ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 177

# Australian market licences: Overseas operators

**Chapter 7 — Financial services and markets**

*Issued 30 October 2003*

*From 5 July 2007, this document may be referred to as Regulatory Guide 177 (RG 177) or Policy Statement 177 (PS 177). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 177.1) or their policy statement number (e.g. PS 177.1).*

## What this guide is about

RG 177.1 This guide outlines our approach to the regulation of financial markets:

(a) that are authorised overseas; and

(b) whose operators apply to be licensed, or are licensed, to operate a financial market in Australia under s795B(2) of the *Corporations Act 2001* ("Corporations Act").

In this guide, we refer to these markets as "overseas markets".

RG 177.2 This guide sets out:

**A** our general approach to the licensing of overseas markets

*see RG 177.6–RG 177.46*

**B** our approach to and guidance on the obligations of overseas market licensees

*see RG 177.47–RG 177.63*

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C how to get an overseas market licence

*see RG 177.64–RG 177.102*

RG 177.3 We have also included two schedules to help applicants provide us with the information we need to assess their application: see RG 177.103–RG 177.104.

RG 177.4 Our approach in this guide is guided by:

(a) Regulatory Guide 172 *Australian market licences: Australian operators* (RG 172), which outlines our role in and approach to financial market regulation generally under the Corporations Act; and

(b) RG 54 *Principles for cross border financial services regulation* (RG 54). We have adopted these principles to ensure that our policy and decision-making on cross border financial services activity generally are soundly based and consistent.

> Note: For a copy of RG 172 or RG 54, see our website at www.asic.gov.au or contact ASIC Infoline on 1300 300 630.

RG 177.5 This guide must be read in conjunction with RG 172, which applies to both domestic markets and (in most respects) overseas markets. This guide deals with issues specific to overseas market operators.

> **Important note:** The contents of this guide are based on the law as at 30 October 2003. Examples in this guide are for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements. This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Act applies to you.

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# A Our general approach to the licensing of overseas markets

Note: This section sets out our interpretation of key criteria that an applicant must satisfy before we will advise the Minister to grant an overseas market licence. For more information on how to get a licence, see Section C.

## Our policy

RG 177.6 We will only advise the Minister to grant an overseas market licence under s795B(2) if we consider that all the criteria in s795B(2) are met (see RG 177.7).

Note: For further information on what we will consider when advising the Minister, see RG 177.67.

RG 177.7 Our advice to the Minister will be affected by our interpretation of the following key criteria in s795B(2):

(a) whether the applicant is eligible to apply for an overseas market licence under s795B(2) (see RG 177.12–RG 177.18);

(b) whether regulation of the market in the home country is sufficiently equivalent to regulation under the Corporations Act (s795B(2)(c); see RG 177.19–RG 177.34);

(c) what we consider is adequate for co-operation arrangements between:

  (i) ASIC and the applicant (s795B(2)(d): see RG 177.35–RG 177.39); and

  (ii) ASIC and the home regulatory authority (s798A(3)(d): see RG 177.40–RG 177.46).

## Underlying principles

RG 177.8 The alternative licensing route in s795B(2) for overseas markets is intended to facilitate competition and avoid regulatory duplication while maintaining investor protection and market integrity: see paragraph 7.100 of the Explanatory Memorandum. Our general approach to the licensing of overseas markets is based on this legislative intention.

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## Explanation

### *When does a person need an Australian market licence?*

RG 177.9 A person needs an Australian market licence if they:

(a) operate a financial market (see RG 172.15–RG 172.36);

(b) operate that financial market in Australia (see RG 172.37–RG 172.48); and

(c) have not been exempted from the operation of Part 7.2 (see RG 172.49–RG 172.67).

RG 177.10 If such a person has their principal place of business in a foreign country (“home country”), they:

(a) can apply for a domestic market licence under s795B(1);

Note: For details about how to get a domestic market licence, see RG 172.125–RG 172.172.

(b) may be eligible to apply for an overseas market licence under s795B(2) (see RG 177.12–RG 177.18).

RG 177.11 If the Minister is satisfied, after having regard to the matters in s798A(2) and (3), that all the criteria in s795B(2) are met, the Minister may grant an overseas market licence under s795B(2).

### *Who is eligible to apply under s795B(2)?*

RG 177.12 A person is only eligible to apply for an overseas market licence under s795B(2) if they are authorised to operate in the home country the same financial market that they propose to operate in Australia. In considering whether an applicant is eligible to apply for an overseas market licence, we will be guided by our interpretation of the following key terms in s795B(2):

(a) “authorised” (see RG 177.13–RG 177.15);

(b) “financial market” (see RG 177.16–RG 177.17); and

(c) “same market” (see RG 177.18).

#### What does “authorised” mean?

RG 177.13 We think the requirement that an applicant be authorised to operate the facility in the home country means that:

(a) the home regulatory authority has assessed the applicant and its business activities; and

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(b) as a result of that assessment, the applicant is permitted to operate in the home country, as all or part of its assessed business activities, the facility that it proposes to operate in Australia.

We think it means more than that the applicant is able to operate the particular facility without contravening the law in the home country.

> Note: If a market operator is not "authorised" to operate the facility in the home country, they will need to apply for a domestic market licence under s795B(1): see RG 172.

RG 177.14 We may consider that a person is authorised to operate the facility in the home country even if the applicant is not required under the home regulatory regime to hold, or has been exempted (subject to conditions) from holding, a form of authorisation or licence specifically for the facility. In these situations, our view will be affected by:

(a) the overall home regulatory regime;

(b) the extent of assessment of the applicant and the facility by the home regulatory authority; and

(c) the nature and extent of any conditions on the applicant's activities in the home country.

RG 177.15 We expect that, for most applications under s795B(2), the applicant will already be operating the facility in the home country at the time of application, but we do not interpret s795B(2) as requiring this. It is possible that an applicant under s795B(2) may propose to commence operating the facility in several countries (including Australia and its home country) at the same time. If the applicant is authorised to operate the facility but the facility is not already operating in the home country, it is likely that the applicant will need to provide additional information to satisfy us that:

(a) regulation of the market in the home country is sufficiently equivalent to regulation under the Corporations Act (see RG 177.19–RG 177.34); and

(b) it will comply with its Australian obligations if an overseas market licence is granted (see Section B).

### What does "financial market" mean?

RG 177.16 The facility that the applicant is authorised to operate in its home country:

(a) must fall within the definition of a financial market in s767A (see RG 172.16–RG 172.36); but

(b) need not be:

   (i) described as a financial market in the home country; or

   (ii) authorised specifically as a financial market in the home country; or

   (iii) regulated as a financial market in the home country,

provided the activities that are involved in operating the facility, and that would be regulated under Australian regulation of financial markets, are regulated in the home country.

RG 177.17 A facility that is a financial market under s767A may have a different form of authorisation in the home country. For example, the facility may be authorised in the home country as an alternative trading system, or the operation of the facility may be covered by the home country authorisation of the applicant as a broker or dealer.

