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ASX RESPONSE TO ASIC CONSULTATION PAPER 379: ASIC CS SERVICES RULES

ASX appreciates the opportunity to provide a submission to the Australian Securities and Investment Commission's (ASIC's) Consultation Paper 379 and the draft ASIC CS Services Rules (draft Rules). ASX Clear and ASX Settlement as the licensees of the cash equities clearing and settlement (CS) facilities are committed to providing a fair and dynamic marketplace for all, together with upholding the regulatory requirements under the respective CS facility licences.

ASX considers the competition in clearing and settlement (CICS) legislation and the draft Rules as the logical next step in ensuring that the regulatory framework supports competition in clearing and settlement in the best long-term interests of the Australian market. The CICS legislation provided ASIC with the power to make rules to facilitate outcomes that are consistent with those expected in a competitive market for CS services. In this context, ASX notes that the draft Rules seek to balance the policy objective of facilitating competitive outcomes while not compromising financial stability or effective market function.

The draft Rules are intended to give effect to the Council of Financial Regulators (CFR) Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia (the Regulatory Expectations), in addition to imposing a number of additional obligations on the operators of CS facilities in line with the stated policy intent. Prior to the implementation of the Regulatory Expectations in 2016, ASX operated in accordance with its own ASX Cash Equities Clearing and Settlement Code of Practice (Code of Practice), which has been in place since 2013.

In CFR's 2015 Review of Competition in Clearing Australian Cash Equities: Conclusions report, it was noted that *"the Agencies consider it important not only that the Regulatory Expectations remain in place until the emergence of a competitor, but also that the relevant regulators would be able to impose enforceable requirements on ASX where the Regulatory Expectations were either not being met or not delivering the intended outcomes."* Once the Rules are in place, ASX considers that the principles of the Regulatory Expectations will have been shifted into those Rules, and that there would be benefit in a statement confirming that the Regulatory Expectations are now superseded by the Rules. This would ensure that where there is divergence between the Regulatory Expectations and the Rules, there is clarity about the obligations that apply.

Similarly, ASX is giving active consideration to the future of the Code of Practice once the Rules are in place.

Under the Regulatory Expectations, CFR has also developed principles that aim to provide further guidance on access to ASX Clear's central counterparty services in circumstances where the licensed listing market that is seeking access is not affiliated with ASX Group (the Open Access Principles). ASX considers that the Open Access Principles provide useful guidance and that there would be merit in retaining the principles regardless of the status of the Regulatory Expectations.

Comments on the draft Rules

ASX provides the attached submission on the draft Rules with the intention of ensuring that the Rules will operate in line with the policy intent of the CICS legislation, that the obligations imposed appropriately balance the policy intent against additional compliance costs and enable the implementation of any necessary changes from a practical perspective.

While a number of the draft Rules are broadly consistent with the Regulatory Expectations, the draft Rules also include additional obligations not expressly covered in the Regulatory Expectations. Compliance with the proposed Rules will require uplift across ASX's business beyond what is currently required to ensure compliance with the Regulatory Expectations. There are also additional reporting or record-keeping requirements in a number of areas. Given that non-compliance with the Rules will constitute a breach of the *Corporations Act 2001* (Cth) (**Corporations Act**), with significant penalties attached, there is additional significance on ensuring compliance with the requirements. A detailed mapping exercise of ASX's current compliance activities against the final version of the Rules, including the additional obligations, will need to be undertaken.

As a result, the proposed three month transitional period will be challenging. This submission identifies the specific Rules with which ASX considers that putting the necessary arrangements in place to ensure compliance within three months will be difficult. Given the annual external audit (required under draft Rule 2.4.3) will consider whether the policies, procedures and processes were in place to support compliance with the Rules from their commencement and the penalties that may attach to any breach of the Rules, ASX submits that a longer transitional time period is appropriate. ASX proposes that a transitional timeframe of at least six months is reasonable to enable adequate governance arrangements over any changes to its business practices and reporting or record keeping procedures.

The proposed transitional timeframe will be particularly challenging given the proposed timing for finalisation of the Rules. If the Rules are made in Q4 2024 as proposed in ASIC's Consultation Paper, the three month transitional period in which ASX will need to review existing arrangements to determine necessary changes (which will then need to be approved through internal governance processes and embedded throughout the business) will fall across the end of year summer leave period.

ASX's submission also highlights some practical issues with a number of the proposed broad definitions, which are used throughout the Rules, including 'core system' and 'user'. Clarification of these definitions will ensure that the Rules are targeted at the systems and outcomes that ASIC intends. ASX has also raised concerns with the frequency and trigger points for some of the proposed reporting arrangements and external reviews, having regard to efficiency considerations in achieving the intended policy outcomes.

With regard to ASIC's question posed in the Consultation Paper about the inclusion of technology and governance issues in relation to the CHES replacement project within the scope of the annual external audit of compliance with the Rules, ASX considers it would be appropriate to draft any requirement such that it could be satisfied by a review currently planned under the CHES replacement assurance plan. This approach would minimise unnecessary additional costs relating to commissioning external reviews. It would also be beneficial for any review of technology and governance issues to be undertaken by the primary assurance provider for the CHES replacement project, drawing on their cumulative project knowledge and expertise.

ASX has also provided comments on a number of the proposed Rules to seek clarification of ASIC's expectations for compliance. ASX understands that the final Rules will be accompanied by an Explanatory Statement, which may provide clarification and guidance that addresses the concerns raised in the submission. In some cases, further clarification in the Rules themselves may be appropriate.

As with any new regulatory requirements, there will be additional costs for ASX associated with ensuring compliance with the new Rules (both in relation to ensuring appropriate arrangements are in place to support initial compliance, and compliance on an on-going basis). A number of ASX's comments in the submission go to ensuring an appropriate balance between achieving ASIC's stated policy intention and minimising unnecessary additional costs.



