8 July 2024

Ms Wendy Hau
Acting Assistant Secretary
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Dear Ms Hau

Treasury Laws Amendment (Delivering Better Financial Outcomes) Regulations 2024

The Financial Advice Association of Australia[1] (FAAA) welcomes the opportunity to provide feedback on the draft Treasury Laws Amendment (Delivering Better Financial Outcomes) Regulations 2024.

We note that the Treasury Laws Amendment (Delivering Better Financial Outcomes) Bill 2024 was passed by both houses of Parliament on Thursday 4 July 2024 and as a result some of the wording in the Commencement table of the draft regulations will need to be updated.

We have set out our concerns below about these regulations proposing changes to the Corporations Act, whilst the Treasury Laws Amendment (Delivering Better Financial Outcomes) Bill 2024 was still in front of the Parliament, and the confusion that this will generate.

Our comments relate to parts 1, 2, 3 and 4 of the draft regulations.

Part 1 - Superannuation

Item 1 of the draft regulations serves to ensure obligations under s99FA of the SIS Act, as amended by the Treasury Laws Amendment (Delivering Better Financial Outcomes) Bill 2024, can be satisfied electronically. We support this clarification in the regulations.

Part 2: Ongoing fee arrangements - Application and transitional arrangements

Section 962X of the Corporations Act requires records of compliance to be kept in relation to ongoing fee arrangements; s962X(2) permits the regulations to specify the records that must be kept.

Item 9 inserts Part 10.52 and regulation 10.52.01 into the Corporations Regulations to set out how certain amendments in the draft regulations would apply to Fee Disclosure Statements (FDS) previously given to a client, once the FDS obligations are removed from the law. However, neither s962X nor the regulations stipulate the duration for keeping FDS records. ASIC *Information Sheet 256*

[1] The Financial Advice Association of Australia (FAAA) is the largest association representing the financial advice profession in Australia, with over 10,000 members. It was formed in 2023 following the merger of the two leading financial planning/advice bodies in Australia – the Financial Planning Association (FPA) and the Association of Financial Advisers (AFA). With this merger, a united professional association that advocates for the interests of financial advisers and their clients across the country was created.

(INFO 256) – FAQs: Ongoing fee arrangements states records in relation to an FDS must be kept for at least five years (question 12). Given the Bill removes the FDS obligations, it is possible that ASIC guidance will be removed from its website.

To provide greater clarity for AFS licensees and authorised representatives, we suggest the regulations include a note as to the period for which FDS records must be kept. This should be consistent with ASIC INFO 256 – ie. "at least five years".

Part 3: Financial Services Guide - Statements that clients can request records of further advice

We are concerned that s943N as proposed in the draft regulations presents two potential inconsistencies:

1. Expansion of the obligation beyond market related advice and advice that does not recommend the purchase or sale of products

2. Whereas the draft regulation clearly only applies 'if' the adviser/licensee has made a statement on their website to the effect that a client may request a RoA, the Explanatory Statement suggests a broader application.

Current obligations and the Bill

Current obligations under sections 942B(g) and 942C(h) of the Corporations Act state that if a providing entity provides "*further market-related advice (see s946B(1)) or advice to which s946B(7) applies) - a statement in relation to which the following requirements are satisfied*:

(i) the statement must indicate that the client may request a record of that advice, if they have not already been provided with a record of that advice;
(ii) the statement must set out particulars of how the client may request such a record;
(iii) any limitations in those particulars on the time within which the client may request such a record must be consistent with any applicable requirements in regulations made for the purposes of this subparagraph or, if there are no such applicable requirements, must be such as to allow the client a reasonable opportunity to request a record of the advice."

Section 943J of the Treasury Laws Amendment (Delivering Better Financial Outcomes) Bill 2024 requires that the 'website disclosure information' includes what would normally be required by an FSG through the following definition:

> ***"Website disclosure information**, in relation to a financial services licensee or an authorised representative of a financial services licensee, means the statements and information:*
>
> > *(a) in the case of a financial services licensee—that would be required by s942B to be in a Financial Services Guide given by the licensee; and*
> >
> > *(b) in the case of an authorised representative—that would be required by s942C to be in a Financial Services Guide given by the authorised representative."*

Expansion of RoA statement obligation

The provisions in s943N in the Bill are restricted to 'market related advice and advice that does not recommend the purchase or sale of products'. This is in line with existing sections 942B and 942C of the Act. However, the DBFO draft regulations propose to amend the Bill by creating a 'new' s943N that is not limited to certain advice circumstances. This will have the effect of varying the application of the provisions in s943N to all types of advice.

