AFSL (as most will), it may simply confirm to ASX that it has in place measures to ensure its responsible managers are of good fame and character, as required in ASIC Regulatory Guides 105.33 and 2.162, which are also applied to any of its directors who are not responsible managers;<sup>29</sup> or
- in all other cases, it must provide statutory declarations to ASX in relation to itself and from each of its directors confirming that:
  - they have not been the subject of any previous bankruptcy, insolvency, receivership, administration, or similar event;
  - they have not been charged with or convicted of any offences relating to dishonesty, fraud, financial markets-related conduct, or money laundering;
  - they have not been the subject of any fines, civil penalties, banning, suspension or other disciplinary measures for financial markets-related conduct;
  - they have not been the subject of any disciplinary action or adverse mention in a report made by, or at the request of, any government or governmental authority or agency, the Commission, ASX, an approved clearing facility, an approved settlement facility, and any other exchange, market operator or clearing and/or settlement facility;
  - they have not been refused membership of any financial markets-related, legal or accounting professional organisation or had such a membership revoked; and
  - they have not had an application for participant status (or equivalent status) on another exchange, market, approved clearing facility or approved settlement facility refused,

whether in Australia or elsewhere and that they are not aware of any open or pending investigations or threatened proceedings that could lead to any of the above.<sup>30</sup>

The applicant must indicate in its response to question A.4.1 of the application form which of these 3 options it is taking. If it indicates that it is taking the third option, the required statutory declarations must be attached to the application form as Annexure A6.

<sup>26</sup> In the case of the ASX Clear (Futures) facility, see ASX Clear (Futures) Operating Rule 4.2(c) and the related Procedure.

<sup>27</sup> That is, an authorised deposit-taking institution which has been granted authority to carry on a banking business in Australia under the Banking Act 1959 (Cth).

<sup>28</sup> The applicant must be able to provide evidence of this policy to ASX upon request at any time: see paragraph (a) of ASX Clear (Futures) Operating Rules Procedure 4.2(c).

<sup>29</sup> The applicant must be able to provide evidence of these measures to ASX upon request at any time: see paragraph (b) of ASX Clear (Futures) Operating Rules Procedure 4.2(c).

<sup>30</sup> If the applicant or any of its directors cannot provide such a statutory declaration confirming these matters, they must include with Annexure A6 a statement to that effect and a detailed explanation of the circumstances involved.

An editable version of a sample statutory declaration can be downloaded from:  
[www.asx.com.au/regulation/compliance/compliance-downloads.htm](http://www.asx.com.au/regulation/compliance/compliance-downloads.htm).

The applicant must also consent to ASX obtaining information on the creditworthiness of the applicant. It does so by checking the “Confirmed” box as the response to question A.4.2 of the application form.

ASX may have regard to any information in its possession from any source in determining whether an applicant is of high business integrity.<sup>31</sup>

### 3.5 Resources and processes

An applicant seeking admission as a participant in any ASX market or facility must provide a written certification to ASX on or before its admission as a participant that it has the resources and processes in place to comply with its obligations under the applicable Operating Rules.<sup>32</sup> It must indicate in its response to question A.5.1 of the application form whether it is providing the required certification with its application (in which case it must attach the certification as Annexure A7 to its application) or whether it will be providing the certification later.<sup>33</sup>

For these purposes, “resources” include financial, technological and human resources and “processes” include management supervision, compliance, risk management, training, business continuity and disaster recovery processes.<sup>34</sup>

The prescribed form of written certification can be downloaded from:  
[www.asx.com.au/regulation/compliance/compliance-downloads.htm](http://www.asx.com.au/regulation/compliance/compliance-downloads.htm).

In providing this certification to ASX, an applicant seeking admission as a participant in the ASX Clear (Futures) facility must have regard to:

- the ASX Clear (Futures) Operating Rules;
- this Guidance Note;
- ASX Clear (Futures) Operating Rules Guidance Note 9 *Offshoring and Outsourcing*;
- ASX Clear (Futures) Operating Rules Guidance Note 10 *Business Continuity and Disaster Recovery*, and
- the standards expected of financial services licensees set out in ASIC Regulatory Guide 104 *Licensing: Meeting the general obligations* and ASIC Regulatory Guide 105 *Licensing: Organisational competence* (this applies even if the applicant does not hold an AFSL).<sup>35</sup>

It is up to each applicant to determine what resources and processes it needs to have in place to comply with its obligations under the ASX Clear (Futures) Operating Rules, having regard to the materials above and to the nature and scale of its intended business activities.

If required by ASX, the applicant must be able to demonstrate to the satisfaction of ASX, at any time, the basis on which the above certification is or was provided.<sup>36</sup> This applies both before and after the applicant is admitted as a participant.

