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10 September 2024

Dodie Green
Senior Manager, Clearing and Settlement Facilities
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000

By email: CSfacilities@asic.gov.au

Dear Dodie,

Cboe Global Markets Australia (**Cboe Australia**) welcomes the opportunity to make a submission on the Australian Securities and Investments Commission's (**ASIC**) draft CS Services Rules (**Rules**).

Cboe Australia operates a licensed financial market that executes approximately 20% of the total average daily trading volume in the Australian equities market. Our focus as a market operator is to provide trusted, liquid, and resilient markets in support of a larger ecosystem that serves and benefits all investors. Cboe Australia's roots lie in an Australian initiative to challenge the monopoly services provided by the vertically integrated ASX trading platform and clearing and settlement system. Cboe Australia is now one of the rare successful challengers to the vertically integrated incumbent.

Given this history, Cboe Australia is strongly of the view that competition provides the best outcomes for users of services and is a strong proponent of regulatory settings that promote competition and innovation.

Unfortunately, the market for clearing and settlement (**CS**) services for cash equities in Australia is characterised by substantial barriers to entry, including some that have been created by the incumbent monopoly provider. These barriers have significantly contributed to the current monopoly market structure for CS services.

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Vertical integration can bring benefits to customers and markets, but can also be leveraged in a way that is damaging to customers and the market as a whole where a vertically integrated group is also a monopolist. As a result, this market structure necessitates significant regulatory oversight to mitigate the risks of monopolistic rent-seeking and abuse of market power, including in ways which seek to prevent competition from emerging. Cboe Australia has, over many years, called for strong regulation in CS services to both mitigate these risks and support potential competitors.

With the introduction of ASIC's rulemaking power under Part 7.3A of the *Corporations Act 2001* (**Corporations Act**), Australia now faces a once in a generation opportunity to support competitive outcomes in both the regulatory settings and, through these, the technology and systems on which users of Australia's equity security clearing and settlement services rely. In Cboe Australia's view, ASIC must seize this opportunity to ensure that Australia's post-trade environment delivers success for Australia's investors and its financial system both now and into the future.

Cboe Australia commends ASIC for its work developing such comprehensive and detailed draft Rules to implement the Council of Financial Regulators' (**CFR**) *Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia* (**Regulatory Expectations**). These draft Rules are the strongest step yet to secure a competitive future for users of Australia's monopoly CS services. ASIC deserves credit for its work, alongside other CFR agencies, to come this far.

However, the Regulatory Expectations are a point-in-time policy statement, reflecting the work that had gone into previous CFR reviews until September 2017. Since then, events have demonstrated the difficulties stemming from ASX's position as a vertically-integrated monopolist, including both the CHESS replacement failure and users' difficulties accessing ASX's monopoly CS services.

Accordingly, Cboe Australia supports the position outlined in the Regulatory Expectations that:

> *"Agencies also expect to review the Regulatory Expectations periodically, including in the event of material changes to the operating environment for these services. Such reviews may assess the ongoing appropriateness of the Regulatory*

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> *Expectations and their effectiveness in delivering the intended outcomes, with consideration given to stakeholder feedback."*[1]

Cboe Australia submits that this consultation presents just such an opportunity for ASIC, and the CFR more broadly, to consider the appropriateness of the Regulatory Expectations, particularly in light of changes to the industry landscape.

While the introduction of ASIC's rulemaking and the ACCC's arbitration power have brought more clarity, the competitive landscape has changed since 2015 and potential competitors have withdrawn. Given the current demands of the CHESS replacement program and ASX's demonstrated willingness to provide incentive payments to existing vendors and participants to re-engage development to the Tata Consultancy Services (**TCS**) BaNCS-based CHESS replacement program, it seems unlikely that local clearing participants or vendors have the capacity to support a new competitor in the near future.

As a result of these changes, Cboe Australia considers that ASIC and the CFR should reframe their policy stance from 'achieving outcomes consistent with those which might be expected in a competitive environment', to 'regulating the facilities through which monopoly CS services are provided as public utilities'. Until such time as a committed competitor emerges for these services, we believe regulating these services as public utilities is more appropriate. The key difference is that a public utility objective is both more proximate to the current market structure, and more explicitly and directly addresses the structure of the incumbent monopolist. This is preferable to the current articulation of policy because the outcomes for users of monopoly services are, in Cboe Australia's view, ultimately attributable to the structural incentives driving a vertically-integrated monopolist. Without significant focus on this structure any regulatory framework risks creating loopholes which can undermine regulators' objectives.

In Cboe Australia's view, ASIC has already taken steps towards this approach with its comprehensive implementation of the Regulatory Expectations under the draft Rules – much to its credit. Cboe Australia submits that this approach should be reflected more explicitly in the CFR's policy stance, as well as in ASIC's guidance and statements on its regulatory goals for the Rules if and when published. However, Cboe Australia also submits that ASIC should also make certain changes to the draft Rules to address some remaining gaps and more fulsomely implement a 'public utility' model of CS facility regulation.

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[1] p.4

There is international precedent for this proposed approach. In Canada, the Ontario Securities Commission (**OSC**) has implemented conditions similar to those Cboe Australia has proposed in this submission, particularly in relation to governance and an overarching 'public interest' duty in the provision of monopoly services.[2] This demonstrates that these proposals have been successfully implemented in other jurisdictions, which can serve as a model for Australia.

To this end, Cboe Australia's submission focuses on two key themes.

1. Support for the CS Services Rules – Cboe Australia commends ASIC for its work and strongly supports the proposed Rules, subject to our comments and suggestions below for how they could be strengthened to better achieve the CFR's policy objectives; and
2. Strengthening the Rules to better achieve their goals – while Cboe strongly supports the draft Rules, there are key elements which could be strengthened to more effectively achieve the policy goals they seek to fulfil both in the current environment and for the future, particularly under the CHESS replacement system.

Cboe Australia's submission includes:

- this cover letter, outlining our overarching views on the Rules and identifying issues of significant importance to Cboe Australia;
- a table cataloguing our responses to the consultation questions (**Attachment A**); and
- a table with comments on the text of the Rules (**Attachment B**).

Separately, other arms of the Cboe group have deep expertise in the operation of central counterparties in a competitive environment, including by engaging with competing securities settlement facilities. We understand that Cboe Clear Europe will be providing a separate submission outlining considerations for a possible future competitive environment for CS services which are contemplated under the enabling legislation for these Rules.

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[2] See *Notice of Commission Approval and Recognition Orders - Maple Group Acquisition Corporation - Alpha Exchange Inc.*, particularly Schedule 2, Section 2 Public Interest Responsibilities, available at https://www.osc.ca/en/industry/market-regulation/marketplaces/exchanges/recognized-exchanges/alpha-exchange-inc-recognition-orders/notice-commission-approval-and#s3_1_1.

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## Support for the CS services Rules

Cboe Australia takes this opportunity to express its strong support for these draft Rules. ASIC deserves considerable credit for its work developing such comprehensive and detailed Rules to implement the Regulatory Expectations. In implementing the Regulatory Expectations, the Rules will support better outcomes for users of monopoly CS services for Australian equity securities.

The existing monopoly provision of CS services has resulted in the forced use of expensive and cumbersome systems which do not serve investors well and have not kept up with technological change. In Cboe Australia's view, this is the result of a lack of competitive pressure that destroys incentives to invest in systems and improve service quality.

While the best outcome for Australian investors is effective competition in the provision of CS services, until such competition emerges close regulation is required to create outcomes consistent with those which would emerge if monopoly CS services were provided by a public utility. ASIC's rulemaking power is a robust tool to achieve this outcome. Cboe Australia strongly supports the Rules as a whole and the policy goals they seek to achieve.

A number of rules go directly to issues which have plagued the financial services industry over the last several years. Perhaps chief among these is the CHESS replacement project. While the failure of the replacement project has cost industry stakeholders hundreds of millions of dollars, ASX's administration of the project created significant concerns for industry even before its failure. A significant concern was that industry stakeholders' needs were not being adequately incorporated into the replacement system's design, particularly for those users who compete with ASX in upstream or potentially downstream markets (such as market operators and share registries).

Accordingly, subject to comments about how this can be strengthened below, Cboe Australia strongly supports the user input requirements under Rule 2.1.2: *User input*. It is essential to ensure that industry stakeholders are ASX's primary concern when making decisions about its current CS services, CHESS, and the design of the CHESS replacement system. The user input group is an important mechanism to ensure users' voices are heard and appropriately considered. While Cboe Australia suggests ASIC enforce this rule in a way that differs from current user input arrangements, we nevertheless strongly support the implementation of Regulatory Expectation 1: *User Input* via this rule.

Cboe Australia also strongly supports Rule 2.2.1: *Transparent, non-discriminatory, and fair and reasonable pricing* and Rule 2.3.1: *Non-discriminatory access*. Subject to certain comments about how these could be strengthened, Cboe Australia considers these rules reflect core principles of the Regulatory Expectations which are now legally enforceable. More specifically, subrules 2.3.1(2)(a) and 2.4.5(3) address significant issues Cboe has faced (including, before 2022, as Chi-X Australia) resulting from the integration of CS services provision and market operator. Cboe Australia expresses strong support for these requirements. The implementation of these Regulatory Expectations is a significant and positive change which will support users of ASX's monopoly CS services and their end clients.

