



ASX

Reducing Red Tape:

Results of Consultation Process and Invitation to Comment on Additional Rule and Procedure Changes Guidance Note 1 Admission as a Participant New Participant Application Form

Consultation Paper

16 February 2015

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Invitation to comment:

ASX is seeking comments from participants, their advisers and other stakeholders on:

- the further Rule and Procedure changes identified under the heading “Additional red tape savings” below;
- the drafts of Guidance Note 1 *Admission as a Participant* for the ASX and ASX 24 markets and the ASX Clear, ASX Clear (Futures) and ASX Settlement facilities (Annexures **C**, **D**, **E**, **F** and **G** respectively); and
- the draft new participant admission application form for these markets and facilities (Annexure **H**).

Due date for comments:

Submissions are due by 20 March 2015.

Where to send comments:

Submissions should be sent by email to:

bill.woods@asx.com.au

or by post to:

ASX Compliance Pty Limited
 20 Bridge Street
 Sydney NSW 2000
 Attention: Bill Woods

ASX prefers to receive submissions in electronic form.

Confidentiality:

If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly in your submission.

Submissions not marked as ‘confidential’ will be made publicly available on ASX’s website.

Meetings:

ASX is available to meet with interested parties for bilateral discussions on the consultation materials.

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Introduction

1. On 31 October 2014 ASX issued a public consultation paper [Reducing Red Tape – proposed amendments to ASX’s admission and notification requirements](#), proposing changes to standardise and streamline its admission and notification requirements for the ASX and ASX 24 markets and the ASX Clear, ASX Clear (Futures) and ASX Settlement facilities that service those markets.

Reducing Red Tape Consultation response

2. ASX received 11 written submissions in response to the consultation paper, 8 of which were designated “confidential”. The non-confidential written submissions are available on the ‘Public Consultations’ page of the ASX website (<http://www.asx.com.au/regulation/public-consultations.htm>) next to the entry for 31/10/14. The written submissions covered 18 separate participants and 3 non-participants. ASX also received informal feedback from another 4 participants.
3. ASX received overwhelming support for the proposals set out in the *Reducing Red Tape* consultation paper and therefore ASX intends to press ahead with, and seek regulatory approval for, all of the substantive changes proposed in that paper.

Final form of *Reducing Red Tape* Rule and Procedure amendments

4. The final form of the Rule and Procedure amendments for which ASX will be seeking regulatory approval (subject to any further feedback ASX may receive on some new Rule and Procedure changes ASX has added to the package referred to below) are attached in Annexure A. Annexure A is divided into the following parts:

- Part 1** - changes to ASX Rules
- Part 2** - changes to ASX Procedures
- Part 3** - changes to ASX 24 Rules
- Part 4** - changes to ASX 24 Procedures
- Part 5** - changes to ASX Clear Rules
- Part 6** - changes to ASX Clear Procedures
- Part 7** - changes to ASX Clear (Futures) Rules
- Part 8** - changes to ASX Clear (Futures) Procedures
- Part 9** - changes to ASX Settlement Rules
- Part 10** - changes to ASX Settlement Procedures
- Part 11** - changes to ASX Enforcement and Appeals Rules
- Part 12** - changes to ASX Enforcement and Appeals Procedures

5. As part of reviewing the consultation submissions and finalising its response, ASX has identified some extra Rule and Procedure changes to add to the *Reducing Red Tape* package that will help to further reduce the compliance burden of participants. Some of these were identified by respondents to the consultation paper and others by ASX. These additional Rule and Procedure changes are set out under the heading “Additional red tape savings” below.
6. ASX has made some drafting changes to the proposed Rule and Procedure changes it consulted upon, in some cases in response to submissions received and in others of its own volition. The yellow shaded commentary boxes in Annexure A identify whether the Rule and Procedure amendments are in the form originally consulted upon, whether there have been drafting changes to the amendments originally consulted upon, or whether they are new amendments that ASX has added to the *Reducing Red Tape* package.

7. ASX did receive some comments in response to the proposed Rule and Procedure changes set out in the *Reducing Red Tape* consultation paper with which it did not agree and which it therefore did not adopt. ASX's response to those comments is included at the end of this paper under the heading "ASX's Response to Specific Submissions".
8. Subject to:
- any further changes it may make in response to any comments it may receive in relation to the new Rule and Procedure amendments ASX has added to the *Reducing Red Tape* package mentioned below; and
 - to ASX receiving the necessary regulatory approvals (including non-disallowance by the Minister of the Rule amendments under sections 793E and 822E of the Corporations Act),

ASX intends that the *Reducing Red Tape* Rule and Procedure amendments will come into effect on 1 June 2015, so that they are in place for the financial year ending 30 June 2015.

Participants will therefore be relieved of a number of year-end obligations they would otherwise had to have complied with, including:

- in the case of ASX Clear participants, the requirements to:
 - obtain annual written representations from their responsible executives under ASX Clear Operating Rule 4.22.1;
 - have their responsible executives provide an annual continuing education self-assessment form under ASX Clear Operating Rule 4.1.1(f) and the related Procedure; and
 - submit to ASX an annual ASX Clear Key Risks and Internal Systems Statement; and
- the requirement for ASX Clear and ASX Clear (Futures) participants to lodge with ASX their annual ASIC Form FS 71 audit report.¹

Participants will also benefit, on and from 1 June 2015, from the removal of a number of notification obligations and the extension of the time limit for others.

Additional red tape savings

9. As mentioned previously, as part of reviewing the consultation submissions and finalising its response, ASX has identified some additional Rule and Procedure changes it can make to further reduce red tape for participants. These include:
- The removal of the requirement in ASX Operating Rule 3280 for ASX market participants to immediately notify all of their clients of ASX's power under the ASX Operating Rules to cancel or amend market transactions or crossings (which also leads to the consequential deletion of ASX Operating Rule 3281).²
 - The removal of the 2pm and 2.30 pm intra-day deadlines for ASX 24 participants to designate, allocate and assign trades from the morning session in ASX 24 Operating Rules Procedure 3713.³

¹ This is being replaced with an obligation simply to notify ASX where a significant issue has been identified by the auditor in that report.

