24 April 2018

Ms Deborah Bails
Market Supervision
Australian Securities and Investments Commission
Melbourne VIC 3001

By email: deborah.bails@asic.gov.au

Dear Ms Bails

Further submission on Regulatory Guide 264 - Sell-side research

Thank you for the opportunity to meet with James Andronis and Grantly Brown on 13 March 2018 to discuss **ASIC Regulatory Guide 264** (**Regulatory Guide** or **RG 264**).

AFMA found it very constructive and greatly valued the feedback ASIC provided, which has been communicated to the broader AFMA membership. As discussed, AFMA agreed to provide further written submissions on certain of the issues discussed. The submission that follows focusses on the single most important issue for AFMA and its members, that is, to the need to better accommodate analyst input into underwriting, commitments or similar committees ("**Committees**") prior to the commencement of analyst investor education meetings for the purpose of ensuring that such Committees have access to all relevant information in order to make an informed assessment about the issuer, the offer and the financial institutions' willingness to be involved in the IPO. AFMA and its members fully appreciate ASIC's concern that the integrity of the IER and the research analyst's independence are not compromised and AFMA's interests are aligned with ASIC on that point. AFMA members would welcome further discussion and engagement with ASIC on these issues and, if ASIC thought it would be useful, AFMA members would be keen discuss potential safeguards ASIC considers necessary to ensure the integrity of the process.

Defined terms in this submission have the meaning given in the Regulatory Guide, unless otherwise specified.

1. Research analyst input into Committees

As RG 264 currently stands, but for a limited exception prior to the final underwriting decision (e.g. a day or two before), the research analyst will not be able to meaningfully interact with anyone outside the research and compliance departments between the end of the pre-solicitation phase of a capital raising until the IER is widely distributed. AFMA members have serious concerns about the impact of these restrictions because they limit the ability of Committees to have the benefit of (but not to influence) an independent research analyst's expert and personal assessment of the issuing company, before the IER is widely distributed. As we have previously mentioned, it is important to note that any definitive legal agreement under which a licensee agrees to underwrite a transaction

(whether it is a hard underwrite or a settlement underwrite scenario) will inevitably be after the issue of the IER. AFMA members also believe the restriction is out of kilter with global practices and would result in Australia being the only developed market globally which restricts Committees having access to all relevant material, which includes analysts' expert views. AFMA members, which include a number of global institutions, are concerned that this has the potential to materially disadvantage the Australian capital markets.

As discussed at our meeting, there are a number of "gating points" that determine whether a licensee proceeds with a transaction prior to any final decision being made to "underwrite" a transaction. One of those critical "gating points" is the decision to issue an IER. Australian market practice involves the distribution of an IER before the release of a pathfinder or other disclosure document and so the issue of an IER is invariably the first time when a licensee is publicly associated with an issuer and a potential capital markets transaction. Whilst not the point at which a licensee assumes market or underwriting risk, the issue of an IER does involve the licensee assuming reputational, regulatory and business risk and public association with an issuer and a potential transaction, so processes are accordingly put in place to assess and approve the assumption of that risk.

The quorum and membership of Committees (as well as permitted attendees) are a matter for each licensee but invariably include senior executives of relevant parts of the business, usually senior management, equity capital markets, corporate advisory/investment banking, equities, research senior management, legal, compliance and other control functions, such as market risk and internal audit. These Committees manage the licensee's risk (including liability and reputational risk), as well as seek to ensure that regulatory and business standards are maintained, on all equity capital markets transactions, including IPOs.

Accordingly, it is imperative to the Committee's decision making and approval processes to have access to and the benefit of all key information and expertise. This would include the research analyst's views on the issuer, its business, its viability as a listed entity and its financials. In this respect, the research analyst provides the Committee with an independent assessment of the issuer and the transaction. The views of the research analyst may also impact timing of a transaction and the Committee's views on the readiness of the issuing company to undertake the transaction.

Indeed, without the benefit of the analyst's independent and expert assessment of the issuer and the offer, the licensee may not have as comprehensive a view about the issuer and the offer as they will only be able to make a material decision about the transaction based on information from the corporate advisory/investment banking function. We believe it is for everyone's benefit, including those of potential investors and the market generally, that the Committee be able to make a decision having regard to all pertinent information including broader stakeholder interest. In particular, while the Committee will clearly have the interests of the licensee in mind, it will also be focussed on the interests of the issuing company and of institutional investors as well as ensuring completion of a successful transaction for the issuer and investors alike.