Rule 2.1.4: *Core Systems* and subrules 2.3.1(2)(b), (c) and (e) go directly to the design and development of the systems used to provide monopoly CS services. In Cboe Australia's view, these rules are essential to ensure that the design of the CHESS replacement system does not preserve legacy barriers to access or create new barriers to access. In particular, Cboe Australia strongly supports the requirement in subrules 2.1.4(3) and 2.3.1(b) to incorporate International Open Communication Procedures and Standards into any changes to core systems, as well as the definition of such standards to include ISO20022 and FIX 5.0. ASIC should be commended for this requirement to facilitate technical interoperability, which is important to ensure competitive outcomes for users of monopoly CS services and to support a potential competitor in future.

Finally, Cboe Australia strongly supports the proposed three-month transition period. The Rules are an important piece of regulatory architecture, and it is therefore important that they come into force as soon as possible. The Regulatory Expectations have applied (though not in a legally enforceable manner) for several years, so the proposed transition period should not be expected to present significant challenges.

## Strengthening the Rules

Consistent with our comments above about the need to achieve a 'public utility' model of monopoly CS services provision, Cboe Australia suggests a number of changes to strengthen the draft Rules. These changes are intended to close potential gaps and assist ASIC more effectively achieve the CFR's policy goals towards CS services.

Cboe Australia suggests changes relating to:

- Independent/external reviews;
- User input to governance; and
- Terms and price of access.

## Independent reviews

A number of proposed rules require a covered licensee to commission independent reviews or audits.[3] However, Cboe Australia considers that the commercial relationship between a reviewer and a covered licensee commissioning such reviews presents significant challenges to these requirements as currently drafted.

In particular, while Cboe Australia strongly supports the goals underpinning the rules requiring external review, it is difficult to see how genuine scrutiny about compliance with the Rules can be expected from a commercial relationship. Because these Rules will require regular external reviews for the foreseeable future, a reviewer has a powerful commercial incentive to win future work in subsequent years. This incentive creates a structural alignment between the reviewer's commercial interests and the covered licensees' interests in the reviews delivering supportive findings. This alignment of interests works against the purpose of the rules requiring independent review, and undermines the relevant rules' ability to fulfil their intent of delivering meaningful transparency to users. This is particularly important because it is likely that users will ultimately pay for the costs of any external reviews under fees charged for access to monopoly CS services. As a result, it is important that these reviews deliver valuable transparency to users.

In Cboe Australia's view, the default position should be that independent scrutiny – where it goes to compliance with regulatory obligations – is free from any possible commercial influences. Ideally, an independent reviewer's commercial interests in winning future work would be aligned with ASIC's regulatory priorities in ensuring compliance with the Rules. This would ensure that the reviews are fulfilling their intended purpose, and support industry confidence in the reviews and the incentives motivating a reviewer.

To address these structural conflicts, Cboe Australia submits that ASIC should:

- commission the reviews proposed under the draft Rules itself;

[3] Rules 2.4.1: *Covered services comparative report*; 2.4.2 *Cost allocation model report*; 2.4.3 *Annual external audit*; and 2.4.6 *External assurance report—Core Systems*.

- recover the costs of commissioning these reviews under the industry funding model (**IFM**); and
- introduce a rule requiring the board of a covered licensee to comply with the ASIC-commissioned review.

These changes will support the benefits that an independent review provides. ASIC commissioning the reviews will ensure that their scope is appropriate and that the reviewer's commercial interests are aligned with ASIC's regulatory priorities in enforcing the Rules. ASIC could simply commission reviews in the same terms as outlined in these Rules, which Cboe Australia agrees are appropriate.

ASIC could recover the costs of this approach under the IFM, specifically by attributing the costs to domestic clearing and settlement facility licensees. This approach would therefore not impose any additional cost burden on ASIC compared to the approach currently outlined in the draft Rules. Most importantly, this proposed approach would align a reviewer's commercial interests with ASIC's regulatory goals, and support users' confidence in the reviews. This will ensure that these proposed reviews better fulfil their intended policy goals than they could under the current drafting.

## User input

As outlined above, Cboe Australia strongly supports the proposed user input into governance group required under Rule 2.1.2: *User input*. However, Cboe Australia considers that there are two issues with ASX's current user governance arrangements which this rule should address.

First, ASX's current arrangements for user input into governance – such as the ASX Business Committee and the Cash Equity Clearing and Settlement Advisory Group (**Advisory Group**) – are not structured in a way that is effectively meeting the policy goals that Rule 2.1.2: *User input* seeks to fulfil.

The Business Committee was formed in 2013 pursuant to a CFR recommendation that ASX implement a Code of Practice, including user input into governance arrangements.[4] We applaud the intent of those recommendations; a well-functioning Business Committee is essential for users to be able to provide actionable input that improves the clearing and

[4] See pages 5-6, *Competition in Clearing Australian Cash Equities: Conclusions*, CFR, 2012, available at https://treasury.gov.au/sites/default/files/2019-03/Competition-in-clearing-and-settlement-of-the-Australian-cash-equity-market.pdf.

settlement ecosystem. However, in the decade since those recommendations were adopted it has become clear that the Business Committee, as currently constructed, is not as effective as it could be, in large part due to its design. In particular:

1. It is too large, and includes too many members for users to effectively coordinate their views and reach consensus.
2. It does not meet independently of ASX, which has led to a concern that many users are afraid to challenge ASX at Committee meetings for fear of blowback.
3. ASX chairs the Committee, which allows it to control proceedings (including the agenda) and has led to the Committee deteriorating into a one-way channel of communication, which ASX uses to communicate its own positions and views more so than to effectively receive user input.

Stakeholder concerns about their ability to provide input into user governance arrangements led some stakeholders to form the CHESS Replacement Stakeholder Group several years before the project was paused in 2022. Similar concerns were subsequently aired before the Parliamentary Joint Committee into Corporations and Financial Services, which led to the formation of the Cash Equity Clearing and Settlement Advisory Group in 2023. In Cboe Australia's view, the fact that these concerns have not been convincingly settled some 11 years after the Business Committee was first convened illustrate that, as currently structured, it is not fulfilling the policy goals that Rule 2.1.2 seeks to achieve.

While the Advisory Group has successfully carried out its intended strategic governance role in relation to the CHESS Replacement project and its vendor selection, it is constituted by members who are too senior to be expected to understand CHESS users' business and operational needs in sufficient detail, at least not without consultation to the members' respective employers – which Cboe Australia understands is not allowed. Moreover, Cboe Australia understands that the Advisory Group was only intended to be a temporary body, and was setup accordingly. Ideally, a more clearly permanent body would be established to conform to this rule.

As a result, Cboe Australia submits that either a new body is required, or material changes must be made to existing bodies. In either case, a group conforming with Rule 2.1.2 should be structured to:

1. effectively represent users, including by limiting the size of the body to allow it to come to consensus, while noting that this will need to be balanced against the need

to ensure the broad range of users are effectively represented – this could be done by limiting the size of the body but providing other avenues for the broad range of users to provide input, such as by electing members and voting on matters of particular importance;

2. ensure that the body:
    a. does not include ASX as a member so that its positions can be formed independently of ASX, and so that it can be chaired by a user representative;
    b. can meet independently of ASX to settle its own views, which can then be put to ASX in meetings required under draft subrule 2.1.2(1)(a); and
3. operate at a level that ensures users' operational and technical needs can be considered in appropriate detail, likely a Chief Operating Officer or Chief Technology Officer level.

The creation of such a body does not necessarily require amendments to the draft rules. However, it would require ASIC to enforce this rule on the basis that current user input arrangements are not compliant. ASIC should be closely involved in the creation of a body which conforms to the matters outlined above, particularly with respect to its terms of reference, representation of members, and the responsibilities of its members, and Cboe Australia looks forward to working constructively with other industry stakeholders as a member.

Second, Cboe Australia considers there is a lack of user representation at the board level of the covered licensees ASX Clear and ASX Settlement. Given their centrality to users of Australian financial markets and Cboe Australia's view that they should be run as for-profit public utilities, Cboe Australia considers it appropriate that users have some representation on the boards of the covered licensees. Moreover, user representation at the board level would ensure that recommendations from independent reviews are appropriately actioned, and that design decisions made in respect of core systems appropriately reflect user input, including through the user input group required under Rule 2.1.2: *User input*.

Cboe Australia submits that this could be done by amending the rules to require the covered licensees to:

- have at least 25% of their directors appointed from nominees made by the user input group required under Rule 2.1.2: *User input* (i.e. half of directors who must be independent under rule 2.1.1)[5]; and
- convene a subcommittee, composed of an equal number of industry-nominated and other directors, to assume responsibility for the independent and external reviews required under Rules 2.4.1, 2.4.2, 2.4.3 and 2.4.6.

These directors would not, under this proposal, be expected to "represent" users in their capacity as directors (which may raise issues in relation to their duties to the covered licensees) – but their presence on the covered licensees' boards would give confidence to users that their perspectives were understood at the board level. It would also ensure that any recommendations arising from external reports which may affect users would be understood and appropriately actioned.

