360 Treasury Systems AG
Grüneburgweg 16-18/ Westend Caree
D-60322 Frankfurt am Main
Germany

Manager, Financial Markets Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

Frankfurt am Main, 30 January 2013

Australia's Financial Market Licensing Regime: Addressing Market Evolution

Response of 360T

360 Treasury Systems AG ("360T") welcomes the opportunity to provide feedback to Treasury and the Australian Securities and Investments Commission ("ASIC") on their November 2012 consultation paper ("the Paper") on proposals to amend the current Australian Market Licensing ("AML") regime as set out in Part 7.2 of the Corporations Act. 360T is also grateful to have had the opportunity to participate in the 'soft soundings meeting' on 22 January 2013.

Background

360T ("the Company") is a non-risk taking intermediary that is the business of providing transaction capabilities and related services to wholesale market participants: banks, broker dealers, asset managers, hedge funds, corporate treasuries and commodity trading advisors. 360T was established in 2000 and is authorised and regulated by the German Federal Financial Services Authority ("BaFin"). By utilising the provisions of the pass-porting regime of the European Union ("EU") Markets in Financial Instruments Directive ("MiFID"), 360T provides its services across all twenty seven member states of the European Economic Area (EEA). 360T provides its services in all other major financial centres. In Australia, 360T has applied for and is currently waiting on the granting of an exemption from the need to hold an Australian Markets License.

As a consequence of the regulatory reform of the Over The Counter ("OTC") derivatives markets, as initially proposed by the G20 and which is now taking shape in various jurisdictions, 360T is taking steps to qualify as a Swaps Execution Facility (SEF) in the United States ("US") and to obtain authorisation as a Multilateral Trading Facility ("MTF") in the EU. The Company may, as appropriate, seek authorisations elsewhere.

Feedback

As 360T has admittedly come to review the Paper at a late stage, and with a 1 February 2013 deadline for submitting responses, this response dwells primarily upon providing some general observations in relation to the overall high level themes that we have drawn from the paper.

Current Regime

360T concedes that the AML regime as created in 2001 may not have anticipated the full extent of market evolution. However, contrary to the implied assertion in the Paper that the current regime is no longer fit for purpose, 360T is of the view that the regime has in fact stood the test of time rather well and that perhaps it requires less revision than contemplated.

The current regime has allowed ASIC, whether by granting an AML or issuing an exemption from the need to hold an AML, to capture most of those organisations that 360T would consider as amounting to 'market operators'. Moreover, in operating the current AML regime it seems to us that ASIC has been adept at applying proportional compliance obligations to the variety of markets it oversees – and equally been admirably progressive in championing a broad principle of mutual recognition, as evidenced through ASIC's willingness to take account of the strength of an overseas firms home country regulatory system when assessing its application for an AML or an exemption and via the standards it sets thereafter.

360T is also of the opinion that the current AML regime has been adequately supported by the Australian Financial Services License (AFSL) regime, which covers the activities of those firms who are engaging in market activities but who are not in our opinion, market operators.

In short, and particularly for overseas firms, we believe that the current regime has worked well in allowing a variety of market operators to flourish in Australia, much to the benefit of both the professional and retail investor.

The Proposed Options

It is clear from the commentary in the Paper that in terms of favouring one option over another, that ASIC would favour that option which provides them with maximum flexibility. Amidst the current global drive for regulatory reform as originally initiated by the G20, 360T understands why ASIC should favour this option, and indeed we agree that the regime should be capable of capturing entities such as Dark Pool operators. However, we would caveat caution in that whilst flexibility is undoubtedly a useful tool, ASIC must not devise such a loose regime that it has the unintended consequence of capturing participants that could not in themselves be defined as market operators, but which rather are more correctly viewed as being engaged in providing ancillary activities and which are perhaps more appropriately dealt with either through the AFSL regime, or perhaps not captured all.

