



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 211

Clearing and settlement facilities: Australian and overseas operators

April 2010

About this guide

This guide tells you

- when you need an Australian clearing and settlement facility (CSF) licence and how to apply for one, whether you are an Australian or overseas operator;
- our approach to advising the Minister about an exemption from holding a CSF licence; and
- what you should do after you have been granted a licence.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued on 20 April 2010 and is based on legislation and regulations as at 20 April 2010.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your licensee obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview: Operating a CS facility in Australia

Key points

The purposes of regulating CS facilities are to:

- maintain financial system stability;
- reduce systemic risk;
- ensure clearing and settlement services are provided in a fair and effective way; and
- protect market users and CS facility users.

The Minister has primary responsibility for licensing CS facilities operating in Australia and for granting exemptions from the requirement to hold a CSF licence.

ASIC and the RBA are responsible for advising the Minister on applications for CSF licences and ensuring that operators comply with their licensee obligations in Part 7.3 of the *Corporations Act 2001* (Corporations Act).

The Department of Treasury advises the Minister on clearing and settlement policy.

You must have a CSF licence if you operate a CS facility in Australia unless the Minister has exempted you.

You can apply to the Minister, through ASIC, for a CSF licence or an exemption from the requirement to hold a CSF licence.

If you are granted a CSF licence, you should assess your compliance with your licensee obligations and report annually to ASIC. ASIC and the RBA will assess and report at least annually to the Minister on your compliance.

Why are CS facilities regulated?

- RG 211.1 The purposes of regulating CS facilities under the Corporations Act are to:
- (a) maintain financial system stability;
 - (b) reduce systemic risk;
 - (c) ensure clearing and settlement services are provided in a fair and effective way; and
 - (d) protect investors dealing in financial products and users of CS facilities.
- RG 211.2 We believe that these purposes are met when the desired regulatory outcomes relevant to each CS facility are achieved. Table 1 lists those desired regulatory outcomes.

- RG 211.3 If you are already, or intend to become, a CS facility operator, we expect your facility to deliver the relevant regulatory outcomes. In determining the relevance of the regulatory outcomes and how you achieve them, we will adopt a flexible approach and take into account the characteristics of your facility, including:
- (a) the nature of the activities conducted by your facility;
 - (b) the nature of the financial market or markets (if any) with which your facility has arrangements in relation to clearing and/or settlement;
 - (c) the nature of the financial products for which your facility provides services, including whether the contracts constituting the products are standard contracts widely accepted by the industry;
 - (d) the size of your facility, including the systemic risk it poses to the Australian financial system and its potential impact on financial stability;
 - (e) the type of your participants and who they represent; and
 - (f) the technology used in the operation of your facility.

Table 1: Regulatory outcomes for CS facility operators

Regulatory area	Regulatory outcomes
CS facility stability	<p>The regular mechanism provided by the facility operates reliably and the risk of failing is minimised, so that:</p> <ul style="list-style-type: none"> • existing and potential facility users can be confident that it will be available in the future; and • the risk of existing and potential facility users, operators of markets or other CS facilities being adversely affected by any failure of the facility is also minimised.
Clearing and settlement process	<p>The clearing and settlement process is transparent so that participants:</p> <ul style="list-style-type: none"> • understand their obligations and the operation of the facility; and • can identify, understand and evaluate the financial risks and costs associated with their participation in the facility. <p>Users of a CS facility are confident that the facility operates fairly and that settlement obligations will be met in a timely manner. For example, participants:</p> <ul style="list-style-type: none"> • promptly and properly settle their obligations; and • comply with the law and the facility's operating rules.

Regulatory area	Regulatory outcomes
Facility and participant supervision	<p>The facility and its participants are properly supervised by the operator so that breaches of the law or the facility's operating rules are likely to be detected and disciplined. As a result:</p> <ul style="list-style-type: none"> • participants and existing and potential facility users have confidence in the operation of the facility; • participants and facility users are not disadvantaged by breaches of the facility's operating rules; and • the facility has a good reputation. <p>Facility supervision is not compromised by:</p> <ul style="list-style-type: none"> • conflicts between the facility operator's duties and its commercial interests; • the influence of a major shareholder; • the involvement of unfit individuals in the management of the facility operator; or • the facility operator's lack of resources.
Risk management	<p>Risks relating to default and other risks, including systemic risk, counterparty risk, market risk, liquidity risk and operational risk, are anticipated and appropriately dealt with, so that:</p> <ul style="list-style-type: none"> • participants and existing and potential facility users can be confident that the clearing and settlement obligations will be met promptly and properly in case of a participant default; • the risk of operators of markets, participants of the CS facility or other CS facilities being adversely affected by a participant default will be minimised; and • systemic risk to the Australian financial system is reduced.
RG 211.4	<p>To achieve the above regulatory outcomes, the CS facility operator should:</p> <ol style="list-style-type: none"> (a) ensure that its services are provided in a fair and effective manner; (b) comply with any licence conditions or exemption conditions, including those relating to financial stability and, if applicable, with the RBA's financial stability standards (see RG 211.8); (c) make available to the market in a timely manner necessary information on the clearing and settlement process, such as the rules and procedures, operational requirements and restrictions; (d) have adequate arrangements for supervising the facility; (e) have adequate financial, technological, human and other resources to supervise the facility; (f) have adequate arrangements for handling conflicts of interest; (g) enforce compliance with the facility's operating rules; (h) notify ASIC of disciplinary action against a participant, and suspected significant breaches of the law or the facility's operating rules by a participant; (i) provide information to ASIC and the RBA to enable ASIC and the RBA to monitor the facility operator's compliance with its obligations;

- (j) take reasonable steps to ensure an unacceptable control situation does not develop or exist if it is a widely held market body within the meaning of Division 1 of Part 7.4; and
- (k) take reasonable steps to ensure that no disqualified individual becomes or is involved in the facility operator.

Who regulates CS facilities?

Minister

- RG 211.5 The Minister, with the advice and assistance of ASIC and, on certain issues, the RBA, is responsible for:
- (a) licensing CS facilities operating in Australia;
 - (b) varying, suspending or cancelling a CSF licence;
 - (c) determining whether a CS facility has adequate operating rules;
 - (d) making directions about the operation of a CS facility; and
 - (e) granting exemptions from the requirement to hold a licence to operate a CS facility in Australia.
- RG 211.6 In deciding whether to grant a CSF licence, the Minister must consider the matters set out in s827A, which focuses on the operation of the facility. These include any relevant advice from ASIC and the RBA: s827A(2)(h).

Department of Treasury

- RG 211.7 The Department of Treasury:
- (a) advises the Minister on clearing and settlement policy;
 - (b) briefs the Minister on CSF licence and exemption applications and operating rule change notifications; and
 - (c) arranges for licences and exemptions to be drafted by the Australian Government Solicitor.

RBA

- RG 211.8 The RBA regulates CS facilities by:
- (a) setting financial stability standards for the purposes of ensuring that CSF licensees conduct their affairs in a way that causes or promotes overall stability of the Australian financial system. The RBA has issued two separate standards, one for securities settlement systems and one for central counterparties;

Note: See s827D and <http://www.rba.gov.au/PaymentsSystem/StdClearingSettlement/standards.html>.

- (b) assessing, at least once each year, CSF licensees' compliance with their obligations under the financial stability standards (where they apply) and to do all other things necessary to reduce systemic risk, and reporting to the Minister on the result of the assessment (s823CA); and
- (c) advising the Minister about matters for which the Minister has a discretion under Part 7.3. For example, the RBA may advise the Minister about:
 - (i) applications for a CSF licence; and
 - (ii) a licensee's breach of their obligations, to the extent that it is reasonably practicable to do so, to comply with the financial stability standards and do all things necessary to reduce systemic risk.

Note: See s827A(2)(h), 821BA(2).

ASIC

RG 211.9 ASIC regulates CS facilities by:

- (a) advising the Minister about:
 - (i) applications for a CSF licence (s824A(2), 827B);
 - (ii) applications for a CSF licence exemption (s820C(1));
 - (iii) changes to operating rules (s822D, 822E); and
 - (iv) other matters for which the Minister has a discretion under Part 7.3. For example ASIC may advise the Minister of a licensee's breach of their obligations (s821B(1));
- (b) assessing and reporting to the Minister on CSF licensees' compliance with their obligations, other than the obligations relating to financial stability standards compliance and systemic risk reduction, which are assessed by the RBA (s823C);
- (c) enforcing CSF licensees' compliance with their obligations under the Corporations Act (s822C, 823C); and
- (d) enforcing the prohibition on a person operating, or holding out that the person operates, a CS facility in Australia if the person does not hold a licence or an exemption (s820A, 1311(1), 1313(1)).

RG 211.10 When considering issues about CS facilities, we focus on the regulatory outcomes that CS facility regulation seeks to achieve, which are outlined in Table 1.

RG 211.11 ASIC works closely with the RBA in performing its functions to regulate CS facilities.

When do you need a CSF licence?

RG 211.12 You need a CSF licence if:

- (a) you operate a CS facility in Australia; and
- (b) the Minister has not exempted you.

Note: See s820A.

RG 211.13 In assessing whether your facility is a CS facility operating in Australia we:

- (a) have regard to the key terms in the definition of CS facility in the Corporations Act and whether they apply to your operations (s768A); and
- (b) evaluate whether there is a sufficient nexus between the facility's operations and Australia.

RG 211.14 You may apply for a licence under either:

- (a) s824B(1), for a domestic or, in some instances, an overseas operator; or
- (b) s824B(2), for an overseas operator.

RG 211.15 You may operate more than one CS facility in Australia.

RG 211.16 For a comprehensive explanation of how we decide whether you require a licence and what type of licence, see Section B.

Are you eligible for a CSF licence exemption?

RG 211.17 You can apply to the Minister, through ASIC, for an exemption from the requirement to hold a CSF licence. We will recommend an exemption only when we are satisfied that there is no satisfactory policy reason for regulating you as a CSF licensee. All applications are assessed on a case-by-case basis.

Note: See s820C and Explanatory memorandum para 8.37.

RG 211.18 Section C explains our approach to CSF licence exemptions.

Applying for a CSF licence or an exemption

RG 211.19 After you have read Sections B and C, we recommend you discuss your proposed operations with us.

RG 211.20 Once you have your discussion with us and have decided that you wish to apply for an exemption, submit an application as set out in Section C. If you

decide that you need a CSF licence, use Section E to prepare your application.

- RG 211.21 If you are an overseas operator, please read also Section D, which sets out our approach in relation to an application for an overseas CSF licence under s824B(2).

Examples of facilities and our regulatory approach to them

- RG 211.22 For examples of some facilities and our view on whether they are CS facilities operated in Australia, see Appendix.

Continuing obligations if you have a CSF licence

- RG 211.23 If you are granted a licence, you should ensure that you are complying with your licensee obligations and provide an annual report to ASIC about your compliance: s821E.

- RG 211.24 ASIC will assess, at least annually, whether you are complying with your obligations (other than your obligations, to the extent that it is reasonably practicable to do so, to comply with the financial stability standards and do all things necessary to reduce systemic risk) as a CSF licensee under the Corporations Act.

Note: See s823C and Explanatory Memorandum para 8.122.

- RG 211.25 The RBA will assess, at least annually, whether you are complying with the financial stability standards (where they apply) and doing all things necessary to reduce systemic risk.

- RG 211.26 Refer to Section F for more details of licensee obligations, annual reporting and assessment.

B Do you need a CSF licence?

Key points

You need a CSF licence if you operate a CS facility in Australia and the Minister has not exempted you from holding a CSF licence.

In assessing whether you operate a CS facility in Australia we:

- have regard to the key terms in the definition of CS facility in the Corporations Act and whether they apply to your operations; and
- evaluate whether there is a sufficient nexus between the facility's operations and Australia.

You can apply for a licence under:

- s824B(1), if you are a domestic operator or, in some instances, an overseas operator; or
- s824B(2), if you are an overseas operator (see Figure 2).

You may also apply for a CSF licence that authorises you to operate more than one CS facility, but each of those CS facilities will be regulated separately: RG 211.68–RG 211.71.

When do you need a CSF licence?

RG 211.27 You need a CSF licence if you:

- (a) operate a CS facility in Australia; and
- (b) the Minister has not exempted you.

Note: See s820A.

Clearing and settlement arrangements

What are clearing and settlement arrangements?

RG 211.28 In addition to CS facilities, the Corporations Act also refers to a concept of clearing and settlement arrangements.

RG 211.29 Clearing and settlement arrangements are arrangements for clearing and settlement of transactions effected through a financial market (s790A) which may include arrangements:

- (a) with a CSF licensee; or
- (b) that are part of the market's operating rules.

RG 211.30 A CS facility is one type of clearing and settlement arrangement.

Clearing and settlement arrangements for a licensed financial market

RG 211.31 The Minister decides whether:

- (a) clearing and settlement arrangements are necessary for a financial market;
- (b) the clearing and settlement arrangements in place are adequate;
- (c) the clearing and settlement arrangements need to be provided by a person who holds a CSF licence; or
- (d) an exemption from having a CSF licence should be granted to the provider of clearing and settlement arrangements.

ASIC will recommend the most appropriate option to the Minister.

RG 211.32 If the Minister thinks that there needs to be clearing and settlement arrangements then a condition will be included in the Australian market licence specifying the type of clearing and settlement arrangements that are adequate for that market: s796A(4)(c), 792A(b).

RG 211.33 ASIC will advise the Minister that some form of clearing and settlement arrangements is necessary if:

- (a) concluded contracts are entered into on the financial market; and
- (b) parties to the contracts do not know the identity of the person with whom they contract.