We would welcome the opportunity to discuss the matters raised in this submission in more detail. If you have any questions, please contact Shelby Brinkley, Senior Policy Adviser (shelby.brinkley@asx.com.au) or myself on the details below.

Kind regards

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Attachments:

- > Attachment A – ASX Submission
- > Attachment B – Summary of ASX submission

ATTACHMENT A: ASX submission to ASIC CP 379 Draft ASIC CS Services Rules

1. Preliminary and interpretation matters

1.1. Commencement

As noted in the Consultation Paper, in addition to enshrining the Regulatory Expectations, the draft Rules include additional obligations not expressly covered in the Regulatory Expectations. Compliance with these new proposed Rules will require changes across ASX's business beyond what is currently required to ensure compliance with the Regulatory Expectations. As a result, there are number of Rules with which compliance within the proposed three month transitional period will be challenging. This submission identifies the specific Rules with which ASX considers compliance within three months presents the most significant issues.

The proposed transitional timeframe will be particularly challenging to comply with given the proposed timing for finalisation of the Rules. If the Rules are made in Q4 2024 as proposed, the three month transitional period in which ASX will need to review existing arrangements to determine necessary changes to be made will fall across the end of year summer leave period where staffing availability is likely to be reduced compared to usual business periods. Reflecting the reduced availability of key staff, governance forums are not scheduled to meet over the holiday period (including both management committees and Board meetings) with the usual cadence, which would create challenges for finalising any updates to internal policies and procedures to comply with the final Rules.

ASX proposes that a transitional timeframe of at least six months is reasonable to enable adequate governance arrangements in relation to any changes to policies, business practices and reporting or record keeping procedures. An appropriate transition period is also important in light of the significant maximum penalties that apply to non-compliance with the Rules.

1.2. Definitions

1.2.1 Core Systems

The current definition of 'Core System' included in the draft Rules refers to any information technology system that is used to provide a Covered Service, and could therefore capture a number of information systems that integrate with CHES (and CHES replacement). A number of the draft Rules impose obligations on Core Systems, and as such ASX would appreciate clarification that it is ASIC's intention to only apply the Rules to the systems that are core to the delivery of CS services. Examples of information technology systems that may be inadvertently captured by the proposed definition include systems used for risk management of cleared equities transactions or ASX's finance billing system. It is understood that it is not ASIC's intention to apply obligations such as Rule 2.1.4 to these systems.

ASX suggests amending the definition in the Rules to clarify that a core system means an information technology system that is core to the delivery of a Covered Service.

ASX considers that it would useful if further clarity was provided in the Explanatory Statement or other guidance as to which systems are intended to be captured by the definition. A clear regulatory perimeter for this definition is important to ensure that an external auditor reviewing compliance with the Rules (under draft Rule 2.4.3) is able to accurately assess compliance with the Rules.

1.2.2 International Open Communication Procedures and Standards

ASX considers that the definition of International Open Communication Procedures and Standards should not be limited to ISO 20022 and FIX 5.0 as there are other internationally-accepted procedures and standards for data transmission that may be required in order to facilitate interoperability with CHES replacement. To future proof the Rules, ASX proposes that the definition be drafted as follows:

International Open Communication Procedures and Standards means *the international procedures and standards for messaging and reference data that are appropriate to be accommodated by the Core Systems for provision of the Covered Services including the following procedures and standards for messaging and reference data:*

(a) ISO 20022; and
(b) FIX 5.0

1.2.3 User

The proposed definition of ‘user’ in the draft Rules extends significantly beyond the definition of ‘user’ currently contained in the Regulatory Expectations.¹ The draft Rules rely on this definition in a number of places, including in creating obligations for CS service providers in ensuring user input into decisions and ensuring that core systems meet the differing needs of users. The broad nature of the definition means that these obligations become unclear and difficult to ensure compliance with.

In particular, the draft Rules propose to include any person that proposes to use, either directly or indirectly, a Covered Service. This means that a significantly broad and undefined class of people will be brought within the definition.

Proposed users

Identifying proposed (direct or indirect) users is extremely difficult to achieve comprehensively for CS services, which makes it practically difficult to ensure compliance with the Rules as currently drafted. Given that the definition of ‘user’ is used throughout the draft Rules to create a number of varying obligations, ASX considers it would be more appropriate to remove the concept of ‘proposes to use’ from the definition, and rather insert an obligation to consider specific proposed users in the particular Rules where it is necessary and relevant to meet the policy intent of the Rule.

As currently drafted, the broad definition of user and resulting obligations under the draft Rules, including to provide access to users, could adversely impact ASIC’s policy objective of facilitating competition while not compromising financial stability or effective market functioning. Attaching obligations in respect of all potential use cases that a user may propose could lead to a situation where access is required to be provided that may compromise financial stability or effective market functioning, for example, where it could adversely affect the core CS service offering (i.e. clearing, settlement and central securities depository functions provided for the benefit of all participants and issuers).

For these reasons, ASX proposes that the definition of ‘user’ be amended as follows:

User means a person that uses ~~or proposes to use~~, either directly or indirectly, a Covered service provided by a CS Service Provider, including but not limited to...

In addition, ASX considers that the concept of a ‘person that proposes to use a Covered Service’ should be limited to those people who have taken material steps to use a Covered Service. ASIC may also wish to consider including a specific definition of ‘proposed user’ to which specific Rules could reference where appropriate and necessary.

Market participants

The proposed definition of ‘user’ in the draft Rules also now expressly extends to market participants. ASX considers that market participants are currently being represented in the Business Committee in their capacity as clearing and settlement participants, or by the clearing and settlement participant that provides third party clearing and settlement arrangements (where applicable). Given these arrangements, ASX seeks to clarify if the express inclusion of market participants as a stand-alone example of users is intended to require that they are separately represented in the representative bodies.

