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15 September 2011

The General Manager
Retail Investor Division
The Treasury
Langton Cresent
PARKES ACT 2600

email: futureofadvice@treasury.gov.au

Dear Sir

Submission:
Exposure Draft – Corporations Amendment (Future of Financial Advice) Bill 2011

RBS Morgans management team and board of directors support the overall aims of FoFA to improve the availability and quality of advice to retail clients. We have reviewed the Corporations Amendment (Future of Financial Advice) Bill 2011 Explanatory Memorandum and the Exposure Draft and considered the practical implications of the proposed changes on the provision of financial advice to retail investors.

As such we have prepared the following submission for your consideration.

Key Observations

We have structured our comments and observations with regard to the key aims of FoFA to measure where the current structure is working and where, in our view, the proposed changes will not achieve the desired outcomes.

We understand the key aims of the FoFA reforms are broadly:

- Improve the quality of financial advice **Quality (“Q”)**
- Expand availability of more affordable forms of advice **Availability (“A”)**
- Enhance retail investor protection **Investor Protection (“IP”)**
- Improve investor confidence in the financial advice industry **Investor Confidence (“IC”)**

Given the differences between the activities of the Financial Planning Industry and the Stockbroking Industry and the way advice is provided, (in particular “time-critical” advice when advising on listed securities), we anticipate practical issues where the draft legislation will not achieve the desired aims of improving the quality of advice. In some instances, we believe it will reduce the availability of advice to retail clients investing in listed securities.

To avoid confusion, we believe it is imperative to differentiate between the activities of the Financial Planning Industry and the Stockbroking Industry, in particular where financial product advice and securities advice (advice from the representatives of Market Participants relating to the buying and selling of securities listed or in the process of being listed on a regulated exchange) is provided to retail investors. In our opinion, given the extent of regulation and supervision of Market Participants, stockbroking activities undertaken by Market Participants should be excluded from the proposed FoFA reforms in order to maintain and improve the availability and affordability of advice for retail investors.

In relation to the Exposure Draft – Corporations Amendment (Future of Financial Advice) Bill 2011, we offer the following specific comments where we think the proposed reforms will not achieve the key FoFA aims or will have issues in their practical applications. Additional background material supporting our observations is contained in the Attachment to this submission

CHAPTER 1
BEST INTEREST OBLIGATIONS

The proposed legislation will reduce the ability of Market Participants operating in "time critical" environments to act in a client's best interest	**Q**	**A**	**IP**	**IC**
Stockbrokers (Market Participants) advise clients and execute transactions in a live and dynamic market (dealing in listed securities). Once the portfolio or sector weightings are selected and settled, the monitoring of companies and providing advice by the broker-adviser is time critical with share prices continuously moving, and as a consequence limited time to react and act in a client's best interest.	✘	✘	✘	✘

The practical effects of a number of the proposals put forward in the proposed reforms will reduce the ability of the broker-adviser to give time-critical advice and in doing so act in the client's best interest as a direct result of these additional administrative burdens proposed by the Best Interest Obligations.

Recommended Solution: *We recommend where the proposed legislation requires advice to be provided to clients in writing that there be the provision where this is "**time critical**" advice that it can be provided within 5 days of the advice being provided as currently permitted for Statements of Advice.*

The proposed section 961C(2)(c) imposes significant obligations on providers to make enquiry of clients. Clients decide what information they provide to their financial adviser leaving the financial adviser exposed to subsequent claims.	**Q**	**A**	**IP**	**IC**
We are concerned how the requirement to make "*reasonable inquiries*" to determine what is "*reasonably apparent*" will work in a practical sense. It is a very wide and subjective test. Often it will only become apparent whether reasonable inquiry has been made with the benefit of hindsight. It is not reasonable that a financial adviser be required to "second guess" what has or has not been provided by a client.	✘	✘	✘	✘

The proposed legislation, in our view is unbalanced and places the financial adviser in a position of significant professional risk. Financial Advisers will be extremely reluctant to provide advice where there is doubt about whether all relevant information has been provided (this is a subjective test under the proposed legislation). We believe this will reduce the availability of advice to investors.