### What does "same market" mean?

RG 177.18 We will regard the facility that the applicant proposes to operate in Australia as the same market that the applicant is authorised to operate in its home country if, at a minimum:

(a) the financial products to be traded through the facility in Australia are, or will be, the same as or a subset of the products traded through the facility in the home country;

(b) the same operating rules will govern trading of those products, whether trading originates from Australia or the home country; and

(c) offers and invitations will be dealt with according to the same trading mechanism, whether the offers and invitations originate from Australia or the home country.

> Note: If the proposed facility is not the "same market", the market operator will need to apply for a domestic market licence under s795B(1): see RG 172.

## *When is a home regulatory regime "sufficiently equivalent"?*

RG 177.19 Section 795B(2)(c) requires that the home regulatory regime as it applies to the operation of the facility in the home country be sufficiently equivalent (in relation to the degree of investor protection and market integrity it achieves) to the Australian regulatory regime for comparable domestic markets.

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RG 177.20 We will assess the home regulatory regime as it applies to the overseas market as satisfying s795B(2)(c) if it:

(a) is clear, transparent and certain (see RG 177.21–RG 177.22);

(b) is consistent with the *IOSCO Objectives and Principles of Securities Regulation* (see RG 177.23–RG 177.25);

(c) is adequately enforced in the home jurisdiction (see RG 177.26–RG 177.28); and

(d) achieves the investor protection and market integrity outcomes that are achieved by the Australian regulatory regime for comparable domestic markets (see RG 177.29–RG 177.34).

Note: See Principles 7–10 of RG 54.

These criteria form our "equivalence test" for s795B(2)(c).

## Clear, transparent and certain

RG 177.21 A "clear" regulatory regime is one that is clearly articulated and can be easily understood. A "transparent" regulatory regime is one whose rules, policies and practices are readily available to and known by all relevant persons. A "certain" regulatory regime is one that is applied in a consistent manner and is not subject to indiscriminate changes. At a minimum, this principle means that the relevant parts of the home regulatory regime must be in written form, be available to Australians in English and not be subject to arbitrary discretions.

RG 177.22 We consider that if the home regulatory regime for an overseas market does not meet these minimum conditions, it will not be sufficiently equivalent to the Australian regulatory regime for comparable domestic markets because:

(a) the home regulatory regime will not be consistently or reliably applied or enforced;

(b) Australian investors will not be able to understand their rights and remedies under the home regulatory regime; or

(c) we will not be able to obtain sufficient knowledge of how the home regulatory regime works in practice to assess the regime.

## Consistent with IOSCO objectives and principles

RG 177.23 The *IOSCO Objectives and Principles of Securities Regulation* are applicable to financial markets generally, except where

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those objectives and principles are clearly inappropriate for a particular financial market.

Note: This is stated in footnote 1 to the *IOSCO Objectives and Principles of Securities Regulation*.

RG 177.24 A regulatory regime is consistent with the IOSCO objectives and principles if the home regulatory authority:

(a) assesses the home regulatory regime against those objectives and principles; and

(b) reasonably determines that the home regulatory regime is broadly compliant with those objectives and principles.

RG 177.25 The aims, purposes and outcomes of the Australian regulatory regime for financial markets are consistent with the IOSCO objectives and principles. Therefore, consistency by the home regulatory regime with the IOSCO objectives and principles indicates that the Australian and home regulatory regimes:

(a) share a similar regulatory philosophy; and

(b) are, at a high level, equivalent.

Note: The key outcomes achieved by the Australian regulatory regime are set out in Table A "Regulatory outcomes and mechanisms in financial markets" in RG 172.12.

### Adequately enforced

RG 177.26 A regulatory regime is adequately enforced if the relevant home regulatory authority:

(a) has sufficient powers of investigation and enforcement;

(b) has sufficient resources to use those powers; and

(c) uses those powers and resources to promote compliance with the regulatory regime.

Additionally, the legal system within which the regulatory regime operates should be independent and have a reputation for integrity.

RG 177.27 In assessing whether the home regulatory regime is adequately enforced, we will rely on matters such as:

(a) the international reputation of the home regulatory regime;

(b) assessments of the home regulatory regime by the home regulatory authority; and

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(c) assessments of the home regulatory regime by international financial institutions and other international organisations.

RG 177.28 A regulatory regime that is inadequately enforced in its home country will not be sufficiently equivalent to the Australian regulatory regime because it is likely to be frequently ignored and therefore it will not reliably achieve its intended regulatory outcomes.

### Comparable investor protection and market integrity outcomes

RG 177.29 Section 795B(2)(c) requires a comparison of the outcomes achieved by the home regulatory regime as it applies to the overseas market in the home country, and the outcomes achieved by the Australian regulatory regime as it applies to comparable domestic markets. This is clear from the use of the word "achieves" in s795B(2)(c).

RG 177.30 We consider that the home regulatory regime as it applies to the overseas market will not be sufficiently equivalent to the Australian regulatory regime unless it achieves all the relevant key outcomes of the Australian regulatory regime for comparable domestic markets. This involves assessing the "total regulatory requirements" of the home country: see paragraph 7.104 of the Explanatory Memorandum. It also involves considering the features of the overseas market.

Note: The key outcomes achieved by the Australian regulatory regime are set out in Table A "Regulatory outcomes and mechanisms in financial markets" in RG 172.12. The key outcomes that are relevant to a market may vary according to the features of the market: see RG 172.11.

RG 177.31 When comparing the outcomes achieved by the two regulatory regimes, we will consider whether the home regulatory regime as it applies to the overseas market achieves (or will achieve when the market starts operating) each of the following key investor protection and market integrity outcomes that are relevant to the overseas market:

(a) market users use the overseas market on an informed basis;

(b) market users are confident that the overseas market as a whole operates fairly and that they will be treated fairly;

(c) market users are confident about the participants in the overseas market they deal with;

(d) listed entities, participants and other market users that breach the law or the overseas market's rules are likely to be detected and disciplined, and supervision of the overseas market is not

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compromised by conflicts of interest or other improper influences;

(e) the price formation processes, and the overseas market as a whole, operate reliably; and

(f) transactions entered into through the overseas market are cleared and settled promptly, fairly and effectively.

RG 177.32 When we consider whether the home regulatory regime achieves these key outcomes, we will focus on whether the outcomes are achieved from the perspective of Australian users of the market.

RG 177.33 We believe that comparing outcomes is a better way to measure equivalence than comparing regulatory mechanisms, which does not take into account whether the regulatory mechanisms are effectively implemented.

RG 177.34 Our equivalence test does not require the regulatory mechanisms used in each country to be the same. However, to assess whether the home regulatory regime achieves the key outcomes in RG 177.31, we will need to know in detail and understand the regulatory mechanisms by which those outcomes may be achieved, especially if those mechanisms are not the same as the Australian regulatory mechanisms.

## *What are adequate co-operation arrangements?*

### Arrangements with the overseas market operator

RG 177.35 Under s795B(2)(d), the Minister must be satisfied that the applicant undertakes to co-operate with us by sharing information and in other appropriate ways.

