File Name: 2015/C04

6 May 2015

Maan Beydoun
Senior Specialist
Investment Managers and Superannuation
Australian Securities and Investments Commission
Email: Maan.Beydoun@asic.gov.au

Dear Maan

Soft Consultation – Amendments to Class Order 14/1252

Thank you for inviting the Association of Superannuation Funds of Australia (ASFA) to participate in the confidential 'soft' consultation on proposed amendments to ASIC Class Order [CO 14/1252]. Our comments below are based on the draft amending Class Order [CO 15/XXXX] ("draft Class Order") provided to Robert Hodge via email on 28 April 2015.

Given the confidential nature of this consultation, the relatively short timeframe provided for a response and the significance and complexity of the subject matter, ASFA strongly recommends that ASIC undertake a public consultation prior to finalising the amending Class Order.

ABOUT ASFA

ASFA is a non-profit, non-politically aligned national organisation. We are the peak policy and research body for the superannuation sector. Our mandate is to develop and advocate policy in the best long-term interest of fund members. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90 per cent of the 14 million Australians with superannuation.

COMMENTS

ASFA considers that the proposed amendments to [CO 14/1252] will improve the operation of the disclosure regime in relation to fees and costs, and will lead to more consistent disclosure. Our detailed comments are set out below.

1. Specific comments in relation to the draft Class Order

1.1. Paragraph 4(a)

ASFA notes the change to paragraph 4 of the Class Order to reflect its expansion to include a definition of ***investment option*** in the Class Order at paragraph 7A.

1.2. Paragraph 4(b)

ASFA notes the change to paragraph 6(a)(ii) of the class order to accommodate the proposal to move the definition of ***interposed vehicle*** from sub-paragraph 6(a)(ii) to sub-paragraph 6(a)(iv), immediately following the definition of indirect costs. ASFA supports this amendment, as it places the definition immediately following the definition of indirect costs, which makes reference to interposed vehicles.

Paragraph 4(c)
As a preliminary comment, we recommend that, for ease of interpretation, the reference to 'paragraph 1(c)' be replaced with a reference to 'subparagraph 6(a)(iv) notional subclause 101A(1)(c)'. Without such precision, and in the absence of a direct reference to notional clause '101A Indirect costs', the reader is required to examine subparagraphs (i), (ii), (iii) and (iv) of paragraph 6 in order to locate a paragraph labelled 1(c).

Further, it appears that a carriage return has been omitted after the words '"as defined in clause 209A or an insurance fee":' and the amendment to notional subclause 101A(3) was intended to be shown as paragraph 4(d). Correction of this error will necessitate the relabelling of current paragraphs 4(d) through 4(j) as paragraphs 4(e) through 4(k). Please note that our comments below refer to the paragraph numbers *as currently shown* in the draft Class Order.

Proposed change to notional subclause 101A(1)(c)

We understand that the intention of this paragraph is to amend the definition of ***indirect costs*** to resolve the uncertainty around the status of particular fees and to avoid the potential for fees being either omitted or double counted. It aims to achieve this by directly referencing certain definitions of 'fees' set out in clause 209A of Schedule 10 of the *Corporations Regulations 2001*, instead of those defined in section 29V of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) as is currently the case.

We note that the types of fees and amounts itemised in clause 209A and section 29V differ in two key respects:

(i) 'Insurance fees' are defined in section 29V but not clause 209A.

This has been adequately addressed by the separate exclusion of 'insurance fees' in the amendment to notional subclause 101A(c)

(ii) 'Indirect cost ratio' is itemised in clause 209A but not section 29V.

While it might be argued that the 'indirect cost ratio' is not a 'fee' and therefore is not intended to be caught by the wording of the amended subclause 101A(1)(c), we note that the heading to clause 209A, in which 'indirect cost ratio' appears, is 'defined fees for superannuation products'. As a result, the amended subclause 101A() could potentially be interpreted as meaning that 'indirect costs' **excludes** any amount that falls within the definition of 'indirect cost ratio'. As 'indirect costs' are a key component of the calculation of the 'indirect cost ratio', the risk of this possible interpretation could produce an unintended outcome. As such, ASFA recommends that this be clarified.

Proposed change to notional subclause 101A(3)

The proposed amendment to notional subclause 101A(3) is intended to clarify the meaning of the '**buy-sell spread**' of a product or option.

In ASFA's view, the proposed amendments appear reasonable and should lead to a more consistent approach to the determination of indirect costs.

However, we note that due to the extensive use of subparagraphs and subpoints, subclause 101A(3) is now quite difficult to follow. In our view, the structure and clarity of subclause 101A(3) would be greatly improved by reviewing the numbering protocols used, to ensure that the reader can clearly identify those elements of the definition which are standalone requirements, and those which are further conditions applying to one or more of the prior requirements.

For example, this should include:

- relabelling current subparagraphs 101A(3)(a)(ii)(C) and (D) to reflect that they are not standalone subparagraphs, but are actually further conditions that apply to subparagraphs 101A(3)(a)(ii)(A) and (B)
- relabelling current subparagraphs 101A(3)(a)(ii)(D)(6) to (8), to reflect that these are not standalone subparagraphs, but are actually further conditions that apply to subparagraphs 101A(3)(a)(ii)(D)(1) to (5).

