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Corporations Team
Australian Securities and Investments Commission
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Submitted via email to: asic.takeovers.policy.submissions@asic.gov.au

CP 365 Remaking ASIC class orders on takeovers, compulsory acquisitions and relevant interests

The Australian Financial Markets Association (AFMA) welcomes the opportunity to provide comment on *Consultation Paper 365 Remaking ASIC class orders on takeovers, compulsory acquisitions and relevant interests*.

AFMA supports the need to remake the nine listed class orders on takeovers, compulsory acquisitions, and relevant interests into ASIC instruments to avoid their upcoming sunset, under the *Legislation Act 2003*. The current class orders remain relevant. They are considered necessary for the efficient functioning of the relevant areas of regulation by our members.

AFMA is generally supportive of the individual proposed remakes.

The only matter on which we have detailed comment is in relation *Class Order [CO 13/520] (Relevant interests, voting power and exceptions to the general prohibition)* on the question about whether limitations should be placed on the money lending and financial accommodation exceptions in s609(1), as modified by [CO 13/520], such that they do not apply where the financier otherwise has an equity interest in the entity. We are concerned about the proposed amendment to the money-lending exception to the effect that *"in s 609(1) to apply only where the lender does not have other relevant interests in securities of the entity"*. The Takeovers Panel case, referred to *Donaco International Limited [2019] ATP 11*, refers to a situation where options were granted to the lender as part of the lending arrangement. Greater clarity on the scope of ASIC's intent would be welcome; from the consultation paper, we are unclear as to whether ASIC is seeking to solely cover this specific scenario. An investment bank, for example, has many different businesses and could have interests in securities of the entity through completely unrelated activities. These activities often would take place on the other side of an information barrier. Investment banks also already have robust conflict of interest processes, as required under their Australian Finance Services Licence (AFSL). Therefore, AFMA proposes, that as a minimum, ASIC include a carve out for AFSL holders, given their strict pre-existing regulatory obligations.

An additional point for attention is our recommendation for an exception to avoid the natural issues that arise under the 'associate' definition of section 12(2)(c) of the *Corporations Act* 2001 for financiers under a syndicated arrangement becoming associates, with respect to the sell down of the shares on enforcement as a result of any coordination agreement/arrangements. Under current ASIC proposal, this would require a financial institution to include the relevant interests of each other lender in aggregate with their own relevant interest on enforcement. This is problematic for some firms, where other parts of the group may trade the security (e.g. hedging activity), which given the double counting involved, could put the firm at risk of reaching the 20% takeover threshold when there is no control aim from the lenders.

AFMA would welcome the opportunity to discuss the consultation further and the points raised in our submission. Please contact me on 02 9776 7917 or by email at myoung@afma.com.au.

Yours sincerely,

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