21 August 2018

Manager
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: productregulation@treasury.gov.au

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION ON DESIGN AND DISTRIBUTION OBLIGATIONS AND PRODUCT INTERVENTION POWER

The SMSF Association (SMSFA) welcomes the opportunity to make a submission on Treasury's revised design and distribution obligations and product intervention power draft legislation.

We acknowledge the significant positive reform in relation to the feedback received during the Government's previous round of consultation.

We reiterate that the introduction of these measures will help increase the standard of financial products as well as the culture surrounding their creation. We believe the measures will further align the interests of consumers with those of issuers and distributors of financial products but should not negatively affect firms striving to create innovative and valuable products.

The introduction of broader proactive powers for the Australian Securities Investment Commission (ASIC) will also provide an effective form of reducing significant consumer detriment. We believe the intervention power's main utility comes from its ability to influence product providers' behaviours and to be exercised swiftly when required. At the same time, it is imperative that this power should be exercised mainly as a last resort.

Design and distribution obligations

The SMSFA is supportive of the design and distribution regime which will promote the provision of financial products to suitable consumers. It should already be inherent in issuers' and distributors' behaviour to conduct themselves with the intent to appropriately market and distribute financial products.

We believe that the guidance which facilitates the specific design and distribution obligations should be relatively minimal to avoid unnecessary red tape and not stifle current practical processes. This guidance should provide examples for key concepts such as what is an appropriate determination for a 'class of persons', 'reasonable steps' and 'review triggers'.

Clarification and distinction between obligations on issuers and distributors

The SMSFA is supportive of the revised exposure draft which now clarifies and provides a distinction between obligations on issuers and distributors. In particular, the amendments made in regards to the scope of regulated distribution activity should now make the application of the law sufficiently clear to issuers and distributors.

Furthermore, the specific amendments made to issuers making a target market determination are also important and welcome clarifications to the exposure draft. This will ensure there is more practicality and reasonableness to the obligations imposed on an issuer when creating a target market determination.

Record-Keeping Requirements

The SMSFA supports the revised provisions which provide a reduced regulatory burden on both issuers and distributors with regards to record-keeping. However, the potential for an issuer to impart unreasonable record-keeping requirements and requests on a distributor is a concern.

Therefore, the regulator should ensure guidance is issued that details appropriate record-keeping requirements as to ensure distributors are not subject to an unnecessary compliance burden. We also encourage the regulator to utilise its regulation power that allows for the distribution information required to be collected and kept by regulated persons to be adjusted if necessary to support the effective operation of the new regime. This should include if the issuer's request is going beyond what is necessary to facilitate an efficient collection process.

Personal financial advisors

We support the exclusion of personal financial advice being subject to the distribution obligations, apart from the required record-keeping and notification obligations. This allows the opportunity for consumer choice to remain by allowing consumers access to specific products if they receive financial advice that determines a product is appropriate for them.

Intervention Powers

The SMSFA is supportive of introducing a power for ASIC to intervene where it identifies a financial product may cause significant consumer detriment. We believe a proactive power for ASIC is vital to support its ability to prevent consumer losses from occurring rather than merely taking action against product providers after the fact.

Despite our support for the intervention power we believe that this power should only be used as a last resort when a significant risk arises. This will limit any uncertainty, restrictions on innovation and costs that may be borne out of excessive intervention. Additionally, the mere presence of a proactive power in ASIC's toolkit paves the way for product makers to always be 'aware' of the potential for action which will help shape behaviours.

Therefore, we encourage ASIC in its regulatory guidance to explain when they would have issued an intervention order using case studies of previous real examples such as Storm Financial and Opes Prime to highlight its potential use.

The Association continues to recommend that a failure to comply with the consultation process should invalidate an intervention order. Therefore, we encourage ASIC to create processes that streamline the efficiency of any consultation to ensure the power is used correctly. We also believe all consultations should be kept confidential prior to any call for public comment giving product issuers a private right to reply. A public announcement from ASIC regarding a potential intervention order and public consultation may cause investors to panic and sell down the product, which could lead to significant detriment to consumers, product issuers and broader investment markets.

If you have any questions about our submission please do not hesitate in contacting us.

Yours sincerely,

John L Maroney

John Maroney
CEO
SMSF Association

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak professional body representing SMSF sector which is comprised of over 1.1 million SMSF members who have $712 billion of the funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.