

Australian Securities and Investments Commission
Level 7, 120 Collins Street
Melbourne VIC 3000

Via email: rri.consultation@asic.gov.au

Wednesday 4 September 2024

Dear ASIC,

ASIC Consultation on Extending the Operation of Legislative Instruments

The Financial Advice Association of Australia¹ (FAAA) welcomes the opportunity to provide feedback on the proposed extension of Class Order [CO 14/923] Record-keeping obligations for Australian financial services licensees when giving personal advice and ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2021/716.

We provide the following feedback for your consideration.

Class Order [CO 14/923] Record-keeping obligations for Australian financial services licensees when giving personal advice

The FAAA have for a long time advocated for greater regulatory capacity for financial advisers to rely upon their professional judgement, rather than the type of prescriptive record keeping obligations that are set out in this Class Order. This view is consistent with the values and standards in the Code of Ethics, and has also been reflected in the deliberations with respect to the Quality of Advice Review and the Government's Delivering Better Financial Outcomes (DBFO) reforms. The obligations in Class Order 14/923 generate a high amount of activity and effort to comply with, particularly as they relate to 912G(2)(a) and 912G(2)(b). Compliance with these obligations has caused a significant increase in the cost of providing financial advice.

This Class Order is now 10 years old, and during this time, there have been a number of changes to the Corporations Act providing the opportunity for the substance of this Class Order to be built into the law. As an example, section 962X of the Corporations Act "Obligation to keep records of compliance" defines record keeping obligations with respect to ongoing fee arrangements. The same thing should apply with respect to the record keeping obligations for the Best Interests Duty and related obligations. The Government's proposals with respect to the repeal of the safe harbour steps in Section 961B(2) will also significantly impact the relevance of this Class Order.

We note that Section 912G(3) requires that the retention of records obligation continues to apply even if a financial services licensee ceases to operate. We are uncertain as to how this might work in practice, particularly where the licensee is in administration or in liquidation. It would seem to be appropriate to have

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.

some discussion within the Class Order on how these obligations can be transferred to another business or licensee. This obligation is extended to Authorised Representatives in Section 912G(4). In this case, the situation could be further complicated by the death of an individual AR. It is unclear how this would work in that context. The continuation of these record keeping obligations beyond the closure of these businesses or the death of an individual, in the absence of an obvious alternative solution, is quite problematic.

The requirements set out in Section 912G(6) are confusing. It is assumed that this relates to the modified obligations that apply to agents and employees of Approved Deposit Taking Institutions in Section 961B(3) or with respect to General Insurance as addressed in Section 961B(4), however this is not clearly the case.

Section 912G(7) is particularly complex as it is excluding all but some provisions of this Class Order in the case of some circumstances where a Statement of Advice is not required. What is further confusing is that the circumstances described in Section 912G(7)(b), should also meet the classification in Section 912G(7)(a), since further market related advice as addressed by Section 946B(3A) is a situation where a Statement of Advice is not required, as established by Section 946B or the Corporations Act. We assume that Records of Advice permitted under Corporations Regulation 7.7.10AE are equally partially excluded from the obligations under Section 912G.

While professional judgement and the Code of Ethics should be the focus, the pending consultation on the Government's Tranche 2 DBFO reforms offers an opportunity to build certain provisions of the Class Order into obligations in the primary legislation. We encourage ASIC to advocate for the appropriate obligations within this Class Order to be subject to a thorough consultation process as part of the DBFO reform agenda. Any necessary and appropriate provisions should be incorporated into the Corporations Act.

We suggest Class Order [CO 14/923] Record-keeping obligations for Australian financial services licensees when giving personal advice, in its current form, is not a useful part of the legislative framework and should not be extended, other than as a short term measure in a modified and simplified form.

ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2021/716

Our opening position is that the current breach reporting regime is excessively broad and is capturing matters that are not worthy of being self-reported to ASIC or consuming ASIC's focus and time.

We would also make the point that this Legislative Instrument highlights the importance of the reforms to the Corporations Act that have been proposed by the Australian Law Reform Commission (ALRC). Section 6(b)(ii) refers to Section 912A(1)(g)(ia) that has been added to the law as a result of ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98, which is however not readily discoverable, given that this instrument does not immediately come up when subject to a Google search. We do not accept that Section 912A(1)(g)(ia) is necessary or appropriate in the first place, however to the extent that it is excluded from breach reporting obligations, we consider this to be appropriate.

The provision to exclude trivial misleading and deceptive conduct is appropriate.

The provision with respect to reporting a matter subsequent to a previously reported matter within 90 days, rather than 30 days, is appropriate, and should reduce additional unnecessary effort and cost, particularly for

a matter that is subject to further emerging cases or is the result of a problem that is difficult to fix immediately.

Section 9 of the Legislative Instrument on “Core obligations in the financial services law” no longer appears necessary, as Section 912D(3) already reflects the changes that are set out in these modifications.

Conclusion

Whilst the FAAA supports the importance of appropriate record keeping, this needs to be based upon a sensible consideration of the costs of record keeping. In the context of the current focus on the cost of financial advice, we believe that it is appropriate for this to be subject to further careful deliberation.

We would welcome the opportunity to discuss any questions you may have regarding our feedback.

Yours sincerely,



Phil Anderson
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Financial Advice Association of Australia