

18 October 2018

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
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Parliament House
CANBERRA ACT 2600

By email only: economics.sen@aph.gov.au

Dear Mr Fitt

Submission in Response to Inquiry into Treasury Laws Amendment (Design and Distribution Obligations (DDO) and Product Intervention Powers (PIP)) Bill 2018 [Provisions]

The Financial Services Council (**FSC**) appreciates the opportunity to provide its views to the Senate Economics Legislation Committee on the Treasury Laws Amendment (Design and Distribution Obligations (**DDO**) and Product Intervention Powers (**PIP**)) Bill 2018 (**Bill**) and would be pleased to discuss these further in person in any future public hearings.

Introduction

The FSC welcomes the changes that were made in the latest version of the Bill and Explanatory Memorandum (**EM**) which includes the following:

1. clarification in the EM that the DDO obligations do not apply to legacy products;
2. introducing 'as soon as reasonably practicable but no later than 10 Business Days after' in sections 994C(6) and (7) in relation to a regulated person ceasing to engage in retail product distribution;
3. the exclusion of financial products issued under a mutual recognition scheme; and
4. clarification in the EM that regulations are proposed to exclude defined benefit funds and eligible rollover funds from the DDO regime.

Other than for the above changes, the FSC's views expressed in its submission to Treasury dated 15 August 2018 in relation to the earlier draft of the Bill and EM (**the Submission**), continue to be held by the FSC. A copy of the Submission is attached for your reference.

Some of the views and issues raised by the FSC in the Submission are referred to in this submission to confirm their importance and for emphasis. As far as possible, issues have been raised in the same order as in the Submission for ease of reference. FSC Members request that all of these issues are considered so that the new regime is workable and efficient.

Design and distribution obligations

Transitional timing & ASIC Regulatory Guide Development

For all the reasons set out in paragraph 2.1 of the Submission, the FSC confirms its request that the transitional period is extended from 2 to 3 years, including:

1. the realistic length of time that it will take members to become fully compliant (refer to the detailed strawman timeline attached to the Submission (paragraph 2.1(e)(1));
2. extensive process and operational challenges to be addressed, including significant record-keeping obligations; and
3. the ASIC Regulatory Guidance is still to be developed and will include significant details that Members will need before they can design and execute all necessary transitional changes.

Also, in relation to development of the ASIC Regulatory Guidance, both in terms of expediting its completion and ensuring the best outcome in terms of workable DDO regime, our Members strongly support there being early involvement by industry, including our Members, in developing the Regulatory Guides. This is viewed as critical to achieve industry-wide operational efficiency and productivity and in this regard, FSC Members strongly support the early development of industry templates (refer to paragraph 2.7 of the Submission).

Personal Advice

For the reasons detailed in paragraph 2.3 of the Submission, the FSC repeats its request for the alternate proposed wording for Section 766B(3A) of the Bill.

The key concern with the current wording of the section is the narrowness of the circumstances in which the exception applies and the seriousness of the consequences of being taken to have provided personal advice. As currently drafted conduct does not constitute personal advice if questions asked are “solely” for the purpose of determining if a person is in the target market which is unduly restrictive and narrow. Our key request is that the “solely” concept is replaced with “to the extent that” and that section 766B(3A) permits the “consideration” of a person's objectives, situation and needs.

Excluded conduct and excluded dealing

The need for clarification raised in paragraph 2.4 of the Submission in relation to the scope of above definitions has not been fully addressed by the new section 994E(6) which provides for limited activities which are 'necessary to implement personal advice given to the client' to not be taken to be a failure to take reasonable steps for the purposes of section 994E(3)(d).

As the concept of excluded dealing and excluded conduct has wider application than just section 994E(3)(d) (including sections 993C(3), 993C(4), 993C(5), 993C(6), 993C(7), 994E(1) and 994J(2)), we repeat our request for two small amendments to the definition of “excluded dealing” in paragraph 2.4(g) of the Submission to address:

1. for the first amendment, to remove the inconsistent outcomes under the definition in relation to “dealings” and “arranging’ dealings” (paragraph 2.1(d)); and
2. for the second amendment, to ensure platform operators giving effect to personal advice are covered (paragraph 2.1(e)).

Adopting the suggested changes would address what would appear to be inadvertent anomalies and reflects the consensus views of the law firms: Johnson Winter + Slattery, Herbert Smith Freehills, King + Wood Mallesons and Norton Rose Fulbright as to the changes needed to this definition.