¹ Under the Regulatory Expectations, ‘users’ are broadly defined to include participants of the ASX CS facilities; end users; unaffiliated market operators, central counterparties and settlement facilities; technology service providers; and other relevant stakeholders.

2. Governance

2.1. Board composition

ASX does not have specific comments on Rule 2.1.1 relating to board composition. The Code of Practice includes a commitment that the Boards of ASX Clear and ASX Settlement Boards (**CS Boards**) will be comprised of 50% non-executive directors that are not also directors of ASX Limited. The Code also includes a commitment that ASX will ensure that a quorum of the Boards of ASX Clear and ASX Settlement can be constituted by directors that are not also directors of ASX Limited, consistent with draft Rule 2.2.1.

2.2. User input

Transparent formal mechanisms for stakeholder input are important in ensuring ASX is accountable directly to users. ASX acknowledges that the proposed rules are not intended to interfere with ASX's current arrangements for stakeholder input, under which it maintains both the Business Committee and the ASX Cash Equities Clearing and Settlement Advisory Group (**Advisory Group**) to facilitate stakeholder input to the CS Boards and management.

Under the current arrangements for stakeholder input, ASX considers that the Business Committee would be the 'representative body' for the purposes of compliance with the Rules. While the Advisory Group also provides a stakeholder forum for input to the CS Boards, it was established with a clear mandate to consider strategic matters related to cash equities clearing and settlement services and associated infrastructure, and operate alongside the Business Committee. In addition, members of the Advisory Group participate in an individual capacity in the interest of the overall cash equities market (rather than as representatives of users or classes of users).

While the draft Rules refer to 'one or more representative bodies', based on the current drafting it is not clear if both of the representative bodies would need to meet all of the obligations contemplated under subrule 2.1.2. ASX understands it is ASIC's intention to allow the bodies together to satisfy the obligations, and suggests that the drafting of the Rules could be amended to reflect this. Alternatively, clarification could be provided in the accompanying Explanatory Statement. This clarification would also be beneficial to ensure that ASX can ensure continued compliance with the Rules in the event of any changes to the current arrangements for stakeholder input.

2.2.1 Representing all users

The requirement that the representative bodies are representative of all users (subrule 2.1.2(1)(b)) may prove challenging to practically comply with given the broad definition of 'user' under the draft Rules. Including individual representatives of all users may result in these bodies becoming too large to effectively achieve their intended outcome, and some users may not wish to participate in ASX's representative bodies. In addition, as described above, the inclusion of 'a person that uses or proposes to use, either directly or indirectly, a Covered Service' in the definition of user makes it difficult to identify the class of stakeholders and could potentially extend to persons with only tangential interest in the CS facilities, making compliance impractical. Including representatives of such proposed users could also potentially be unfair to current users of the CS facilities.

By comparison, the Regulatory Expectations requires ASX to ensure that membership of its user governance arrangements is representative of the user base of its CS services. ASX considers that a formulation in line with the current Regulatory Expectations is more appropriate and would achieve the policy intent. A formulation requiring that the representative bodies are representative of the user base of the CS services would also allow for proportional representation amongst different class of users, which would result in more equitable representation of users.

2.2.2 Feedback on external assurance report

Subrule 2.1.2(1)(e)(ii) requires that the CS provider's governance framework enables the representative bodies to review and provide feedback on any external report required under rule 2.4.6 (the external assurance report relating to core systems). ASX considers it would be inappropriate and could compromise the integrity of the external assurance report if the representative bodies are provided draft versions of the report for feedback prior to finalisation. It would be more appropriate for this Rule to be drafted in way that requires the final version of any such report be provided to

representative bodies to allow the bodies to review and provide feedback to the CS Boards and management in response to the recommendations, and/or on management's proposed response to the recommendations.

ASX has no specific concerns with the requirement that the representative body or bodies review and provide feedback on the proposed terms of reference for the annual audit, as required by subrule 2.1.2(1)(e)(i).

2.2.3 'All issues'

Subrule 2.1.2(1)(f) requires that the governance framework for user input must ensure that the board of the CS service provider considers all relevant issues raised, in addition to recommendations made by a representative body.

From a practical perspective, it would be difficult to implement this rule. It also does not reflect how ASX's stakeholder representative bodies operate and interact with the CS Boards. For example, the Charter of the Business Committee provides that:

All recommendations of the Business Committee to ASX Management and the Boards of ASX Clear and ASX Settlement shall be made on the basis of a broad consensus of those members present at the relevant meeting of the Business Committee.

Similarly, the Charter of the Advisory Group provides:

Where appropriate make recommendations to the Boards of ASX Clear and ASX Settlement on such strategic matters related to cash equities clearing and settlement services and associated infrastructure. Recommendations must represent the broad consensus of the Advisory Group members, as determined by the Chair of the Advisory Group (Chair). Where the Advisory Group is unable to reach a broad consensus in respect of a matter, the Chair must advise the Boards of ASX Clear and ASX Settlement of the respective positions of the Advisory Group members and the reasons for those positions put forward by members at the Advisory Group meeting(s) where the matter was discussed.

In these forums, and particularly in the Business Committee, members raise a range of issues of varying significance. It is the role of the Chair (in discussion with members) to determine which issues raised by stakeholders are material enough to raise with the CS Boards.² The Chairs of both the Business Committee and the Advisory Group regularly attend meetings of the CS Boards, where feedback is provided beyond the formal recommendation process. In addition, the Advisory Group chose to provide advice to the CS Boards (rather than a recommendation) in November 2023 which highlighted issues for the boards' consideration.

