

Margin Lending Laws

Within 6 months from legislation commencement - must lodge a licence application/variation
 12 months after legislation commencement - must comply with all margin lending requirements
 If a licence application/variation has not been lodged or has been rejected - will not be able to provide margin lending services 6 months after legislation commencement
 Training requirements must be fulfilled within 18 months of legislation commencement

Currently waiting for commencement date to be announced.
 6 November 2009 - Legislation received Royal Assent

Timing

Requirements do not apply to a body regulated by APRA
 Positive net assets and solvent
 Cash resources to cover next 3 months expenses
 Audit compliance annually and on ASIC's request
 Base level financial requirements

Surplus liquid fund (SLF) requirement
 If holding client assets valued over \$100,000, you need a minimum of \$50,000 in SLF
 ASIC estimates that currently only 4 margin lenders are not regulated by APRA (there are 10 in total)
 NTA requirement of up to \$5 million
 Adjusted surplus liquid fund (ASLF) requirements will apply to non-standard margin lenders (undrawn credit is excluded from ASLF calculation)
 Additional requirements for non-standard margin loan facilities
 ASIC estimates that currently there is only one non-standard margin loan provider in Australia
 Requirements specific to issuers/lenders

Financial Resources Requirements (RG166)

Procedures must be compliant with ASIC RG165 and Complaints Handling Standard, AS ISO 10002-2006
 Internal dispute resolution
 Procedures must be compliant with ASIC RG165 and RG139
 Must be a member of an ASIC-approved EDR scheme (FOS)
 External dispute resolution
 EDR scheme will be able to handle complaints involving responsible lending requirements

Dispute resolution requirements (RG165)

public consultation closed 23 Oct 2009
 must not exceed the equivalent of four A4 pages of 9pt text
 What is margin lending?
 How can you benefit from margin lending?
 How margin lending works
 What is a margin call?
 The risk of losing money
 The costs
 How to apply
 must include the following topics
 PDS

Disclosure

Regulations prescribe the contents of each topic
 APL
 Interest rates
 Other benefits not listed in the key benefits section
 can only incorporate by reference
 Update to disclose margin lending ASFL authorisation
 Update to tell clients about the ability to request Assessment of Unsuitability
 FSG

Disclosure requirements
 Complete an accredited specialist margin lending course
 Course must be on ASIC Training Register.
 Course must meet the specialist margin lending training requirements
 Arrange for ASIC to accredit a margin lending course which has already been completed
 Complete an alternative approach to meeting the training standard
 Advisers can be individually assessed by an authorised assessor if they possess 5 years relevant experience out of the last 8 years
 To provide advice on margin lending products, you must either:
 Training requirement must be fulfilled within 18 months of legislation commencement
 RG146 states that accredited margin lending training must satisfy the specialist knowledge requirements listed in Appendix A. This includes:
 Product types
 Product Characteristics
 Taxation
 Legal environment
 Theories of investment, portfolio management and management of investment and risk

Advisers recommending margin loans

Recommendation must be appropriate to needs and circumstances (reasonable basis obligation)
 must obtain and document sufficient information for the Lender to assess unsuitability
 must take reasonable steps to verify client's situation
 Must notify client of margin calls if client has appointed adviser as agent
 SOA

Amends the Corporations Act to add margin lending as a financial product
 Corporations Legislation Amendment (Financial Services Modernisation) Act 2009
 Amends the Corporations Regulations 2001 to include margin lending requirements
 Corporations Amendment Regulations 2009

Relevant law

n.b. this mind map shows the requirements when dealing with retail clients. If you deal with wholesale clients, certain requirements may not apply.

Definition of margin lending facility

Standard Margin Loans
 Includes protected equity MLs: limited or non-recourse MLs; Hybrid products; MLs where security is fin products AND residential property.
 Borrowing \$ to invest in securities and other fin products against the security of any equity contribution, specifically fin products
 Margin loan must be made to a natural person (excludes corporate entities)
 Provider to make reasonable inquiries to ensure the client's intention to use the funds mainly to purchase fin products
 Borrower must use the loan (wholly or partly) to acquire shares or other financial products
 Loan is secured over the shares or marketable securities
 Borrower is subject to margin calls

Non-Standard Margin Loans
 e.g. Tricom and Opus Prime "loans"
 Stock and securities lending structures
 Includes situations where client receives "transferred property"
 e.g. borrowing against home to buy shares when home only security for loan

Exclusion:
 Investment loans
 Regulated by new ACL regime instead
 Margin loans for personal, domestic, household or non-investment business purposes.


Responsible lending obligations

Applies to margin loan lenders
 Consistent with ACL/National Consumer Credit requirements

Assessment of Unsuitability
 Lender must make reasonable inquiries about unsuitability
 Not considered "advice"
 Must consider:
 ability to service loan
 client's financial situation
 amount and source of incomes
 For retail clients (price of facility is < \$500k)
 whether client "retail"
 double-gearing
 security
 guarantors
 amount of debt
 e.g. Credit checks
 Lenders can rely on information contained in an SOA, as long as it's not more than 90 days old.
 Must make efforts to verify information

Notification of margin calls
 Lender must notify client as soon as practicable
 Clarifies ambiguity about who's responsible to notify client of margin calls
 Unless client explicitly agrees to notifications being provided by planner as their agent (pursuant to contractual arrangement between the lender, the client, and the agent).

Applies to:
 New margin lending facilities
 Existing margin lending facilities
 When "new obligations" are incurred (e.g. increase in credit limit, margin call, issuing periodic statements)



This diagram is a summary only intended to promote and assist discussion. The document is subject to a Creative Commons Licence - www.creativecommons.org. The author is Holley Nethercote Commercial Lawyers. To attribute the author, please provide this link to www.hnlaw.com.au. This diagram does not constitute legal advice, and is current as at December 2009.

Preparation

If you wish to advise or deal in margin lending products, you will need the applicable product authorisation's. The two types of products are:

- Standard Margin Lending Facilities
- Non-Standard Margin Lending Facilities

Application / Variation Process

Standard licence application / variation procedure

Draft and submit core proofs

Core proofs must cover all of your financial services and products (even for variations)

A5 Business Description

B1 Organisational Competence - demonstrating your organisational competence to provide your financial services and products

C10 Margin Lending Proof (Complex Product), which needs to include:

- Pro forma / standard margin lending agreement
- margin loan unsuitability assessment
- clients are provided with unsuitability assessments on request
- potential margin calls are monitored
- clients are notified about margin calls
- clients are notified of the special risks involved in non-standard margin lending facilities (if applicable)

Complete any other applicable proofs

If you need to add a responsible manager onto your AFSL to cover margin lending activities, you will also need to complete ASIC form FS20 and also provide people proofs

Pay the appropriate fee

Applications/Variations must be lodged within 6 months of legislation commencement but ASIC will not accept lodgement in the first month

Australian Credit Licence is not required for Margin Loans
 ACL is required for dealings with other types of credit contracts (e.g. assisting client to apply for, or increase mortgage)
 Refer to National Consumer Credit Code Mind Map