

**ASIC MARKET INTEGRITY RULES (COMPETITION IN EXCHANGE MARKETS)  
AMENDMENT 2013 (NO. 2)  
EXPLANATORY STATEMENT**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes the *ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2013 (No. 2)* (the **Instrument**) under subsection 798G(1) of the *Corporations Act 2001* (the **Corporations Act**). Capitalised terms used in this Explanatory Statement (e.g. “Participant”) are defined in the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011* (the **ASIC Market Integrity Rules (Competition)**).

## **1. Enabling legislation**

Subsection 798G(1) of the Corporations Act provides that ASIC may, by legislative instrument, make rules that deal with the following:

- (a) the activities or conduct of licensed markets;
- (b) the activities or conduct of persons in relation to licensed markets;
- (c) the activities or conduct of persons in relation to financial products traded on licensed markets.

## **2. Purpose of the legislative instrument**

Since the ASIC Market Integrity Rules (Competition) were made on 29 April 2011, there have been market structure developments including growth in automation and innovation in electronic trading in domestic markets. This has included many Participants establishing and operating ‘Crossing Systems’ which are automated services that match or execute client orders otherwise than on a lit market order book with orders of: the participant, other clients or any other person whose orders may access the crossing system.

The purpose of the Instrument is to amend the ASIC Market Integrity Rules (Competition) to address regulatory issues resulting from these recent market developments, including:

- (a) a lack of consistent and readily accessible information to the market and to users of a Crossing System about how Crossing Systems operate and when orders may be executed on a Crossing System;

- (b) inconsistent treatment of users of a Crossing System, including the imposition of impediments to the ability to opt-out of using a Crossing System;
- (c) inconsistent, and at times deficient, monitoring of the use of a Crossing System and reporting of suspicious activity in the Crossing System;
- (d) inconsistent, and at times inadequate, systems and controls in place to respond to and manage to instances of Crossing System outages;
- (e) inconsistent management of confidential order information; and
- (f) payments for the opportunity to handle or execute another person's Orders that may conflict with the recipients underlying obligations to manage conflicts of interest.

In response to these regulatory issues, the Instrument introduces the following amendments to the ASIC Market Integrity Rules (Competition):

- (a) new rules for the operation of Crossing Systems to reflect their more 'market like' nature;
- (b) a requirement that a Market Operator make available certain information, including market or venue identification, on course-of-sales disclosures on T+3; and
- (c) enhanced rules for the management of confidential order information and conflicts of interest by a Participant.

Details of the Instrument are contained in **Attachment A**.

These amendments are required for ASIC to continue to effectively carry out its responsibility for market supervision in the context of a changing market environment.

### **3. Consultation**

ASIC has consulted on the amendments effected by the Instrument. We have taken the results of the consultation process into account in preparing this Instrument, in which we have aimed to strike an appropriate balance between:

- (a) maintaining and facilitating fair and efficient markets;
- (b) promoting confident and informed investors and financial consumers; and
- (c) facilitating activity in the financial services industry, including not unreasonably

burdening financial services providers and facilitating the international competitiveness of the Australian financial services industry.

Our consultation process included:

- (a) *Consultation Paper 202 Dark liquidity and high-frequency trading: Proposals (CP 202)* was released in March 2013 and proposed market integrity rules for the ASIC Market Integrity Rules (Competition). Submissions to CP 202 were received from: market operators, market participants including Participants that operate a Crossing System, high-frequency traders, fund managers and retail investors. In addition we received submissions from various associations including Australian Financial Markets Association (AFMA), the Financial Services Council (FSC), the Stockbrokers Association of Australia (SAA), and the Australian Shareholders' Association (ASA) (25 written submissions all together).

We received some substantive comments on the proposals in CP 202 particularly relating to the following areas specific to the ASIC Market Integrity Rules (Competition):

- a minimum size threshold for dark orders;
- changes to tick sizes; and
- record-keeping requirements for all orders that enter a Crossing System.

Based upon these comments, we have not proceeded to make rules in these areas at this stage. Submissions were generally receptive to the remainder of ASIC's proposals in CP 202 that we have proceeded with in relation to the ASIC Market Integrity Rules (Competition).

- (b) We also held meetings with industry stakeholders and information sessions for members of the AFMA, FSC and the SAA.

#### **4. Penalties**

Subsection 798G(1) of the Corporations Act provides that market integrity rules are legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

Subsection 798G(2) of the Corporations Act provides that market integrity rules may include a penalty amount for a rule. A penalty amount must not exceed \$1,000,000. The penalty amount set out below a rule is the penalty amount for that rule.

## 5. Commencement of the Instrument

The Instrument will commence in accordance with the Commencement information in the Instrument as follows:

- (a) All items in Schedule 1 of the Instrument other than items [4D], [8], [10] and [12], the day after the day on which this instrument is registered under the *Legislative Instruments Act 2003*;
- (b) Item [8] in Schedule 1 of the Instrument, the day after the end of the period of 3 months beginning on the day on which this instrument is registered under the *Legislative Instruments Act 2003*;
- (c) Items [4D], [10] and [12] in Schedule 1 of the Instrument, the day after the end of the period of 3 months beginning on the day specified in paragraph 5A.1.1(1)(b) of the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011* (F2013C00335). Paragraph 5A.1.1(1)(b) of the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011* specifies the date on which Equity Market Participants and CGS Market Participants (as defined in that instrument) must comply with Chapter 5A (Regulatory Data) of that instrument.

## 6. Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights is included in this Explanatory Statement at **Attachment B**.

## **ATTACHMENT A**

### **Paragraph 1 – Enabling Legislation**

This paragraph provides that the Instrument is made under subsection 798G(1) of the *Corporations Act 2001*.

### **Paragraph 2 – Title**

This paragraph provides that the title of the Instrument is the *ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2013 (No. 2)*.