The operation of these forums is designed to ensure that issues that both have a broad consensus, or which are otherwise material, are brought to the attention of the CS Boards. A requirement for all issues raised in the representative body to be presented to the CS Boards may result in a situation where it is impractical for the Board to consider and respond to all issues raised by individual members. In addition, providing feedback in this manner may be too disparate to be meaningful or useful to the CS Boards' in their decision making, and may prevent the material issues from being given adequate consideration by the CS Boards. Such outcomes would appear to be at odds with the policy intent behind draft Rule 2.1.2.

² The Business Committee's charter describes the role of the independent chair as to:

- a. convene, set the agenda for, and preside over meetings of the Business Committee;*
- b. take a leadership role in facilitating discussion and forging a consensus among Business Committee members on matters being considered by the Business Committee;*
- c. keep and approve the minutes of meetings of the Business Committee; and*
- d. report to, and from, the Boards of ASX Clear and ASX Settlement in relation to recommendations of the Business Committee and other matters raised by the Business Committee.*

To ensure the rule achieves the intended policy outcome and enables practical compliance, ASX recommends subrule 2.1.2(1)(f) be amended to reflect the current operation of the representative bodies.

2.2.4 Public reporting on interactions with users

ASX would appreciate further guidance on ASIC's expectations on the requirement to publicly report on the interactions with users (subrule 2.1.2(3)(a)). As currently drafted, strict compliance with the draft Rule could require the quarterly publication of a register of interactions between the CS service providers and users. ASX would caution against this approach as it would create a large compliance burden on the CS facilities, and may discourage some stakeholders from engaging with ASX on an open and transparent basis. Such an approach would seem to be inconsistent with the intended policy outcomes.

ASX considers that the policy intent of this subrule could be achieved by requiring the production of a summary report of engagements undertaken in the period, including thematic issues raised by users. This would also enable a more effective explanation of how feedback has contributed to decision making, as required by subrule 2.1.2(3)(c). ASIC may wish to consider clarifying its expectations for compliance with this Rule in the Explanatory Statement accompanying the final Rules.

ASX also suggests that such a report be prepared on a biannual basis, rather than a quarterly basis, in order to achieve an appropriate balance between regular reporting and additional compliance costs. A six-monthly cadence would provide for more meaningful reporting, particularly against 2.1.2(3)(c), as the issues on which feedback has been taken into account are more like to have progressed through ASX's internal governance processes in this timeframe.

ASX's existing arrangements have a standard form of reporting in relation to meetings of its existing representative bodies (for example, communique for the Advisory Group and minutes of meeting for the Business Committee) which are published on the ASX website. The minutes of Business Committee meeting are subject to approval by members (typically at the next quarterly meeting) and are provided to the CS Boards for consideration prior to their publication. Requiring the reporting in line with subrule 2.1.2(3)(a) within one month of the end of each quarter would likely mean that summary of interactions would not include such minutes.

2.3. Organisational requirements

The obligations in draft Rule 2.1.3 build on the obligations in the Regulatory Expectations for ASX to establish governance structures and reporting lines at the management and operational levels that promote access to its CS services on commercial, transparent, and non-discriminatory terms. The Regulatory Expectations provide that these arrangements should ensure that the interests of users are upheld in accordance with Regulatory Expectation 3³ and may be demonstrated, for example, through the key performance indicators set for relevant management.

The draft Rules articulate the requirements with greater specificity than the Regulatory Expectations, which will require work to assess the CS facilities' current compliance with the Rules and implement changes to uplift arrangements where necessary. Any changes will need to be subject to appropriate internal governance arrangements. As such, ASX considers that it will be difficult to ensure compliance within the proposed three month transition period, particularly if this period falls over the end of year summer holiday period.

2.4. Core Systems

2.4.1 Challenges with application of definitions

The broad definitions of both 'core system' and 'users' as described above create practical implications for compliance with draft Rule 2.1.4.

The definition of 'core system' may pick up information systems that integrate with CHES and CHES replacement. As these systems do not provide for user access to CS services, it would not be appropriate for them to be required to accommodate International Open Communication Procedures and Standards.

³ Commercial, transparent and non-discriminatory access to CS services.

Further, the broad and undefined class of people covered by the proposed definition of ‘user’ makes compliance with subrules 2.1.4(a) and (b) very difficult. The requirements appear to create current obligations in relation to future (including unknown) access use cases.

2.4.2 Application to current CHES

ASX notes that the definition of core system would also capture current CHES. Making changes to the design of current CHES to satisfy draft Rule 2.1.4 would require a significant undertaking from both ASX and industry (potentially involving increased operational risk), would significantly impact the timeframe for delivery of CHES replacement and would involve duplicate work and additional costs for ASX and participants. As such, it is understood that the policy intent is to apply the Rule to the CS service provider as it transitions to CHES replacement, and going forward following go-live.

ASX would appreciate clarity to be provided in the Explanatory Statement (or other guidance) that draft Rule 2.1.4 does not create obligations to make changes to current CHES.

2.4.3 ‘Differing needs of users’

The obligation in subrule 2.1.4(a) refers to the core systems meeting the differing needs of users. ASX has concerns that the broad definition of users combined with the phrasing of this obligation could require consideration of all needs of all users (including proposed and indirect users). In comparison, the Regulatory Expectations are drafted to require:

Investments should ensure that, to the extent reasonably practicable, the performance, resilience, security and functionality of the core CS infrastructure meet the needs of users, recognising the diversity and differing needs of users.

ASX considers that this obligation would more appropriately be framed with reference to the needs of users taken as a whole, and with a reference to the overall interests of the market.

It is particularly important for ASX to have regard to the overall interests of the market when considering requests for access. Given the stated policy object of the Rules of facilitating competition while not compromising financial stability or effective market functioning, it is important that ASX be able to have regard to the degree to which a person’s request for access is developed, how access would impact the overall market and its broader regulatory obligations when determining whether to grant access.