To be able to demonstrate the basis on which the certification is provided, ASX would expect the applicant to have documented its key processes for meeting its obligations under the relevant Operating Rules and to be able to

<sup>31</sup> ASX Clear (Futures) Operating Rules Procedure 4.2(c) (concluding sentence).

<sup>32</sup> In the case of the ASX Clear (Futures) facility, see ASX Clear (Futures) Operating Rules 4.2(e) and the related Procedure.

<sup>33</sup> The option for an applicant to provide the required form of certification later is given in recognition of the fact that an applicant may not wish to go to the trouble and expense of obtaining all of the necessary resources, and putting in place all of the necessary processes, until it has a reasonable degree of certainty that it will be admitted as a participant.

<sup>34</sup> ASX Clear (Futures) Operating Rule 4.2(e).

<sup>35</sup> ASX Clear (Futures) Operating Rules Procedure 4.2(e).

<sup>36</sup> ASX Clear (Futures) Operating Rules Procedure 4.2(e).

produce an internal sign-off from a director, chief executive, head of compliance or other senior officer at the applicant that lists those documented processes and states that the signatory is satisfied that they are sufficient for the applicant to comply with its obligations under those Operating Rules.

In the case of an applicant seeking admission as a participant in the ASX Clear (Futures) facility, its “key processes” for these purposes would include:

- its compliance framework, that is, its general processes for identifying and monitoring compliance with its key legal and regulatory obligations and for identifying, remediating and reporting on any compliance breaches;<sup>37</sup>
- its risk management framework,<sup>38</sup> that is, its general processes for identifying and managing or mitigating the risks it faces, including but not limited to market risk, liquidity risk, counterparty risk, operational risk and cyber risk;<sup>39</sup>
- its operational processes and procedures for the registration, allocation and transfer of market contracts and the daily close out of matched positions;<sup>40</sup>
- its processes for meeting its initial margin and daily settlement amounts, as well as any intra-day and extra margins (including how it will forecast and monitor those obligations and the funding lines it will have in place for that purpose);<sup>41</sup>
- its processes for complying with the requirements for physical delivery;<sup>42</sup>
- its processes for ensuring that it has client agreements in place with its clients containing the minimum terms required by the ASX Clear (Futures) Operating Rules;<sup>43</sup>
- its processes for complying with its account establishment obligations in the ASX Clear (Futures) Operating Rules;<sup>44</sup>
- its processes for complying with the client protection model provisions in the ASX Clear (Futures) Operating Rules, including providing a copy of the Client Protection Model Fact Sheet<sup>45</sup> to each new client before holding an open position for that client;<sup>46</sup>
- its processes for monitoring position limits;<sup>47</sup>

<sup>37</sup> Applicants should have regard to the guidance given by ASIC about compliance measures in section C and Appendix 1 of ASIC Regulatory Guide 104 *Licensing: Meeting the general obligations*. This includes ASIC’s guidance about the recording and reporting of compliance breaches and regularly reviewing compliance measures to take account of past breaches.

<sup>38</sup> Applicants should have regard to the guidance given by ASIC about risk management systems in section D and Appendix 1 of ASIC Regulatory Guide 104 *Licensing: Meeting the general obligations*.

<sup>39</sup> Applicants should have regard to the good practice guidance published by ASIC about cyber resilience available online at <http://www.asic.gov.au/regulatory-resources/digital-transformation/cyber-resilience/>. Applicants should also consider the latest global standards on cyber resilience, such as the National Institute of Standards and Technology Cybersecurity Framework (refer <https://www.nist.gov/topics/cybersecurity>), and any local guidance provided by Australian regulatory bodies and government departments, such as the Australian Signals Directorate (refer <https://www.asd.gov.au/>).

<sup>40</sup> ASX Clear (Futures) Operating Rules 31 and 31A (registration), 32 (allocation), 33 (transfer) and 46 (close-out of matched positions) and Schedule 6. See also ASX OTC Operating Rule 4.5.

<sup>41</sup> ASX Clear (Futures) Operating Rules 43 – 45, Schedule 3 (Prescribed Times) and ASX OTC Operating Rules 5.1-5.11 and 8.2.

<sup>42</sup> ASX Clear (Futures) Operating Rule 63 and Schedule 14.

<sup>43</sup> ASX Clear (Futures) Operating Rule 4.14(j).

<sup>44</sup> ASX Clear (Futures) Operating Rule 41.

<sup>45</sup> Currently entitled “ASX Client Clearing Service for Derivatives – Fact Sheet” and available on ASX Online at <http://www.asx.com.au/documents/clearing/client-protection-model-fact-sheet.pdf>.

<sup>46</sup> ASX Clear (Futures) Operating Rules 110 – 121 and ASX OTC Operating Rule 9.