The requirement to ensure such directors on the covered licensee's boards, and to have a subcommittee assume responsibility for the response to the independent reviews, will provide significantly more industry confidence that any recommendations are appropriately actioned.

There is some international precedent for this suggested change. The OSC has imposed governance requirements on CDS Clearing and Depository Services Inc., which require that:

- at least 33% of its board of directors are representatives of a "diversity of participants" in its CS facility; and
- one director must be a representative of an unaffiliated exchange.[6]

Meanwhile, in the United States, the Depository Trust and Clearing Corporation (**DTCC**) has 13 directors who represent participants in its facilities, out of 20 total. While DTCC is

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[5] In Cboe Australia's view, this rule should not operate to require the covered licensees to appoint any particular nominee, which would preserve their ability to accept or decline particular nominees on the basis of their skills and experience. Users could nominate a number of nominees, of whom the licensees could choose a subset for the 25% of board seats.

[6] See Conditions 4.2(b) and (c) in *Notice of Commission Approval and Recognition Orders - Maple Group Acquisition Corporation - Alpha Exchange Inc.*, Schedule B, Part II – Terms and Conditions Applicable to CDS Ltd and CDS Clearing, Section 4 Governance, available at https://www.osc.ca/en/industry/market-regulation/marketplaces/exchanges/recognized-exchanges/alpha-exchange-inc-recognition-orders/notice-commission-approval-and#toc:~:text=criteria%20for%20recognition.-,4%20GOVERNANCE,-4.1%20The%20recognized.

neither vertically-integrated nor for-profit, it nevertheless represents a useful example of the kind of 'public utility' model towards which ASIC should strive, at least in relation to governance.

## Terms and price of access

Cboe Australia is strongly supportive of the policy approach towards the terms and price of access, both in the Regulatory Expectations and as implemented in the Rules. Cboe Australia particularly supports supplementing the headline obligations under subrules 2.2.1(1) and 2.3.1(1) with more prescriptive supplementary obligations in additional subrules.

However, Cboe Australia submits that ensuring users of monopoly CS services can access those services on the same – not merely 'sufficiently equivalent' or 'materially equivalent' – terms as will entities affiliated with a covered licensee is a core element of a 'public utility' model of CS services regulation. While this is reflected in several of the rules (particularly those incorporating headline obligations under the Regulatory Expectations), certain subrules contemplate different terms or prices of access for unaffiliated users. Cboe Australia submits these should be amended.

Moreover, Cboe Australia notes that certain obligations throughout the Rules are limited by a qualifier that an entity need only take 'reasonable steps' in order to comply. In Cboe Australia's view, this qualifier is unnecessary, and risks creating gaps which could complicate the Rules' ability to achieve their objectives.

### *Ensuring equal access*

Certain draft Rules contemplate different terms or prices of access to monopoly CS services for unaffiliated users, reflecting language used in the Regulatory Expectations. For example, Regulatory Expectation 2(a)(ii) prohibits discriminatory pricing, "*except to the extent that the efficient cost of providing the same service to another party is higher*."

In particular, subrule 2.2.1(2)(a) allows for price discrimination against unaffiliated users to the extent that the efficient costs of providing the same service is higher. Subrule 2.3.1(3)(b) also contemplates different terms of access, if only indirectly, by requiring a covered licensee to maintain and publish policies and procedures that promote access to covered services on operational and commercial terms and service levels that are

"substantially equivalent" to those that apply to the CS service provider or any of its associated entities.

To be clear, Cboe Australia recognizes that equal access is a core goal of the Regulatory Expectations and these Rules, and reiterates its support for this goal and the rules implementing them. This goal is reflected in rules which impose general obligations to price, and provide access to, covered services on fair, reasonable, transparent, and non-discriminatory terms – particularly subrules 2.2.1(1) (subject to our comments about removing the 'reasonable steps' qualifier) and 2.3.1(1).

However, in Cboe Australia's view these general obligations can only be applied subject to the specific exemptions identified above. This means these exceptions, while narrow (and, in the case of subrule 2.3.1(3)(b), technically applying only to the obligation to maintain policies and procedures rather than the actual provision of access), risk operating against the overall intent of the Rules as incorporated in the general obligations and other, more prescriptive rules.

As a starting point, Cboe Australia cannot see any compelling policy reason for the Rules to contemplate different prices or terms of access for unaffiliated users of monopoly CS services. The possibility of any such differences materializing runs against the overarching policy goals the Rules seek to achieve. While CHESS was designed and built more than thirty years ago for a market which was not yet contemplating competition in either secondary trading or clearing and settlement, ASX has more than earned back its investment in that system. Any differences in the provision of services stemming from the design of CHESS cannot continue to justify any form of discriminatory pricing if ASIC is to effectively achieve outcomes consistent with either a competitive environment for CS services or a public utility model of CS service provision.

This issue is even more acute for the provision of services using the CHESS replacement system. Any cost differences for users of the CHESS replacement system when it eventually goes live can only be attributable to design decisions which are even now entirely within ASX's control. If the replacement system were to generate such cost differences it would represent a missed opportunity to secure genuine non-discriminatory access for all users of Australia's equity market infrastructure. As outlined above, Cboe Australia strongly considers that the replacement system must not either retain legacy barriers to access or raise new barriers. Any kind of differential access, including in relation

to price, would constitute such a barrier. This must be avoided if the Rules are to achieve their goals.

Accordingly, Cboe Australia submits that ASIC should address these issues by amending the draft Rules to remove any contemplation of different terms or prices of access to monopoly CS services for different users.

*Removing 'reasonable steps' qualifiers*

Certain obligations under these rules are limited by a qualifier that a covered licensee need only take 'reasonable steps' to comply.

As a general proposition, Cboe Australia submits that 'reasonable steps' qualifiers are appropriate when the substantive obligations to which they relate are detailed and prescriptive. In these circumstances, the qualifier allows for flexibility in the application of the obligation, and limits the risk that an entity becomes exposed to legal liability in relation to an obligation it is not practicably able to meet. This would be an unjust outcome.

However, this rationale is substantially weaker in relation to principles-based obligations because principles-based obligations – by their high-level and general nature – already incorporate flexibility in their application. Because of this, Cboe Australia submits that the starting point for the implementation of such obligations should be that they are not limited by a 'reasonable steps' qualifier.

The draft Rules include important principles-based obligations which are limited by the 'reasonable steps' qualifier, and Cboe Australia submits that these qualifiers should be removed. These provisions should operate to require a licensee to 'ensure' that it complies with the relevant substantive obligations, rather than merely taking 'reasonable steps to ensure' it complies. While we identify a number of particular examples below, we submit that these qualifiers should be removed throughout the Rules.

First, subrule 2.2.1(1) requires that a covered licensee must take reasonable steps to ensure that the pricing of its covered services is fair, reasonable, and transparent. There are conceivably many ways a covered licensee could ensure its pricing is fair, reasonable, and transparent, and so this substantive obligation already allows for flexibility in its application. Removing the qualifier would not be expected to make the obligation overly prescriptive. This approach seems to have been adopted in subrule 2.3.1(1), which does not include a 'reasonable steps' qualifier for the corresponding headline 'access' obligation. Cboe Australia supports this approach. Retaining the qualifier, in contrast, risks

giving rise to unproductive arguments about whether a particular step is 'reasonable,' creating another potential loophole that could work to undermine the core goals of these Rules.

Similarly, Rules 2.1.4: *Core systems* and subrule 2.3.1(2) requires that a covered licensee take 'reasonable steps' to achieve a number of more specific, but still principles-based, obligations – including, for example, to design and develop core systems in a way that does not raise barriers to access. Cboe Australia submits that the same arguments apply here. Arguably, they are more salient here because some of these obligations go to the design of the CHESS replacement system. For example, subrule 2.3.1(2)(b) introduces an obligation that a covered licensee take 'reasonable steps' to ensure its core systems are designed to facilitate technical interoperability. Meanwhile, Rule 2.1.4: *Core systems* requires that a covered licensee take 'reasonable steps' to ensure that its core systems meet users' differing needs, not raise barriers to access, and accommodate international open communication procedures and standards. It would be a significant gap if a covered licensee were to successfully argue that it was not 'reasonable' to take certain steps to, for example, facilitate technical interoperability or meet users' differing needs. Such an outcome would undermine the core goals of the Rules.

Finally, Rule 2.4.5: *Policies and procedures* obliges a covered licensee to maintain documented policies and procedures that ensure compliance with these Rules "as far as reasonably practicable." Cboe Australia considers that the case for a qualifier on an obligation to maintain policies and procedures is especially weak, because those policies and procedures carry less legal weight than the substantive obligations imposed under the Rules. Because of this, internal policies and procedures should be designed to ensure full compliance with substantive regulatory obligations, not simply compliance to the extent that is 'reasonably practicable.'

Cboe Australia submits that there is no compelling policy reason to retain these qualifiers, and they should be removed. The obligations to which they relate are already principles-based rather than prescriptive, and they risk introducing gaps or hurdles which will make the CFR's policy goals more difficult to achieve. The goals of open access and fair, reasonable and transparent pricing are too important to be subject to this qualifier.

