AUSTRALIAN BANKERS' ASSOCIATION INC.

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Dear Ms Hadisutanto,

Record keeping requirements

The Australian Bankers' Association (ABA) appreciates the opportunity to provide comments to ASIC on C*onsultation Paper 214: Updated record-keeping obligations for AFS licensees*.

General comments

The ABA recognises that ASIC is proposing class order relief to modify the law and is proposing to update regulatory guidance to impose record keeping requirements for AFS licensees in relation to the provision of personal advice to retail investors, the conflicted remuneration provisions, and the provision of intra-fund advice[1]. We understand that the intention of the class order relief and regulatory guidance is to give the industry certainty about its record keeping obligations pursuant to the FOFA reforms and Stronger Super reforms. We also understand that it is ASIC's intention to adopt a facilitative approach to compliance and enforcement with the record keeping obligations until 30 June 2014.

The ABA believes that record keeping practices are important to ensure AFS licensees keep accurate accounts of their product and service offerings and dealings with their customers and retail clients. Good record keeping practices are essential in running a financial services business, maintaining good adviser-client relationships, promoting processes which underlie the provision of good quality advice and making sure compliance policies and procedures are maintained. Good record keeping practices are also necessary in the instance that the record keeping system is required to establish evidence of compliance, such as if there is a complaint made by a client or a surveillance exercise or an investigation is conducted by a regulatory authority, ombudsman or law enforcement agency.

Therefore, the ABA supports ASIC issuing and updating its regulatory guidance on record keeping requirements, and in particular to take account of new legal provisions. However, we are concerned that if the proposed new and additional record keeping requirements as outlined in the consultation paper were imposed, this would have a substantial impact on record keeping systems and compliance costs for the industry. The proposals would require banks and banking groups to make changes that would result in significant business inefficiencies, such as

[1] The ABA notes that ASIC is proposing record keeping obligations relating to:
(a) personal advice provided to retail clients in accordance with the new FOFA conduct obligations in Division 2 and 3 of Part 7.7A, such as the best interests duty and related obligations;
(b) financial product advice provided to retail clients in accordance with the conflicted remuneration provisions in Division 4 and 5 of Part 7.7A; and
(c) personal advice for which superannuation trustees are not permitted to collectively charge members as intra-fund advice in accordance with section 99F of the SIS Act.

implementing substantial changes to their new FOFA-related systems to ensure capture of these new obligations, revising existing policies, procedures and processes, and adjusting existing industry arrangements. We do not believe the proposed record keeping requirements are warranted, especially where the new obligations would require banks and banking groups to retain records of individual interactions with retail clients, individual payments accepted and made, individual employee remuneration arrangements and payments, or advice arrangements and associated fees pertaining to individual investment strategies within superannuation funds.

Specific comments

Amendment by class order instrument

The ABA understands that ASIC is able to make a class order to update the references to Pro Forma 209 (PF 209). This approach is sensible as it would be inefficient for ASIC and AFS licensees to adjust individual licence conditions and update individual licences. However, while we recognise that AFS licensees are required to keep adequate records about their financial services businesses, we are concerned that the proposed class order instruments would make amendments beyond those related to the new FOFA and Stronger Super provisions, and thereby extend the record keeping requirements and confer those requirements as legal obligations. This approach will also contribute to administrative complexity as the record keeping requirements will not be contained in one document[2].

We are also concerned that ASIC is proposing to exercise its new modification power in order to prescribe new and additional record keeping requirements. This approach means that if an AFS licensee fails to comply with the new record keeping requirements established by ASIC, that this would constitute a breach of the law and enforcement action can be taken accordingly. We do not believe that the legislature had in mind that the regulator would impose additional and new regulatory obligations on AFS licensees and their advisers without legislative due process when introducing this new power, instead that this power would be used only when absolutely necessary to address an immediate threat to market integrity or systemic market failure.

The ABA supports:

- Implementing class order relief that relates only to updating references from the repealed section 945A and section 945B in the Corporations Act;
- Focusing regulatory guidance on establishing principles for good record keeping processes and providing some examples relevant to the new FOFA and Stronger Super provisions as a way to educate and inform the industry about regulatory expectations[3];
- Adopting an approach with the regulatory guidance which recognises the different business models across industry, including current practices with regards to geographically spread authorised representatives and contracts and industry arrangements between parties to ensure compliance with the obligation to retain adequate records; and
- Updating regulatory guidance so that all record keeping requirements, including existing requirements contained in other documents (i.e. FAQs, information sheets, regulatory guides, etc), are contained in one document.

The ABA does not support ASIC modifying the law with respect to imposing new legal obligations for record keeping requirements relating to the conflicted remuneration provisions.

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[2] In addition to the proposed class order instruments, *Regulatory Guide 175: Licensing: Financial product advisers — conduct and disclosure* [RG 175], *Regulatory Guide 245: Fee disclosure statements* [RG 245] and *Regulatory Guide 246: Conflicted remuneration* [RG 246] contain guidance about record keeping in relation to the best interests duty and related obligations (updated October 2013), the fee disclosure statement obligations (reissued in March 2013) and the conflicted remuneration provisions (issued in March 2013).

