

ADMISSION AS A PARTICIPANT

<p>The purpose of this Guidance Note</p>	<ul style="list-style-type: none"> To outline to applicants the requirements they must meet to be admitted as a participant in the ASX Clear facility and to assist them in preparing their application
<p>The main points it covers</p>	<ul style="list-style-type: none"> The application process generally 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 facility The additional admission requirements that apply to applicants seeking admission as a participant in the ASX Clear facility Further admission requirements that apply to applicants incorporated or carrying on business outside Australia The ongoing obligation of participants to comply with the admission requirements Rights of appeal on admission decisions
<p>Related materials you should read</p>	<ul style="list-style-type: none"> Guidance Note 3 <i>Changes in Participation</i> Guidance Note 4 <i>Waivers and in Principle Advice</i> Guidance Note 7 <i>Client Agreements</i> Guidance Note 9 <i>Offshoring and Outsourcing</i> Guidance Note 10 <i>Business Continuity and Disaster Recovery</i> Guidance Note 12 <i>Trust and Client Segregated Accounts</i> ASIC Regulatory Guide 104 <i>Licensing: Meeting the general obligations</i> ASIC Regulatory Guide 105 <i>Licensing: Organisational competence</i>

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Important notice: ASX has published this Guidance Note to assist applicants considering a participation in ASX Clear to understand the applicable admission requirements. It sets out ASX's interpretation of the ASX Clear 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 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 Pty Limited ("ASX") to outline to applicants the requirements they must meet to be admitted as a participant in the ASX Clear 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 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.

2.2 The admission application

To apply for admission as a participant in the ASX Clear facility, the applicant must complete an application in the prescribed form and give it to ASX.¹ An editable version of the application form can be downloaded from: www.asx.com.au/regulation/compliance/compliance-downloads.htm.

ASX uses a common application form² 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;³
- 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 facility must complete Parts A and C of the application.⁴

The application must be properly completed, dated and executed by the applicant.⁵ 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 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
20 Bridge Street
Sydney NSW 2000

¹ ASX Clear Operating Rule 3.1.1A.

² 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.

³ 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.

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

⁵ 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).

or in soft copy to 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 facility must be accompanied by the relevant application fee set out in ASX's published schedule of fees.⁶

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 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 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 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)⁷ of the receipt and acceptance of the application.

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 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 Operating Rules to assess whether it conforms to the underlying principles of the Rules⁸ and ASX policy.

⁶ Available online at: https://www.asxonline.com/intradoc-cgi/groups/participant_services/documents/information/asx_027373.pdf.

⁷ The primary regulator of the ASX Clear facility.

⁸ The fundamental principle underlying all ASX Clear Operating Rules is that the ASX Clear facility should be fair and efficient.

If the application does not fully conform to the requirements of the ASX Clear 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.⁹ 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 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.¹⁰

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.¹¹

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.¹² ASX will invariably impose a standard condition specifying the categories of market transaction that the applicant is authorised to clear (cash market, options market, futures market and/or OTC options market transactions), as well as the approved market operators in respect of which it is authorised to clear those transactions.¹³

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 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.

⁹ 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 Operating Rule 3.1.3.

¹⁰ 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.

¹¹ ASX Clear Operating Rule 3.1.3A.

¹² ASX Clear Operating Rule 3.1.4.

¹³ ASX Clear Operating Rule 3.1.4 and ASX Clear Operating Rules Procedure 3.1.4.

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 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 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.¹⁴ 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);¹⁵
- 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;¹⁶
- a management structure chart showing the key personnel involved in managing the applicant's proposed ASX activities and their titles, roles and reporting lines;¹⁷ and
- 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.¹⁸

In the case of an applicant seeking admission to ASX Clear, its technology process flow diagram should contain sufficient information to allow ASX to assess whether the applicant will meet the technical and performance requirements of the ASX Clear Operating Rules, including having the necessary organisational and technical resources to communicate reliably with the clearing system and correctly process clearing messages.¹⁹

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;

¹⁴ In the case of the ASX Clear facility, see ASX Clear Operating Rule 3.2.1(a). This requirement does not apply to an applicant seeking admission as a participant in the ASX Settlement facility.

¹⁵ Question A.2.1 and Annexure A1 to the application form.

¹⁶ Question A.2.2 and Annexure A2 to the application form.