RG 177.36 We will only advise the Minister that s795B(2)(d) is met if the arrangements that will apply between the applicant and ASIC have been agreed to, and we are satisfied that, if a licence is granted, they will be operative by the time the overseas market commences operating in Australia.

RG 177.37 At a minimum, adequate co-operation arrangements with an overseas market operator will cover how the market operator will:

(a) give us notice of the matters in s792B and 793D;

(b) give us information, reports, assistance or access (as appropriate) for the purposes of s792B(3), 792C, 792D, 792E, 792F or 794C;

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(c) notify us of proposed changes to the range of financial products traded through the market as it operates in Australia or in the home country;

(d) notify us of proposed changes to the market's clearing and settlement arrangements for transactions entered into through the market as it operates in Australia or in the home country;

(e) ensure that it can require information to be provided to it and to us by any person to whom the market operator outsources performance of any aspect of the market's operation or performance of any part of the market operator's Australian obligations; and

(f) otherwise demonstrate to us on a continuing basis that it is complying with each of its Australian obligations, including obligations created by any licence conditions imposed by the Minister.

RG 177.38 The co-operation arrangements will also deal with notification to us of relevant matters relating to the market's continuing authorisation in its home country.

RG 177.39 The form and content of co-operation arrangements that are adequate will vary according to the circumstances of the applicant. In the past we have used a variety of formal arrangements, including memoranda of understanding, letters of arrangement and enforceable deeds.

> Note: Applicants should discuss with us early in the application process our expectations for the co-operation arrangements with them. See also Section C.

## Arrangements with the home regulatory authority

RG 177.40 When making licensing decisions about overseas markets, the Minister must consider whether there are adequate co-operation arrangements between ASIC and the home regulatory authority: s798A(3)(d).

RG 177.41 We only expect to advise the Minister to grant an overseas market licence if we have adequate co-operation arrangements with the home regulatory authority. This is because licensing of overseas markets in Australia raises a number of regulatory issues that do not arise with domestic markets.

RG 177.42 A major issue is balancing the respective regulatory responsibilities of ASIC and the home regulatory authority. A high degree of co-operation and information sharing will be needed

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between the relevant regulators to ensure that both duplicative regulation and regulatory gaps are minimised as much as possible.

RG 177.43 At a minimum, adequate co-operation arrangements will provide for:

(a) timely sharing of information about the overseas market; and

(b) timely co-operation in:

  (i) supervising and investigating activities in the overseas market; and

  (ii) taking enforcement action involving the overseas market.

RG 177.44 We think adequate co-operation arrangements will ensure that the home regulatory authority will, if requested by us, take appropriate action in relation to the overseas market to protect Australian investors and the integrity of the overseas market as it operates in Australia. That action should be capable of being as effective as action the home regulatory authority would take in similar circumstances to protect investors or the integrity of markets that operate in the home country. Particularly in the area of supervision of the overseas market, adequate co-operation arrangements will mean that we have access to direct and continuing contact with the relevant officers of the home regulatory authority, so as to make the arrangements effective by enabling prompt exchanges of information.

RG 177.45 Adequate co-operation arrangements with the home regulatory authority will generally be in the form of a memorandum of understanding or some other documented arrangement. However, they may be supplemented by more informal arrangements and relationships.

RG 177.46 An applicant for an overseas market licence is not responsible for bringing into existence or determining the content of co-operation arrangements between ASIC and the home regulatory authority.

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# B What are the obligations of overseas market licensees?

## Our policy

RG 177.47 For obligations under the Corporations Act that are shared by domestic and overseas market licensees ("shared obligations": see RG 177.52), we will apply our policy in RG 172 to overseas market licensees. Overseas market licensees must also comply with obligations that apply only to overseas market licensees ("additional obligations": see RG 177.57–RG 177.62). The table below summarises the obligations and the applicable policy.

| Key shared obligations | Section | Applicable policy |
|---|---|---|
| Do all things necessary to ensure that the market is fair, orderly and transparent | s792A(a) | RG 172.81–RG 172.85 |
| Have adequate arrangements for supervising the market | s792A(c) | RG 172.86–RG 172.101 |
| Have sufficient resources | s792A(d) | RG 172.102–RG 172.106 |
| Provide ASIC with an annual report | s792F | RG 172.114–RG 172.115 |
| Comply with the conditions on the licence | s792A(b) | RG 177.93–RG 177.102 |

| Additional obligations | Section | Applicable policy |
|---|---|---|
| Be registered in Australia as a foreign company under Division 2 of Part 5B.2 of the Corporations Act (s792A(f))<br>Note: This obligation also applies to a foreign body corporate that is licensed under s795B(1). | s792A(f) | — |
| Remain authorised to operate the financial market in the home country and not change the home country without the Minister's prior approval | s792A(g) | — |

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| Additional obligations | Section | Applicable policy |
|---|---|---|
| Notify ASIC if no longer authorised to operate the financial market in the home country | s792B(4)(a) | — |
| Notify ASIC of significant changes to the home regulatory regime | s792B(4)(b) | RG 177.57–RG 177.59 |
| Notify ASIC of all changes to the market's operating rules | s793D(3) | RG 177.60 |
| Comply with any ASIC determination on written procedures | s793A(4) | RG 177.61–RG 177.62 |

### What should an overseas market licensee do to ensure compliance?

RG 177.48 We consider that, to ensure compliance with its Australian obligations, an overseas market licensee should plan for, monitor and assess its compliance in accordance with our policy in RG 172.71–RG 172.75.

### How will we assess compliance?

RG 177.49 When we assess how well an overseas market licensee is complying with its Australian obligations for the purposes of s794C, we will adopt the approach set out in RG 172.76–RG 172.80.

RG 177.50 In addition to the matters in RG 172.76, we will consider:

(a) any self-assessment provided to us by the overseas market licensee of its compliance with its obligations under the home regulatory regime;

(b) any other information provided to us by the overseas market licensee under the co-operation arrangements between the overseas market licensee and us (see RG 177.35–RG 177.39);

(c) any assessment made available to us by the home regulatory authority of the overseas market licensee's compliance with its obligations under the home regulatory regime; and

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(d) any other information provided to us by the home regulatory authority under the co-operation arrangements between the home regulatory authority and us (see RG 177.40–RG 177.46).

## Underlying principles

RG 177.51 Overseas market licensees must comply with obligations under both the Australian regulatory regime and the home regulatory regime. Therefore, it is particularly important that licensees have in place appropriate processes for ensuring their compliance under each regime.

## Explanation

### *Shared obligations*

RG 177.52 Overseas market licensees must comply with most of the obligations that are imposed on domestic market licensees. Therefore, our policy in RG 172 on obligations that are shared by domestic and overseas market licensees applies to overseas market licensees. In particular, we think our policy in RG 172.97–RG 172.100 on monitoring participant conduct applies to overseas market licensees.

Note 1: As stated in RG 172.70, we do not discuss in RG 172 every obligation of an Australian market licensee. Similarly, we do not discuss in this guide every obligation that is shared by domestic and overseas market licensees.

