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By email: issuers@asx.com.au

ASX Settlement Operating Rule amendments - Depositary Nominee services

Dear Ms Webb

Cboe Australia Pty Ltd (**Cboe Australia**) thanks ASX for its extensive engagement with Cboe Australia regarding access to the services provided by CHESS Depository Nominees Pty Ltd (**CDN**) and welcomes the opportunity to comment on ASX's proposed amendments to the ASX Settlement Operating Rules and Procedures that will help facilitate this.

Introduction

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 the broader Australian financial market that serves and benefits all investors. Cboe Australia will commence a corporate listings business later this year.

Given Cboe's role operating a licensed financial market that competes with ASX Trade while also relying on ASX Clear Pty Ltd (**ASX Clear**) and ASX Settlement Pty Ltd (**ASX Settlement**) for access to clearing and settlement services, Cboe strongly supports the movement towards consistent, non-discriminatory terms for access to clearing and settlement services, including CDN services, for all users, including issuers who list their securities on markets other than the ASX market. Accordingly, Cboe Australia supports the overarching purpose of the proposed amendments to incorporate terms on which a commercial provider of depositary nominee services would provide them.

Below, Cboe Australia has both high-level general comments regarding the rule changes, the role of CDN, and the supporting consultation paper, as well as specific comments in relation to certain proposed rule changes and the draft Nominee Terms.



General Comments - CS Services Rules

In Cboe Australia's view, CDN is a 'CS Service Provider', and the depositary nominee services provided by CDN which are governed by the ASX Settlement Operating Rules and the proposed Nominee Terms are 'Covered Services' within the meaning of the ASIC CS Services Rules 2025 (**CS Services Rules**). In this regard, among other things, we note that:

- the ASX Settlement Operating Rules materially govern the relationship between CDN, the issuer of the securities underlying CDIs, and holders of CDIs, and the actions of CDN;
- access to CHESS is necessary to fulfil both the commercial purpose for which CDIs are issued (on market trading in the economic exposures to underlying securities) and in order to benefit from the application of the ASX Settlement Operating Rules over a number of core functions; and
- ASX itself refers to CDN "as part of the CHESS settlement process" in the consultation paper.

It accordingly follows that the CDN services must be provided in compliance with the CS Services Rules when those rules come into force on 24 May 2025.

However, the consultation paper does not reference the CS Services Rules, and therefore it is not clear to Cboe Australia whether the CS Services Rules were considered when developing the proposed operating rule changes.

In Cboe Australia's view, ASX should explicitly address the application of the CS Services Rules to CDN services and how the proposed changes comply with those Rules, particularly with respect to:

- user input (rule 2.1.2);
- transparent, non-discriminatory, and fair and reasonable pricing (rule 2.2.1);
- non-discriminatory access (rule 2.3.1); and
- policies and procedures (2.4.4) (albeit noting that this rule comes into effect 3 months after the others).

Cboe Australia provides its general comments in relation to each of these requirements below.

User input

We acknowledge that Cboe Australia and ASX have had extensive and productive engagement to progress the CDN access matter to this point. While we expect that ASX would have continued to offer engagement regardless, we consider it is important that, going forward, the framework for engagement complies with rule 2.1.2, noting that those rules would add



additional rigour and structure to user input. Cboe Australia does not offer specific suggestions at this stage for how consultation should occur, but we will welcome the opportunity to engage further with ASX on this matter at an appropriate time.

Transparent, non-discriminatory, and fair and reasonable pricing

Cboe Australia notes that ASX has not provided a fee schedule as part of this consultation, or separately. We consider that ASX should publish a schedule that complies with rule 2.2.1(2)(b) as soon as possible and ensure that pricing, as well as the supporting documents, policies and procedures, and models, comply with the various obligations in that rule so that CDN services are priced in a manner that is transparent, non-discriminatory, and fair and reasonable.