¹⁷ Question A.2.3 and Annexure A3 to the application form.

¹⁸ Question A.2.4 and Annexure A4 to the application form.

¹⁹ ASX Clear Operating Rule 3.2.1(f) and 3.6.1.

- 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,²⁰ 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,²¹ unless it can demonstrate to ASX's satisfaction that such a licence is not required by the Corporations Act 2001 (Cth).²²

ASX would generally expect a participant in the ASX Clear facility to require an AFSL authorising it:

- to deal in securities;
- if it intends to clear transactions to buy or sell units in listed trusts or in exchange traded funds that are established as managed investment schemes, to deal in managed investment products; and
- if it intends to clear transactions to buy or sell ASX exchange traded options (ETOs) or ASX futures, to deal in derivatives,²³

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;²⁴
- 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 and ASIC Regulatory Guide 176 *Licensing: Discretionary powers - wholesale foreign financial services providers*;²⁵ or

²⁰ 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).

²¹ In the case of the ASX Clear facility, see ASX Clear Operating Rule 3.2.1(c).

²² 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.

²³ See sections 766A(1)(b) and 911A(1) and the definition of "dealing" in section 766C.

²⁴ 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.

²⁵ 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.

- 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.²⁶

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 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 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.

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.

²⁶ 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 participant clears market transactions for a market 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 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 market participant or underlying client based in Australia except where it is permitted by law to do so.

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.²⁷ There are three ways in which the applicant may provide evidence of its high business integrity:

- if the applicant is an ADI,²⁸ 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;²⁹
- 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;³⁰ 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.³¹

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.

An editable version of a sample statutory declaration can be downloaded from:

www.asx.com.au/regulation/compliance/compliance-downloads.htm.

²⁷ In the case of the ASX Clear facility, see ASX Clear Operating Rules 3.2.1(d) and 3.4.1 and ASX Clear Operating Rules Procedure 3.4.1.

²⁸ 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).

²⁹ The applicant must be able to provide evidence of this policy to ASX upon request at any time: ASX Clear Operating Rules Procedure 3.4.1(a).

³⁰ The applicant must be able to provide evidence of these measures to ASX upon request at any time: ASX Clear Operating Rules Procedure 3.4.1(b).

³¹ 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.

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.³²

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.³³ 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.³⁴

For these purposes, “resources” include financial, technological and human resources and “processes” include management supervision, training, compliance, risk management, business continuity and disaster recovery processes.³⁵

The prescribed form of written certification can be downloaded from:

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 facility must have regard to:

- the ASX Clear Operating Rules;
- this Guidance Note;
- ASX Clear Operating Rules Guidance Note 9 *Offshoring and Outsourcing*;
- ASX Clear 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).³⁶

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 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.³⁷ 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 produce an internal sign-off from a director, chief executive, head of compliance or other senior officer at the

³² ASX Clear Operating Rules Procedure 3.4.1 (concluding sentence).

³³ In the case of the ASX Clear facility, see ASX Clear Operating Rules 3.2.1(e) and 3.5.1 and ASX Clear Operating Rules Procedure 3.5.1.

³⁴ 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.

³⁵ ASX Clear Operating Rule 3.5.1.

³⁶ ASX Clear Operating Rules Procedure 3.5.1.

³⁷ ASX Clear Operating Rules Procedure 3.5.1.

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 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;³⁸
- its risk management framework,³⁹ 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;⁴⁰
- its processes for meeting its net payment obligations to ASX (including how it will forecast and monitor those obligations and the funding lines it will have in place for that purpose);⁴¹
- its processes for complying with its settlement obligations under the ASX Clear Operating Rules;⁴²
- if the applicant is intending to clear derivative market transactions, its processes for:
 - ensuring it has provided a client with all documents required under the ASX Clear Operating Rules and the Corporations Act;⁴³
 - ensuring it has a client agreement in place with each client for whom it will clear derivatives that meets the prescribed minimum requirements;⁴⁴
 - complying with its account establishment obligations under the ASX Clear Operating Rules;⁴⁵
 - managing the risks associated with this activity (such as its processes for assessing creditworthiness, imposing position limits, and monitoring and stress testing exposures);
 - complying with any position limits, margin limits or exercise limits imposed by ASX;⁴⁶
 - complying with the periodic reporting requirements under the ASX Clear Operating Rules;⁴⁷
 - ensuring it allocates, price averages, designates, registers and reports derivative market transactions pursuant to its obligations under the ASX Clear Operating Rules;⁴⁸ and

³⁸ 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.

