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Email: FSCP.submissions@asic.gov.au

Georgia Cleeve
Senior Lawyer, Financial Advisers
Australian Securities and Investments Commission
Level 7, 120 Collins Street
Melbourne, VIC 3000

Dear Ms Cleeve

CONSULTATION PAPER 359: UPDATE TO RG 263 FINANCIAL SERVICES AND CREDIT PANEL

The Stockbrokers and Investment Advisers Association (formerly the Stockbrokers and Financial Advisers Association) (SIAA) is the professional body for the stockbroking and investment advice industry. Our members are Market Participants and Advisory firms that provide securities and investment advice, execution services and equity capital-raising for Australian investors, both retail and wholesale, and for businesses. Practitioner Members are suitably qualified professionals who are employed in the securities and derivatives industry.

SIAA welcomes the opportunity to provide feedback on ASIC Consultation paper 359: *Update to RG 263 Financial Services and Credit Panel* (Consultation Paper).

The following SIAA members have been appointed to the Financial Services and Credit Panel (the Panel). We consider that their expertise will be highly respected by those appearing before the Panel and ensure informed decisions are taken.

- Ms Gabrielle Bouffler, Senior Manager – Compliance, AUSIEX
- Ms Donna Caird, Head of Risk, Euroz Hartley
- Mr Ian Chambers, Managing Director, Head of Morgan Stanley Wealth Management Australia
- Mr Hamish Dee, Director, Morgans Financial
- Mr Gary Deegan, Head of Compliance, Ord Minnett
- Mr Ross Illingworth, Executive Director, Kingfisher Capital Partners
- Mrs Melissa Nolan, Senior Compliance Manager, E.L. & C. Baillieu
- Mrs Lauren Walker, Senior Wealth Adviser, Cannacord Genuity Financial, and
- Mr Matthew Wigzell, Co-Head of Desk/Melbourne/Syndication Coordinator, Cannacord Genuity Financial.

Our submission is informed by Panel member feedback.

Executive summary

SIAA recommends the following amendments to the draft Regulatory Guide:

- When exercising its discretion to convene a sitting Panel, ASIC takes into account the following matters:
 - fairness
 - materiality
 - different licensee structures.
- When assessing the materiality of a benefit to a financial adviser, ASIC measures it against the remuneration that the Financial Adviser historically has received rather than typical industry remuneration.
- When assessing the materiality of the damage or loss to a client ASIC takes non-financial factors into account that are relevant to the client.
- Successful applications for variation or revocation should be the exception rather than the rule.
- ASIC should provide written reasons to the applicant for not convening a panel for variation or revocation of a determination.
- Panel hearings should not be recorded and must be secure.
- For confidentiality purposes, the names of the sitting Panel should not be included in the statement of reasons nor in any media release issued by ASIC.

SIAA also recommends that:

- ASIC develops a 'playbook' that contains greater detail about the processes of a Panel.
- Panel members are provided with a book of decisions made by previous Panels that can act as a 'decision library'.
- Financial Advisers are provided with guidance on how to prepare and format any information that they wish to present to ensure so that the workings of the Panel are not overwhelmed by overly long or irrelevant material.
- If ASIC intends to refer matters arising from an MDP determination, the process of doing so be included in the Regulatory Guide.

Our detailed responses to the questions raised in the Consultation Paper are below.

Detailed comments

B1Q1 Do you agree with our proposed approach to determining when to exercise our discretion to convene a sitting panel?

The draft Regulatory Guide provides that when determining whether it will exercise its discretion to convene a sitting panel ASIC will consider the regulatory benefit that may be derived from the referral ie, whether the misconduct is widespread or part of a growing trend and whether the referral will send an effective and deterrent message to industry.

We note that the discretion ASIC may exercise is extremely broad. SIAA considers that there must be an overarching principle of fairness applied in its exercise to ensure that it is not arbitrary. In particular, SIAA would be concerned if ASIC exercised its discretion to refer matters considered as 'test cases' or new areas of law. The Single Disciplinary Body cannot be seen to be acting punitively against advisers, treating them as scape-goats or using the Panel as a way to pursue standards of

conduct that exceed the law. We concede that it is challenging to develop more detailed guidance at the moment, as the Panel has not decided any cases as yet. However, more detail will need to be added to the guidance as the Panel starts to operate to ensure there is method and fairness in the exercise of the discretion to convene.