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## Reiterating support

Once again, Cboe Australia commends ASIC for its work on these draft Rules, which will form a core pillar of the regulatory regime for market infrastructures. ASIC deserves credit for its comprehensive and detailed approach. While Cboe Australia submits that certain changes are warranted, we nevertheless express significant support for both the draft Rules as a whole and the policy goals they seek to achieve.

If you have any questions about this submission or would like more information, please contact me at [redacted] or on [redacted].

Sincerely,

[redacted]

**Christian Myers** | Senior Legal Counsel
Cboe Australia Pty Ltd
[redacted]
[redacted]

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# Attachment A: Responses to Consultation Paper 379

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| ASIC proposal | ASIC Question | Cboe Australia response |
|---|---|---|
| A1 We are not making a formal proposal but we seek your general feedback as set out below. | A1Q1 We would welcome stakeholder views on whether the prospect of competition emerging in cash equity CS services has changed since 2015. Do you believe the proposed obligations on CS service providers will achieve the intended policy objective of facilitating competition, or competitive outcomes in the absence of competition? | While the passage of the *Treasury Laws Amendment (2023 Measures No. 3) Act 2023*, which introduced ASIC's rulemaking power under Part 7.3A of the Corporations Act, has brought more clarity, the competitive landscape has changed since 2015 and potential competitors that pushed for this clarity in 2015 have now withdrawn from the Australian market.<br><br>As a result, future competition relies on the emergence or re-emergence of a committed competitor. In July 2023, Cboe made a submission to the Parliamentary Joint Commission on Corporations and Financial Services outlining the preconditions which, in our view, are required before this is likely to occur.<br><br>Because these preconditions remain largely unfulfilled, and given the current demands of the CHESS replacement program and ASX's payments linked to participation in current CHESS and the CHESS replacement system, it seems unlikely that local clearing participants or vendors would be willing or able to support a new competitor within the cash equities clearing space.<br><br>As a result, Cboe Australia submits that ASIC should consider regulating the covered licensees ASX Clear and ASX Settlement as public utilities operated by a commercial entity, for profit, but with significant regulatory oversight which operates to practically separate the provision of CS services from the provision |

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| | | of other services by the corporate group. As outlined above, this will more directly target the underlying causes of monopolistic behaviour, leading to better outcomes for both the market for CS services and, given this market's centrality to capital formation in Australia, the economy as a whole. |
| B1 We propose to implement the Regulatory Expectations as enforceable obligations through the ASIC CS Services Rules 2024. See the draft ASIC CS Services Rules 2024 in the attachment to this paper. | B1Q1 Do you consider that the proposed rules cover the Regulatory Expectations and, more broadly, are sufficient to facilitate competitive outcomes in the monopoly provision of CS services? If not, what (if any) are the other obligations the CS services rules should impose? | Cboe agrees the proposed rules cover the scope of the Regulatory Expectations. We reiterate our support for this detailed and comprehensive implementation of the Regulatory Expectations.<br><br>However, in some cases particular provisions could be strengthened to more effectively achieve the policy goals the Regulatory Expectations, and now the Rules, seek to fulfil, as outlined in our cover letter and in other responses to these consultation questions. |
| | B1Q2 Do you have any feedback in relation to how the Regulatory Expectations have been implemented in the draft CS services rules (set out in the attachment to this paper)? | As outlined in our cover letter above, Cboe Australia commends ASIC for its expansive and comprehensive implementation of the principles outlined in the Regulatory Expectations.<br><br>However, the Regulatory Expectations are a point-in-time policy statement, reflecting the work that had gone into previous CFR reviews until September 2017. Since then, events have demonstrated the difficulties stemming from ASX's position as a vertically-integrated |

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| | | monopolist, including both the CHESS replacement failure and users' difficulties providing input into governance arrangements and, for some users, accessing ASX's monopoly CS services.<br><br>Accordingly, Cboe Australia supports the position outlined in the Regulatory Expectations that regulators review their effectiveness in delivering the intended outcomes and consider stakeholder feedback.<br><br>This consultation is one such opportunity to consider stakeholder feedback, and Cboe Australia takes this opportunity to submit that the goal underpinning the implementation of the Regulatory Expectations could be reframed to regulate ASX Clear and ASX Settlement as public utilities operated by commercial entities for profit. To this end, certain rules could be strengthened to better implement these principles and secure a competitive future for all users of Australia's cash equity CS services. |
| | B1Q3 Do you expect to incur any costs as a result of our proposal? If so, please provide an estimate of the time and costs that you will expend. In providing this estimate, please compare your costs with the situation where we do not introduce the proposed rule. Please provide | Cboe does not expect to incur additional costs because of these rules. However, to the extent that this imposes costs on other industry participants, Cboe submits that these costs are likely to be outweighed by the benefits accruing to the financial services industry as a whole and, because of the financial service industry's role in facilitating capital formation, the economy at large. |

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| | feedback on whether these costs are likely to be one-off or ongoing. | |
| B2 We propose to introduce rules that require a CS service provider to engage an independent expert to conduct an audit and prepare a written report about the CS service provider's compliance with the proposed rules (annual review). | B2Q1 Do you agree with the scope of the annual review? If not, please provide detailed reasons for your answer. | Cboe Australia agrees with the scope of the proposed annual review, but – consistent with our comments above – considers that requiring a covered licensee to commission such reviews is unlikely to meaningfully improve transparency in the medium-to-long term because the reviewer's commercial interests in winning future work are aligned with the covered licensees' interests in having the reviews deliver supportive findings.<br><br>To address this structural conflict, ASIC should commission the review with costs recovered under the industry funding model; require the covered licensees to comply with such a review; require industry representation on the boards of the covered licensees; and require a subcommittee of these boards, made up of an equal number of industry representatives and other directors, to assume responsibility for responding to the reviews.<br><br>These changes would significantly support industry confidence in such reviews and their ability to deliver meaningful transparency. |
| | B2Q2 Should the proposed scope of the annual review be extended to | Cboe agrees the scope of the annual review should include the CHESS replacement program. It will be |

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| | include technology and governance issues in relation to the CHESS replacement program, noting that these matters are also a consideration under Part 7.3 of the Corporations Act? | essential to ensure that the replacement system is designed in accordance with the principles underpinning these Rules if they are to achieve their goals of supporting better outcomes for users for the life of the replacement system. In particular, it is critical that the replacement system not retain legacy barriers to access or build-in new barriers to access. An independent annual review provides important transparency to ensure these outcomes – subject to our comments above about the need to have such a review commissioned by ASIC. |
| | B2Q3 Do you expect to incur any costs as a result of our proposal? If so, please provide an estimate of the time and costs that you will expend. In providing this estimate, please compare your costs with the situation where we do not introduce the proposed amendment. Please provide feedback on whether these costs are likely to be one-off or ongoing. | Cboe Australia would not incur any direct costs under this proposal but notes that costs to ASX are likely to be passed on to users of ASX's monopoly CS services in some capacity. In Cboe Australia's view, this makes it essential that the annual review delivers meaningful transparency, which can only be achieved by eliminating any kind of commercial relationship between an independent reviewer and the covered licensees.<br><br>To this end, Cboe Australia reiterates its view expressed above that such a review should be commissioned by ASIC. |
| C1 We propose to introduce rules that: | C1Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer. | Cboe agrees with this proposal subject to our comments below in answer to C1Q2. |

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| (a) define 'international open communication procedures and standards' to mean procedures and standards for messaging and reference data:<br>(i) ISO 20022; and<br>(ii) FIX 5.0; and<br>(b) require a CS service provider to take all reasonable steps to ensure that any changes to its core systems accommodate international open communication procedures and standards. | C1Q2 Do you agree with the definition of 'international open communication procedures and standards' and do you consider that the definition covers the relevant procedures and standards, noting that these will be fixed as at the date the rules are made? In your response, please give detailed reasons for your answer | Cboe agrees that ISO20022 and FIX 5.0 should be specified as 'international open communication procedures and standards' in the Rules.<br><br>However, Cboe considers that it will be important for users and ASIC to monitor developments in international communication protocols and update this definition as necessary. Cboe considers that this definition should not operate to prevent the implementation of more effective & open messaging protocols if and when these emerge.<br><br>To address this risk, both independent reviews and the user input group required under rule 2.1.2 should consider this on an ongoing basis. ASIC should stand ready to amend this definition if and when either entity recommends that it should be expanded to cover new protocols.<br><br>Consistent with our responses above and below, the 'reasonable steps' qualifier should be removed, and the obligation should operate to require a CS service provider to ensure that its core systems accomodate these protocols. The costs associated with bespoke messaging, connection and encryption protocols have not served the Australian market well and have increased costs to all users. It is difficult to conceive of steps that would not be reasonable, in all the circumstances, not to implement international open |

