



Manager
Financial Services Unit
Financial System Division
The Treasury

By email: ProductRegulation@treasury.gov.au

9 February 2018

Dear Sir or Madam,

Response of IG Markets Limited (“IG”) to the Design and Distribution Obligations and Product Intervention Power – Draft Legislation (“draft legislation”)

We are grateful for the opportunity to respond to the consultation on the exposure draft of the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 and to provide our comments.

1. IG

By way of brief background, IG deals in securities, managed investment schemes and over-the-counter (“OTC”) contracts for difference (“CFDs”) on a broad array of financial instruments, to a predominantly retail client base. IG is regulated in Australia by the Australian Securities and Investments Commission (“ASIC”) and is a holder of an Australian Financial Services (“AFS”) Licence (No. 220440).

For further information about IG please see the enclosed annex, which provides a short summary of our business and our corporate group.

2. Executive Summary

IG firmly believes in robust and proportionate regulatory oversight of financial products and services in Australia, and we support the Government’s aim of introducing new design and distribution obligations for entities that issue or distribute financial products, as well as strengthening consumer protection by introducing product intervention powers. We support the majority of the proposals set out in the draft legislation, and we provide the following comments and feedback, which we hope Treasury will consider. These comments are considered further below when addressing the draft legislation.

- In the event of a review trigger or an occurrence which indicates the target market determination is no longer appropriate, a responsible person should be allowed a reasonable timeframe to review the target market determination and make a new target market determination (if necessary) without being required to stop dealing in, or providing advice on financial products, to avoid the risk of a responsible person suffering potentially significant detriment by way of essentially having to stop business;
- The record-keeping requirements in the draft legislation are too prescriptive and do not consider the nuances of the wide range of financial products the draft legislation covers;



- With respect to financial product promotions, regulated persons are already subject to advertising and promotion obligations set out in the *Corporations Act 2001* (Cth) and ASIC Regulatory Guide 234. It is therefore our view that there is no additional benefit to the consumer in introducing a requirement for financial product promotions to include a description of the target market audience. Further, such a requirement will stifle advertising via a number of essential marketing channels;
- In considering whether detriment resulting from a financial product is significant, in order to avoid the unintended consequence of Australian consumers moving their business to product distributors and issuers in offshore, unregulated jurisdictions, thereby losing the protections provided by ASIC, ASIC should be required to take into account whether the detriment was caused by AFS licensees, or, by unlicensed, offshore brokers, who will continue to inflict detriment on Australian consumers, with or without the product intervention rules in place; and
- In addition to the requirement for ASIC to consult prior to making a product intervention order, ASIC should be required to have taken action in banning persons or initiating other serious enforcement action against persons that fail to comply with relevant financial services laws and any applicable AFS licence obligations

3. Submissions

A. Amendments relating to the Design and Distribution of Financial Products

Section 993DB Application

We agree with the application provision, specifically – with respect to IG’s OTC derivative products – the requirement that a target market determination is required to be made only in relation to financial products issued to retail clients, owing to the fact that a PDS is only required to be prepared or given to retail clients.

We also agree with the exceptions set out in sub-sections (2) and (3).

Sections 993DB(5), 993DB(6) & 993DB(7) Target market determination

We are supportive of the Government’s work on protecting Australian retail consumers from poor practices of issuers and distributors, by way of introducing an obligation on responsible persons to make a target market determination for the financial product before a person deals in the product, or provides financial product advice in relation to the product.

Section 993DC(3) Target market determinations to be reviewed

We agree in principle that where an event has occurred which suggests the target market determination is no longer appropriate, or where a review trigger has arisen, the responsible person must review the target market determination, and, if the determination is not appropriate, make a new determination. However, it is both unreasonable and problematic to require a responsible person to refrain from dealing, or from providing financial product advice, in relation to the financial product until the responsible person has completed the review and made the new target market determination (if applicable). In practical terms, this means a responsible person must stop issuing the financial product to new and existing clients, including clients who have existing financial products on their accounts. As the draft legislation does not differentiate between responsible persons who deal in financial products on an ‘execution only’ basis, or



responsible persons who only provide general advice, the impact of such a requirement means that a responsible person must remove all general advice content from its website, along with any other online/offline general advice material, and the responsible person must not provide advice, including general advice, by way of assisting existing clients with their account and existing financial products, either over the phone, face to face, or electronically. In our view, the sensible approach would be to provide responsible persons with a reasonable timeframe, for example 10 business days, to carry out the target market determination review and make a new target market determination (if required). To that end, a responsible person must treat the review as a priority, however, it has the opportunity to complete a review and modify the target market determination without suffering potential significant detriment by way of halting business and negatively impacting clients. This is particularly important for responsible persons who deal in financial products on an 'execution only' basis and provide general advice only.

Section 993DE Reasonable steps to ensure target market determinations given effect to

The wording of this section, when read in conjunction with the provision regarding the appropriateness of target market determinations in section 993DB(10), implies that a product issued in a particular target market should meet all of the objectives, financial situations or needs for all persons in the target market. We consider this to be unreasonable. In line with the views of the Australian Financial Markets Association ("AFMA"), we suggest that the draft legislation be amended so that a product is only required to meet 'one or more objectives, financial situations or needs' of the persons in a target market. We also suggest that further clarification as to the form that a target market determination should take should be provided in ASIC guidance.

