



11 October 2019

The Manager
Financial Services Reform Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600
by email: ProductRegulation@treasury.gov.au

Dear Sir / Madam

Corporations Amendment (Design and Distribution Obligations) Regulations 2019

The Australian Banking Association (**ABA**) welcomes the opportunity to provide this submission to the Treasury on the Corporations Amendment (Design and Distribution Obligations) Regulations 2019.

We welcome the release of the draft regulations and appreciate the fact that some of the concerns that we have raised in the past have been addressed. We endorse many of the provisions but have some residual concerns. These are set out below.

Key Points

- We welcome the exclusion from the requirement to provide a Target Market Determination (**TMD**) of credit provided wholly or predominantly for business purposes.
- In implementing this legislation, it is important that the principle of scalability be flexibly applied and that clear guidance be given on this by ASIC.
- We welcome the clarification around the exclusion of wholesale ADI debentures.
- We reiterate that basic banking products should not be included in the regime.
- If the inclusion of basic deposit products by these regulations is to be maintained:
 - very simple basic deposit products that will likely be suitable for all should be excluded.
 - basic banking products designed wholly or predominantly for business purposes should be excluded.
- Section 994E(1) of the Act should be modified to ensure consistency is applied to conduct of both issuers and sellers and other regulated persons in respect of legacy products.
- The regulations should clarify that that brokers would not be captured as an issuer and only ever as a distributor (noting that some brokers will hold their own Australian credit license while others will operate as credit representatives).

Application to credit

We note that these amendment regulations follow amendments made to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (the Bill) for purposes including to extend the design and distribution obligations (**DDO**) and product intervention powers (PIP) regimes to financial products regulated under the Australian Securities and Investments Commission Act 2001 (the **ASIC Act**).

This had the effect, among other things, of extending these regimes to credit products. We note and welcome the proposed exclusion, in the draft regulations, from the requirement to provide a target market determination (TMD), of credit provided wholly or predominantly for business purposes. Application of the DDO to business lending may have had the effect of unduly restricting flexibility for lenders and lead to poorer outcomes for business customers. The exclusion is also consistent with the Royal Commissions refusal to recommend an extension of the responsible lending obligations in the *National Consumer Credit Protection Act 2009 (Credit Act)* to small business.¹

One concern we have regarding the inclusion of consumer credit products is that this raises questions about the extent to which this adds to regulatory obligations over and above those contained in the responsible lending regime under the Credit Act. The ABA will draw to ASIC's attention that it will be important that any ASIC Guidance emphasise the scalability of obligations under this regime, as unduly onerous obligations in relation to consumer credit could have an impact on the broader economy.

We also note the introduction of a Best Interests Duty for mortgage brokers from 1 July 2020. We note that banks may take this into account when making their TMDs.

Wholesale ADI debentures

We note that the regulations now clarify that wholesale debentures are not within scope by adding language consistent with that we have previously proposed. We endorse this approach and agree, as the Explanatory Memorandum notes, that this ensures that the obligations are not extended to wholesale issuances that do not require disclosure to investors.

Basic deposit products / basic banking products

We note that, as foreshadowed at an earlier stage, the draft regulations extend the DDO regime to basic banking products. In line with our previous submissions, we believe that the regime should not be so extended for the following reasons:

- The extension of the regime to basic *banking* products, as opposed to the earlier expressed intention to include only basic *deposit* products would subject products such as direct debit facilities to the DDO without any apparent benefit to consumers.
- Basic deposit products should not be subject to the DDO regime. ABA members have taken steps to improve consumer outcomes – including those associated with basic deposit products – under the Banking Code of Practice. This, coupled with the simple character of basic deposit products, renders the application of the regime unnecessary.

The extension of the DDO regime to *basic banking products* goes beyond the intention expressed in the Explanatory Memorandum to the Bill which was limited to the inclusion of *basic deposit products*. As noted in the Explanatory Statement to the regulations, the definition of 'basic banking products' in the Corporations Act includes 'basic deposit products' but also includes non-cash payments (which includes direct debit and other online banking facilities, for example - see section 763D of the Corporations Act); and facilities for providing traveller's cheques.

In our view there would be no benefit to consumers for the DDO to apply to the additional products caught by the broader definition – i.e. 'basic banking products'. For example, it is unclear what could usefully be said in a TMD for a direct debit facility. These and like products are relatively simple, and likely to be suitable for any consumer. The extension of the DDO regime to these products will needlessly increase costs to business and consumers.