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| | | communication procedures and standards in the CHESS replacement system. Because this rule applies, in theory, only to 'changes' to core systems, Cboe Australia considers that this proposed change may not create a standing obligation to implement these protocols in current CHESS independent of any additional changes to the system. |
| | C1Q3 Do you expect to incur any costs as a result of our proposal? If so, please provide an estimate of the time and costs that you will expend. In providing this estimate, please compare your costs with the situation where we do not introduce the proposed amendment. Please provide feedback on whether these costs are likely to be one-off or ongoing. | Cboe considers that this proposal, if implemented fully, will reduce costs both to Cboe Australia and other users of monopoly CS services. However, in order to implement this requirement, it will be essential to ensure that it applies not just to message traffic between a CS service provider and its users, but also to any peripheral systems which impact connectivity to a CS system – such as encryption standards. This is a significant contributor to the unequal performance Cboe Australia and other AMOs observe versus the ASX market when sending trades to CHESS, and one that is expected to be maintained until CHESS Phase 1 has been implemented.<br><br>If this requirement does not apply to peripheral systems, then Cboe Australia considers that users may still need to connect to expensive and difficult peripheral systems, limiting the effectiveness of this rule and its ability to reduce costs to users of monopoly CS services. |
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| | C1Q4 The proposed rules are intended to ensure that CS service providers' core systems accommodate technical interoperability with users' systems. More broadly, what do you understand by 'interoperability' and the scope of interoperability in the Australian market? | The Regulatory Expectations use two different terms to describe different circumstances in which users connect to a CS facility. First, "interoperability" seems to be limited to the narrow circumstance of competing CS facilities connecting to each other to facilitate the clearing and/or settlement of the same security through either facility. Meanwhile, "access" is used to describe all other users' connections to a CS facility.<br><br>While Cboe Australia does not have strong views about the particular words that are used to describe different types of connections, we feel very strongly that all users must be able to connect to a CS facility on efficient and equal terms, including through the use of industry standard communication protocols, regardless of whether they are an interoperating CS facility or any other type of access seeker.<br><br>This means that, in Cboe Australia's view, regulators must ensure consistency between their policy positions for 'interoperability' and 'access' so that all users can connect to a CS facility through the use of industry standard communication protocols, and on equal terms and conditions of access.<br><br>If and when a committed competitor emerges, ASIC should stand ready to make rules for full interoperability where the same security can be cleared or settled through more than one central counterparty/securities settlement facility, including |

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| | | where both parties to a trade choose to clear/settle through different facilities. |
| C2 We propose to introduce a rule to require the CS service providers to undertake an independent review of the pricing of their CS services against the price of similar services in other comparable international markets within a year after the proposed rules are made, and thereafter at least every five years, and to publish the results of the review. | C2Q1 Do you agree with this proposal, including the scope and frequency at which the review needs to be conducted? In your response, please give detailed reasons for your answer. | Cboe Australia strongly supports this rule, subject to our comments above about the need to ensure an independent review is commissioned by ASIC on the same terms as outlined in this proposal. This will ensure that the reviewer is appropriately arms-length from the subject of any review.<br><br>Nevertheless, such a review will be a useful way to illustrate the costs imposed on Australian equity market participants by the monopoly provision of CS services. Cboe Australia welcomes this transparency.<br><br>However, we expect that any higher costs accruing to Australian users compared to overseas markets will be attributed to the need for unique systems to serve the Australian market. Cboe Australia considers that the need for these “unique systems” is largely, if not entirely, artificial, and that the current need for industry participants to connect to proprietary technology has increased costs for no clear benefits. This also informs our views expressed above and below that the ‘reasonable steps’ qualifier should be removed from the obligations to implement international open communications procedures and standards, and to ensure that core systems do not raise barriers to access. |

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| | | The findings from these reviews should inform regulators' use of their tools to ensure fair, reasonable, and non-discriminatory access for users of monopoly CS services, particularly in relation to design decisions made in relation to the CHESS replacement system.<br><br>Moreover, a covered licensee should be required to publish the full review of pricing, rather than just a summary. |
| | C2Q2 Do you expect to incur any costs as a result of our proposal? If so, please provide an estimate of the time and costs that you will expend. In providing this estimate, please compare your costs with the situation where we do not introduce the proposed amendment. Please provide feedback on whether these costs are likely to be one-off or ongoing. | Cboe Australia does not expect to incur any direct costs from this proposal but notes more generally that it is likely that users of monopoly CS services will pay for this review through service fees. As such, it is essential that the review deliver genuine transparency for users, and in Cboe Australia's view this can only be achieved by severing the commercial relationship between a reviewer and a covered licensee and ensuring that a full review is published rather than just a summary. |
| C3 We propose that the CS services rules will apply to CS service providers, defined as: | C3Q1 Do you agree with the definition and scope of 'CS service provider'? In your response, please give detailed reasons for your answer. | Cboe Australia agrees that this scope is appropriate. It is essential that the definition operate to prevent the shifting of CS services outside the scope of the Rules. As such, Cboe Australia supports an approach which focuses on capturing any entity involved in the provision of monopoly CS services, including associated entities. In some instances, we think certain |

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| (a) ASX Clear and ASX Settlement (the covered licensees);<br><br>(b) a direct or ultimate holding company of a covered licensee that makes, or participates in making, decisions that relate to the provision of CS services; or<br><br>(c) an associated entity of the covered licensee that provides a CS service, in its capacity as such a provider. | | rules expressed to apply only to the covered licensees may need to apply to their associated entities – for example, rules requiring policies and procedures governing conflicts of interest. |
| | C3Q2 Do you expect to incur any costs as a result of our proposal? If so, please provide an estimate of the time and costs that you will expend. In providing this estimate, please compare your costs with the situation where we do not introduce the proposed amendment. Please provide feedback on whether these costs are likely to be one-off or ongoing. | Cboe Australia does not expect to incur any direct costs as a result of this proposal. Cboe Australia supports this proposal extending to associated entities of the covered licensees. |
| C4 We propose to introduce rules that will require the covered licensees to have appropriately documented policies and procedures in place to identify and mitigate any actual or perceived conflicts between the interests of: | C4Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer. | Cboe Australia strongly agrees with this proposal, subject to our response to C4Q2 below about how it could be strengthened.<br><br>As an upstream competitor with the ASX market, Cboe has experienced significant difficulty dealing with the ASX group to secure access to its monopoly CS services, including as Chi-X Australia. We strongly support this rule which should address many of these concerns. |

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| (a) the covered licensee or an associated entity; and<br><br>(b) an unaffiliated entity. | | However, this rule will need to be monitored and enforced closely to generate positive outcomes for users, particularly because these policies and procedures need not be made publicly available, and may only be scrutinized by a reviewer commissioned and paid by ASX. As a result, Cboe Australia considers there are risks that this rule may not fulfil its policy intent if not subject to close, independent enforcement. |
| | C4Q2 Does this proposal adequately address the management of the conflicts of interest between the covered licensees and other entities within ASX Group in relation to the provision of CS services? If not, please elaborate on further or alternative options. | Cboe Australia considers there are at least two challenges facing this proposal as currently drafted.<br><br>First, this consultation question only contemplates such requirements applying to the covered licensees and not associated entities of the covered licensees. If this proposal is so limited, then it would not, in theory, apply to staff employed by other arms of the corporate group who work on matters relating to the provision of CS services. If this is the case, then it may undermine the effectiveness of the required policies and procedures and the rule more generally.<br><br>This may necessitate an additional limb of this rule addressing this issue in some form. One approach may be to extend this requirement to a 'CS service provider' as defined, since that definition in the draft rules captures associated entities involved in the provision of a CS service. |

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| | | Second, Cboe Australia considers that it may be difficult for users to connect the requirement on the covered licensees to maintain these policies and procedures with the outcomes they experience in dealing with the licensees. This is because:<br>1. there is no requirement that the policies and procedures be publicized;<br>2. it is not clear whether a failure to conform to this requirement would give rise to any kind of remedy for a user who suffered as a result of a covered licensee's non-compliance with this rule; and<br>3. it is unclear how a user can rely on this requirement if it is facing difficulties dealing with a covered licensee more generally.<br><br>At a minimum, these policies and procedures need to exert effective influence over the decisionmakers facing the conflicts of interest which stem from a vertically-integrated group structure. Close regulatory supervision will be necessary to ensure these policies and procedures exert effective influence over the decisions of entities in the ASX Group and are not merely tokenistic.<br><br>One means of ensuring these policies and procedures are effective is having external reviews required under other rules examine a random sample of interactions between the covered licensee and a user, where the covered licensee faces an actual or perceived conflict of interest in dealing with that user. The reviewer could |

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| | | look at whether the policies and procedures required under this rule were effective in mitigating the conflicts of interest.<br><br>However, this approach would rely on the independent reviewer having a commercial incentive which is aligned with the regulatory goals of ensuring compliance with the Rules. If the reviewer is commissioned by a covered licensee, then it may not be incentivized to critically assess whether these policies and procedures were effective in mitigating conflicts of interest. |
| | C4Q3 Do you expect to incur any costs as a result of our proposal? If so, please provide an estimate of the time and costs that you will spend. In providing this estimate, please compare your costs with the situation where we do not introduce the proposed amendment. Please provide feedback on whether these costs are likely to be one-off or ongoing. | Cboe Australia does not expect to incur any costs as a result of this proposal. |
| C5 We propose to introduce rules that require: | C5Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer. | Cboe Australia strongly supports this proposal, subject to certain comments about how it could be strengthened. The CHESS replacement system is likely to serve the Australian market for at least several |