² It is no longer considered necessary that ASX impose such a requirement, since all transactions on the ASX market are subject to, and take place in accordance with, the ASX Operating Rules in any event. This is a matter for participants to consider in their contractual arrangements with clients, in terms of minimising their exposure to the client in the event that ASX does exercise its powers to cancel or amend a transaction.

³ Feedback from participants has confirmed that these cut-offs are administratively onerous to meet and they are not required for ASX's operational or risk management processes.

- The removal of the requirement presently in ASX Clear Operating Rule 19.2.3(c) for an ASX Clear participant to notify ASX if it becomes aware that any market participant for which it provides clearing services is the subject of any regulatory action in connection with the market participant's activities as a market participant.⁴
 - Picking up a suggestion made by the Stockbrokers Association of Australia, the removal of the requirement in ASX Settlement Operating Rule 7.1.10 for settlement participants to obtain ASX's consent to a bulk change of HINs.
 - The removal of the admission criteria in ASX Settlement Operating Rule 4.4.1(d) and (e) requiring applicants seeking admission as a specialist settlement participant to meet the business integrity requirements in ASX Settlement Operating Rule 4.11.1 and for their principals to meet the capacity requirements in ASX Settlement Operating Rule 4.10.1.⁵
 - The removal of the admission criterion in ASX Settlement Operating Rule 4.4A.1(d) requiring applicants seeking admission as a product issuer settlement participant and their principals to meet the capacity requirements in ASX Settlement Rule 4.10.1.⁶
 - The introduction into each ASX Rulebook⁷ of a provision to the effect that where a participant in one ASX market or facility is also a participant in another ASX market or facility and a notice being provided relates to both participations, a notice given in accordance with the operating rules of the other market or facility is taken to be given in accordance with the operating rules of the first-mentioned market or facility.⁸
 - Picking up another suggestion made by the Stockbrokers Association of Australia, the addition of a note to ASX Clear Operating Rule 4.23.7 stating that one way in which an ASX Clear participant can notify ASX of the various matters referred to in that rule is to copy ASX in on any corresponding notification given to ASIC under Rule 3.5.10 of the ASIC Market Integrity Rules (ASX Market) 2010.⁹
10. ASX is keen to hear from participants, their advisers and other stakeholders whether they have any comments in relation to these additional Rule and Procedure changes.

Guidance Note 9 *Offshoring and Outsourcing*

11. ASX has taken on board a number of the comments made by respondents to the *Reducing Red Tape* consultation paper in relation to ASX's proposed Guidance Note 9 *Offshoring and Outsourcing*. The final form of that Guidance Note is attached as **Annexure B**, in mark-up format identifying the changes made to the consultation version.

⁴ This is on the basis that the market participant concerned will have a separate obligation under the ASX Operating Rules to notify ASX of that regulatory action.

⁵ These types of participation generally only last for a short period and for a specific purpose, such as facilitating the settlement obligations relating to a specific takeover or buyback. Subjecting specialist settlement participant applicants to the demands of proving high business integrity in the same manner and to the same extent as other participants in ASX markets and facilities, in ASX's opinion, is not warranted for these type of short and limited participations. Instead, specialist settlement participant applicants will continue to be subject to the requirement that they meet the capacity requirements in ASX Settlement Rules 4.4.1(d) and 4.10.1. ASX will also be able to deny admission to someone ASX considers inappropriate to be a specialist settlement participant under its general discretion in that regard in new ASX Settlement Rule 4.2.3A.

⁶ The capacity requirements are subsumed in the business integrity requirements that the applicant must meet under ASX Settlement Operating Rules 4.4A.1 and 4.11.1 and ASX Settlement Operating Rules Procedure 4.11.1.

⁷ See the amendments to ASX and ASX 24 Operating Rules Procedure 6901 and new ASX Clear Operating Rules Procedure 1.7.2, ASX Clear (Futures) Operating Rules Procedure 19.1 and ASX Settlement Operating Rules Procedure 1.10.1 in Annexure A.

⁸ This change is being made to alleviate the burden of duplicative notification obligations.

⁹ This change is also being made to alleviate the burden of duplicative notification obligations.

12. Again, ASX did receive some comments in relation to Guidance Note 9 with which it did not agree and which it therefore did not adopt. ASX's response to those comments is also included in the attachment to this paper entitled "ASX's Response to Specific Submissions".
13. ASX will now be preparing separate versions of Guidance Note 9 for each of the ASX and ASX 24 markets and the ASX Clear, ASX Clear (Futures) and ASX Settlement facilities and adding them to the Rulebooks for those markets and facilities, also with an effective date of 1 June 2015.

Guidance Note 1 *Admission as a Participant*

14. As foreshadowed in the *Reducing Red Tape* consultation paper, ASX has finalised drafts of Guidance Note 1 *Admission as a Participant* for each of the ASX and ASX 24 markets and the ASX Clear, ASX Clear (Futures) and ASX Settlement facilities. These drafts incorporate and reflect the *Reducing Red Tape* Rule and Procedure amendments. The drafts are respectively attached as **Annexures C, D, E, F and G** to this paper.
15. While Guidance Note 1 is mostly relevant to new applicants seeking to be admitted as a participant in the above-mentioned markets and facilities, participants will be aware that they have an ongoing obligation to continue to comply with applicable admission requirements. One key admission requirement in this regard is the obligation for an applicant to have "adequate resources and processes" to comply with its obligations as a participant under the operating rules for the market or facility in which it is seeking to become a participant.¹⁰
16. Guidance Note 1 addresses the requirement to have adequate resources and processes in a section headed "Resources and processes".¹¹ That section sets out the key processes that ASX expects an applicant seeking admission to any of the above ASX markets or facilities to have documented and in place to comply with its primary obligations under the Operating Rules for that market or facility.
17. Given the obligation for participants to continue to comply with the admission requirements, effectively all participants will be expected to have up-to-date documented processes to comply with their primary obligations under the relevant Operating Rules, as outlined in Guidance Note 1.
18. ASX is therefore keen to hear from participants, their advisers and other stakeholders whether they have any comments in relation to the drafts of Guidance Note 1 for ASX's various markets and facilities, particularly in relation to section headed "Resources and processes".

