

CIRCULAR



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**To: All Members
Market Representatives
Registered Representatives**

No: 92/98

Dealing by Employees of Futures Brokers use of Corporate Structures

Compliance and Surveillance have noted that some employees of Member organisations are using their personal companies to effect futures transactions. Employees may, using a company name, instruct a futures broker other than their employer to execute an order in the employee's company name.

The purpose of this Circular is to advise Members that the Exchange considers it best practice that where Member employees use their personal company structures to effect futures transactions, it should ensure that these transactions are effected through the employer as agent of the employee and not through another Member organisation.

Subsection 1267(7) of the Corporations Law provides:

"A person who is an employee of a Member organisation of a futures exchange in connection with a business of dealing in futures contracts carried on by the Member organisation shall not, as principal, deal, or agree to deal, in futures contracts unless the Member organisation acts as the agent of the person in respect of the transaction."

Subsection 1267(7) will therefore apply to a person who is an employee of the Member organisation. The rationale of subsection 1267(7) is to ensure that "officers" of a Member organisation use their employer as their agent to effect any dealings for the officers own account. "Employee" is widely defined in the Corporations Law to include:

- (i) officers of the Member organisation (ss1267(8)); and
- (ii) a person who performs services, pursuant to a subsisting agreement, for the Member organisation or the futures broker (ss1267(10))

["Officer" includes directors, secretaries, executive officers or employees (s82A)].

What is the position where the person who is an employee of a Member organisation and uses a company structure to trade futures contracts?

Subsection 1267(7) applies to persons who are employees and would not technically apply to body corporate structures, that is, unless the body corporate was recognised as the employee of the Member

organisation. The Exchange Articles however enhance the effect of ss1267(7) and provide guidance in relation to use of body corporate structures by employees of Member organisations.

Members are referred to Circular 67/98 which provides details of recent rule amendments to Articles 3.6(3)(o) and 4.6(4)(l).

The Exchange Articles give effect to the operation of subsection 1267(7) where Article 3.6(3)(o) (Floor Members) and Article 4.6(4)(l) (Associate Members) provide that the respective Members must not knowingly deal in futures or option contracts on behalf of a director, partner or employee of any other Floor Member or Associate Member who deals on behalf of others, or on behalf of any account in which such director, partner or employee has an interest either direct or indirect.

For the purpose of Articles 3.6(3)(o) and 4.6(4)(l) "employee" is defined to include:

".....persons who as a representative of the Member advise or solicit instructions from persons or corporations in relation to the sale or purchase of futures or options contracts."

Thus, where an employee of a futures broker uses their personal company structure to trade futures contracts, the requirements in Articles 3.6(3)(o) and 4.6(4)(l) will prevent a Floor Member or Associate Member from transacting any business in the name of that personal company structure as the employee will be operating a trading account in which the employee has a direct interest. A personal company structure will generally be identified where the sole director of the body corporate is the employee of a futures broker or where the employee of the futures broker is a shareholder of the body corporate.

The following scenario has also been raised with the Exchange, where a company structure is used where one or both of the directors of the company structure are employees of Member organisations. In this instance the Exchange recommends that:

- (1) where only one director is an employee of a Member organisation and that director is responsible for instructing on trading decisions for the company, then the company should effect its futures transactions through that directors Member organisation as agent;
- (2) where more than one of the directors of the company structure are employees of different Member organisations (e.g., a husband and wife are employed by different Member organisations and are joint company directors), and only one director actively makes the futures trading decisions, then the Exchange would consider that futures transactions should be effected through that directors Member organisation as agent.

The Australian Securities Commission has supported this approach to ensure that the rationale behind subsection 1267(7) is not avoided simply by the use of a corporate entity. Members are also advised to review their Compliance Manuals at Section 10 "Dealings on Behalf of other Members' Employees".

Should any Members or employees wish to discuss or clarify any matters raised in this Circular, please contact Ms Deborah Horne, General Manager Compliance and Surveillance on (ph) 9256 0650 or Ms Johanna Turner, Assistant General Counsel, Legal Compliance on (ph) 9256 0556.

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