



ASIC Consultation Paper 378 – Safeguard Mechanism reforms: Updates to RG 236

CMI submission

The Carbon Market Institute (CMI) welcomes the opportunity to respond to the Australian Securities and Investment Commission’s (ASIC) Consultation Paper 378 of May 2024, that seeks views from Safeguard Mechanism facilities, advisers, intermediaries and participants in the carbon markets on proposed updates to ASIC’s regulatory guidance in the current version of Regulatory Guide 236 *Do I need an AFS licence to participate in carbon markets?*(RG 236).

CMI is an independent, member-based institute that promotes the use of market-based solutions and supports best practice in decarbonisation to limit warming to 1.5°C. Our membership includes 150+ primary producers, carbon service providers, First Nations organisations, legal and financial institutions, technology firms and emissions-intensive companies in Australia and Asia Pacific. The CMI Board updates CMI’s Policy Positions annually, which draw practical insights from—but are ultimately independent of—members.¹ CMI also administers the Australian Carbon Industry Code of Conduct (ACI Code), which was established in 2018 to steward consumer protection and market integrity.²

CMI’s policy positions and views are developed independently of our member organisations, and do not purport to represent any CMI individual, member company, or industry sector.

Feedback on the Consultation Paper

1. Updates to reflect Safeguard Mechanism reforms

CMI is generally supportive of ASIC’s proposed updates to RG 236 to reflect the Safeguard Mechanism reform amendments that were made in April 2023, to help organisations understand their Australian financial service licence obligations under the *Corporations Act 2001* (Cth) (Corporations Act) and associated regulation, when participating in or providing financial product advice and other financial services in relation to carbon markets.

We welcome the proposed updates that:

- Include ‘safeguard mechanism credits’ (SMCs) as a type of eligible international emissions unit, to reflect that they are financial products, and to provide guidance on how the relevant parts of Ch 7 of the Corporations Act involving licensing, financial services and product disclosure apply to activities involving SMCs; and
- Provide more detailed guidance on when a person may be providing financial product advice in relation to offset projects related to regulated emissions units, including the guidance that distinguishes between advice of a technical nature and advice that is, or could reasonably be regarded as being, intended to influence a decision about SMCs or Australian Carbon Credit Units (ACCUs), as elaborated in draft RG 236.140–RG 236.143.

2. Updated examples of other types of financial products

CMI supports ASIC’s updates to the examples of an ACCU Scheme carbon aggregator arrangement that is a managed investment scheme (see Example 3) and an arrangement to fulfil a carbon abatement contract that

¹ CMI 2023, ‘CMI Policy Positions’, https://carbonmarketinstitute.org/app/uploads/2023/11/CMI-Policy-Advocacy-Positions_FINAL-2023.pdf.

² CMI 2024, ‘Australian Carbon Industry Code of Conduct’, <https://carbonmarketinstitute.org/code/>.



is not a managed investment scheme (see Example 4). We consider these examples to be well framed in supporting an understanding of when these arrangements may constitute financial products.

CMI recommends ASIC’s proposed new example about an options contract for SMCs (see Example 2) be reframed to apply to all eligible international emissions units, not only SMCs, as well as contemplate the application to forward sales and purchase agreements.

To provide sufficient guidance on relevant market scenarios, CMI recommends additional examples be provided in the proposed updates to RG 236 that contemplate:

- Circumstances where the price provided in the option to acquire emissions units on a future date is variable.
- Advice involving co-benefits such as nature, biodiversity or First Nations benefits associated with a land-based carbon project that is, or could reasonably be regarded as being, intended to influence a decision about ACCUs.

CMI also recommends further clarity be provided in the proposed updates to RG 236 regarding the application of s761D(3)(b) of the Corporations Act, which exempts contracts for the future provision of services from falling within the definition of a ‘derivative’.

We recommend the updated guidance clarify the meaning of “exposure to an underlying product” and whether this applies to quantity, value or price of an underlying product and/or other factors under RG236.99. We note that RG236.99 currently provides “where the substance of the contract is to provide exposure to an underlying product (such as ACCUs), and the provision of future services are merely incidental or ancillary to that purpose, the exception will not apply”.

Additional scenario examples could be provided in the proposed updates to RG 236 that contemplate:

- An arrangement where the contract provides exposure to the quantity of an underlying product (if that is intended to be included within ASIC’s meaning of “exposure”), alongside the scenario example provided on an options contract for a right to purchase SMCs at a future date;
- Circumstances in which a contract would be considered a derivative or contract for the future provision of services, including an example that illustrates where a service provider is contracted to provide carbon project sourcing services to a potential project proponent, such as identifying and facilitate the purchase of land on which a carbon project may be progressed.

In light of the Albanese Government’s Sustainable Finance Strategy that underscored its commitment to mobilise significant private capital to achieve net zero³, we also recommend ASIC contemplate the applicability of the proposed updates to RG 236 to novel products that may be considered financial products that are being developed to help attract financing and increase demand for new technologies and services that are designed to support the economic transition to net zero. It may be appropriate to signal to the market how ASIC intends to evolve its guidance into the future to support this policy agenda.

3. Updated guidance on ‘making a market’

CMI supports ASIC’s proposed updates to RG 236 to clarify circumstances that may constitute ‘making a market’, thereby requiring authorisation under an Australian finance service licence. We consider the guidance provided in draft RG 236.152–RG 236.154 and the supporting scenario examples 5 and 6 to be well

³ See further, [New steps on the Albanese Government’s sustainable finance strategy | Treasury Ministers](#) (2 November 2023).



framed in supporting an understanding of what constitutes making a market when buying or selling regulated emissions units.

We recommend an additional scenario example be provided that contemplates the circumstance where a market participant supports a project proponent to sell ACCUs on the secondary market from time to time.

4. Guidance on managing a financial risk

CMI recommends ASIC provide additional guidance in RG236 to clarify how carbon markets may be contemplated under the exemption to Australian financial service licensing obligations for derivative arrangements (s761D Corporations Act) in circumstances where an entity is managing financial risk (regulation 7.06.01(1)(m) *Corporations Regulations 2001* (Cth) referred in paragraph RG236.184.

While the application of this exemption is reasonably clear in the context of derivatives to manage interest rate and foreign currency risks, we consider additional guidance could be provided on whether forward contracts for the procurement of carbon credits entered into for the purpose of meeting future corporate climate targets and compliance obligations would also be characterised as a financial risk in the application of the exemption.

We recommend a scenario example be provided to illustrate the types of risks that can be taken into account under the exemption for managing financial risks, that contemplates the longer-term strategies employed by entities to meet their compliance obligations under the reformed Safeguard Mechanism.

Should you have any questions about CMI's feedback or wish to discuss, please contact me at kurt.winter@carbonmarketinstitute.org.

Yours sincerely

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