New participant admission application form

19. ASX has finalised a draft new application form for applicants seeking admission as a participant of the ASX and ASX 24 markets and the ASX Clear, ASX Clear (Futures) and ASX Settlement facilities. The draft form incorporates and reflects the *Reducing Red Tape* Rule and Procedure amendments and draft Guidance Note 1. It is attached as **Annexure H** to this paper.
20. The new application form is intended to guide applicants through the admission requirements and assist them in generating the documentation required to accompany the application. ASX has endeavoured to make the form as simple and mistake-proof as possible.
21. As part of the changes it is making to its admission processes, ASX will no longer expect applicants applying for admission to the ASX Clear and ASX Settlement facilities to generate and lodge with ASX a general "management plan". Instead, applicants will have to produce the specific annexures referred to in the application form, including

¹⁰ See the amendments to ASX and ASX 24 Operating Rule 1000(d), ASX Clear Operating Rules 3.2.1(e) and 3.5.1, ASX Clear (Futures) Operating Rule 4.2(e), and ASX Settlement Operating Rules 4.3.1(h), 4.4.1(g), 4.4A.1(g), 4.5.1(g) and 4.18.1 in Annexure A.

¹¹ Section 3.5 of the Guidance Notes relating to the ASX and ASX 24 markets and ASX Clear and ASX Clear (Futures) facilities and section 3.4 of the Guidance Note relating to the ASX Settlement facility.

a written certification that they have adequate resources and processes in place to comply with their obligations under the relevant Operating Rules, having regard in particular to the guidance on that matter in Guidance Note 1.

Readers should also note that ASX will be able to call for evidence at any time (before or after admission) as to the basis on which that written certification was provided.

22. ASX is keen to hear from participants, their advisers and other stakeholders whether they have any comments in relation to the draft application form, including any suggestions for improvements.

Transitional arrangements

23. A number of participants raised in their consultation submission what transitional arrangements ASX will apply in relation to the *Reducing Red Tape* Rule and Procedure changes and also in relation to Guidance Notes 1 and 9.

24. Given the nature of the *Reducing Red Tape* Rule and Procedure changes, which with 3 notable exceptions mentioned in paragraphs 25 - 27 below mostly involve a reduction in the compliance obligations of participants, ASX does not see the need to defer the introduction of, or allow any grace period in relation to, those Rule and Procedure changes.

Accordingly, subject to the exceptions mentioned in paragraphs 25 - 27 below, ASX will expect all participants to comply with, and thereby take the benefit of, the *Reducing Red Tape* Rule and Procedure changes on and from their effective date of 1 June 2015.

25. The first exception to the position outlined in paragraph 24 above relates to the modified admission requirement that an applicant must have adequate resources and processes to comply with its obligations as a participant under the relevant Operating Rules.¹²

As mentioned above, since participants have an ongoing obligation to comply with applicable admission requirements, all participants will be expected to have up-to-date documented processes to comply with their primary obligations under the relevant Operating Rules, as outlined in the section headed “Resources and processes” in Guidance Note 1.

While ASX would expect all participants already to have in place appropriate documented processes to comply with all of their key obligations as participants, ASX acknowledges that some participants may need time to review, and possibly also update, their key processes in order to align them with the expectations in Guidance Note 1. ASX will allow existing participants a grace period of until 1 January 2016 before ASX will expect them to have completed this exercise.

It should be noted that while the admission requirement to have adequate resources and processes will apply as an ongoing obligation to all participants, the requirement to provide a written certification to that effect only operates on or before admission and therefore will only apply to new applicants. Once admitted, participants will be expected to continue to have up-to-date documented processes in place to comply with their key obligations under the relevant Operating Rules but they will not be required to provide a certification to ASX in that regard.

26. The second exception to the position outlined in paragraph 24 above applies to participants in the ASX Clear (Futures) facility. As a result of harmonising the notification obligations across the various ASX Rulebooks, participants in that facility will on and from 1 June 2015 become subject to a number of new notification obligations, including the obligation to notify ASX of:

- any information previously supplied to ASX being incomplete, inaccurate or misleading (new ASX Clear (Futures) Operating Rule 4.11C);

¹² See note 10 above.

- a significant issue identified by the participant's auditor in an ASIC Form FS 71 audit report (modified ASX Clear (Futures) Operating Rule 4.14(aa));¹³
- any changes to its financial year end (new ASX Clear (Futures) Operating Rule 4.14(ab)(i));
- the appointment, removal or resignation of its auditor (new ASX Clear (Futures) Operating Rule 4.14(ab)(ii));
- any change in its name or address (new ASX Clear (Futures) Operating Rule 4.14(c));
- any change in controller (new ASX Clear (Futures) Operating Rule 4.14(da));
- any other material change in information concerning its business as a clearing participant from that previously provided to ASX (new ASX Clear (Futures) Operating Rule 4.14(db));
- the appointment of, or changes in, its authorised signatories (new ASX Clear (Futures) Operating Rule 4.14(ea));
- any event that will adversely affect the participant's financial position or solvency (modified ASX Clear (Futures) Operating Rule 4.14(f));¹⁴
- legal proceedings that may affect the operations of ASX Clear (Futures) or the interpretation of the Rules (new ASX Clear (Futures) Operating Rule 4.14(m));
- regulatory action relating to its activities as a Clearing Participant (new ASX Clear (Futures) Operating Rule 4.14(n));
- it being unable to communicate with the ASX Clear (Futures) (new ASX Clear (Futures) Operating Rule 4.14(o));
- any notification to its insurer of any claim, potential claim or circumstance that might give rise to a claim, that relates in any way to its activities as a Clearing Participant (paragraph (c) of new ASX Clear (Futures) Operating Rules Procedure 4.14(e)); and
- any proposal to locate or relocate any part of its business as a clearing participant (including, without limitation, any gateway or other means of communicating clearing messages to ASX Clear (Futures) or any employees) outside Australia (new ASX Clear (Futures) Operating Rule 4.15A(a)).

