3rd June 2014

Mr Luke Sheehan
Retail Investor Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: luke.sheehan@treasury.gov.au

Dear Luke

Future of Financial Advice streamlining reforms – Regulation 7.7A.12B

Thank you for the opportunity to makes comments on the draft revised version of Corporations Regulation 7.7A.12B in connection with stamping fees.

AFMA has strived to maintain the confidentiality of the draft. Members of AFMA's Capital Raising Committee formed a working group to provide comments. The members of the working group have given signed confidentiality agreements to Treasury.

The Capital Raising Committee represents many of the major investment banks, underwriters and lead managers in the Australian capital markets. They, together with their corporate clients (issuers) are the users of Regulation 7.7A.12B. They are in a unique position to provide informed commentary about the regulation and its application in practice, and to make suggestions about how it can be improved to ensure that the original purpose of the regulation is maintained.

AFMA's members have been concerned for some time that the regulation is not technically correct in certain aspects, and is too open to interpretation. These concerns are shared, as you are aware, by some legal advisers. The uncertainty that has been created by differing legal interpretation is highly undesirable and has meant that in some circumstances, issuers have taken the view that it is not open to them, or a person acting on their behalf, to pay stamping fees in a capital raising situation. This may have had a detrimental impact on those capital raisings and on the ability of retail investors to access or participate in those capital raisings.

AFMA also notes that the definition of "investment entities" that are excluded from the operation of the regulation is to be deleted, following our submissions on this aspect. We very much welcome this change.

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Please find attached a further draft of the regulation with AFMA's suggestions marked up. Below is an explanation of the reasons in support of the proposed changes.

1. **Definition of "approved capital raising"**

   AFMA does not think that the regulation needs to be prescriptive in relation to whether there is an "offer" or "invitation" in relation to the issue or sale of an approved financial product.

   Rather, AFMA believes that the central point of a capital raising is the actual "issue" or "sale" of an approved financial product and then whether the fee is paid in connection with that issue or sale. AFMA believes that introducing concepts of "offer" and "invitation" may cause unnecessary confusion.

   This drafting point is also reflected in the definition of "stamping fee".

   AFMA understands Treasury's view that this regulation is designed to apply in relation to "capital raisings" which, by definition, implies the raising of funds (that is an increase in, or the collection of, cash or other monies). Clearly this exemption is not intended to apply to capital reductions (and stamping fees would be very rare in that form of capital management exercise in any event).

   AFMA would note, however, that there may be instances where a raising of funds is not the intention behind a relevant transaction. For example, reinvestment or exchange offers may not involve the "raising" of funds. A reinvestment or exchange offer generally involves an issuer issuing or selling a financial product (usually a hybrid security or debenture) which is either issued in exchange for an existing financial product (usually another hybrid security or debenture, which is then redeemed or cancelled) or the proceeds of sale or redemption of an existing financial product are reinvested in the issue of a new financial product.

   In either example, the capital position of the issuer may remain unchanged and no funds have actually been "raised". In such cases, AFMA does not believe that the policy considerations behind this regulation would be breached and the exemption should be available.

   AFMA also notes that there may be instances where a reinvestment or exchange offer actually involves two different members of the same corporate group (i.e. the issuer and purchaser entities are not the same) and so it may not be the issuer of the new financial product that pays the stamping fee.

   To address this, AFMA have suggested that the words "or retain" are added between "raise" and "funds".

   AFMA also suggests that the words "person making the offer" are replaced with " the person issuing or selling the approved financial product or for another person".

2. **Definition of "approved financial product"**

   AFMA believes that the definition of "approved financial product" in limbs (b) and (c) needs to be amended slightly so that it covers financial products that are already quoted.

   Stamping fees have application (less often) in offers of already quoted financial products such as a rights issue or large block trade (which is further discussed below) and AFMA believes the draft regulation should apply to those as well. Without those changes, the regulation would only apply

in relation to an initial public offering of those financial products. AFMA does not believe that was the policy or legislative intent.

This change is also consistent with the current version of Regulation 7.7A.12B and the proposed language in limb (a).

3. Definition of "stamping fee"

Upon consideration of the definition of stamping fee, AFMA believes that there may be instances where a stamping fee is not paid by the issuer/holder or "a person acting on behalf of" the issuer or holder.

This is because a fee may be paid by a person as an underwriter as a commission or fee (but not a brokerage fee covered by Regulation 7.7A.12D) where that benefit is not necessarily being paid on behalf of the issuer/holder.

This has particular application in the sale of existing quoted financial products, particularly in the case of large underwritten "block trades". In that case, an underwriter will underwrite the sale of a block of issued and freely tradeable financial products on behalf of a holder. Those sales are often not conducted by way of standard on-market trades. Being freely tradeable, those financial products can, as a matter of law, be offered to retail clients.

Where a broker receives a fee in connection with that sale (which is often referable to the size of its allocation), it may receive that fee from the underwriter, acting in that capacity, and therefore such fee (or the relevant part thereof) cannot be truly categorised as a fee paid by "a person acting on behalf of" the issuer or holder. Part of that fee could then be referrable to financial product advice given to retail clients. The holder selling the financial product may not know about or approve that fee.

We do not believe that this fee would contravene the policy intentions behind the regulation. Indeed, without it, it may mean that block trades such as these are restricted to wholesale clients only to ensure that any such fee does not constitute conflicted remuneration. This in turn has the real potential to restrict the access of retail clients to this form of capital raising.

As such, AFMA has suggested that:

- in limb (a), the words "that an issuer of a financial product, or a person acting on behalf of the issuer" be replaced with the words "a person, including an issuer of an approved financial product or a person acting on behalf of the issuer"; and

- in limb (b), the words "that a holder of a financial product, or a person acting on behalf of the holder" be replaced with the words "a person, including a holder of an approved financial product or a person acting on behalf of the holder".

AFMA has suggested the addition of a limb (c) which covers the payment of a benefit covered in limbs (a) and (b) to representatives of a provider. This wording is consistent with Regulation 7.7A.12D(1)(b) and clarifies potential uncertainty as well as ensuring that the intent outlined in previous versions of the Explanatory Memorandum is explicitly clear in the body of the Regulation itself.

All references to "financial product" should be to "approved financial product" to ensure consistent use of the defined term in the draft regulation.

As noted above, AFMA believes that there is no need to differentiate between an offer and invitation of financial products and so has sought to simplify the drafting accordingly.

Please contact me on 02 9776 7997 or tlyons@afma.com.au if you would like to discuss any aspects of our suggested changes, or require further information on any of the points raised.

Yours sincerely

Tracey Lyons
Director, Market Operations & Retail