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| (a) a CS service provider to take all reasonable steps to ensure that its core systems are designed and developed in a way that does not raise barriers to access by unaffiliated entities;<br><br>(b) a CS service provider to maintain and publish policies and procedures designed to ensure that investment, design and development of its core systems, including changes to its core systems, do not raise barriers to access for unaffiliated entities;<br><br>(c) a CS service provider to include in any public statements about material investments in core systems, a statement whether the policies and procedures referred to in (b) have been complied with;<br><br>(d) a covered licensee to engage an independent expert to conduct a review | | decades. It is essential to ensure ASX does not use its control of the CHESS replacement system to build-in features that preference & privilege the ASX market or raise other barriers to access if this legislation is to achieve its goals of supporting outcomes similar to those which might emerge in a competitive environment, or, preferably, outcomes consistent with a public utility model of monopoly CS services provision.<br><br>Accordingly, it is essential to ensure that this rule applies broadly across ASX's existing systems and the CHESS replacement system, and is closely enforced. In particular, Cboe Australia considers it imperative that legacy barriers are not replicated in the CHESS replacement system. These include esoteric encryption standards (AS2805) and the bespoke EIS message protocol. These have made it costly for industry participants, including Cboe Australia, to connect to ASX's systems.<br><br>Cboe Australia also considers that the 'reasonable steps' qualifier should be removed from (a). Given the substantive obligation is already principles-based, there is already flexibility in its application, and removing the qualifier would not be expected to make the rule overly prescriptive.<br><br>While we support the requirements in subrule (c), we consider that an independent external reviewer (or ASIC) should be responsible for determining whether |

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| and prepare a written report (external assurance report) about compliance with (a) before the board makes a final decision on the matters covered by the policies;<br><br>(e) a covered licensee to provide the external assurance report to the representative body for feedback before it is provided to the board;<br><br>(f) a covered licensee to make the report publicly available as soon as practicable or no later than one month after it has been provided to the board. | | such policies and procedures have been complied with. Moreover, we reiterate the need for the independent review required under (d) to be commissioned by ASIC to ensure that it is truly independent and robust. Costs can be recovered from domestic clearing and settlement facility licensees under the industry funding model. |
| | C5Q2 Do you expect to incur any costs as a result of our proposal? If so, please provide an estimate of the time and costs that you will expend. In providing this estimate, please compare your costs with the situation where we do not introduce the proposed amendment. Please provide feedback on whether these costs are likely to be one-off or ongoing. | Cboe Australia does not expect to incur any costs as a result of this proposal. |
| C6 We propose to introduce rules that:<br><br>(a) require a covered licensee to publish audited management accounts on | C6Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer. | Cboe Australia supports this proposal.<br><br>Because the cost allocation and transfer pricing policy will affect the attribution of costs for which prices are charged for CS services, Cboe Australia considers it important that the principles guiding these allocations are clear and transparent. To that end, Cboe Australia |

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| an annual basis in respect of its CS services;<br><br>(b) the audited management accounts must include a cost allocation and transfer pricing policy that describes the methodology used for allocating revenue and costs. | | particularly supports the requirement that these be audited. |
| | C6Q2 Do you expect to incur any costs as a result of our proposal? If so, please provide an estimate of the time and costs that you will expend. In providing this estimate, please compare your costs with the situation where we do not introduce the proposed amendment. Please provide feedback on whether these costs are likely to be one-off or ongoing. | Cboe Australia does not expect to incur any costs as a result of this proposal. |
| C7 We propose to introduce rules that require a CS service provider to engage an appropriately qualified independent expert to conduct a review, prepare a written report about the appropriateness of the CS service provider's model for the internal allocation of costs and publish the report (cost allocation model report). | C7Q1 Do you agree with this proposal? In your response, please give detailed reasons for your answer. | Cboe Australia agrees with this proposal in principle. However, two challenges face this proposal as drafted.<br><br>First, consistent with our comments elsewhere, we strongly consider that the independent review should be commissioned by ASIC to ensure that it is genuinely independent.<br><br>Second, ASX is well placed to attribute capital costs across the business in a way that is most advantageous. In other words, the key challenge is not assessing whether the model for the allocation of costs is appropriate (though this is important as well). Rather, it is ensuring that the business decisions which gave rise to those costs were appropriate and do not |

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| | | constitute monopoly rent-seeking. For example, "gold-plating" certain monopoly services, and then passing on the costs which this creates, is unlikely to show up as an issue on a review of the appropriateness of costs alone.<br><br>Accordingly, while Cboe Australia supports this review, it will be important for industry and ASIC to take a broad view when considering this report, and particularly to keep in mind the broader forces driving costs facing users of monopoly services. |
| | C7Q2 Do you expect to incur any costs as a result of our proposal? If so, please provide an estimate of the time and costs that you will expend. In providing this estimate, please compare your costs with the situation where we do not introduce the proposed amendment. Please provide feedback on whether these costs are likely to be one-off or ongoing. | Cboe Australia does not expect to incur any costs as a result of this proposal. |
| D1 We propose a three-month transition period for the commencement of the | D1Q1 Do you agree with the proposed three-month transition period? In your response, please | Cboe Australia strongly supports the proposed three-month transition period. The Regulatory Expectations have applied for about seven years, so should not be expected to present significant challenges. Moreover, |

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| ASIC CS Services Rules 2024. | provide detailed reasons for your answer. | these Rules provide significant benefits to industry, for the provision of CS services under current CHESS and the CHESS replacement system. As such, it is essential that these Rules apply as soon as possible, to ensure that both the current and future provision of CS services is on terms for users which are fair, reasonable, transparent and non-discriminatory. |
| | D1Q2 In implementing the proposed rules, how will you need to change your business practices? In your response, please provide detailed reasons for your answer | Cboe Australia does not expect to change its internal business practices as a result of these Rules, but looks forward to benefitting from more equal and transparent access to CS services as a result of their expect to change its connections to ASX as a result of their implementation. |
| | D1Q3 Do you foresee any new material risks being introduced to your organisation in complying with the proposed rules? If so, please provide detailed reasons for your answer. | Cboe Australia does not foresee any new material risks being introduced into our organization from the introduction of these Rules. |

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# Attachment B: Cboe Australia comments on draft CS services rules

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| **Chapter 1 (definitions and preliminaries)** | We have no additional comments in relation to Chapter 1 which are not already covered in answers to the consultation questions (e.g. definition of 'international open communication procedures and standards') or in comments to particular rules in Chapter 2, outlined below. |
| **Chapter 2** | |
| *Part 2.1 Governance requirements* | |
| Rule 2.1.1 Board composition<br><br>(1) A Covered Licensee's board must be comprised of at least 50% non-executive directors who are independent of its ultimate holding company.<br><br>(2) A quorum of a Covered Licensee's board must be able to be formed by the non-executive directors referred to in subrule (1).<br><br>(3) An Associated Entity of a Covered Licensee that controls a Covered Licensee must ensure a Covered Licensee's compliance with subrules (1) and (2). | Cboe Australia supports this rule. However, consistent with our comments above, we submit that this should be amended to require 25% of board members to be nominated by the user input to governance group required under rule 2.1.2, subject to our comments about how that group should be structured to comply with the intent of that rule. |

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| Rule 2.1.2 User input<br><br>(1) A CS Service Provider's governance framework for decisions that relate to Covered Services (including investment strategy for Covered Services) must incorporate arrangements that:<br>(a) provide for one or more representative bodies of Users and Technology Service Providers to meet with the CS Service Provider regularly, and at least quarterly;<br><br>(b) ensure the representative body or bodies is or are representative of all Users and Technology Services Providers;<br><br>(c) enable the members of the representative body or bodies to contribute to the agenda and format of the relevant body's meetings;<br><br>(d) ensure that members of the representative body or bodies have input into the CS Service Provider's strategy setting, priorities, operational arrangements, and Core System design;<br><br>(e) enable the representative body or bodies to review and provide feedback on:<br>(i) proposed terms of reference for the annual audit required under Rule 2.4.3; and | Cboe Australia strongly supports this requirement, and ASIC should be commended for its comprehensive drafting. However, as outlined above, existing bodies such as the Business Committee and the Cash Equity Clearing and Settlement Advisory Group as currently structured do not fulfil the policy goals that this rule seeks to achieve.<br><br>The group required under this rule should be structured to:<br>1. Effectively represent users, including by limiting the size of the body to allow it to come to consensus while ensuring that the broad range of current users can have input to the body;<br>2. Ensure that the body does not include ASX as a member and can meet independently of ASX to settle its own views, which can then be put to ASX in joint meetings; and<br>3. Allow for an independent chair to prevent ASX from controlling the body's proceedings, including the agenda.<br><br>This body should have clear requirements of key stakeholders ensuring international and domestic clearers, global and domestic custodians, settlement participants, registries, AMOs and vendors are represented. This group should hold a governance role that obligates them to act in the best interests of CHESS users. This group should be nominated and voted on by the broad set of constituent stakeholders to |