These new notification obligations essentially replicate the notification obligations of participants in other ASX markets and facilities. Those ASX Clear (Futures) participants who are participants of other ASX markets and facilities (as most are) will therefore already be subject to, and have the processes in place to comply with, these obligations.

ASX expects all ASX Clear (Futures) participants to comply with the new and modified notification obligations on and from their effective date of 1 June 2015.

ASX will be issuing a draft new ASX Clear (Futures) Operating Rule Guidance Note 8 *Notification Obligations* to assist participants to understand and comply with their new and modified notification obligations well ahead of 1 June 2015. It will also be issuing updated drafts of Guidance Note 8 *Notification Obligations* for each of ASX's

¹³ This replaces the requirement presently in ASX Clear (Futures) Operating Rule 4.14(aa) for participants to lodge an ASIC Form FS 71 audit report annually with ASX.

¹⁴ This replaces the requirement presently in ASX Clear (Futures) Operating Rule 4.14(f) for participants to notify ASX of the appointment of a receiver or liquidator and/or the bankruptcy of any partner or director.

other markets and facilities well ahead of 1 June 2015, to assist participants in those markets and facilities to understand and comply with their modified notification obligations.

Those Guidance Notes will formally come into effect on 1 June 2015, at the same time as the new and modified notification obligations.

27. The third exception to the position outlined in paragraph 24 above also applies to participants in the ASX Clear (Futures) facility. Currently those participants are required by ASX Clear (Futures) Operating Rule 4.14(e) to effect and maintain such form of professional indemnity (or equivalent) insurance as ASX Clear (Futures) may from time to time determine to be appropriate to protect the interests of their clients. As a result of harmonising the insurance obligations across the ASX Clear and ASX Clear (Futures) Rulebooks, the professional indemnity insurance requirements for participants in the ASX Clear (Futures) facility will be specified in somewhat more detail in ASX Clear (Futures) Operating Rules Procedure 4.14(e).

ASX does not expect participants in the ASX Clear (Futures) facility to amend or re-document existing insurance policies to meet the requirements of Procedure 4.14(e). However, as and when those policies come up for renewal, ASX will expect participants to align their insurance arrangements with the requirements in Procedure 4.14(e).

28. As to Guidance Note 1 *Admission as a Participant*, other than the guidance under the headings “Resources and processes” and “Ongoing compliance with admission requirements”, that Guidance Note is mostly of relevance to applicants seeking admission as a participant in the ASX and ASX 24 markets and the ASX Clear, ASX Clear (Futures) and ASX Settlement facilities.

ASX’s position on transitional arrangements in relation to the requirement to have adequate resources and processes is set out in paragraph 25 above.

29. As to Guidance Note 9 *Offshoring and Outsourcing*, that Guidance Note will come into force on 1 June 2015, when ASX’s uniform regime for regulating offshoring and outsourcing comes into effect.

ASX would note that participants have an existing obligation to have appropriate management supervision, compliance and risk management processes in place to ensure that any offshored or outsourced activities meet their obligations under the applicable Operating Rules and so that obligation is not new. The detailed guidance on the scope that obligation in Guidance Note 9, however, is new and ASX therefore acknowledges that some participants may need time to review, and possibly also update, their existing offshoring and outsourcing arrangements in order to align them with the expectations in Guidance Note 9. ASX will allow existing participants a grace period of until 1 January 2016 before ASX will expect them to have completed this exercise.

Any new offshoring or outsourcing arrangements entered into on or after 1 June 2015 will be expected to comply with the expectations in Guidance Note 9.

Invitation to comment

30. ASX now invites comments from participants, their advisers and other stakeholders on:
- the further Rule and Procedure changes identified under the heading “Additional red tape savings” above;
 - the drafts of Guidance Note 1 *Admission as a Participant* for each of the ASX and ASX 24 markets and the ASX Clear, ASX Clear (Futures) and ASX Settlement facilities (**Annexures C, D, E, F and G** respectively); and
 - the draft new participant admission application form for these markets and facilities (**Annexure H**).
31. If you wish to provide comments on these matters, please do so by Friday 20 March 2015 by email to the following email address:

bill.woods@asx.com.au

or by post to:

ASX Compliance Pty Limited
20 Bridge Street
Sydney NSW 2000
Attention: Bill Woods

ASX prefers to receive submissions in electronic form.

32. ASX is proposing to make the submissions it receives in response to this further consultation paper publicly available on its website, unless a respondent clearly indicates that it wishes its submission to remain confidential.

Attachment – ASX’s response to specific submissions

Most respondents to the *Reducing Red Tape* consultation paper simply indicated their agreement with the Rule and Procedure changes proposed by ASX without providing specific comments. The support for the changes was overwhelming.

The commentary below sets out ASX’s response to specific submissions that were made by respondents to the *Reducing Red Tape* consultation paper. Mostly this occurred where the respondent indicated that they did not agree with, or were unsure about, a particular Rule or Procedure amendment. Since most submissions were given on a confidential basis, in most cases the name of the respondent is not able to be identified.

Standardise and streamline ASX’s admission requirements

Australian Financial Services Licence (AFSL) requirements

1. One respondent suggested that ASX should discontinue its existing practice of requiring applicants seeking to be admitted as an ASX or ASX 24 principal trader to produce, at their expense, a legal opinion to confirm they are not required to hold an AFSL.

ASX has received advice from senior counsel that ASX and ASX 24 principal traders generally will not require an AFSL to deal in securities or derivatives or to make a market, if their only financial services activity in Australia is dealing on their own account. Accordingly, ASX will be discontinuing its existing practice of requiring applicants seeking to be admitted solely as an ASX or ASX 24 principal trader to produce a legal opinion to confirm they are not required to hold an AFSL.

This change in ASX’s processes is reflected in the attached drafts of Guidance Note 1 *Admission as a Participant* for the ASX and ASX 24 markets and also in ASX’s draft new application form.

It should be noted that ASX may require an applicant to provide a legal opinion on other issues including, for example, in the case of an applicant that is incorporated or carries on business overseas, whether it has all of the required overseas licences and authorisations to conduct its activities as a participant.