Note 2: The references in RG 172.97–RG 172.100 to reg 7.2.07 (content of operating rules for a domestic market) merely support our interpretation of s792A(c)(ii) and (iii), and do not detract from the application to overseas market licensees of our policy on monitoring participant conduct.

#### Excluded domestic obligations

RG 177.53 However, overseas market licensees are not required to comply with the following obligations that apply to domestic market licensees (and therefore our policy in RG 172 on these obligations does not apply to overseas market licensees):

(a) the obligation to include specific matters in its operating rules and written procedures (s793A(3): see RG 172.151–RG 172.155);

(b) the obligation to submit changes to its operating rules to disallowance by the responsible Minister (s793E(1): see RG 172.153); and

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(c) the obligation, where any of the participants in the overseas market provide financial services to persons as retail clients, to have compensation arrangements that comply with Part 7.5 of the Corporations Act (s792A(e) and 880A: see RG 172.107–RG 172.113).

RG 177.54 Paragraph 7.104 of the Explanatory Memorandum states that, in not imposing these Australian requirements on overseas market licensees, reliance is placed on the overall equivalence of the home regulatory regime and the Australian regulatory regime. In many cases, that equivalence may be partly because the overseas market licensee is subject to comparable requirements in the home country.

Note: For a discussion of equivalence, see RG 177.19–RG 177.34.

RG 177.55 Even though an overseas market licensee is not required to comply with reg 7.2.07 about the content of its operating rules, s793D(3) makes it clear that operating rules for the overseas market must exist. We expect that operating rules for a licensed overseas market will generally deal with the same kind of matters as reg 7.2.07. This is because those matters are fundamental to the operation of a fair, orderly and transparent market and an overseas market licensee must comply with the Australian obligation to do all things necessary to ensure that the market is fair, orderly and transparent: see RG 177.47.

Note: Section 793D(3) says that an overseas market licensee must notify us of any change to the market's operating rules: see also RG 177.60. Regulation 7.2.07 says that operating rules of domestic markets must deal with matters such as the criteria for access to the market, ongoing requirements for participants, the classes of financial products dealt with on the market, and execution of orders.

RG 177.56 Even though an overseas market licensee is not required to have compensation arrangements that comply with Part 7.5, a number of countries have arrangements of some kind for providing compensation to retail clients for loss caused by participants in markets operating in their country. The existence and nature of any such arrangements will be relevant to our assessment of equivalence (see RG 177.31(c) and Part C(b) of Schedule 2) and of appropriate licence conditions (see RG 177.101–RG 177.102).

## *Additional obligations*

### Notify significant changes to home regulatory regime

RG 177.57 Under s792B(4)(b), an overseas market licensee must notify us of significant changes to the home regulatory regime.

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RG 177.58 We think a change is significant if it may affect the previous assessment that the home regulatory regime as it applies to the overseas market and the Australian regulatory regime for comparable domestic markets are sufficiently equivalent. If a change to the home regulatory regime results in the loss of sufficient equivalence, then under s797B(d)(ii), the Minister may suspend or cancel the overseas market licence.

Note: For a discussion of equivalence, see RG 177.19–RG 177.34.

RG 177.59 Examples of changes that we consider are significant include:

(a) a change to the regulatory structure in the home country;

(b) a change to the supervisory arrangements for the overseas market as it operates in the home country;

(c) a change in the home country to the obligations imposed on the overseas market licensee;

(d) a change in the home country to the way that amendments to the overseas market licensee's operating rules are made or approved; and

(e) a change in the compensation regime that exists in the home country for retail clients of participants in the overseas market.

This list is not exhaustive.

### Notify changes to the market's operating rules

RG 177.60 Under s793D(3), an overseas market licensee must lodge with us written notice of changes to the market's operating rules as soon as practicable after the change is made, even though those changes are not subject to disallowance by the Minister (as is the case for domestic markets). This obligation relates to all changes, not only "significant" changes. It ensures that we are aware at all times of the current operating rules, and can consider whether a change to the market's operating rules affects an overseas market licensee's compliance with its Australian obligations or the equivalence of the home regulatory regime.

### Comply with determinations on written procedures

RG 177.61 Under s793A(4), we have a discretion to determine that an overseas market licensee must have written procedures about specified matters. If we exercise this discretion, the overseas market licensee must comply with our determination.

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RG 177.62 We do not propose at this stage to issue general guidance on when we would exercise this discretion. We will assess on a case-by-case basis whether written procedures are required, taking into account the content of the overseas market's operating rules and any existing written procedures. We may require written procedures to deal with matters affecting Australian market users that cannot be appropriately dealt with in licence conditions: see RG 177.93–RG 177.102. We will consider issuing general guidance when we have more experience in dealing with a range of applications under s795B(2).

### *How will we assess compliance?*

RG 177.63 Under s794C, we may conduct assessments at any time of how well an overseas market licensee is complying with its Australian obligations, and must assess at least annually an overseas market licensee's compliance with the obligation in s792A(c) to have adequate arrangements for supervising the market. Information about the overseas market licensee's compliance with its obligations under the home regulatory regime is highly relevant to compliance with its Australian obligations, because of the overall equivalence between the Australian and the home regulatory regimes.

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# C How do you get an overseas market licence?

## Our policy

### *What must you include with your application?*

RG 177.64 There is currently no application form for an Australian market licence. An applicant must provide us with information and documents relevant to all the criteria and matters in s795B(2), 798A(2)(a)–(f) and 798A(3)(a)–(c). Certain information and documents may be relevant to more than one of these sections: see RG 177.69–RG 177.85.

### *How will we deal with your application?*

RG 177.65 We will return any application that does not contain the information and documents required by s795B(2)(a) and reg 7.2.14 and 7.2.15.

RG 177.66 We aim to provide the Minister with advice about an application for an overseas market licence within 16 weeks of receiving an application that contains *all* the information and documents required: see RG 177.86.

### *What will we consider when advising the Minister about your application?*

RG 177.67 When framing our advice to the Minister about granting an overseas market licence, we will consider:

(a) the law and regulations (particularly the matters in s798A and 795B) (see RG 177.92); and

(b) what conditions might need to be imposed under s796A if an overseas market licence is granted (see RG 177.93–RG 177.102).

The Minister must take our advice into account when deciding whether to grant a licence: s798A(2)(h).



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- Before you apply, contact **The Director, Markets Regulation** in ASIC's Sydney office to check:
  - — what you need to do; and
  - — whether we have any co-operation arrangements with your home regulatory authority.
- Lodge your application in writing addressed to **The Director, Markets Regulation, GPO Box 9827, Sydney NSW 2001**.
- Include the prescribed fee with your application: see Item 15 of the *Corporations (Fees) Regulations 2001*.

## Underlying principles

RG 177.68 We expect the applicant to provide ASIC with comprehensive information about the overseas market, how it is proposed to operate in Australia and the home regulatory regime. We may take steps to confirm information provided by an applicant, but generally we will not conduct investigations to fill gaps in the information provided by an applicant.