This provision seems to be inconsistent with ASIC Paper 164 "Additional guidance on how to scale advice". We believe this guidance serves as a practical illustration regarding how advice can be provided in these situations. Our experience in stockbroking is that a large majority of clients dealing in securities prefer scaled or "piece by piece" financial advice rather than comprehensive or "holistic" advice. In fact, we find many clients use more than one stockbroker for their investment advice and prefer to keep these relationships and information separate (a strategic choice by the client).

The proposed sections 961K (Conflict between client's interest and those of provider) and 961L (Conflict between client's interest and those of licensee and authorised representative) introduce competing obligations on Market Participants	**Q**	**A**	**IP**	**IC**
Stockbrokers operate in a highly regulated and supervised environment. It needs to be recognised in considering the extent of the best interest obligation or relevant defences to an alleged breach of that obligation, that a stockbroker providing financial product advice to a retail investor client not only has the proposed best interest obligation to consider when providing advice but also has obligations as a Market Participant.	**?**	**?**		

These obligations are often competing and may in fact mean that where they are in conflict, the stockbroker must give priority to their obligations as a Participant over those of the retail investor client. This may also from time-to-time be at odds with the requirement to give priority to the interests of the client in the event of conflict over the interests of the licensee or authorised representative.

Whilst the draft legislation stipulates that the client's best interests are to take precedence, we believe the obligations of the Market Participant to the market are of greater importance to all investors, not just the individual.

Recommended Solution: *Given the obligations of Market Participants to ASIC Market Integrity Rules may from time-to-time preclude brokers from acting in the best interests of clients, we recommend this be carved out or made as an exception and be a defence for Market Participants to any claims for loss or damages as a consequence of the proposed best interest obligations.*

CHAPTER 2
CHARGING ON-GOING FEES TO CLIENTS

The 30 day limit is administratively impractical and can expose a client in certain circumstances	**Q**	**A**	**IP**	**IC**
	?	**?**		

The 30 day limit for client response is impractical from an administrative perspective. Retail investors are notorious for not responding to paperwork and often require significant follow up. There should be flexibility in the legislation to accept responses outside this time frame in circumstances where a client may be travelling, out of the country, in hospital, etc. A 60 day term may be more appropriate.

For listed securities, many platforms use custodial or nominee services to register client holdings. If a client fails to opt-in in a limited time frame, the adviser / licensee has limited time to remove the client from the platform and this can lead to undesirable tax consequences.

Furthermore, if the client fails to opt-in within the legislated timeframe and is removed from the portfolio service, a significant administrative effort is required to re-establish the client and any adverse tax consequences from previous removal can not be reversed and will impact a client in these circumstances.

Clarification Sought*: As the provider of a portfolio service, if we elect to retain the client on the service if the client fails to respond, we then need to establish a process to exclude the client from fees. It is unclear whether we could back date those fees should the client subsequently opt back into the*

service.

***Recommended Solution**: 30 day limit should be extended to 60 days and/or a 60 day reinstatement period following the 30 day limit where a client does not respond.*

A client's failure to opt in can place an adviser in breach of a client's best interests obligations in certain circumstances

Q A IP IC

For many platforms (excluding administrative and custodial platforms) opt-in requirements are impractical in terms of any expectation to cease any further advice to a client who does not renew an arrangement (and particularly if the lack of response is outside the client's ability to respond). Many advisers would not ignore or not assist a client who needs advice particularly where a relationship has been in place for some time. For listed securities, failure to provide on-going advice on new circumstances (volatile markets, stock price movements, takeovers, new issues, change in company outlook) can be as important to a client's interests as the initial advice.

Clients can end up paying more or face uncertainty

Q A IP IC

Platforms or advice-based management platforms (particularly in securities) cement a "relationship" and advice structure between clients and advisers and facilitate efficient settlement through CHESS and other settlement platforms. Based on the draft legislation, the client may end up paying more in fees when they opt-out as the adviser would be forced to charge a flat rate, hourly rate or higher brokerage to provide the 'critical' advice sought by the client after their arrangement is terminated.