Business integrity requirements

2. One respondent commented that ASX’s modified business integrity requirements, which are based on the existing business integrity requirements in the ASX Clear and ASX Settlement Operating Rules Procedures and which will now apply across all of ASX’s markets and facilities, could work to increase a participant’s regulatory burden rather than reduce it. The reason given was that they oblige a participant, if required by ASX at any time, to be able to produce evidence:
 - if it is APRA-regulated, that it has in place a ‘fit and proper’ policy that meets the requirements of APRA Prudential Standard CPS 520; or
 - if it has an AFSL and is therefore ASIC-regulated, that it has in place measures to ensure its responsible managers are of good fame and character, as required by ASIC Regulatory Guides 105.33 and 2.162, which are also applied to any of its directors who are not responsible managers.

Since APRA and ASIC would expect an entity subject to their regulation to have such policies in place at all times and to be able to produce evidence that they are in place, ASX does not see how its modified business integrity requirements would add to a participant’s regulatory burden.

ASX would also note that the ASX Clear and ASX Settlement Operating Rules Procedures currently require a participant in those facilities to be able to provide the evidence referred to above.

Organisational requirements

3. Two respondents queried what ASX would expect of applicants and participants in terms of satisfying the modified organisational requirements that they have “adequate resources and processes” to meet their obligations under the applicable Operating Rules.

As foreshadowed in the *Reducing Red Tape* consultation paper, ASX has comprehensively addressed this matter in the section headed “Resources and processes” in Guidance Note 1 *Admission as a Participant* for each of the ASX and ASX 24 markets and the ASX Clear, ASX Clear (Futures) and ASX Settlement facilities. That section sets out the key processes that ASX expects an applicant seeking admission to each respective ASX market or facility to have documented and in place to comply with its primary obligations under the Operating Rules for that market or facility.

A new applicant will be required to certify to ASX on or before its admission that it has the resources and processes in place to comply with its obligations under the Operating Rules for the markets and facilities in which it is seeking to become a participant. In providing this certification to ASX, the applicant will be required to have regard to:

- the Operating Rules;
- Operating Rules Guidance Note 1 *Admission as a Participant*;
- Operating Rules Guidance Note 9 *Offshoring and Outsourcing*; and
- in the case of ASX Clear, ASX Settlement and ASX Clear (Futures) applicants, Operating Rules Guidance Note 10 *Business Continuity and Disaster Recovery*,

for the markets and facilities in which it is seeking to become a participant.

The applicant will also be required to have regard to 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*.¹⁵

The applicant must also be able to demonstrate to the satisfaction of ASX, at any time, the basis on which the above certification is or was provided to ASX. Guidance Note 1 addresses how an applicant can meet this requirement.

An applicant will not generally be expected to provide copies of its documented processes with its application form, although ASX will be able to call for a copy of some or all of those processes in an appropriate case to verify that they in fact exist.

4. One respondent noted the ongoing obligation that participants have to continue to comply with the admission requirements and expressed concern that the supporting documentation required to evidence compliance with the “adequate resources and processes” requirement on an ongoing basis could add to, rather than reduce, the regulatory burden of participants.

ASX notes that the relevant obligation is that a participant must have adequate resources and processes to comply with its obligations under the applicable Operating Rules. As mentioned previously, a part of having adequate processes is ensuring that the participant has in place up-to-date documented processes to comply with all of its key obligations under the Operating Rules of the market or facility in which they participate.

¹⁵ See the amendments to ASX and ASX 24 Operating Rules Procedure 1000(d), ASX Clear Operating Rules Procedure 3.5.1, ASX Clear (Futures) Operating Rules Procedure 4.2(e), and ASX Settlement Operating Rules Procedure 4.18.1 in Annexure A.

ASX considers that having such processes in place is a minimum acceptable standard for all participants and therefore ASX does not see this as adding to the regulatory burden of participants.

ASX would also note that most of the participants in ASX's markets and facilities will also be regulated by ASIC or APRA or equivalent overseas regulators, whom ASX believes would have a similar expectation.

5. One respondent suggested that the requirement to have regard to ASIC Regulatory Guides 104 and 105 when signing off that an applicant or participant has "adequate resources and processes" should only apply to those applicants and participants holding an AFSL.

That was not in fact ASX's intention. ASX intended that all applicants and participants should have regard to the standards expected of financial services licensees in Regulatory Guides 104 and 105 – particularly the guidance around compliance measures, risk management systems, monitoring and supervision, training and competence, adequacy of resources, and organisational competence – when determining whether they have appropriate resources and processes.¹⁶ This applies even if they do not hold an AFSL. ASX has modified the relevant Procedures to make this clear.

In this regard, the guidance given by ASIC in Regulatory Guides 104 and 105 is generic and universal and, in ASX's view, should be applied by all financial services organisation, whether or not they hold an AFSL.

ASX's discretionary powers to grant or refuse admission

6. One respondent expressed the view that admission to an ASX market or facility should not be in the absolute discretion of ASX. That comment was directed to new ASX Clear Operating Rule 3.1.3A, ASX Clear (Futures) Operating Rule 4.4A and ASX Settlement Operating Rule 4.2.3A, which ASX has inserted to make it clear that admission to those facilities is at the absolute discretion of ASX.

Admission to the ASX and ASX 24 markets is already at the absolute discretion of ASX (see ASX and ASX 24 Operating Rule 1200). The introduction of an equivalent provision into the ASX Clear, ASX Clear (Futures) and ASX Settlement Operating Rules simply aligns them in this respect.

ASX would note that applicants denied admission to the ASX Clear, ASX Clear (Futures) or ASX Settlement facilities have a right of appeal under the ASX Enforcement and Appeals Rulebook.

A uniform regime for foreign participants

7. One respondent expressed the view that principal trader applicants incorporated or carrying on business in a place outside Australia should not have to go to the trouble and expense of providing a legal opinion that they hold all necessary licences and authorisations in that place and that it should suffice for ASX's purposes if they provided a statutory declaration that to the best of their knowledge and belief they have all such licences (if any) as are necessary.

ASX does not agree. The provision of such a legal opinion is an important safeguard to ensure that ASX does not run into regulatory difficulties in the overseas jurisdictions in question.