<sup>47</sup> ASX Clear (Futures) Operating Rule 9.

- if the applicant intends to clear option contracts, its processes for managing the risks associated with this activity (such as its processes for assessing creditworthiness, imposing position limits, and monitoring and stress testing exposures);
- if the applicant intends clear OTC derivative transactions for clients, its processes for ensuring it only clears for clients that are incorporated or carrying on business in a prescribed jurisdiction and satisfy the qualification criteria pursuant the ASX OTC Operating Rules;<sup>48</sup>
- its processes for complying with the financial requirements in the ASX Clear (Futures) Operating Rules;<sup>49</sup>
- its processes for complying with the audit requirements in the ASX Clear (Futures) Operating Rules;<sup>50</sup>
- its processes for meeting any change in commitment ASX impose (including the funding lines it will have in place for that purpose);<sup>51</sup>
- its processes for complying with the record requirements in the ASX Clear (Futures) Operating Rules;<sup>52</sup>
- its processes for meeting the minimum technical requirements prescribed by ASX for access to the ASX Clear (Futures) facility including connectivity, testing and accreditation requirements;<sup>53</sup>
- business continuity and disaster recovery arrangements that meet the expectations outlined in ASX Clear (Futures) Operating Rules Guidance Note 10 *Business Continuity and Disaster Recovery*;<sup>54</sup>
- if the applicant intends to act as clearing guarantor for a third party, its processes for managing the risks associated with this activity (such as its processes for assessing creditworthiness, imposing position limits, monitoring and stress testing exposures, and dealing with any misdirected transactions where the third party uses more than one clearer); and
- if the applicant intends to offshore or outsource any of its clearing activities, its processes for meeting the expectations outlined in ASX Clear (Futures) Operating Rules Guidance Note 9 *Offshoring and Outsourcing*.

As part of the application process, ASX may ask an applicant to provide ASX with a copy of some or all of the processes above so that ASX can verify that they are in place.

When documenting their key processes, applicants should note the guidance given by ASIC about compliance measures generally:<sup>55</sup>

“It is not enough just to document your measures. You also need to fully implement them. This means you need to put them into practice and integrate them into the day-to-day conduct of your business.”

### 3.6 Nominated contacts

An applicant seeking admission as a participant in any ASX market or facility must provide a completed and signed ASX Online Initial Access Form<sup>56</sup> to nominate at least two individuals to access the ASX web-based system

<sup>48</sup> ASX OTC Operating Rule 2.15.

<sup>49</sup> ASX Clear (Futures) Operating Rule 8 and Schedule 9 Clause 1 and, if applying as an OTC Clearing Participant, ASX OTC Operating Rules 2.3 and 3.3.

<sup>50</sup> ASX Clear (Futures) Operating Rule 4.14(a) and (aa).

<sup>51</sup> ASX Clear (Futures) Operating Rules 5.7 – 5.11.

<sup>52</sup> ASX Clear (Futures) Operating Rule 4.14(i).

<sup>53</sup> ASX's technical requirements will depend on the business model and connectivity options selected by the applicant. Further information about the technical requirements for the ASX Clear (Futures) facility can be obtained from ASX Participant Transitions.

<sup>54</sup> ASX Clear (Futures) Operating Rule 4.4(e).

<sup>55</sup> ASIC Regulatory Guide 104 *Licensing: Meeting the general obligations*, at paragraph 27.

<sup>56</sup> See question A.6.1 of the application form.

interface known as ASX Online.<sup>57</sup> The individuals will be granted permission to access ASX Online as 'Enterprise Administrators' for the applicant entity and will be responsible for setting-up 'roles' in ASX Online, including persons with the authority to deal with various operational, risk or compliance issues on its behalf following its admission as a participant.<sup>58</sup> The completed form is required to be provided as Annexure A8 to its application.

An editable version of the ASX Online Initial Access Form can be downloaded from:  
[www.asx.com.au/regulation/compliance/compliance-downloads.htm](http://www.asx.com.au/regulation/compliance/compliance-downloads.htm).

#### 4. Additional admission requirements for the ASX Clear (Futures) facility

In addition to the common admission requirements mentioned under heading 3 above, an applicant seeking admission as a participant in the ASX Clear (Futures) facility must meet the following additional admission requirements. They are addressed in Part F of the application form.

##### 4.1 Type of participation and products to be cleared

An applicant seeking admission as a participant in the ASX Clear (Futures) facility must indicate in its response to question F.1.1 of the application form which of the following types of products it intends to clear:

- ASX futures & options (commodity, energy & environmental (AUD & NZD), equity, interest rate (AUD & NZD) futures and options); and/or
- OTC Derivatives.

