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**Attention:**

Christian Mikula  
Manager  
Retail Investor Division

Dear Christian

**Exposure Draft - Regulating Eligible Emissions Units as Financial Products**

We make the following comments on the exposure draft of the Corporations Amendment Regulation 2012.

**1 Commencement date**

Draft regulation 7.1.07I in effect defers the units becoming financial products until 1 July 2012.

This raises 2 issues that are discussed in more detail below:

- there is other legislation that could benefit from a transitional period;
- the period of deferral is very likely to leave insufficient time for persons requiring an Australian financial services (“AFS”) licence to obtain a licence (or vary an existing licence) as currently it is not possible to apply for the necessary licence authorisations.

*Other legislation*

The exposure draft released in November 2012 was accompanied by draft Australian Securities and Investments Commission Amendment Regulations. If the operation of the Corporations Act in respect of units is to be deferred, it would be logical for the operation of the ASIC Act to also be deferred.

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (“**AML/CTF Act**”) applies to any person that provides a *designated service*. As a consequence of the *Carbon Credits (Consequential Amendments) Act 2011* (“**Carbon Act**”) acquiring or disposing of carbon units, ACCUs or eligible international emissions units as agent for a person will be a *designated service*. A person that holds an AFS licence will also provide a designated service if they arrange for a person to receive this service.

The AML/CTF Act imposes extensive obligations on providers of designated services. To comply with many of these obligations significant lead time is required in order to both create appropriate processes and procedures and to implement those processes and procedures (for example, an AML/CTF Program that has been approved by the board must be in place). In recognition of this the AML/CTF Act had a phased 2 year transition period.

We understand that it is not proposed to provide any transitional relief to persons that will provide designated services as a consequence of the Carbon Act. We submit that it is appropriate to provide such relief on the basis that:

- it is necessary to enable entities to develop processes and procedures to comply with the AML/CTF Act (in particular for those entities that are not currently regulated under the AML/CTF Act); and
- it is consistent with the relief provided from compliance with Chapter 7 of the Corporations Act.

#### *AFS licensing timing*

A person who carries on a business of providing financial services in relation to units in Australia will need to hold an Australian financial services (AFS) licence covering the provision of the financial services or satisfy a licensing exemption.

Existing licensees who will provide financial services in relation to units will need to vary their licences. Applicants will need to convince ASIC to vary their AFS licences to cover their activities in relation to units and to put in place compliance measures in relation to those activities. Traders and others who do not currently have an AFS licence and require one, will need to apply for one. This will require the investment of considerable time in preparing a comprehensive licence application and also ongoing financial, compliance and other resources.

Before commencing an application, ASIC will need to develop new policies and the electronic licence application and variation system must be amended to allow authorisation in respect of units. ASIC will need to determine its competence, experience and qualification requirements for services provided in relation to units and also registered managed schemes that invest in units. ASIC will need to decide what it requires given it is not possible to have experience in new units that are yet to be created.

There is a risk that ASIC will not adopt new policies and systems with enough time for entities to apply for an AFS licence (or a licence variation). As currently drafted in Corporations Regulation 7.1.07I, the deferral period would have already begun and ASIC has not released any new policies.

If an entity needs an AFS licence or needs to vary an existing licence, we expect that it might take between 3 to 6 months to obtain the licence or variation after ASIC adopts its new policies and systems. This assumes that ASIC's policies will not require applicants to undergo any new courses to satisfy's ASIC's requirements.

Previously, entities needing an AFS licence have had longer to obtain one. For example:

- when the AFS licence first came into effect, there was a 2 year transition (Part 10.2 of the Corporations Act);
- most recently, when margin lending products were added as a financial product, there was effectively a 12 month period for entities that applied for a licence within the first 6 months of the commencement date (section 1490).

We suggest that there be a separate longer transitional period for obtaining a new or varied AFSL.

## **2      *Draft Regulation 7.1.35C applies only to carbon units***

The regulation will in effect exempt dealing by a person in a carbon unit on behalf of a related body corporate or associated entity of the person to require an AFS licence. However it does not also apply to ACCUs eligible international emissions units. It is not clear why the regulation shouldn't also apply to ACCUs and eligible international emissions units. This regulation is inconsistent with the approach taken with respect to the other proposed exemptions in the draft regulations, which apply to all types of eligible emissions units.

## **3      *Draft Regulation 7.6.01(1)(ma) and ACCU projects***

The regulation will apply only for dealings entered into for the purpose of managing financial risk in relation to the surrender, cancellation or relinquishment of the relevant unit (draft regulation 7.6.01(1)(ma)(iii)).

This wording will limit the application of the licensing exemption in relation to operators of projects that will produce ACCUs as it excludes the ability to "transfer" ACCUs. For example, to obtain certainty for a project, a project operator might at the beginning of a project agree to transfer the ACCUs as they are issued at the end of a successful project's crediting period in return for a pre-agreed price. That is, the operator will enter into a derivative contract to manage the financial risk of the project in relation to the eventual sale of the ACCUs. The proposed wording in regulation 7.6.01(1)(ma)(iii) will not apply in this situation because the operator will transfer the ACCUs rather than surrender, cancel or relinquish them. Even though the operator will not require an AFS licence when it transfers its units if it is dealing as principal (section 766C(3)), it may require one for the dealings in derivatives.

Please do not hesitate to contact me with any queries.

Yours sincerely

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The Treasury

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