Investment & Financial Services Association Ltd
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12 June 2008

Senator the Hon John Faulkner
Special Minister of State and
Cabinet Secretary
Parliament House
CANBERRA ACT 2600

Dear Minister

RE: Lobbying Code of Conduct (Code): Application to Corporate Groups

I am writing on behalf of a large number of IFSA member companies regarding a significant anomaly in the requirements of the Code for registration of lobbyists. I understand that this matter has been raised with you by at least one of our members, and that there has been consultation between one of your Departmental officers and a number of IFSA members in an effort to resolve the issue.

Consultations with your Department have involved discussion of possible amendments to the questions and answers which interpret the Government's requirements under the Code. These consultations have unfortunately failed thus far to produce, in our view, a workable outcome.

Under the Code, employees of a company, including designated government relations staff, who engage with Ministers or officials in an attempt to influence Government decision making are not required to register as lobbyists because they are not third parties. However, the anomaly arises for any large company, which has a holding company with a number of wholly owned and controlled subsidiaries, operating as a single ASX listed entity that is a corporate group.

According to the current set questions and answers appearing on the Departmental website, the holding company must register as a lobbyist for its staff to communicate with Ministers or officials on behalf of any of these wholly owned subsidiaries that are the constituent parts of the listed entity (see part 4 of question 5 (Do I need to register?)). In other words, wholly owned subsidiaries will be treated as third party or consultant lobbyists when in fact there is no third party relationship.

The Lobbying Code of Conduct defines both lobbying and lobbying activity. Communications with a Government representative include oral, written and electronic communications. Lobbying activities means communications with a Government representative in an effort to influence Government decision-making. This includes, but is not limited to, the making or amendment of legislation, the development or amendment of a Government policy or program, the awarding of a Government contract or the allocation of funding.

It is the nature of this modern business that large financial institutions employ a large number of legal, regulatory, compliance, taxation and other specialists to deal with legislative and regulatory matters. As a consequence, parts 4 and 5 of question 5 require will effectively require the holding company to register every lawyer and every member of their compliance and regulatory teams who have direct contact with Government on behalf of a subsidiary

which would be part of a corporate group. As you are aware financial services corporate groups include and are required to establish specialist companies as trustee or the responsible entity where they offer superannuation or managed investment products.

It would be a significant, complex and expensive task to identify all management and staff, and all of the entities that will be subject to registration under the code. That process will be made infinitely more costly and onerous because of the requirement to continually update the register by listing and delisting individuals dealing with matters that are relevant to wholly owned and controlled subsidiary companies.

Such an obligation under the Code will require nothing less than the installation of another layer of compliance infrastructure across the full range of these institutions' operations. Even when those systems are in place, ensuring compliance with the registration requirements of the Code before an employee of one of these institutions deals with a minister, an official or a regulator will significantly impede the speed and efficiency of communication between the largest members of the financial services industry and Government. This outcome is totally at odds with the impressions the Labor Party sought to convey before the election that its intention was to reduce regulation and remove unnecessary red tape.

In consultation with your Department, one of the proposed amendments provided to IFSA and some of its members by a Departmental officer include a diagram of a corporate structure that sought to differentiate the holding company and a first line of subsidiary companies from the subsidiaries to the first line of subsidiary companies. In that case, the holding company would not be required to register if it was acting on behalf of itself or one of these first line subsidiary companies but would be required to register if it was acting on behalf of a subsidiary to one of the first line subsidiary companies. This is, in our view, illogical and provides no practical relief.

Subsidiaries to the first line subsidiary companies of the holding company are wholly owned and controlled by the corporate group so there is no third party. Secondly, in many cases the subsidiaries of the first line subsidiary companies will in fact be principal or major operating assets of the corporate group and are the entities for which most interactions with Government will be initiated.

This draft question and answers also specify that the entity which should be registered is the service company through which the staff who do the lobbying are employed. These staff are often, but not always, employed by a services company which is one of the wholly owned and controlled subsidiaries that are the constituent parts of the listed entity. However, the service company would not be an appropriate entity to register as a lobbyist because it is only there to provide an efficient, centralised payroll and human resources function, and not to control the duties of the employees which are determined according to the requirements of the total corporate group.

The people who are to be treated as third party lobbyists under either the existing or suggested revised question 5 are the management and staff of the listed entity, many of whom would work across the various wholly owned and controlled businesses that comprise the corporate group. Any employee of the listed entity who is required to engage with a Minister or official in an attempt to influence government decision making for one of the subsidiaries would be acting as the employee of both the wholly owned and controlled subsidiary and the listed entity. Since the subsidiary is wholly owned and controlled by the listed entity there is no third party and no ambiguity as to whom the employee is representing.

The use of these holding company structures has, of course, a wider taxation and regulatory context. Since the introduction of the concept of consolidated groups into taxation law, companies have had the option of having the tax liabilities of all of their wholly owned and controlled subsidiaries dealt with in a consolidated return. Additionally, acceptance of NOHC (non-operating holding company) structures was explicitly recommended in the report of the Wallis Inquiry into the financial system because they are an efficient means of structuring a

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modern diversified financial services company and they prevent arbitrage of the regulatory system.

The solution to this problem is to recognize that corporate groups with a holding company structure are no different to other companies, and that holding companies' subsidiaries are not their clients. Both types of companies should be dealt with in accordance with the following paragraph from page 2 of the Lobbying Code of Conduct:

> *"For the avoidance of doubt, this Code does not apply to any person, company or organization, or the employees of such company or organization, engaging in lobbying activities on their own behalf rather than for a client, and does not require any such person, company or organization to be recorded in the Register of Lobbyists unless that person, company or its employees also engage in lobbying activities on behalf of a client or clients."*

This could be given effect by two means:

(1) Clarifying the paragraph above to include specific reference to corporate groups, i.e.: "such company, corporate group or organization", and

(2) Removing parts 4 and 5 from question 5 of the current questions and answers on the departmental website.

We would be pleased to provide you with further assistance or clarification if required.

Yours sincerely

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Chief Executive Officer

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