As such, whilst we can see benefits in the concept of flexibility, we nevertheless suggest that ASIC needs to ensure that any new regime must still be strictly defined in order to avoid creating legal and

regulatory uncertainty. Admittedly, the Paper does recognise this drawback, but on the whole we do not consider the Paper to have given the concept of uncertainty' the weight it deserves nor properly considered how uncertainty could potentially curtail market innovation.

360T agrees that it is prudent for a new regime to be devised in such a way as to allow for a number of market categories. However, in terms of having the flexibility to set specifically tailored requirements within those categories; in practice 360T will not necessarily find this an advantage. This is because like many firms, and certainly those with an international set-up yet subject to varying regulatory and compliance requirements, 360T will frequently apply the highest common denominator in order to ensure efficiency across its systems and controls. That said, ASIC should resist the temptation to set too high requirements and instead only impose those requirements that it deems truly necessary to uphold the principles of market confidence and investor protection.

Obligations

360T is strongly in favour of highly rigorous standards being set by regulatory authorities for the purpose of ensuring that market operators not only comply with the proposed rules but also promote confidence in the wider market by doing so. However, these obligations should be proportionate to the market category in question.

In terms of setting oblations, or making rules in respect of licensing obligations, 360T is of the view that ASIC's power should, (as asked in Question 9), be limited to matters in which default requirements in the legislation are 'switched off'. This view, and we apologise for saying as much, is based on the premise that if a regulator has the power to devise new obligations then - as is the nature of the beast – it will do so, with the inherent possibility that in a short period of time the regime may unintentionally import uncertainty, give rise to further unintended consequences and curtail innovation.

Fees

360T agrees that fees should be applied to reflect the level of work that needs to be undertaken by ASIC to process an application, and that adjusted fee levels are only to be expected for on-going supervision activities provided they are proportionate to the level of supervision exercised in relation to a particular firm. However, generally speaking, as firms have seen regulatory costs rise inexorability in many other jurisdictions then 360T would ask ASIC to ensure that any new fee structure is entirely transparent and that any rise in fees thoroughly justified beforehand.

We think it is self-evident that a poorly constructed fee structure could deter an overseas market from operating in Australia and equally deter local market operators or innovative start-ups.

Compatibility with foreign regimes

360T agrees that in devising a new regime that ASIC should seek to ensure compatibility with foreign regimes.

Although 360T does not necessarily believe in a strict interpretation of 'compatibility' on the basis that it is unrealistic for countries to have a perfect alignment of laws and regulations, the Company does believe that firms that are properly managed in the eyes of their home state supervisors should be able to conduct business with minimal additional requirements being imposed by host state regulators. This should apply equally to overseas firms seeking to operate in Australia, and to Australian firms seeking to operate in other jurisdictions.

As aforementioned, 360T believes that in accepting the integrity of other supervision regimes that ASIC has been a thought leader in championing the broad principle of mutual recognition. Sadly, we do not have such high expectations of other regulators who have frequently displayed what at times would appear to be a self-serving hostility to this laudable principle. We would very much hope, therefore, that ASIC will not cease to apply this broad principle to overseas firms seeking to set up operations in Australia in the event that it finds a lack of willingness by other regulators to accept Australian market operators setting up in their jurisdictions without insisting on subjecting those operators to an unnecessary additional layer of local obligations.

Concluding Remarks

As mentioned, 360T has engaged with this consultation only recently and therefore has not had the time to fully address the potential impact or consequences of what is being proposed. Nevertheless, we are sure that ASIC will have grasped that our main concern is that by creating too flexible a regime that it may inadvertently create a regime that has the consequence of capturing too many market participants or a regime which gives rise to legal and regulatory uncertainty. This would be particularly tragic given that despite its faults, the current AML regime has served the Australian markets rather well.

360T would be happy to discuss our response in further detail.

Martin Oakley
Global Head: Regulatory Affairs
360 Trading Networks
Grüneburgweg 16-18/ Westend Caree
D-60322 Frankfurt am Main
Tel: +4969900289720
Mob: +447557401193
martin.oakley@360T.com