## Explanation

### *What must you include with your application?*

RG 177.69 An applicant must provide information and documents that:

(a) explain the matters in s798A which the Minister must consider when deciding whether to grant an Australian market licence; and

(b) positively demonstrate that the applicant meets all the criteria in s795B(2).

The following table provides more detail.

| Information/documents | References |
| --- | --- |

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| | |
|---|---|
| Referred to in s798A(2)(a)–(f) and 798A(3)(a)–(c) (which includes information about participants in the market) | RG 177.73 |
| Required by reg 7.2.14 and 7.2.15 (which includes information about clearing and settlement arrangements)<br><br>Note: Where reg 7.2.14 requires "details" of matters to be provided, the information needs to give us a complete understanding of the relevant matter. | s795B(2)(a): see RG 177.76 |
| Demonstrating that the applicant will comply with each of its Australian obligations from the time the market commences operating in Australia, and on a continuing basis | s795B(2)(b): see RG 177.80–RG 177.82, Section B, RG 177.35–RG 177.39 and Part A of Schedule 1 |
| Demonstrating the requirements and supervision to which the overseas market is subject in the home country | s795B(2)(c) and reg 7.2.15(b): see RG 177.83–RG 177.84), Part B of Schedule 1, and Schedule 2 |
| That otherwise will help us advise the Minister about the application | See RG 177.85 |

RG 177.70 The application should include a table that cross-references the legislative requirements with the corresponding sections in the application.

RG 177.71 The application and all information and documents provided with the application must be in English.

RG 177.72 We will require evidence that the applicant's governing body expressly considered and approved the application before it was made. We will accept for this purpose a declaration made by each member of the governing body or by a senior person or persons authorised by specific resolution of the governing body to make the declaration on the governing body's behalf, that to the best of the governing body's knowledge and having made proper inquiries:

(a) the applicant meets the criteria in s795B(2); and

(b) the information and documents provided in support of the application are true, correct and complete.

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## Participants

RG 177.73 Section 798A(2)(e) requires the Minister to consider the participants (or proposed participants) in the market. An application for an overseas market licence should include information about all participants or proposed participants, and not just Australian participants or proposed Australian participants.

> Note: For the definition of "participant", see "Key terms". For further discussion on participants, see RG 172.95–RG 172.101.

### *Implications for foreign participants*

RG 177.74 An overseas market operator should be aware that an application for an overseas market licence may have implications for non-Australian participants in their market. This is because non-Australian participants in an overseas market that operates in Australia may be taken to be carrying on a financial services business in Australia. Under s911A, a person who carries on a financial services business in Australia must hold an Australian financial services ("AFS") licence covering the provision of the financial services unless the person is exempt.

> Note: Such a person may also need to be registered in Australia as a foreign company under Division 2 of Part 5B.2.

RG 177.75 Therefore, before making an application for an Australian market licence, an overseas market operator should consider whether the foreign participants in their market are likely to need an AFS licence, or whether a licensing exemption exists or could be sought under s911A(2) in respect of the foreign participants. Applicants should discuss with us early in the application process the potential Australian licensing issues for the foreign participants in the overseas market.

> Note: For some guidance on possible exemptions, see Regulatory Guide 176 *Licensing: Discretionary powers — Wholesale foreign financial services providers* (RG 176).

## Clearing and settlement arrangements

RG 177.76 Regulation 7.2.14(e) requires an application to contain details of the clearing and settlement arrangements for the financial market in the home country. We expect these details to include information about:

(a) the obligations that arise when parties enter into a transaction through the market;

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(b) how the parties to a transaction effected through the market meet their respective obligations that arise from entering into the transaction;

(c) the technical infrastructure, laws, rules and procedures that support or relate to the performance of the obligations referred to in paragraph (a);

(d) how, from the perspective of an Australian user, transactions effected through the overseas market will be cleared and settled;

(e) each of the persons who will be involved in the clearing and settlement of transactions effected through the overseas market by an Australian user;

(f) where applicable, how and where a financial product, that is acquired by or attributable to an Australian user as a result of a transaction effected through the overseas market, will be held; and

(g) whether the clearing and settlement arrangements for the financial market in the home country are provided by a clearing and settlement facility ("CS facility").

Note: A CS facility is a facility that provides a regular mechanism for the parties to transactions relating to financial products to meet obligations to each other that:

(a) arise from entering into the transactions; and

(b) are of a kind prescribed by the regulations: see s768A, reg 7.1.09 and 7.1.10.

*Implications for overseas clearing and settlement facilities*

RG 177.77 An overseas market operator should be aware that, if the clearing and settlement arrangements for the overseas market are provided by an overseas CS facility, an application for an overseas market licence may have implications for that CS facility. This is because the connection between the overseas market and the overseas CS facility may mean that the CS facility is taken to operate in Australia (see RG 177.79). Under s820A, a CS facility that operates in Australia must hold an Australian CS facility licence unless the CS facility is exempt.

Note: An overseas operator of a CS facility that operates in Australia may also need to be registered in Australia as a foreign company under Division 2 of Part 5B.2.

RG 177.78 Therefore, before making an application for an Australian market licence, an overseas market operator should consider whether the overseas CS facility may need an Australian CS facility licence, or whether a relevant exemption exists or could be sought under s820C for the CS facility. Applicants should discuss

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with us early in the application process the potential Australian licensing issues for an overseas CS facility that provides clearing and settlement arrangements for the overseas market.

### *When does a CS facility operate in Australia?*

RG 177.79 Under s820D(1), a CS facility operates in Australia if the facility is operated by a body corporate that is registered under Chapter 2A of the Corporations Act. A CS facility may also operate in Australia in other circumstances: see s820D(2). When assessing for the purposes of s820D(2) whether a CS facility operates in Australia we will consider various factors, including whether:

(a) all or a significant part of the CS facility's infrastructure is located in Australia;

(b) the CS facility has participants in Australia;

(c) financial products located in Australia are cleared and/or settled by the facility.

These factors are not exhaustive.

> Note: Our policy in RG 177.79 is similar to our policy on when a financial market operates in Australia: see RG 172.38–RG 172.48. It is expected that mere accessibility by one or a few persons in Australia to a CS facility based overseas would not be enough to constitute operating in Australia: see paragraph 8.33 of the Explanatory Memorandum.

## Demonstrating compliance with Australian obligations: s795B(2)(b)

RG 177.80 In order to advise the Minister whether the applicant will comply with its obligations if an overseas market licence is granted, we will need detailed information about the applicant's expertise, systems, structures, processes and resources for operating the market, and how those matters relate to the proposed operation of the overseas market in Australia. Part A of Schedule 1 indicates the type of information and documents we will generally require for s795B(2)(b).

RG 177.81 To a large extent, an applicant may be able to demonstrate that it will comply with its Australian obligations by demonstrating how it meets its obligations under its home regulatory regime. An applicant may also provide evidence of how it complies with obligations under the regulatory regime of any other countries in which the applicant's market operates. However, we will not rely solely on evidence of compliance with the home or other regulatory regimes.

