

3 June 2024

Regulatory Reform and Implementation  
Australian Securities and Investments Commission  
Submitted by email: [RG236.Feedback@asic.gov.au](mailto:RG236.Feedback@asic.gov.au)



## Consultation Paper 378

The Australian Financial Markets Association (AFMA) is responding to the Australian Securities and Investments Commission's (ASIC) Consultation Paper 378 regarding updates to Regulatory Guide 236.

AFMA is the leading financial markets industry association promoting efficiency, integrity and professionalism in Australia's financial markets, including the capital, credit, derivatives, foreign exchange, energy, carbon, and other specialist markets. Our membership base is comprised of over 130 of Australia's leading financial market participants, including many participants in the carbon market.

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### Key Points

- **The carbon market is growing rapidly with many new participants with limited financial market experience.**
  - **ASIC should provide clear guidance about which activities attract regulation under the Corporations Act to assist participants to understand their obligations.**
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### 1. Development of the market

Recent changes to government policy, including the reforms to the safeguard mechanism, have energised the Australian carbon market. There has been a great increase in activity in the Australian Carbon Credit Unit (ACCU) market with many new buyers, sellers and other service providers entering the market or expanding their activities. These participants have a wide range of experience and some have limited previous experience of financial services regulation or engagement with ASIC. It is therefore important for ASIC's regulatory guides to provide clear information to participants about what activities will and will not attract regulation under the Corporations Act. AFMA therefore welcomes the provision of clearer and more detailed guidance in the regulatory guide regarding the definitions of financial products, what constitutes financial advice and the disclosure obligations for retail clients. We see this as important in providing market integrity and boosting professionalism across the market as a whole.

### 2. Providing financial advice

A key area of uncertainty for participants in the carbon market is what activities constitute providing financial product advice. This has been an important issue in the ACCU market where participants regularly provide technical advice about land use activities that can generate ACCUs as well as assisting in the creation and sale of the ACCUs. We expect it will be an important issue in the Safeguard Mechanism Credit (SMC) market where there will be a demand for expert technical and engineering advice about how to reduce firms' emissions.

AFMA welcomes ASIC's expanded guidance regarding providing advice on offset projects and considers that this will help clarify the difference between providing technical and financial advice regarding ACCU projects. We also welcome ASIC providing guidance for safeguard facilities with the following reservation. Paragraph RG 236.143 states that:

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*Provid[ing] advice to a safeguard facility that includes a comparison of the costs of avoiding an excess emissions situation through operational changes and the costs of purchasing and surrendering SMCs and ACCUs to meet its baseline, this advice is likely to be financial product advice.*

While we appreciate the sentiment behind this paragraph that advice that looks at both the cost of SMCs and ACCUs as well as the cost direct emissions reductions is likely to be financial advice, we caution that the current wording may be slightly too broad in practice.

Safeguard mechanism entities are likely to commission reports from technical experts, such as engineering consultancies, to determine how to directly reduce their emissions. The advice these technical experts provide will clearly not be financial advice, but for liable entities to make commercial decisions to act on the advice they will need to develop businesses cases which are likely to compare the cost of offsets to technical changes to produce direct emissions reductions. These business cases, which may be prepared by technical advisers, are likely to use current ACCU and SMC spot and forward prices to show the value of carbon reductions. Under the proposed guidance this would likely amount to providing financial advice. AFMA suggests that the guidance should be clarified so that it captures detailed advice that compares strategies for buying ACCUs and SMCs against direct emissions reductions but excludes technical advice that merely uses observable spot and forward prices as a comparison point to show the value of direct emissions reductions.

**AFMA Recommendations**

- i. The guidance in paragraph RG 236.143 should be clarified to capture detailed advice that compares strategies for buying ACCUs and SMCs against direct emissions reductions but exclude technical advice that merely uses observable spot and forward prices to show the value of direct emissions reductions.

**3. Derivatives**

Given the target audience of this guide AFMA thinks it is useful to provide clear guidance about what ASIC considered to be a derivative. Paragraph RG 236.64 of the current regulatory guide provides quite clear guidance that options and forwards are likely to be derivatives, but this has been omitted from the current guide. As we understand these are the most common carbon derivatives, and that there is some confusion in the market about the regulatory treatment of environmental products, we think it would be helpful for the guide to provide very clear guidance about what ASIC considers to be derivatives.

**AFMA Recommendations**

- ii. The regulatory guide should provide very clear guidance about what carbon products ASIC considers to be derivatives.

AFMA would welcome the opportunity to discuss this submission further and would be pleased to provide further information or clarity as required. Please contact me at [REDACTED] or [REDACTED].

Yours sincerely,

[REDACTED]

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