RG 211.34 We may also advise the Minister that clearing and settlement arrangements are necessary in other circumstances, particularly where the market users include retail investors.

RG 211.35 In deciding whether to advise the Minister that the provider of the clearing and settlement arrangements should have a CSF licence, we will consider the following factors:

- (a) whether the clearing and settlement arrangements will be provided by a person other than a participant, or an agent of a participant, in the market;
- (b) the size and sophistication of the market, including whether there are retail market users;
- (c) the classes of financial products and the anticipated trading volume;
- (d) the complexity of the clearing and settlement arrangements proposed for the market, including the resources required to conduct the arrangements;
- (e) the procedures for dealing with failure to settle;

- (f) whether the clearing and settlement arrangements may result in systemic risks; and
- (g) the extent to which the clearing and settlement arrangements are otherwise regulated.

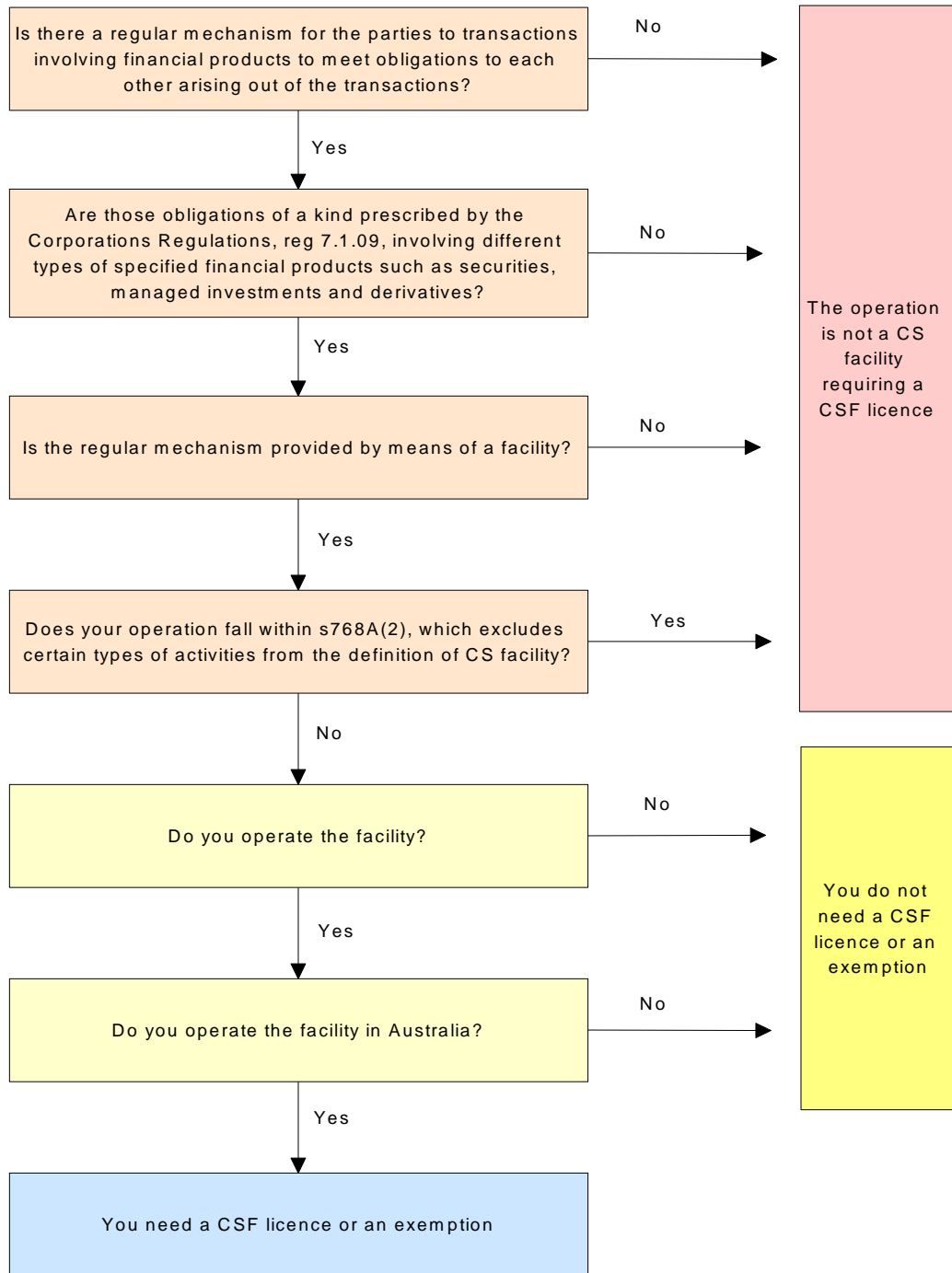
CS facilities must be licensed

- RG 211.36 If a financial market's clearing and settlement arrangements constitute a CS facility, they must be operated by a CSF licensee, unless the CS facility is exempt: s820A(1).
- RG 211.37 The Corporations Act imposes different obligations for market licensees and CSF licensees because they provide different services and give rise to different risks.
- RG 211.38 In general, we do not consider that an Australian market licence is an appropriate substitute for a CSF licence or that Australian market licence conditions can adequately replace the obligations imposed by the Corporations Act on CSF licensees. However, there may be circumstances where the operation of a financial market arguably falls within the broad definition of a CS facility. In that situation, we may, after considering the nature of the operations of the financial market and all the relevant circumstances of the case, decide that regulating the operator under the Australian market licence regime is more appropriate than regulating the operations both as a market and a CS facility.

Deciding whether your operation is a CS facility

- RG 211.39 Figure 1 may assist you in deciding whether you need to apply for a CSF licence, or apply for an exemption from the requirement to hold one.

Figure 1: Deciding whether you need a CSF licence or exemption



What type of operation is *not* considered a CS facility?

- RG 211.40 Section 768A(2) of the Corporations Act sets out what conduct does not constitute operating a CS facility. The Corporations Act specifically excludes the following:
- (a) an authorised deposit-taking institution (ADI) acting in the ordinary course of its banking business;
 - (b) a person acting on their own behalf, or on behalf of one party to a transaction only;
 - (c) a broker dealing with its client's account in the ordinary course of its business activities;
 - (d) a participant in a CS facility taking on the delivery or payment obligations of its client;
 - (e) treasury operations between related corporate bodies;
 - (f) a facility for the exchange and settlement of non-cash payments (see s763D) between providers of non-cash payment facilities; and
 - (g) any other conduct prescribed by reg 7.1.10(2), which excludes conduct of National Stock Exchange of Australia Limited, Bendigo Stock Exchange Limited and their participants in operating a facility in accordance with the operating rules of a licensed market if the requirements of reg 7.1.10(3) are met.

What type of operation *is* considered a CS facility?

- RG 211.41 We will consider all the functions and operations of a facility when determining whether it is a CS facility. You may need to obtain your own legal advice about whether you operate a CS facility.
- RG 211.42 In assessing whether you operate a CS facility we will have regard to the key terms in the definition of CS facility in the Corporations Act and determine whether it applies to your operations. A typical CS facility either operates a securities settlement system or acts as a CCP through a novation mechanism, but the definition in the Corporations Act also encompasses other types of facilities.
- RG 211.43 The Appendix gives some examples and our view on whether or not they are CS facilities.

Definition of CS facility

- RG 211.44 Under s768A(1), a CS facility is defined as 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 reg 7.1.09, including obligations arising from a contract to transfer a security, a derivative or an interest in a managed investment scheme.
- RG 211.45 More details about the obligations referred to in reg 7.1.09 are set out in RG 211.53.

Considering key terms

- RG 211.46 We use our interpretation of the following four key terms in the Corporations Act when deciding whether you operate a CS facility:
- (a) ‘facility’;
 - (b) ‘regular’;
 - (c) ‘mechanism’; and
 - (d) ‘to meet obligations to each other’.

Note: See s768A(1).

‘Facility’

- RG 211.47 The word ‘facility’ is not defined in the Corporations Act for these purposes. We consider that a ‘facility’ means any form of infrastructure, including relatively simple elements of infrastructure.
- RG 211.48 An integrated infrastructure constitutes a single facility and may be a CS facility even if any or all of its component parts, when considered in isolation, do not constitute a CS facility.
- RG 211.49 The following factors indicate that a number of component parts constitute an integrated infrastructure and a single facility:
- (a) the component parts are owned or controlled by the same entity or are part of the same corporate group; or
 - (b) together the component parts assist the parties to transactions in financial products to meet obligations to each other and no component part is a regulated CS facility.

These factors are not exhaustive.

Note: Our approach to the definition of a facility is consistent with *Carragreen Currency Corporations Pty Ltd v Corporate Affairs Commission (NSW)* (1986) 11 ACLR 298, 312–3, which held that a facility is any form of infrastructure.

‘Regular’

RG 211.50 ‘Regular’ means systematically, in the sense that there are recurring opportunities for transaction parties to meet obligations to each other through the facility. ‘Regular’ does *not* mean continuously or at specified intervals. A CS facility operating for a short time may still operate regularly.

Note: See Explanatory memorandum para 8.26.

‘Mechanism’

RG 211.51 A ‘mechanism’ includes technical infrastructure, regulations and procedures.

Note: See Explanatory memorandum para 8.24.

RG 211.52 An association which just coordinates the making of clearing and settlement regulations and procedures that are then adopted by its members, but which does not provide technical infrastructure, would not be operating a CS facility.

Note: See Explanatory memorandum para 8.25.

Meaning of ‘to meet obligations to each other’

RG 211.53 The relevant obligations comprise:

- (a) obligations arising from a contract to transfer a security;
- (b) obligations arising from a contract to transfer any of the following in relation to a registered scheme:
 - (i) an interest in the scheme;
 - (ii) a legal or equitable right or interest in an interest covered by subparagraph (i); or
 - (iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);
- (c) obligations arising from a contract to transfer any of the following in relation to a managed investment scheme that is not a registered scheme, other than a scheme (whether or not operated in this jurisdiction) in relation to which none of s601ED(1)(a), (b) and (c) of the Corporations Act are satisfied:
 - (i) an interest in the scheme;
 - (ii) a legal or equitable right or interest in an interest covered by subparagraph (i); or

- (iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);
- (d) obligations arising from a contract to transfer a debenture, stock or bond issued or proposed to be issued by a government;
- (e) obligations arising from a contract to transfer a foreign exchange contract that is not:
 - (i) a derivative; or
 - (ii) a contract to exchange one currency (whether Australian or not) for another that is to be settled immediately;
- (f) obligations arising from a contract to transfer a right that includes an undertaking by a body to repay, as a debt, money deposited with or lent to the body;
- (g) obligations arising from acquiring or providing a derivative; and
- (h) obligations arising from the entry into a repurchase agreement.

Note: See reg 7.1.09.

- RG 211.54 The obligations do not have to arise from transactions made on a financial market as defined in the Corporations Act. They include obligations which arise from bilateral transactions entered into in the over-the-counter (OTC) markets.
- RG 211.55 A facility can provide a mechanism for parties 'to meet obligations to each other' in a number of ways, such as facilitating the transfer of consideration from a purchaser to a seller, and facilitating the transfer of the financial product from the seller to the purchaser. The phrase means more than simply providing information to allow parties to transactions to know the nature of their obligations to each other (for example, by providing parties to transactions with trade confirmations).
- RG 211.56 We consider that novation, a process through which the original obligation between counterparties of a transaction is discharged and substituted by two contracts under which a CS facility becomes the seller to every buyer and the buyer to every seller, is one of the mechanisms by which parties can meet obligations to each other. The phrase 'to meet obligations to each other' does not exclude from the definition CS facilities that use novation.
- RG 211.57 Similarly, s768A(2)(b), which excludes from the definition of CS facility arrangements where a person acts on their own behalf or only on behalf of one person to the transaction, does not apply to CS facilities that use novation.

Note: See Explanatory memorandum para 8.27–8.28.

Do you operate the facility?

RG 211.58 In determining who operates a facility we will consider a range of factors including who:

- (a) provides the services offered by the facility to end users;
- (b) sets the operating rules and procedures; and
- (c) oversees compliance with operating rules of the facility.

RG 211.59 The facility may comprise infrastructure which is owned by one entity and leased or licensed to another entity that provides the service to facility users.

Is your CS facility operating 'in Australia'?

RG 211.60 An operator of a CS facility only requires a CSF licence if it operates the CS facility in Australia.

RG 211.61 A CS facility is operating in Australia if it is operated by a body corporate that is registered under Chapter 2A of the Corporations Act: s820D(1).

RG 211.62 A CS facility may also operate in Australia in other circumstances. When assessing whether a CS facility operates in Australia, we will consider a number of factors including:

- (a) whether all or a significant part of the CS facility's technical infrastructure is located in Australia. Technical infrastructure includes hardware of any computerised clearing and settlement system;
- (b) whether the CS facility has one or more users and/or participants in Australia and is targeted at Australian users and/or participants;
- (c) whether the volume and value of transactions cleared and settled by the facility that are submitted by Australian participants and/or users are material (to be determined on a case-by-case basis);
- (d) the nature of the transactions and financial products in respect of which the facility's services are made available, such as whether the financial products are denominated in Australian dollars, referenced to an Australian-based entity, or issued by an Australian-based entity; and
- (e) whether the CS facility operator has entered into an arrangement with the operator of a licensed or exempted financial market (whether a domestic market or an overseas market) operating in Australia to provide clearing and settlement services to that financial market.