In our previous submissions on the Single Disciplinary Body, SIAA has emphasised the importance of the Panel only dealing with material matters. We reiterate our view that ASIC should exercise its discretion in a way that ensures minor and administrative matters are filtered out.

Another issue that SIAA would like to bring to ASIC's attention is the important line between the responsibility of a licensee on one hand and an adviser on the other. This issue is particularly relevant in large organisations. Issues that are solely the responsibility of a licensee should not be visited upon the adviser. There will also be situations involving complex factual matrices and multiple layers of compliance involving the Financial Adviser and the licensee. ASIC will need to take care when exercising its discretion to ensure that it doesn't convene a Panel for conduct that was not the responsibility of the Financial Adviser.

SIAA recommends that the Regulatory Guide be amended to reflect these issues.

B2Q1 Do you agree that it is appropriate for ASIC to have regard to these factors in assessing the materiality of:

- (a) Damage or loss to a client; or**
- (b) Benefit to a financial adviser?**

B2Q2 Are there any other factors ASIC should consider in assessing the materiality of:

- (a) Damage or loss to a client: or**
- (b) Benefit to a financial adviser?**

The draft Regulatory Guide provides that when assessing whether a benefit to a Financial Adviser is material, ASIC will have regard to the broad circumstances of the Financial Adviser and the benefit itself, including the size of the benefit relative to *typical industry remuneration*. SIAA considers that there are no existing benchmarks in the industry that would enable an assessment against typical industry remuneration.

SIAA recommends that the draft Regulatory Guide be amended to provide for the benefit to be assessed against the remuneration that the Financial Adviser has historically received.

Assessment of the damage or loss to a client must not be limited to purely financial factors. ASIC should be able to take non-financial factors into account that are relevant to the client. By way of example, a client's terminal illness or a Financial Adviser's exercise of undue influence are factors that make adviser misconduct more egregious. Another important factor ASIC should take into account is whether the conduct brings the industry into disrepute.

SIAA recommends that the Regulatory Guide be updated to include non-financial factors.

B3Q1 Do you agree that it is appropriate for ASIC to have regard to these matters in assessing whether a person is fit and proper to provide personal advice to retail clients on relevant financial products?

B3Q2 Are there any other matters ASIC should have regard to in assessing whether a person is fit and proper to provide personal advice to retail clients on relevant financial products?

Contravention of a financial services law or involvement in the contravention of a financial services law by another person

ASIC must convene a Panel if it reasonably believes that the Financial Adviser has contravened a financial services law and that the contravention is serious. Once a Panel is convened, presumably it will need to determine if the Financial Adviser has in fact contravened the financial services law and if they have, the appropriate action to take. SIAA considers that guidance will need to be provided to the Panel members in making a determination as to whether a contravention of a financial services law has occurred. Will the matter need to be referred to a court to make a determination or will the Panel have the ability to make its own decision? If the Panel has to make its own decision, what matters should the Panel take into account?

The same issues will arise when a Panel is convened to determine if a Financial Adviser has been involved in the contravention of a financial services law by another person. What is the level of knowledge or recklessness that would be required in order for a Panel to make a determination and would a formal court determination be required?

Been linked at least twice to a refusal or failure to give effect to an AFCA determination

Our members' experience is that once a matter is referred to AFCA, the licensee has carriage of the matter and the Financial Adviser may be 'out of the loop' as regards the future handling of the claim. For SIAA members, a Financial Adviser is less likely to 'be an officer of or substantially or significantly involved in the management of the financial firm that is party to the complaint'. Convening a Panel for a matter over which a Financial Adviser has no control would not be fair. Different considerations would of course apply in circumstances where the Financial Adviser is also the licensee and it would be appropriate for a Panel to be convened if this was the case.

SIAA recommends that the draft Regulatory Guide be amended to reflect a more nuanced approach that takes different licensee structures into account. The Panel members would also benefit from information from AFCA on the numbers and types of unpaid relevant AFCA determinations.

The 'one-size-fits-all' approach to clients evidenced in the Storm Financial case is an example of the type of egregious conduct a Panel would expect to have referred to it for determination if it was the result of actions undertaken by a Financial Adviser rather than the licensee.