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| (ii) on any external assurance report required under Rule 2.4.6;<br><br>(f) ensure that the board of the CS Service Provider considers all relevant issues raised, and any recommendations made, by a representative body; and<br><br>(g) ensure any decision to take action that does not accord with the recommendations of a representative body are documented and given to the representative body, together with reasons for the decision, as soon as practicable after the decision is made.<br><br>(2) A CS Service Provider must have regard to feedback provided under paragraph (1)(e) before:<br>(a) finalising the terms of reference for the annual audit required under Rule 2.4.3; or<br>(b) a final decision is made by the board on the investment, design, development, or implementation of its Core Systems, including any material changes to its Core Systems.<br><br>(3) A CS Service Provider must:<br>(a) publicly report on the CS Service Provider's interactions with Users (including but not limited to interactions with the representative body or bodies referred to in subrule (1) for | ensure fair representation. This group must have sufficient practical expertise across post-trade settlement operations and technology, as well as governance experience. In particular, this group should operate at the Chief Operating Officer or Chief Technology Officer level to ensure that it is capable of understanding users' technical and operational needs. Perhaps most importantly, ASX should not be a member, to ensure it can form its own user consensus.<br><br>ASIC and RBA should be observers of these bodies and their meetings. Cboe Australia strongly supports the 'comply or explain' requirement outlined in subrule 2.1.2(1)(g). ASIC should also closely scrutinize any decisions by ASX which do not accord with the body's recommendations. |

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| each quarter starting on the date these Rules commence, within one month of the end of each quarter; and<br><br>(b) publicly report on service developments and investment projects related to Covered Services, for each 12 month period starting on the date these rules commence, within one month of the end of each 12 month period; and<br><br>(c) ensure that both the quarterly and annual reports referred to in this subrule include an explanation of feedback received from Users and Technology Service Providers, and explain how that feedback has contributed to decision making by the CS Service Provider. | |
| Rule 2.1.3 Organisational requirements<br><br>(1) A CS Service Provider must maintain and operate effective written organisational and administrative arrangements that promote access to its Covered Services on commercial, transparent, and non-discriminatory terms in accordance with Rule 2.3.1. These arrangements must include, but are not limited to:<br>(a) well-defined, transparent and consistent reporting lines;<br><br>(b) ensuring staff with appropriate seniority and authority regularly review the effectiveness of the reporting lines referred to in paragraph (a); | Cboe Australia supports this requirement, and particularly supports applying this to 'CS Service Providers' as defined, which includes associated entities of the covered licensees. If this requirement were to apply more narrowly to only capture the covered licensees, then it may risk not applying to the staff employed by other arms of the ASX Group who are involved in the provision of CS services. Cboe Australia supports the comprehensive drafting approach adopted here, and commends ASIC for its precision.<br><br>More generally, because these policies and procedures will not be public, close ASIC supervision will be essential to ensure ASX adheres to this requirement and it operates to fulfil its policy intent. |

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| (c) ensuring that key performance indicators for relevant staff include accountability for compliance with this Rule.<br><br>(2) A CS Service Provider must maintain accurate records of the written arrangements required under subrule (1) and the allocation of responsibilities in relation to Covered Services, and retain those records for a period of at least 5 years. | |
| Rule 2.1.4 Core Systems<br><br>A CS Service Provider must take all reasonable steps to ensure that:<br>(a) its Core Systems meet the differing needs of Users;<br>(b) its Core Systems do not raise barriers to access by Users; and<br>(c) any changes to its Core Systems accommodate International Open Communication Procedures and Standards. | Cboe Australia strongly supports this Rule, particularly in relation to the CHESS replacement system. However, certain changes could be made to strengthen this rule.<br><br>First, consistent with our comments above, the 'reasonable steps' qualifier should be removed. The substantive obligations in subrules (a)-(c) are already principles-based which provides flexibility in their application, rendering the qualifier unnecessary. More fundamentally, they are too important to be subject to the qualifier. There is no conceivable reason that the requirement to accommodate international Open Communication Procedures and Standards, as defined, should be subject to the qualifier.<br><br>Second, consistent with our comments above, Cboe Australia suggests ASIC consider expanding the definition of a 'core system' to include systems that 'will be' used to provide CS services in future, and that these systems do not maintain any historical barriers. This would provide an abundance of legal certainty that |

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| | ASIC can enforce this rule over the CHESS replacement project before it goes live. |
| *Part 2.2 Transparent, non-discriminatory, and fair and reasonable pricing* | |
| Rule 2.2.1 Transparent, non-discriminatory, and fair and reasonable pricing<br><br>(1) A CS Service Provider must take all reasonable steps to ensure that the pricing of its Covered Services, is transparent, fair, and reasonable.<br><br>(2) Without limiting the steps a CS Service provider must take under subrule (1), a CS Service Provider must:<br>(a) 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;<br><br>(b) publish fee schedules for each Covered Service, in a clear, consistent and accessible form, that includes:<br>(i) a description of the Covered Service;<br>(ii) applicable terms and conditions;<br>(iii) eligibility for any rebates;<br>(iv) any revenue-sharing arrangements; and<br>(v) discounts applicable; | Cboe Australia strongly supports this rule and the policy goals underpinning it. However, consistent with our comments above, we submit that ASIC should remove the qualifier in (1) that a covered licensee need only take 'reasonable steps' to ensure the pricing of its covered services is transparent, fair, and reasonable. These substantive obligations are already principles-based, allowing for flexibility in their application, and so the qualifier is not necessary, but risks leaving open a loophole that would operate against the CFR's policy goals. This kind of approach has been adopted under subrule 2.3.1(1), and should be replicated here under subrule 2.2.1(1).<br><br>Cboe Australia also submits that ASIC should remove the exception in (2) that a CS service provider must not discriminate in favour of an associated entity "*except to the extent that efficient costs of providing the same service are higher*". Cboe Australia considers that there should be no difference between the costs charged to an unaffiliated market operator and the ASX market. This is because ASX controls the design of the system which gives rise to differences in the efficient costs for the provision of the same service to affiliated vs |

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| (c) make available on its website, information and tools to assist Users to anticipate the price they will have to pay for the use of Covered Services, which enables Users to assess:<br>(i) the expected cost impacts of any pricing changes;<br>(ii) the expected cost impact associated with new products and initiatives; and<br>(iii) the impact of discounts, rebates and revenue-sharing arrangements for different User groups and different activity profiles;<br><br>(d) maintain and publish policies and procedures for implementing changes to the pricing of its Covered Services which ensure, as far as practicable, that any such changes do not have the effect of shifting material revenue streams to entities other than Covered Licensees;<br><br>(e) maintain and publish a model for the internal allocation of costs, including the cost of allocated capital, and policies to govern the transfer of prices between the relevant CS Service Provider and Associated Entities, that ensures:<br>(i) where possible, costs are directly allocated to the services which gives rise to the costs; and<br>(ii) shared costs are allocated based on appropriate, proportionate and transparent metrics;<br><br>(f) maintain and publish a methodology for determining the prices of its Covered Services that demonstrates that the | unaffiliated entities. This is particularly critical for the CHESS replacement system, which should not be built in a way that creates differences in any costs – including 'efficient' costs – between ASX-affiliated and unaffiliated users.<br><br>More generally, Cboe Australia supports in principle the requirement in subrule 2.2.1(2)(e) and (f) but considers that ASX is well-placed to attribute capital costs across the business that legitimize their allocation. For example, ASX could 'gold plate' certain services, which increases the costs attributable to users and are justifiable in a model, but which do not usefully serve users' interests. This kind of activity may defeat the intent of the rule. Cboe submits that it is important that any independent reviewer be commissioned by ASIC to ensure that scrutiny of these funding models is sufficiently broad, and genuinely arms-length. |

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| expected revenue from the provision of Covered Services reflects the efficient costs of providing those services, including a return on investment commensurate with the commercial risks involved;<br><br>(g) ensure that any fee change for its Covered Services and any fees imposed for new Covered Services is consistent with subrule (1), and publish on its website a document explaining the basis of any such change or new fees, including, but not limited to:<br>(i) an explanation of the relevant metrics and other evidence used as a basis for the fee change; and<br>(ii) an explanation of how the fee change complies with the policies and procedures referred to in paragraph (2)(d);<br><br>(h) maintain records that demonstrate how it is complying with paragraph (2)(a), and retain those records for a period of at least 5 years; and<br><br>(i) negotiate commercially and in good faith with Users regarding fees and other financial contributions charged for changes to Covered Services provided to a User; and<br><br>(j) maintain accurate records that explain how it has negotiated with Users referred to in paragraph (2)(i), and retain those records for a period of at least 5 years. | |

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| (3) A CS Service Provider must consult with Users about any proposed material changes to a policy, procedure, model, or other document required under subrule (2). | |
| *Part 2.3 Access to Covered Services—service levels, information handling and confidentiality* | |
| Rule 2.3.1 Non-discriminatory access<br><br>(1) A CS Service Provider must provide access to its Covered Services (including data) on commercial, transparent and non-discriminatory terms.<br><br>(2) A CS Service Provider must take all reasonable steps to ensure that:<br>(a) it deals with User requests to access Covered Services (including access to its Core Systems) in a fair and timely way;<br><br>(b) the design of its 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<br><br>(c) its Core Systems are designed and developed in a way that does not raise barriers to access by Unaffiliated Entities | Cboe Australia strongly supports this rule and the policy goals underpinning it. However, consistent with our comments above, the 'reasonable steps' qualifier in subrule 2.3.1(2) is not necessary. The importance of the matters outlined in subrule 2.3.1(2) warrant stricter compliance requirements and the removal of the qualifier. Similarly, (2)(b) and (c) go to matters which are critical to the outcome of non-discriminatory access, and so the need for qualifiers to weaken the obligations runs against the importance of this goal.<br><br>Moreover, the qualifier – which operates, in theory, to require only certain steps to be taken to achieve compliance – provides grounds on which the covered licensees can force an argument about the extent to which they must go in order to comply. Such arguments are not a productive use of either regulators' time or users' time, and delay important steps to assure competitive outcomes for users. Cboe Australia submits the qualifier should be removed.<br><br>On a less substantive note, we suggest ASIC consider moving the word 'must' at the start of subrule (3)(a) into |