### **Paragraph 3 – Commencement**

This paragraph provides that the Instrument commences in accordance with the Commencement information in the Instrument as follows:

- (a) All items in Schedule 1 of the Instrument other than items [4D], [8], [10] and [12], the day after the day on which this instrument is registered under the *Legislative Instruments Act 2003*;
- (b) Item [8] in Schedule 1 of the Instrument, the day after the end of the period of 3 months beginning on the day on which this instrument is registered under the *Legislative Instruments Act 2003*;
- (c) Items [4D], [10] and [12] in Schedule 1 of the Instrument, the day after the end of the period of 3 months beginning on the day specified in Rule 5A.1.1(1)(b) of the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011*. Rule 5A.1.1(1)(b) of the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011 specifies the date on which Equity Market Participants and CGS Market Participants (as defined in that instrument) must comply with Chapter 5A (Regulatory Data) of that instrument.

### **Paragraph 4 – Amendments**

This paragraph provides that Schedule 1 amends the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011*.

### **Schedule 1 - Amendments**

#### **Item [1] Rule 1.4.3, in the definition of “Crossing System”**

Item [1] of Schedule 1 to the Instrument makes an amendment to the definition of Crossing System, by removing the words "to its clients" that would be inconsistent with the amendment made in Item [4] of Schedule 1 to the Instrument, and recognises that persons other than clients

of a Participant that operates a Crossing System have orders executed in the Participant's Crossing System.

Items [2] and [3] Rule 1.4.3, in the definition of "Crossing System"

Items [2] and [3] of Schedule 1 to the Instrument make formatting and punctuation amendments to the definition of "Crossing System" which are required for the amendment in Item [4].

Item [4] Rule 1.4.3, in the definition of "Crossing System"

Item [4] of Schedule 1 to the Instrument amends Rule 1.4.3 by inserting into the definition of 'Crossing System' the following words "(c) any other person whose Orders access the automated service,".

This has the effect of extending the definition of a Crossing System to include an automated service that matches or executes Client Orders with Orders of any other person whose Orders access the automated service (such as clients of another Participant who sends their Orders to the Crossing System).

Item [4A] – Rule 1.4.3, definition of "Crossing System Initial Report"

Item [4A] of Schedule 1 to the Instrument replaces the reference to Rule 4.3.1 in the definition of Crossing System Initial Report with a reference to Rule 4A.2.1. This amendment is a consequential amendment required to reflect the amendment in Item [7], which renumbers Rule 4.3.1.

Item [4B] – Rule 1.4.3, definition of "Crossing System Monthly Report"

Item [4B] of Schedule 1 to the Instrument replaces the reference to Rule 4.3.2 in the definition of Crossing System Monthly Report with a reference to Rule 4A.2.2. This amendment is a consequential amendment required to reflect the amendment in Item [9], which renumbers Rule 4.3.2.

Item [4C] – Rule 1.4.3, definition of "Crossing System Reporting Information"

Item [4C] of Schedule 1 to the Instrument replaces the reference to Rule 4.3.3 in the definition of Crossing System Reporting Information with a reference to Rule 4A.2.3. This amendment is a consequential amendment required to reflect the amendment in Item [11], which renumbers Rule 4.3.3.

Item [4D] – Rule 1.4.3, definition of "Crossing System Reporting Information"

Item [4D] of Schedule 1 to the Instrument omits the definition of Crossing System Reporting Information. This Item reflects the omission of the substantive requirement to provide Crossing System Reporting Information in Item [10]. This Item commences on the same day as Item [10], namely the day after the end of the period of 3 months beginning on the day specified in Rule 5A.1.1(1)(b) of the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011*. Rule

5A.1.1(1)(b) of the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011 specifies the date on which Equity Market Participants and CGS Market Participants (as defined in that instrument) must comply with Chapter 5A (Regulatory Data) of that instrument.

Item [4E] – Rule 1.4.3, after the definition of "Crossing System Reporting Information"

Item [4E] of Schedule 1 to the Instrument inserts a definition of Course of Sales information, which is defined to have the meaning given by Rule 5.1.6A(2) (see Item [16]).

Item [4F] – Rule 1.4.3, definition of "Family Company"

Item [4F] of Schedule 1 to the Instrument amends the definition of Family Company to ensure it operates for the purposes of new Rule 4A.4.3 (inserted by Item [13]).

Item [4G] – Rule 1.4.3, definition of "Family Trust"

Item [4G] of Schedule 1 to the Instrument amends the definition of Family Trust to ensure it operates for the purposes of new Rule 4A.4.3 (inserted by Item [13]).

Item [4H] Rule 1.4.3, after the definition of "NMI"

Item [4H] of Schedule 1 to the Instrument inserts a new definition "Non-Public Crossing System Information" and provides it has the meaning given by Rule 4A.3.2(5). This definition is used in new Rule 4A.3.2, inserted by Item [13].

Item [4I] – Rule 1.4.3 after the definition of "Post-Trading Hours Period"

Item [4I] of Schedule 1 to the Instrument inserts a definition of "Prescribed Person", which provides that "Prescribed Person" means, in relation to a Participant:

- (a) an Employee, a director, a partner, or officer of the Participant;
- (b) an entity that controls the Participant or a Related Body Corporate of the entity that controls the Participant;
- (c) the immediate family of a person referred to in paragraphs (a) or (b);
- (d) a Family Company and a Family Trust of a person referred to in paragraphs (a) to (c);  
and
- (e) where a Participant or a person referred to in paragraphs (a) to (d) is a body corporate, any body corporate or other entity controlled by that body corporate.

Item [4J] – Rule 1.4.3, after the definition of "Principal"

Item [4J] of Schedule 1 to the Instrument inserts a new definition of "Publicly Available Crossing System Information", and provides it has the meaning given by new Rule 4A.3.1(2), inserted by Item [13].

Item [4K] – Rule 1.4.3, definition of "Tick Size", paragraph (a)

Item [4K] of Schedule 1 to the Instrument inserts a reference to Rule 4A.6.1 in the definition of Tick Size, to ensure the definition reflects the amendment in Item [13] which governs Tick Sizes in Crossing Systems.