In considering this comment it did occur to ASX that there may be some ambiguity around the interaction of the proposed new admission requirement for the ASX and ASX 24 markets and the ASX Clear and ASX Clear (Futures) facilities that an applicant which is incorporated or carries on business in a place outside Australia must hold any licence or other authorisation required under the law of that place for it to carry on its business as a participant,¹⁷

¹⁶ ASX Clear and ASX Settlement participants are already obliged to have regard to these ASIC Guidance Notes when determining their management structures and supervisory policies and processes: see ASX Clear Operating Rules Procedure 3.5.1 and ASX Settlement Operating Rules Procedure 4.18.1.

¹⁷ See the amendments originally proposed in the *Reducing Red Tape* consultation paper to ASX and ASX 24 Operating Rule 1000, ASX Clear Operating Rule 3.2.1 and ASX Clear (Futures) Operating Rule 4.2(b).

and the ongoing obligation that participants have to continue to comply with the admission requirements. For example, some might be concerned whether this would require all existing participants in those markets and facilities that are either incorporated or carrying on business offshore to provide a legal opinion or other evidence to ASX that they hold the necessary licences and authorisations.

It was certainly not ASX's intention. To remove any implication that participants have any ongoing obligations in this regard, ASX has decided not to proceed with its proposal to include a general admission requirement for all of its markets or facilities that an applicant which is incorporated or carries on business in a place outside Australia must hold any licence or other authorisation required under the law of that place for it to carry on its business as a participant. Instead ASX will address this issue on a case-by-case basis under the modified powers that ASX has introduced into ASX and ASX 24 Operating Rules 1002 and 6004, ASX Clear Operating Rules 3.8.1 and 4.19.1 and ASX Clear (Futures) Operating Rules 4.3A and 4.15A.

8. One respondent suggested that ASX should clarify what it would expect a foreign applicant to provide to support its admission application.

ASX has comprehensively addressed this matter in Guidance Note 1 *Admission as a Participant* for each of the ASX and ASX 24 markets and the ASX Clear, ASX Clear (Futures) and ASX Settlement facilities. The relevant materials appears in a section headed "5. Further admission requirements that apply to applicants incorporated or carrying on business outside Australia".

The matter is also dealt with in section A.7 (applicants incorporated overseas) and A.8 (applicants with overseas activities) of ASX's draft new application form.

9. One respondent expressed concern about the breadth of powers that ASX would have under the modified Rules and Procedures to regulate, and impose conditions relating to, offshoring.

ASX would note that it already has the power to impose such conditions under the Operating Rules for its various markets and facilities. The new Rules simply make this process more transparent. ASX firmly believes this power is both necessary and appropriate. As stated in Guidance Note 9, offshoring arrangements are a potential source of added risk for a participant, as well as for the market, clearing and settlement facilities of ASX. These added risks arise because offshored activities are often performed:

- at scale, meaning that if something does go wrong, it has the potential to do so on a large scale;
- on behalf of multiple parties, giving rise to divided attention and loyalties by the person performing those activities on behalf of the participant; and
- at a remote location vis-à-vis the participant's operations in Australia, exposing them to disruption if communications between the participant and the place where the activities are being performed fail.

These risks may be compounded by time zone differences, language barriers and the fact that the staff performing the activities may not have the same level of familiarity with the relevant ASX Operating Rules and Australian market customs and business practices as Australian-based staff.

From ASX's perspective, offshoring also has the potential to impede communications between ASX and a participant on urgent operational issues and expose ASX and its participants to overseas regulatory requirements and taxation issues.

10. One respondent sought clarification on whether foreign ADIs can apply to be admitted as participants in ASX Clear.

This issue is addressed in section 5.1 of draft ASX Clear Operating Rules Guidance Note 1:

"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. ASX Clear has applied for ESMA recognition and is currently reviewing its policy position on foreign applicants as part of that process. Any queries from a foreign applicant on this issue should be directed to the ASX Participants Transition Team.”

Guidance Note 9 Offshoring and Outsourcing

11. Reflecting the overwhelming support for the *Reducing Red Tape* Rule and Procedure changes, ASX received almost as much feedback on Guidance Note 9 as it did on the entire package of Rule and Procedure changes.
12. Three respondents sought greater clarification of what things are, and are not, an outsourcing arrangement, particularly in relation to cloud computing services, software vendors and telecommunications and other utility providers.

ASX has endeavoured to address these concerns with the amendments it has made to Guidance Note 9 (see Annexure B).

13. One respondent thought that it would help readers if certain key terms, such as “offshoring” and “outsourcing”, were defined in the introduction to the Guidance Note 9.

These terms are defined in context in section 2 of Guidance Note 9 and so ASX does not believe this is necessary.

14. One respondent raised a concern that the statement in section 3 of Guidance Note 9 that all material offshoring and outsourcing arrangements should be “approved by the board of directors of the participant or by a senior manager of the participant with specific delegated authority to enter into such arrangements” was too rigid and did not reflect the governance practices of many participants, particularly the subsidiaries of multi-national corporations.

ASX has amended section 3 of Guidance Note 9 to address this concern (see Annexure B).

15. One respondent requested that ASX clarify the term “wholly inhouse” used in Section 4 of Guidance Note 9.

Section 4 includes an explanation of the term “wholly-inhouse” and effectively defines it as an arrangement between wholly-owned group entities.

The term “wholly-owned group entity” is probably well enough understood without a definition, but for clarity, a footnote to Guidance Note 9 includes a definition of that term.

In the consultation version of Guidance Note 9, this definition was based on the definition then in ASX Clear Operating Rule 2.10. That definition in turn incorporated and referenced the definition of “wholly-owned subsidiary” in the Corporations Act.

In considering this issue, ASX identified some potential anomalies with the way in which “wholly-owned subsidiary” is defined in the Corporations Act. That definition arguably does not cater for more than two layers of wholly-owned subsidiaries in a chain of companies, and arguably does not apply if a company in a corporate chain is owned by a number of different wholly-owned group entities. As a result, ASX is adopting a new definition of “Wholly-Owned Group Entity” in ASX Clear Operating Rule 2.10 which addresses these anomalies. It has also updated the footnote in Guidance Note 9 referring to the definition of “Wholly-Owned Group Entity” in ASX Clear Operating Rule 2.10.