2.4.4 Facilitating existing governance steps

Draft Rule 2.1.4 is contained within the part of the rules dealing with ‘Governance Requirements’ (Part 2.1). However, the requirement to take all reasonable steps to ensure that the Core System meets the differing needs of users and that any Core System changes accommodate international open communication procedures and standards does not contemplate the usual governance steps for user input (particularly where there are differing views) and the ability for the CS Boards to be able to take a decision that does not accord with a recommendation made by the Business Committee and Advisory Group (with regard to the obligations around ‘if not, why not’ adoption of such recommendations).

This appears to be in contrast with comments in the Consultation Paper that the draft Rules are not intended to interfere with ASX’s existing arrangements for stakeholder input, under which it maintains two advisory forums for stakeholder input to the CS Boards and management. Clarification is requested that the requirements in draft Rule 2.1.4 remain subject to the governance steps that apply to determining what Core Systems will deliver or accommodate.

2.4.5 Duplication and variation in requirements for Core Systems

In addition to draft Rule 2.1.4, ASX notes that the draft Rules create obligations relating to requirements for access, interoperability and international open communication procedures and standards for core systems in multiple places, including:

- **Draft Rule 2.3.1(2)(b) and (c):** These subrules require that the design of Core Systems facilitates technical interoperability with systems used by Unaffiliated Entities to access Covered Services, including through the adoption of appropriate International Open Communication Procedures and Standards, and its Core Systems are designed and developed in a way that does not raise barriers to access by Unaffiliated Entities. This rule is not limited to a ‘change’ to Core Systems, suggesting a strict interpretation would apply to the design of existing CHES.
- **Draft Rule 2.3.1(3)(e):** This subrule requires the maintenance and publication of policies and procedures designed to ensure that investment, design or development of its Core Systems, including changes to its Core Systems, do not raise barriers to access from Unaffiliated Entities. It does not include an ‘all reasonable steps’ qualification.

ASX’s comments in Section 2.4 of this submission above also apply in relation to subrules 2.3.1(2)(b) and (c), and 2.3.1(3)(e). ASX also considers that the requirements should be expressed consistently – that is, should apply to changes to Core Systems, and include an ‘all reasonable steps’ qualification.

3. Pricing

ASX notes that the obligations relating to pricing in draft Rule 2.2.1 broadly reflect the commitments with respect to pricing created by the Regulatory Expectations and the Code of Practice.

A key new obligation is the requirement to maintain records to demonstrate how the CS service provider is complying with the subrule to not discriminate in favour of the CS service provider or any of its associated entities, except to the extent that the efficient costs of providing the same service to another party was higher. Work will be required to map current compliance activities against this requirement, and implement changes where required.

3.1. Tools

Subrule 2.2.1(c) requires a CS service provider to make information and tools available to assist users to anticipate the price they will have to pay for the use of covered services. ASX seeks clarification of ASIC’s expectations regarding the obligation to provide ‘tools’. For example, ASX seeks to understand if worked examples of the application of fee changes would satisfy draft subrule 2.2.1(c). Further guidance in the Explanatory Statement would be useful.

ASX notes in particular the practical difficulties of providing tools such as interactive calculators in light of the diverse business models of the users of the CS services. This issue is further exacerbated if the obligation extends to provide tools to assist ‘proposed users, direct or indirect’ of the CS services. It is very difficult to build a tool that would allow for accurate comparison of the impacts for every user.

3.2. Negotiation with users

ASX notes there are a range of users, and some of these users have large cohorts, where ASX’s operating rules and a schedule of fees apply (for example, CS participants and issuers). Fees set in the fee schedules apply equally to all relevant users on a non-discriminatory basis, and any changes to these fees are subject to consultation with users.

In this context, ASX is seeking clarification if draft Rule 2.2.1(2)(i) is intended to apply to those users, noting that negotiation with over 2000 issuers would be practically difficult.

ASX notes that the Regulatory Expectations limited this obligation to unaffiliated market operators and CS facilities:

ASX should negotiate commercially and in good faith with unaffiliated market operators and CS facilities regarding fees and other financial contributions charged for any extensions to its monopoly CS services, and in particular those provided under the existing Trade Acceptance Service and the Settlement Facilitation Service

In light of the challenges presented by an obligation for negotiation (beyond consultation) with issuers and participants, ASIC may wish to consider limiting draft Rule 2.2.1(2)(i) to apply to unaffiliated market operators and CS facilities.

4. Non-discriminatory access

ASX notes that the CICS legislation provides that in the event of any inconsistency between the CS services rules and the Financial Stability Standards made under section 827D of the Corporations Act, the Financial Stability Standards prevail to the extent of the inconsistency. For avoidance of doubt for all stakeholders, ASX considers that it would be useful to clarify that ASX is subject to a hierarchy of regulatory arrangements.

4.1. Application to the Operating Rules

Draft Rule 2.3.1 seeks to ensure that access to Covered Services (including data) is provided on commercial, transparent and non-discriminatory terms. As a licensed operator of clearing and settlement facilities in Australia, ASX has an important role to do all things reasonably practicable for its clearing and settlement services to be provided in a fair and effective way and is obliged under the Corporations Act to have rules governing the access to and operation of those facilities.⁴

The ASX Clear Operating Rules and the ASX Settlement Operating Rules (collectively referred to as **Operating Rules**), which are subject to ASIC's oversight and disallowance by the relevant Minister, perform an essential role in ASX meeting its regulatory obligations, including the criteria for determining persons eligible to be participants, ongoing requirements for participants, and matters relating to risk in the licensed CS facilities.

