Stockbrokers
and Financial Advisers
Association Limited

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Australian Securities and Investments Commission
Level 5
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SYDNEY NSW 2000

By email: feeconsentsandindependence@asic.gov.au

ASIC CONSULTATION PAPER CP329 — ADVICE FEE CONSENTS AND INDEPENDENCE DISCLOSURE
SUBMISSION BY STOCKBROKERS AND FINANCIAL ADVISERS ASSOCIATION

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 which 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.

We refer to the Consultation Paper **CP 329 — Advice Fee Consents and Independence Disclosure** (CP329) issued by ASIC on 10 March 2020. The Stockbrokers and Financial Advisers Association ("SAFAA") appreciates the opportunity to make this submission in relation to the Consultation Paper and accompanying Draft Legislative Instruments.

We note ASIC's announcement on 23 March 2020 that, among other things, it would be deferring non time-critical consultations, having regard to the extreme conditions being experienced at present world-wide. SAFAA acknowledges and appreciates this flexibility. Notwithstanding this, SAFAA is providing this submission on the Consultation Paper now rather than waiting until a later time.

As a Preliminary matter, we note that the legislation dealing with the matters which are the subject of CP329 has not yet been passed by Parliament. Further, given that Parliament may not sit before August 2020 to deal with the draft legislation, it is not possible for legislation and attendant obligations to be enacted prior to the intended 1 July 2020 starting date.

We note that ASIC has indicated in CP329 that the proposed Legislative Instruments are based on the Exposure Draft Legislation that was released for comment, but will be liable to change in the event that legislation is passed in different terms. We also note that ASIC is proposing to issue guidance in the Explanatory Statements that accompany the Final Legislative Instruments and that the terms of that guidance is not yet available for comment.

These circumstances make it very difficult to provide clear feedback on CP329. Our comments are necessarily subject to the same provisos, namely, that they can only address the draft material that is in the CP and Instruments, and are based on the Exposure Draft legislation that has been made public.

Furthermore, we make the preliminary comment that the obligation to make prospective ongoing fee disclosure is fraught with problems. In order for the obligation to be capable of practical implementation, some clear and effective provisions will need to be made either in the Legislative Instrument or in ASIC guidance.

Date of Commencement

We note the commencement dates of the Fee Disclosure requirements listed in paragraph [58] of CP329. As already noted, given that the legislation has not been enacted, the 1 July 2020 date is not now possible.

Even without the impact of the extraordinary global events that have occurred in recent weeks, the start date for the obligation was always a practical impossibility. SAFAA made this point to Treasury in its submission on the Exposure Draft legislation.

The sheer size of the task of furnishing clients with Fee Disclosure Statements (FDSs), and the complexity of making changes to systems needed to generate FDSs, should not be underestimated. Firms would have needed to commence system development work already in order to meet the 1 July start date; however, completion of such complex IT system changes by that date was an unreasonable expectation, given that the law is not in place or even settled, and the full details unknown. Moreover, these significant system changes were being required at a time when firms were already devoting resources to the ASX CHESS replacement/DLT project. The capacity of firms to undertake more system changes was already limited.

Since the consultation on the Exposure Draft legislation, the extreme market volatility arising as a result of the COVID-19 pandemic has had an enormous impact on Market Participants. Participants are under significant stress as they provide advice and guidance to their clients, who are under considerable anxiety due to market conditions.

Trading volumes are high, and the levels of trading, clearing and settlement are placing stress on IT and Operations staff within Market Participants.

Due to the business continuity arrangements put in place in order to address social distancing requirements, Participants are mostly employing split teams and working remotely where possible. IT and Operations staff are working extended hours to ensure business and client requirements are satisfied. In the light of indications from government that these conditions are most likely to be in place for six months, this makes attending to the system changes needed to deal with the FDS changes highly problematic. Indeed, we note that ASX announced on 25 March that it was delaying implementation of the CHESS replacement and DLT project, and that this delay was not solely due to the impact of COVID-

19, but also in response to user feedback on requested functionality changes as well as timing and the need for ASX to complete aspects of its own readiness.

SAFAA notes that even with the delay in the implementation of the CHESS replacement/DLT project, this generational system change will place significant ongoing requirements on the same IT and Operations staff within Market Participants who will be called upon to re-engineer the Fee Disclosure processes. The constraints on capacity need to be taken into account in any commencement date set for the final legislation.

SAFAA appreciates that the implementation dates will ultimately be a matter set by government. However, to the extent that ASIC is able to also advise the above considerations to government, or to the extent that ASIC will have any flexibility to determine enforcement action on implementation dates in its Legislative Instruments, this will be immensely important to Market Participants and the feasibility of implementing the changes.

Transitional Arrangements

The transitional arrangements as presently worded create a number of issues:

1. For a client where a FDS or renewal is due under existing provisions before 1 July 2020, but are not disclosed before that date, the current arrangements cease on 1 July 2020 and an FDS — and where required — renewal notice, must be provided under the transitional arrangements between 1 July and 31 December 2020. The fee recipient must also seek the client's consent prior to 1 January 2021 to make fee deductions from the client's account. Where the consent is obtained prior to 1 January 2021, some of the new provisions apply from that date (s962U and s962X), which brings forward the FDS obligations.

