



3 November 2021

Natalie Boulizos, Senior Manager  
Market Supervision  
Australian Securities and Investments Commission  
GPO Box 9827  
Brisbane QLD 4001

By email: [MIRsubmissions@asic.gov.au](mailto:MIRsubmissions@asic.gov.au)

Dear Ms Boulizos

**Re: AFMA submission to ASIC Consultation Paper 347 Proposed amendments to the prohibition on order incentives in the ASIC market integrity rules**

The Australian Financial Markets Association (AFMA) welcomes the opportunity to provide comment to ASIC in response to CP 347 on the proposed amendments to the prohibition on order incentives in the ASIC market integrity rules. As an industry association of over 120 members including Australian and international banks, leading brokers and securities companies, we promote best practices, integrity and efficiency in the Australian financial markets.

We appreciate ASIC's aims in seeking to support good investor outcomes and avoid negative impacts on market quality related to 'payment for order flow' in the Australian market. Without revisiting the policy case for or against we support that given the existing policy there should be consistency in its application.

We also support the simplification of the concept of 'negative commissions'. However, it is important that regulatory instruments used to discourage certain practices are aimed at the right groups and the key motivating factors for these practices.

In our comments below we note that while market participants play an important role in supporting measures to prevent payments for order flow, there are practical limits on what can be done to monitor measures by third parties and non-market participants. We also state other concerns which we trust will be of assistance.

### *Proposed amendments to the prohibition on order incentives*

Market participants may in practice have little visibility of the practices of the ultimate end clients of the clients that they engage. As such ASIC's proposed requirement (in draft rule 5.4B.1(1)(b)) that participants take reasonable steps to ensure their clients have not made a cash payment to a third party for order flow does not directly address the regulatory gap that ASIC has identified. By placing the obligation on participants, 'payment for order flow' may simply move further down the chain of clients and the prohibition risks not being effective. While we note the flexibility given in determining what reasonable steps might look like, we note that the requirement for an annual attestation may not be the optimal way to ensure compliance, as it establishes significant ongoing process costs and risks for participants.

ASIC should consider mechanisms to achieve its desired outcome to prevent 'payment for order flow' directly and avoid placing additional, undue regulatory burden on market participants alone.

### *Soft dollar incentives for order flow*

In our view the current guidance in ASIC Regulatory Guide 265 sufficiently addresses the potential risks associated with soft dollar incentives for order flow. It is common practice for participants to provide clients with services such as research and subsidised access to third party services. The guidance makes it clear that these offerings should improve the quality of the financial services provided to the clients and must not impact participants' best execution obligations. This is in addition to the general obligations of participants (and licensees in general) to provide financial services efficiently, honestly and fairly, and to have adequate arrangements in place to manage any conflicts of interest.

In this regard, we appreciate ASIC's clarification to AFMA, that CP 347 does not propose to consider the prohibition of soft dollar incentives for order flow (such as research services). Given the wide industry impact such prohibition would have, we support this clarification by ASIC and suggest that if ASIC has any plans in future to regulate research arrangements that this follows a stand-alone consultation.

### *Prohibition on order incentives*

AFMA wishes to confirm that ASIC's intention is not to unintentionally capture structured products which may involve an on-market execution and where fee arrangements for the on-market execution may be embedded in the product terms. For example, the terms of a structured product may require an on-market execution to be executed on behalf of the client who may pay a fee to their advisor and/or a firm may pay a fee to the advisor.

We support that in such a circumstance, any embedded fees associated with the issuance of the structured product should be excluded from this prohibition.

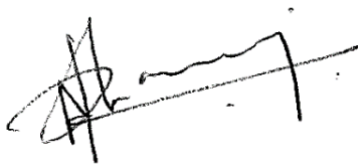
We note the wording in ASIC Securities MIR rule 5.1AA.1 which provides a carve out for needing to execute transactions on market where “the transaction is entered into pursuant to the terms of the relevant product, including a redemption”. We suggest an equivalent carve out to be included under the prohibition on order incentives to ensure structured products aren’t inadvertently captured by this prohibition.

*Feedback on drafting*

As a general observation, we note that CP 347 contains multiple references to parties in scope including “Market Participants”, “other persons”, “third parties”, “associates of third parties”, “clients of third parties”, “client of the other person” and “another person (the other person)”. Many of these are referenced in the same sentence which may render the true intent of the proposed amendments confusing or unclear.

We look forward to engaging further with ASIC in improving market outcomes and quality. Please feel free to reach out to us via the Secretariat for any information.

Sincerely

A handwritten signature in black ink, appearing to read 'Nikita Dhanraj', with a horizontal line extending to the right.

Nikita Dhanraj  
**Policy Manager**