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Note: If the facility is not already operating, this evidence will not be available and the applicant will need to demonstrate in other ways that it will comply with all its Australian obligations. Information in an application to the home regulatory authority for regulatory approval may be particularly relevant.

#### *Impediments under the home regulatory regime to compliance with all the Australian obligations*

RG 177.82 In some cases, there may be a tension between the Australian obligations that will apply if an overseas market licence is granted and the applicant's obligations under the home regulatory regime. Before making an application for an Australian market licence, an overseas market operator should consider all the obligations it has under the home regulatory regime, and whether these are compatible with the Australian obligations it will have if an overseas market licence is granted. Particular attention should be paid to any impediments to compliance with the statutory obligations referred to in paragraphs (a) and (b) of RG 177.37. In limited cases, it may be possible to resolve apparent difficulties in complying with both regulatory regimes. Applicants should discuss with us early in the application process any impediments under their home regulatory regime to compliance with all the Australian obligations.

### Demonstrating the nature of the home regulatory regime: s795B(2)(c)

RG 177.83 In order to advise the Minister whether the equivalence test is satisfied, we will need detailed information about the home regulatory regime as it applies to the overseas market in the home country and how it will apply to the proposed operation of the market in Australia. Part B of Schedule 1 indicates the type of information and documents we will generally require for s795B(2)(c).

RG 177.84 In Schedule 2, we have listed some questions intended to supplement Part B of Schedule 1 by indicating the level of detail we will need to assess whether the home regulatory regime as it applies to the overseas market achieves the relevant key outcomes for equivalence: see RG 177.31.

### Other information

RG 177.85 We expect an applicant to provide us with other information and documents that will help us advise the Minister generally about the application, including:

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(a) a copy of current authorisations to operate the facility in jurisdictions other than the home country, including any conditions on those authorisations;

(b) details of applications for authorisation to operate the facility in jurisdictions other than the home country that did not result in authorisation;

(c) a description or copy of any information sharing or other co-operation arrangements between the applicant and foreign regulators, other than the home regulatory authority; and

(d) a description or copy of any information sharing or other co-operation arrangements between the applicant and other market operators, clearing houses or investor compensation schemes in other foreign countries.

### *How will we deal with your application?*

RG 177.86 The time it takes us to deal with an application will depend on a number of factors, including the difficulty of assessing the equivalence of the home regulatory regime for the applicant's facility and the Australian regulatory regime for comparable financial markets. It may take us longer than 16 weeks to deal with your application if:

(a) the application is particularly complex;

(b) we have not previously assessed the equivalence of the Australian and the home regulatory regimes for facilities such as the applicant's facility;

(c) we are waiting for a response to a request for clarification or verification (see RG 177.87–RG 177.90);

(d) we have to negotiate co-operation arrangements with the home regulatory authority; or

(e) the application requires public consultation (see RG 177.91).

RG 177.87 We may require an applicant to clarify or independently verify information or documents provided with the application. This includes verification of an English translation of any document not originally written in English. The applicant must provide the clarification or verification at its own cost. A person verifying must be suitably qualified and have no interest in the outcome of the application.

RG 177.88 We will generally require independent verification of the adequacy of the applicant's technological and financial resources for operating and supervising the overseas market as it will operate in

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Australia. However, we may not require such verification if, in light of the overseas market's history of operation and technological development, we are satisfied that it has the internal expertise to assess the adequacy of its technological and financial resources.

RG 177.89 We may require independent verification of the applicant's description of the home regulatory regime as it applies to the applicant's facility in the home country. If we receive a number of applications under s795B(2)(c) from applicants in the same home country, we may develop a degree of familiarity with requirements under that overseas regulatory regime. However, we will still need to assess equivalence on a case-by-case basis, because each market is different and the regulatory regime may apply differently to each market.

RG 177.90 We may also require independent verification of any other significant matter relating to the market's operation.

RG 177.91 We will decide whether an application requires public consultation on a case-by-case basis. We will consider:

(a) the features of the market, including:

  (i) the existing and potential size of the market; and

  (ii) the existing and potential market users;

(b) the extent to which the market may impact on the fairness, orderliness and transparency of financial markets already operating in Australia;

(c) the impact the market may have on Australian investors; and

(d) the impact the market may have on the reputation of Australia as a financial centre.

### *What will we consider when advising the Minister about your application?*

RG 177.92 Under s798B, we may give the Minister advice in relation to:

(a) any matter in respect of which the Minister has a discretion under Part 7.2 (relating to the licensing of financial markets); and

(b) any other matter concerning financial markets.

#### Licence conditions

RG 177.93 Under s796A, the Minister may impose conditions on an overseas market licence. When we advise the Minister about

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licence conditions, we will adopt an approach that is consistent with RG 172.143–RG 172.145.

RG 177.94 However, we may advise the Minister to impose conditions on an overseas market licence that are not relevant for domestic market licences. This is because:

(a) overseas market operators do not have their principal place of business in Australia;

(b) overseas market operators may be subject to different regulatory mechanisms in the home country; and

(c) overseas markets may involve risks for Australian investors (particularly retail clients) that do not affect market users in the home country or users of comparable domestic markets.

RG 177.95 The equivalence test in s795B(2)(c) compares regulatory outcomes, not regulatory mechanisms (see RG 177.29–RG 177.34). This means there may be cases where the Australian and the home regulatory regimes are taken to be sufficiently equivalent, and the home regulatory regime as it applies to the overseas market is considered to achieve the key outcomes in RG 177.31, but where features of the overseas market or differences between the regulatory mechanisms used in Australia and the home country may disadvantage potential Australian users of the overseas market or affect the integrity of Australian financial markets as a whole.

RG 177.96 In such cases, we may advise the Minister to impose supplementary conditions on an overseas market licence if we think that:

(a) additional measures are appropriate to protect the interests of potential Australian users of the overseas market or the integrity of Australian financial markets as a whole; and

(b) those measures can be satisfactorily implemented by limited supplementary conditions.

RG 177.97 Examples of the supplementary conditions we may advise the Minister to impose are:

(a) conditions about disclosures (see RG 177.98–RG 177.100); and

(b) conditions about participant supervision or client compensation (see RG 177.101–RG 177.102).

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*Conditions about disclosures*

RG 177.98 We will generally advise the Minister to impose conditions requiring disclosure of the following matters to Australian users and potential users of the overseas market:

(a) that the overseas market is primarily regulated by the home regulatory regime;

(b) that the rights and remedies available in relation to the overseas market may differ from those in comparable domestic markets;

(c) the general nature of the rights and remedies available in relation to the overseas market, and how those rights and remedies can be accessed by Australian users;

(d) any special risks associated with the overseas market, such as:

  (i) any special features of the market;

  (ii) the effect of time zone differences; and

  (iii) currency risks; and

(e) the arrangements for clearing and settlement of transactions effected through the overseas market by Australian users, and where applicable, for custody of financial products held for or attributable to Australian users.

This list is not exhaustive.

RG 177.99 Disclosure of these matters to Australian users and potential users of the overseas market enables Australians to make more informed choices about using the overseas market.