##### 4.2 Business continuity arrangements

An applicant seeking admission as a participant in the ASX Clear (Futures) facility must provide:<sup>59</sup>

- a copy of its business continuity plan (BCP) for its ASX Clear (Futures) activities as Attachment F1 to its application form;<sup>60</sup>
- a copy of its BCP infrastructure diagram as Attachment F2 to its application form;<sup>61</sup> and
- a completed BCP self-assessment survey as Attachment F3 to its application form.<sup>62</sup>

ASX's BCP self-assessment survey has further information about what should be included in the applicant's BCP and BCP infrastructure diagram. An editable version of ASX's BCP self-assessment survey can be downloaded from [www.asx.com.au/regulation/compliance/compliance-downloads.htm](http://www.asx.com.au/regulation/compliance/compliance-downloads.htm).

##### 4.3 Financial requirements

An applicant seeking admission as a participant in the ASX Clear facility must state its financial year end in its response to question F.3.1 of the application form.

Unless otherwise exempt, an applicant seeking admission as a participant in the ASX Clear (Futures) facility must meet the financial requirements in Rule 8 and Schedule 9 Clause 1 of the ASX Clear (Futures) Operating Rules.<sup>63</sup>

<sup>57</sup> ASX Online is a secure extranet site provided by ASX to enable participants, among other things, to receive ASX notices; lodge regulatory reports; submit participant forms; raise service requests and establish authorisation credentials for activities relating to their ASX participation.

<sup>58</sup> Mandatory roles specified on the ASX Online Initial Access Form are required to be set up by the enterprise administrator prior to the applicant's admission as an ASX participant.

<sup>59</sup> An applicant that is also seeking to be admitted as a participant in the ASX Clear or ASX Settlement facility will be asked to provide the same documents in Parts C and D respectively of the application form. It only needs to submit these documents once.

<sup>60</sup> See question F.2.1 of the application form.

<sup>61</sup> See question F.2.2 of the application form.

<sup>62</sup> See question F.2.3 of the application form.

<sup>63</sup> ASX Clear (Futures) Operating Rule 4.2(d).

Applicants that are applying to clear OTC derivative transactions must meet the financial requirements in ASX OTC Operating Rule 3.3.<sup>64</sup>

An applicant that is not an ADI must:

- provide its last audited financial statements, including every attachment required by law, as Annexure F4 to its application,<sup>65</sup> and
- provide its auditor's details in its response to question F.3.3 of the application form.<sup>66</sup>

If the applicant does not have audited financial statements, it must provide an income statement and balance sheet drawn up in accordance with the provisions of the Corporations Act (or equivalent foreign legislation), to the extent applicable, and signed by at least 2 directors of the applicant.

Following acceptance of the application, CRA will liaise with the applicant in relation to any additional information and documentation it requires to assess the applicant's capacity to comply with ASX's financial requirements.

#### 4.4 Other compliance requirements

Where applicable, an applicant seeking admission as a participant in the ASX Clear (Futures) facility must meet the following additional compliance requirements:

- If the applicant intends to clear for any client (including any related body corporate), it must attach a pro forma of its client agreement as Annexure F5 to its application highlighting where the minimum terms required by ASX Clear (Futures) Operating Rule 4.14(j) are contained.<sup>67</sup>
- If the applicant intends to clear for any person other than itself or a related body corporate, it must confirm that it has, or will prior to its admission as a participant have, the requisite professional indemnity insurance in place by checking the "Confirmed" box in its response to question F.4.2 of the application form.<sup>68</sup>
- The applicant must provide a completed ASX Authorised Signatory Appointment Form nominating individuals with the authority to sign documentation and to deal with operational issues on its behalf.<sup>69</sup> It must indicate in its response to question F.4.3 of the application form whether it is providing the signed Authorised Signatory Form with its application (in which case it must attach the form as Annexure F6 to its application) or whether it will be providing the form later.<sup>70</sup>

<sup>64</sup> ASX OTC Operating Rule 2.3(b).

<sup>65</sup> See question F.3.2 of the application form.

<sup>66</sup> An applicant that is also seeking to be admitted as a participant in the ASX Clear facility will be asked to provide similar documents and information in Part D of the application form. It only needs to submit these documents and information once.

<sup>67</sup> See question F.4.1 of the application form and ASX Clear (Futures) Operating Rule 4.14(j).