Item [5] – After Rule 4.2.6

Item [5] of Schedule 1 to the Instrument inserts a Chapter heading "Chapter 4A – Crossing Systems", a Part Heading "Part 4A.1 Application" and a Rule 4A.1.1 "Application of Chapter" which provides the Chapter applies to (a) Participants of the ASX Market, the ASX24 Market, and of the Financial Market operated by Chi-X Australia Pty Ltd (ACN 129 584 667) under *Australian Market Licence (Chi-X Australia Pty Ltd) 2011*; and (b) to Orders and Transactions in Financial Products able to be traded on these markets, unless otherwise specified in each Rule.

The amendment in Item [5] is part of a series of amendments (see Items [5] to [11]) which have the effect of ensuring the existing Rules relating to Crossing Systems appear in one Chapter (4A) of the Rules.

Item [6] – Part 4.3, heading

Item [6] of Schedule 1 to the Instrument renumbers the heading of Part 4.3 to Part 4A.2. This amendment is part of a series of amendments (see items [5] to [11]) which have the effect of ensuring existing Rules relating to Crossing Systems appear in one Chapter (4A) of the Rules.

Item [7] – Rule 4.3.1

Item [7] of Schedule 1 to the Instrument renumbers Rule 4.3.1 as Rule 4A.2.1. This amendment is part of a series of amendments (see items [5] to [11]) which have the effect of ensuring existing Rules relating to Crossing Systems appear in one Chapter (4A) of the Rules.

Item [8] – subparagraph 4A.2.1(1)(b) (as renumbered by Item [7])

Item [8] of Schedule 1 to the Instrument amends subparagraph 4A.2.1(1)(b) (previously Rule 4.3.1(1)(b), renumbered by Item [7]) by inserting after "transmits orders to Crossing Systems" "or receives Orders from other Crossing Systems". The amendment commences on the day that is three months after the day on which the Instrument is registered under the *Legislative Instruments Act 2003*, to give Participants time to make any changes to their systems necessary to comply with the amended rule.

This amendment requires a Participant that operates a Crossing System to report to ASIC when its Crossing System receives Orders from another Crossing System as well when it transmits Orders to another Crossing System.

Item [9] – Rule 4.3.2

Item [9] of Schedule 1 to the Instrument renumbers Rule 4.3.2 to Rule 4A.2.2. This amendment



is part of a series of amendments (see items [5] to [11]) which have the effect of ensuring existing Rules relating to Crossing Systems appear in one Chapter (4A) of the Rules.

Item [10] – Rule 4A.2.2 (as renumbered by Item [9])

Item [10] of Schedule 1 to the Instrument, omits Rule 4A.2.2 and substitutes a new Rule that provides a Participant that operates a Crossing System during a calendar month must, if there have been any changes during that calendar month to the information last provided to ASIC in the Participant's Crossing System Initial Report or Crossing System Monthly Report:

- (a) prepare, within 20 business days of the end of the calendar month, a report (the **Crossing System Monthly Report**) setting out the changes to the information provided in the Participant's Crossing System Initial Report or Crossing System Monthly Report last provided to ASIC;
- (b) provide the Crossing System Monthly Report prepared under (a) to ASIC as soon as practicable after it has been prepared.

This rule commences the day after the end of the period of 3 months beginning on the day specified in Rule 5A.1.1(1)(b) of the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011*. Rule 5A.1.1(1)(b) of the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011* specifies the date on which Equity Market Participants and CGS Market Participants (as defined in that instrument) must comply with Chapter 5A (Regulatory Data) of that instrument.

Item [11] – Rule 4.3.3

Item [11] of Schedule 1 to the Instrument renumbers Rule 4.3.3 as Rule number 4A.2.3. This amendment is part of a series of amendments (see items [5] to [11]) which have the effect of ensuring existing Rules relating to Crossing Systems appear in one Chapter (4A) of the Rules.

Item [12] – Rule 4A.2.3 (as renumbered by Item [11])

Item [12] of Schedule 1 to the Instrument omits the Rule 4A.2.3 Crossing System Reporting Information (renumbered from Rule 4.3.3 by Item [11]). The existing Rule specifies the existing content for a Crossing System Monthly Report. Item [10] of this instrument significantly reduces the content of those reports, such that the existing Rule specifying content of the Crossing System Monthly Report is no longer required.

Item [12] commences on the same day as Item [10], namely the day after the end of the period of 3 months beginning on the day specified in Rule 5A.1.1(1)(b) of the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011*. Rule 5A.1.1(1)(b) of the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011* specifies the date on which Equity Market Participants and CGS Market Participants (as defined in that instrument) must comply with Chapter 5A (Regulatory Data) of that instrument

Item [13] – after Rule 4A.2.3 (as renumbered by Item [11])

Item [13] of Schedule 1 to the Instrument inserts:

- (a) a new Part 4A.3 Disclosure Requirements for Crossing Systems;
- (b) a new Part 4A.4 Fair treatment, fairness and priority in dealing and opting out by users of Crossing Systems;
- (c) a new Part 4A.5 Crossing Systems—Monitoring and suspicious activity reporting; and
- (d) a new Part 4A.6 - Crossing System Tick Sizes and system controls.

as follows:

In Part 4A.3, Disclosure Requirements for Crossing Systems, Rule 4A.3.1(1) provides that a Participant that operates a Crossing System must make available the information (the *Publicly Available Crossing System Information*) set out in subrule (2) on a website that is publicly accessible; and free of charge.

Rule 4A.3.1 (2) provides that, for the purposes of these Rules, ***Publicly Available Crossing System Information*** means the information set out in column 3 of the following Table.

Item	Type of information	Publicly Available Crossing System Information
1	Operator	The code identifying the Crossing System.
2	Start Date	The date the Crossing System began to operate in this jurisdiction.
3	Products	The types of Financial Products traded on the Crossing System.
4	Access Criteria	The criteria used to determine eligibility to use the Crossing System.
5	Aggregation and other Crossing Systems	If Orders in the Crossing System may be executed or matched in another Crossing System because they are transmitted to one or more other Crossing Systems, or if they are executed or matched in the Participant's Crossing System with Orders received from one or more other Crossing Systems:  (a) the code identifying the other Crossing System or Systems; and  (b) for each Crossing System identified under paragraph (a), whether Orders are transmitted to the other Crossing System, whether Orders are received from the other Crossing System, or both

Rule 4A.3.1 (3) provides that a Participant must, within one business day of implementing changes to the operation of the Crossing System described in the Publicly Available Crossing System Information, update the website where the Publicly Available Crossing System Information is made available, to reflect those changes.

