Stockbrokers Association of Australia
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Corporations Amendment (Streamlining of Future of Financial Advice) Bill and Regulations 2014

Submission
19 February 2014

Introduction

The Stockbrokers Association of Australia is pleased to provide these comments on the *Corporations Amendment (Streamlining of Future of Financial Advice) Bill* 2014 and the *Corporations Amendment (Streamlining of Future of Financial Advice) Regulation* 2014.

The Bill and Regulation, which were released for comment on 29 January 2014, are generally **welcomed** by the Stockbrokers Association. They make the following reforms to the FOFA provisions of the *Corporations Act 2001*:

- restoring the Accountants' Certificate expiry period to 2 years
- extending the Stamping Fee exemption to investment entities like LICs
- removing the opt-in requirements
- removing the annual fee disclosure requirements for pre-1 July 2013 clients
- removing the 'catch-all' provision from the best interests duty
- explicitly allowing for the provision of scaled advice
- exempting general advice from the ban on conflicted remuneration, and
- broadening the existing grandfathering provisions for the ban on conflicted remuneration.

We would like to make the following comments on certain aspects of the reforms.

Timing

We note that the reforms are to be made by both legislative amendment and regulation. This is to enable time-sensitive amendments to be made in the near future through regulation, and then locked into legislation thereafter. We commend the Government for proposing to enact these reforms in the most timely manner possible.

Industry has made a long transition to FOFA. Certainty is now needed as to the final position. This is essential for licensees, and their clients. Moreover, ASIC is in a difficult position during this period of uncertainty in relation to its approach to enforcement. Ideally, it must either take a formal no-action stance, or enforce the current provisions until they are amended. Whether this is possible in the current uncertainty remains to be seen.

Conflicted Remuneration

Throughout the FOFA process, we submitted that the whole prohibition on *conflicted remuneration* needed to be reconsidered and redrafted so that it was better aligned to the *actual objectives* of FOFA. Rather than prohibiting the movement of funds between financial product issuers or sellers and advisers, there needed to be some **nexus** to the actual definition of *conflicted remuneration* i.e. where a benefit is given to a licensee or their representative in respect of *advice* provided to a client that might influence the financial product recommended or the financial advice given.

Conflicted Remuneration prohibition should apply to Personal, not General advice

One of the primary concerns we always had with the conflicted remuneration provisions was the fact that they originally applied to the provision of **both general and personal advice**. Expanding the scope of FOFA to general advice unnecessarily complicated the implementation and administration of the regime. Including general advice in the FOFA provisions made the scope of the prohibition so broad as to make it unworkable.

In our opinion, the inclusion of general advice went well beyond the original intention behind FOFA i.e. removing the risk of retail clients receiving conflicted advice that may be inappropriate for them due to the fact that the adviser is being paid a commission. By definition, **general advice does not take into account a person's needs or objectives so it is not appropriate to apply a conflicted remuneration regime when a recommendation is not being made based on the person's individual circumstances**.

We are pleased that the scope of FOFA is being narrowed to its original intent. Financial advisers that are paid commissions in respect of the advice that they provide to their clients are generally (if not always) providing personal advice and in our opinion it is this type of advice that was intended to be addressed by FOFA. The fundamental value proposition of any party that provides personal advice (including stockbrokers and financial planners) is that they provide advice that it **tailored** to the needs of their clients. Consistent with the best interests duty – which only ever applied to personal advice – we welcome the narrowing of the ban on conflicted remuneration to the provision of **personal advice.**

We also welcome the clarification of the '**client pays**' exception via a new Note to s963A, which will make it clearer that benefits paid by the client includes benefits *authorised* by the client. Clear and specific client authority should remove the risk of conflicted remuneration ever being paid.

Scaled advice

In traditional stockbroking, clients often seek advice on a limited basis, for example, a brief inquiry as to which stock(s) to buy or sell. Clients don't often require a full financial plan or advice on their entire circumstances or portfolio of investments. We were therefore pleased to see further measures in the proposed reforms to accommodate clients and their limited requirements.

ASIC has previously noted that according to surveys around **one-third** of Australians prefer scaled or 'piece-by-piece' financial advice rather than comprehensive or 'holistic' advice.[1] (Our Members would suggest that if this survey were solely conducted in **stockbroking**, the figure would be significantly **higher** than one-third.) Previously, while scaled advice was mentioned in a *Note* to s961B(2)(g), and acknowledged by ASIC in regulatory guidance, the new provisions will allow greater certainty. The adviser and client will be able to agree to limit the scope of advice that is sought so that the client's needs should be better met.

Accountants' Certificate renewal period restored to 2 years

We welcome the restoration of the 2 year renewal period for Accountants' wholesale client certificates which was reduced to 6 months by FOFA. As we stated in our letter to the Assistant Treasurer of 22 January 2014,

> *There is no policy justification for having a 6 months expiry period for Accountants' certificates in the context of financial Advice and 2 years for share offers. The rationale for the certificates has always been the same: they serve as an independent assessment of the superior financial position of a client that can be relied upon in the assessment of their status as wholesale, so as not requiring all the disclosure and other obligations owed to a retail client. They serve the same function in the context of advice as they do for share offers. There is no justification for two different renewal periods applying to Accountants' certificates in the two contexts.*

OTHER MATTERS

Finally, we wish to raise two other FOFA-related issues which appear to have been overlooked in the current reforms:

- the review of the definitions of 'retail' and 'wholesale' investors, and
- Share Registry Mining.

1. Review of Retail/Wholesale client definitions

In January 2011, following one of the recommendations of the PJC *Storm Inquiry Report*[2] the Government released an Options Paper in a wide-ranging review of the definition of

[1] ASIC Regulatory Guide 244 *Giving information, general advice and scaled advice* December 2012 at RG 244.6

[2] Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into financial products and services in Australia - Report* November 2009

retail and wholesale clients under the *Act*[3]. In late February 2011, submissions closed. These definitions are crucial the whole structure of the regulation of financial services and financial advice. It is therefore a matter of some concern that, 3 years after submissions closed on the options paper, no final or interim proposals arising from the 2011 review have been released.

2. Share Registry Mining

In 2012, we raised an issue with Government regarding the differential regulation of the permitted uses of share registers[4]. The effect of the current provisions is that licensees that are not market participants can access share registers to solicit business from shareholders. However, market participants are prohibited from doing so. There is no policy or regulatory justification for this ban, and we urgently seek its removal in the current round of reform.

Such an amendment would fit squarely in the spirit of deregulation. It could be achieved by simply deleting the offending paragraph, namely Corporations Regulation 2C.1.03(b). (For full details of this issue, please refer to our Letter of 7 August 2012 **attached**.)

While the above two matters were not included in the current proposals - and time will probably prevent them being included in the current round - we are concerned that they will again lose priority and may be forgotten in the Government's financial services policy formulation.

We are once again grateful for the opportunity to comment on what we trust (apart from the two matters last mentioned above) will be the **final tranche** of substantive FOFA reforms. The reforms should contribute to the original aim of facilitating better and more professional advice to more investors. Importantly, they should also achieve this without compromising investor protection.

Should you require further information, please contact me, or Doug Clark, Policy Executive dclark@stockbrokers.org.au .

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STOCKBROKERS ASSOCIATION OF AUSTRALIA
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[3] Australian Government *Wholesale and Retail Clients - Future of Financial Advice Options Paper* dated January 2011
[4] Stockbrokers Association *Letter to the Hon Bill Shorten MP Minister for Financial Services and Superannuation Access to Share Registers* dated 7 August 2012 **(attached)**