<sup>68</sup> See question F.4.2 of the application form and ASX Clear (Futures) Operating Rule 4.14(e) and the related Procedure. Under these provisions, an ASX Clear (Futures) participant that clears for any person other than itself or a related body corporate is required to take out and maintain, at all times, a professional indemnity (or equivalent) insurance policy that it determines (acting reasonably) to be adequate, having regard to the nature and extent of the business carried on by the participant in connection with its business as a participant and the responsibilities and risks assumed or which may be assumed by it in connection with that business. It must retain a copy of the certificate evidencing the insurance (paragraph (a) of ASX Clear (Futures) Operating Rules Procedure 4.14(e)). The insurance must cover the applicant against a breach of duty it owes in a professional capacity, whether owed in contract or otherwise at law, arising from any act or omission of the participant and its employees (paragraph (b) of ASX Clear (Futures) Operating Rules Procedure 4.14(e)). If the insurance is provided by a related body corporate, the applicant must receive confirmation from the related body corporate that it is the insurer or the self-insurer covering and indemnifying the applicant against these liabilities and retain a copy of the confirmation (paragraph (e) of ASX Clear (Futures) Operating Rules Procedure 4.14(e)).

<sup>69</sup> In the case of the ASX Clear (Futures) facility, see ASX Clear (Futures) Operating Rule 4.14(ea).

<sup>70</sup> The option for an applicant to provide the Authorised Signatory Form later is given in recognition of the fact that an applicant may not have engaged all of the management and operational staff needed to run its business as a participant at the time of applying for admission.

- If the applicant is an ADI,<sup>71</sup> it must:
  - confirm that it is aware of the conditions set out in “APRA’s Letter to ADIs relating to membership of CCPs” dated 4 June 2013 by checking the “Confirmed” box in its response to question F.5.1 of the application form;<sup>72</sup> and
  - provide details of its latest Tier 1 capital figure in its response to question F.5.2 of the application form.<sup>73</sup>
- If the applicant is applying to clear OTC derivative transactions (either as dealer to dealer or under the client protection model), it must:
  - either be an Australian Bank or an Australian subsidiary of an Australian Bank regulated by APRA or the holder of an appropriate AFSL (as determined by ASX), or of a similar licence issued in a jurisdiction other than Australia on the basis of which it is exempt from the requirement to hold an AFSL;<sup>74</sup>
  - meet the OTC commitment requirements in the ASX OTC Operating Rules;<sup>75</sup>
  - provide any legal opinions ASX requires in respect of the enforceability of applicable Operating Rules;<sup>76</sup>
  - check the box in its response to question F.6.1 of the application form to confirm that it has read, and has developed processes and procedures to ensure it can comply with its obligations with respect to, the default management provisions contained in ASX OTC Operating Rule 6;<sup>77</sup>
  - if the applicant is not a futures participant, check the box in its response to question F.6.2 of the application form to confirm that it has arrangements in place for a futures participant to clear market contracts which the applicant acquires in any default management auction;<sup>78</sup> and
  - attach the applicant’s preferred form of ISDA Schedule as Annexure F7 to its application for review and negotiation by ASX.<sup>79</sup>

<sup>71</sup> That is, an authorised deposit-taking institution which has been granted authority to carry on a banking business in Australia under the Banking Act 1959 (Cth).

<sup>72</sup> A copy of this letter is available on the APRA website at: <https://www.apra.gov.au/sites/default/files/130604-letter-to-adis-re-ccps.pdf>.

<sup>73</sup> An ADI applicant should disclose its latest quarterly Tier 1 capital figure as calculated for its banking regulator.

Consolidated group data may only be provided if consolidated group Tier 1 capital is over A\$5 billion (in which case, an Australian ADI may report its Level 2 Tier 1 capital, as defined by APRA under Prudential Standard APS 110, and a foreign ADI may report its consolidated group Tier 1 capital in accordance with the requirements of its home banking regulator).

Single entity Tier 1 capital must be provided if consolidated group Tier 1 capital is A\$5 billion or less (in which case, an Australian ADI should report its Level 1 Tier 1 capital, as defined by APRA under Prudential Standard APS 110, and a foreign ADI should report its Tier 1 capital for the participant legal entity in accordance with the requirements of its home banking regulator).

<sup>74</sup> ASX OTC Operating Rule 2.3(a).

<sup>75</sup> ASX OTC Operating Rules 2.6 and 3.2.

<sup>76</sup> ASX OTC Operating Rule 2.1 and OTC Handbook Clause 2.4.

<sup>77</sup> In providing this confirmation, the applicant is also confirming that it can demonstrate compliance with ASX OTC Operating Rule 6 if requested by ASX.

<sup>78</sup> ASX OTC Operating Rule 2.3(d).

<sup>79</sup> An OTC participant must enter into an ISDA master agreement with ASX Clear (Futures) Pty Ltd in form and substance satisfactory to ASX: see ASX OTC Operating Rule 2.4.