If the TMD obligations are to be extended to basic products at all, this should be confined to basic deposit products and not to basic banking products, as flagged in the Explanatory Memorandum to the Bill.

That said, it should be noted that it remains the case that the ABA does not support the extension of the DDO to basic deposit products. The policy intent of the DDO is to overcome the identified deficiencies

¹ See recommendation 1.9 and associated commentary.

of disclosure, such as “consumer disengagement, complexity of documents and products, behavioural biases, misaligned interests and low financial literacy.” It also intends to reduce the likelihood of failures such as Storm Financial or Opes Prime. It is not clear how including basic products furthers this objective, nor what the expected benefits for consumers will be, particularly as basic deposit products are excluded from the disclosure regime.

The inclusion of basic deposit and basic banking products in the DDO regime does not further the stated policy intentions and complicates their provision without providing useful consumer protection.

In consultation rounds, Treasury noted that the intention of this regime is to make issuers consider which markets are appropriate for particular products. In relation to basic products, Treasury has argued that certain fee structures or product categories – such as term deposits – may not be suitable for all.

In our view, the concerns raised by Treasury will be addressed under the Banking Code of Practice which commenced operation in July this year. The new banking code requires banks to investigate the source of customers' income. If they have a government card, the bank must proactively provide them with information about the basic, low-fee and fee-free accounts that they have.

In this way the industry has taken steps to improve consumer protections around basic deposit products, especially for vulnerable and low-income customers. In light of those steps, the application of the DDO regime to basic products is, in our view, largely superfluous.

In addition, flexibility and convenience for consumers in matters such as opening new accounts will be reduced if complexity is added to the process in order to comply with DDOs. There are circumstances where the ability to swiftly and easily open an account can be critical – some situations associated with family and domestic violence, for example. Unnecessarily complicating such processes by adding to the existing regulatory burden is undesirable, especially if corresponding consumer benefits cannot be demonstrated.

In this regard we note the statement in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry's Interim Report that “given the existing breadth and complexity of the regulation of the financial services industry, adding any new layer of law or regulation will add a new layer of compliance cost and complexity. That should not be done unless there is a clearly identified advantage....”

If the inclusion of basic deposit products by these regulations is to be maintained:

- very simple basic deposit products that will likely be suitable for all should be excluded. This would avoid unnecessary cost and complexity brought about by the application of the regime to these products.
- Basic banking products designed wholly or predominantly for business purposes should be excluded.

General advice in respect of "legacy products"

We also seek clarification on the application of certain obligations to conduct in respect of financial products that are no longer offered for issue or sale (legacy products) after commencement of the DDO regime. In short, the effective inclusion of 'general advice' - any matter which is not purely factual - in 'retail product distribution conduct' means that the obligations will apply in some aspects to legacy products where no new distribution will occur, creating an additional regulatory burden affecting routine communications about legacy products.

Relevantly, in respect of those legacy products there is a requirement on an issuer or seller to take reasonable steps that will, or are reasonably likely to, result in retail product distribution conduct for that product being consistent with the relevant TMD (section 994E(1)) but there is no such requirement imposed on any other regulated person including a distributor (section 994E(3)).

It is our view that these inconsistent obligations require clarification as:



- the obligations do not appear to be consistent with the objectives of the DDO regime (ie. the DDO regime appears to only intend to regulate the design and distribution of products that are on offer for issue or sale); and
- it is not clear what mischief the inconsistency in the provisions seeks to address.

Based on the objectives of the DDO regime, we recommend that consideration be given to section 994E(1) being modified to ensure consistency is applied to conduct of both issuers and sellers and other regulated persons in respect of legacy products.

Mortgage brokers and the definition of 'issuer'

One interpretation of the definition of 'issuer' would suggest mortgage brokers are captured:

“a person who issues a credit product to a retail client ('issue' is defined in section 9 of the Corporations Act to mean 'circulate, distribute, and disseminate')” (s994(1)).

In our view the regulations should clarify that that brokers would not be captured as an issuer and only ever as a distributor (noting that some brokers will hold their own Australian credit license while others will operate as credit representatives).

Thank you again for the opportunity to comment on the draft regulations. If you require any further information on the above points, please do not hesitate to contact us.

Yours faithfully

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