RG 211.63 These factors are not exhaustive. The presence or absence of one or more of these factors will not be determinative of our approach to a particular facility. We will consider all the circumstances surrounding the operation of the facility in assessing whether the facility is operating in Australia.

However, ultimately our assessment will turn on whether there is a nexus between operation of the regular mechanism provided by the facility and Australia.

Note 1: See s820D(2) and Explanatory Memorandum para 8.31-8.33.

Note 2: Our policy in RG 211.62–RG 211.63 is similar to our policy on when a financial market operates in Australia: see Regulatory Guide 172 *Australian market licences: Australian operators* (RG 172). 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 Explanatory Memorandum para 8.33.

RG 211.64 A CS facility may operate simultaneously in Australia and other jurisdictions either as an Australian or overseas CS facility: s824B(2).

When is a CS facility targeting Australian users and/or participants?

RG 211.65 Determining whether a CS facility targets Australian investors and/or participants requires assessing all the facts and circumstances about the facility. The following factors may indicate that a CS facility is targeting Australian investors and/or participants:

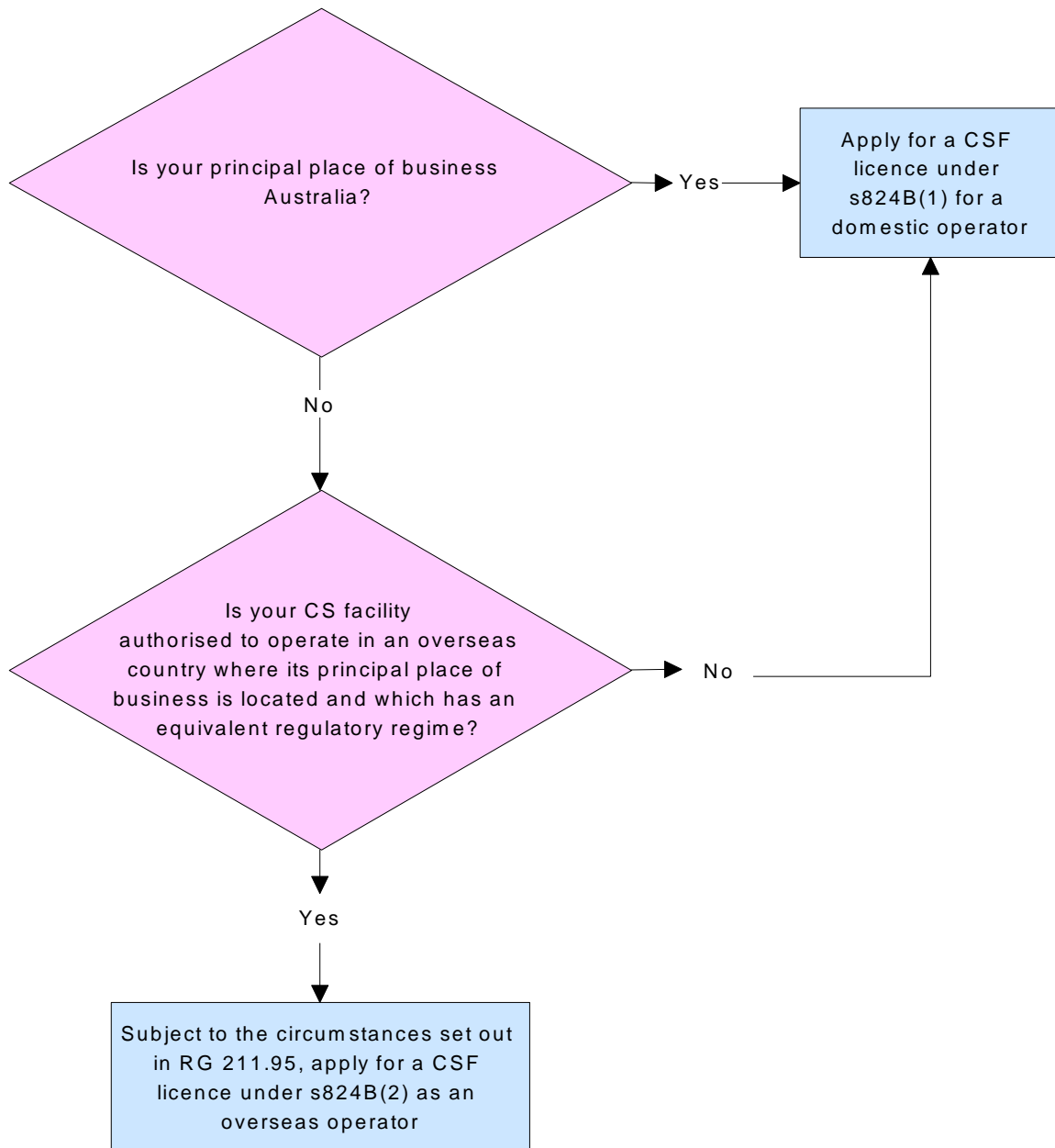
- (a) participants in Australia have direct secure access, including through the internet, to the facility;
- (b) the operator, or a person acting with the endorsement of the operator, promotes the CS facility in Australia by, for example:
 - (i) advertising the CS facility in Australian publications;
 - (ii) sending direct mail publicity about the CS facility to Australian addresses; or
 - (iii) sending email publicity about the CS facility to Australian addresses; or
- (c) the CS facility actively seeks to provide services for financial products traded by Australian-based entities whether over the counter or on market.

These factors are not exhaustive.

What type of CSF licence do you need?

RG 211.66 If you have concluded that your facility requires a CSF licence, use Figure 2 to decide whether you will apply for a:

- (a) CSF licence (domestic operator): or
- (b) CSF licence that authorises you to operate your overseas CS facility in Australia (overseas operator): see Section D.

Figure 2: Deciding whether you require a licence as a domestic or overseas operator

RG 211.67 It is the Minister's discretion to grant an overseas CSF licence to an overseas operator under s824B(2), rather than a domestic CSF licence under s824B(1). The Minister can only exercise this discretion after being satisfied with a number of matters, in particular those set out in s824B(2), which focuses on regulatory equivalence, and s827A.

How many CSF licences do you need?

RG 211.68 If you will be operating more than one CS facility in Australia, you may apply for a CSF licence that authorises you to operate two or more CS facilities: s824E.

- RG 211.69 These are some of the characteristics we will consider in deciding when you need more than one CSF licence:
- (a) whether there is more than one facility provided for participants to meet obligations to each other arising from transactions in financial products;
 - (b) the transaction volume and the number and types of financial product for which each facility provides a regular mechanism for meeting obligations; and
 - (c) whether the operating rules are materially or substantially different for alternative financial products or different mechanisms for meeting obligations are provided.
- RG 211.70 We will assess and separately regulate each CS facility even though it may be on the same licence as another CS facility: s824E.
- RG 211.71 If you think you will be operating more than one CS facility, please discuss this with us before applying.

C Can you get a CSF licence exemption?

Key points

The Minister may grant a licence exemption for your CS facility when there is no satisfactory policy reason for regulating it as a licensed CS facility.

We normally only advise the Minister to exempt a particular CS facility or type of CS facility if:

- regulatory outcomes for CS facilities are not relevant to the facility;
- regulatory outcomes for CS facilities are achieved without regulation; or
- the cost of regulation required to achieve the regulatory outcomes for CS facilities significantly outweighs the benefits of those outcomes.

When applying for an exemption, please provide the information about your facility as set out in this section.

When CSF licence exemption may be granted

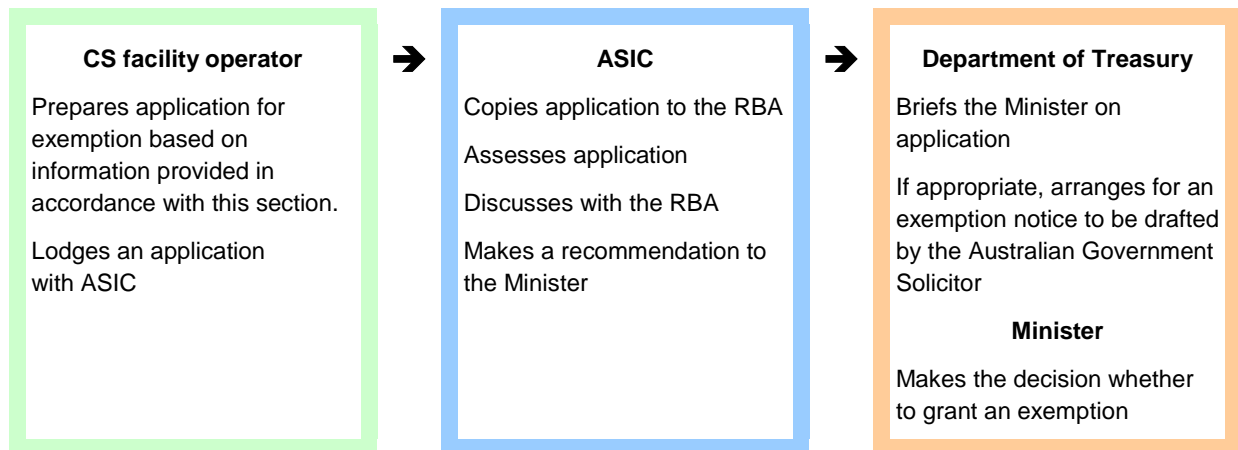
RG 211.72 The Minister decides whether to grant an exemption under s820C(1).

RG 211.73 The Minister's exemption power is intended for use when there is no satisfactory policy reason for regulating the arrangements as a licensed CS facility.

Note: See Explanatory memorandum para 8.37.

RG 211.74 ASIC will consider each exemption application on a case-by-case basis. Before finalising our advice, ASIC will discuss the exemption application with the RBA.

RG 211.75 Figure 3 shows a summary of the exemption process:

Figure 3: CSF licence exemption process

When we will advise the Minister to grant an exemption

- RG 211.76 We normally only advise the Minister to exempt a particular CS facility or type of CS facility if:
- regulatory outcomes for CS facilities are not relevant to the facility (see RG 211.77);
 - regulatory outcomes for CS facilities are achieved without regulation under Part 7.3 (see RG 211.78); or
 - the cost of regulation required to achieve the regulatory outcomes for CS facilities significantly outweighs the benefits of those outcomes (see RG 211.79–RG 211.82).

These categories may overlap.

Note: The regulatory outcomes for CS facilities are those matters that we have detailed in Table 1 including financial stability, effectiveness of clearing and settlement processes, supervision and risk management.

Regulatory outcomes are not relevant to the CS facility

- RG 211.77 Under special circumstances, we may advise the Minister that even if your facility meets the definition of a CS facility, it does not need a licence because the regulatory outcomes for CS facilities that we have identified in Table 1 are not relevant to your facility. In these circumstances, there may be no satisfactory policy reason for regulating it as a licensed CS facility.

Regulatory outcomes achieved without Part 7.3

- RG 211.78 We may advise the Minister to exempt your CS facility because it is subject to other forms of regulation that ensure the regulatory outcomes for CS facilities that we have identified in Table 1 are achieved without regulation. In these circumstances, there may be no satisfactory policy reason for regulating the facility as a licensed CS facility.

Regulatory cost significantly outweighs benefits

- RG 211.79 We may advise the Minister to exempt your CS facility if the cost of regulation significantly outweighs the benefits. In making the assessment we will take into account factors including:
- (a) the volume and value of transactions cleared and/or settled by or through your facility;
 - (b) the impact of the activities of your facility on the Australian financial system;
 - (c) the degree of systemic risk posed by the activities of your facility;
 - (d) your characteristics as the facility operator, including whether you operate any other CS facilities;
 - (e) the type of entities that are parties to the transactions in respect of which your facility provide services, and who those entities represent;
 - (f) the number and type of Australian participants who use your facility;
 - (g) the nature of the regular mechanism provided by the facility for parties to transactions in financial products to meet the obligations to each other arising out of those transactions;
 - (h) the nature of the financial products for which your facility provides services;
 - (i) whether the financial products to which the relevant transactions relate are commonly acquired and disposed of by retail investors;
 - (j) the number of financial products for which a regular mechanism is provided to the parties to transactions relating to those financial products to meet their obligations; and
 - (k) whether you are subject to other forms of regulation and the nature of that regulation.
- RG 211.80 The benefits of CS facility regulation arise from achieving the regulatory outcomes in Table 1. When we consider the costs of CS facility regulation, we look at the burden or costs associated with meeting the regulatory obligations including:
- (a) supervising the CS facility and its participants;
 - (b) maintaining operating rules in accordance with the Corporations Act; and
 - (c) reporting and completing an annual assessment.
- RG 211.81 You should make a clear case for why the costs outweigh the benefits of regulation.
- RG 211.82 An example of a situation when we may advise the Minister to grant an exemption is for a CS facility that only clears and settles trades in shares of

an incorporated club with a small number of members. There may be a limited number and value of shares traded each year, so that the club is able to rely on the Corporations (Low Volume Financial Markets) Exemption Notice 2003 [03/1162] and does not need an Australian market licence. The activities of the CS facility are unlikely to have any significant impact on the Australian financial system or pose any systemic risk. The shares in this situation are not acquired or disposed of primarily for making a financial investment. The cost of regulation, as a CS facility, would be unduly onerous.

When we will advise the Minister *not* to grant an exemption

RG 211.83 We will not advise the Minister to exempt:

- (a) an overseas CS facility solely because it is subject to regulation in the foreign country where its principal place of business is located, even if regulated by sufficiently equivalent regulations in the foreign country. Giving an exemption could undermine the licensing regime; or
- (b) a CS facility solely because there is doubt about whether the financial products to which the facility relates are, or should be, within the definition of financial product.

These circumstances are not exhaustive.