Questionable whether opt-in will improve quality and availability of advice

Q A IP IC

Will opt-in really benefit clients seeking advice? If they are not getting appropriate advice this increases the risk of entering into transactions or strategies that are either not suitable for the client, or they breach legislative rules eg contribution caps. Specifically with respect to Market Participants, what happens if there is a corporate action by a company? How is the client going to know how to respond to the corporate action and make the right decision?

CHAPTER 3
ENHANCEMENTS TO ASIC'S LICENSING AND BANNING POWERS

We support the Government's objective to increase the standard of advice across the financial services industry. We also agree with the extension of ASIC's power under the proposed legislation to include the banning of employee representatives in addition to Licensees and Authorised Representatives. Notwithstanding this, we believe the draft legislation moves beyond what is required to address any weakness in the existing legislation and provides ASIC with significant and highly subjective powers.

We do not believe these additional, highly subjective, powers are required.

Q	A	IP	IC
		?	?

The draft legislation provides ASIC with the ability to ban a person who is not of good fame and character. Is it possible for a person to pass the 'fit and proper' test (ie., be of good fame and character), and then be considered 'likely to contravene their obligations under s912A'? These two tests appear to be in conflict.

We are very concerned there appears to be no mechanism for any review or appeal process to any banning determination by ASIC under the proposed reforms. The legislation or regulations must provide for a review mechanism or process to protect the integrity of the legislation given the subjective powers being granted to ASIC. This is particularly important given the enhanced powers for ASIC (with its significant resources) to ban an individual (based on ASIC's subjective assessment) is proposed giving rise to an inequitable position for impacted individuals to appeal any decisions.

Clarification Sought*: We seek clarification about whether the current review and appeal process of the Administrative Appeals Tribunal remain unaltered under the proposed changes.*

OBSERVATIONS AND COMMENTS ON OTHER POLICY POSITIONS ANNOUNCED

We oppose the commission ban, and any opt-in ban for corporate super at the employee level **Q A IP IC**

We oppose the ban on commissions on group life insurance in all superannuation products and to commissions on any life insurance policies in a default or MySuper product ban, and any opt in ban for corporate super at the employee level.

There has been no provision in the legislation for opt-in on Corporate Super. We are comfortable with opt-in every 2 years at the *employer level but not the member level*.

We have considerable concerns about the possibility that advice services will be withdrawn as a consequence of the opt-in legislation (wrt corporate super). Industry research has shown that if members are forced to pay for advice over 50% of members will not pay for that advice leaving many exposed or uninsured[2].

From the results of a Brand Management survey conducted[2], more than two fifths of those who have used the services of a corporate super adviser say they would not be likely to use an adviser if the service wasn't provided through their super fund (44.1%). This suggests that a large proportion of members would be left without access to professional advice if the service was taken away.

We believe that a reduction in Australians getting access to advice is not the intention of FOFA, but will be the result if this goes ahead.

Conclusion

We recognise it is crucial that the outcomes of the proposed reforms deliver on their key aims. However, as proposed, there are a number of aspects that will have a severe impact on the quality and availability of advice to retail investors.

There are clear differences between Financial Planners and Market Participants in terms of regulation, supervision, capital requirements and the type of advice provided – financial product advice versus securities advice. It is not possible to have a single definition as a

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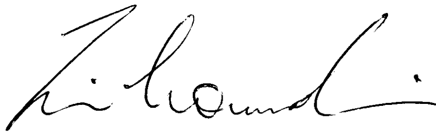
[2] Association of Financial Adviseors – AFA Corporate Super Research (conducted by CoreData) April 2011

catch-all without having an impact on the ability of Market Participants to effectively provide advice to retail investors.

Further, we are concerned that the proposed legislation is being introduced in a staged manner so that the impacts cannot be analysed as a whole and potential key impacts may be missed. For example, in addition to the anticipated Tranche 2 of the FoFA reforms we understand further amendments are proposed in relation to the definition of a Sophisticated Investor (Section 708 of Corporations Legislation) and the definition of a Financial Planner.

We trust this submission clearly sets out and explains our concerns. We would welcome any contact should you require any further clarification.

