



18 December 2017

Manager, Corporations and Schemes Unit
Financial Systems Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email to ASICfunding@treasury.gov.au

Re: Introduction of ASIC Fees-for-Service under the Industry Funding Model

Thank you for the opportunity to comment on the proposed new fee-for-service regime which supplements the annual levy requirements within the new industry funding model for ASIC.

It is appropriate that fees are charged for ASIC's regulatory services where the 'activities are completed at the request of, and for the benefit of, a specific entity'.

Some of the comments and questions in this submission are relevant when considering how the industry funding model applies across each of the affected industry sectors. However, ASX's comments are primarily focused on how the arrangements will be applied to financial market infrastructure (FMI) service providers.

There are a number of practical questions around the proposed funding model, particularly how the two elements (annual levy and fee-for-service) will interact in practice. The answers to these questions are important in determining the impact the new industry funding regime will have on 'competition and innovation', one of the funding model's objectives.

Providing greater clarity and transparency through additional published guidance will allow affected entities to understand how the overall funding model will work in practice and to be in a position to make fully informed decisions.

The FMI sector is somewhat different to many of the other sectors covered by the industry funding model. It is characterised by a small number of regulated entities in each of the industry sub-sectors. This reflects the market structure of those activities, in particular that ASX is often the sole provider of those services.

Interaction between the annual ASIC levy and fee-for-service arrangements.

There has been no clear articulation of how the two elements of the ASIC funding model will be combined to ensure that there is no 'over-recovery' of the costs of ASIC's supervisory activities. While the authorities will likely have considered this issue when establishing the funding model, it has not been explained in either the consultation around the annual levy method or in the current paper on the fee-for-service charges.

The timing differences between the two elements (service fees are paid during the financial year and the annual levy paid is after the end of the financial year) makes it possible for a clear and transparent framework to be put in place to ensure the two elements work together seamlessly.

The funding model should explicitly recognise any revenue generated through fee-for-service charges received during the financial year for a particular industry segment. This revenue would be subtracted from the total ASIC regulatory costs to determine, after the end of the financial year, the amount to be recovered through the annual ASIC levy. This will ensure the industry funding model will not collect revenue over and

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above the amount of regulatory costs incurred by ASIC during the year. As a result, where ASIC regulatory activity and resources has been focused on processing and approving particular requests during the year (i.e. licence applications, operating rule changes, waivers) this can be appropriately reflected in the distribution of ASIC's costs.

For example, the draft Cost Recovery Implementation Statement (CRIS) for ASIC Industry Funding for FY18 indicated that the budgeted costs for regulating large security exchange operators (currently two licensed operators) was estimated to be \$3.757m. If the new fee-for-service arrangements had been operational for FY18, any revenue received from a fee paying service (e.g. ASIC review of a listing or trading rule change or processing a new licence application) would be subtracted from that amount with the remainder apportioned according to the methodology for determining the annual levy payment.

The consultation paper acknowledged that:

“ideally expenses and revenue should be aligned on a yearly basis. However, where justified they can be aligned over a longer period (for example, the business cycle of the activity). There must not be systematic over- or under-recovery of costs over time.”

Any additional published guidance should provide examples of circumstances which justify a mismatch of expenses and revenues in a given year and how over-recovery of costs will be prevented. One example might be where ASIC incurs large capital costs and that should be recovered over a number of years (such as occurred with the ASIC market surveillance levy). It would be informative to outline other scenarios, if any, which may justify a divergence between annual costs and revenue.

Fees relating to FMI licence applications

The practical arrangements in relation to fee-for-service charges for licence applications, exemptions and condition changes seem straightforward. It is assumed that the fee level would be advised by ASIC (where a tiered fee arrangement is in place) and charged at the point when an application is lodged, based on ASIC's assessment of the amount of resources necessary to assess the suitability of the applicant.

This should enable a licence applicant to factor these costs into their decision as to whether to apply for a licence. That licence provides a direct benefit to the applicant by allowing them to provide a particular financial service and so it is appropriate that the ASIC costs associated with granting the licence is recovered from the entity.

Fees relating to FMI operating rule changes

Where a market or clearing and settlement facility operator proposes to make an operating rule change that is subject to a regulatory disallowance process (under s793D or s822D of the Corporations Act) it will be subject to a significantly higher fee under the new arrangements.

The current fee for such rule changes (\$161) does not reflect the costs incurred by ASIC in assessing the rule change. However, the significant increase in the fee (up to \$38,651), if not implemented properly, may potentially discourage regulatory changes that are focused on market quality and lowering compliance costs.

Understanding how the annual levy and fee-for-service will work together is critical when determining the impact the large fee-for-service increases will have on the incentive to undertake non-essential rule changes.