³⁹ 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*.

⁴⁰ 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/>).

⁴¹ ASX Clear Operating Rules Section 12.

⁴² ASX Clear Operating Rule 4.20, which includes having the ability to record/register and settle transactions.

⁴³ ASX Clear Operating Rule 7.1.1(b).

⁴⁴ ASX Clear Operating Rules 7.1.1(a), 7.1.2 and Schedule 5. See also ASX Clear Operating Rules Guidance Note 7 *Client Agreements*.

⁴⁵ ASX Clear Operating Rule 10.1.1 and the related Procedure.

⁴⁶ ASX Clear Operating Rules 14.1, 14.2 and 14.3.

⁴⁷ ASX Clear Operating Rule 4.15.

⁴⁸ ASX Clear Operating Rules 11.1, 11.2, 11.3, 12.1.1A and 12.20.2.

- calling cash or collateral from its clients sufficient to meet its margin obligations under the ASX Clear Operating Rules;⁴⁹
- its processes for complying with the capital requirements in the ASX Clear Operating Rules;⁵⁰
- its processes for complying with the audit requirements in the ASX Clear Operating Rules;⁵¹
- its processes for complying with the client money requirements (including the reconciliation requirements) in the ASX Clear Operating Rules;⁵²
- its processes for ensuring that client monies are not used for the purposes of meeting its cash market margin obligations to ASX;⁵³
- its processes for complying with the client asset protection requirements in the ASX Clear Operating Rules;⁵⁴
- its processes for meeting any clearing fund contributions or emergency assessment ASX may seek or impose (including the funding lines it will have in place for that purpose);⁵⁵
- its processes for complying with the disputes and complaint obligations in the ASX Clear Operating Rules;⁵⁶
- its processes for complying with the record requirements in the ASX Clear Operating Rules;⁵⁷
- its processes for meeting the minimum technical requirements prescribed by ASX for access to the ASX Clear facility including connectivity, testing and accreditation requirements;⁵⁸
- business continuity and disaster recovery arrangements that meet the expectations outlined in ASX Clear Operating Rules Guidance Note 10 *Business Continuity and Disaster Recovery*;⁵⁹
- if the applicant intends to clear 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)⁶⁰ and for ensuring that it has a clearing agreement in place with each third party for whom it will clear that meets the prescribed minimum requirements;⁶¹ and
- if the applicant intends to offshore or outsource any of its clearing activities, its processes for meeting the expectations outlined in ASX Clear 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.

⁴⁹ ASX Clear Operating Rule 14.7.

⁵⁰ ASX Clear Operating Rules Section 5. See also '4.4. Capital requirements' on page 14.

⁵¹ ASX Clear Operating Rule 4.5.

⁵² ASX Clear Operating Rule 4.23. See also ASX Clear Operating Rules Guidance Note 12 *Trust and Client Segregated Accounts*.

⁵³ ASX Clear Operating Rule 14.8.1(b).

⁵⁴ ASX Clear Operating Rule 4.25.

⁵⁵ ASX Clear Operating Rules 8.1 and 8.2.

⁵⁶ ASX Clear Operating Rules 18.1.1, 18.2.2 and 18.2.4.

⁵⁷ ASX Clear Operating Rules 4.4, 4.6, 4.18, 7.37 and 18.2.3.

⁵⁸ ASX Clear Operating Rules 3.6, 6.1 and 6.2. 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 facility can be obtained from ASX Participant Transitions.

⁵⁹ ASX Clear Operating Rule 4.2.1.

⁶⁰ ASX Clear Operating Rules Section 9.

⁶¹ ASX Clear Operating Rule 9.1.1.

When documenting their key processes, applicants should note the guidance given by ASIC about compliance measures generally.⁶²

“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 Form⁶³ to nominate at least two individuals to access the ASX web-based system interface known as ASX Online.⁶⁴ 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.⁶⁵ 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.