In respect of CS participants and issuers (as users), their contractual arrangements with ASX are addressed through the Operating Rules, with changes subject to consultation and regulatory clearance processes. Given the importance of the Operating Rules, as well as the general licence obligations of the CS facilities,⁵ it would be helpful to obtain clarity that the Operating Rules satisfy the requirements of Rule 2.3.1 and that in the event of any inconsistency with obligations under Part 7.3 of the Corporations Act or the Financial Stability Standards, the requirements in the Corporations Act and Financial Stability Standards prevail to the extent of the inconsistency. This is particularly relevant to both facilitating technical interoperability (Rule 2.3.1(2)(b) as well as to providing access to Core Systems or data (Rule 2.3.1(3)(a)(ii)) (for example, facilitating interoperability or access should not compromise the safety/stability of the CS facilities operated by ASX Clear and ASX Settlement or compromise the requirements set out under the Operating Rules).

ASX notes that the contracts made under, as well as, the Operating Rules were excluded from the operation of the unfair contract terms (**UCT**) regime under the *Competition and Consumer Act 2010* lest it interfere with, or create uncertainty around, particular terms of operating rules that are necessary to the maintenance of market stability and integrity. The explanatory memorandum which implemented the changes to the UCT regime explained the basis for the exclusion as follows:

*Operating rules are contracts that govern the core operational functioning of licensed markets and clearing and settlement facilities as well as the admission standards for listed securities. Operating rules are integral to the operation of Australia's financial markets and, among other matters, provide for the finality and irrevocability of transactions. Application of the unfair contract terms provisions to these contracts could potentially interfere with, or create uncertainty around, particular terms of operating rules that are necessary to the maintenance of market stability and integrity.*⁶

Similarly, the application of the requirements of Rule 2.3.1 to the Operating Rules could interfere or create uncertainty with the Operating Rules and the function they perform in the CS facilities operating in accordance with regulatory obligations. ASX requests that ASIC consider excluding the Operating Rules from the requirements of Rule 2.3.1, or in the alternative, providing clarification in the Explanatory Statement or other guidance that the Rules relating to non-discriminatory access are not intended to interfere with the Operating Rules.

⁴ See Page 1, [Monitoring and Enforcing Compliance with ASX's Operating Rules](#) for further information.

⁵ Section 821A, *Corporations Act 2001* (Cth).

⁶ Explanatory Memorandum to the *Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) Bill 2022* (Cth) at pages 49-50.

4.2. Core Systems to facilitate technical interoperability

Subrules 2.3.1(2)(b) and (c) appear to duplicate requirements in 2.1.4, including taking all reasonable steps to ensure the design of core systems facilitates technical interoperability (including through the adoption of international open communication procedures and standards) and does not raise barriers to access. Additionally, as set out in section 2.4. above, subrule 2.3.1(2)(b) is not limited to a 'change' to Core Systems and accordingly would appear to apply to existing CHES.

It is unclear why the obligation is duplicated in the draft Rules. ASX suggests retaining the standalone requirement in draft Rule 2.1.4.

4.3. Updates to documentation

The obligations in draft Rule 2.3.1(3)(a) to ensure that agreements with users are on commercial, transparent and non-discriminatory terms, which is proposed to extend to Core Systems and data (in addition to the Covered Services presently addressed in the Regulatory Expectations and Code of Practice), will require work to be undertaken to assess the CS facilities' compliance with that requirement and implement changes to uplift arrangements where necessary.

Any changes will need to be subject to change management processes contemplated under the relevant agreements and appropriate internal governance arrangements. As such, ASX considers that it will be difficult to ensure compliance within the proposed three month transition period, particularly if this period falls over the end of year summer leave period.

5. Reporting, policies and procedures

5.1. Covered Services comparative report

ASX does not have specific comments on the proposed Rule to require an independent review of CS services pricing against the price of similar services in other comparable international markets. ASX notes that there is interest from stakeholders for regular and transparent reviews of the pricing of CS services with comparable international markets.

Noting the significant cost and effort that is involved with preparing such a report, ASX considers that a five year cadence is appropriate, and achieves the appropriate balance between compliance costs and ensuring the availability of contemporary comparative information about CS services pricing for stakeholders. ASX would have concerns if the Rules required a more frequent cadence for the preparation and publication of the Covered Services comparative report in light of the significant cost and effort involved.

As noted in the Consultation Paper, in 2014 ASX commissioned Oxera to benchmark the costs of using its cash equity CS services against the costs of using these services in other markets. In comparing the fees charged, the Oxera report considered differences in scale, service levels and capital contributions. ASX consulted with key stakeholders, including through the Business Committee on the scope and methodology of the study, with some stakeholders providing information directly to Oxera to assist in framing its analysis. Oxera compared markets based on a range of user profiles, with each profile representing different types of investors (retail and institutional) and different brokers that are active in the Australian market. The profiles were then applied to the fee schedules of financial market infrastructure providers (FMIs) in other countries to give an estimate of the costs of using trading and post-trading services. The approach used by Oxera is well-established and has been used to undertake similar benchmarking analysis for securities regulators and exchange groups in other markets.

5.2. Cost Allocation Model report

ASX is supportive of a requirement to engage an independent person with appropriate skills, knowledge and experience to conduct a review and prepare a written report about the extent to which the CS service provider's model for the internal allocation of costs ensures that, where possible, costs are directly allocated to the services which give rise to the costs and shared costs are allocated based on appropriate, proportionate and transparent metrics.

ASX's Code of Practice includes a commitment to publish a cost allocation and transfer pricing policy that describes the methodology used for allocating revenue, directly attributable costs, indirect and common shared costs and capital that relates to the clearing and settlement of cash equities. ASX is currently updating its Cost and Revenue Allocation Policy, which provides that the allocation of costs will be largely driven by the nature of the expense and alignment to the relevant section of the business. Where possible, ASX will first determine the cause or driver of the cost and allocate to the sections of the business that are driving the costs.

5.2.1 Materiality threshold

There are circumstances in which minor and inconsequential changes are made to ASX's documents, procedures and models, including to update cross-references or correct typographical errors. As currently drafted, subrule 2.4.2(2)(a) would require the production of Cost Allocation Model report by an independent person in the event of any change to the model. ASX notes that there are not insignificant costs associated with such external reviews.