Yours faithfully
RBS MORGANS LIMITED



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ATTACHMENT

This submission is in response to Draft – Corporations Amendment (Future of Financial Advice) Bill 2011 and supplements our submission on the proposed FoFA Reforms dated 22 July 2011 addressed to:

Ms Sue Vroombout
Future of Financial Advice Unit
Department of the Treasury
Langton Cresent
PARKES ACT 2600

From the Explanatory Memorandum we understand that there are two underlying objectives of the reforms:

1. *"improve the quality of financial advice while building trust and confidence in the financial planning industry through enhanced standards which align the interests of the adviser with the client and reduce conflicts of interest."; and*

2. *"facilitating access to financial advice, through the provision of simple or limited advice.*"

We applaud these goals and concur that ongoing reform is needed to maintain the relevancy of legislative controls and ensure that the financial distress to retail investors caused by business model aberrations such as Storm, Westpoint and Trio is avoided in the future.

In preparing our submission we note that the failures, whilst causing distress to a group of retail investors, were limited to a small group of financial advisers and not the broader financial advisery community. In particular, the regulated stockbroking industry has had a relatively low level of complaints representing only 8% (134) of total complaints received in the 2009-2010 year, 6.5 times less than the financial planning industry according to the Financial Ombudsman Service. [1]

The draft legislation released on 29 August 2011 provides detail on three primary areas being best interest obligations, the "Opt-in" or renewal provisions for retail investor clients, and enhancements to ASIC's powers. We understand that the draft legislation dealing with conflicted remuneration will be provided at a later date. Clarification has also been provided regarding other FOFA elements including treatment of insurance commissions, extension of soft dollar benefits, applications of the reforms to stockbrokers, grandfathering of existing arrangements, and restriction of the use "financial planner" (which will be looked at by the end of 2011).

Requirement to distinguish between Financial Planning and Stockbroking activities

RBS Morgans is one of the oldest and largest retail focused financial advisery businesses in Australia. Within our network we undertake both stockbroking and financial planning activities. Internally we are comfortable we have a clear understanding of the difference between each service.

We believe however, that the draft legislation lacks the clarity necessary to distinguish between stockbroking and financial planning. We strongly believe this lack of clarity will result in adverse consequences for the practical implementation of the legislation which in turn, will have a detrimental impact on achieving the reform goals.

The Background Material of the Press Release accompanying the Explanatory Memorandum and Exposure Draft outlined the application of the reforms to stockbrokers including:

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[1] Financial Ombudman Service: 2009-201 Annual Review.

- *“the core activities of the stockbroking industry will not be unduly impacted by the FOFA reforms”;* and
- *“other aspects of the reforms, including the obligation to act in the best interests of clients, would have full application to brokers where they provide financial advice to retail investor clients”*

We believe that both of these statements could be open to different interpretations and different practical applications, which in turn could dilute the success of the Reform goals. A more robust definition of the differences between stockbroking and financial planning activities could assist avoid any ambiguity.

RBS Morgans operates on the basis of there being a clear difference between stockbroking and financial planning.

Financial planning involves helping retail investors define their investment goals and tailoring financial solutions to help reach those goals. Advisers providing financial planning advice are qualified professionals authorised to advise on all aspects of wealth management, not just buying and selling shares. Financial planning activities consider investment strategy, investment structures, tax planning, budgets, asset allocation, risk profiling, superannuation - including self managed super funds, life insurance and estate planning in addition to each individual’s personal circumstances and financial commitments.

Stockbroking involves the activities around buying and selling of securities in listed companies and associated derivative products. Advisers undertaking stockbroking activities must be qualified professionals authorised to buy and sell shares on licensed stock exchanges such as the Australian Securities Exchange (ASX), the National Stock Exchange of Australia (NSX), or the soon to be launched Chi-X Australia. Advising and trading on behalf of clients in derivative products requires additional accreditation and authorisation. Retail investor clients are charged a one-off transaction fee for each stockbroking transaction that is usually based on the value of the transaction.

As detailed in our previous submission and summarised on page 4 of that document under “***MARKET PARTICIPANTS ARE HIGHLY REGULATED – THIS IS WORKING***”, stock market participants in Australia are already subject to a higher level of regulation and ASIC oversight than other AFSL holders. Our previous submission pointed to the relatively low incidence of complaint in relation to investments against stockbrokers compared to complaints against financial planners. We believe this indicates the current, additional regulation of stockbroking is working.