Rule 4A.3.1 (4) provides that a Participant must give ASIC a copy of the Publicly Available Crossing System Information published under subrule (1) and each update to the Publicly

Available Crossing System Information published under subrule (3) within one business day of making that information available on the website under this Rule.

Rule 4A.3.1 (5) provides that ASIC may determine and publish on its website a notification of the execution venue codes referred to in subrule (2).

Rule 4A.3.1 (6) provides that a Participant does not need to comply with this Rule until 3 months have passed from the commencement of this Rule.

The maximum penalty specified for Rule 4A.3.1 is \$100,000.

In Part 4A.3, Disclosure Requirements for Crossing Systems, Rule 4A.3.2(1) provides a Participant that operates a Crossing System must:

- (a) prior to accepting an Order from a client for the first time after the time at which a Participant must comply with this Rule, provide the client with a copy of the Publicly Available Crossing System Information or inform the client of the website address where that information is available; and
- (b) for all clients who are informed under paragraph (a), inform those clients each time an update to the Publicly Available Crossing System Information is published under Rule 4A.3.1(3), prior to accepting an Order from that client after the information has been updated.

Rule 4A.3.2 (2) provides that a Participant that operates a Crossing System must:

- (a) prior to accepting an Order from a client for the first time; and
- (b) prior to accepting an Order from a client after the Non-Public Crossing System Information has been updated under subrule (3),

provide that client with a document containing the information set out in subrule (5) (the ***Non-Public Crossing System Information***).

Rule 4A.3.2 (3) provides that a Participant must, within one business day of implementing changes to the operation of the Crossing System described in the Non-Public Crossing System Information, update the Non-Public Crossing System Information to reflect those changes.

Rule 4A.3.2 (4) provides that a Participant must give ASIC a copy of:

- (a) the Non-Public Crossing System Information provided under subrule (2), within one business day of first providing that information; and
- (b) each update to the Non-Public Crossing System Information provided under subrule (3), within one business of that update.

Rule 4A.3.2 (5) provides that for the purposes of these Rules, ***Non-Public Crossing System Information*** means the information set out in column 3 of the following Table.

Item	Type of information	Non-Public Crossing System Information
1	User obligations	A description of the obligations imposed on users of the Crossing System by the operator of the Crossing System.
2	Order Types	A description of the order types available to those who have access to the Crossing System, including a brief description of the characteristics of each order type.
3	Operations	<p>A description of the operation of the Crossing System, including but not limited to:</p> <ul style="list-style-type: none"> <li>(a) how Orders are managed, including how prices are determined and cancellations are managed;</li> <li>(b) details of any different treatment or arrangements for certain users or order types;</li> <li>(c) the level of anonymity given to Orders, including whether indications of interest are allowed;</li> <li>(d) the circumstances in which Principal Orders may interact with other Orders in the Crossing System, the nature of the Principal Orders (for example, proprietary desk, facilitation, or market-maker);</li> <li>(e) whether Orders of Related Bodies Corporate of the operator enter the system, and if so, how conflicts arising because Orders of Related Bodies Corporate enter the Crossing System, are managed;</li> <li>(f) how any other conflicts of interest that may arise are managed; and</li> <li>(g) if there are liquidity providers or market makers whose Orders access the Crossing System, the commitments (if any) they may have and any benefits they receive.</li> </ul>
4	Fees	The fees imposed for Orders to gain access to the Crossing, or to be matched or executed in the Crossing System, and an indication whether those fees differ from (e.g. by being in addition to) the Participant's standard fees.

Rule 4A.3.2 (6) provides that a Participant does not have to comply with this Rule until 6 months have passed from the commencement of this Rule.

The maximum penalty specified for Rule 4A.3.2 is \$100,000.

Rule 4A.3.3 (Notification of Crossing System outages) provides in subrule (1) that if technical or other system issues materially affect the efficiency of or proper functioning of a Crossing System operated by a Participant, that Participant must provide the following information, in writing, to ASIC and all users with Orders in the Crossing System other than users who are Retail Clients:

- (a) a description of the effect of the technical or other system issues;
- (b) how the the technical or other system issues are being managed by the Participant;

(c) any alternative arrangements for users' Orders that have been put in place by the Participant while the technical or other systems issues persist; and

(d) when the the technical or other system issues have been resolved,

as soon as practicable after the system issue arises, or the issue is resolved, as applicable.

Rule 4A.3.3(2) provides that a Participant does not have to comply with subrule (1) until 6 months have passed from the commencement of subrule (1).

The maximum penalty specified for Rule 4A.3.3 is \$100,000.

In new Part 4A.4 (Fair treatment, fairness and priority in dealing and opting out by users of Crossing Systems), Rule 4A. 4.1(1) provides that a Participant that operates a Crossing System must ensure that the Crossing System is operated by a common set of procedures that balance the interests of all users of the Crossing System and do not unfairly discriminate between users of the Crossing System.

Rule 4A.4.1(2) provides that subrule (1) does not prevent a Participant that operates a Crossing System from providing less favourable treatment for its own use of the Crossing System, or less favourable treatment for use of the Crossing System by its Related Bodies Corporate.

Rule 4A.4.1(3) provides that a Participant does not have to comply with subrule (1) until 6 months have passed from the commencement of subrule (1).

The maximum penalty specified for Rule 4A.4.1 is \$100,000.

Rule 4A.4.2 (Fairness and priority in dealing), provides, in subrule (1) that a Participant that operates a Crossing System must ensure that the Crossing System deals fairly and in due turn with Clients' Orders; and a Client Order and an order of the Participant trading as Principal.

Rule 4A.4.2(2) provides that a Participant does not have to comply with this Rule until 6 months have passed from the commencement of the Rule.

The maximum penalty specified for Rule 4A.4.2 is \$1,000,000.