The Committee must be comfortable to proceed with the transaction prior to the release of the IER. Absent such comfort, licensees may be reluctant to proceed with aligning their reputation, or being publicly associated, with an issuing company or transaction. Without this insight, AFMA is concerned that licensees will simply not be willing to release an IER and undertake the associated investor education. This could result in a phasing out of not only the provision of IERs in Australia (irrespective of whether they include valuation information) but may, more importantly, also contribute to a reduced willingness of

licensees to arrange and manage equity capital markets transactions in the Australian market, thereby impacting the efficiency of the broader market.

AFMA does appreciate that RG 264 permit interaction between analysts and corporate advisory/ investment banking teams during the pre-solicitation phase. However, the pre-solicitation phase is very early in the life of a transaction. It covers a time prior to mandate and well before the analyst undertakes due diligence on the issuer. A detailed analysis on the issuer, its business, operations and financial matters will not have occurred at the pre-solicitation phase. In addition, there may be a significant period between the commencement of a pitching phase and release of an IER and, in any event, a Committee will want to understand the research analyst's developed views on an issuer immediately prior to the release of an IER, not its views at a time when the research analyst has not been able to undertake any substantive diligence on an issuer.

AFMA and its members understand ASIC's concerns that these interactions may be perceived to provide an opportunity for pressure to be applied to research analysts to alter their views and the IER before it is widely distributed. However, it is vital to stress that this is neither the purpose nor the intention of an analyst's engagement with the Committee. Rather, the intention is to allow the research analyst to put forward its views to the Committee to help inform the Committee's decision about whether the licensee should proceed with its involvement in a transaction, not to improperly influence a research analyst to change their valuation or other views. Members believe these risks can be managed with other controls.

AFMA members view this issue as the most significant outstanding issue from the implementation of RG264 and believe that a mutually acceptable solution can and must be found. As such, AFMA would welcome an opportunity to discuss appropriate controls with ASIC to ensure that research analysts can participate in Committee meetings both as soon as practicable before (i) the IER is widely distributed, and (ii) final underwriting or commitment decision (that is, when approval to execute an underwriting agreement or offer management agreement is sought). At a minimum AFMA members would propose that:

- any interactions between the research analyst and the Committee is monitored by Compliance and/ or Legal;
- the IER is final, or close to final, prior to the Committee meeting and the valuation has been approved by the member's established senior research review committee or process; and
- any changes to the IER required to be made after the Committee meeting (such as due to changes in the Pathfinder etc but not due to any influence from the Committee) must be approved by compliance and established senior research review committee or process.

Certain licensees do not require research analysts to participate in Committee meetings. In those instances, AFMA proposes that senior management of a licensee, including senior members of its corporate advisory business, should be able to receive the views expressed in an IER (including valuations) by way of an internal-use-only and confidential write-up prepared by the research analyst to the Committee, provided the same protections agreed with ASIC apply.

As it relates to RG 264.93, we encourage ASIC to clarify that it is not just for "hard underwritten" transactions that the research analysts' views may be provided to the Committee. The same reputational and other risks arise in relation to transactions

involving settlement support and best efforts transactions. We expect that ASIC intends to capture these other categories of capital markets transactions, but AFMA members would appreciate this clarification.

Other matters discussed

At the meeting with ASIC, we also discussed the requirement in Guideline D5(a) that valuation information in an IER should be expressed as an enterprise or total value for the issuing company. We understand other market participants have discussed the same issue with ASIC after our meeting and so we do not propose to make further submissions on the point. AFMA members remain of the view that the provision of a standalone whole of company equity valuation (not a "per share" valuation) should be available for inclusion in an IER, but AFMA has left it to members to separately liaise with ASIC on this matter should they wish.

Lastly, as it relates to the possible extra-territorial application of RG264, AFMA members recognise ASIC's observation that certain requirements under the Corporations Act 2001 (Cth), such as "insider trading", have an extra territorial application and, accordingly, RG264 needs to be interpreted consistently with the existing jurisdictional coverage of the Act. Accordingly, AFMA members do not propose to put forward a further submission on extra-territoriality.

Conclusion

We would value an opportunity to discuss this matter further with ASIC as soon as you have had an opportunity to consider it.

AFMA members continue to deal with a number of interpretation issues around RG 264. As such, we would like to take this opportunity to again request that ASIC consider holding an open forum for AFMA members to discuss these issues.

Please contact David Love either on 02 9776 7995 or by email dlove@afma.com.au if further clarification or elaboration is desired.

Yours sincerely

David Love
General Counsel & International Adviser