We strongly suggest that a clear and simple definition of stockbroking activities that removes potential ambiguity or different applications of the Draft Legislation would assist in ensuring the FoFA reform goals are achieved. Our recommendation would be to define stockbroking as those activities undertaken by Market Participants on ASX, Chi-X, NSX and other licensed and regulated stock exchanges, and that these activities and remuneration for these activities be carved out of the FOFA reforms.

We note that Treasury intends releasing a public consultation paper before the end of 2011 on restricting the term “financial planner”. We believe this would be of great assistance in providing retail investors comfort that the individual providing investment advice has attained the requisite qualification, authorisation, experience and ongoing education required to provide holistic investment advice, and conversely, clearly indicate the regulated boundaries or limits of other financial advisers.

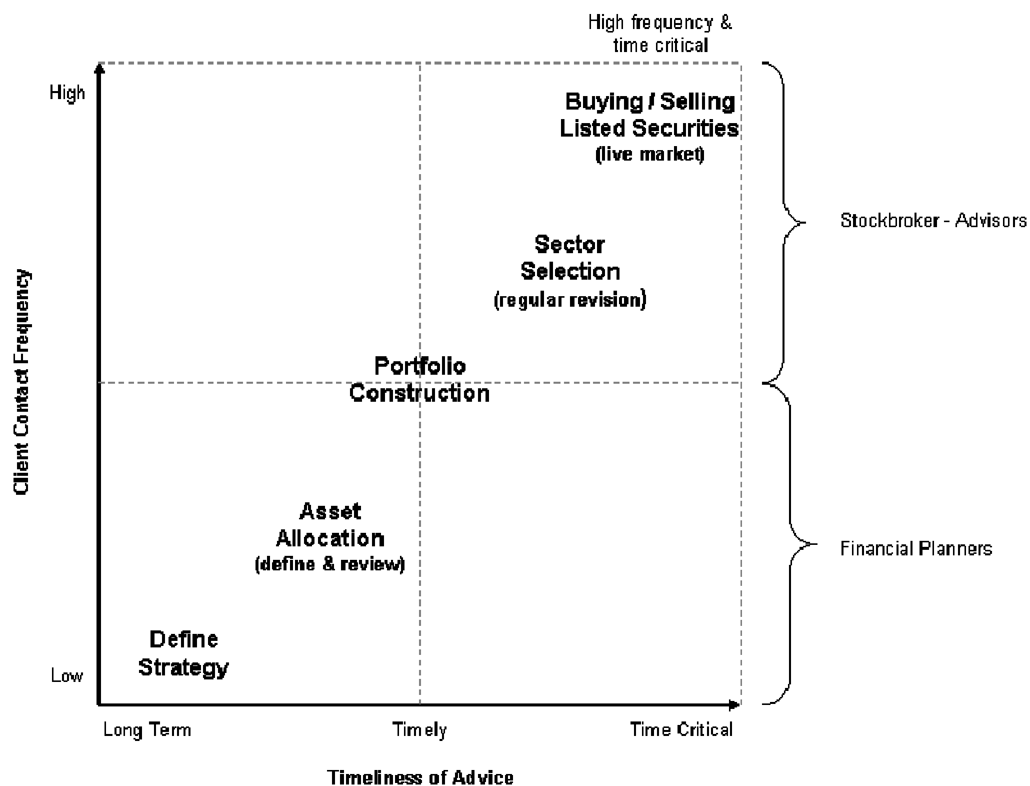
Notwithstanding this, our specific comments on the proposed reforms set out in Tranche 1 follow:

CHAPTER 1
BEST INTEREST OBLIGATIONS

There are significant differences in the nature of the advice provided by financial planners and stockbrokers. These differences must be understood in order to consider the practical shortfalls of the proposed legislation in respect of the quality and availability of advice to retail investors.

Stockbrokers operate in "time critical" environments

The following diagram sets out a summary of the principal areas of advice. In particular the "environment" in which this advice is provided.



