<u>EXPLANATORY COMMENTARY</u>

ASIC MARKET SUPERVISION COST RECOVERY FEES

Corporations (Fees) Act 2001

Corporations (Fees) Amendment Regulations 2011 (No. 2)

Section 8 of the *Corporations (Fees) Act 2001* (the Act) provides that the Governor-General may make regulations for the purposes of sections 5, 5A, 6 and 6A of the Act, which deal with the imposition of fees for things done under the *Corporations Act 2001* (the Corporations Act).

The Act allows the Corporations (Fees) Regulations 2001 (the Fees Regulations) to specify the fees imposed by the Australian Securities and Investments Commission (ASIC) for performing its market supervision functions under the Corporations Act, including specifying when the fee liability is incurred.

Section 6A of the Act states that the Fees Regulations may prescribe a fee for a chargeable matter by specifying an amount as the fee or by specifying a method for calculating the amount of the fee.

The Fees Regulations enable the recovery of ASIC's costs for:

- undertaking its new regulatory functions following the transfer of market supervision (on 1 August 2010) and the introduction of market competition; and
- the development of a framework to support market competition.

Amendments to the Fees Regulations (the proposed Regulations) would provide for the ongoing recovery of the costs of those functions. Additionally, they would enable the recovery of funding for ASIC's enhanced market supervision capabilities. The enhanced market supervision measure, announced at the 2012-13 Budget, provides funding to enhance ASIC's market surveillance and supervision systems and tools, and deliver improvements to ASIC portals and registers accessed by market participants.

Treasury undertook a public consultation from December 2012 seeking comment on potential amendments to current ASIC market supervision cost recovery arrangements for the period from 1 July 2013 to 30 June 2015. The Government received 18 submissions from current and impending market operators and market participants as well as other industry stakeholders.

As a result of this consultation, the proposed Regulations would incorporate the following proposals:

- Amendments to the detailed amounts recovered by ASIC from market operators and participants for the period commencing on 1 July 2013 and ending on 30 June 2015.
  - It is noted that the detailed amounts to be recovered by ASIC over the period are set out and explained in a Cost Recovery Impact Statement

(CRIS). The draft CRIS for the period covered by the proposed Regulations is also being made available for review and comment as part of this consultation.

- The introduction of a fixed fee component of $1,835 per quarter for cash equity market participants.
  - This change will better reflect the fact that part of ASIC's regulatory activity is independent of the level of trading activity of direct market participants, and is spent on non-issue specific, general reviews of market participants.
- Shifting a portion of ASIC's staff costs from allocation based on trade activity to allocation based on message activity.
  - Given the significant increase in the amount of time spent by ASIC staff working on issues related to increased algorithmic trading including high frequency trading, some staff costs will be allocated through a message-based fee rather than purely through a transaction-based fee as is currently the case. The majority of ASIC's non-IT costs would continue to be allocated according to transaction volumes.
- Changes to the late payment fees to be more administratively simple and efficient.

Further consideration will be given to the proposed Regulations following this consultation on the exposure draft.

Details of the proposed Regulations are included in the Attachment.

ATTACHMENT

Details of the *Corporations (Fees) Amendment Regulation 2013 (No.)*

Section 1 – Name of Regulations

Section 1 would provide that the name of the Regulations is the *Corporations (Fees) Amendment Regulation 2013 (No.)*.

Section 2 – Commencement

Section 2 would provide that the Regulations commence on 1 July 2013.

Section 3 – Authority

Section 3 would provide that the Regulation is made under the *Corporations (Fees) Act 2001*.

Section 4 – Schedule(s)

Section 4 would provide that each instrument specified in the Schedule is amended or repealed as set out in the applicable items in the Schedule.

Schedule 1 – Amendments

Item [1] – Paragraph 8(1)(a)

This proposed item would provide that the quarterly fee for a small financial market (as defined in the Fees Regulations) is $8,735.

Item [2] – Paragraph 8(5)(a)

This item would provide that the quarterly fee for the ASX 24 derivatives market is $344,670.

