

## WAIVERS AND IN-PRINCIPLE ADVICE

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>To assist participants and entities applying for admission as a participant of the ASX clearing facility to understand how ASX deals with applications for waivers of, and requests for in-principle advice in relation to, the ASX Clear Operating Rules.</li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>ASX's power to waive an ASX Clear Operating Rule</li> <li>The decision-making principles that ASX applies when considering a waiver application</li> <li>How to apply for a waiver</li> <li>The usual timetable for waiver decisions</li> <li>The publication of waiver decisions</li> <li>In-principle advice on the application of an ASX Clear Operating Rule to a particular situation or on ASX's preparedness to grant a particular waiver</li> </ul>
<p><b>Related materials you should read</b></p>	<ul style="list-style-type: none"> <li>Guidance Note 1 <i>Admission as a Participant</i></li> </ul>

**History:** Guidance Note 4 amended 26/08/16. Previous versions of this Guidance Note were issued in 08/13 and 06/15, and under the ACH Clearing Rules as Guidance Note No. 9 in 05/04, 06/05 and 09/07.

**Important notice:** ASX has published this Guidance Note to assist participants to understand and comply with their obligations under the ASX Clear Operating Rules. 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 participants 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 to assist participants and entities applying for admission as a participant of the ASX clearing facility to understand how ASX Clear Pty Limited (ASX) deals with applications for waivers of, and requests for in-principle advice in relation to, the ASX Clear Operating Rules.

## 2. ASX's waiver powers

ASX Clear Operating Rule 1.6.1 empowers ASX at any time to relieve any person or class of person from the obligation to comply with a provision of the Rules (other than an indemnity or disclaimer provision<sup>1</sup>), either generally or in a particular case or category. ASX may do so on conditions. If conditions are imposed on a waiver, all of the conditions must be complied with for the waiver to be effective.<sup>2</sup>

ASX may withdraw a waiver at any time.<sup>3</sup>

## 3. The principles applied by ASX when considering waiver requests

In deciding whether or not to grant, and what conditions ought to be imposed on, a waiver, ASX will have regard to the following principles:

- to justify the waiver, the applicant must demonstrate that it will suffer commercial detriment or other disadvantage if the waiver is not granted; and
- ASX must be satisfied that granting the waiver is not inconsistent with:
  - ASX's statutory obligations as the operator of a clearing facility; or
  - the policy underlying the particular rule sought to be waived,and that it will not adversely affect the reputation, integrity or efficiency of the ASX's clearing facility.

Waivers will not be granted retrospectively.

Where appropriate, ASX may impose an expiry date on a waiver.<sup>4</sup> This affords ASX an opportunity to review the ongoing need for, and desirability of, continuing the waiver.

<sup>1</sup> ASX Clear Operating Rule 1.6.3.

<sup>2</sup> ASX Clear Operating Rule 1.6.1. A failure to comply with a condition imposed by ASX on the waiver of an Operating Rule is also regarded as a contravention of that Operating Rule: see ASX Clear Operating Rule 1.6.2.

<sup>3</sup> ASX Clear Operating Rule 1.6.1.

<sup>4</sup> ASX Clear Operating Rule 1.6.4.

### 4. Preliminary discussions with ASX

Before submitting a formal application for a waiver of the ASX Clear Operating Rules, ASX recommends that applicants first discuss the matter with ASX Participants Compliance or, if the waiver relates to capital requirements, ASX Counterparty Risk Assessment.

ASX Participants Compliance or Counterparty Risk Assessment (as appropriate) will be able to provide general advice on the waiver process and a preliminary view on:

- the likelihood of a particular waiver being granted;
- the likely timetable for a decision on a waiver application, given the nature and complexity of the application and the current workloads within the respective departments; and
- whether it is appropriate for the applicant to request in-principle advice on the waiver application (see below) ahead of making the formal waiver application.

### 5. Applications for waivers

An application for a waiver must be in writing<sup>5</sup> and submitted by the applicant or a professional adviser or representative acting on behalf of the applicant. It should be addressed to the General Manager, Participants Compliance or, if the waiver relates to capital requirements, the Manager, ASX Counterparty Risk Assessment.

If the rule for which a waiver is sought has an equivalent rule in another ASX Rulebook which applies to the participant, the application should also include a request for a waiver of that other rule.

Unless the applicant has already received in-principle advice that ASX would be prepared to grant the waiver,<sup>6</sup> the application should include:

- the specific ASX Clear Operating Rule or Rules to be waived;<sup>7</sup>
- an explanation of the transaction (including diagrams where appropriate) or other event or circumstance giving rise to the need for the waiver;
- the reason for the waiver, including an explanation of the commercial ramifications if the waiver is not granted; and
- where applicable, the start and end date of the requested waiver.

This information should be provided in sufficient detail to enable ASX to fully assess the application and to be satisfied that giving the waiver requested will not compromise the underlying policy of the rule or rules in question. ASX may reject or defer consideration of an application for a waiver that does not include this information in sufficient detail.

The onus is on the applicant to establish that there is a sufficiently strong commercial case to justify the granting of the waiver and that granting the waiver:

- is consistent with the statutory obligations imposed on ASX as the operator of a licensed clearing facility;
- will not undermine the principles on which the ASX Clear Operating Rules are based or the policy underlying the particular rule to be waived; and

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<sup>5</sup> ASX Clear Operating Rule 1.6.1.

<sup>6</sup> In which case, the application for the waiver can simply reference the in-principle advice received from ASX and confirm that the facts outlined in the request for the in-principle advice have not changed (see "10 In-principle advice" on page 5 below).