The Explanatory Statement to the draft regulations indicates this amendment has been proposed to replicate modifications in adjacent regulations, which currently apply to FSG disclosure. While we support the intent of ensuring there is alignment between the FSG disclosure and website disclosure requirements, it is unclear as to the current application of the FSG requirements beyond the two types of advice. We would welcome clarification on this requirement as it applies to FSGs. Otherwise, it appears as the purpose of the proposed s943N in the draft regulations is to expand the application of the provisions in the Bill outside of due parliamentary process. This example illustrates the problems with the financial services regulatory regime, as highlighted in the recent ALRC report, where the law is reflected in multiple locations and contains inconsistency. It is important to avoid this outcome.

Obligation to give a client a RoA

Both s943N of the Bill and the proposed s943N in the draft regulations express a clear intent that the obligation to 'give a client a RoA' is only applicable ***'if'*** the adviser/licensee has made a statement on their website to the effect that a client may request one. The word 'if' implies that an adviser/licensee would not be required to provide the RoA in the absence of this statement, rather a RoA is only required to be given if the adviser/licensee has included in a website disclosure a commitment to do so.

Whilst we think that this outcome to limit it to circumstances where such a commitment has been made is appropriate, it does generate a lack of clarity given, as stated above, the definition of website disclosure information is reliant on s942B and s942C of the Act and these provisions require such a statement to be included for market related further advice. The regulations should make it clear as to the application of this requirement.

Impact of inconsistencies

These inconsistencies have the potential to lead to misunderstanding and unintended breaches of the obligations. This is particularly concerning given item 81 of the Bill imposes a potential 1 year imprisonment for a breach of s943N. We would welcome greater clarity and consistency in the law, rather than reliance on regulations to fix such matters.

We would also question whether this should be an offence provision, noting that there is no discussion in the Explanatory Statement on the penalty that would apply.

Timeframe for providing a RoA

We further make the point that it is unclear how long an AFSL, or financial adviser, has to provide the copy of the RoA, from the time the client requests it; and whether a delayed delivery that required a follow-up by the client, would still be classified as an offence. The provisions of this request from the

client could take many different forms (email, phone call, text message etc), increasing the risk of failure to respond. ASIC Information Sheet 266 (INFO 266) – *FAQs: Records of Advice (RoAs)* includes the following suggestion on the timeframe for providing an RoA if a client requests it:

> *"**Tip**: If a client requests a copy of an RoA, you should give the client a copy as soon as practicable after receiving the client's request."*

This timeframe is offered as a tip from the Regulator. It is not a requirement.

Timing of draft regulations

It is also unclear as to why the regulations have been specifically drafted to amend a provision in a Bill that was still before Parliament when the draft regulations were released for consultation; or the reason for expanding the application of these provisions. We seek clarity in this regard.

Part 3: Financial Services Guide - Penalty provisions

The draft regulations clarify that:

- certain breaches of website disclosure obligations do not need to be reported to ASIC (item 10 of the draft regulations), and
- minor contraventions of an offence or civil penalty provision of the website disclosure obligations will be subject to the infringement notice regime (item 34 of the draft regulations).

FAAA welcomes these changes, which address concerns raised in our previous submissions to Treasury and the Senate Economics Committee on the DBFO Bill.

Part 4: Conflicted Remuneration

We note many of the changes that involve an updating of the references to Section 963C would have been required independent of the DBFO Bill, with the Explanatory Statement revealing that these errors had existed since 2016.

With respect to the provision relating to ADI employee benefits, we note the sentence in the Explanatory Statement that: "*Further, the 6 month transitional period allows ADIs time to adjust existing remuneration structures before the commencement of the repeal of regulation 7.7A.12H*". However, in practice, there is no mandated requirement for this to take place and ADIs can leave these arrangements in place indefinitely if they choose to do so.

Given one of the goals is to remove unnecessary exemptions from the conflicted remuneration regime, this is a disappointing outcome.

FINANCIAL ADVICE ASSOCIATION AUSTRALIA

Conclusion

We would welcome the opportunity to discuss the matters raised in our submission further. Please contact me on 02 9220 4500 or via phil.anderson@faaa.au.

Yours sincerely

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