



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

24 August 2021

Product Design and Distribution Obligations Team
Financial Services Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

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Dear Sir/Madam

Application of design and distribution obligations to financial planners

The Financial Planning Association of Australia¹ (FPA) formally requests urgent relief using ASIC's modification and exemption powers under s994L of the Corporations Act, from specific DDO reporting requirements for financial planners providing personal financial advice to retail clients.

While the FPA supports the ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/ currently out for stakeholder consultation, we are disappointed that it does not address the unnecessary and unworkable record keeping and reporting obligations the DDO Act places on financial planners.

Treasury's recently released paper - *Amendments to the Design and Distribution Obligations* states:

The Design and Distribution Obligations (DDO) are intended to help consumers obtain appropriate financial products by requiring issuers of financial products to determine an appropriate target market for these products, and requiring issuers and distributors to take reasonable steps to ensure that products are distributed accordingly. The obligations require issuers and distributors to develop and maintain effective product

¹ The Financial Planning Association (FPA) is a professional body with more than 12,000 individual members and affiliates of whom around 8,500 are practising financial planners and 5,207 are CFP professionals. Since 1992, the FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of the Future of Financial Advice reforms.
- The FPA was the first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- We built a curriculum with 18 Australian Universities for degrees in financial planning through the Financial Planning Education Council (FPEC) which we established in 2011. Since 1 July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- When the Financial Adviser Standards and Ethics Authority (FASEA) was established, the FPEC 'gifted' this financial planning curriculum and accreditation framework to FASEA to assist the Standards Body with its work.
- We are recognised as a professional body by the Tax Practitioners Board.

governance arrangements across the life cycle of financial products. This will promote better provision of products to consumers that are likely to be appropriate for them.

...The Government intends to make a number of amendments to achieve its intended operation of these reforms. These amendments are necessary to clarify the law, to ensure a consistent application of the law, and that the regime remains fit-for-purpose.

However, applying the DDOs to planners ignores the higher standards of the financial advice regime and brings into question whether some elements of the regime are fit-for-purpose. For example, the application of the DDOs to financial planners ignores the requirement that planners must ensure their advice must be appropriate for them. This is a higher standard than the aim that products are 'likely to be' appropriate for consumers.

Application of DDO reporting and record keeping requirements to financial planners

The reporting and record keeping requirements in the DDO regime look at product regulation from the product perspective and the potential risk/harm posed to retail clients, as identified under the TMD, as a whole.

In contrast, when providing personal advice, financial planners consider the appropriateness of each product recommendation in relation to the individual client's circumstances and as one part of that client's broader financial plan. The best interest obligations in the Corporations Act and the standards of the new Financial Planner Code of Ethics, oblige financial planners to undertake significant product research and comparisons to determine whether a product is appropriate for that client's circumstances. The product must be suitable for the role it will play in the financial plan to achieve the client's immediate and longer-term goals and meet likely future interests and needs. These obligations also require planners to clearly demonstrate that the client would be in a better financial position and that it would improve the client's financial wellbeing if the advice were followed. This will be different for each client of the financial planner.

Financial planners do not have a 'whole of market' view of investors of a particular product. Planners would only be privy to consumers who invest in a product if they are clients of the planner. If the planner has recommended the product through the provision of quality personal advice in the best interest of their client, the planner has considered all risks of the product in relation to the individual client's circumstances and determined that the product is appropriate. As a planner's product recommendation is based on this client/product assessment and not the product TMD, the client may fall outside the issuer's target market for that product.

Hence, reports from financial planners about whether a product presents harm or risks to consumers invested outside the TMD will likely taint the data about the product.

Financial planners have stringent disclosure, record keeping and reporting requirements under the financial advice provisions in the Corporations Act. Imposing additional reporting and record keeping requirements that do not naturally 'fit' in existing advice processes and reporting, would create an additional onerous administrative burden for planners as the conclusions a planner draws about the risks and appropriateness of a product will differ based on each client's circumstances.

Given financial planners are permitted to provide personal financial advice that is inconsistent with the product issuer's TMD, the FPA questions whether any additional consumer protections would be gained by imposing the DDO reporting and record keeping obligations on planners.

Excluded conduct

Provisions in the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (the DDO Act) apply to 'regulated persons' as defined in s1011B of the Corporations Act 2001. This includes "any financial service licensee" and "any authorised representatives of a financial services licensee".