Financial Planners operate in an environment of strategic advice which is directed to the long term goals with timely revisions and adjustments. These revisions and adjustments typically take place at 6 monthly or annual intervals.

Stockbrokers advise clients and execute transactions in a live and dynamic market which is continuously moving. Once the portfolio or sector weightings are selected and settled, the monitoring of companies and providing advice by the broker-adviser is in a time critical environment with share prices continuously moving and often limited time to react and act in a client's best interest. In our view, Stockbrokers have been operating in an environment of Client's Best Interests since the final introduction of the CLERP reforms in March 2004 in line with the requirements of the "know your client" and "statements of advice". We note the new obligations in the FoFA Legislation replace these provisions.

This fundamental difference means that the practical effects of a number of the proposals put forward in the proposed reforms will not achieve the desired outcomes of the FoFA Reforms

and in fact will reduce the ability of the broker-adviser to give time-critical advice and in doing so act in the client's best interest as a direct result of the additional administrative burdens proposed by the Best Interest Obligations.

Recommended Solution*: We recommend where the proposed legislation requires advice to be provided to clients in writing that there be the provision where this is "**time critical**" advice that it can be provided within 5 days of the advice being provided as currently permitted for Statements of Advice.*

Failure to recognise this issue in the legislation and place significant administrative and time burden on broker advisers will result in a near complete removal of access for retail investors to timely and time-critical securities and market advice.

The Best Interest Obligations introduce a significant imbalance of obligations between providers and clients – 961C(2)(c)

The proposed section 961C(2)(c) imposes significant obligations on providers to make enquiry of clients. Clients decide what information they provide to financial advisers leaving financial advisers exposed to subsequent claims.

Market Participants and AFSL holders have been operating in an environment of "know your client" and "statement of advice" since the introduction of the final CLERP amendments in 2004. In our experience as a Market Participant, these requirements are working, as evidenced by the low level of complaints against stockbrokers[2].

We are concerned how the requirement to make "*reasonable inquiries*" to determine what is "*reasonably apparent*" to obtain complete and accurate information will work in a practical sense. It is a very wide and subjective test and often it will only become apparent whether reasonable inquiry has been made with the benefit of hindsight and analysis and with a different perspective on what would have constituted "reasonable inquiries", especially in the circumstances where a client is preparing to make a claim against a financial adviser. It is not reasonable that a financial adviser be required to "second guess" what has or has not been provided by a client.

The proposed legislation, in our view is unbalanced and places the financial adviser in a position of significant professional risk to the investor. Financial Advisers will be extremely reluctant to provide advice where there is doubt whether all relevant information has been provided (this is a subjective test under the proposed legislation) which will reduce the availability of advice to investors.

This provision seems to be inconsistent with ASIC Paper 164 "Additional guidance on how to scale advice". We believe this guidance serves as a practical illustration regarding how advice can be provided in these situations. Our experience in stockbroking is that a large majority of clients dealing in securities prefer scaled or "piece by piece" financial advice rather than comprehensive or "holistic" advice. In fact, we find many clients use more than one stockbroker for their investment portfolio and prefer to keep these relationships and information separate. This is a strategic decision by the client.

We believe the broad requirements of the "subject matter of advice" and the objective test of "reasonably apparent" as proposed un the new section 621C(2) will reduce the availability of advice in listed securities, particularly if tailored or scaled advice is not permitted. This is inconsistent with the FoFA objectives.

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[2] Financial Ombudsman Service 2009-2010 Annual Review

Brokers have competing obligations to the proposed Best Interest Obligations

The proposed sections 961K (Conflict between client's interest and those of provider) and 961L (Conflict between client's interest and those of licensee and authorised representative) introduce competing obligations on Market Participants

Stockbrokers operate in a highly regulated and supervised environment. It needs to be recognised in considering the extent of the best interest obligation or relevant defences to an alleged breach of that obligation, that a stockbroker providing financial product advice to a retail investor client not only has the proposed best interest obligation to consider when providing advice but also has obligations as a Market Participant.