## 5. Further admission requirements that apply to applicants incorporated or carrying on business outside Australia

### 5.1 ASX's policy position on foreign applicants

While it has a general power to admit entities incorporated outside Australia under the ASX Clear (Futures) Operating Rules, as a matter of policy, ASX currently only accepts applications for admission to the ASX Clear (Futures) facility from entities incorporated outside Australia if they are a branch of a foreign bank from an approved jurisdiction and they are authorised to carry on banking business in Australia or if they meet certain other requirements. Any queries from a foreign applicant on this issue should be directed to the ASX Participants Transition Team.

### 5.2 ASX's power to impose additional requirements for admission

Applications to be admitted as a participant in an ASX market or facility from entities that are incorporated or intend to carry on any part of their ASX activities outside Australia raise a number of different considerations compared to applications from entities that are incorporated and intend to carry on business wholly in Australia. These are addressed by ASX on a case-by-case basis.

Where an applicant is incorporated or intends to carry on any part of its business as an ASX Clear (Futures) participant outside Australia and ASX considers it appropriate to do so, ASX has the power under ASX Clear (Futures) Operating Rule 4.3A and the related Procedure to impose additional requirements for the applicant to be eligible to be admitted as a participant in the ASX Clear (Futures) facility. These may include requirements that:

- the applicant or a related body corporate currently conducts clearing operations which are regulated by a foreign clearing and settlement facility, a foreign financial market or a foreign regulatory authority acceptable to ASX;
- the applicant is a clearing and settlement facility which holds an Australian CS Facility licence or operates as a clearing and settlement facility in an overseas jurisdiction in accordance with the legal requirements of that jurisdiction and ASX considers the applicant to be adequately regulated in that jurisdiction;
- the applicant, or persons connected with the applicant, give an additional undertaking or undertakings governed by Australian law in respect of any matter which ASX considers reasonable or in the interest of the public or ASX including, without limitation, undertakings as to:
  - the amount of resources and number of employees to be located in Australia;
  - access by ASX to records required to be kept under the ASX Clear (Futures) Operating Rules;
  - foreign taxes that might be payable;
  - the law governing the applicant's activities under the ASX Clear (Futures) Operating Rules and the applicant's submission to jurisdiction;
  - whether the law of the applicant's incorporation would recognise protections which are substantially equivalent to those afforded by Australian law to clients' money and property in a winding-up of the applicant; and
  - the ranking of creditors on a winding-up of the applicant;
- the applicant provide a legal opinion, from independent lawyers acceptable to ASX and paid for by the applicant, which deals with matters required by ASX and which is acceptable to ASX;
- the applicant provide a performance bond in the form and substance acceptable to ASX; and



- if the applicant proposes to conduct any “Overseas Activity” (as defined in ASX Clear (Futures) Operating Rule 4.15A), the applicant notify ASX of the details of the proposed Overseas Activity and demonstrate that the proposed Overseas Activity will comply with ASX Clear (Futures) Operating Rules Procedure 4.15A.

### 5.3 Applicants incorporated overseas

If an applicant seeking admission as a participant in an ASX market or facility is incorporated in a place outside Australia, it must either be registered as a foreign company carrying on business in Australia under Part 5B.2 Division 2 of the Corporations Act or appoint an agent in Australia approved by ASX for the service of process in Australia.<sup>80</sup>

An applicant incorporated overseas must indicate in its response to question A.7.1 of the application form whether:

- it is already registered as a foreign company carrying on business in Australia;
- it intends to register as a foreign company carrying on business in Australia (in which case it must complete the registration process before it will be admitted as a participant<sup>81</sup>);
- it has appointed an agent in Australia for the service of process, in which case, it must attach as Annexure A9 to its application a copy of the appointment and the agent’s acceptance of the appointment; or
- it intends to appoint an agent in Australia for the service of process, in which case, it must also specify the agent’s name, address, telephone number and email and lodge a copy of the appointment and the agent’s acceptance of its appointment before it will be admitted as a participant.<sup>82</sup>

If the applicant has, or is seeking, an ASIC exemption from the requirement to hold an AFSL on the basis of a licence it has in a foreign jurisdiction, or if it maintains that it is not required to hold an AFSL but has a licence in a foreign jurisdiction that will cover its ASX Clear (Futures) activities, it must also attach as Annexure A10 to its application a document providing details of the law under which that licence is issued and a copy of that licence.<sup>83</sup>

In terms of which option an applicant should select in its answer to question A.7.1, an applicant that is not incorporated in Australia should be aware that if it intends to do anything that constitutes “carrying on business” in Australia, it must register as a foreign company carrying on business in Australia under section 601CD of the Corporations Act.<sup>84</sup> In this regard, if it intends to have premises,<sup>85</sup> staff or clients in Australia, it will almost certainly be taken to be carrying on business in Australia and therefore have to register under that section. Even if it does not intend to have premises, staff or clients in Australia, it may still need to register as a foreign company carrying on business in Australia under that section, depending on its particular business model and its proposed activities in Australia.