Will there be obligations with an exemption?

RG 211.84 There may be ongoing obligations imposed on a facility operator after an exemption has been granted.

RG 211.85 We may advise the Minister to impose conditions on the exemption to protect the users of the facility. Conditions may include a requirement:

- (a) to hold an AFS licence;
- (b) where a foreign operator is exempt from the requirement to hold an AFS licence, whether under the Corporations Act, Corporations Regulations 2001 (Corporations Regulations) or a class order for wholesale foreign financial service providers, that:
 - (i) it must submit to the jurisdiction of an Australian court in an action brought by us in relation to its operation of the facility; and
 - (ii) it must register with us as a foreign company if required under the Corporations Act;
- (c) for the key features of the CS facility to remain as they are when the exemption is granted;
- (d) to report to us periodically about the operation of the CS facility and compliance with conditions of the exemption;

- (e) to alert users of the CS facility to the fact that the CS facility is exempted;
- (f) to report to us any disciplinary action taken against a user of the CS facility or when the CS facility operator suspects that a person has committed, is committing or is about to commit a significant contravention of the Corporations Act;
- (g) to report to us any significant system outages;
- (h) to obtain an audit report about the operation of the CS facility prepared by a specified person or body that is suitably qualified;
- (i) to maintain records of all activities of the facility for five years;
- (j) to make available on its website the facility's annual audited financial statement;
- (k) if the financial products to which the facility relates are not traded on a licensed market or the traded price and other post-trade data of those products are not readily available to the public, and if we consider it is appropriate to do so, to make available to the current and potential users of the facility and to us:
 - (i) all end-of-day settlement prices of those products that are used for margin calculation;
 - (ii) aggregate open interests of those products accepted for clearing and settlement by the facility;
 - (iii) any other pricing or valuation information on those products; and
 - (iv) any other information that is necessary to enable the current and potential users of the facility to evaluate the costs and risks associated with using the facility;
- (l) to provide us with regular reports or electronic feeds of data, as prescribed by us, on all or classes of transactions cleared and/or settled via the facility, to support our supervision of financial markets;
- (m) to enter a written cooperation agreement with us and the RBA; or
- (n) any other conditions that are necessary to ensure that the regulatory outcomes in Table 1 will be achieved.

How to apply for a licence exemption

RG 211.86 Apply by submitting an application to us. The application should provide details of:

- (a) the operation of the particular CS facility or type of CS facility; and
- (b) the reasons why you should be exempted from the requirements of Part 7.3.

RG 211.87 We recommend you discuss your application with us before you submit it.

Processing time for an exemption application

- RG 211.88 We encourage you to submit a *draft* application before your *formal* application so we can ensure it is complete and detailed enough for ASIC to advise the Minister, and for the Minister to make a decision.
- RG 211.89 ASIC and the RBA will complete the assessment of your formal application in 12 to 16 weeks. This is the time between you submitting a formal application and our referral of your application to the Minister. This processing time excludes:
- (a) time spent clarifying issues with you;
 - (b) time waiting for information from you;
 - (c) any time we may spend consulting with third parties; and
 - (d) the time between referral to the Department of Treasury and the Minister's decision.
- RG 211.90 Occasionally, ASIC or the RBA may need to consult with the public about an application for exemption. In such cases, it will take us longer than 16 weeks to provide advice to the Minister. In deciding whether to consult with the public, we will consider:
- (a) whether the exemption is for a type of CS facility or a particular CS facility;
 - (b) the features of the CS facility, including:
 - (i) the anticipated volume and value of transactions to be cleared and settled through the facility; and
 - (ii) the likely facility users; and
 - (c) the need to apply the financial stability standards to the facility by assessing the likely impact of the activities of the facility on the Australian financial system and level of systemic risk it will pose.

D CSF licence—overseas operators

Key points

You are eligible to apply for an overseas CSF licence under s824B(2) if you are authorised to operate in your home country the same CS facility that you propose to operate in Australia.

In order for an overseas CSF licence to be granted, the home regulatory regime, as it applies to the operation of the overseas CS facility in the home country, must be sufficiently equivalent (in relation to the degree of protection from systemic risk and the level of fairness and effectiveness of services it achieves) to the Australian regulatory regime for comparable domestic CS facilities.

Adequate cooperation arrangements between ASIC, the RBA and

- the applicant; and
- the relevant home regulatory authorities,

must be in place before we could advise the Minister to grant an overseas CSF licence. ASIC and the RBA will look at putting in place the cooperative arrangements with the relevant home regulatory authorities.

Our policy

- RG 211.91 We will only advise the Minister to grant an overseas CSF licence under s824B(2) if we are satisfied that all the criteria in s824B(2) on regulatory equivalence are met and the matters that the Minister must have regard to in s827A(3) are taken into account.
- RG 211.92 In advising the Minister, we will assess your application against the following key criteria:
- (a) whether you are eligible to apply for an overseas CSF licence under s824B(2);
 - (b) whether regulation of the CS facility in your home country is sufficiently equivalent under s824B(2)(c); and
 - (c) what we consider is adequate for cooperation arrangements between:
 - (i) ASIC and you (s824B(2)(d));
 - (ii) the RBA and you (s824B(2)(d));
 - (iii) ASIC and the home regulatory authority (s827A(3)(d)); and
 - (iv) the RBA and the home regulatory authority (s827A(3)(d)).
- RG 211.93 In assessing whether the home country's regulatory regime is sufficiently equivalent under s824B(2)(c) and there are adequate cooperation

arrangements between ASIC, the RBA and the home regulatory authority, we will be guided by our general approach in Regulatory Guide 54 *Principles for cross border financial services regulation* (RG 54), Regulatory Guide 176 *Licensing: Discretionary powers—wholesale foreign financial services providers* (RG 176) and Regulatory Guide 177 *Australian market licences: Overseas operators* (RG 177). See also the RBA publication, ‘*Assessing the Sufficient Equivalence of an Overseas Regulatory Regime*’, as to how the RBA approaches the question of regulatory equivalence.

Underlying principles

RG 211.94 The alternative licensing route in s824B(2) for overseas CS facilities is intended to facilitate competition and avoid regulatory duplication while ensuring that systemic risk is reduced and services are provided in a fair and effective way. Our general approach to the licensing of overseas CS facilities is based on this legislative intention.

Note: See Explanatory Memorandum para 8.90.

RG 211.95 However, in certain circumstances, even if an overseas CSF licence applicant satisfies all the criteria set out in s824B(2), ASIC or the RBA may advise the Minister that it is more appropriate for the overseas CS facility operator to apply for a domestic licence under s824B(1). An example would be an overseas CS facility seeking to provide services to a market considered particularly large in Australia or systemically important.

Who is eligible to apply for an overseas CSF licence?

RG 211.96 A person is only eligible to apply for an overseas CSF licence under s824B(2) if they are authorised to operate in their home country the same CS facility that they propose to operate in Australia. In considering whether an applicant is eligible to apply for an overseas CSF licence, we will consider the following key terms in s824B(2):

- (a) ‘authorised’;
- (b) ‘CS facility’; and
- (c) ‘same facility’.

‘Authorised’

RG 211.97 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

- (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.

RG 211.98 We think it means more than that the applicant is able to operate the particular facility without contravening the law in the home country.

RG 211.99 If a CS facility operator is not authorised to operate the facility in its home country, it will need to apply for a domestic CSF licence under s824B(1).

RG 211.100 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 from holding, a form of authorisation or licence specifically for the facility. In these situations, we will consider:

- (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 211.101 We expect that, for most applications under s824B(2), the applicant will already be operating the facility in the home country at the time of application, but we do not interpret s824B(2) as requiring this. It is possible that an applicant under s824B(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) the operation of the facility in the home country will be subject to requirements and supervision that are sufficiently equivalent, in relation to the degree of protection from systemic risk and the level of effectiveness and fairness of services it achieves, to the requirements and supervision under the Corporations Act (see RG 211.106–RG 211.126); and
- (b) it will comply with its Australian obligations if an overseas CSF licence is granted.

'CS facility'

RG 211.102 The facility that the applicant is authorised to operate in its home country:

- (a) must fall within the definition of a CS facility in s768A (see RG 211.40–RG 211.57); but
- (b) need not be:
 - (i) described as a CS facility in the home country; or

- (ii) authorised specifically as a CS facility in the home country; or
- (iii) regulated as a CS facility in the home country,

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

RG 211.103 A facility that is a CS facility under s768A may have a different form of authorisation in the home country.

'Same facility'

RG 211.104 In assessing whether the facility that the applicant proposes to operate in Australia is the same facility that is authorised to operate in its home country, we will consider a number of factors including whether:

- (a) the facility in Australia will be operated by the same legal entity that operates the overseas facility, with the same financial resources;
- (b) the financial products and classes of transactions to which the facility in Australia relates are, or will be, the same as or a subset of the financial products and classes of transactions to which the facility in the home country relates; and
- (c) the same operating rules will govern provision of services by the facility, whether the transaction is received in Australia or the home country.

RG 211.105 If the facility the operator proposes to operate in Australia is not the 'same facility' that the applicant is authorised to operate in its home country, the facility operator will need to apply for a domestic CSF licence under s824B(1).

When is a home regulatory regime 'sufficiently equivalent'?

RG 211.106 Section 824B(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 protection from systemic risk and the level of effectiveness and fairness of services it achieves) to the Australian regulatory regime for comparable domestic CS facilities.

RG 211.107 We will assess the home regulatory regime, as it applies to the overseas CS facility, as satisfying s824B(2)(c) if it:

- (a) is clear, transparent and certain;
- (b) is consistent with the IOSCO Objectives and Principles of Securities Regulation, and achieves the high-level outcomes set out in international recommendations and/or standards relating to CCPs or, if

relevant, securities settlement systems published by CPSS-IOSCO from time to time;

- (c) is comparably enforced in the home jurisdiction; and
- (d) achieves the systemic risk protection and fair and effective services outcomes that are achieved by the Australian regulatory regime for comparable domestic CS facilities.

Note: See Principles 7–10 of RG 54.

RG 211.108 The RBA will take into account the following additional factors in assessing sufficient equivalence of the home regulatory regime as it applies to the overseas CS facility, in relation to the degree of protection from systemic risk:

- (a) the coverage of financial stability-related principles applied by the home regulator relative to the financial stability standards set by the RBA; and
- (b) the nature and intensity of the home regulator’s oversight process.

RG 211.109 ASIC will generally discuss your application and the home regulatory regime with the RBA and your home regulator to assist us in our assessment.

Clear, transparent and certain

RG 211.110 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 arbitrary 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 211.111 We consider that if the home regulatory regime for an overseas CS facility does not meet these minimum conditions, it will not be sufficiently equivalent to the Australian regulatory regime for comparable domestic CS facilities 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 standards

RG 211.112 IOSCO has set out its broad objectives and principles of securities regulations in a publication titled the ‘IOSCO Objectives and Principles of

Securities Regulation' (the Objectives and Principles). The Objectives and Principles are generally applicable to financial markets of a jurisdiction as a whole, including clearing and settlement functions, except where those objectives and principles are clearly inappropriate for a particular CS facility. The aims, purposes and outcomes of the Australian regulatory regime for CS facilities are consistent with the Objectives and Principles.

- RG 211.113 A regulatory regime is consistent with the Objectives and Principles if the home regulatory authority:
- (a) assesses the home regulatory regime against the Objectives and Principles; and
 - (b) reasonably determines that the home regulatory regime is broadly compliant with the Objectives and Principles.
- RG 211.114 In addition to the Objectives and Principles, IOSCO has also developed, in conjunction with CPSS, the CPSS-IOSCO Recommendations relating specifically to clearing and settlement functions. The Australian regulatory regime achieves the high-level outcomes of the CPSS-IOSCO Recommendations.
- RG 211.115 We will consider the foreign regime's consistency with the Objectives and Principles, and whether the regime achieves the high-level outcomes of the CPSS-IOSCO Recommendations, in determining whether there is sufficient regulatory equivalence between the foreign regime and Australia's regulatory regime.
- RG 211.116 CPSS and IOSCO may periodically review and revise the CPSS-IOSCO Recommendations to take into account market developments. Our general approach will be to promote compliance with any revised or newly established international recommendations/standards on CCPs and securities settlement systems published by CPSS and IOSCO from time to time.

'Comparable enforcement'

- RG 211.117 A regulatory regime is comparably 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.
- RG 211.118 Additionally, the legal system within which the regulatory regime operates should be independent and have a reputation for integrity.
- RG 211.119 In assessing whether the home regulatory regime is comparably 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
- (c) assessments of the home regulatory regime by international financial institutions and other international organisations.

RG 211.120 Our main purpose in assessing whether the home regulatory regime is comparably enforced is to ensure that the regime reliably achieves its intended regulatory outcomes.

Comparable outcomes in relation to systemic risk reduction and provision of fair and effective services

RG 211.121 Section 824B(2)(c) requires a comparison of the outcomes achieved by the home regulatory regime, as it applies to the overseas CS facility in the home country, and the outcomes achieved by the Australian regulatory regime, as it applies to comparable domestic CS facilities. This is clear from the use of the word ‘achieve’ in s824B(2)(c).

RG 211.122 We consider that the home regulatory regime as it applies to the overseas CS facility 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 CS facilities. This involves assessing the ‘total regulatory requirements’ of the home country: see para 8.94 of the Explanatory Memorandum. It also involves considering the features of the overseas CS facility.

Note: The key outcomes achieved by the Australian regulatory regime are set out in Table 1.