RG 177.100 The way the information in RG 177.98 must be disclosed will depend on the nature of the overseas market. If the overseas market is purely screen based, it may be appropriate for the disclosures to be made electronically. In other cases, it may be necessary for the overseas market operator to impose specific obligations on Australian participants in the overseas market to disclose the information to Australian clients (particularly retail clients).

*Conditions about participant supervision or client compensation*

RG 177.101 We envisage that it may be appropriate in some cases to impose licence conditions for the supervision of Australian participants in the overseas market, or for arrangements relating to compensating Australian retail clients for loss caused by participants in the overseas market.

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RG 177.102 For example, in relation to supervision, the home regulatory regime may not require the market operator to directly supervise its participants. We may therefore advise the Minister to impose a condition that allows us to perform specific limited supervisory functions. In relation to compensation, the home regulatory regime may not have compensation arrangements that would be accessible by Australian retail clients. We may therefore advise the Minister to impose a condition that would protect those clients in the event of defalcation or fraudulent misuse of the client's money, property or authority over property.

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# Schedule 1: Information to be provided for s795B(2)(b) and (c)

RG 177.103 This schedule sets out the type of information and documents an applicant should provide to demonstrate that it satisfies the criteria in s795B(2)(b) and (c): see RG 177.80–RG 177.84 and Section B. Certain information and documents may be relevant to both criteria. These examples are not exhaustive.

**Part A: Demonstrating compliance with Australian obligations — s795B(2)(b)**

Information and documents that demonstrate whether an applicant will comply with each of its Australian obligations include:

(a) a description of the systems, structures, processes and resources (including human and financial resources) that the applicant will use to comply with its Australian obligations, especially as they relate to and impact on the operation of the facility in Australia;

(b) if the applicant is already operating the facility in its home country or elsewhere, evidence as to how the applicant meets its obligations under those regulatory regimes, especially if those obligations are similar to the obligations in s792A–H;

(c) an explanation of how the applicant supervises participants in the facility and enforces compliance with its operating rules (see RG 177.52 and RG 177.73);

(d) evidence of testing of the facility's systems and processes for the operation of the market in Australia;

(e) a description or copy of any information sharing or other co-operation arrangements between the applicant and existing Australian operators of financial markets or clearing and settlement facilities.

**Part B: Demonstrating the nature of the home regulatory regime — s795B(2)(c)**

Information and documents that demonstrate the requirements and supervision to which the facility is, or will be, subject in the home country include:

(a) an explanation of the matters listed in s798A(2)(a)–(f) and reg 7.2.14(d) (relating to the features of the market: see also RG 177.73;

(b) an explanation of the matters listed in s798A(3)(a)–(c) (relating to authorisation in the home country);

(c) a copy of the home country authorisation to operate the facility,

**Part B: Demonstrating the nature of the home regulatory regime — s795B(2)(c)**

including any conditions on the authorisation (reg 7.2.15(a));

(d) a description of the regulatory regime applying generally in the home country to facilities such as the applicant's facility, including the laws, rules and relevant regulatory bodies;

(e) a copy of or relevant extracts of the relevant laws, rules and procedures applying in the home country to the applicant's facility;

(f) a description of the minimum requirements in the home country for the content of the operating rules and written procedures of the applicant's facility, and of the processes for changing those operating rules and written procedures;

(g) a copy of the applicant's operating rules and written procedures for the facility;

(h) a description of the requirements in the home country for the home regulatory authority, the applicant or any other person to supervise the applicant's facility (including the conduct of participants), and to monitor and enforce compliance with the facility's operating rules;

(i) a description of the arrangements for clearing and settlement of market transactions (reg 7.2.14(e): see also RG 177.76);

(j) a copy of the relevant rules for the clearing and settlement arrangements, where the arrangements are operated or supervised by the applicant;

(k) an explanation of compensation mechanisms in the home country for retail clients in the event of misconduct by, or insolvency of, a participant in the applicant's facility and how these will apply in respect of an Australian participant in the facility;

(l) an analysis of why the applicant thinks the home regulatory regime meets the equivalence test in s795B(2)(c) and in particular, how the home regulatory regime achieves each of the relevant key outcomes in RG 177.31;

> Note 1: For a discussion of equivalence, see RG 177.19–RG 177.34.
>
> Note 2: See also Schedule 2 for questions that will assist the applicant to provide sufficiently detailed information about the home regulatory regime.

(m) a description or copy of the information sharing or other co-operation arrangements between the applicant and the home regulatory authority; and

(n) a description or copy of any information sharing or other co-operation arrangements between the applicant and other market operators, clearing houses or investor compensation schemes in the home country.

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# Schedule 2: Information for assessing outcomes of home regulatory regime

RG 177.104 This schedule sets out questions about an applicant's home regulatory regime that are intended to help the applicant to provide us with sufficiently detailed information so that we can assess whether the home regulatory regime as it applies to the overseas market achieves the relevant key outcomes for equivalence: see RG 177.84 and RG 177.31. These questions are examples only, and are not intended to limit the information and documents that an applicant should provide about the home regulatory regime.

**Part A: Market information**

**Q1.1** What regulatory requirements exist for the provision of information to market users and potential market users about the market operator, trading processes, participants, products and any listed entities, including requirements about:

(a) content;

(b) accuracy;

(c) timing; and

(d) completeness?

**Q1.2** What regulatory requirements exist for the provision of pre-trade and post-trade information to market users and potential market users?

**Q1.3** What are the sources of the requirements in Q1.1 and Q1.2?

**Q1.4** On whom are the requirements imposed?

**Q1.5** By whom and how is compliance with the requirements monitored?

**Q1.6** By whom and how are the requirements enforced?

**Q1.7** What role does the home regulatory authority perform in regulating information disclosure?

**Q1.8** What role does the market operator perform in regulating information disclosure?

**Part B: Trading**

**Q2.1** How does the market operator and/or home regulatory authority ensure that any matching process occurs in a fair, orderly and transparent manner?

**Q2.2** What restrictions exist in relation to conducting transactions, otherwise than through the market, in financial products that are traded through the relevant market ("off-market" transactions)?

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**Part B: Trading (cont.)**

**Q2.3** How are "off-market" transactions supervised?

**Q2.4** What regulatory controls exist against price manipulation and other market abuse practices?

**Q2.5** Who is responsible for any such controls?

**Q2.6** What role does the home regulatory authority perform in monitoring the trading of financial products through the market?

**Q2.7** What role does the market operator perform in monitoring the trading of financial products through the market?

**Q2.8** By whom and how are the regulatory obligations about trading enforced?

**Part C(a): Participants — supervision**

**Q3.1** What obligations are there on market participants about:

(a) complying with instructions from a client;

(b) completing transactions;

(c) dealing with conflicts of interest;

(d) handling client money and property;

(e) complying with the relevant law and market operating rules in the home country;

(f) financial standing; and

(g) acting efficiently, honestly and fairly?

**Q3.2** What are the sources of these obligations?

**Q3.3** What role does the home regulatory authority perform in monitoring participants and enforcing participants' compliance with their obligations?