Rule 4A.4.3(1) sets out the factors that are relevant in considering whether Rule 4A.4.2. has been complied with:

(a) the Participant acts in accordance with its instructions;

(b) Orders that do not involve the exercise of discretion by the Participant in relation to the time or price or quantity of the Order are entered in the Crossing System in the sequence in which they are received, and otherwise as expeditiously as practicable;

- (c) Orders of a client (which is not a Prescribed Person) that involve the exercise of discretion by the Participant in relation to the time or price or quantity of the Order are given preference, within the meaning of subrule (2), over the Participant's Principal Orders, unless the client otherwise consents;
- (d) if the sequence of entry of Orders into the Crossing System is not clearly established by the time the Orders were received, and one of the Orders is for the Participant trading as Principal, the Participant gives preference to the Order of a client over the Participant's Principal Order;
- (e) if the Participant has acted in accordance with its procedures to ensure that a person initiating, transmitting or executing an Order who is aware of instructions of a client (which is not a Prescribed Person) to deal in the relevant Financial Products that has not been entered in the Crossing System does not use that information to the disadvantage of that client;
- (f) the Participant buys or sells for a Wholesale Client;
- (g) allocation of Transactions executed on the Crossing System occurs fairly; and
- (h) a Participant's Principal Orders are not knowingly interposed between Orders of its clients that would otherwise have Crossed.

Rule 4A.4.3(2) provides that in Rule 4A.4.3 (1)(c), a reference to a Participant giving preference to an Order of a client over the Participant's Principal Orders, means that from the time of receipt of the Order until it is fully executed, the Participant does not enter into, as Principal, a Transaction executed on the Crossing System for the same Financial Products on the same terms, having regard to subrule (3), unless:

- (a) the Financial Products are allocated to the client in accordance with the client's instructions;
- or
- (b) the Financial Products are allocated to the client pursuant to an allocation policy previously disclosed to the client, to which the client consents, under which the Participant may buy or sell (and be allocated) the same Financial Products as Principal.

Rule 4A.4.3(3) provides that for the purposes of subrule (2), a limit Order which cannot be executed owing to price differences is not on the same terms.

Rule 4A.4.3(4) provides that a Participant does not have to comply with this Rule until 6 months have passed from the commencement of the Rule.

The maximum penalty specified for Rule 4A.4.3 is \$1,000,000.

Rule 4A.4.4 (Opting out of Crossing Systems) provides at subrule (1) that a Participant that operates a Crossing System must permit a client or other user of the Crossing System to opt out of having its Orders sent to the Participant's Crossing System (including any other Crossing System that may be accessible through the Participant's Crossing System), and the Participant must not impose on a user that opts out any additional operational or administrative requirements as a consequence of opting out of the Crossing System.

Rule 4A.4.4(2) provides that a Participant does not have to comply with subrule (1) until 3 months have passed from the commencement of subrule (1).

The maximum penalty specified for Rule 4A.4.4 is \$100,000.

New Part 4A.5 (Crossing Systems—Monitoring and suspicious activity reporting) provides at Rule 4A.5.1(1) that a Participant that operates a Crossing System must: (a) monitor use of its Crossing System for compliance with the obligations of users described in subrule 4A.3.2(5); (b) monitor use of its Crossing System for compliance with the operating procedures of the Crossing System; and (c) take action to ensure breaches identified under paragraphs (a) and (b) do not recur.

Rule 4A.5.1(2) provides a Participant must notify ASIC, in writing, of all significant breaches identified by the Participant during the course of monitoring undertaken under Rule 4A.5.1 as soon as practicable after identification of the relevant breach.

Rule 4A.5.1(3) provides that a Participant must keep records that demonstrate the monitoring activities it undertakes under Rule 4A.5.1, and of all breaches identified under Rule 4A.5.1 for a period of seven years.

Rule 4A.5.1(4) provides that a Participant does not have to comply with this Rule until 9 months have passed from the commencement of this Rule.

The maximum penalty specified for Rule 4A.5.1 is \$100,000.

Rule 4A.5.2 (Crossing System suspicious activity reporting) provides, at subrule (1) that subject to subrules (2) and (3), if a Participant that operates a Crossing System has reasonable grounds to suspect that:

(a) a person (*the Insider*) has placed an order into or entered into a Transaction on the Crossing System operated by the Participant in relation to a Financial Product while in possession of inside information (within the meaning of section 1042A of the Act), whether or not the Participant is aware of:

- (i) the identity of the Insider; or
- (ii) all of the details of the Order or Transaction; or

(b) a Transaction or an Order transmitted to the Crossing System operated by the Participant has or is likely to have the effect of:

- (i) creating an artificial price for trading in Financial Products on a Financial Market operated in this jurisdiction;
- (ii) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in Financial Products on a Financial Market operated in this jurisdiction;
- (iii) creating, or causing the creation of, a false or misleading appearance of active trading in Financial Products on a Financial Market operated in this jurisdiction; or
- (iv) creating, or causing the creation of, a false or misleading appearance with respect to the market for, or the price for trading in, Financial Products on a Financial Market operated in this jurisdiction,

whether or not the Participant is aware of:

- (v) the intention of any party to the Transaction or Order; or
- (vi) all of the details of the Transaction or Order,

the Participant must, as soon as practicable, notify ASIC in writing of the details of the Transaction or Order (to the extent known to the Participant) and the reasons it suspects the matter set out in paragraphs (a) and/or (b).

Rule 4A.5.2 (2) provides that a Participant is not required to notify ASIC under subrule (1) if the Participant has reported the information that would otherwise be required to be contained in the notification to ASIC under subrule (1) to the Australian Transaction Reports and Analysis Centre under section 41 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or under section 16 of the *Financial Transaction Reports Act 1988*.

Rule 4A.5.2 (3) provides that a Participant is not required to comply with Rule 4A.4.2 (1) until 3 months have passed from the commencement of Rule 4A.4.2 (1).

The maximum penalty specified for Rule 4A.5.2 is \$20,000.

Rule 4A.5.3 (Confidentiality) provides that a Participant who notifies ASIC under Rule 4A.5.2(1) must not disclose that the notification was made, or the information contained in the notification, to any person other than for the purposes of seeking legal advice or as required by law.