RG 211.123 When comparing the outcomes achieved by the two regulatory regimes, we will consider whether the home regulatory regime, as it applies to the overseas CS facility, achieves (or will achieve when the CS facility starts operating) each of the following key systemic risk protection and fair and effective services outcomes that are relevant to the overseas CS facility:

- (a) the regular mechanism provided by the facility operates reliably and the risk of failing is minimised;
- (b) the clearing and settlement process is transparent;
- (c) users of the facility are confident that the facility operates fairly and that settlement obligations will be met;
- (d) the facility and its participants are properly supervised by the operator so that breaches of law or the facility’s rules are likely to be detected and disciplined and the supervision of the facility is not compromised by conflicts of interest or other improper influences; and

- (e) risks relating to default and other risks, including systemic risk, counterparty risk, market risk, liquidity risk and operational risk, are anticipated and appropriately dealt with.

Note: The key outcomes achieved by the Australian regulatory regime are set out in Table 1. The key outcomes that are relevant to a CS facility may vary according to the features of the CS facility: see RG 211.3.

RG 211.124 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 CS facility. In this respect, one of the factors we will assess is how the relevant insolvency legislation of the home country will affect the rights of the Australian-based users of an overseas CS facility as compared to the rights of users of a domestic CS facility in Australia.

RG 211.125 In assessing whether the home regulatory regime achieves the outcomes in relation to systemic risk protection, the RBA will conduct an initial assessment of the applicant against the measures underpinning the relevant financial stability standard. The RBA will also conduct a similar exercise for a sample of other CS facilities operating under the same overseas regime, to validate whether the observed outcomes for the applicant are illustrative of those generally achieved under the regime in question.

Note: See RBA publication, '*Assessing the Sufficient Equivalence of an Overseas Regulatory Regime*', <http://www.rba.gov.au/PaymentsSystem/StdClearingSettlement/assessing.html>.

RG 211.126 The achievement of the key outcomes by the home regulatory regime 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 211.123, 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.

Specific guidance in assessing sufficient equivalence relating to protection from systemic risk

RG 211.127 When assessing sufficient equivalence in relation to the degree of protection from systemic risk, in addition to the principles outlined above, the RBA will also take into account the following factors:

- (a) the clarity and coverage of financial stability-related principles applied by the home regulator relative to the financial stability standards. In particular, the RBA will look for evidence of a high degree of overlap in the broad coverage of such principles and the measures underpinning the relevant standards; and

- (b) the nature and intensity of the home regulator's oversight process, including direct comparison with the regime applied by the RBA. Amongst other things, the RBA will look for evidence of a formal assessment process, regular dialogue and adequate reporting and enforcement arrangements.

Note: See RBA publication, '*Assessing the Sufficient Equivalence of an Overseas Regulatory Regime*',
<http://www.rba.gov.au/PaymentsSystem/StdClearingSettlement/assessing.html>.

What are adequate cooperation arrangements?

Arrangements with the overseas CS facility operator

- RG 211.128 Under s824B(2)(d), the Minister must be satisfied that the overseas applicant undertakes to cooperate with the RBA and ASIC by sharing information and in other appropriate ways.
- RG 211.129 We will only advise the Minister that s824B(2)(d) is met if the arrangements that will apply between the RBA, ASIC and the applicant have been agreed to, and the RBA and ASIC are satisfied that if a licence is granted, they will be operative by the time the overseas CS facility commences operating in Australia.
- RG 211.130 At a minimum, adequate cooperation arrangements with an overseas CS facility operator will cover how the facility operator will:
- (a) give us notice if:
- (i) it becomes aware that it will no longer be able to meet, or has breached, one of the general obligations under s821A;
 - (ii) it provides a new class of financial services incidental to the operation of the facility;
 - (iii) it takes disciplinary action against a participant in the facility;
 - (iv) it has reason to suspect that a person has committed, is committing, or is about to commit a significant contravention of the facility's operating rules or the Corporations Act;
 - (v) there is a change in its directors or senior management;
 - (vi) it becomes aware that a person has come to have, or has ceased to have, more than 15% of the voting power of itself or its holding company; or
 - (vii) there is a change in its operating rules;
- Note: See s821B and 822D.
- (b) give the RBA notice if it becomes aware that it:

- (i) has failed, or is likely to fail, to comply with financial stability standards where they apply; or
- (ii) may no longer be able to meet, or has breached, its obligation to, to the extent that it is reasonably practicable to do so, do all other things necessary to reduce systemic risk;

Note: See s821BA.

- (c) give us information, reports, assistance or access (as appropriate) for the purposes of:
 - (i) s821C—relating to giving ASIC assistance for performing its functions;
 - (ii) s821D—relating to giving ASIC access to a facility;
 - (iii) s821E—relating to giving ASIC an annual report on compliance with the licensee obligations; or
 - (iv) s823C—relating to ASIC’s assessment of compliance;
- (d) give the RBA information or assistance (as appropriate) for the purposes of s821C—relating to giving the RBA assistance for performing its functions—or s823CA—relating to the RBA’s assessment of your compliance;
- (e) notify us of proposed changes to the range of financial products and transactions in respect of which the facility’s services are provided in Australia and in the home country;
- (f) ensure that it can require information to be provided to it and to us by any person to whom the CS facility operator outsources performance of any aspect of its operation or performance of any part of its Australian obligations; and
- (g) 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 211.131 The cooperation arrangements will also need to deal with notification to us of relevant matters relating to the CS facility’s continuing authorisation in its home country, including any cessations or variations to the form or type of that authorisation and any significant changes to the regulatory regime applying to the facility in its home country: s821B(3).

RG 211.132 The form and content of cooperation 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: You should discuss with us and the RBA early in the application process our expectations for the cooperation arrangements with them.

Arrangements with the home regulatory authority

- RG 211.133 When making licensing decisions about overseas CS facilities, the Minister must, under s827A(3)(d), consider whether there are adequate cooperation arrangements between ASIC, the RBA and the home regulatory authority.
- RG 211.134 We only expect to advise the Minister to grant an overseas CSF licence if the RBA and ASIC have adequate cooperation arrangements with the relevant home regulatory authority. This is because licensing of overseas CS facilities in Australia raises a number of regulatory issues that do not arise with domestic CS facilities.
- RG 211.135 Supervision of an overseas CS facility will require the balancing of respective regulatory responsibilities of ASIC, the RBA and the home regulatory authority. A high degree of cooperation and information sharing will be needed between the relevant regulators to ensure that both duplicative regulation and regulatory gaps are minimised as much as possible.
- RG 211.136 At a minimum, adequate cooperation arrangements will provide for:
- (a) timely sharing of information about the overseas CS facility; and
 - (b) timely cooperation in:
 - (i) supervising and investigating activities in the overseas CS facility; and
 - (ii) taking enforcement action involving the overseas CS facility.
- RG 211.137 We think adequate cooperation arrangements with the home regulatory authority will result in appropriate action in relation to the overseas CS facility by the appropriate regulator, to assist in achieving our regulatory objectives in Australia.
- RG 211.138 Particularly in the area of supervision of the overseas CS facility, adequate cooperation arrangements will mean that ASIC or the RBA has 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 211.139 Adequate cooperation 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 211.140 ASIC and the RBA will look at putting in place the appropriate cooperative arrangements with the relevant home regulatory authorities. However, it may not be possible to put arrangements in place in all cases and, where we can put such arrangements in place, it may take significant time.

Implications for foreign participants

RG 211.141 You should be aware that an application for an overseas CSF licence may have implications for your non-Australian participants that provide clearing and/or settlement services to Australian users of the facility. This is because non-Australian participants in an overseas CS facility that operates in Australia may, in certain circumstances, 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 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 211.142 Therefore, before making an application for an overseas CSF licence, you should consider whether the foreign participants in your CS facility are likely to need an AFS licence, or whether a licensing exemption exists or could be sought under s911A(2) for the foreign participants. You should discuss with us early in the application process the potential Australian licensing issues for the foreign participants in your overseas CS facility.

Note: For guidance on some possible exemptions, see RG 176.

E Applying for a CSF licence

Key points

This section outlines the application process and tells you what information we want in your licence application.

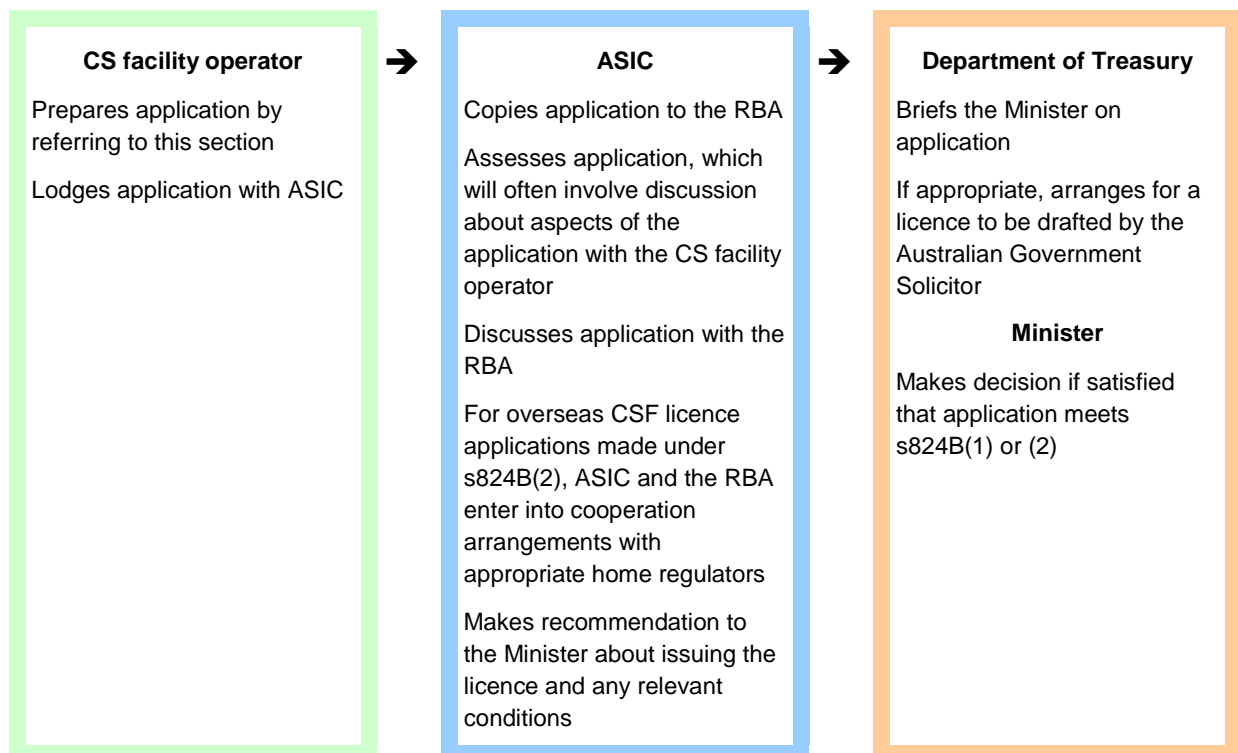
You need to send us an application that contains detailed information on your company, characteristics of your facility, resources, rules and supervisory procedures.

We consider each licence application on a case-by-case basis and then recommend to the Minister whether a licence should be granted.

Advising the Minister about your application

RG 211.143 Figure 4 is a summary of the CSF licence application process.

Figure 4: CSF licence application process



RG 211.144 The Minister will consider any relevant advice from ASIC or the RBA about your application: s827A(2)(h).

RG 211.145 When framing our advice to the Minister about granting you a licence, we will consider:

- (a) the Corporations Act and Corporations Regulations;

- (b) how the regulatory outcomes in Table 1 will be achieved in the operation of your CS facility, including your ability to comply with the licensee obligations on an ongoing basis; and
- (c) what conditions might need to be imposed on your CSF licence.

Licence conditions

- RG 211.146 All CSF licences are subject to mandatory conditions that specify:
- (a) the particular facility that is licensed; and
 - (b) the class(es) of financial product(s) in respect of which the facility can provide services.
- Note: See s825A(4).
- RG 211.147 The Minister may impose any conditions that they consider appropriate for the operation of the CS facility. We will advise the Minister about the conditions we think should apply to your CSF licence.
- RG 211.148 For example, we may advise the Minister to impose conditions that include:
- (a) how you deal with your other activities in order to minimise the effect of any failure on the facility;
 - (b) regular reporting to us on your financial resources;
 - (c) confirming technological resources are in place;
 - (d) appointing a particular person to perform an important role in the operation or supervision of the CS facility (such as a supervisor); or
 - (e) providing us with regular reports or electronic feeds of data, as prescribed by us, on all or classes of transactions cleared and/or settled via the facility, to support our supervision of financial markets.
- RG 211.149 We will discuss with the RBA whether they would like to propose any conditions to the licence.
- RG 211.150 We will consult with you about the type of conditions we may recommend before we give our advice to the Minister.

What to include in your application

- RG 211.151 An application must be made in accordance with s824A and include the information and documents specified in regs 7.3.10 and 7.3.11 for a domestic licence, or regs 7.3.13 and 7.3.14 for an overseas licence.
- RG 211.152 You should demonstrate in your application how you would comply with your licensee obligations on an ongoing basis. Your application should, at a minimum, deal with the following:

- (a) detailed information and characteristics of your facility and your company;
- (b) skills and expertise you have, or will have when your CS facility commences, to satisfy the general obligations set out in s821A;
- (c) adequacy of technological resources and systems to operate your facility;
- (d) sufficiency of available financial, human and other resources;
- (e) adequacy of the operating rules; and
- (f) sufficiency of arrangements and procedures for the supervision of your facility.