Further, given the broad access to websites that a responsible person will commonly use to provide information, and in some cases general advice, about its financial products and services to consumers, it is unclear whether responsible persons need to ensure that such content is suitable for all consumers who visit the website, (irrespective of the fact that these consumers may not become clients of the responsible person) and additionally, whether the responsible person must ensure that all those people must fall within the responsible person's target market. Such an approach is problematic because such information is generally targeted at consumers who will become clients of the responsible person, and therefore those consumers will naturally fall within the target market. However, responsible persons should be able to present general advice on websites without being required to tailor the information to take into account the fact that people outside the target market may access the information.

Sections 993DF Record keeping and notification obligations

While we support the requirement to maintain records of distribution information, in our view this section is too prescriptive and does not consider the nuances of the wide range of financial products the draft legislation covers. By way of example, IG deals in and provides general advice on OTC CFDs which are captured by the draft legislation. In terms of the recording obligations, as currently drafted, the following is unclear with respect to OTC CFDs:

- Whether the "number of issues and sales" of the product the responsible person makes refers to the number of CFD transactions or the size of the CFD transaction; and
- Whether the "dollar value of the issues and sales" refers to the initial margin required to open the transaction, the total exposure of the transaction, the total realised profit/loss of the transaction (including or excluding fees and charges), or another metric.

Further, it is unclear whether persons providing general advice, are required to record each and every instance that general advice is provided. If this is the intent of the draft legislation, it would prove both extraordinarily burdensome and



problematic for issuers of general advice. While general advice may be provided directly to a client over the phone, face-to-face, via emails, via 'live' chat, via social media interactions, and other online methods of corresponding, general advice can also be issued to a broad audience via a responsible person's website, in bulk emails, newsletters, and in financial product promotions. It is our view that having to record each and every instance of general advice issued is unnecessary given the nature of general advice (i.e. general product information only which does not take into account a client's objectives, financial situation and needs), and would result in an increased compliance cost and regulatory burden.

Finally, given the wide and varying range of financial products that the draft legislation covers, we suggest that the majority of the recording requirements should be provided in ASIC guidance rather than prescribed in legislation. Having such detail in the guidance will allow for differences across significantly varied financial product types.

Section 993DG Notifications to ASIC

It is our view that if there is a significant breach of the design and distribution obligations, the existing breach reporting obligations should apply. It seems unnecessary and burdensome to impose separate and differing reporting obligations, to those which already exist under s912D of the *Corporations Act 2001*.

Further, the draft legislation does not define "significant dealing" and therefore the type of activity that would constitute such a dealing is unclear.

Subparagraphs 1018A(1)(c)(ii) (ca) & section 1018A(2)(C)

We support appropriate and proportionate disclosure requirements, however with respect to financial product promotions, responsible persons are already subject to the advertising and promotion obligations set out in the *Corporations Act 2001* (Cth), specifically in relation to the requirement to refer to a PDS¹. Further, responsible persons are required to comply with *ASIC Regulatory Guide 234: Advertising financial products and services (including credit): Good practice guidance* ("RG234"), which includes the requirement to only advertise financial products to a suitable target audience². Additionally, where a financial product has a high level of risk, RG234 requires a product advertisement to include a prominent risk warning about these risks.³

Given the existing target audience, disclosure and risk warning requirements, it is our view that there is no benefit to the consumer of requiring financial product promotions to include a description of the target market determination. Further, as online and mobile marketing channels becoming increasingly prevalent, the legislation needs to remain technology neutral, and consider that many advertising channels are limited in terms of space. Introducing another advertising disclosure requirement would certainly stifle advertising opportunities via these channels. We would also argue that this requirement is inconsistent with ASIC's technology-neutral approach to regulation.

We include an example of a common form of online advertising utilised by IG, demonstrating the disclosure requirements that OTC derivative issuers must include on financial product promotions to comply with current laws and regulations:

¹ Section 1018A *Corporations Act 2001* (Cth)

² RG 234.105 - 109

³ RG 234.45



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our PDS. CFD losses can exceed
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*By primary relationships, Investment Trends November 2011-2016 report. Losses can exceed deposits.
Refer to the PDS. Issued by IG Markets Limited AFSL 220440.



We do not consider that the further requirements imposed by the draft legislation provide any additional benefit or protection to the consumer over and above the existing regime. In addition, we consider that the requirement to include further disclosure content on promotional material is impractical and unnecessary when applied to online advertising, as illustrated by the above example. Although we agree that a responsible person's target market determination should be readily available to consumers, we believe that linking each online advertisement to a web page containing a description of the target market determination, as well as detailing the target market determination in the PDS, ought to be sufficient to satisfy disclosure obligations in this regard.

Further, OTC derivative providers occupy a particularly niche sector of the financial services industry and operate predominantly under centralised business models, without branches to support the distribution of advertising and promotional materials. For this reason, firms in our sector are much more reliant on online advertising than other industry participants.