These obligations are often competing and may in fact mean that where they are in conflict, the stockbroker must give preference to their obligations as a Participant over those of the retail investor client. This may also from time-to-time be at odds with the requirement to give priority to the interests of the client in the event of conflict over the interests of the licensee or authorised representative.

For example, in general terms the firm and its advisers are required to follow a client's instructions. However, the firm may breach its obligations as a Market Participant by executing such instructions where the execution of those trades leads for example to market manipulation; creating a false and misleading appearance of active trading; trades involving no change in beneficial ownership or a general failure to maintain an orderly market. This is despite the fact that it may be in the client's best interest to have the trade executed.

There are also prohibitions on giving advice where that would amount to insider trading. For example, in addition to the general Corporations Act insider trading prohibition, the ASIC Market Integrity Rules prohibit a Market Participant from using certain information learned from a client to advise another client in a way that would damage the interests of either client.

That is, despite the fact that it may be in a client's best interests to have that information or advice when making an investment decision – even if not disclosed to the market.

Whilst the draft legislation stipulates that the client's best interests are to take precedence, we believe the obligations of the Market Participant to the market are of greater importance to all investors, not just the individual.

Recommended Solution*: Given the obligations of Market Participants to ASIC Market Integrity Rules may from time-to-time preclude brokers from acting the in the best interests of clients, we recommend this be carved out or made as an exception and be a defence for Market Participants to any claims for loss or damages as a consequence of the proposed best interest obligations.*

CHAPTER 2
CHARGING ON-GOING FEES TO CLIENTS

It is proposed, where an ongoing financial advice relationship exists with a retail investor client, advisers are required to discharge two separate obligations:

- Disclosure obligation: the adviser must provide a fee disclosure statement to the client outlining fee and service information relevant to the client
- Renewal notice obligation: the adviser must provide both a fee disclosure statement and a renewal notice to the client in order to continue charging an ongoing fee for a period longer than 24 months.

Opt-in applies in situations where advisers provide **financial product advice** to retail investor clients and the client pays a fee which does not relate to advice already provided. That is, opt-in does not apply to payment plans for advice or services already provided

We believe clarification is required for the definition of "financial products advice", especially as it relates to "securities" advice or financial services.

Our specific concerns in relation to the proposed opt-in obligations:

The 30 day limit is administratively impractical and can expose a client

The 30 day limit for client response is impractical from an administrative perspective. Retail investors are notorious for not responding to paperwork and often require significant follow up. There should be flexibility in the legislation to accept responses outside this time frame in circumstances where a client may be travelling, out of country, in hospital, etc. A 60 day term would be more appropriate.

For listed securities, many platforms use custodial or nominee services to register client holdings. If a client fails to opt-in in a limited time frame, the adviser / licensee has limited time to remove the client from the platform and this can lead to undesirable tax consequences where holdings are removed from the platform.

Furthermore, if the client fails to opt-in within the legislated timeframe and is removed from the portfolio service, a significant administrative effort is required to re-establish the client and any adverse tax consequences from previous removal can not be reversed and will impact a client in these circumstances.

Clarification Sought*: As the provider of a portfolio service, if we elect to retain the client on the service if the client fails to respond, we then need to establish a process to exclude the client from fees. It is unclear whether we could back date those fees should the client subsequently opt back in to the service.*

Recommended Solution*: 30 day limit should be extended to 60 days and or a 60 day reinstatement period following the 30 day limit where a client does not respond.*

A client's failure to opt in can place an adviser in breach of a clients best interests obligations in certain circumstances

For many platforms (excluding administrative and custodial platforms) opt-in requirements are impractical in terms of any expectation to cease any further advice to a client who does not renew an arrangement (and particularly if the lack of response is outside the client's ability to respond). Many advisers would not ignore or not assist a client who needs advice particularly where a relationship has been in place for some time. For listed securities, failure to provide on-going advice on new circumstances (volatile markets, stock price movements, takeovers, new issues, change in company outlook) can be as detrimental to a client's interests as the initial advice.

Clients can end up paying more or face uncertainty

Platforms or advice-based management platforms (particularly in securities) largely cement a "relationship" and advice structure between clients and advisers and ease of settlement through CHESS and other settlement platforms. Based on the draft legislation, the client may end up paying more in fees when they opt-out as the adviser would likely charge a flat rate, hourly rate or higher brokerage to provide the 'critical' advice sought by the client after their arrangement is terminated.