The maximum penalty specified for Rule 4A.5.3 is \$20,000.

New Part 4A.6 (Crossing System Tick Sizes and system controls) provides, in Rule 4A.6.1(1) that subject to Rule 4A.6.1(2) and (3), a Participant that operates a Crossing System must not accept, display or queue Orders in its Crossing System in Tick Sizes less than:

- (a) \$0.01 for an Equity Market Product priced at equal to or greater than \$2.00;



(b) \$0.005 for an Equity Market Product priced at equal to or greater than \$0.10 and less than \$2.00; and

(c) \$0.001 for an Equity Market Product priced at less than \$0.10.

Rule 4A.6.1 (2) provides that Rule 4A.6.1 (1) does not apply to an Order that, if executed, would result in a Block Trade, Large Portfolio Trade or, in the context of Rule 4.2.3, a Transaction at the Best Mid-Point.

Rule 4A.6.1 (3) provides a Participant does not have to comply with subrule (1) until 3 months have passed from the commencement of Rule 4A.6.1.

The maximum penalty specified for Rule 4A.6.1 is \$1,000,000.

Rule 4A.6.2 (Crossing System - efficiency and integrity controls) provides, in subrule (1) that subject to subrule (3), a Participant that operates a Crossing System must at all times have appropriate automated filters designed to ensure the efficiency and integrity of the Crossing System.

Rule 4A.6.2(2) provides that subrule (3), a Participant that operates a Crossing System must ensure it has controls that enable immediate:

(a) suspension of, limitation of, or prohibition on, the entry into any Crossing System operated by the Participant of Orders in a series of related Orders where the Participant has identified that Orders in the series have entered the Crossing System operated by the Participant and have interfered with or are likely to interfere with the efficiency or integrity of the Crossing System; and

(b) cancellation of Orders in a series that have already entered a Crossing System operated by the Participant where the entry of further Orders in the series has been suspended, limited or prohibited under paragraph (a).

Rule 4A.6.2(3) provides that a Participant that is subject to Rule 5.6.1 and 5.6.3 of the *ASIC Market Integrity Rules (ASX Market) 2010* or to Rule 5.6.1 of the *ASIC Market Integrity Rules (Chi-X Australia Market) 2011* does not have to comply with this Rule.

#### Item [14] – Rule 5.1A.1(1)(c)

Item [14] of Schedule 1 to the Instrument amends Rule 5.1A.1 (“Application of Chapter”) by making formatting and punctuation amendments consequential on the amendment in Item [15].

#### Item [15] – Rule 5.1A.1(c)

Item [15] of Schedule 1 to the Instrument amends Rule 5.1A.1 to insert “except in Rule 5.1.6A, ” before “Orders and Transactions”.

This amendment has been made to ensure that new rule 5.1.6A (“Market Operator to make available Course of Sales information within three days” applies to Financial Products – see Item [16].

Item [16] – Rule 5.1.6A, after Rule 5.1.6

Item [16] of Schedule 1 to the Instrument inserts new Rule 5.1.6A (“Market Operator to make available Course of Sales information within three days”).

Rule 5.1.6A(1) requires a Market Operator, subject to subrule (5), to make available Course of Sales Information for each Transaction in a Financial Product executed or reported to its Market. Rule 5.1.6A(2) provides what ‘Course of Sales Information’ means. It includes product identification, Transaction time, price and volume of each Financial Product subject of each Transaction, value of each Transaction, the buy and sell participant identifier for each Transaction, the relevant code if the Transaction involved a Crossing, and the code identifying the venue in which the Transaction was executed (e.g. market, Crossing System or other facility).

Rule 5.1.6A(3) requires the Market Operator to make available the information required in subrule (1) on the third business day after each Transaction, on reasonable commercial terms, and on a non-discriminatory basis.

Rule 5.1.6A(4) provides that ASIC may publish on its website a notification of the execution venue codes that are referred to in the ‘Course of Sales Information’ in subrule (2).

Rule 5.1.6A(5) provides that a Market Operator is not required to comply with subrule (2) until one month has passed from commencement of the Rule to allow time to adjust and implement any new systems they require to comply with the new rule. Subrule (5) also provides that a Market Operator does not have to provide the execution venue code referred to in item 9 of subrule (2) until 10 March 2014, to align with the date on which the amendments to Chapter 5A (Regulatory data) of the ASIC Market Integrity Rules (Competition) are scheduled to come into effect.

The maximum penalty specified for Rule 5.1.6A is \$1,000,000.

Item [17] – after Rule 7.3.1

Item [17] of Schedule 1 to the Instrument inserts a new Part, "Part 7.4 Managing confidential Order information", and a new Part, "Part 7.5 Order incentives" after Rule 7.3.1 as follows:

Rule 7.4.1(1) provides that a Participant must take reasonable steps to ensure its officers and employees do not use or disclose information about Orders received by the Participant or Transactions resulting from those Orders unless permitted or required under these Rules or the law.

Rule 7.4.1(2) provides subrule (1) does not apply to:

- (a) information about Orders or Transactions if that information is generally available;

- (b) Pre-Trade Information about Orders received by a Participant if the Pre- Trade Information has been made available by a Market Operator under Rule 4.1.2;
- (c) Pre-Trade Information about Orders received by a Participant if it is necessary to use or disclose that Pre-Trade Information to execute an Order (including disclosure of the Pre-Trade information in a routing instruction);
- (d) Post-Trade Information about Transactions resulting from Orders received by a Participant if the Post-Trade Information has been made available by a Market Operator under Rule 5.1.4;
- (e) Post-Trade Information about Transactions resulting from Orders received by a Participant if it is necessary to disclose that Post-Trade Information for confirmation or billing purposes;
- (f) information about Orders or Transactions disclosed to a person that:
  - (i) maintains or services the Participant’s internal Order management system(s) or Crossing System(s) and who has agreed, in writing to limit its use of the Order and Transaction information disclosed to it to the purposes of that maintenance or service; or
  - (ii) provides Administrative Services or analytical services to or for the Participant in relation to Orders and Transactions and who has agreed, in writing, to limit its use of the Order and Transaction information disclosed to it to the purposes of those Administrative Services or analytical services, as applicable.