ASX considers that the inclusion of a materiality threshold in the requirement would be appropriate to ensure that the requirement applies only to changes that have a practical impact for the operation of the model.

5.3. Annual external audit

The Regulatory Expectations include a requirement for ASX to commit to submitting an annual external audit of its governance, pricing and access arrangements against the Regulatory Expectations. In the Code of Practice, ASX committed to annually commission an independent assurance firm to conduct an external audit of its compliance with the Regulatory Expectations.

The first audit of ASX's compliance with the Regulatory Expectations was released in 2017. Prior to the release of the Regulatory Expectations, ASX has been subject to an independent annual audit in relation to its compliance with the Code of Practice for Cash Equities Clearing and Settlement in Australia for financial years 2014, 2015 and 2016.

PwC undertook a seventh reasonable assurance audit in relation to ASX's compliance with the Regulatory Expectations in accordance with the Australian Standard on Assurance Engagement 3100 – Compliance Engagements issued by AASB for the year ended 30 June 2023. PwC assessed ASX's compliance with the Regulatory Expectations by reference to the Compliance Framework developed by ASX, which comprises the ASX Code of Practice and related policies and procedures. The audit for year ended 30 June 2024 is currently underway.

5.3.1 Inclusion of technology and governance issues in the annual external audit

ASIC's consultation paper asks if the scope of the annual review should be extended to include technology and governance issues in relation to the CHES replacement program. In addition, as noted in the consultation paper, these matters are a consideration under Part 7.3 of the Corporations Act.

If ASIC is minded to include such an obligation in the Rules, ASX considers it would be appropriate to draft the requirement such that it could be satisfied by a review currently planned under the CHES replacement assurance plan. A 'Full Project Health Check' will be undertaken regularly by the primary assurance provider under the CHES replacement assurance plan. These Health Checks will cover topics such as project governance, vendor management, risk and issue management, among other matters. If required under the Rules, ASX can arrange for a public report relevant to the matters detailed in any Rule made by ASIC to be prepared and published on an Annual basis.

This approach would minimise unnecessary additional costs relating to commissioning external reviews. It would also be of benefit for any review of technology and governance issues to be undertaken by the Primary Assurer for the CHES replacement project, drawing on the cumulative project knowledge and expertise.

ASX considers that given the existing obligations under part 7.3 of the Corporations Act, an audit or review requirement relating to technology and governance issues as part of the Rules should be limited explicitly to the CHES replacement project. ASX suggests that such an obligation would most appropriately be contained in a standalone Rule (rather than as part of draft Rule 2.4.3).

5.4. Management accounts

Consistent with the commitments in the Code of Practice, ASX currently publishes annual management accounts in respect of the CS facilities. The management accounts are subject to review by an external auditor.

Draft Rule 2.4.4(2)(a) extends beyond Covered Services to apply to all services provided by a CS Service Provider. As drafted, this may apply to ASX Limited and its provision of services relating to the market it operates or ASX Operations Pty Limited as the service company across ASX markets and CS facilities in relation to the provision of services across those markets and facilities. To avoid any such unintended extension beyond CS Services, which are the focus of the legislation, ASX requests that the existing reference to 'services' in draft Rule 2.4.4(2)(a) be amended to 'Covered Services'.

5.5. Policies and procedures

Draft Rule 2.4.5 expands on several requirements in the Regulatory Expectations in relation to the management of conflicts between the commercial interests of entities within the ASX Group and unaffiliated entities. This rule is drafted broadly and does not provide detail as to the types of conflicts required to be covered by the policies and procedures. ASX understands that this rule is intended to address the potential for conflicts of interest referred to in the Explanatory Memorandum for the CICS legislation.⁷ If so, it would be helpful if the Explanatory Statement could clarify that this rule is intended to apply to actual or perceived conflicts referred to in the CICS Explanatory Statement.

ASX currently maintains a Conflicts Management Policy and Conflicts Management Handbook which set out the arrangements for managing conflicts of interest and roles and responsibilities of staff.

ASX also publishes Conflicted Entities Watchlist to assist in the identification of actual, potential and perceived conflicts of interest and Information Handling Standards, which provide for the protection of confidential information provided to the CS facilities by unaffiliated market operators.

5.5.1 Review requirement

ASX understands that the intention of subrule 2.4.5(3) is to ensure that the processes that ASX has in place for ensuring the appropriate handling of commercial information from unaffiliated entities remain current. Regular reviews will also allow learnings and incremental improvements to be incorporated into the documented policies and procedures. The Rule contemplates that the review will assess if the policies and procedures are ensuring that the information provided by unaffiliated entities is handled as confidential, provided only to those with a need to know and not used to advance the interests of the CS service provider or its associated entities.

In order to achieve the policy intent of continuous improvement, there must be sufficient time between the review which identifies the uplift and the subsequent review, to allow for internal governance (including potential Board approval where relevant) over changes to policies and procedures and the embedment of the change in business practice. As such, ASX suggests that an annual review period would be more appropriate. An annual review would also strike a more appropriate balance with the compliance burden.

5.6. Core Systems external assurance report

Draft Rule 2.4.6 proposes that an External Assurance report is prepared prior to each final decision by the board in relation to investment, design, development or implementation of its core systems, including material changes to its core systems. ASX acknowledges the importance of external assurance regarding compliance with draft Rule 2.1.4 and subrules 2.3.1(2)(b) and (c), and that such assurance will assist the CS service provider in making the required statement under subrule 2.3.1(3)(f). As indicated in sections 2.4.5 and 4.2 above, differences in the description of the related obligations may create challenges for the external assurance of compliance with the Rules.

⁷ Explanatory Memorandum to the Treasury Laws Amendment (2023 Measures No. 3) Bill 2023, para 3.15.