4. Additional admission requirements for the ASX Clear facility

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

4.1 Type of participation and products to be cleared

ASX Clear currently offers two participation types:

- a ‘direct participant’ – a participant that only clears for:
 - itself and its own clients; and/or
 - one or more market participants that are wholly-owned group entities and their clients; or
- a ‘general participant’ – a participant that clears for:
 - third parties and third party clients; or
 - itself, its own clients, third parties and third party clients.

An applicant seeking admission as a participant in the ASX Clear facility must indicate in its response to question C.1.1 of the application form the type of a participation for which it is applying.

The applicant must also indicate in its response to question C.1.2 of the application form which of the following types of transactions it wishes to clear:

- cash market transactions;
- options market transactions;
- ASX futures market transactions; and/or

⁶² ASIC Regulatory Guide 104 *Licensing: Meeting the general obligations*, at paragraph 27.

⁶³ See question A.6.1 of the application form.

⁶⁴ ASX Online is a secure extranet site provided by ASX to enable participants to, amongst other things, receive ASX notices; lodge regulatory reports; submit participant forms; raise service requests and establish authorisation credentials for activities relating to their ASX participation.

⁶⁵ 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.

- OTC options market transactions.

4.2 Nominee company requirements

An applicant seeking admission as a participant in the ASX Clear facility must indicate in its response to question C.1.3 of the application form whether it intends to operate a nominee company or companies to register the ownership of financial products of which it is not the beneficial owner and, if so, state the name of each nominee company. It must also confirm in its response to question C.1.4 of the application form that each nominee company:

- is incorporated in Australia with a name which contains the word “nominee”;
- has a constitution that precludes the nominee company from owning any financial products or other property except cash beneficially, and
- is a directly held legally and beneficially wholly owned subsidiary of the applicant.⁶⁶

4.3 Business continuity arrangements

An applicant seeking admission as a participant in the ASX Clear facility must provide:⁶⁷

- a copy of its business continuity plan (BCP) for its ASX Clear activities as Attachment C1 to its application form;⁶⁸
- a copy of its BCP infrastructure diagram as Attachment C2 to its application form;⁶⁹ and
- a completed BCP self-assessment survey as Attachment C3 to its application form.⁷⁰

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.

4.4 Capital requirements

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

Unless otherwise exempt, an applicant seeking admission as a participant in the ASX Clear facility must meet the capital requirements in section 5 of the ASX Clear Operating Rules.⁷¹

The applicant must indicate in its response to question C.3.2 of the application form whether it:

- intends to comply with the risk based capital requirements in Schedule 1 of the ASX Clear Operating Rules;
- intends to comply with the NTA requirements in Schedule 2 of the ASX Clear Operating Rules; or
- seeks an exemption under ASX Clear Operating Rule 5.2 from the above capital requirements on the basis that it is subject to an appropriate level of prudential supervision under an approved “Other Capital Regime”.

An applicant that intends to comply with the risk based capital requirements or the NTA requirements must:

⁶⁶ As required by ASX Clear Operating Rule 4.11.1.

⁶⁷ An applicant that is also seeking to be admitted as a participant in the ASX Settlement or ASX Clear (Futures) facilities will be asked to provide the same documents in Parts D and F respectively of the application form. It only needs to submit these documents once.

⁶⁸ See question C.2.1 of the application form.

⁶⁹ See question C.2.2 of the application form.

⁷⁰ See question C.2.3 of the application form.

⁷¹ ASX Clear Operating Rule 3.2.1(g).

- provide its last audited financial statements, including every attachment required by law, as Annexure C4 to its application;⁷² and
- provide its auditor's details in its response to question C.3.4 of the application form.⁷³

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, to the extent applicable, and signed by at least 2 directors of the applicant.

An applicant that intends to comply with the risk based capital requirements must also attach as Annexure C5 to its application a statement outlining any other business activities it proposes to undertake in addition to being a participant of ASX Clear.⁷⁴ This includes, but is not limited to, the following details:

- all products to be offered to clients (whether directly or through arrangements with other parties), regardless of whether these are traded on the ASX market, another market or exchange, or over the counter (OTC);
- all products to be traded as principal, regardless of whether these are traded on the ASX market, another market or exchange, or OTC;
- whether the applicant will be undertaking securities lending/borrowing, repo/reverse repo or free delivery transactions or offering margin lending; and
- whether the applicant will have foreign currency denominated assets or liabilities on its balance sheet.

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 capital requirements.