Rule 7.4.1(3) provides that for the purposes this Rule, “Administrative Services” includes Order routing or execution services.

Rule 7.4.1(4) provides a Participant does not have to comply with this Rule until 6 months have passed from the commencement of this Rule.

The maximum penalty specified for Rule 7.4.1 is \$1,000,000.

New Part 7.5 (Order incentives) provides, in Rule 7.5.1(1) that where a Participant handles or executes an Order as a result of an arrangement with another person (the *other person*) to direct Orders to the Participant, the Participant must not, indirectly or directly, make a cash payment to the other person for the opportunity to handle or execute those Orders if the cash payment leads to the net cost, calculated as set out in subrule (2), being less than the value of Reported Price for the Transactions the subject of the Orders.

Rule 7.5.1(2) provides that the calculation of the net cost for the purposes of Rule 7.5.1(1) must be done as follows:

Net cost = (***Commission*** less the dollar value of any cash payment to the other person) + ***Reported Price***

Rule 7.5.1(2) also provides that ***Commission*** means the dollar value of any payment received by the Participant (including commission received from a client of the other person) for the

opportunity to handle or execute the other person's Orders; and **Reported Price** means the total dollar value of the Transaction or Transactions the subject of the other person's Order or Orders as executed on the Market of a Market Operator or, if applicable, reported to a Market Operator under Rule 5.1.1, or if applicable, set out in a confirmation provided to the other person under Rule 3.4.2 of the ASIC Market Integrity Rules (ASX Market) 2010 or ASIC Market Integrity Rules (Chi-X Australia Market) 2011.

Rule 3.4.2 of the ASIC Market Integrity Rules (ASX Market) 2010 and ASIC Market Integrity Rules (Chi-X Australia Market) 2011 permits a Participant to accumulate multiple Transactions on a single confirmation and specify a volume weighted average price for those Transactions in specified circumstances.

Rule 7.5.1(3) provides that a Participant does not have to comply with this Rule until 6 months have passed from the commencement of this Rule.

The maximum penalty specified for Rule 7.5.1 is \$100,000.

## **ATTACHMENT B**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2013 (NO. 2)**

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **A. Overview of the legislative instrument**

1. The legislative instrument amends the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011 (ASIC Market Integrity Rules (Competition))* that apply to:
  - (a) the activities and conduct of a financial market operated by an Australian market licensee;
  - (b) the activities or conduct of persons in relation to a financial market;
  - (c) the activities or conduct of persons in relation to financial products traded on a financial market.
  
2. The ASIC Market Integrity Rules (Competition) were made on 29 April 2011 under subsection 798G(1) of the *Corporations Act 2001 (Corporations Act)*.
  
3. Since the ASIC Market Integrity Rules (Competition) were made on 29 April 2011, there have been market structure developments including growth in automation and innovation in electronic trading in domestic markets. This has included many market participants establishing and operating ‘crossing systems’ which are automated services that match or execute client orders otherwise than on a lit market order book with orders of: the market participant, other clients or any other person whose orders may access the crossing system.
  
4. The purpose of the legislative instrument is to amend the ASIC Market Integrity Rules (Competition) to address regulatory issues resulting from these recent market developments including:
  - (a) a lack of consistent and readily accessible information to the market and to users of a crossing system about how crossing systems operate and when orders may be executed on a crossing system;
  - (b) inconsistent treatment of users of a crossing system, including the imposition of impediments to the ability to opt-out of using a crossing system;
  - (c) inconsistent, and at times deficient, monitoring of the use of a crossing system and reporting of suspicious activity in the crossing system;
  - (d) inconsistent, and at times inadequate, systems and controls in place to respond to and manage to instances of crossing system outages;
  - (e) inconsistent management of confidential order information; and
  - (f) payments for the opportunity to handle or execute another person’s orders that may conflict

with the recipients underlying obligations to manage conflicts of interest.

5. In response to these regulatory issues, the legislative instrument introduces the following amendments to the ASIC Market Integrity Rules (Competition):

- (a) new rules for the operation of crossing systems to reflect their more ‘market like’ nature;
- (b) a requirement that a market operator make available certain information, including market or venue identification, on course-of-sales disclosures on T+3; and
- (c) enhanced rules for the management of confidential order information and conflicts of interest by a Participant.

6. The Office of Best Practice Regulation (**OBPR**) has assessed the Regulatory Impact Statement (RIS) for proposals in *CP 202: Dark liquidity and high-frequency trading: Proposals (CP 202)*. OBPR is satisfied that the RIS meets the Government's best practice regulation requirements.

## **B. Human rights implications**

### *Article 17 of the International Covenant on Civil and Political Rights*

7. The legislative instrument engages the right to privacy and reputation in Article 17 of the International Covenant on Civil and Political Rights (“Article 17”). Article 17 prohibits unlawful or arbitrary interferences with a person's privacy, family, home (which the UN Human Rights Committee has interpreted as including a person's workplace) and correspondence. It also prohibits unlawful attacks on a person's reputation. It provides that persons have the right to the protection of the law against such interference or attacks. The UN Human Rights Committee has not defined ‘privacy’. The Commonwealth Attorney-General's Department has provided guidance that privacy should be understood to comprise freedom from unwarranted and unreasonable intrusion into activities that society recognises as falling into the individual sphere of autonomy. To avoid being considered arbitrary, any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.<sup>1</sup>

8. The amended ASIC Market Integrity Rules (Competition) impose an obligation on financial market participants relating to notifications to ASIC that may engage the right to privacy and reputation in Article 17. Specifically the amended ASIC Market Integrity Rules (Competition) impose obligations on financial market participants to:

- (a) notify ASIC where the participant of a financial market has reasonable grounds to suspect that a matter referred to in Rule 4A.4.2 of the amended ASIC Market Integrity Rules

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<sup>1</sup> Australian Government Attorney-General's Department : *Privacy and Reputation*  
<http://www.ag.gov.au/Humanrightsandantidiscrimination/Humanrightsandthepublicsector/Humanrightsguidancesheets/Pages/Privacyandreputation.aspx>

(Competition) has arisen (referred to as “Crossing System suspicious activity reporting”).