We also note that rule 2.2.1(3) requires ASX to publicly consult about any proposed material changes to a policy, procedure, model, or other document required under rule 2.2.1(2), and we consider this would include consultation when those documents, including the fee schedule, are first published. Finally, we note that the reports required under rules 2.4.1 and 2.4.2 would need to be made and published to further support the fair and reasonable pricing requirements.

Non-discriminatory access

Cboe Australia acknowledges and welcomes the primary purpose of the proposed rule changes to provide access to CDN to market operators that are not affiliated with the ASX group. However, we consider ASX should explicitly address how it has complied with the non-discriminatory access obligations in rule 2.3.1. Specifically, we look forward to engaging with ASX in relation to the policies and procedures that ASX will maintain which:

- require requests for access to the CS Service Provider's services to be dealt with in a fair and timely way, particularly in relation to an issuer that is seeking provision of depository nominee services;
- specify reasonable timeframes for responding to and progressing enquiries, requests for access and complaints; and
- specify reasonable timeframes and arrangements for resolving disputes.

Related to this point, we have made specific suggestions regarding decision making governance in the specific comments section below.

Policies and procedures

We note that rule 2.4.4 will require ASX to maintain policies and procedures, including in relation to the management of conflicts of interest and the handling of confidential information. While the rule does not come into effect until 24 August, we consider that ASX must have appropriate arrangements in place from the commencement of access to CDN by unaffiliated



market operators, given its general obligations, and that any application linked to an unaffiliated market operator must be treated as confidential by ASX.

Related to this point, we have made specific suggestions regarding confidentiality in the specific comments section below.

Specific Comments

Confidentiality

Several provisions allow for CDN to either delegate functions to any other party or acknowledge that there may be interactions between CDN and its related bodies corporate in relation to CDIs. For example, Clause 5.4 of the Nominee Terms contemplates the provision of services with CDN and its related bodies corporate, while Clause 6.1 allows for the delegation of rights or the employment of third parties.

Considering these provisions, it is essential that there be clear confidentiality requirements for CDN and ASX Settlement to prevent the inappropriate transmission or use of commercially sensitive information, such as new listing and/or quotation applications, particularly given the confidentiality obligations required under the CS Services Rules.

Governance – application for CDIs

In Cboe Australia's view, the framework for decisions made in respect of CDN services should be transparent, to give confidence to non-affiliated users that services are provided on a non-discriminatory basis. Relevant decisions include the initial approvals of applications for CDIs. Further, ASX Settlement Operating Rule 13.5A.1 allows the depositary nominee to revoke the trust under which it holds securities for any circumstances set out in the Nominee Terms. Clause 8.1(a) of the Nominee Terms, in turn, allows the termination of the trust with 60 days' notice.

There are currently no provisions specifying the governance arrangements for either of these decisions.¹ Consistent with our comments the application of the CS Services Rules, and the comments immediately above, Cboe Australia submits that provisions should be incorporated which:

1. specify the timeframes in which that application must be dealt with, noting that requests for access must be dealt with in a fair and timely way; and
2. for both types of decision:

¹ While Clause 8.1 has four limbs (a)-(d), the use of 'or' in the penultimate limb (c) suggests each limb operates independently.



- a. specify the decision-maker for these decisions;
- b. specify grounds on which the decision may be made; and
- c. provide for avenues of appeal.

We would be pleased to engage with ASX further on these points.

Governance - refusal to accept transfers of securities

ASX Settlement Operating Rule 13.3.4 deals with the circumstances in which the depositary nominee may refuse to accept a transfer of Principal Financial Products.

Cboe Australia considers that the discretion under 13.3.4(b)(ii) is too broad. Currently, it allows the depositary nominee to refuse to accept a transfer if it “*considers in its discretion that this is required to comply with its Australian Financial Services license obligations or any requirement of any such agency or authority...*” Cboe Australia submits that the depositary nominee should be required to “reasonably consider” those matters before it is free to exercise this discretion.

