

3 November 2021

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

Dear Ms Boulizos

CONSULTATION PAPER 347: PROPOSED AMENDMENTS TO THE PROHIBITION ON ORDER INCENTIVES IN THE ASIC MARKET INTEGRITY RULES

The Stockbrokers and Financial Advisers Association (SAFAA) is the professional body for the stockbroking and investment advice industry. Our members are Market Participants and Advisory firms that provide securities and investment advice, execution services and equity capital-raising for Australian investors, both retail and wholesale, and for businesses. Practitioner Members are suitably qualified professionals who are employed in the securities and derivatives industry.

SAFAA welcomes the opportunity to provide feedback on ASIC *Consultation paper 347: Proposed amendments to the prohibition on order incentives in the ASIC Market Integrity Rules* (Consultation Paper).

Proposed amendments to the prohibition on order incentives in Part 5.4B of the Securities Markets Rules

SAFAA provided [feedback](#) to Consultation Paper 202 *Dark liquidity and high-frequency trading: Proposals in 2013*.

SAFAA's view remains that cash payments and cash rebates for order flow should be prohibited.

As stated in our submission in 2013, SAFAA does not support a prohibition that would prevent brokers offering differential brokerage rates according to the volume of business provided by a client. It is a standard aspect of the carrying on of any business to offer discounts to customers who provide more business, and this should not be construed as a 'payment'. The key consideration is that the lower rate of brokerage results in a lower transaction cost which benefits the end client, and is not a payment of cash to any broker or intermediary directing the order flow.

Any amendments to the Securities Markets Rules would need to ensure that differential brokerage rates were not caught up in the prohibition. Otherwise, SAFAA agrees with simplification of the concept of 'negative commission'.

SAFAA understands ASIC's concerns that there is a regulatory gap when payments are made between non-market participants or intermediaries because they are not subject to the Market Integrity Rules. However, SAFAA does not agree with the proposal to require a market participant to take reasonable steps, in circumstances where the market participant handles or executes orders as a result of an arrangement with another person, to ensure the other person has not made a cash payment to a third party for order flow. We recommend that proposed Rule 5.4B.1 be deleted.

We consider that imposing a requirement upon market participants to essentially 'police' the prohibition on payment for order flow amongst market intermediaries is an unfair burden. The proposed rule captures all intermediate orders and imposes liability on market participants in the event that the market intermediary has engaged in payment for order flow. It is unfair to hold market participants liable for actions that are outside their control.

We note that 'reasonable steps' as set out in the Consultation Paper might include one or more of:

- Incorporating terms or clauses in the market participant's agreement with that person.
- Asking the person during the onboarding process whether they engage in payment for order flow or intend to.
- Obtaining an undertaking that the person will not engage in payment for order flow.
- Obtaining an annual declaration that the person will not engage in payment for order flow.

The 'reasonable steps' set out above also impose an unreasonable burden on market participants and would add to regulatory red tape. Adding to the regulatory burden of market participants when 'payment for order flow is not commonplace in the Australian equity market' (as stated in the Consultation Paper) runs directly counter to one of ASIC's key strategic priorities to administer the law to minimise the costs and burdens of regulatory requirements for its regulated population.

If ASIC is concerned that the regulatory gap may result in an increase in payment for order flow amongst market intermediaries, a fairer solution is for it to recommend to government to amend the Corporations Act to ensure that the prohibition is universally applied to both market participants and intermediaries. This would result in liability for payment for order flow being imposed on the entity that actually breaches the prohibition. Amending the Corporations Act takes a longer time than amending the Market Integrity Rules. However, the Consultation Paper does not provide any evidence of an increase in payment for order flow and refers merely to the possible emergence of payment for order flow arrangements amongst market intermediaries. As the proposed amendment is not required to solve an urgent problem, taking additional time to amend the Corporations Act to ensure that the legislative framework operates more fairly, is appropriate.

Soft dollar incentives for order flow

SAFAA considers that there are sound reasons for some soft dollar benefits to be provided, for example, trading hardware and software, etc and these are best treated separately and in soft dollar benefit policies and guidance generally. We do not agree that controls on soft dollar incentives should be incorporated within the rule framework or included in Part 5.4B.

Conclusion

If you require additional information or wish to discuss this submission in greater detail please do not hesitate to contact SAFAA's policy manager, Michelle Huckel, at michelle.huckel@stockbrokers.org.au.

Kind regards

A handwritten signature in black ink, appearing to be 'JF' with a large flourish and '6x' written below it.

Judith Fox
Chief Executive Officer