16. Two respondents submitted that all arrangements between group companies should be treated as “insourcings” rather than “outsourcings”, even if the companies concerned were not part of the same wholly-owned group. As a consequence, these respondents submitted that the more relaxed due diligence and documentation standards sets out in Guidance Note 9 for offshoring arrangements between wholly-owned group entities should also apply to offshoring arrangements involving group entities that are not part of the same wholly-owned group.

ASX does not agree.

The policy settings in Guidance Note 9 for wholly owned group companies reflect the commercial reality mentioned in the Guidance Note that:

many participants form part of a larger wholly-owned corporate group and that those groups often conduct their business activities as if the entities in the group were part of a single enterprise. It is not uncommon, for example, for various activities relating to the business of a participant to be performed by functions that sit within, or staff who are employed by, another entity within the group, without the arrangements between the entities being formally documented in legally binding agreements. These arrangements can extend to the provision of premises, equipment, technology, finance, accounting, legal, compliance, risk, administration and other support services.

As a consequence, the policy settings in Guidance Note 9 for arrangements between wholly-owned group entities are considerably more relaxed than for arrangements between entities that are not part of the same wholly-owned group.

Where a participant enters into an arrangement with a group entity that is not part of the same wholly owned group to perform, on a continuing basis, a business activity that currently is, or could be, undertaken by the participant itself, ASX considers that should be treated like any other third party outsourcing. The fact that the ownership interests in the participant and the service provider are not wholly aligned will give rise to a potential for their business interests also not to be aligned.

17. One respondent suggested that the requirement to notify ASX of any “overseas activity” highlighted in section 9 of Guidance Note 9, whether it was material or not, was too broad and that this notification obligation should be confined to material overseas activity.

In ASX’s view, this would lead to a potential gap in its rule framework for regulating overseas activity. A participant might form the view that a particular overseas activity was not material and therefore not notify ASX of its intention to embark upon that activity. This would deny ASX the opportunity to consider the risks associated with the overseas activity and whether it needs to impose conditions or requirements to manage those risks.

As highlighted above, ASX sees offshoring as a potential source of significant risk for the ASX markets and facilities and it therefore considers it to be an appropriate policy setting that participants should have to notify ASX of any proposed overseas activity.

18. One respondent highlighted what it saw as an apparent discrepancy between the requirement in the various Operational Rules to notify ASX in advance of any offshoring activity, whether or not it is material, and the commentary in section 9 of Guidance Note 9 regarding a participant’s obligation to notify ASX when an offshoring arrangement is terminated, which only applies to a material offshoring arrangement.

ASX does not see this as a discrepancy. The difference is a function of the fact that ASX has a specific regime requiring it to be notified in advance of overseas activity, which captures any offshoring arrangement, whereas the termination of an offshoring arrangement only has to be notified to ASX if it is a material change to the participant’s business.

ASX needs to be notified in advance of a participant entering into an offshoring arrangement, whether or not it is material, so that ASX can consider whether it needs to impose conditions or requirements to manage the risks associated with the arrangement. ASX does not need to be notified of the termination of a non-material offshoring arrangement.

19. ASX also received some confidential comments suggesting that the guidance should in fact be more prescriptive on what functions could and, more particularly could not, be offshored or outsourced.

ASX believes it has taken a balanced and measured approach on this issue in its guidance. Provided they have appropriate management supervision, compliance and risk management processes in place in relation to their

offshored and outsourced activities, ASX considers that this is largely a matter for individual participants to determine, based on their particular business model.

Removing "responsible executives" from the ASX Clear rules

20. All but two respondents supported ASX's proposal to remove the "responsible executive" (RE) requirements from the ASX Clear Operating Rules and Procedures.
21. The first of the two respondents who did not support the change expressed concern that this might create a "management gap" between the broking operations of participants (which are required to have REs under the ASIC Market Integrity Rules) and their clearing operations.

ASX does not share this concern, for all the reasons previously set out in the *Reducing Red Tape* consultation paper.

ASX would note that the ASX 24 market and ASX Clear (Futures) and ASX Settlement facilities do not have, and have never had, RE requirements and it is not aware of anyone suggesting that they have suffered from a "management gap" as a consequence.

ASX would further note that the removal of the office of REs does not detract in any way from the requirement of a participant to have adequate resources and processes in place, including human resources and management supervision, compliance and risk management processes, to comply with its obligations as a participant.

22. The second respondent who did not support the change made a confidential submission commenting that it would be sensible to retain a separate RE structure under the ASX Clear Operating Rules, as this would provide a formal oversight mechanism for back office functions and also allow participants to standardise, align and leverage RE frameworks across both front and back office. It further commented that it would be looking to maintain its internal RE arrangements regardless of the outcome of the *Reducing Red Tape* proposal.

Participants are required to have adequate resources and processes, including management supervision, compliance and risk management processes, to meet all of their obligations under the relevant Operating Rules. That obligation extends to their back office as well as their front office. If a participant chooses to meet this requirement by establishing its own internal RE arrangements, then that is largely a matter for it, provide the arrangements meet the requirement of being "adequate".

ASX, of course, has no issues with participants continuing to apply their own internal RE frameworks if they think that is a helpful measure in meeting their supervisory obligations under the ASX Clear Operating Rules.

23. One respondent disagreed with ASX's proposal to remove the annual professional training obligations attached to REs.

ASX would note that this obligation only applies to participants in the ASX Clear facility and not to participants in any of ASX's other markets or facilities. The person nominated as RE under the ASX Clear Operating Rules is required to be someone in a senior supervisory position in relation to the participant's *clearing* activities. Clearing is a very specialised activity. For most participants, only a limited number (in many cases just one or two) executives within the entire organisation would be appropriately designated as an RE for the purposes of the ASX Clear Operating Rules. There are currently only 39 ASX Clear participants. Hence the number of REs actually covered by the annual training requirement is not all that significant.

ASX further notes that all participants with an AFSL are required to ensure that all of their personnel, not just one or two REs in their clearing business, receive appropriate training on the financial services they provide.