B. Amendments relating to Product Intervention Orders

Section 1022CC Marking product intervention orders

We agree that ASIC's product intervention powers should be limited to making orders with respect to financial products that are available to retail clients. Financial products available to wholesale clients should unquestionably fall outside the scope of ASIC's product intervention powers.

Section 1022CD Significant detriment to retail clients



In considering whether detriment resulting from a financial product is significant, in order to avoid the unintended consequence of Australian consumers moving their business to product distributors and issuers in offshore, unregulated jurisdictions, thereby losing the protections provided by ASIC, ASIC should be required to take into account whether the detriment was caused by AFS licensees, or, by unlicensed, offshore brokers, who will continue to inflict detriment on Australian consumers, with or without the product intervention rules in place.

Moreover, with respect to sub-section (b), where a product is operating as it was designed to do – and in compliance with the relevant laws, regulations and AFS licence authorisations – it is our view that whether or not there is an actual or potential financial loss is irrelevant. For example with leveraged trading, both profits and losses will be magnified in comparison with traditional stockbroking products which naturally have a lower risk profile. However the risk profiles of leveraged products are entirely different, and consumers invest in these products for entirely different reasons. Undoubtedly consumers' risk appetites vary across product types, and therefore, providing consumers are fully informed of the risks, this should be considered by way of defining 'significant' within classes of products and investors.

Section 1022CE ASIC to consult before making product intervention orders

In addition to the requirement for ASIC to consult prior to making a product intervention order, ASIC should be required to have taken action in banning persons or initiating other serious enforcement action against persons that fail to comply with relevant financial services laws and any applicable AFS licence obligations. Moreover, before ASIC is able to invoke any product intervention powers, all supervisory and/or enforcements actions must be exhausted, thereby likely eliminating the need to ban all product issuers.

Adopting alternative, less restrictive measures, such as those outlined above, would significantly help to improve transparency and investor protection, while avoiding the need for ASIC to make product intervention orders except in the most serious cases, which may prove complicated to implement and lead to possible unintended consequences. For example, a market-wide ban on a particular product would likely lead to consumers taking their business to offshore, unregulated product issuers, thereby losing the protections afforded to them by ASIC and the access to external dispute resolution bodies, such as FOS.

In addition, we are concerned that ASIC's failure to comply with the 'mandatory' consultation requirements does not invalidate a product intervention order. In our view this particular provision contradicts the preceding consultation requirements set out in section 1022CE of the draft legislation. We would appreciate further clarification regarding the intention behind this provision and how it would operate in practice. In the absence of such explanation we consider that the provision has the potential to invalidate the entire ASIC consultation process set out in the draft legislation.

Conclusion

We welcome the ability to engage in consultations and thank the Treasury for the opportunity to be able to provide comments on the Draft Legislation.



Yours faithfully,

A handwritten signature in black ink, appearing to read 'Kevin Algeo'.

Kevin Algeo
Chief Executive Officer
Australia and New Zealand



ANNEX: SUMMARY OF IG MARKETS BUSINESS OPERATIONS

1) INTRODUCTION

IG Markets Limited (“IG”) deals in securities, MIS and contracts for differences (CFDs) on a broad array of financial instruments. IG was formed in the UK under the laws of England and Wales where it is regulated by the Financial Conduct Authority (“FCA”). IG is also registered as an overseas company in both Australia and New Zealand where it is regulated by ASIC and the FMA respectively.

2) INFORMATION ABOUT IG AND THE IG GROUP

2.1 IG and the IG Group

IG is a member of the IG Group, which was established in 1974 in the UK. IG Group Holdings plc is the ultimate holding company of the IG Group and, in May 2005, its shares were listed on the London Stock Exchange. IG Group Holdings plc’s market capital is currently in excess of £2.1 billion and it is a FTSE 250 company. The IG Group has offices in London, France, Spain, Germany, Italy, Sweden, the United States, Japan, South Africa, Switzerland, Dubai, Australia and Singapore. It also has a Representative Office in China and employs approximately 1,500 people worldwide.

2.2 IG’s regulators

IG’s primary regulator is the Financial Conduct Authority (“FCA”) in the UK. As noted above IG also holds an AFSL in Australia where it has been in operation since 2002. IG has activated its EU regulatory passport and provides services from branches in Germany, France, Italy, Spain, Portugal and Sweden and is subject to conduct of business supervision by the regulators in these European countries. Other IG Group companies are regulated by the CFTC in the US, the Financial Services Agency in Japan, the Financial Markets Authority in New Zealand, the Monetary Authority of Singapore, the Financial Services Authority in Dubai and the Financial Markets Supervisory Authority in Switzerland.

2.3 More information about IG and IG Group

IG’s Australian website (www.ig.com/au) contains a description of our securities, MIS and CFDs, the range of markets offered, explains our online dealing platforms and provides examples of the way in which our products work. The site also contains relevant disclosure documents, customer agreement and application forms.

The IG Group’s corporate website (www.iggroup.com) contains further information about the IG Group of companies, including copies of our most recent report and accounts.