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| (3) Without limiting the manner in which a CS Service Provider complies with subrules (1) and (2), a CS Service Provider:<br>(a) must ensure that the terms and conditions of its agreements with Users ensure the provision of:<br>(i) Covered Services; and<br>(ii) access to its Core Systems or data,<br>is on commercial, transparent and non-discriminatory terms, consistent with the legitimate business interests of the CS Service Provider and with the legitimate business interests of access seekers, including through the use of standardised terms and conditions;<br><br>(b) maintain and publish policies and procedures, including governance arrangements that promote access to Covered Services by Unaffiliated Entities on operational and commercial terms and with service levels that are substantially equivalent to those that apply to the CS Service Provider or any of its Associated Entities;<br><br>(c) maintain and publish with policies and procedures that:<br>(i) require requests for access to the CS Service Provider's services to be dealt with in a fair and timely way;<br>(ii) specify reasonable timeframes for responding to and progressing enquiries, requests for access and complaints; and | the chapeau in (3). As currently drafted, there is no verb connecting the text in subrules (3)(b)-(f) with the text in (3); it seems to have been incorporated in (3)(a). |

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| (iii) specify reasonable timeframes and arrangements for resolving disputes;<br><br>(d) ensure the policies and procedures referred to at paragraph (c) above do not affect either party's right to refer a dispute for arbitration by the Australian Competition and Consumer Commission in accordance with Part XICB of the Competition and Consumer Act 2010;<br><br>(e) maintain and publish 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;<br><br>(f) include in any public statements about material investments in Core Systems, a statement whether the policies and procedures referred to in subrule (e) have been complied with. | |
| *Part 2.4 Reporting, policies and procedures* | |
| Rule 2.4.1 Covered Services comparative report<br><br>(1) A CS Service Provider must:<br>(a) engage an independent person with appropriate skills, knowledge, and experience to prepare a report (comparative report) comparing the pricing of its Covered Services against the price of similar services in other comparable international markets; and | Cboe Australia supports the appointment of an independent expert to review the pricing of CS services in Australia compared to other international markets, subject to our comments above that independent experts should be commissioned by ASIC with costs recovered from industry under the industry funding model. This will ensure that there is no structural conflict of interest between a reviewer's commercial |

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| (b) publish a summary of the comparative report as soon as practicable after the comparative report is prepared.<br><br>(2) A CS Service Provider must prepare and publish a summary of the comparative report as required under subrule 2.4.1(1):<br>(a) within 12 months after these Rules commence; and<br>(b) at least once in each five year period starting on the date the first comparative report is published under paragraph (a). | relationship with a covered licensee and their role in assessing the licensee against this rule.<br><br>Cboe Australia also submits that subrule (2) should require the report in its entirety to be published, rather than a summary. This is important to ensure that users benefit from the transparency that a report provides. This is even more important if ASIC declines to commission such reviews itself. If a covered licensee commissions such a report and is required to publish only a summary, then it would be unlikely to be capable of providing useful transparency to users. |
| Rule 2.4.2 Cost Allocation Model report<br><br>(1) A CS Service Provider must engage an independent person with appropriate skills, knowledge, and experience to conduct a review and prepare a written report (Cost Allocation Model report) about the extent to which the CS Service Provider's model for the internal allocation of costs referred to in subrule 2.2.1(2)(e) ensures the matters specified in subrules 2.2.1(2)(e)(i) and (ii).<br><br>(2) A Cost Allocation Model report must be:<br>(a) prepared before any change is made to the CS Service Provider's model for the internal allocation of costs referred to in subrule 2.2.1(2)(e); and<br>(b) completed and provided to the board of the CS Service Provider as soon as reasonably practicable after it has been | Cboe Australia supports the appointment of an independent expert to review the cost allocation of CS services, subject to our comments above about how this expert should be commissioned by ASIC with costs recovered from domestic CS facility licensees under the industry funding model, as well as our comments about the need to ensure decisions driving costs – particularly system design decisions – are appropriately scrutinized. |

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| prepared, and in any event no later than 2 months after the completion of the report; and<br>(c) made publicly available as soon as reasonably practicable after it has been provided to the board, and in any event no later than one month after it has been provided to the board.<br><br>(3) If no Cost Allocation Model report needs to be prepared under subrule (2) in the 12 month period from the commencement of these Rules, a CS Service Provider must arrange for a Cost Allocation Model report to be prepared, provided to the board and made publicly available by no later than 13 months after these Rules commence. | |
| Rule 2.4.3 Annual external audit<br><br>(1) A CS Service Provider must engage an independent expert to conduct an audit and prepare a written report (Annual Review report) about the CS Service Provider's compliance with these Rules.<br>(2) The Annual Review report must be:<br>(a) prepared each year, starting on the date these Rules commence;<br>(b) completed and provided to the board of the CS Service Provider as soon as reasonably practicable after the report has been prepared, and in any event no later than 2 months after the completion of the report; and<br>(c) made publicly available as soon as reasonably practicable after it has been provided to the board, and in | Cboe Australia supports this rule, subject to our comments above about the need for the independent expert to be commissioned by ASIC with costs recovered from domestic CS facility licensees under the industry funding model. |

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| any event no later than one month after it has been provided to the board. | |
| Rule 2.4.4 Management accounts<br><br>(1) A Covered Licensee must publish management accounts in respect of its Covered Services.<br><br>(2) The management accounts must:<br>(a) include 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 all services provided by a CS Service Provider, including those relating to Covered Services;<br>(b) be published annually; and<br>(c) be subject to an assurance review by an independent person with appropriate skills, knowledge, and experience. | Cboe Australia supports this rule, particularly the requirement for the publication of the management accounts and the requirement for an independent assurance review – subject to our comments above about the need for the independent expert to be commissioned by ASIC with costs recovered from domestic CS facility licensees under the industry funding model.<br><br>On our understanding, this rule would require both the model used for allocating revenue and various costs, as well as the accounts applying that methodology. We consider it important that both the methodology and the accounts with that methodology applied must be published. |
| Rule 2.4.5 Policies and procedures<br><br>(1) An entity that is required to comply with these Rules must maintain documented policies and procedures that ensure as far as reasonably practicable ensure compliance with these Rules.<br><br>(2) Without limiting subrule (1), a Covered Licensee must ensure that it has appropriately documented policies and procedures in | Cboe Australia supports this requirement. However, consistent with our comments above, we suggest ASIC consider extending this rule to apply to associated entities of a covered licensee where they provide staff or other support to the covered licensee necessary for the covered licensee to provide its covered services. Otherwise, there may be gaps in the power of these |

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| place to identify and mitigate any actual or perceived conflicts between the interests of:<br>(a) the Covered Licensee, or an Associated Entity; and<br>(b) an Unaffiliated Entity.<br><br>(3) Without limiting subrule (1), a CS Service Provider must maintain and review, at least on a quarterly basis, documented policies and procedures for the handling of sensitive or confidential information that ensure, as far as reasonably practicable that commercial information provided to it by Unaffiliated Entities is:<br>(a) handled as confidential information,<br>(b) provided only to those with a need to know, and<br>(c) not used to advance the interests of the CS Service Provider or its Associated Entities. | required policies and procedures to achieve the intended outcomes.<br><br>We also reiterate our comments above about the need to ensure that these policies and procedures exert effective influence over decisionmakers who may otherwise be conflicted, and are not merely tokenistic. This could be done through the use of external reviews if these are commissioned by ASIC. This is particularly necessary for ensuring compliance with (3).<br><br>We also reiterate our comments that the 'reasonably practicable' qualifiers be removed for the reasons outlined in our cover letter above.<br><br>We note that the word 'ensure' seems to have been duplicated in subrule (1). |
| Rule 2.4.6 External assurance report—Core Systems<br><br>(1) A Covered Licensee must engage an independent expert to conduct a review and prepare a written report (External Assurance report) about compliance with Rule 2.1.4 and subrules 2.3.1(2)(b) and (c).<br><br>(2) The External Assurance report must be:<br>(a) prepared prior to each final decision by the board about investment, design, development, or implementation of its | Cboe Australia supports this rule, subject to our comments above about the need for the independent expert to be commissioned by ASIC with costs recovered from domestic CS facility licensees under the industry funding model.<br><br>Moreover, we are interested to see how these controls would work in practice for both the board of the covered licensee & the representative body providing feedback. |

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| Core Systems, including material changes to its Core Systems;<br>(b) provided to the representative body for feedback in accordance with Rule 2.1.2;<br>(c) provided to the board of the CS Service Provider as soon as reasonably practicable after the representative body has provided its feedback, and in any event no later than 2 months after the completion of the report; and<br>(d) made publicly available as soon as reasonably practicable after it has been provided to the board, and in any event no later than one month after it has been provided to the board. | |