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Dear Daniel

### **ASIC Supervisory Cost Recovery Regulations 2017**

The Australian Financial Markets Association (AFMA) wishes to make the following submission to this consultation. It builds on the preliminary submission lodged on 8 May.

#### **Uncertainties in Calculating Levies**

AFMA members continue to express uncertainty about their prospective levy contribution based on the information that has been provided by Treasury and ASIC to date. For example, some of the proposed levies have components for which the monetary value is not known to the entity to be levied, e.g., ASIC's IT costs that are to be apportioned to each participant in a given sector. AFMA has asked ASIC for some of this information but it has not been provided.

It would be helpful if Treasury could issue an updated information paper as soon as practicable after the regulations are in effect showing the quantum of sub-sector levies and the number of entities captured. The information paper could also be used to provide further clarity on the issues identified below.

#### **Nexus Between Corporate Advisory and OTC Traders**

The draft regulations replace the previously proposed levy on OTC revenue with one on OTC trader headcount conditional on the employing entity forming part of the corporate advisers sub-sector. While a levy on OTC headcount rather than revenue was supported

by some of our members, the nexus with corporate advisory presents the same anomaly AFMA previously highlighted when OTC revenue was tied to investment banking activity. A not-insignificant proportion of trading in OTC financial products (and by implication, headcount) is undertaken by entities that most likely do not fall within the corporate advisory sub-sector. This has the potential to create an inequitable misalignment between the regulatory effort expended by ASIC in respect of OTC traders and the burden of the levy. Furthermore, AFMA has queried multiple times why the view has been taken that trading in OTC financial products by OTC traders should be linked to investment banks (as described in the previous iteration of the model), now described as corporate advisors in current version of the model.

It would be helpful if Treasury could clarify the rationale for this nexus and the number of entities that it estimates engage in both corporate advisory and OTC trading that make up the levy base and the number of entities that engage in OTC trading but are not counted in the corporate advisers sector.

Some AFMA members have indicated that they have more than one licensed entity under which an OTC trade could be booked, even though the trader will be employed by only one of these entities. This would seem to give rise to a situation where the employee could be counted under both the employing and the related entity, giving rise to double counting of OTC trader headcount. It would be preferable if the regulations could be amended to avoid such double counting.

### **Corporate Advisers and Cross-Border Transactions**

The corporate advisers entity metric references total gross revenue made under the entities' licence in line with the ATO approach to determining assessable income. However, in the case of cross-border transactions facilitated by the offshore offices of the levied entity, fee sharing arrangements are often used to apportion revenue based on work performed. It would be preferable if the entity metric was based only on revenue apportioned to the local licensed entity to reflect work conducted in Australia so as not to unduly penalise cross-border transactions where it is unlikely ASIC is expending regulatory resources in any event.

### **Deposit Product Providers and Foreign Bank Branches**

The funding model levies licensees with authorisations as deposit product providers. Foreign bank branches cannot take retail or non-corporate deposits, but can take deposits of any size from corporates, non-residents and employees and are still required to hold an AFSL. ASIC Regulatory Guide 176 states that ASIC can offer exemptions from these requirements for Foreign Financial Services providers that only intend to provide wholesale services. Previous feedback from Treasury suggests that the funding model is based on an assumption that the majority of foreign bank branches have an exemption from the requirement to hold this authorisation and therefore would not be levied.

However, our inquiries with a sample of foreign ADIs suggest most do not in fact have an exemption under RG176 and would potentially be levied as deposit providers. This would appear to be an unintended consequence of the proposed model.

AFMA urgently seeks further clarification of this issue, in particular, the number of foreign ADIs that are estimated to be included and excluded from the deposit providers subsector. If inclusion in the deposit providers subsector is an unintended consequence of the model, the regulations should be revised to explicitly carve-out foreign bank branches.

### **Cash Equities and Futures Market Participants**

The draft regulations reflect previous stakeholder feedback in relation to separately levying cash equities and future participants. However, the levying of futures participants is anomalous in that it seems to assume no regulatory effort by ASIC in respect of other exchange-traded derivatives that are not futures. In this context, we note that the ASX is authorised as a derivatives exchange, not just a futures exchange. It is also worth noting that some derivatives, such as fx swaps, can be both exchange-traded and over-the-counter, at least in part, but the funding model does not seem to contemplate this possibility.

Further clarification of the rationale for the exclusion of non-futures exchange-traded derivatives from the levy base would be welcome. Again, this anomalous treatment has the potential to create an inequitable misalignment between regulatory effort and the burden of the proposed levies.

Members have also sought clarification that 'cash equities participant' refers only to trading and not custodial activity, given that custodians are subject to a separate levy.

### **Payment product provers**

The definition of the payment product providers entity metric is unclear and requires further clarification to understand how revenue should be calculated and what can be included in expenses.

### **Exempt Markets**

The annual levy on entities that operate exempt markets has been queried by members given that there appears to be very limited ongoing regulatory effort by ASIC in respect of these markets that would justify a fee of \$45,000 per annum per exempt market. While AFMA members acknowledge there is regulatory effort involved in making the exemption (which attracts a fee under the model), the lack of ongoing engagement with ASIC makes the annual levy onerous, particularly for members who hold multiple exemptions.

AFMA members would welcome additional transparency in relation to the ongoing regulatory effort in respect of exempt markets that forms the basis for the annual levy. AFMA note that an important rationale for the industry funding model is to provide greater transparency to the regulated population.

### **Review of Operation of Industry Funding Model**

AFMA has previously recommended that the Government commit to a review of the industry funding model within three years of the commencement of operation with a view to ensuring that the model is working as intended and to resolve unforeseen issues and

anomalies. AFMA sees such a review as an important element in the governance and accountability arrangements underpinning the model. Stakeholders would also find a commitment to a review reassuring. While not within the scope of the consultation on the regulations, such a commitment should be made by Government before the model comes into operation on 1 July 2017.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Step Kirchner', written in a cursive style.

**Dr Stephen Kirchner**  
**Economist**