4.5 Other compliance requirements

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

- If the applicant seeks to be authorised to clear options market transactions and/or OTC options market transactions but is not, and does not seek to be, authorised to clear the cash market transactions associated with those options market transactions and/or OTC options market transactions, it must appoint a participant that is authorised to clear those cash market transactions.⁷⁵ The clearing agreement must contain the minimum terms set out in Schedule 3 to the ASX Clear Operating Rules.⁷⁶

If applicable, the applicant must indicate in its response to question C.4.1 of the application form whether:

- it is providing a copy of the clearing agreement it has entered into with that participant with its application, in which case it must attach a copy of the agreement as Annexure C6 to its application; or

⁷² See question C.3.3 of the application form.

⁷³ An applicant that is also seeking to be admitted as a participant in the ASX Clear (Futures) facility will be asked to provide similar documents and information in Part F of the application form. It only needs to submit these documents and information once.

⁷⁴ See question C.3.5 of the application form. Under ASX's risk based capital requirements, each participant must have sufficient liquid capital to cover its total risk requirement (TRR). The calculation of TRR needs to capture risks arising from all activities undertaken in the participant legal entity. It is not just restricted to activity on the ASX market.

⁷⁵ ASX Clear Operating Rule 3.2.1(i).

⁷⁶ ASX Clear Operating Rule 9.1.1(c).

- it will be providing this later,⁷⁷ in which case it must provide to ASX a copy of the executed clearing agreement before it will be admitted as a participant in the ASX Clear facility.
- If the applicant is applying to be a general participant, it must attach a pro forma of its clearing agreement as Annexure C7 to its application highlighting where the minimum terms required by Schedule 3 to the ASX Clear Operating Rules are contained.⁷⁸
- If the applicant intends to clear derivatives market transactions (ETOs or ASX futures) for any client, it must attach a pro forma client agreement for those transactions as Annexure C8 to its application highlighting where the minimum terms required by Schedule 5 to the ASX Clear Operating Rules are contained.⁷⁹
- If the applicant is applying to be a direct participant and wishes to clear for a wholly-owned group entity, it must attach as Annexure C9 to its application a legal opinion from a recognised Australian law firm confirming that the relevant body corporate satisfies the definition of “wholly-owned group entity” under the ASX Clear Operating Rules.⁸⁰
- 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 C.4.6 of the application form.⁸¹
- If the applicant intends to clear:
 - for itself and also through another general participant;
 - for a market participant which clears for itself and also clears through another general participant; or
 - for a market participant which clears through two or more general participants,it must confirm that it is aware of, and acknowledges, the risks associated with clearing arrangements involving multiple clearers, as described in ASX Clear Operating Rules Procedure 3.2.2(a), by checking the “Confirmed” box in its response to question C.4.6 of the application form.
- If the applicant intends to clear market transactions effected through two or more approved market operators, it must confirm that it is aware of, and acknowledges, the matters described in ASX Clear Operating Rules Procedure 3.2.3 by checking the “Confirmed” box in its response to question C.4.7 of the application form.
- The applicant must provide a completed and signed ASX Authorised Signatory Appointment Form nominating individuals with the authority to sign documentation and to deal with operational issues on its behalf.⁸² It must indicate in its response to question C.4.8 of the application form whether it is providing the

⁷⁷ The option for an applicant to provide a copy of the executed clearing agreement 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 a participant authorised to clear cash market transactions until it has a reasonable degree of certainty that it will be admitted as a participant.

⁷⁸ See question C.4.2 of the application form and ASX Clear Operating Rule 9.1.1.

⁷⁹ See question C.4.3 of the application form and ASX Clear Operating Rule 7.1.2.

⁸⁰ See question C.4.4 of the application form and ASX Clear Operating Rules Procedure 3.2.2(b).

⁸¹ See question C.4.5 of the application form and ASX Clear Operating Rules 3.2.1(h) and 4.3. Under these provisions, an ASX Clear 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 (ASX Clear Operating Rule 4.3.1(a)). 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 (ASX Clear Operating Rule 4.3.1(b)). 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 (ASX Clear Operating Rule 4.3.2).

⁸² In the case of the ASX Clear facility, see ASX Clear Operating Rule 4.12.1.

signed Authorised Signatory Form with its application (in which case it must attach the form as Annexure C10 to its application) or whether it will be providing the form later.⁸³

An editable version of the ASX Authorised Signatory Form can be downloaded from:
www.asx.com.au/regulation/compliance/compliance-downloads.htm.