Reasonable Steps – Personal Advice

The FSC repeats its request in paragraph 2.5 of the Submission to amend section 994E(4) of the Bill to in effect provide that a regulated person has not failed to take reasonable steps if after making all inquiries reasonable in the circumstances it believes the product acquisition was made in reliance of another regulated person’s personal advice. This amendment would avoid unnecessary duplication and expense especially for platform operators.

Employer-sponsors

As noted in paragraph 2.9 of the Submission, the apparent anomaly that the scope of the DDO appears to cover employers who provide superannuation information to employees. FSC Members remain concerned as to the effect of this and seek clarity by clarification in the Explanatory Memorandum, as suggested in the Submission.

Reasonable basis and significant detriment – safe harbours

The FSC notes that there is Member support for introducing further statutory safe harbours in relation to reasonable steps and significant dealing for persons making target market determinations, and regulated persons distributing financial products. That is, in relation to product acquisitions based on portfolio diversification or for hedging purposes; provided that the acquisition is appropriate for that client. It is submitted that this change would protect consumers interests and as well as to simplify dealing with such transactions under the DDO regime and reduce regulatory costs. The following changes to the Bill are suggested:

1. addition of a ‘portfolio diversification’ basis for satisfying the reasonable steps test under S994E(1) as an additional provision S994E(2.1) such as

“A person has satisfied their reasonable steps under S994E(1) if they require the product to be issued or acquired for portfolio diversification or hedging purposes and issue or acquisition suits the client’s total portfolio or the risk being hedged”.

2. addition of a ‘portfolio diversification’ basis for satisfying the reasonable steps test under S994E(3) as an additional provision S994E(3.1) such as

'A person has satisfied their reasonable steps under S994(3) if the individual the product is issued to confirms the product is issued or acquired for portfolio diversification or hedging purposes and issue or acquisition suits the client's total portfolio or the risk being hedged'.

Similarly it is submitted that the DDO regime should, for the avoidance of doubt, exclude significant detriment arising from the fall value of a product per se. There is Member support for the introduction of a safe harbour provision to clarify that the DDO regime in relation to significant detriment with the requested addition to the Bill, by adding a new subsection to Section 1023E such as:

"(4) Notwithstanding subsections (1), (2) and (3) a loss or fall in value of a financial product is not prima facie a significant detriment."

Other DDO Concerns of Members:

Also, the FSC Members have raised the following issues

1. the application of the DDO obligations to platform operators and master trust providers is likely to result in duplication, unnecessary complexity and inefficiencies;
2. need for further clarity on the application of the DDO obligations in practice, either in the Bill itself or the Explanatory Memorandum in relation to:
 - a. master trusts and platform operators – for example in the case of the operator being the unit holder and not the consumer investing in the product – does this automatically trigger the DDO obligations unless there is an express exclusion? (such as the issue covered in paragraph 2.4(c) of the Submission);
 - b. the new DDO regime needs to take into account existing frameworks that exist and are working (e.g. MySuper products) and in this regard for AISC to follow due process with any increased powers; and
 - c. Superannuation products – notably:
 - i. Licenced MySuper products – to the extent they may be referred to in a PDS; and
 - ii. insurance within a superannuation product - (whether it is a MySuper product or otherwise) could be treated as a separate product that would be subject to DDO,
it is submitted these possibilities should be clearly excluded.

Product Intervention Powers (PIP) – Private Consultation

It is noted that the Bill still does not provide any opportunity for private consultation between ASIC and the product issuer prior to a product intervention order being made and publication of that order. For the reasons set out in paragraph 3.2 of the Submission, the FSC is still of the view that there should be private consultation for a reasonable period (of at least a suggested 5 business days) to provide due process and procedural fairness by the addition of a new section 1023F(5) to this effect to the Bill.

The absence of a right to consult privately deprives the product issuer of any opportunity to satisfy ASIC, such as by way of explanation or product remediation. Consequently, there is a real risk that unnecessary reputational damage may be caused, that innovation may be stifled and that consumer loss or detriment may be crystallised.

Should you have any questions in relation to our comments, please contact us on 02-9299-3022.

We look forward to discussing this matter further in due course.

Yours faithfully

Yours sincerely



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Senior Legal Counsel