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Manager
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The Treasury
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Dear Ms Moore,

Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017

AMP appreciates the opportunity to make a submission in relation to the Government's Exposure Draft Legislation to improve outcomes for financial consumers released on 21 December 2017.

We support the FSC submission in relation to this Bill and, in our submission, would like to emphasise the importance of the following five points which are relevant for AMP.

1. No obligation on product issuers or distributors to provide personal advice

Compliance with the Design and Distribution Obligations (DDO) should not result in product issuers, or distributors, who distribute products under either general advice or no advice, being in a scenario of personal advice for which they may not be licensed to provide.

a. When making an appropriate Target Market Determination (TMD), product issuers will not have access to individual customer information, nor are they necessarily licenced, to provide personal advice in relation to a financial product. The current language used in s993DB(10) of the draft legislation suggests that personal advice requirements will be taken into account by product issuers. While the Explanatory Memorandum states that this is not the case, we believe it is essential for this to also be made clearer in the law itself. We agree with the FSC's suggested amendment included in their submission as follows:

s993DB(10) "A target market determination for a financial product must be such that it would be reasonable to conclude that, if the product were issued or sold to persons in the target market in accordance with the distribution conditions, the product would *be*

reasonably likely to *generally meet the ~~likely~~ objectives, financial situations and needs that ~~of the~~ persons in the target* market *would reasonably be expected to have."*

b. For execution only (no advice but dealing/arranging), and also general advice scenarios, the regulated person, often and quite intentionally, will not have sufficient information about the client to assess whether they fit within the TMD for a financial product. To comply with the distribution obligations in s993DE of the draft legislation, the regulated person will need to obtain sufficient personal details from the client to assess whether they fit within the TMD and this presents a risk that the client will assume that their personal objectives, financial situation and needs are being taken into account. This would inadvertently satisfy the definition of 'personal advice', requiring Best Interest Duty (BID) and other obligations for the regulated person. These regulated persons are not licensed to provide personal advice and this outcome would mean a breach of their licence and the Corporations Act.

   We also note that the Productivity Commission has recently recommended in its Draft Report on Competition in the Australian Financial System that the term 'general advice' be renamed to improve consumer understanding and that *"the term 'advice' should only be used in association with 'personal advice' that takes into consideration personal circumstances".*[1]

   We therefore request that the draft legislation is amended to confirm that compliance with the DDO will not require a regulated person to provide personal or any type of 'advice'.

2. Identification of, and changes to, a TMD apply at the point of issue/sale of a financial product

Our interpretation of the draft legislation and Explanatory Memorandum is that the DDO and TMD will apply at the point of issue/sale of a financial product, for new customers only. This means that if a review or a review trigger causes a TMD for a financial product to be amended, the new TMD will apply to new issues/sales of that product to new customers going forward. And, the new TMD will therefore not be required to be considered in relation to existing customers that were within the previous TMD.

We believe that this is an important point that requires clarification for product issuers in the Explanatory Memorandum.

3. Best Interest Duty (BID) obligations of financial advisers should not be restricted by the DDO

The BID obligations of financial advisers providing personal advice may require a financial product to be distributed outside its TMD, if the product is appropriate for the client under the BID. This should not be considered a breach under s993DE(2) of the draft legislation and should not require notification to the product issuer under s993DE(5). Fulfilment of a financial adviser's obligations under the BID should not put them in breach of the new obligations under the DDO. We request that this be confirmed in the draft legislation and set out in the Explanatory Memorandum to ensure there are no conflicting obligations for financial advisers.

The same concept of the product being distributed outside its TMD, in some cases, could apply to customers choosing a product directly. As the TMD cannot take into account each customer's individual objectives, financial situation and needs, there may be instances where despite not falling within the TMD, a customer still chooses a financial product. This should be allowed with appropriate disclosure to the customer, explicit agreement from the customer through the application process, and should not be considered a breach under s993DE.

[1] Productivity Commission Inquiry into Competition in the Australian Financial System – Overview & Draft Recommendations, January 2018, draft recommendation 12.1, page 43

4. Prohibition to issue, deal or advise when a TMD may no longer be appropriate

Subsection 993DC(4) suggests that a product issuer must immediately cease to issue a product while reviewing a TMD, when an event or trigger occurs under paragraph (3)(b), and the issuer cannot commence issuing interests in the product until it makes a new TMD or confirms that the existing TMD is still appropriate.