However, 'excluded conduct' is defined in s994A of the DDO Act as:

excluded conduct means:

- (a) *an excluded dealing; or*
- (b) *providing personal advice.*

Section 994E(6) exempts the implementation of personal financial advice from the s994E(5) requirement that 'regulated persons' must take 'reasonable steps' to ensure consistency with target market determinations:

- (6) *A regulated person is not taken to have failed to take reasonable steps for the purpose of paragraph (3)(d) if the person engages in retail product distribution conduct that:*
 - (a) *relates to a particular retail client; and*
 - (b) *relates to a particular financial product; and*
 - (c) *is necessary to implement personal advice given to the client in relation to the product.*

However, s994F of the DDO Act sets record keeping and notification obligations which apply to all 'regulated persons':

- (3) *The regulated person must collect and keep complete and accurate records of the following information (distribution information) in relation to the product:*
 - (a) *the number of complaints in relation to the product that the regulated person receives;*
 - (b) *the steps the regulated person has taken in relation to the product as required by section 994E (reasonable steps to ensure consistency with the target market determination);*
 - (c) *if the regulated person is specified in the determination as required to report information of a specified kind to the person who made the*

determination (see subparagraph s994B(5)(h)(i))—information of that kind that the regulated person acquires;

- (d) *if the regulated person is not the person that made the determination—the dates on which the regulated person reported as required by subsection (4), (5) or (6) and the substance of the reports.*

The record keeping requirements in s994F(3) apply to all regulated persons including financial planners providing personal advice. However, excluded conduct (ie. personal financial advice) is exempt from the requirement to take “reasonable steps to ensure consistency with the target market determination” under s994E.

It is inconsistent and unreasonable to require a person to report and keep records on actions that the person is legally exempt from undertaking. This is a significant concern given a failure to comply with the provisions in s994F is an offence and a civil penalty provision and will also likely result in stringent ASIC reporting requirements under the pending new breach reporting requirements.

The Act also fails to take into account the practical implausibility of financial planners being able to meet these requirements. For example:

- Fee-for-service advice – the financial planning profession has progressively changed its business and remuneration models in recent years with many financial planners moving to a fee-for-service advice model. Under these arrangements, it may be the case that a planner provides a client with an SOA for the client to consider and implement themselves, including investing in recommended products. Financial planners may also assist with implementing the advice recommendations in relation to product investments. However, there may be no ongoing relationship with the client.
- Third party authority – if a client arranges third party authority oversight of their accounts for the financial planner, under the DDO the product provider then identifies the financial planner as “distributor of product” even if the planner is just gathering information about the client and does not provide any advice on the actual product. Under the DDOs this will result in the planner having ongoing reporting about the product.

Excluded dealing

Similarly, ‘excluded dealing’ is defined in the DDO:

excluded dealing means a dealing in a financial product that consists of arranging for a retail client to apply for or acquire the product, where the arranging is undertaken:

- (a) *by a person, or by an associate of a person; and*
- (b) *for the purpose of implementing personal advice that the person has given to the retail client.*

Section 994F(6) states:

- (6) *If the regulated person:*
- (a) *becomes aware of a significant dealing in the product; and*
 - (b) *becomes aware that the dealing is not consistent with the target market determination;*

the regulated person must, as soon as practicable, and in any case within 10 business days, report the dealing, in writing, to the person who made the determination.

The FPA is concerned that the DDO Act creates reporting and record keeping obligations requiring financial planners providing 'excluded conduct' and undertaking 'excluded dealing', to report to product providers if the dealing is not consistent with the target market determination, and where there is a significant dealing, even though financial planners are exempt from the requirement to meet the target market determination requirements when providing personal financial advice to retail clients. This exemption was provided in recognition of the financial advice best interest duty in the Corporations Act. This is clearly acknowledged in s994G and the 'excluded dealing' definition of the DDO Act, which also exempts the reporting to ASIC if the dealing is not consistent with the determination and personal advice has been provided to a retail clients.

Product providers' requirements of planners

Section 994B(5)(h) states:

- (5) *A target market determination for a financial product must:*
- (h) *specify the kinds of information needed to enable the person who made the target market determination to identify promptly whether a review trigger for the determination, or another event or circumstance that would reasonably suggest that the determination is no longer appropriate, has occurred and, for each kind of information, specify:*
 - (i) *the regulated person or regulated persons that, under subsection 994F(5), are required to report the information to the person who made the determination; and*
 - (ii) *a reporting period for reporting the information under subsection 994F(5).*

The position taken by the Financial Services Council in response to CP325 and tabled at ASIC's March 2020 DDO roundtable, strongly indicates product providers' desire to use s994B(5)(h) to abscond from their responsibility for monitoring and investigating the ongoing appropriateness and effectiveness of a target market determination and potential risk of harm to consumers, by pushing it onto financial planners even though they are permitted to provide personal financial advice that is inconsistent with the target market determination. The FPA strongly opposes this approach and suggests this is not in line with the intent or letter of the legislation.

Product providers have direct access to credible and detailed information about their products:

(a) complaints data:

- These should only be required when a complaint is received, as opposed to reporting on a regular/quarterly basis or 'reporting period' set by the issuer. Thus, the process could be integrated into the distributor company's IDR process flow and be provided to a product issuer within the new 30 day timeframe for IDR obligations.
- Similarly, EDR and AFCA complaint systems have publicly available information that shows how many complaints are made against product types. This provides an opportunity to consolidate the necessary information issuers and distributors need to keep and who they should report complaint data to, and how it can be used.