- If the applicant is an ADI,⁸⁴ 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 C.5.1 of the application form;⁸⁵ and
 - provide details of its latest Tier 1 capital figure in its response to question C.5.2 of the application form.⁸⁶

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 Operating Rules, as a matter of policy, ASX does not currently accept applications for admission to the ASX Clear facility from entities incorporated outside Australia unless they are a branch of a foreign bank from an approved jurisdiction and they are authorised to carry on banking business in Australia. 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 intends to carry on any part of its business as an ASX Clear participant outside Australia and ASX considers it appropriate to do so, ASX has the power under ASX Clear Operating Rule 3.8.1 and the related Procedure to impose additional requirements for the applicant to be eligible to be admitted as a participant in the ASX Clear 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;

⁸³ 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.

⁸⁴ 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).

⁸⁵ 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>.

⁸⁶ 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)..

- 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 Operating Rules;
 - foreign taxes that might be payable;
 - the law governing the applicant's activities under the ASX Clear 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 Operating Rule 4.19.1), the applicant notify ASX of the details of the proposed Overseas Activity and demonstrate that the proposed Overseas Activity will comply with ASX Clear Operating Rules Procedure 4.19.1.

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.⁸⁷

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 participant⁸⁸);
- 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

⁸⁷ In the case of the ASX Clear facility, see ASX Clear Operating Rule 4.19.5. 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.

⁸⁸ 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.

- 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.⁸⁹

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 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.⁹⁰

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.⁹¹ In this regard, if it intends to have premises,⁹² 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.

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;⁹³
- 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;⁹⁴
- 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;⁹⁵

⁸⁹ 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.

⁹⁰ See question A.7.2 of the application form.

⁹¹ 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)).

⁹² See section 21(1).

⁹³ See section 911D.

⁹⁴ Section 601CW.

⁹⁵ 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.

- 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;⁹⁶
- unless exempted by ASIC,⁹⁷ 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*.⁹⁸

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 Operating Rule 3.8.1, 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 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 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.⁹⁹

⁹⁶ Section 601CF.

⁹⁷ 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 98 and the accompanying text).

⁹⁸ 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*.

⁹⁹ In the case of the ASX Clear facility, see ASX Clear Operating Rules 3.2.1(b) and 4.19.4.

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 facility in accordance with ASX Clear 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 facility has an ongoing obligation to continue to satisfy the applicable admission requirements.¹⁰⁰

In this regard, there are 3 admission requirements of particular significance that continue to apply to an ASX Clear 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;¹⁰¹
- the requirement to have “adequate resources and processes” to comply with its obligations as a participant under the ASX Clear Operating Rules;¹⁰² and
- the requirement to meet the technical and performance requirements of the ASX Clear Operating Rules, including having the necessary organisational and technical resources:
 - to communicate reliably with the clearing system and correctly process clearing messages; and
 - to ensure that clearing messages submitted by the participant do not interfere with the proper functioning, efficiency and integrity of the clearing system.¹⁰³

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

Participants should note the guidance given by ASIC about compliance measures generally:¹⁰⁴

“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 Operating Rules¹⁰⁵ 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

¹⁰⁰ ASX Clear Operating Rule 4.1.1(a).

¹⁰¹ ASX Clear Operating Rule 3.2.1(c).

¹⁰² ASX Clear Operating Rules 3.2.1(e) and 3.5.1.

¹⁰³ ASX Clear Operating Rule 3.2.1(f) and 3.6.1.

¹⁰⁴ ASIC Regulatory Guide 104 *Licensing: Meeting the general obligations*, at paragraphs 31 and 32.

¹⁰⁵ ASX Clear Operating Rules Procedure 3.5.1.

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 facility, or who has conditions imposed on its admission that it finds unacceptable, is entitled to appeal that decision.¹⁰⁶

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.¹⁰⁷

¹⁰⁶ ASX Clear Operating Rules 3.9.3 (in relation to a decision to refuse admission) and 3.1.5 (in relation to a decision to impose a condition on admission).

¹⁰⁷ Rule 3.1.3 of the ASX Enforcement and Appeals Rulebook and the accompanying Procedure.