ASX therefore no longer considers it necessary or appropriate that it impose an annual professional training obligation on REs under the ASX Clear Operating Rules.

24. Based on the substantial level of participant support it received and for the reasons outlined above and in the *Reducing Red Tape* consultation paper, ASX will be proceeding with its proposal to remove the RE requirements from the ASX Clear Operating Rules and Procedures, including the annual professional training obligations attached to REs.

Simplifying and aligning ASX's notification requirements

25. One respondent expressed concern that the proposed rule changes requiring ASX Clear and ASX Clear (Futures) participants to submit a group structure chart on an annual basis¹⁸ would increase, rather than decrease, the regulatory burden on participants.

ASX does not believe this concern to be valid. Currently, ASX serves written notices on all clearing participants requiring them to provide this information each year. As a practical matter, therefore, making this a specific obligation under the Rules does not increase the regulatory burdens faced by participants. It does, however, relieve ASX of the need to serve these written notices and enables participants to slot this into their regular compliance calendars without having to wait to receive and respond to such a notice.

26. One respondent requested that ASX clarify the due date and method for providing the group structure chart.

ASX has inserted new ASX Clear Operating Rules Procedure 4.7.1 and ASX Clear (Futures) Operating Rules Procedure 4.14(ac) to address this request.

27. One respondent suggested that ASX consider only requiring the lodgement of an annual group structure chart where there had been a change to the structure of the participant from its previous annual lodgement.

ASX had concerns with this suggestion. In particular, it would require ASX to infer that no lodgement meant that there had been no change in group structure, whereas it could equally be explained by the participant simply forgetting to make the required lodgement.

As a compromise, ASX has inserted as the last paragraph to ASX Clear Operating Rule 4.7.1 and ASX Clear (Futures) Operating Rule 4.14(ac) a statement that an ASX Clear or ASX Clear (Futures) participant may satisfy the obligation to provide an annual group structure chart by referring to the date on which the last version of their group structure chart was provided to ASX and stating that the participant's group structure chart has not changed since that date.

28. One respondent made a general observation that ASX should allow a longer time for notifications not connected with an event or potential event of default.

ASX has reviewed the deadlines for all of the various notifications required under its Operating Rules as part of the *Reducing Red Tape* exercise and it has extended a number of them from 5 business days to 10 business days. ASX believes that the notification deadlines it will have in place after the *Reducing Red Tape* Rule and Procedure changes come into effect are appropriate and reasonable.

29. One respondent commented that ASX should clarify what is meant by giving a notification "immediately".

ASX proposes to address this issue in the revised drafts of Guidance Note 8 *Notification Obligations* that it will be issuing for each of the ASX and ASX 24 markets and the ASX Clear, ASX Clear (Futures) and ASX Settlement facilities.

¹⁸ See the amendments to ASX Clear Operating Rule 4.7.1 and ASX Clear (Futures) Operating Rule 4.14(ac) in Annexure A.

Other matters

30. One respondent suggested that there should be a central notification point for all notifications to ASX. In response, ASX has incorporated into the *Reducing Red Tape* package amendments to each ASX Rulebook¹⁹ providing that where a participant in one ASX market or facility is also a participant in another ASX market or facility and a notice being provided relates to both participations, a notice given in accordance with the operating rules of the other market or facility is taken to be given in accordance with the operating rules of the first-mentioned market or facility.
31. The Stockbrokers Association of Australia made two helpful suggestions that ASX has incorporated into the Reducing Red Tape Rule amendments:
- again to reduce the burden of duplicative notification obligations, the addition of a note to ASX Clear Operating Rule 4.23.7 stating that one way in which an ASX Clear participant can notify ASX of the various matters referred to in that rule is to copy ASX in on any corresponding notification given to ASIC under Rule 3.5.10 of the ASIC Market Integrity Rules (ASX Market) 2010; and
 - the removal of the requirement in ASX Settlement Operating Rule 7.1.10 for settlement participants to obtain ASX's consent to a bulk change of HINs.
32. One respondent requested that ASX clarify the status of its Guidance Notes generally.

A statement to the following effect currently appears on the front page of each Guidance Note that ASX has published since 1 August 2010 (the date when responsibility for market supervision was transferred to ASIC):

ASX has published this Guidance Note to assist participants to understand and comply with their obligations under the ASX [Name of Rules] Operating Rules. Nothing in this Guidance Note necessarily binds ASX in the application of the ASX [Name of Rules] 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.

To make it abundantly clear, ASX intends to update this statement to add as the second sentence:

It sets out ASX's interpretation of the ASX [Name of Rules] Operating Rules and how ASX is likely to enforce those rules.

Accordingly, where a Guidance Note expresses an opinion by ASX that a participant is obliged to do something under an Operating Rule, ASX expects all participants to comply with that opinion or else face disciplinary action by ASX for non-compliance.

Occasionally ASX will make statements in a Guidance Note about the obligations of participants under the Corporations Act, the ASIC Market Integrity Rules, the general law or best practice standards. These matters largely fall outside ASX's regulatory bailiwick²⁰ and therefore are not matters that ASX can enforce. Any such statements should be treated as suggestions or observations only.

It will generally be apparent on the face of a Guidance Note whether a statement is expressing an opinion on compliance with an Operating Rule or is merely a suggestion or observation.

33. One respondent suggested that ASX should not delete ASX Clear (Futures) Operating Rule 4.14(h), which currently requires a clearing participant to maintain appropriate trading records for any principal trading activities. While

¹⁹ See the amendments referred to in note 7 above.

²⁰ Save in relation to those Operating Rules, such as ASX Clear Operating Rule 4.23.2, which require a participant to comply with particular Corporations Act obligations.

acknowledging that this is something that is regulated by the Corporations Act and the ASX 24 Operating Rules, the respondent thought it was a helpful reminder to have included in the ASX Clear (Futures) Operating Rules.

ASX does not believe it is necessary or appropriate for the ASX Clear (Futures) Operating Rules to impose on participants in that facility obligations in relation to their activities in a different market that are already covered by the Operating Rules of that market and by the general law. Accordingly, ASX is proceeding with its proposal to delete ASX Clear (Futures) Operating Rule 4.14(h).