RG 211.153 We encourage you to look at Section F for discussion of your obligations as a CSF licensee on an ongoing basis. This will help you in putting together your application.

RG 211.154 We expect your application will provide information to illustrate that the matters set out in s824B and 827A that are relevant to you have been addressed properly.

RG 211.155 We may request independent verification by a suitably qualified third party about a particular matter or aspect of your CS facility's operation. In such a case, you should supply the verification at your own cost.

RG 211.156 You will help us deal with your application if you include a table that cross-references the legislative requirements in Part 7.3 with the corresponding sections in the application.

RG 211.157 The application and all information and documents provided with the application must be in English.

RG 211.158 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 s824B(1) or 824B(2), as appropriate; and
- (b) the information and documents provided in support of the application are true, correct and complete.

RG 211.159 As we need to understand fully the operation of the facility, we may require additional information about the operation of the facility or other matters. We recommend you discuss this with us before you submit your application.

Processing time for a CSF licence application

- RG 211.160 Our experience has shown that it is desirable for applicants to submit a *draft* application before their *formal* application, so we can ensure it is complete and detailed enough for ASIC to advise the Minister, and for the Minister to make a decision.
- RG 211.161 It will generally take between 12 and 16 weeks for ASIC and the RBA to assess your formal application and prepare advice for the Minister. This is the time between you submitting a formal application and our referral of your application to the Minister. This processing time excludes:
- (a) time spent clarifying issues with you;
 - (b) time waiting for information from you;
 - (c) any time we may spend consulting with third parties; and
 - (d) the time between referral to the Department of Treasury and the Minister's decision.
- RG 211.162 With novel or complex applications, we may need to consult with the public. In such cases, processing will take longer than 16 weeks. We will decide whether your application requires public consultation on a case-by-case basis. Some of the factors we will consider when making this decision include:
- (a) whether the CS facility may have a regulatory impact on existing licensed CS facilities;
 - (b) whether the CS facility may affect the reputation of Australia as a financial centre;
 - (c) the features of the CS facility, including:
 - (i) the size of the facility; and
 - (ii) the likely facility users; and
 - (d) the likely impact of the CS facility's activities on Australian investors and the Australian financial system.

F Licensee obligations, annual reporting and assessment

Key points

After you have been granted your CSF licence, you must ensure you meet your licensee obligations on an ongoing basis.

The important responsibilities are to ensure your CS facility's services are provided in a fair and effective way, comply with the RBA's financial stability standards, and do all other things necessary to reduce systemic risk.

As a CSF licensee, you should demonstrate you are implementing your compliance plans by assessing and monitoring your CS facility to ensure you are complying with your obligations on an ongoing basis.

You must send us an annual self-assessment on how you have complied with all of your licensee obligations.

ASIC and the RBA assess at least annually and report to the Minister on whether you are complying with your licensee obligations.

Licensee obligations

Summary of your general obligations

RG 211.163 The general obligations of an Australian CSF licensee are set out in the Corporations Act. You must:

- (a) to the extent that it is reasonably practicable to do so:
 - (i) comply with the RBA's financial stability standards; and
 - (ii) do all other things necessary to reduce systemic risk;
- (b) to the extent that it is reasonably practicable to do so, do all things necessary to ensure that your facility's services are provided in a fair and effective way;
- (c) comply with the conditions on your licence;
- (d) have adequate arrangements for supervising the facility, including arrangements for:
 - (i) handling conflicts of interest; and
 - (ii) enforcing compliance with the facility's operating rules;
- (e) have sufficient financial, technological and human resources to operate the facility and for your supervisory arrangements;

- (f) ensure that an unacceptable control situation does not develop or exist (if you are a widely held market body within the meaning of Division 1 of Part 7.4);
- (g) ensure that no disqualified individual is involved in the licensee;
- (h) continue to be registered as a foreign company under Division 2 of Part 5B.2, if you are a foreign body corporate; and
- (i) remain authorised to operate the CS facility in your principal place of business, if you hold an overseas CSF licence granted under s824B(2).

Note: The main obligations that you as a CSF licensee must comply with on a continuing basis are set out in s821A. Additional specific obligations are set out in s821B–821E.

Have you complied with the RBA’s financial stability standards and done all other things necessary to reduce systemic risk?

RG 211.164 One of your key responsibilities as a CSF licensee is that you must, to the extent that it is reasonably practicable to do so, comply with the RBA’s financial stability standards (see RG 211.8) and do all other things necessary to reduce systemic risk: s823E. ASIC and the RBA will work closely together to oversee your compliance with these obligations.

RG 211.165 A domestic or overseas CSF licensee that operates a securities settlement facility must comply with the Financial Stability Standard for Securities Settlement Facilities issued by the RBA. However, if the value of financial obligations settled by the facility in a financial year does not exceed \$100 million, this standard will not apply.

Note: See

http://www.rba.gov.au/PaymentsSystem/StdClearingSettlement/securities_settlement_facilities_standard.html.

RG 211.166 A CSF licensee that operates a central counterparty must comply with the Financial Stability Standard for Central Counterparties issued by the RBA. An overseas CSF licensee that operates a central counterparty is exempt from complying with this standard if certain conditions are met, including:

- (a) compliance with the home regulatory regime’s requirements relating to financial stability; and
- (b) having in place satisfactory arrangements to provide additional information to the RBA as required.

Note: See

http://www.rba.gov.au/PaymentsSystem/StdClearingSettlement/central_counterparties_standard.html.

Is your CS facility operating in a fair and effective way?

- RG 211.167 Another key responsibility as a CSF licensee is that you must do all things necessary to ensure that your facility's services are provided in a fair and effective way, to the extent that it is reasonably practicable to do so: s821A(a).
- RG 211.168 We interpret the phrase using the ordinary meanings of the words 'fair' and 'effective'. Whether an operator is complying with this obligation will be assessed on a case-by-case basis, taking into account the particular circumstances of the facility's operation, and having regard to the regulatory outcomes in Table 1.
- RG 211.169 The obligation to 'do all things necessary' is qualified by the phrase 'to the extent that it is reasonably practicable to do so'. In other words, you must do everything reasonably practicable to ensure that the CS facility's services are provided in a fair and effective way.
- RG 211.170 Cost by itself will not make any action 'not reasonably practicable', unless the cost is manifestly excessive or unreasonable when compared to the regulatory outcomes sought.

Meeting your supervisory obligations

- RG 211.171 As a CSF licensee you are required to meet your supervisory obligations including:
- (a) handling conflicts between your commercial interests and the need for you to ensure that your facility's services are provided in a fair and effective way;
 - (b) detecting potential or actual non-compliance with the law or your operating rules;
 - (c) dealing with actual or suspected breaches of the law or your facility's operating rules, including remedial, disciplinary and other deterrent measures;
 - (d) dealing with complaints about your facility or participants;
 - (e) cooperating and sharing information with:
 - (i) ASIC;
 - (ii) the RBA;
 - (iii) operators of financial markets on which transactions for which your services are provided occur; and
 - (iv) operators of markets or other CS facilities that have the same participants as you; and
 - (f) making available and using resources for conducting supervisory activities.

Recognising and acting on conflicts of interest

- RG 211.172 In order to identify and appropriately respond to actual or potential conflicts of interest, you should have arrangements in place to anticipate when conflicts may arise and handle them properly. Conflicts may arise when making decisions relating to:
- (a) admitting a person to the facility as a participant;
 - (b) commercial interests and supervisory or regulatory interests;
 - (c) monitoring of a facility participant;
 - (d) taking investigative or disciplinary action;
 - (e) exercising discretions, such as granting waivers from the facility's operating rules or charging variable fees;
 - (f) a related party within the same group, such as a market operator for whose participants your CS facility provides services; or
 - (g) providing your CS facility's services in respect of transactions in financial products which take place in a particular financial market that is competing with a financial market operated by a related party.
- RG 211.173 In this regard, we expect that you will separate your commercial and reporting activities from your supervisory activities. However, we will consider, on a case-by-case basis after taking into account the nature of your facility's operation, not requiring such separation if it is too onerous, and provided that other mechanisms are in place to ensure appropriate management of conflicts.
- RG 211.174 It is also crucial that your other activities do not adversely affect, or have the potential to adversely affect, your compliance with your obligations as a licensed CS facility operator. You should ensure that you have sufficient human, financial and technical resources for the proper operation of your licensed CS facility at all times. In doing so, you should make sure that other business or private activities do not influence proper supervision of the facility.
- RG 211.175 Some CS facility operators may operate another facility by which parties to transactions in things that are not financial products (e.g. commodities) can meet the obligations arising out of those transactions. In that situation the CS facility operator will not require a CSF licence in respect of its conduct in operating that other facility.
- RG 211.176 If you operate a facility for non-financial products (which would constitute a CS facility if it involved provision of services in relation to obligations arising out of transactions in financial products), we expect that you will tell participants and users of your unlicensed facility that the unlicensed facility is operated separately from the licensed CS facility. It is very important that you:

- (a) avoid misleading users of the facility into believing that the facility is regulated as a licensed CS facility; and
- (b) protect the integrity of CS facility regulation so that users of the unlicensed facility understand the regulatory differences between the two facilities you operate.

RG 211.177 Some CS facility operators may provide services in respect of transactions that do not involve financial products through the same facility through which they provide services in respect of transactions that do involve financial products. In this situation, the CS facility operator must ensure that the supervisory resources it has to supervise the transactions for which it is authorised to operate the CS facility are sufficient, in light of the resources it requires to operate the unregulated aspect of the facility.

Do you continue to have sufficient resources to operate your CS facility?

Financial and human resources

- RG 211.178 You should continuously assess what financial and human resources you need to fund the ongoing effective operation of your CS facility, its supervisory arrangements and all its other activities. For example, if you have had growth in the volume of transactions for which the facility's services are used, we would expect you to adjust your resources, or otherwise justify the adequacy of resources, dedicated to supervision so that you continue to meet your obligations.
- RG 211.179 Examples of acceptable financial resources are assets within your ownership and control, funding from other business activities, or an intra-group guarantee.
- RG 211.180 In determining whether you have sufficient financial resources, two of the factors that we will consider are the nature of:
- (a) the regular mechanism provided by the facility and the extent that the CS facility operator will be liable for meeting parties' obligations to each other arising out of transactions in financial products; and
 - (b) the financial products for which you provide services, including the expiry dates of those products, and the extent to which the CS facility is liable for meeting the obligations in relation to the financial products. For example, we may require additional resources if the expiry dates of those products are unusually long.

We will also look at other factors to determine whether additional financial resources are required.

RG 211.181 Financial resources should cover obligations arising from:

- (a) the operation of the facility;
- (b) your supervisory arrangements; and
- (c) any activity conducted by you other than operating the CS facility.

Technological resources

RG 211.182 If you want to implement a significant change to your technological resources after you start operating, we generally require an independent expert to verify the adequacy of your technological resources after the change.

Continuing adequacy of your operating rules and procedures

RG 211.183 Effective operating rules and procedures are one key element in meeting your licensee obligations.

RG 211.184 They should be relevant to your CS facility. Differences in CS facilities mean that the content may vary for each facility. For example, operating a facility that provides services in relation to transactions in shares may be different from operating a facility that provides services in relation to transaction in credit derivatives.

RG 211.185 The Corporations Regulations distinguish between operating rules and written procedures, for example:

- (a) **the operating rules** may detail the regulated services provided and the ways participants must act to obtain those services, while
- (b) **the written procedures** may detail procedures for:
 - (i) the appropriate sharing with markets, other CS facilities, ASIC and the RBA, of information about participants;
 - (ii) arrangements to ensure the integrity and security of systems; and
 - (iii) identifying and monitoring risks that are relevant to your facility.

RG 211.186 Although the requirement about the content of the operating rules and written procedures does not apply to an overseas CSF licence granted under s824B(2), s822D(3) makes it clear that operating rules for an overseas CS facility must exist. We expect that the operating rules for an overseas CSF licence applicant will generally deal with the same kind of matters as set out in reg 7.3.05. This is because those matters are fundamental to the provision of fair and effective services by a CS facility and an overseas CSF licensee must, to the extent that it is reasonably practicable to do so, comply with the obligation to do all things necessary to ensure that its services are provided in a fair and effective manner.

Operating rules

- RG 211.187 The Minister, in granting you a domestic CSF licence under s824B(1), must be satisfied that you have adequate operating rules to ensure, as far as reasonably practicable, that the CS facility will operate in a fair and effective way.
- RG 211.188 When you apply for a CSF licence, we will carefully review your operating rules and procedures and assess whether they are adequate for your CS facility. You must keep these rules and procedures up-to-date and appropriate for your CS facility in light of changes to the facility's operations over time.
- RG 211.189 Operating rules are legally binding on participants and the CS facility operator. A range of persons, including a person aggrieved by a failure to comply with the rules, may take action to enforce the operating rules: s822C.
- RG 211.190 The operating rules of a CS facility are all the rules determined or established by the CS facility operator that:
- (a) deal with the activities or conduct of the CS facility or the activities or conduct of persons in the facility;
 - (b) impose substantive obligations on, or grant rights to, the CS facility operator, any facility user or any participant; and
 - (c) are not written procedures as required by the Corporations Regulations.
- Note: For example, a form prescribed for use by an operating rule would generally not be an operating rule because it does not impose substantive obligations.
- RG 211.191 In assessing whether a provision is part of the 'operating rules', as defined in s761A, we determine whether a substantive obligation is imposed by the rule.
- RG 211.192 Operating rules should deal with those matters specified in reg 7.3.05, such as:
- (a) the regulated services to be provided by the facility;
 - (b) matters relating to risk in the facility;
 - (c) access to the facility, including the ongoing requirements for participants;
 - (d) suspension and expulsion of participants;
 - (e) disciplinary action against participants;
 - (f) procedures for participants to address risks that are relevant to the facility;
 - (g) requirements to facilitate monitoring of participants' compliance with operating rules; and
 - (h) handling of defaults.