5.6.1. Trigger for external assurance report

ASX has concerns that draft Rule 2.4.6 creates multiple triggers for an external assurance report ahead of readiness for go-live. ASX understands that the reference to 'each final decision by the board' is intended to capture final decisions rather than iterative points in the decision making process. In this regard, undertaking an external assurance report at a more mature (and closer to final) stage of the decision making process where meaningful review of the design elements can be undertaken would be appropriate. ASX notes that there may not necessarily be a Board decision at this point, and as such ASIC should consider delinking this requirement from Board decision making.

ASX considers that the policy intention of this draft Rule would be achieved by requiring an external assurance report, which would provide a desktop review focused on the solution design and requirements, ahead of go-live of any implementation of material changes to Core Systems. The review should be prepared at a time when the project is appropriately progressed, such that meaningful review of factors such as solution architecture, business and technical requirements and message specifications can be undertaken. The report should also be prepared ahead of readiness go-live decisions such that if there were findings requiring remediation, such remediation would not impact the critical path to go-live. As it is difficult to determine the timing of such a review, the timing should be determined by ASX with regard to these factors (rather than set in the Rules).

ATTACHMENT B: Summary of ASX submission

ASX suggested drafting changes

Draft rule	ASX suggested drafting changes
1.1.3 Commencement	The Rules commence six months after the instrument is registered on the Federal Register of Legislation.
1.2.2 Definitions	<p>Core System: The definition be amended to clarify that a core system means an information system that is core to the delivery of a Covered System.</p> <p>International Open Communication Procedures and Standards: The definition be amended to the international procedures and standards for messaging and reference data that are appropriate to be accommodated by the Core Systems for provision of the Covered Services and includes include as examples, rather than exhaustively list, ISO 20022 and FIX 5.0.</p> <p>User: The definition be amended to remove the concept of ‘proposes to use’ from the definition. An obligation to consider proposed users in the specific Rules where it is necessary and relevant to meet the policy intent of the Rule. The concept of a ‘person that proposes to use a Covered Service’ should be limited in to those people who have taken material steps to use a Covered Service.</p>
2.1.2 User input	<p>The requirement that representative bodies are representative of all users should be amended to be similar to the construction of the current Regulatory Expectations (that is, the representative bodies are representative of the user base of the CS services).</p> <p>Subrule 2.1.2(1)(e)(ii) should be amended so that feedback from the representative body is not required on draft versions of external assurance reports.</p> <p>Subrule 2.1.2(1)(f), relating to the reporting of all issues to the CS Boards, should be amended to reflect the current operation of the representative bodies.</p> <p>The obligation to provide a public report on interactions with users should be a biannual, rather than quarterly, obligation.</p>
2.1.4 Core systems	The requirement to meet the differing needs of users should be framed with reference to the needs of users taken as a whole, and with reference to the overall interests of the market.
2.2.1 Transparent, non-discriminatory, and fair and reasonable pricing	<p>The reference to ‘services’ in draft Rule 2.2.1(2)(a) should be replaced with ‘Covered Services’.</p> <p>Rule 2.2.1(2)(i), relating to the obligation for negotiation should be limited to apply to unaffiliated market operators and CS facilities (and not issuers and participants).</p>
2.3.1 Non-discriminatory access	Subrules 2.3.1(2)(b) and (c) appear to duplicate requirements in Rule 2.1.4. It is unclear why the obligation is duplicated in the draft Rules. ASX suggests retaining the standalone requirement in draft Rule 2.1.4.
2.4.2 Cost Allocation Model report	A materiality threshold should be included in the requirement for the publication of a Cost Allocation Model report prior to any changes to the model for the internal allocation of costs.

Draft rule	ASX suggested drafting changes
2.4.3 Annual external audit	If ASIC is minded to include a requirement relating to an annual review of technology and governance issues in relation to CHES replacement program, the requirement should not be contained in the annual external audit, but rather a standalone requirement relating to CHES replacement.
2.4.4 Management accounts	The reference to 'services' in draft Rule 2.4.4(2)(a) should be replaced with 'Covered Services'.
2.4.5 Policies and procedures	The review of documented policies and procedures for the handling of sensitive or confidential information under subrule 2.4.5(3) should be an annual, rather than a quarterly requirement.
2.4.6 External assurance report – Core Systems	The Rule should require an external assurance report ahead of go-live of any implementation of material changes to Core Systems. The review should be prepared at a time when the project is appropriately progressed, such that meaningful review of factors such as message specifications can be undertaken. The report should also be prepared ahead of readiness go-live decisions such that if there were findings requiring remediation, such remediation would not impact the critical path to go-live. The timing of the Review should be determined by ASX with regard to these factors (rather than set in the Rules).

Requests for clarification

In addition to the changes suggested in the table above, ASX also requests clarification on the following matters (either in the Explanatory Statement or any additional guidance issued by ASIC to accompany the Rules):

Draft rule	Clarification sought
1.2.2 Definitions	<ul style="list-style-type: none"> Whether the express inclusion of market participants in the definition of 'user' as a stand-alone example is intended to require that they are separately represented.
2.1.2 User input	<ul style="list-style-type: none"> Whether the obligations can be satisfied by multiple representative bodies together, or if each representative body must meet all the obligations. Further guidance on ASIC's expectation on the requirement to publicly report on interactions with users.
2.1.4 Core systems	<ul style="list-style-type: none"> Whether the Rule is intended to create obligations with respect to current CHES. That the requirements in draft Rule 2.1.4 remain subject to the governance steps that apply to determining what Core Systems will deliver or accommodate.
2.3.1 Non-discriminatory access	<ul style="list-style-type: none"> That the Rules relating to non-discriminatory access are not intended to interfere with the Operating Rules.
2.4.5 Policies and procedures	<ul style="list-style-type: none"> That this rule is intended to apply to actual or perceived conflicts referred to in the CICS Explanatory Statement.