An applicant seeking admission as a participant in an ASX market or facility should take its own legal advice on whether it needs to register as a foreign company carrying on business in Australia, which takes account of its particular business model and its proposed activities in Australia.

<sup>80</sup> In the case of the ASX Clear (Futures) facility, see ASX Clear (Futures) Operating Rule 4.15A(e). A participant must also inform ASX of the intended effective date of any agent ceasing for any reason to act as agent for the participant and, where that applies, appoint as soon as practicable, and in any case before the outgoing agent ceases acting as agent for the participant, a new agent approved by ASX.

<sup>81</sup> The option for an applicant to complete the process of registering as a foreign company after lodging its application and before its admission is offered in recognition of the fact that an applicant may not wish to go to the trouble and expense of registering as a foreign company until it has a reasonable degree of certainty that it will be admitted as a participant.

<sup>82</sup> Again, the option for an applicant to appoint an agent in Australia for service of process after lodging its application and before its admission is offered in recognition of the fact that an applicant may not wish to go to the trouble and expense of appointing an agent until it has a reasonable degree of certainty that it will be admitted as a participant.

<sup>83</sup> See question A.7.2 of the application form.

<sup>84</sup> Section 601CD of the Corporations Act prohibits a foreign company from carrying on business in Australia unless it is registered under Division 2 of Part 5B.2 of that Act. A breach of section 601CD is a criminal offence (section 1311(1)) punishable by a fine of 5 penalty units (section 1311(5)).

<sup>85</sup> See section 21(1).

Registration as a foreign company carrying on business in Australia brings with it a number of regulatory obligations, including:

- to have a registered office in Australia to which communications and notices may be addressed that is open between certain hours and at which a representative of the company is present at all times the office is open;<sup>86</sup>
- to display its name and its place of origin in a conspicuous position and in legible characters outside its registered office and every office and place of business in Australia that is open and accessible to the public;<sup>87</sup>
- to display its name, its Australian Registered Body Number (ARBN), its place of origin and, if the liability of the members is limited and the last word of its name is neither 'Limited' nor 'Ltd.', notice of the fact that the liability of its members is limited on:
  - every public document issued, signed or published by or on behalf of the company in Australia; and
  - every negotiable instrument signed or issued by or on behalf of the company in Australia;<sup>88</sup>
- to retain a local agent who is answerable for the doing of all acts, matters and things that the company is required to do by or under the Corporations Act;<sup>89</sup>
- unless exempted by ASIC,<sup>90</sup> to lodge financial statements with ASIC at least once every calendar year and at intervals of not more than 15 months comprising:
  - a copy of the company's balance sheet, profit and loss statement and cash flow statement (all made up to the end of the last financial year), and
  - any other documents the company is required to prepare by the law that applies in the company's place of origin,

together with a Form 405 *Statement to verify financial statements of a foreign company*.<sup>91</sup>

It should be noted that issues about the requirement to be registered as a foreign company carrying on business in Australia are within the regulatory remit of ASIC. Any questions about that requirement should be directed to ASIC rather than ASX.

Further information about the process for registering as a foreign company and the ongoing obligations that apply to registered foreign companies can be found on the ASIC website at: <http://www.asic.gov.au/for-business/starting-a-company/how-to-start-a-company/foreign-companies/>.

As mentioned previously, under ASX Clear (Futures) Operating Rule 4.3A, ASX can impose additional admission requirements in respect of an applicant incorporated outside Australia. Typically, ASX will require such an applicant to provide a legal opinion from a recognised law firm in the place where it is incorporated confirming either that the

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<sup>86</sup> See section 911D.

<sup>87</sup> Section 601CW.

<sup>88</sup> Section 601DE. The company must also display its ARBN on all documents required to be lodged with ASIC under the Corporations Act: Corporations Regulations 1.0.07 – 1.0.10.

<sup>89</sup> Section 601CF.

<sup>90</sup> ASIC may declare some types of registered foreign company to be exempt from these financial reporting requirements: see ASIC Regulatory Guide 58 *Reporting requirements—registered foreign companies and Australian companies with foreign company shareholders*. An exempt registered foreign company must lodge a Form 406 *Annual return of a foreign company* instead of a Form 405 (see note 91 and the accompanying text).

<sup>91</sup> Section 601CK. When a foreign company that holds an AFSL lodges its financial statements with ASIC, it can either: (a) rely on ASIC Class Orders [CO 03/823] or [CO 06/68] and lodge a Form 405 (in which case it must include an auditor's report with this form); or (b) lodge Forms FS70 *Australian financial services licensee profit and loss statement and balance sheet* and FS71 *Australian financial services licensee audit report*.

applicant holds all necessary overseas licences and authorisations to conduct its ASX activities or that the applicant is not required to hold any overseas licence or authorisation to conduct its ASX activities (as the case may be).