The operating rules may cover other matters: s822A(1).

RG 211.193 We will consider whether, in light of the complexity of your operation, the nature of your participants and the types of the financial products for which your facility provides services, your operating rules:

- (a) meet the requirements of the Corporations Act and regulations and, in particular, whether the rules ensure that your CS facility is operated in a fair and effective way and complies with the financial stability standards if they apply;
- (b) are legally effective, such as through the use of individual contracts binding each participant about the manner in which they will use the facility;
- (c) are consistent with the licensee obligations and licence conditions;
- (d) achieve the regulatory outcomes in Table 1 as appropriate;
- (e) undermine the policy of the Corporations Act, that is, do your rules undermine the Minister's power to disallow rules that are objectionable from a regulatory perspective; and

Note: A rule that gives a CSF licensee a general power to waive other rules may undermine the policy because it may allow the licensee to amend the rules without requiring consideration by the Minister under s822E.

- (f) can be effectively implemented, including whether the facility operator has systems, structures, processes and resources to administer the rules and supervise compliance with the rules.

RG 211.194 We prefer all operating rules to be in one document, rather than in separate contracts or agreements. If you put operating rules in separate agreements with participants and any of those agreements change, we will regard the change as an operating rule change and so the agreement should be lodged with us.

Note: You must lodge **all** operating rule changes with us (s822D).

RG 211.195 If you hold a domestic CSF licence, we expect that you would discuss all prospective rule changes with us. This gives us the opportunity to comment and advise you on them. In some cases, extensive discussion and negotiation with us may be required. While overseas CSF licensees are not subject to the rule disallowance process, we are interested in developments affecting the facility and it is useful for us to understand significant developments affecting the facility beforehand. Accordingly, we would expect to be informed in advance of any proposed significant rule changes.

Note: If a domestic CSF licensee does not lodge a change to an operating rule then the change ceases to have effect after 21 days (s822D). No such provision applies to overseas CSF licensees.

Written procedures

- RG 211.196 You should make sure that the written procedures are clearly identified so that there is no confusion about what constitutes the CS facility's operating rules and written procedures. Your written procedures should explain and detail your processes and arrangements that amplify your operating rules.
- RG 211.197 Your written procedures must deal with the following matters:
- (a) arrangements to ensure the integrity and security of systems (including computer systems);
 - (b) identifying and monitoring risks that are relevant to the licensed CS facility;
 - (c) the development of rules and procedures to address those risks;
 - (d) exchange of appropriate information with:
 - (i) other CS facilities; and
 - (ii) financial markets; and
 - (iii) ASIC and the RBA,

relating to participants and their activities that are relevant to the licensed CS facility;
 - (e) the provision of information about the procedures of the licensed CS facility, including rights, obligations and risks relating to the facility; and
 - (f) arrangements for supervising the licensed CS facility, including the monitoring of compliance by participants and issuers with the operating rules of the licensed CS facility.

Note: See s822A(2) and reg 7.3.06.

- RG 211.198 You do not need to discuss any change in procedures with us beforehand and you are not obligated to notify us of the change. However, we encourage you to keep us informed of any material changes after they are made. Nevertheless, for a domestic CS facility, if the change in procedures relates to, or is proposed in conjunction with, an operating rule amendment, we would expect you to notify us of the change in procedures before it is made, when you submit your rule amendment proposal to us.
- RG 211.199 If you operate an overseas CS facility, you will need to comply with any ASIC determination on matters in respect of which the facility must have written procedures: s822A(4).

Other obligations

- RG 211.200 You should also ensure that you continue to comply with other obligations imposed on CSF licensees by the Corporations Act or included as conditions

of your licence. For example, we expect you to keep records of any checks you undertake to ensure that no disqualified individual is involved in your facility. You are also required under s821C to give reasonable assistance to ASIC and the RBA in relation to the performance of ASIC's and the RBA's functions.

Overseas CSF licensee must also comply with its home regulatory regime and some additional obligations

- RG 211.201 In addition to complying with the obligations under the Australian regulatory regime, an overseas CSF licensee must also comply with its home regulatory regime, remain authorised to operate the CS facility in its home country and not change the home country without the Minister's approval: s821A(f). Therefore, it is particularly important that an overseas CSF licensee has in place appropriate processes for ensuring its compliance under each regime.
- RG 211.202 An overseas CSF licensee must also notify ASIC of any significant changes to the home regulatory regime or if it is no longer authorised to operate the CS facility in its home country: s821B(3).
- RG 211.203 An overseas CSF licensee must continue to be registered in Australia as a foreign company under Division 2 of Part 5B.2: see s821A(e).

Additional conditions may be required to achieve regulatory outcomes

- RG 211.204 Complying with the licence obligations set out in the Corporations Act will help you achieve the regulatory outcomes in Table 1. In certain circumstances, ASIC may recommend the Minister impose conditions on the CSF licence in order to achieve those outcomes.
- RG 211.205 For example, if your facility provides services relating to financial products traded in the OTC markets and those financial products are not traded on a licensed market, or the traded price and other post-trade data of those products are not readily available to the public in general, in order to ensure a transparent clearing and settlement process, we may require you to make available to the current and potential users of the facility and to us:
- (a) all end-of-day settlement prices of those products that are used for margin calculation;
 - (b) aggregate open interests of those products accepted for clearing and settlement by your facility;
 - (c) any other pricing or valuation information on those products; and
 - (d) any other information that is necessary to enable the current and potential users of the facility to evaluate the costs and risks associated with using the facility.

Implementing and monitoring plans

- RG 211.206 Generally, you will best be able to demonstrate compliance with your licensee obligations, and report on the extent of your past compliance (see reg 7.3.04(c) and RG 211.211–RG 211.214), if you actively and continuously plan:
- (a) what you will do to ensure compliance with those obligations; and
 - (b) how you will monitor and assess your compliance,
- then implement those plans.

Implementing your plans for compliance

- RG 211.207 Implementing your plans is important to ensure you comply with your licensee obligations. If you don't implement your plans, it is unlikely that you will be able to:
- (a) ensure compliance with your licensee obligations;
 - (b) demonstrate to us that you are complying and will continue to comply with your licensee obligations;
 - (c) notify us of potential or actual breaches; or
 - (d) make the analysis of your compliance that we expect in your annual report.
- RG 211.208 We expect that you will continually assess the:
- (a) mechanisms for performing each obligation;
 - (b) outcomes and/or standards against which compliance with each obligation will be measured and why these have been selected;
 - (c) procedures, resources and timetables for monitoring and assessing performance of each obligation; and
 - (d) procedures and structures for internal and external reporting of the outcomes of the self-monitoring and assessment.

Monitoring and assessing your compliance

- RG 211.209 Your monitoring and assessing should:
- (a) reliably and efficiently identify actual or potential breaches of your licensee obligations;
 - (b) deal adequately with any breaches detected; and
 - (c) enable you to conclude fairly and reasonably whether, and how well, you have complied with each of your obligations.

- RG 211.210 When we assess your compliance we look to see if your supervisory arrangements:
- (a) are sufficiently independent of your other activities to ensure they are not improperly influenced by commercial considerations;
 - (b) are comprehensive, regular and frequent;
 - (c) are reassessed if there are significant changes in:
 - (i) your facility's operations;
 - (ii) facility users;
 - (iii) operating rules; or
 - (iv) resources; and
 - (d) include adequate processes for monitoring and assessing the performance of any outsourced licensee obligations.

Reporting and assessment

Licensee annual reporting

- RG 211.211 As a CSF licensee, you must produce an annual report on how you consider you have complied with your licensee obligations.

Note: See s821E and reg 7.3.04(c).

- RG 211.212 This report should be a form of self-assessment on how you have implemented your compliance plans, and assessed and monitored your compliance with your obligations.

- RG 211.213 We expect your report to:
- (a) describe in detail the activities the you have undertaken throughout the year in order to meet your obligations;
 - (b) state the objective outcomes and/or standards against which you have measured your compliance with each of your obligations and explain how those outcomes and/or standards evidence compliance with your obligations;
 - (c) identify and explain any divergences during the year between your planned and actual activities and resources for performing and monitoring your performance of those obligations; and
 - (d) state and explain your conclusions about:
 - (i) whether you have achieved those outcomes and/or standards and the extent to which you have fully complied with each obligation;
 - (ii) if less than full compliance is identified, how you will ensure you achieve full compliance with each obligation in the future;

- (iii) the adequacy and effectiveness of your operating rules and procedures in achieving a fair and effective operation, if you hold a domestic CSF licence granted under s824B(1);
- (iv) the adequacy and effectiveness of your supervisory arrangements in achieving a fair and effective operation;
- (v) the adequacy and effectiveness of your arrangements for handling conflicts between your commercial interests and the supervisory obligation to ensure that the facility operates in a fair and effective way;
- (vi) how well you perform each of your obligations;
- (vii) how well you monitor your own performance of each of your obligations; and
- (viii) if any inadequacy or weaknesses have been identified, how you propose to address or have addressed those matters.

RG 211.214 In conjunction with the granting of your CSF licence and, subject to individual circumstances of the case, ASIC may enter into a cooperative agreement with you, setting out among other things the additional information required to be included in your annual report.

RG 211.215 We will use your annual report for background when conducting our annual assessment.

Financial reporting in your first years

RG 211.216 There are additional risks associated with a CS facility that is commencing operation for the first time. We may recommend licence conditions that require you to report to us frequently during your first years of operation on cash flows, financial performance and your financial position.

RG 211.217 Your directors may also need to confirm to us in writing that you:

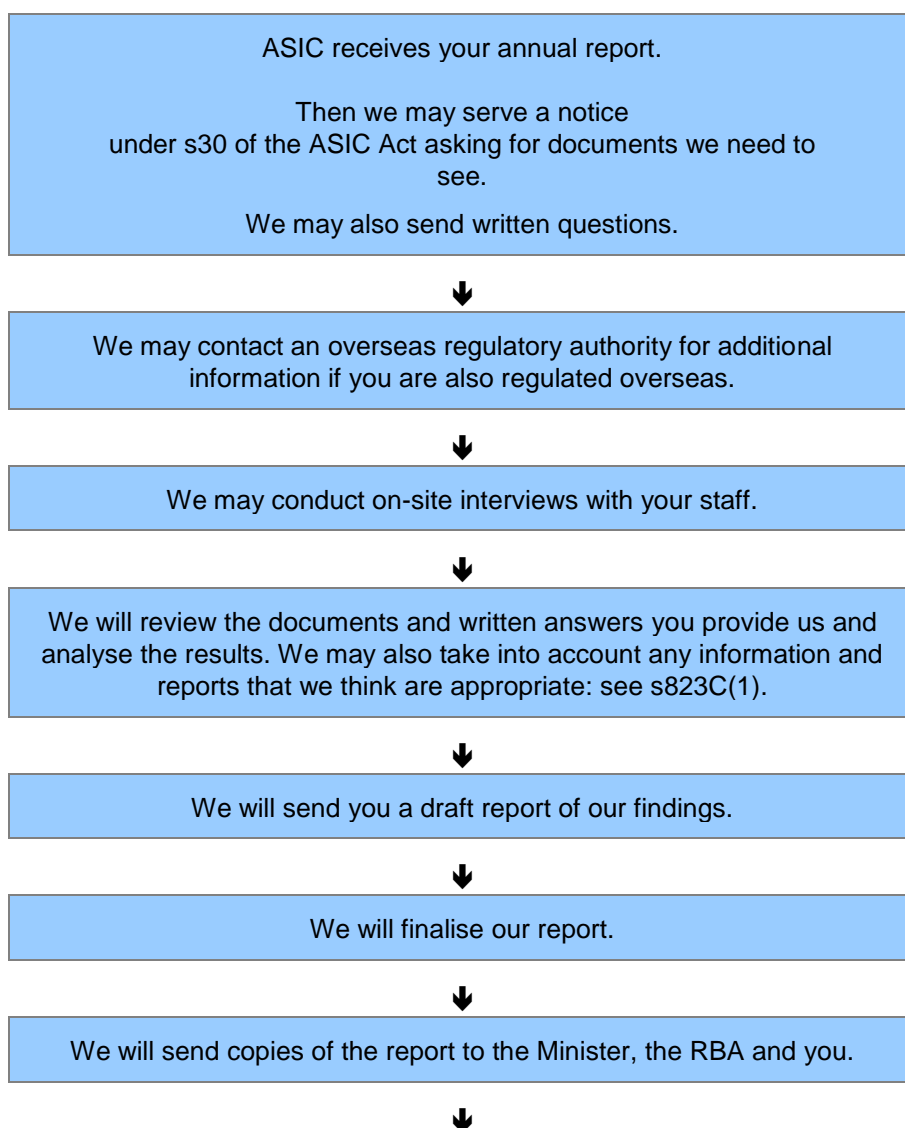
- (a) will be able to pay your debts as and when they become due and payable; and
- (b) have sufficient financial resources to continue to meet your obligations as a CSF licensee.

ASIC's assessment and report

RG 211.218 We are required under s823C to assess at least once a year your compliance with your supervisory obligations under s821A(c) as a CSF licensee, having regard to the regulatory outcomes in Table 1, and report to the Minister. We will usually do an assessment after we receive your annual report required by s821E.