Subsection 993DC(6) suggests that a regulated person must immediately cease to deal or provide advice, upon notification from the product issuer.

Neither of these are practical or possible.

We believe that a reasonable period of time is needed to allow the issuer to continue to issue interests in the product until a decision about the TMD is made, and for the regulated person to take reasonable steps to cease dealing or providing advice, upon notification from the product issuer.

As an example, if a distributor is an advice licensee with thousands of authorised representatives and the product issuer notifies the distributor that the TMD of a certain product may no longer be appropriate, it would not be possible for an advice licensee to immediately cease all dealing/advice activity by all of its authorised representatives.

We believe that a similar provision in s993DC(5) should be provided to address these concerns.

We note that paragraph 1.63 of the Explanatory Memorandum states that this regime is based on S1021J of the Corporations Act which applies to product issuers, and not regulated persons, with a materiality test for defective disclosure documents. There is currently no materiality test for the events or review triggers in 993DC(3)(b) of the draft legislation.

5. Products to which the Design and Distribution Obligations apply

a. **Platforms and mastertrusts –** further clarification is required on how the DDO will be applied to financial products that are investment or superannuation platforms and mastertrusts, as well as the individual investment options and insurance benefits that are included on those product platform and mastertrust menus.

   We note that the FSC has included detail in its submission to clarify the complexity of the proposed DDO with the structure of these products, including in relation to who is the product issuer or distributor. There is the potential for multiple layers of product issuers and distributors within these arrangements, each with obligations under the DDO that need to be taken into consideration to understand the application of the obligations.

   We support the FSC's comments and request that Treasury have further meetings with platform/mastertrust product providers to work through the practical implications of the DDO. We would also be open to meet with Treasury to go over some AMP specific examples relevant in this regard.

b. **Basic banking deposit products –** basic banking deposit products should be listed in the regulations as products excluded from the DDO. They are less complex and lower risk products (offered by Authorised Deposit-taking Institutions), commonly used and widely understood by customers. The Corporations Act contains various regulatory regimes where straightforward products are excluded or given a lighter-touch because of the acknowledged

lower risks involved. For example, a Statement of Advice (SOA) is not required for basic deposit products (RG175.146, reg. 7.7.10AE).

c. **Eligible Rollover Fund (ERF)** – ERFs should be listed in the regulations as a product excluded from the DDO. An ERF is a superannuation fund issued and distributed by an RSE Licensee to another RSE Licensee that determines it is in members' best interests to offer an ERF to assist in instances of inaction by a retail client/superannuation fund member. A retail client does not choose or apply to join an ERF, rather their superannuation balance is transferred to an ERF after a disclosed period of inactivity and related characteristics have been satisfied. Also, a client cannot make contributions into the ERF. In addition, RSE Licensees as issuers of ERFs are subject to significant SIS obligations in relation to conduct and operation of an ERF that provide appropriate protection for ERF customers.

Regulations and ASIC guidance

In addition, we note that there are multiple references to regulations in Schedule 1 of the draft legislation and the Explanatory Memorandum, to prescribe which products the DDO does and does not apply to. The regulations will also provide requirements in relation to distribution information, exemptions and modifications. These references suggest there will be a significant level of detail for the DDO in regulations. At the date of this submission, a draft of these regulations has not been provided to the industry to consider in its response on these proposals. We also understand that ASIC intends to consult with the industry and provide guidance on these proposals.

We therefore request that the draft regulations and ASIC guidance be provided to the industry for consideration of the impacts of these proposals and the provision of feedback, before the draft legislation is introduced into Parliament. In addition to the points we have included in this submission, we have identified a large number of points for clarification and discussion with ASIC in the context of their guidance on the proposals.

The proposed obligations for product issuers and distributors will require substantial changes including product disclosure, marketing material, distribution agreements, advice licensee infrastructure and IT system builds to develop reporting requirements to satisfy the recording obligations and the sharing of that information between product issuers and distributors, for all of the products to which the DDO applies (the full list of which is yet to be confirmed, with detail in regulations). It is difficult to determine the impact of the proposed requirements, and therefore not possible to commence making changes to comply with the DDO, without detailed guidance in the form of regulations and ASIC regulatory guidance, which is therefore required before the draft legislation is introduced into Parliament.

Should you have any queries, or wish to discuss any elements of this submission, please do not hesitate to contact me on [redacted].

Yours sincerely

Alastair Kinloch