<sup>7</sup> ASX will not accept an application for a waiver from "any applicable" ASX Clear Operating Rules or from the ASX Clear Operating Rules generally.

- will not otherwise adversely affect the reputation of the clearing facility ASX operates.

In this regard, it is helpful if the application for a waiver identifies any previous waiver decisions that have been made by ASX in analogous circumstances, together with an explanation as to why those particular decisions are considered relevant to the application.<sup>8</sup> In saying this, however, it should be noted that waivers are granted on a case-by-case basis and the fact that ASX has granted a waiver in circumstances which the applicant considers analogous to its own does not guarantee that ASX will grant a similar waiver to the applicant.

## 6. Reasons for decision

Following its consideration of an application for a waiver, ASX will inform the applicant in writing of its decision on whether or not to grant the waiver and the basis for that decision.

If the waiver is granted, the decision will set out the details of the waiver granted, including any applicable conditions. The decision will also set out the underlying policy behind the Operating Rule that is being waived and why it is considered that the waiver does not offend that policy. This may include excerpts from the materials in support of the application provided by the applicant.

If the waiver is not granted, the decision will state that fact and the reason why the waiver has been refused. For example, this might be because the applicant has not made a sufficiently strong commercial case to justify the grant of the waiver or because ASX considers that granting the waiver would undermine the underlying policy of the rule sought to be waived.

## 7. Timetable for decision

ASX aims to advise an applicant for a waiver of its decision within 20 business days of accepting the application.

If an application for a waiver does not provide the information mentioned above with its application or subsequently requests additional or different waivers, ASX may not be able to meet this timeframe.

It should be noted that the time it takes ASX to process an application for a waiver is very much a function of the quality and completeness of the application. The better and more complete an application, the more quickly and efficiently ASX is likely to be able to process it. ASX therefore encourages applicants for waivers to engage professional advisers who are experienced in ASX matters and to seek their advice and assistance in preparing their waiver application.

## 8. Publication of waivers

The ASX Clear Operating Rules require that waivers granted by ASX are published from time to time.<sup>9</sup> The publication of waivers facilitates the transparency of decisions made by ASX.

Details of waivers granted are usually published on the ASX website twice monthly in the form of a waivers register.<sup>10</sup> The waivers register includes the name of the entity which received the waiver, the terms and conditions of the waiver and brief reasons why it was granted.

ASX is also required to report all waivers of the ASX Clear Operating Rules it grants to the Australian Securities and Investments Commission ("ASIC") under a memorandum of understanding between ASIC and ASX.

If the timing of public disclosure of a waiver is cause for concern (for example, for reasons of commercial sensitivity), an applicant for a waiver should consider seeking in-principle advice (see below) in the first instance and then making a formal application for the waiver at a more appropriate time.

<sup>8</sup> Copies of previous waiver decisions by ASX can also be viewed in the waivers register. To access the waivers register, click on the "Waivers" tab at <http://www.asx.com.au/regulation/rules/asx-clear-operating-rules.htm>.

<sup>9</sup> ASX Clear Operating Rule 1.6.5.

<sup>10</sup> See the "Waivers" tab at <http://www.asx.com.au/regulation/rules/asx-clear-operating-rules.htm>.

For privacy reasons, the names of individuals who are involved in or affected by a waiver will not generally be published in the waivers register, unless the information is in the public domain. References to such individuals will usually be replaced by "Person A" or something similarly anonymous.

### 9. No right of appeal on waiver decisions

A decision by ASX not to grant a waiver, or to impose a condition on the grant of a waiver, is not subject to appeal to the ASX Appeals Tribunal.<sup>11</sup>

### 10. In-principle advice

In an appropriate case, ASX may be prepared to give in-principle advice on the application of an Operating Rule to a particular situation or on ASX's preparedness to grant a particular waiver. The former can be helpful in working out whether or not a waiver is required. The latter can be helpful in managing any timing issues around the granting and publication of waiver decisions.

Any in-principle advice given by ASX will be expressed as a non-binding statement of ASX's intent based on the facts known at the time. It may be given subject to conditions and apply for a limited time. It is treated by ASX as a confidential communication and is not released by ASX to the market.

An application for in-principle advice must be in writing and submitted by the applicant or a professional adviser or representative acting on behalf of the applicant. It should be addressed to the General Manager, Participants Compliance or, if the application relates to capital requirements, the Manager, ASX Counterparty Risk Assessment.

Where the applicant is seeking advice on the application of an Operating Rule to a particular situation, the application should include:

- the specific Operating Rule or Rules in relation to which the advice is sought;<sup>12</sup> and
- an explanation of the transaction (including diagrams where appropriate) or other event or circumstance about which the advice is sought.

This information should be provided in sufficient detail to enable ASX to fully assess the matter and to be satisfied that giving the advice requested is consistent with the underlying policy of the Operating Rule or Rules in question. ASX may reject or defer consideration of an application for in-principle advice that does not include this information in sufficient detail.

An application for in-principle advice on ASX's preparedness to grant a waiver of the rule should include the same information as mentioned above in relation to an application for a waiver of that rule. If ASX indicates in its in-principle advice that it is prepared to grant a particular waiver, the applicant will need to lodge a formal written request for the waiver in due course that references the in-principle advice received from ASX and confirms that the facts outlined in the request for the in-principle advice have not changed.

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<sup>11</sup> See Rule 3.1.3 of the ASX Enforcement and Appeals Rulebook.

<sup>12</sup> ASX will not accept an application for in-principle advice to be given in respect of "any applicable" ASX Clear Operating Rules or the ASX Clear Operating Rules generally.