Questionable whether opt-in will improve quality and availability of advice

Will opt-in really benefit clients seeking advice? If they are not getting appropriate advice this increases the risk of entering into transactions or strategies that are either not suitable for the client, or they breach legislative rules eg contribution caps. Specifically in relation to Market Participants, what happens if there is a corporate action by a company? How is the client going to know how to respond to the corporate action and make the right decision?

We believe the proposed reforms relating to opt-in completely misses the point with regard to the establishment of long term relationships between advisers and clients.

To quote from an article written by Richard Klipin, CEO of Association of Financial Advisers (AFA) for The Australian Journal of Financial Planning, August 2010:

'…those people who have an advice relationship have a greater level of understanding of their finances, are happier with their investments and recognise that the benefits of advice go beyond that of product and strategy expertise. By choosing to seek guidance from a professional, they now have certainty around their financial future and greater peace of mind.'

CHAPTER 3
ENHANCEMENTS TO ASIC'S LICENSING AND BANNING POWERS

We support the government's objective to increase the standard of advice across the financial services industry. We also agree with the extension of ASIC's power under the proposed legislation to include the banning of employee representatives in addition to Licensees and Authorised Representatives. Notwithstanding this, we believe the draft legislation moves beyond what is required to address any weakness in the existing legislation and provides ASIC with significant and highly subjective powers.

Further, the draft legislation groups all licensees into one category and does not does not recognise or take into account that Market Participants operate in an environment of significantly more regulation and surveillance than other AFSL Holders.

The draft legislation also provides ASIC with the power to ban employees of a licensee – even where those employees may not have been directly involved in matters leading to the licensee being suspended or cancelled.

We do not believe these additional, subjective, powers are required.

The draft legislation provides ASIC with the ability to ban a person who is not of good fame and character. We question whether is it possible for a person to pass the 'fit and proper' test (ie, be of good fame and character), and then be considered 'likely to contravene their obligations under s912A'? These two tests appear to be in conflict.

Clarification Sought*: We seek clarification that the current review and appeal process of the Administrative Appeals Tribunal remain unaltered under the proposed changes.*

OBSERVATIONS AND COMMENTS ON OTHER POLICY POSITIONS ANNOUNCED

1. Commissions on Insurance and Corporate Super Opt-In

We understand the proposed law as it applies to insurance is as follows:

1. Banning on commissions on insurance outside super has been excluded.
2. Risk commissions under FoFA will now be allowable on individual life insurance policies written via superannuation choice products and self managed superannuation funds.
3 An ongoing fee to a retail investor client does not include a commission incorporated into an insurance premium. This means that the opt-in provisions in the Exposure Draft do not apply to the commissions contained within an insurance policy.
4. The ban will apply to commissions on group life insurance in all superannuation products and to commissions on any life insurance policies in a default or MySuper product from **July 2013.**

We have no issues with points 1 – 3 above which we view as a positive change to what was originally proposed.

However we oppose the commission ban, and any opt-in ban for corporate super at the employee level.

There has been no provision in the legislation for opt-in on Corporate Super. We are comfortable with opt-in every 2 years at the *employer level but not the member level*.

We have considerable concern about the possibility that advice services will be withdrawn as a consequence of the Opt-in legislation (wrt corporate super). Industry research has shown that if members are forced to pay for advice, over 50% of members will not pay for that advice leaving many exposed or uninsured[2].

From the results of a Brand Management survey conducted[3], more than two fifths of those who have used the services of a corporate super adviser say they would not be likely to use an adviser if the service wasn't provided through their super fund (44.1%). This suggests that a large proportion of members would be left without access to professional advice if the service was taken away.

We believe that a reduction in Australians getting access to advice is not the intention of FOFA, but will be the result if this goes ahead.

2. Extension of ban on soft dollar benefits

We have no comments on the extension of the ban on soft dollar benefits.

[2] Association of Financial Advisers – AFA Corporate Super Research (conducted by CoreData) April 2011