C1Q1 Do you agree that the proposed examples of matters in draft RG 263.37 are relevant to a decision by ASIC whether to convene a sitting panel to consider whether to vary or revoke the direction or order?

C1Q2 Are there any other matters we should include as examples?

SIAA considers that any decision to vary or revoke a direction or order of a Panel risks undermining or ‘second guessing’ the decision of the original Panel and could impugn the impartiality of the Panel process. ASIC would need to consider matters very carefully before deciding to allow an application for variation or revocation of a previous Panel’s determination and more guidance is needed on this. For example, what does a change of circumstances look like? For example, if an applicant has been ordered to undertake training over a six-month period and they complete it in three months, would this be considered to be a change in circumstances?

We consider that successful applications for variation or revocation should be the exception rather than the rule. One example of a matter that we consider ASIC should take into account when deciding against granting an application is where the applicant did not engage with the process of the original determination. Allowing an application for revocation or variation in a situation where the applicant essentially ignored the process represents a waste of the Panel’s time and resources. We also consider that ASIC should be required to provide written reasons to the applicant for not convening a Panel for variation or revocation of a determination.

SIAA recommends that the Regulatory Guide be updated to include these points.

D1Q1 Do you agree with the proposed approach to holding hearings using technology? Why/why not?

SIAA agrees with the proposed approach that hearings of the sitting panel will generally be held using audio-visual teleconferencing.

Using technology for Panel hearings:

- allows Panel members from different locations to participate in Panel meetings, resulting in better outcomes
- assists with timely decision-making
- eliminates travel time
- reduces inconvenience and costs.

We consider that Panel hearings should not be recorded and must be secure. The draft Regulatory Guide provides that a Panel will give a statement of reasons for a final decision for various actions but that ASIC will not publish the statement of reasons of a sitting Panel. SIAA recommends for confidentiality purposes that the names of the members of the sitting Panel not be included in the statement of reasons nor in any media release issued by ASIC. We consider that it is important that there is anonymity in the Panel’s decision making.

D2Q1 Do you agree with our proposed approach to publicising decisions of a sitting panel?

Yes. Publicising decisions of a sitting panel serves as an important deterrence to misconduct and also acts as a reminder of expected standards of conduct of Financial Advisers.

General comments

What actions a sitting panel may take

The draft Regulatory Guide provides that as each sitting panel exercises its own powers and makes its decisions independently, ASIC cannot anticipate the factors sitting panels will consider and accordingly does not provide guidance about how sitting panels will decide what action to take.

While we appreciate that ASIC does not wish to appear to fetter the decision-making power of the Panel, we consider that Panel members will benefit from a 'playbook' that will facilitate a consistent decision-making process. For example, we have previously mentioned that guidance will need to be provided to Panel members as to how they are to determine if a contravention of a financial services law has occurred. This may need to be developed incrementally as Panel practice develops. We also consider that it would not be desirable for there to be different outcomes from a series of determinations that have a similar factual matrix. It would therefore be prudent for Panel members to be made aware of previous Panel decisions.

SIAA recommends that ASIC develop a 'playbook' that contains greater detail about the processes of a Panel and that Panel members are provided with a book of decisions made by previous Panels that can act as a 'decision library'.

Material presented at the hearing

It will be important that Financial Advisers are provided with guidance on how to prepare and format any information that they wish to present to ensure that the workings of the Panel are not overwhelmed by overly long or irrelevant material.

Interaction between the Panel and the Markets Disciplinary Panel (MDP)

SIAA is interested in how ASIC considers the Panel will interact with the operation of the MDP. For example, if there is an adverse finding of the MDP that involves the conduct of a Financial Adviser, is there an expectation that the MDP will refer that matter to the Panel and if so how will that referral be dealt with by ASIC?

SIAA recommends that if ASIC intends to refer matters arising from an MDP determination, the process of doing so be included in the Regulatory Guide.

Conclusion

If you require additional information or wish to discuss this submission in greater detail please do not hesitate to contact SIAA's policy manager, Michelle Huckel, at michelle.huckel@stockbrokers.org.au.

Kind regards



Judith Fox
Chief Executive Officer