While we appreciate that this may reflect the current protocols re legislative drafting, the current drafting is not straightforward to interpret and apply. If it is not possible to amend the numbering protocols as per above, ASFA strongly recommends that the drafting be amended to re-draft the qualifications/conditions as separate sub-clauses to the standalone requirements.

1.3. Paragraph 4(d)

This amendment flows from and supports the change proposed by paragraph 4(c).

ASFA supports the amendment.

1.4. Paragraph 4(e)

This paragraph inserts a substantially revised definition of the term ***'interposed vehicle'.***

While undeniably still a complex definition, ASFA considers that the revision has delivered some additional clarity around the circumstances in which an entity will be considered to be an 'interposed vehicle'.

1.5. Paragraph 4(f)

ASFA notes that this amendment essentially reinstates the wording of the consumer warning for superannuation products that applied prior to the registration of [CO 14/1252].

In our recent submission in response to the proposed amendments to Regulatory Guide 97 *Disclosing fees and costs in PDSs and periodic statements* (RG 97), we highlighted the potential confusion that might arise due to the use of the terms 'contribution fees and management costs' in the [CO 14/1252] version of the consumer warning. As such, we welcome the removal of these terms in the proposed amendment.

However, in our submission in response to RG97, and our earlier submissions in response to the draft versions of [CO 14/1252], we noted that the use of terminology such as "You or your employer may be able to negotiate to pay lower fees" is only appropriate for a public offer member joining a public offer fund, as only such members will be in a position to negotiate regarding fees.

Accordingly, we strongly recommend that this wording be removed from the consumer advisory warning. In circumstances where a public offer member is able to negotiate regarding fees, a statement should be made to this effect.

1.6. Paragraph 4(g)

This paragraph is simply a necessary punctuation change to support the inclusion of new subparagraph 6(i) of [CO 14/1252]. ASFA has no comments on this proposed amendment.

1.7. Paragraph 4(h)

This paragraph proposes changing the text that must be used to describe the indirect costs of an investment on members' periodic statements from this:

> This approximate amount has been deducted from your investment and includes amounts that have reduced the return on your investment but are not charged directly to you as a fee

to this:

> This approximate amount has been deducted from your investment and covers amounts that have reduced the return on your investment but are not charged as a fee.

ASFA supports the amended wording.

1.8. Paragraph 4(i)

This proposed amendment inserts into [CO 14/1252] a definition of *investment Option* which clarifies that where a managed investment scheme or superannuation fund does not offer a choice of investment options, then the scheme or fund is to be regarded as the investment option for disclosure purposes.

ASFA supports this clarification of the law.

1.9. Paragraph 4(j)

ASFA notes the replacement of the reference to Part 11 of the Corporations Regulations, in the note to paragraph 9 of [CO 14/1252], with a reference to Part 12. ASFA welcomes the correction of this cross-referencing error, which we have highlighted to ASIC previously. .

2. Transition timeframe for commencement of the amendments

We note the following comment from your email of 28 April 2015 to Robert Hodge:

> While we have in this version of the draft class proposed an amendment to the transition period of 14/1252, this does not suggest that we have decided not to extended it (as requested we do in some of the submissions). The transition period is being considered and if a decision is made to extend it we will add a further amendment to this amending class order. We may also allow for opt in to take the benefit of certain clarifications, such as the consumer advisory warning clarification, earlier if the product issuer elects.

In our submission in response to proposed amendments to RG97, we expressed the view that the unsettled nature of the disclosure obligations in relation to fees and costs warranted a deferral of the application of [CO 14/1252] to Product Disclosure Statements (PDSs).

ASFA's recommendation at that time was that the modifications set out in [CO 14/1252] should not apply to a PDS until 1 July 2017 (regardless of when the PDS was first given), however, a product issuer should have the ability to opt-in to earlier application of [CO 14/1252].

We note that this current consultation proposes considerable amendments to [CO 14/1252] which – although largely likely to be welcomed by industry – will require trustees to undertake significant analysis, review of work already undertaken to implement [CO 14/1252] and, in some cases, rework to align to the revised Class Order. In addition we note that RG 97 has not yet been finalised, although you have indicated that ASIC intends to publish the updated version "by 30 June 2015".

As a result ASFA again urges ASIC to consider a deferral of the mandatory application of [CO 14/1252] to allow product providers time to undertake the necessary work to ensure effective implementation. ASFA would, however, support the suggestion in your email to Robert Hodge that provision may be made for earlier opt-in by providers to some aspects of the revised Class Order - such as the revised wording of the consumer advisory warning (subject to our comments above regarding the appropriate wording for this warning).

*****

If you have any queries or comments regarding the contents of our submission, please contact Julia Stannard, Senior Policy Adviser, on (03) 9225 4027 or by email jstannard@superannuation.asn.au.

ASFA would be happy to be involved in future consultation on this matter.

Yours sincerely

Fiona Galbraith

Director, Policy