9. The amended ASIC Market Integrity Rules (Competition) also impose an obligation on market operators to make publicly available information that may engage the right to privacy in Article 17, specifically, to:

- (a) make available course-of-sales information for each transaction in a financial product executed on, or reported to, its market (Rule 5.1.6A). The course-of-sales information includes a market participant identifier for each buyer and seller in each transaction that may enable the identification of an individual who is a market participant of a licensed financial market.

10. The records and notifications required by the amended ASIC Market Integrity Rules (Competition) may contain ‘personal information’ as defined in the *Privacy Act 1988*, being information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. This may be the case where the person to whom the record relates (e.g. an employee or representative of the market participant or a client) is an individual.

11. The right in Article 17 is engaged by the amended ASIC Market Integrity Rules (Competition) by reason that they:

- (a) involve the collection, storage, security, use or disclosure of personal information;
- (b) create confidentiality or secrecy provisions relating to personal information; and
- (c) provide for mandatory disclosure or reporting of information.

12. The amended ASIC Market Integrity Rules (Competition) are compatible with the rights recognised in Article 17 of the ICCPR by reason that any interference with a person's privacy or reputation resulting from compliance with the amended ASIC Market Integrity Rules (Competition) will be lawful and not arbitrary. In particular:

- (a) The amended ASIC Market Integrity Rules (Competition) are made in accordance with ASIC’s power to make market integrity rules dealing with the activities or conduct of persons in relation to licensed markets and in relation to financial products traded on licensed markets (see subsection 798G(1) of the Corporations Act), and with the consent of the Minister for Financial Services and Superannuation.
- (b) The amended ASIC Market Integrity Rules (Competition) will assist ASIC to perform its function of supervising financial markets, the operators of which are licensed under subsection 795B(1) of the Act (see section 798F of the Act).
- (c) The amended ASIC Market Integrity Rules (Competition) will further the objects of Chapter 7 of the Act, including promoting fair, orderly and transparent markets for financial products (see paragraph 760A(c) of the Act);

- (d) The amended ASIC Market Integrity Rules (Competition) will assist ASIC to perform its function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system (see paragraph 12A(2) of the *Australian Securities and Investments Commission Act 2001 (The ASIC Act)*);
- (e) Information is provided to ASIC under the amended ASIC Market Integrity Rules (Competition) will be protected in accordance with ASIC's legislative obligations under s127 of the ASIC Act, and to, the extent the information is personal information, under the *Privacy Act 1988*.

13. If the amended ASIC Market Integrity Rules (Competition) were considered to limit the right in Article 17 of the ICCPR, ASIC considers that the amended Competition MIRs are nevertheless compatible with that right. The right in Article 17 is not absolute. As noted, the right has implied limitations ('unlawful' and 'arbitrary') and may be subject to a permissible limitation where that limitation aims to achieve a legitimate objective, there is a rational connection between the limitation and the objective and the limitation is reasonable, necessary and proportionate.

14. The obligations imposed by the amended ASIC Market Integrity Rules (Competition) which may be considered to impose on the right in Article 17 fall in to the below category. Any limitation imposed on the right in Article 17 by the amended ASIC Market Integrity Rules (Competition) has a clear legal basis:

- (I) Suspicious activity reporting (see the rule referred to in paragraph 8(a) above)
  - (a) *Aims to achieve a legitimate objective*

These rules which require reporting of information of a subjective nature to ASIC will assist ASIC to perform its function of supervising financial markets under Part 7.2A of the Corporations Act, and to further the statutory objects of Chapter 7 of the Corporations Act by promoting fair, orderly and transparent markets for all investors and participants.

- (b) *Has a rational connection with the objective*

By ensuring that suspicious activity is notified to ASIC, these rules will enhance ASIC's ability to detect, pursue and deter misconduct which may have an impact on the fairness, orderliness and transparency of Australia's markets.

- (c) *Is reasonable, necessary and proportionate*

The rules are necessary to achieve the legitimate objective described above because they provide ASIC with a significant additional source of market intelligence, recognised in overseas jurisdictions as imperative to market integrity. The rules contain adequate safeguards by requiring an objective threshold to be met before a Suspicious Activity Reporting notification is made, and by requiring a Financial Market Participant to maintain the confidentiality of any such notification. Further safeguards are provided by ASIC's statutory obligations to protect confidential and personal information contained in the notifications.



(II) Course-of-sales information (see the rule referred to in paragraph 9(a) above)

(a) *Aims to achieve a legitimate objective*

These rules which require making publicly available a market participant identifier for the buyer and seller in each transaction will assist ASIC to perform its function of supervising financial markets under Part 7.2A of the Corporations Act, and to further the statutory objects of Chapter 7 of the Corporations Act by promoting fair, orderly and transparent markets for all investors and participants.

(b) *Has a rational connection with the objective*

By ensuring that a market operator makes publicly available a market participant identifier for the buyer and seller in each transaction, these rules will enhance ASIC's pursuit of transparency of Australia's markets.

(c) *Is reasonable, necessary and proportionate*

The rules are necessary to achieve the legitimate objective described above because they provide ASIC with a tool to aid in the promotion of fair, orderly and transparent markets for all investors and participants. The rules contain adequate safeguards by requiring participant identifiers only (a three letter code), rather than individual names and personal details.

### **C. Consultation**

15. In March 2013, ASIC undertook a public consultation on its proposals in CP 202 to amend the ASIC Market Integrity Rules (Competition). We also met with industry associations, market participants, market operators and institutional investors. Feedback was sought from interested stakeholders.

16. We received written submissions from 25 stakeholders including AFMA (Australian Financial Markets Association), SAA (Stockbrokers Association of Australia), ASX and Chi-X. We received some substantive comments on the proposals in CP 202 particularly relating to the following areas: the proposals relating to minimum size threshold for dark orders, changes to tick sizes, and record-keeping requirements of crossing system operators. Based upon these comments, we have not proceeded to make rules in these areas. No human rights issues were raised.