**Q3.4** What role does the market operator perform in monitoring participants and enforcing participants' compliance with their obligations?

**Part C(b): Participants — compensation arrangements**

**Q3.5** What compensation arrangements are available for retail clients in the home country who use the market?

**Q3.6** How do the arrangements operate?

**Q3.7** Under whose authority do the arrangements operate?

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**Part C(b): Participants — compensation arrangements (cont.)**

**Q3.8** Do the arrangements provide retail clients with a right to claim for loss in respect of the defalcation or fraudulent misuse by a participant of the client's money or property?

**Q3.9** If the answer to Q3.8 is yes, is there a right to claim compensation whether or not the participant is insolvent?

**Q3.10** Are there other circumstances when retail clients have a right to claim compensation in respect of participant conduct?

**Q3.11** Will Australian retail clients of participants be able (as a matter of law) to access the arrangements?

**Q3.12** What role, if any, does the home regulatory authority perform in relation to the compensation arrangements?

**Part D: Market supervision**

**Q4.1** How does the home regulatory regime ensure that participants are treated fairly?

**Q4.2** Who is responsible for supervising the market?

**Q4.3** What are the respective supervision roles of the market operator and the home regulatory authority under the home regulatory regime?

**Q4.4** Who is responsible for enforcing other obligations imposed by the home regulatory regime on the:

(a) market operator;

(b) participants; and

(c) other market users?

**Q4.5** How does the home regulatory regime address potential conflicts between the commercial interests of a market operator and ensuring that the market is fair, orderly and transparent?

**Q4.6** What measures in the home regulatory regime are there to ensure that:

(a) no person has a significant interest, shareholding or influence over a market operator;

(b) only fit and proper people are involved in the management of a market operator; and

(c) the market operator has sufficient resources to operate the market properly and perform its functions?

**Q4.7** By whom and how are compliance with the measures in Q4.6 monitored and enforced?

**Part E: Market stability**

**Q5.1** What regulatory requirements are imposed on the market operator

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**Part E: Market stability**

in relation to:

(a) capital;

(b) business planning;

(c) technological resources and disaster recovery planning;

(d) adequately trained staff;

(e) managing electronic communications breakdowns, participant defaults and other emergencies?

**Q5.2** What are the sources of these requirements?

**Q5.3** By whom and how is compliance with these requirements monitored and enforced?

**Part F: Clearing and settlement**

**Q6.1** Who provides the clearing and settlement arrangements for transactions effected through the market?

**Q6.2** Is that person required to be approved by a regulator in the home country and, if so, are they approved?

**Q6.3** If there is an approval process, what is it?

**Q6.4** What obligations are there on the person/s providing clearing and settlement services for transactions effected through the market?

**Q6.5** What financial backing is required/exists to ensure contract completion occurs for transactions effected through the market?

**Q6.6** By whom and how is compliance with these obligations monitored and enforced?

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# Key terms

RG 177.105 In this guide, a reference to:

"AFS licence" means an Australian financial services licence under s913B

"ASIC" means the Australian Securities and Investments Commission

"Australian CS facility licence" means a licence under s824B(1) or (2) that authorises a person to operate a CS facility in Australia

"Australian market licence" means a licence under s795B(1) or (2) that authorises a person to operate a financial market in Australia

"Australian obligations" means the obligations of a market licensee as set out in Division 3 of Part 7.2 of the Corporations Act

"Australian regulatory regime" means the regulatory regime applying to a domestic market licensee

"Corporations Act" means the *Corporations Act 2001* as amended and includes regulations made for the purposes of that Act

"CS facility" means a clearing and settlement facility

"domestic market" means a financial market licensed or applying to be licensed under s795B(1)

"domestic market licensee" means a person who holds an Australian market licence under s795B(1)

"Explanatory Memorandum" means the revised explanatory memorandum to the *Financial Services Reform Bill 2001* that takes into account amendments by the House of Representatives made on 28 June 2001 to the Bill as introduced

"financial product" has the meaning given by Division 3 of Part 7.1 of the Corporations Act

Note: This is a definition contained in s761A of the Corporations Act.

"home country" means the country outside Australia in which the operator of a financial market has its principal place of business

"home regulatory authority" means a body established by or for the government of the home country with responsibility for supervising the overseas market operator and the overseas market in the home country

"home regulatory regime" means the regulatory regime in the home country

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"IOSCO objectives and principles" means the *IOSCO Objectives and Principles of Securities Regulation*, originally adopted by the International Organization of Securities Commissions (IOSCO) in September 1998, and as amended from time to time

"market users" means investors who acquire or dispose of financial products through the financial market in question. Investors may be participants dealing for themselves or, where participants act as agent for other persons as clients, the clients of the participants

"overseas market" means a financial market licensed or applying to be licensed under s795B(2)

"overseas market licensee" means a person who holds an Australian market licence under s795B(2)

"participant" means:

(a) in relation to a financial market, a person who is allowed to directly participate in the market under the market's operating rules;
(b) in relation to a CS facility, a person who is allowed to directly participate in the CS facility under the CS facility's operating rules

Note: This is a definition contained in s761A of the Corporations Act.

"RG 172" (for example) means a regulatory guide (in this example numbered 172)

"reg 7.2.10" (for example) means a regulation in the *Corporations Amendment Regulations 2001 (No 4)* (in this example numbered 7.2.10)

"regulatory outcomes" means the outcomes identified in Table A of RG 172.12

"regulatory regime" means all the laws, rules and procedures comprising the requirements and supervision to which the financial market is subject, and includes the structures and procedures for administering the laws

"retail client" has the meaning given by s761G

Note: This is a definition contained in s761A of the Corporations Act.

"s782" (for example) refers to a provision of the Corporations Act (in this example numbered 782).

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# Related information

RG 177.106

**Headnotes**

Australian market licence, clearing and settlement, financial market, financial market regulation, foreign participant, home regulatory authority, regulatory outcomes, fair orderly and transparent, overseas market, sufficiently equivalent, supervisory obligation, supervisory arrangements, financial resources, licence conditions, operating rules, written procedures

**Regulatory guides**

RG 54 *Principles for cross border financial services regulation: Making the regulatory regime work in a cross border environment*

RG 172 *Australian market licences: Australian operators*

RG 176 *Licensing: Discretionary powers — Wholesale foreign financial services providers*

**Legislation**

*Corporations Act 2001*, Part 7.2, Part 7.3, Part 7.5, Part 7.6, s761A, 761G, 765A, 767A, 768A, 790A, 791A, 791C, 791D, 792A, 792B, 792C, 792D, 792E, 792F, 792G, 792H, 792I, 793B, 793C, 793D, 793E, 794C, 795A, 795B, 796A, 797B, 798A, 820A, 820C, 820D, 824B, 911A, 913B; *Corporations Regulations 2001*, reg. 7.1.09, 7.1.10, 7.2.06, 7.2.07, 7.2.08, 7.2.11, 7.2.12, 7.2.14, 7.2.15.

**Consultation papers**

CP 38 *Australian market licences: Overseas operators* (November 2002)

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