The increase in fees prompts a number of questions around how they will work in practice, including:

- Is the tiered fee structure for operating rule changes appropriate?
 - A tiered fee approach seems sensible given the widely divergent nature of rule changes, from the very simple to the very complex. However the two tiers proposed seem insufficient if the fee is to approximate the actual cost of the ASIC regulatory activity undertaken for a particular rule change.

- There is a large difference in fees between 'low' (\$2,580) and 'medium' (\$38,651) complexity rule changes. Additional guidance is necessary to identify the factors that will be used to determine which category a particular rule change is likely to fall.
- While additional tiers would add complexity to the fee arrangements it may make it more flexible to accommodate the many regulatory activities which fall somewhere in between the two extremes.
- At what point in the rule review process will the levy be determined and payable by the applicant?
 - Currently the (nominal) application fee is paid at the time of formal rule lodgement with ASIC. However, the bulk of ASIC's review of any rule changes occurs prior to formal lodgement.
 - If the fee point is set earlier in the review process, there needs to be clarity on how this will apply in practice (i.e. at what stage in the process) so that it can be factored into an operator's consideration of whether to proceed with a rule change.
- How will proposals that involve changes to multiple rulebooks be handled?
 - Currently where a change involves amendments to multiple rulebooks a fee is charged for each rulebook affected. However, the issues considered by ASIC are often the same for all rulebooks.
 - With significantly higher fees being charged, this approach could create particularly high barriers to such rule changes.
 - There should be flexibility for ASIC to waive the fee where the imposition of multiple fees associated with a single change is deemed inappropriate.
- Will the service fee be applied to all rule changes or just those that involve new products or services?
 - It is stated in the paper that the model is designed so that full cost recovery would be applied where activities are 'completed at the request of, and for the benefit of, a specific entity'.
 - Rule changes that facilitate new products or services clearly meet these criteria.
 - However, there are a range of other rule changes that: enhance market integrity or rule compliance; reduce regulatory compliance costs for customers (e.g. listed companies, participants); or are required as a result of changes to legislation or other regulatory instruments (i.e. Corporations Act, ASIC Market Integrity Rules).
 - Rule changes to enhance market quality and integrity should not be subject to a fee-for-service charge. They are more appropriately funded through the annual ASIC levy regime. This is consistent with the approach set out in the consultation paper that fees would be removed for 'activities that are associated with the supervision of the industry rather than for the benefit of an individual entity.' Abolishing fees in these circumstances would remove any possible disincentive to undertaking such rule changes.
 - ASX notes the proposed fee applies to operating rule changes where there is a disallowance process. It is assumed that it does not apply to changes to guidance notes or operating rule procedures which do not involve any disallowance process.

Accountability measures

It is not clear that the accountability measures outlined, as well as the normal Budget processes, will provide a significant restraint on overall levels of ASIC spending or drive process efficiencies.

While transparency into high-level regulatory priorities, through the ASIC corporate plan and annual report, is welcome, it does not provide the level of detail required to be able to assess whether resourcing decisions

align with these priorities. There is also no indication of whether external parties will be provided with sufficient information to assess the efficiency and effectiveness of the regulatory activities in achieving their objectives.

Regular review of the fee-for-service regime is a good initiative but three years is too infrequent if it is to be used to assess process efficiencies and identify areas for improvement. The initial review period should be 12 months and thereafter every two years.

It is noted that ASIC is still developing the formal assessment process for this regular review and will be releasing details at a later date. As such it is not possible to determine how effective this will be as an accountability measure.

Any assessment of the fee-for-service model needs to explicitly compare the actual resources expended on each regulatory application with the charge imposed on the entity. This information should be published at a level of detail that provides transparency into the resource intensity of specific ASIC activities (e.g. assessing operating rule changes) to provide accountability as to the efficiency and effectiveness of the ASIC's regulatory processes. This would also provide some transparency that the choice of particular fee levels is appropriate.

The introduction of significantly higher fees for service should also be accompanied by specific ASIC service level agreements that provide measurable commitments to stakeholders on the processing times for the regulatory reviews associated with different activities. There should be annual reporting of how ASIC has performed against these service level agreements.

Transitional arrangements

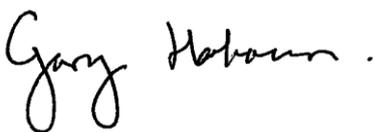
There is no discussion in the consultation paper on the transitional approach to be taken in cases where the ASIC review of a licence application, waiver request, change to licence conditions, or change to operating rules is still being processed when the new fee-for-service regime comes into place on 1 July 2018.

ASX assumes that a practical approach will be taken to not apply a particular fee in cases where a significant portion of the ASIC review was undertaken prior to the commencement of the new regime.

Other issues

The enhanced fee for service regime should be accompanied by changes to the payment options for regulatory applications to provide for electronic payment in addition to the existing cheque payments.

Kind regards



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