2. For clients to whom the former Subdivision C did not apply (i.e. grandfathered clients), during the period 1 July 2020 to 30 June 2021, the fee recipient will need to give a FDS and renewal notice, and seek the client's consent to deductions before 1 July 2021. As with the comments in the preceding paragraph, where the consent is obtained prior to 1 July 2021, some of the new provisions apply from that date (s962U and s962X), which brings forward the obligations.

3. The renewal and consent requirements will potentially be separated in terms of timing. Consent to deductions has to be obtained every 12 months and in advance of a deduction occurring, whereas the FDS (and renewal) is required on the anniversary date of the relevant service arrangement. There will be a requirement to obtain two different confirmations at different times from the client, increasing complexity. During the transition arrangements, there should be an extension of the consent to deduct to align with the next FDS and renewal anniversary date.

Joint Accounts

The provisions require each "account holder" to give consent to automatic deductions from a bank account. This will require multiple tracking of consents to debit, even though a direct debit authority may already have been executed for the account.

For example, if an account had four trustees (or account holders) on a bank account, each one would have to consent to the deductions. If one of those trustees did not provide their consent in the required timeframe, the deductions would have to cease. This is not in alignment with standing instructions a client can have with their bank (e.g. "one to sign" is a common arrangement).

Apart from the complexity of developing systems to track multiple authorisations, this will also be complex for the clients themselves to manage, and for systems to be developed to track multiple authorisations.

SAFAA has drawn this issue to Treasury's attention in relation to the Exposure Draft. If the legislation is passed in the same terms as the Exposure Draft, the extent to which ASIC can provide some flexibility by way of guidance as to how to manage this situation in a cost-effective way will be of assistance.

Disclosure in Dollar amounts

In our submission on the Exposure Draft Legislation, SAFAA raised the difficulties inherent in disclosing fees in dollar terms in advance at the start of the relevant period.

For clients on a standard / fixed fee, this might be less complex — the fee should be ascertainable in dollar terms and should be explained relatively simply.

However, for clients on a variable fee, such as a tiered or percentage fee, the requirement to disclose the fee for the next 12-month period in dollar amounts, or to provide a "reasonable estimate" of the amount of the future 12 months' fees and the method used to work out the estimate, is fraught with issues and requires more clarity. To the extent that this is not provided in the final version of the legislation, then it will be incumbent on ASIC to address the question in its guidance.

In SAFAA's view, disclosure in dollar amounts in advance has always been problematic. Never has this been more apparent than in the current market correction. A variable fee will in most instances depends on the amount of the client's portfolio and a market correction will have a significant impact on this.

Even in the absence of market movements, a client may make the decision to sell a part of their portfolio and redeploy those funds elsewhere, for example, buying an investment property or a boat. The fee disclosure that is made at the start of the period in those cases will be meaningless.

Variable fees will also be higher in the event of an increase in the value of the client's portfolio, whether through a rising market generally, or outperformance of the client's portfolio. The disclosure at the commencement of the period will fall short of the mark, but should not prevent the appropriate fees being charged.

In the absence of any change in the final version of the legislation, SAFAA Members look to ASIC to provide guidance on what amounts to a "reasonable estimate" in these instances, as well as a simple model that can be used, to avoid the need to undertake complex system changes. Our Members advise that, without a simple model, artificial intelligence will need to be implemented in order to fulfil this requirement, a cost that many firms would find challenging to sustain, particularly when consideration is given to the significant costs associated with managing the CHESS replacement/DLT project implementation. This simple model should be the subject of consultation prior to the Legislative Instrument and Explanatory Memorandum being issued.

ASIC guidance should also deal with other situations where additional fees may need to be charged as a result of an event unforeseen at the start of the period, such as:

a. an increase in an ASIC levy or other regulator's levy; National Guaranteed Fund or other compensation scheme levies or charges; or increased fees levied by an Exchange, all of which may need to be passed on to the client
b. a recommendation to the client to acquire additional products during the course of the year. The additional fees and charges would be dealt with in the Statement of Advice relating to that recommendation, and SAFAA questions whether there is any value in there being any additional obligation to issue any amended Fee Disclosure statement. Clarification of how this situation should be dealt with would be of assistance.

Facilitating batch FDS mailout

The FDS requirements are triggered on a day-by-day basis, which creates administrative costs and system complexity in order to deal with this.

It would be of enormous benefit in terms of cost and efficiency if licensees had the option to send out FDSs on a batch basis, say monthly. The Instrument or guidance could provide for all FDSs for clients whose renewal date fell within the month, or whose account was opened during the month, to be sent by [X days] after the last calendar day of the month.

Conclusion

We would be happy to discuss any issues arising from these comments, or to provide any further material that may assist. Should you require any further information, please contact Peter Stepek, Policy Executive, on

Yours sincerely

Judith Fox
Chief Executive Officer