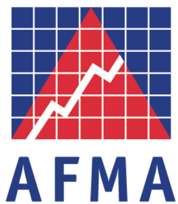

20th March 2013

Ms Irene Sim
General Manager, Retail Investor Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: futureofadvice@treasury.gov.au

Dear Ms Sim

Exposure Draft – FOFA Regulations on Grandfathering

Thank you for the opportunity to provide comments on the *Corporations Amendment Regulation 2013 (No. F)* (draft regulations) released late on 4 March 2013. I would like to note the relatively short timeframe to make a submission on these draft regulations. Also, not all members of the FOFA Peak Consultation Group who would be expected to have an interest in the draft regulations received notification of their release, and were alerted to their existence through other means. This makes it more difficult to make an informed and well-considered submission in the time allowed, which is unfortunate.

AFMA has the following comments and observations about the draft regulations.

1. Drafting issues

(a) Platform operators offering *both* custodial and non-custodial arrangements

The narrow drafting of regulation 7.7A.16 means that it does not adequately anticipate scenarios where a payment is received from a platform operator that holds assets under ***both*** a custodial and non-custodial arrangement. For instance, a platform operator holds units in a managed investment scheme (MIS) under a custodial arrangement and also maintains (via a non-custodial arrangement) equity and cash holdings, which are held directly by the client.

To rectify this anomaly, we suggest that the grandfathering provisions under regulation 7.7A.16 be extended across the *entirety* of the arrangement provided by the platform operator and are not confined just to 'regulated acquisitions' pursuant to a 'custodial arrangement'.

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(b) Explanatory Statement (ES) and Regulations are not consistent

The ES and the Regulations are very different. The intent outlined in the ES does not, in most instances, correlate with the drafting of the Regulations.

An example of this is that, whilst the ES does contemplate top ups and switching between MIS and superannuation, the language in Regulation 7.7A.16 does not permit this in relation to platforms, as the top up provisions in Regulation 7.7A.16A(4) only apply to payments from non-platform operators in Regulation 7.7.16A. So effectively, the purchase of additional units in the same MIS on the same platform will most likely constitute the acquisition of a 'new' financial product and hence grandfathering will not apply.

To rectify this anomaly, the language in Regulation 7.7A.16A(4) needs to be replicated in Regulation 7.7A.16.

(c) Continuity provisions

The 'continuity provisions' in Regulations 7.7A.16(3) and 7.7A.16A(3) are perplexing.

Effectively they could even extend to beyond just corporate restructures - it essentially extends to any type of 'arrangement', perhaps even employment arrangements. This is again inconsistent with the ES. Further guidance on what is intended here would be beneficial.

(d) Terms and conditions of an arrangement

Following on from the comments in paragraph (c) above, Regulation 7.7A.17 may actually operate in a broader manner than anticipated by the ES - it again relates to 'arrangements'. Again, further guidance on what is intended here would be beneficial.

2. The connection between volume based shelf space fees, conflicted remuneration and the grandfathering of both of these payments

A payment made by a fund manager to a platform operator is both conflicted remuneration and a volume based shelf space fees. However the grandfathering provisions in the draft regulations for each of these are different. The relevant provision would be Regulation 7.7A.16A for conflicted remuneration, and for volume based shelf space fees it would be section 1529 of the Corporations Act (Act).

The implications of this are that while an arrangement for the volume based shelf space fee is grandfathered forever, and possibly for all clients who come into the product; for clients who come into the product post 1 July 2014 the revenue will be conflicted remuneration and is banned.

This effectively means that you lose the benefit of grandfathering commission payments that are volume based shelf space fees for clients who are in that product through the platform post 1 July 2014.

3. Employment agreements

Where an employer is not a platform operator, an employment agreement is able to be grandfathered under both the provisions in subsection 1528(1) of the Corporations Act and/or Regulation 7.7A.16A, but the provisions in the Act and the regulation are not the same.

Subsection 1528(1) sets out a general provision for grandfathering that applies to non-platform operators and has no client limitations (other than the arrangement must have been entered into before 1 July 2013).

The regulation relating to payments by non-platform operators (Regulation 7.7A.16A) is limited to arrangements entered into before the application day, and the acquisition of a financial product by a retail client who did not have an interest in the financial product immediately before 1 July 2014.

It is confusing as to which one applies, and in what circumstances.

Further, the ES at the bottom of page 2 specifies that Regulation 7.7A.16A applies where Division 4 would not otherwise apply by virtue of subsection 1528(1).

However it is not clear by reading Regulation 7.7A.16A in what situation it applies versus subsection 1528(1).

Clarity as to the application of the Regulation and the provisions in the Act would be very helpful.

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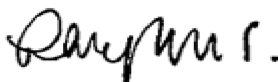
Please contact me on 02 9776 7997 or tlyons@afma.com.au if you have any queries about this letter.

Yours sincerely



Tracey Lyons
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