(b) consumer feedback (including on the performance of the product):

- Issuers should seek their own feedback about the performance of their products from consumers and not require this from financial planners.

(c) requests for information from consumers:

- Similar to complaints data, application forms can also be a tool to provide the information from consumers to issuers on the appropriateness of their target market determination. This puts feedback straight to the issuer as opposed through a secondary source, which is at risk of misinformation, mis-interpretation, data quality and strenuous resource use from the distributor.

(d) percentage of sales to consumers who are not in the target market:

- Product manufacturers should use application forms as a means to capture the appropriate data to enable the ongoing assessment of target market determinations. This could include whether the consumer is investing in the product as a result of receiving personal financial advice, or whether the consumer is investing directly (i.e. has not received advice).

(e) conversion rates:

- Financial planners compare a number of products in complying with their best interest duty obligations. However, this is in relation to their individual client's circumstances, not in relation to the product's TMD. Product providers should be equipped to assess the appropriateness of their TMD using a variety of matrix and data obtained directly from consumers.

(f) volume of sales:

- This should be clear to issuers based on the number of investors/members

and funds under management without additional information being required from distributors.

(g) web analytics (e.g. click data and website paths)

- Specialist knowledge should be utilised to ensure product providers collect and interpret data correctly. The data collected should be representative of the users of the product.

ASIC's statistics show only 20 per cent of consumers seek personal financial advice. This means approximately 80 per cent of consumers access financial products via direct or other distribution channels. The requirement to monitor and assess the ongoing appropriateness of the target market determination was placed on product providers in the legislation to ensure consumers who are not protected by the financial advice best interest duty and Code of Ethics, are monitored against the risk of harm from financial products.

Sections 994B(5)(h), 994F(5), and s994F(3)(c) create a loophole for product providers to obviate some of their product design and distribution responsibilities by allowing them to pass these responsibilities on to planners who service only 20 per cent of consumers, undermining the role of the new laws and putting consumers at risk of continued harm.

This is also contradictory to the law as regulated entities who provide personal financial advice are exempt under the DDO Act from the requirement to be consistent with the target market determination when distributing financial products.

Financial planners are expected to report against TMDs, even though they are obliged under the Corporations Act to meet their best interest obligations for each client, rather than meet the target market determination features indicated by the product provider. The fact that TMDs have not been made available to and will not likely be available to financial planners prior to the 5 October 2021 commencement of the DDO regime, makes it even more unreasonable for planners to be required to report against TMDs and for product providers to push their obligations onto planners.

Significant dealings

Section 994F(6) states:

If the regulated person:

- (a) *becomes aware of a significant dealing in the product; and*
- (b) *becomes aware that the dealing is not consistent with the target market*

the regulated person must, as soon as practicable, and in any case within 10 business days, report the dealing, in writing, to the person who made the determination.

ASIC's Regulatory Guide RG 274 *Product design and distribution obligations* sets the factors that will be relevant for issuers when determining whether a significant dealing has occurred (see RG274.159).

This reporting and record keeping obligation ignores the legal requirements for financial planners to ensure the advice they provide, including any product recommendations they make, is appropriate to meet their client's objectives, financial situation and needs, taking into account the client's broader, long-term interests and likely future circumstances. Rather, it places the product providers TMD above these professional and licensing requirements by imposing additional requirements on planners to have in place systems to compare their recommendations to TMDs and report any inconsistencies.

FPA recommendations

As noted, the reporting and record keeping requirements in the DDO regime look at this issue from the product perspective and the potential **risk/harm** posed to retail clients, as identified under the TMD, as a whole. The DDO reporting and record keeping provisions create onerous requirements for financial planners that fall outside the processes and systems businesses have in place to meet the personal advice obligations; and do not take into account the fact that planners consider a much broader set of facts about each client, as required under the law.

Section 994L allows ASIC to make a notifiable instrument exempting specified persons or class of persons from specified provisions in the DDO Act.

The FPA requests ASIC be directed to make a notifiable instrument:

- exempting financial planners who provide 'excluded conduct' and 'excluded dealings' from sections 994F(3)(b), 994F(c), and 994F(6) of the DDO Act - the obligations to report to the product provider (and associated record keeping requirement):
 - the "reasonable steps the regulated person has taken to ensure consistency with the target market determination";
 - information specified in the target market determination; and
 - a 'significant dealing' that is not consistent with the target market determination.
- restricting product providers ability to impose additional requirements on 'excluded conduct' and 'excluded dealings' via sections 994B(5)(h), 994F(5) and s994F(c), thereby obviating their responsibilities by passing them on to financial planners.

The FPA recommends ASIC's current consultation instrument be amended to exempt financial planners who provider personal financial advice to retail clients on relevant financial products from the DDO record keeping and reporting requirements.

The FPA request the opportunity to discuss this request with Treasury as a matter of urgency. Please contact me ben.marshan@fpa.com.au or 02 9220 4500.

Yours sincerely



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