### 5.4 Applicants with overseas activities

An applicant seeking admission as a participant in any ASX market or facility must indicate in its response to question A.8.1 of the application form whether it proposes to locate any part of its ASX activities or any employees engaged in those activities outside Australia (overseas activity). If it does, it must attach as Annexure A11 to its application a statement setting out full details of the proposed overseas activity and evidence that it has obtained all necessary regulatory approvals from any relevant governmental agency or regulatory authority in Australia or elsewhere in respect of the overseas activity.

This applies whether the applicant is incorporated in Australia or overseas and regardless of the nature, scale or materiality of the overseas activity.

The statement should confirm that the overseas activity will not interfere with the ability of the applicant to comply with its ongoing obligation under the relevant Operating Rules to ensure that it has in place appropriate arrangements so that it and ASX can communicate with each other and receive each other's responses quickly on a day-to-day operational basis and so that it can promptly comply with those Operating Rules or a request of ASX.<sup>92</sup>

ASX will use the information in this statement to assess whether it should apply further requirements for the applicant to be eligible to be admitted as a participant in the ASX Clear (Futures) facility in accordance with ASX Clear (Futures) Operating Rule 3.8.1.

Depending on the nature of the overseas activity, this may include requiring the applicant to provide a legal opinion from a recognised law firm in the place where it intends to conduct its overseas activity confirming either that the applicant holds all necessary overseas licences and authorisations to conduct the overseas activity or that the applicant is not required to hold any overseas licence or authorisation to conduct the overseas activity (as the case may be).

## 6. Ongoing compliance with admission requirements

Once admitted, a participant in the ASX Clear (Futures) facility has an ongoing obligation to continue to satisfy the applicable admission requirements.<sup>93</sup>

In this regard, there are 2 admission requirements of particular significance that continue to apply to an ASX Clear (Futures) participant after its admission:

- the requirement to hold an AFSL that authorises the participant to carry on its business as a participant, unless such a licence is not required by the Corporations Act;<sup>94</sup> and
- the requirement to have "adequate resources and processes" to comply with its obligations as a participant under the ASX Clear (Futures) Operating Rules.<sup>95</sup>

In ASX's view, the ongoing obligation for a participant to have "adequate resources and processes" effectively imposes an continuing obligation on a participant to have up-to-date documented processes to comply with its primary obligations under the ASX Clear (Futures) Operating Rules, as outlined under '3.5 Resources and processes' above.

Participants should note the guidance given by ASIC about compliance measures generally:<sup>96</sup>

<sup>92</sup> In the case of the ASX Clear (Futures) facility, see ASX Clear (Futures) Operating Rules 4.15A(d).

<sup>93</sup> ASX Clear (Futures) Operating Rule 4.10.

<sup>94</sup> ASX Clear (Futures) Operating Rule 4.2(b).

<sup>95</sup> ASX Clear (Futures) Operating Rule 4.2(e).

<sup>96</sup> ASIC Regulatory Guide 104 *Licensing: Meeting the general obligations*, at paragraphs 31 and 32.

“Regularly reviewing your measures will help to ensure they remain effective. In some cases, it may be sensible for you to consider external review. Where compliance issues have arisen (such as major breaches or repeated compliance failures), external compliance review is particularly appropriate.

You need to review your measures when there are changes to your obligations, your business or the environment in which you operate. We expect that you will have a process for identifying changes that may impact on the effectiveness of your measures.”

Participants should also note that the requirement for an applicant for admission to provide a written certification that it has the necessary resources and processes in place to comply with its obligations under the ASX Clear (Futures) Operating Rules<sup>97</sup> only operates on or before admission and therefore only applies to new applicants. Once admitted, participants will be expected to continue to have the resources and processes in place to comply with their obligations under the ASX Clear Operating Rules but they will not be required to provide any form of certification to ASX in that regard.

## 7. Right of appeal

An applicant who is denied admission as a participant in the ASX Clear (Futures) facility, or who has conditions imposed on its admission that it finds unacceptable, is entitled to appeal that decision.<sup>98</sup>

The applicant must pay an appeal fee of \$5,000 (exclusive of GST) to, and lodge written notice of the appeal with, the ASX Appeals Tribunal within 10 business days after the decision is sent to the applicant.<sup>99</sup>

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<sup>97</sup> ASX Clear (Futures) Operating Rules Procedure 4.2(e).

<sup>98</sup> ASX Clear (Futures) Operating Rule 4.6.

<sup>99</sup> Rule 3.1.6 of the ASX Enforcement and Appeals Rulebook and the accompanying Procedure.