- RG 211.219 We may also conduct, at any other time, an assessment of your compliance with your supervisory and other licensee obligations, other than your obligations in relation to financial stability standards and reduction of systemic risk under s821A(aa), which are assessed by the RBA. We will generally do an additional assessment if:
- (a) matters come to our attention that give us cause for concern about your compliance with any of your obligations; or
 - (b) there are significant changes in the features of your facility.
- RG 211.220 Our assessment will take into account the fact that your obligations are ongoing and cannot be assessed at a single moment in time.
- RG 211.221 In conducting our assessments, we will also have regard to any relevant standards and recommendations promulgated by international regulatory bodies such as IOSCO and CPSS.

Figure 5: ASIC's assessment process



The Minister and ASIC have the discretion to print and publish the report: see s823C(6). In some cases, we may issue a media release about the report.

RBA's assessment and report

- RG 211.222 The RBA is required under s823CA to assess and report to the Minister at least once a year on your compliance with your obligations in s821A(aa) as a CSF licensee.
- RG 211.223 The RBA will send copies of the report to the Minister, ASIC and you.
- RG 211.224 The Minister and the RBA have the discretion to print and publish the report: s823CA(5).
- RG 211.225 Ordinarily the ASIC and the RBA reports are prepared at separate times. We, however, provide draft reports to each other. ASIC can disclose confidential information to the RBA about your facility: s127(2A), ASIC Act.

Appendix: Examples of facilities

RG 211.226 This appendix uses examples to illustrate how the information in Sections B to D may apply in a number of situations that are similar to those we have seen in the past. The examples are intended to illustrate our policy; they do not constitute our policy.

Examples not exhaustive

RG 211.227 The examples in this guide are not intended to be exhaustive of all possible types of CS facilities, or of our approach in all circumstances in the future. We will determine our approach to facilities and operators on a case-by-case basis, in light of the Corporations Act, Corporation Regulations and this guide.

AFS licence requirements

RG 211.228 This appendix does not deal with AFS licence requirements. Our examples only deal with the application of Part 7.3. You will also need to consider whether you need to hold an AFS licence, particularly if you are not required to have a CSF licence for the particular activity.

Table 2: Examples of facilities

Example	What are the facts?	Does the company operate a CS facility in Australia?
<p>Example 1: Post-trade information provider</p>	<p>Company A is an international provider of infrastructure services. Its service helps users who engage in cross-border transactions in financial products by reducing the risks associated with manual trade processing and confirmation.</p> <p>In Australia, it provides information services to custodians, trustees and clearing participants.</p> <p>The information provided by Company A includes trade confirmations and other pre-settlement instructions on how custodians, trustees and clearing participants can settle transactions for financial products.</p> <p>Using Company A's services, users are better able to efficiently settle cross-border transactions for financial products.</p>	<p>No. Company A does not provide a regular mechanism for its users to meet obligations arising out of transactions in financial products.</p> <p>All Company A provides is post-trade information. Accordingly, Company A is not operating a CS facility and no CSF licence or exemption from Part 7.3 is required.</p>
<p>Example 2: Client accounting and securities transactions technology provider</p>	<p>Company B is a client accounting and securities transaction technology provider. Its customers include banks, clearing houses, custodians, fund managers, margin lenders and institutional and retail stockbrokers.</p> <p>The technology services provided to users include connecting them to a CS facility of which they are participants, and providing the technology infrastructure that enables users to communicate messages with the CS facility and other participants in the CS facility, including messages relating to the transfer of financial products.</p>	<p>No. Company B does not provide a regular mechanism for its users to meet obligations arising out of transactions in financial products.</p> <p>All Company B provides its users is the communications technology that assists those users to implement other arrangements they have for meeting their obligations arising out of transactions in financial products</p> <p>Accordingly, Company B is not operating a CS facility and no CSF licence or exemption from Part 7.3 is required.</p>

Example	What are the facts?	Does the company operate a CS facility in Australia?
<p>Example 3: Clearing and settlement of trading in a single financial product with small transaction volume</p>	<p>Company C is an Australian public company that operates an online secure market for its Australian shareholders to trade in its shares. It holds an Australian market licence for the online market.</p> <p>Before entering into transactions in Company C's shares, buyers and sellers are required to open an account maintained by Company C. Company C's shares are in dematerialised form, and all shareholders are required to maintain an account with Company C in which their shareholding is recorded.</p> <p>The operating rules of the financial market provide that buyers irrevocably instruct Company C to transfer funds from their account to the seller upon purchase of shares. They also provide that sellers irrevocably instruct Company C to debit their shareholding account to reflect any sale transactions they enter into.</p> <p>The turnover on its online market is below \$100 million every year.</p> <p>The online market only accepts orders of at least \$500,000.</p>	<p>Yes. Company C provides a regular mechanism for parties to transactions in its shares to meet obligations arising out of those transactions.</p> <p>Company C may be able to apply for an exemption from the requirement to hold a CSF licence. It would need to demonstrate that there is no satisfactory policy reason to regulate its facility as a CS facility.</p>

Example	What are the facts?	Does the company operate a CS facility in Australia?
<p>Example 4: Overseas-based CS facility operator clearing for a domestic market</p>	<p>Company D is the operator of a CS facility that is regulated overseas and provides a central counterparty clearing service for products traded on a futures exchange.</p> <p>Company D is not a body corporate registered under Division 2 of Part 5B.2.</p> <p>Company D enters into clearing and settlement arrangements with an operator of an Australian financial market to provide a central counterparty service to Australian participants of its market through novation.</p> <p>Company D does not permit Australian-based participants in its clearing house. Instead, all transactions entered into by Australian users of the market must be cleared by offshore participants of Company D's CS facility. This means that all Australian participants of the market are required to enter into agreements with offshore clearing participants of Company D, in order to enter into transactions on the market.</p> <p>Retail investors could trade on the Australian financial market through the participants of the markets.</p> <p>The financial products traded on the Australian financial market are derivatives contracts referenced to Australian-produced commodities.</p> <p>Transactions on the Australian financial market are traded and settled in Australian dollars.</p>	<p>Yes. Company D is operating a CS facility in Australia.</p> <p>Company D is operating a CS facility by providing a central counterparty service through novation. The central counterparty service is a regular mechanism that allows parties to transactions relating to financial products to meet their obligations under those transactions.</p> <p>Although Company D does not have any Australian participants, in this situation there is a nexus between the operation of the CS facility and Australia because:</p> <ul style="list-style-type: none"> • the market for which it provides services operates in Australia; • the participants of the market are based in Australia; • users of the market and CS facility include Australian retail investors; • the products cleared and settled are referenced to Australian-produced commodities; and • transactions on the market are traded and settled in Australian dollars. <p>Company D could consider applying for an overseas CSF licence under s824B(2) of the Corporations Act if they meet all the criteria in s824B(2).</p>

Example	What are the facts?	Does the company operate a CS facility in Australia?
<p>Example 5: Domestic financial market with clearing and settlement arrangements that involves bilateral physical delivery of paper certificates against payment</p>	<p>Company E is the holder of an Australian market licence and operates a market in Australia that deals in securities issued by companies quoted on its market.</p> <p>Trades concluded on the market are not novated.</p> <p>Following the execution of a transaction on its market, Company E notifies each party to the transaction of the identity of the other party to the transaction.</p> <p>Company E has operating rules for its market that provide for transactions affected through the market to be settled by the parties to the transaction.</p> <p>Company E uses a paper-based certificate system to recognise ownership and transfer of securities traded on its market.</p> <p>On the settlement day, under the market's operating rules, the buying participant is required to pay the selling participant directly for the securities bought and the selling participant is required to complete, sign and deliver both their transfer forms and share certificates to the buying participant.</p>	<p>No. Although Company E provides arrangements for participants to settle trades concluded on its market, both the money obligation and the transfer of the share ownership are not settled by any facility operated by Company E.</p>

Example	What are the facts?	Does the company operate a CS facility in Australia?
<p>Example 6: Overseas-based CS facility operator clearing OTC products in Australia</p>	<p>Company F is incorporated overseas and operates a central counterparty clearing and settlement system in the country where it is incorporated, which is also where it has its principal place of business.</p> <p>The central counterparty clearing and settlement services provided by Company F are regulated by the financial authority of its principal place of business.</p> <p>The central host of Company F's clearing and settlement computer system is located in that overseas country.</p> <p>Company F is not a body corporate registered under Division 2 of Part 5B.2.</p> <p>The products cleared and settled by Company F include credit default swap contracts that are referenced to Australian-based entities (Australian name credit default swap contracts). These Australian name credit default swap contracts are traded over the counter primarily between Australian-based participants of Company F. Company F also provides clearing and settlement services for other derivatives contracts referenced to overseas entities.</p> <p>Company F has 10 Australian participants and the trades that they submit to Company F for clearing and settlement are those Australian name credit default swap contracts they transact with other Australian participants.</p> <p>The value of transactions submitted by the Australian participants for clearing and settlement is material in terms of its impact on the Australian financial system.</p>	<p>Yes. Company F is operating its CS facility in Australia and thus is required to hold a CSF licence. Company F could consider applying for an overseas CSF licence under s824B(2) of the Corporations Act, if they consider that all the criteria in s824B(2) are met.</p> <p>In coming to this conclusion, we have taken into account the following factors:</p> <ul style="list-style-type: none"> • the products cleared and settled by Company F include Australian name credit default swap contracts that are traded primarily by Australian-based participants; • Company F has entered into arrangements with 10 Australian participants to provide them with the clearing and settlement services; • the transactions cleared and settled by Company F are made by Australian participants; and • the volume of clearing transaction generated by Australian participants is of a material amount.

Key terms

Term	Meaning in this document
ADI	An authorised deposit-taking institution within the meaning of the <i>Banking Act 1959</i>
AFS licence	An Australian financial services licence under s913B that authorises a person who carries on a financial services business to provide financial services
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> including any regulations made for the purposes of the Act
Australian market licence	Australian market licence under s791A of the Corporations Act
central counterparty (CCP)	An entity that interposes itself between counterparties to trades, becoming the buyer to every seller and the seller to every buyer
Corporations Act	<i>Corporations Act 2001</i> including any regulations made for the purposes of the Act
Corporations Regulations	Corporations Regulations 2001
CPSS	Committee on Payment and Settlement Systems of the central banks of the Group of Ten countries
CPSS-IOSCO Recommendations	CPSS-IOSCO Technical Committee recommendations for securities settlement systems and the CPSS-IOSCO Technical Committee recommendations for central counterparties, as revised from time to time, including any clearing and settlement systems-related standards promulgated by CPSS and IOSCO
CS facility	A clearing and settlement facility as defined by s768A
CS facility users	Investors who use the services provided by the CS facility to meet obligations arising out of transactions in financial products that they enter into. Investors may be participants acting for themselves or, when participants act as intermediaries, the clients of the participants
CSF licence	An Australian CS facility licence under s824B that authorises a person to operate a CS facility in Australia
CSF licensee	A person who holds a CSF licence Note: This is a definition contained in s761A.
Explanatory Memorandum	Explanatory Memorandum to the Financial Services Reform Bill 2001

Term	Meaning in this document
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.
financial stability standards	Standards issued by Reserve Bank of Australia under s827D
IOSCO	International Organization of Securities Commissions
licensee obligations	Obligations of a CSF licensee as set out in Subdivision A of Division 2 of Part 7.3 of the Corporations Act
market licensee	Holder of an Australian market licence
market users	Investors who acquire or dispose of financial products in a financial market, including an OTC market. Investors may be participants dealing for themselves or, where participants act as intermediaries, the clients of the participants
Objectives and Principles	IOSCO Objectives and Principles of Securities Regulation
OTC	Over-the-counter
Part 7.3 (for example)	Part of the Corporations Act (in this example numbered 7.3)
participant	A person who is allowed to directly participate in the facility under the facility's operating rules Note: This is a definition contained in s761A.
RBA	Reserve Bank of Australia
reg 7.2.10 (for example)	A regulation in the Corporations Regulations (in this example numbered 7.2.10)
retail client	Has the meaning given by s761G and 761GA Note: This is a definition contained in s761A.
RG 141 (for example)	An ASIC regulatory guide (in this example numbered 141)
s782 (for example)	A section of the Corporations Act (in this example numbered 782)

Related information

Headnotes

Australian CSF licence, CS facility, CS facility regulation, regulatory outcomes, exemptions, fair and effective, supervisory obligation, supervisory arrangements, conflicts of interest, financial resources, licence conditions, clearing and settlement arrangements, operating rules, written procedures, sufficiently equivalent

Regulatory guides

RG 54 *Principles for cross border financial services regulation*

RG 172 *Australian market licences: Australian operators*

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

RG 177 *Australian market licences: Overseas operators*

Legislation

Corporations Act, Chap 2A, Part 7.3, Part 7.4, Part 7.6, s761A, 761G, 765A, 768A, 790A, 820A, 820C, 820D, 821A, 821B, 821BA, 821C, 821D, 821E, 821F, 822A, 822B, 822C, 822D, 822E, 823C, 823CA, 824A, 824B, 824C, 824D, 824E, 825A, 827A, 827B, 827C, 827D, 911A, 913B;

Corporations Regulations, regs 7.1.09, 7.1.10, 7.3.04, 7.3.05, 7.3.06, 7.3.10, 7.3.11, 7.3.13, 7.3.14

Cases

Carragreen Currency Corporations Pty Ltd v Corporate Affairs Commission (NSW) (1986) 11 ACLR 298, 312-3

Consultation papers and reports

CP 120 *Operators of clearing and settlement facilities*

REP 194 *Response to submissions on CP 120 Operators of clearing and settlement facilities*