As a more minor matter, ASX may wish to consider whether the drafting of 13.3.4(b)(i) could be clarified. The current drafting implies that a market or approved clearing house is a “governmental agency or regulatory or supervisory authority” which may direct either CDN or a related body corporate of CDN to refuse to accept a transfer of Principal Financial Products. Cboe Australia suggests that ASX move the bracketed text as per the changes in red below to read as follows:

- (i) because of a direction given to the Depositary Nominee or its Related Bodies Corporate ~~(including, without limitation, a market or Approved Clearing House)~~ by any governmental agency or regulatory or supervisory authority ~~(including, without limitation, a market or Approved Clearing House)~~;

Appointment of custodians

ASX Settlement Operating Rules 13.5A.5 allows the depositary nominee to appoint a custodian or agent, which may in turn appoint a sub-custodian or agent. Cboe Australia is concerned by this rule in the following respects:

- the need for a sub-custodian in the context of the CDN services is not clear;
- the functions for which such a custodian or agent may be appointed are not specified;
- the depositary nominee is not liable for any acts done by a custodian or agent, provided only that it exercised due care in selecting the custodian or agent; and
- there does not appear to be any due care requirement for the selection of the sub-custodian.



Cboe Australia considers that this rule should be revisited to narrow its scope and address these concerns.

Power to vary the Nominee Terms

ASX Settlement Operating Rules Procedure 13.1.2(b)(i) allows the depositary Nominee to vary the Nominee terms so long as the Depositary Nominee reasonably considers it will not materially adversely affect holders of CDIs. Cboe Australia considers this is too broad, and additional restrictions to this power should be introduced. At a minimum, these should include that the Principal Issuer and any relevant Approved Market Operator which quotes or lists the CDIs do not object to the variation of the terms.

Notice periods

Several ASX Settlement Operating Rules and Nominee Terms allow the Depositary Nominee to exercise functions or powers that may significantly impact both holders of CDIs and the issuers of the securities underlying those CDIs. We consider, as a rule, there should be preconditions to the exercise of these powers requiring adequate notice be given. Specifically:

1. rule 13.5A.1 (revocation of trust, noting the interaction with Nominee Terms Clause 8.1 which imposes a 60-day notice requirement);
2. procedure 13.1.2(b)(i) (varying the Nominee Terms); and
3. Nominee Terms Clause 5.4 (fees),

require either inadequate or no notice to be given.

Cboe Australia submits that the notice period for the revocation of a trust in Nominee Terms Clause 8.1 should be:

1. incorporated in the ASX Settlement Operating Rules rather than the Nominee Terms, to better protect holders against changes; and
2. extended from 60 days to at least 90, and ideally 120, days given the significant repercussions it is likely to have on both the principal issuer and the holders of CDIs.

The other provisions should have notice periods incorporated into the relevant Procedure and Nominee Terms and should be of at least two months.

Miscellaneous

In reviewing the Consultation Paper, Cboe Australia has made the following miscellaneous observations:



1. Nominee Terms Clause 6.2(a) should be amended to require the Depositary Nominee to 'reasonably believe,' instead of simply 'believe,' that a communication or document is genuine and correct in order to rely upon it;
2. ASX Settlement Operating Rule 13.4.3 appears to have no text in sublimb (a) – it proceeds immediately to (a)(i) and (ii); and
3. it is not clear to Cboe Australia why an issuer must give ASX Settlement confirmation of the Depositary Nominee's agreement to be appointed under rule 13.2.2(b)(i), if the Depositary Nominee is CDN (this requirement may be appropriate if a competitor for depositary nominee services emerges).

Next steps

We wish to again thank ASX for the work that has gone into the proposed changes to the Operating Rules and the consultation process. We trust that the above feedback is helpful in considering the final form of the relevant Operating Rules.

Cboe Australia would welcome the opportunity to discuss further any part of this submission. Please do not hesitate to contact me on 02 80781762 or at bephillips@cboe.com.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'B Phillips', with a long, sweeping horizontal stroke extending to the right.

Benjamin Phillips
Head of Product Development