Item [3] – After subregulation 8(6)

This item would prescribe the cost recovery fee payable by FEX Global Pty Ltd (FEX). FEX was granted an Australian Market Licence in April 2013 and is expected to commence operations within 2013.

The quarterly fee prescribed would be $49,930. Provision would also be made for a proportional payment by FEX for the first billing period which may not constitute a full quarter.

Item [4] – Paragraph 8(7)(a) (formula)

This item would amend the formula for calculating the quarterly fee to be paid by the Australian Securities Exchange (the ASX). As stated above, the numbers in the formula would be changed to give a greater weighting to fees calculated based on message activity, to take account of the greater time spent by ASIC staff working on issues related to increased algorithmic trading including high frequency trading. The base amount for the transaction-based fee would be changed to $215,000, and the base amount of the message-based fee would be set at $607,000.

Item [5] Paragraph 8(7)(b) (formula)

This item would prescribe the formula for calculating the fee to be paid by Chi-X Australia Pty Ltd (Chi-X). The changes and the numbers used in the formula are the same as for the ASX (see proposed Item [4]).

Item [6] – Subregulations 8(7) and 8(9)

This item would change the term used for the IT system used by ASIC for its market surveillance activities to "ASIC's Market Surveillance System".

Item [7] Subregulation 8(9) (formula)

This item would adjust the formula used for calculating the quarterly fee payable by participants in the cash equity markets operated by the ASX and Chi-X.

Similar to the changes applied to the formula for calculating the fee payable by the market operators, the new formula would give a greater weighting to the portion of the fee calculated based on message activity. The base amount for the transaction-based fee would be changed to $1,789,000, and the base amount for the message-based fee would be set at $1,807,000.

The proposed changes would also include the new fixed fee component of $1,835 per participant, as explained above.

Item [8] Subregulation 8(11) (definition of *billing period*)

This item would make the necessary changes to apply the new fee arrangements to the quarterly periods from 1 July 2013 to 30 June 2015.

Item [9] Subregulation 8(11) (after the definition of *exempt market*)

A new definition of 'initial billing period' would be inserted, which would be used in calculating the proportional fee payable by FEX (and other markets which may be licensed in the future) for the first quarter in which it commences operations.

Item [10] Subregulation 8(11) (subparagraphs (a)(iv) and (v) of the definition of *small financial market*)

The definition of 'small financial market' is amended to take into account the inclusion of FEX in the cost recovery provisions.

Item [11] Regulation 9 Market integrity functions – late payment penalty

This item would abolish the existing late payment arrangements and substitute new, simplified arrangements.

Subregulation 9(1) would be amended to clarify that the late payment penalty arrangements set out in regulation 9 only apply when a market supervision fee for a billing period remains unpaid at the time when a fee liability for a <u>subsequent</u> quarter is incurred. Existing subregulation 8(10) clarifies that liability for a market supervision fee is incurred on the day after the period during which ASIC performs its supervision functions.

Subregulation 9(2) would be amended to apply a <u>fixed quarterly penalty fee</u> once a market supervision fee becomes overdue. An additional, higher fixed penalty fee would then be applied if the market supervision fee still remains unpaid when a second subsequent quarterly fee liability is incurred. The fixed penalty fees would be tiered according to the total amount of unpaid fees as set out in the table in subregulation 9(3).

New subregulation 9(3) sets out the detailed calculation method and contains a table setting out the fixed penalty fees payable tiered according to the total amount of unpaid fees. All fees to which a late payment fee is to be applied are to be added together, including any previous unpaid late payment fees. The applicable penalty fee can then be found in the table based on this total amount. A higher penalty fee set out in Column 3 of the table applies if any late payment fee has not been paid for more than one billing period.

Subregulation 9(4) would clarify that liability for a late payment penalty fee would be incurred when a market supervision fee for a billing period remains unpaid at the end of the billing period in which it was incurred. As explained above, existing subregulation 8(10) clarifies that liability for a market supervision fee is incurred on the day after the period during which ASIC performs its supervision functions.

An example is added to clarify the detailed working of the rules.