



Law Council
OF AUSTRALIA

Business Law Section

05 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

Dear Ms Boulizos,

ASIC Consultation Paper 347: Payment for order flow rule amendments

The Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) refers to the Australian Securities and Investments Commission's (**ASIC**) Consultation Paper on Proposed amendments to the prohibition on order incentives in the ASIC market integrity rules dated August 2021 (**Consultation Paper**). The Committee appreciates the opportunity to be involved in the consultation process. Unless expressly defined in this letter, terms defined in the Consultation Paper have the same meaning when used in this letter.

The Committee supports the proposal to amend the prohibition on order incentives in Part 5.4B of the *ASIC Market Integrity Rules (Securities Markets) 2017* as set out in the Consultation Paper. The Committee agrees that the current prohibition is unduly narrow and does not adequately address payments that may occur between non-market participant intermediaries. The proposed rule changes are reasonable and proportionate to address the potential harms, such as conflicts of interest and negative impact on market quality, arising from payment for order flow arrangements.

The Committee does not believe that more prescriptive guidance or rule-marking is required for soft dollar incentives. Any incentives in the form of soft-dollar benefits should continue to be monitored by ASIC. If ASIC proposes the further regulation of such incentives, then we believe it will be important for ASIC to conduct a separate consultation on the proposal.

The Committee's responses to the specific questions raised in the Consultation Paper are set out in the annexed table.

The Committee would be happy to discuss any aspect of this feedback. If you have any questions, please contact Committee members Jeremy Williams [REDACTED] or David Friedlander [REDACTED], in the first instance.

Yours faithfully,

[REDACTED]

Greg Rodgers
Chair, Business Law Section

ANNEXURE – TABLE OF RESPONSES TO SPECIFIC QUESTIONS FROM TREASURY

Q.	QUESTION	RESPONSE
Amending the prohibition on order incentives		
B1Q 1	Do you agree with our proposal? Please give reasons for your answer.	Yes. The proposed amendments represent a proportionate measure to “close the regulatory gap” on cash payments for order flow. However, given the expansion of the rule, we do think it would be beneficial to clarify that genuine internal transfer pricing arrangements between related bodies corporate are not intended to be captured.
B1Q 2	Do you think there are other ways that entities may seek to circumvent the rules (including the proposed amendments) and engage in payment for order flow? For example, where payment for order flow occurs between two entities that have no direct relationship to the market participant. Do you think we should make further amendments to our roles or take other steps, such as updating our guidance, to address this?	The Committee believes that the focus on market participants is appropriate given their role in providing market execution services. At this stage, the Committee does not think that the rules need to be expanded beyond the scope outlined in the Consultation Paper, but this is something that ASIC should continue to monitor in the event that further gaps are observed.
B1Q 3	Will the proposal result in any changes to your systems and procedures or increased one-off or ongoing compliance or administrative costs? Please outline the impact and give an estimate of these costs.	<p>The Committee expects that even for market participants that do not engage in payment for order flow arrangements, the revision to the rules will necessitate the incurrence of costs to ensure that reasonable steps are taken. However, provided ASIC is not prescriptive about its view of what constitutes reasonable steps, based on the examples provided in paragraph 60 of the Consultation Paper, it is not anticipated that the costs or administrative burden of implementation and on-going compliance would be significant for such market participants.</p> <p>The Committee is not in a position to comment more broadly on the system changes or costs for those participants and third parties that may be impacted more significantly by the changes.</p>
B2Q 1	Do you agree with our guidance on what might constitute ‘reasonable steps’ for the purposes of draft Rule 5.4B1(1)? Do you think we should include other steps?	Yes. The Committee agrees with the proposed guidance. It is important that Market Participants have a clear understanding about what may constitute “reasonable steps”. However, we also think it should be for participants to determine what steps are ultimately adopted having regard to the nature of their business and client-base, as opposed to ASIC reflecting a minimum standard or set of expectations. In this respect, the

Q.	QUESTION	RESPONSE
		<p>guidance provided by ASIC should be very clearly reflected as “guidance” and not a set of “expectations” (as contemplated in paragraph 61 of the Consultation Paper).</p> <p>The Committee considers this is particularly appropriate because Australia has not seen material regulatory impacts due to the absence of discernable order flow arrangements. The Committee would only recommend a set of “expectations” if the Australian experience had been more like North America or we could foresee it being the case in the medium term.</p> <p>There are no other steps that we think ASIC should include.</p>
Soft dollar incentives for order flow		
C1Q 1	<p>Do you think our current guidance on soft dollar incentives in RG 265 adequately addresses the risks and harms associated with soft dollar incentives for order flow?</p>	<p>Yes. The Committee considers the guidance set out in paragraphs 521 to 524 adequately addresses the risks and harms associated with soft-dollar benefits. Given the nature of these benefits, it would be too simplistic an approach to regulate them in the same way as a cash payment. In this context, the existing guidance clearly sets out ASIC’s views on the relevant considerations, which is reinforced through the Market Participant’s obligation to comply with its Australian Financial Services License obligations as set out in section 912A(1)(a) and (aa) of the <i>Corporations Act 2001</i> (Cth).</p>
C1Q 2	<p>Do you think we should incorporate the controls on soft dollar incentives (that are currently provided in our guidance in RG 265) expressly within our rule framework? If so, do you think our guidance can be directly transferred into our rules or do you think these controls need to be further revised?</p>	<p>Not at this stage, including because we think the existing guidance on soft dollar incentives is adequate. If ASIC proposes to make such rule changes, then it would be important for ASIC to conduct a separate industry-wide consultation process on the proposal.</p>
C1Q 3	<p>Alternatively, do you think we should make further amendments to Part 5.4B to expressly prohibit soft dollar incentives? If so, what forms of soft dollar incentives should be prohibited? Please give reasons for your answer.</p>	<p>Refer to our response to question C1Q2.</p>