To: Takeovers Panel Secretariat

Dear Sir/Madam

Thank you for the opportunity to submit this clarifying email that supplements our previous submission.

AFMA made its original submission to the consultation on Guidance Note 20 – Equity Derivatives on 31 May 2019. Subsequent to the initial submission, we have come to understand that the drafters of the Guidance Note intended, and it was not an inadvertent outcome, to capture regular institutional client flow in the reporting regime envisaged by the draft Guidance Note. As such we would like to supplement our previous submission with the points addressed in this email.

A variety of practical difficulties may be created by the proposed regime for investors wishing to use equity derivatives to invest in the Australian market. Investors who are not interested in a control transaction are typically more active and under the proposed regime will be required to track and report a potentially large number of derivative transactions and these transactions may be held with a number of market markers.

We expect many of these investors do not currently have the systems to track and report their positions and may need additional information technology, operational and compliance resources to do so. This could discourage trading and liquidity in the Australian market if such tracking and reporting is required for non-controlled transactions.

We made the case in our initial submission for clarity to be provided that it would be a requirement only on the taker of an equity derivative transaction to disclose. If the intention is to capture flow equity derivatives that are unrelated to control transactions, then this point becomes even more important because of the expanded scope and increased number of writers of equity derivatives who will be impacted. An express clear exclusion on placing any obligation on the writer of the equity derivative to disclose would reduce the circumstances in which reporting (essentially of a duplicate of what has already been reported by the taker of the equity derivative) would be required and thereby limit the regulatory burden on the writer of the equity derivative.

We note that where equity derivatives are written by a financial institution these are often then backed-out to a related entity for risk management purposes. Such transactions should not be included as their reporting could lead to a misleading picture of exposures. For example, the financial institution might write an equity derivative for an equivalent of 5% of a company. In transferring this exposure to an intra-group entity, the writer of the equity derivative would become a taker of the equity derivative for reporting purposes and potentially fall within reporting scope. The entity that writes this second derivative may then hedge with a physical 5% shareholding which would also then be reportable. This may create a misleading impression that the writer of the original equity derivative has a 10% exposure within its corporate group. We would submit that it would be appropriate to carve out this type of intra group trading to avoid misleading outcomes and to ensure that transactions that are entered into for risk management and not control transaction purposes are not captured. If this approach were to be adopted, it would be consistent with the current Guidance Note 20 – Equity Derivatives where the market maker is treated the same way as a writer of the equity derivative where it has hedged its equity derivative that it has written.

More generally, it may be appropriate for market makers, who provide equity derivatives products, to be carved out of the proposed regime. Market makers are carved out under the current Guidance Note 20 – Equity Derivatives when the equity derivative is written at arm's length, for clients with which the market maker is not associated or acting in concert in relation to the relevant company, and for whom the market maker is not acting in a corporate advisory capacity or if it is there is an effective Chinese wall in place. We consider this to be a helpful and an appropriate approach.

AFMA suggests that there may be benefit in the Takeovers Panel approaching future consultations in a multistage manner. An issues paper stage can assist in ensuring a common understanding of the objectives, issues and potential downsides to regulatory reform. Where a draft Guidance Note is presented without an issues paper preceding it, there can be lost opportunities for constructive engagement with key stakeholders and impacted parties.

We trust this additional email is of assistance and would be pleased to offer further information if required.

Yours sincerely

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