[3] The ABA notes that we have held concerns with regulatory guidance attempting to establish "best practice" rather than provide legal interpretation – that said, we believe that industry workshops might provide a sensible forum to engage (educate and inform) industry about their existing and new obligations.

Records in relation to the provision of personal advice to a retail client

The ABA notes that ASIC is proposing additional record keeping requirements to demonstrate evidence of the AFS licensee and their authorised representatives' compliance with the best interests duty and related obligations, records of ongoing arrangements or termination of arrangements with retail clients, and copies of prescribed documents a client must receive in relation to ongoing fees, including fee disclosure statements and annual renewal notices[4].

The ABA believes that it is important to ensure that AFS licensees and their advisers are not both required to maintain records of all communications and individual interactions with their customers and retail clients as this would impose an unreasonable regulatory burden and unnecessary compliance costs. Any new and additional record keeping obligations should also not be retrospective. We consider that it should be sufficient for banks and banking groups to keep copies of compliance policies, procedures and documents relating to the provision of personal advice, such as regulated disclosure documents (i.e. Statement of Advice (SOA)) and other compliance documents (i.e. templates, scripts, etc).

Furthermore, the ABA believes it should be adequate for AFS licensees and their authorised representatives to adopt existing contract and industry arrangements which minimise any duplication of compliance obligations and business inefficiencies. For example, we consider it should be sufficient for AFS licensees to retain important compliance documents and adopt a compliance audit program, and therefore be able to access client facing documents (i.e. file notes and other records) if an adviser leaves, and appropriate records should be maintained by the adviser about their retail client. We suggest this approach should be recognized and adopted as part of standard operational and risk management practices.

We are concerned that the proposed record keeping requirements would result in substantial changes to policies, procedures, processes and systems, and in particular existing contract and industry arrangements and compliance systems. These changes would create unnecessary administrative complexity and require significant new internal technology and document management systems, records protocols, data and transfer arrangements, and education and training programs. (Significant new external technology and document management systems may also need to be developed.) The changes would also result in the need to redesign compliance systems applicable to different business models. These additional costs will inevitably increase the cost of advice and decrease access to advice for consumers.

The ABA believes that AFS licensees should be able to retain documents commensurate with the 'modified best interests duty' as a reduced burden, and therefore banks should not be required to produce a record of the advice for personal advice relating to basic, retail banking products. Therefore, we support the proposed approach that the new record keeping requirements do not apply to modified best interests duty and personal advice where a SOA is not required or personal advice which a record of advice is kept in accordance with section 946B(3A) of the Corporations Act as modified by Regulations 7.7.09 and 7.7.10AE of the Corporations Regulations.

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[4] The ABA notes that specifically, the new requirements include:

- the information relied on and the action taken by the advice provider that show the advice provider has acted in the best interests of the client for the purposes of section 961B(1);
- if section 961B(2) is being relied on to show that section 961B(1) has been complied with, the information relied on and the action taken by the advice provider that satisfy the safe harbour steps in section 961B(2);
- the advice, including reasons why advice is considered to be 'appropriate' within the meaning of section 961G;
- where an advice provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the advice provider, or one of their specified related parties, the information relied on and the action taken by the advice provider that show the advice provider has given priority to the client's interests when giving the advice for the purposes of section 961J;
- any ongoing fee arrangement entered into with the client within the meaning of section 962A;
- any assignment of an ongoing fee arrangement;
- a fee disclosure statement given to the client under Division 3 of Part 7.7A;
- a renewal notice given to the client under Division 3 of Part 7.7A;
- any notification from a client given under Division 3 of Part 7.7A that they elect to renew their ongoing fee arrangement; and
- any fees charged after the termination of an ongoing fee arrangement.

Records in relation to the conflicted remuneration provisions

The ABA notes that ASIC is proposing additional record keeping requirements to demonstrate evidence of the AFS licensees' compliance with the conflicted remuneration provisions[5].

The ABA believes that it is important to ensure that AFS licensees are not required to maintain records of all arrangements and individual payments (or determinations in relation to those arrangements or payments) as this would impose an unreasonable regulatory burden and unnecessary compliance costs. It seems that the proposed record keeping requirements would require the following:

- That record keeping requirements for decisions on non-conflicted remuneration occur at each point financial product advice is provided;
- That each payment accepted or made must be clearly identifiable to the relevant arrangement (i.e. that is deemed non-conflicted); and
- The AFS licensee (and/or other parties) must demonstrate the basis of each decision (i.e. how it considered it was non-conflicted remuneration).

For example, paragraph 32 states that an AFS licensee should keep records "demonstrating the circumstances" on which the licensee relies on section 963B or section 963C of the Corporations Act to form the view that the benefit is not conflicted. This would impose a significant additional requirement for technology and document management systems, legal and compliance education and training, and applies to both monetary and non-monetary benefits (including non-recurring small value non-monetary benefits) which are not contained under Regulation 7.8.11A. In practice, this obligation is likely to mean that thousands of additional individual records relating to such benefits annually will need to be separately justified, each could be a little different, and therefore the administration of the requirement will be extremely onerous for AFS licensees.

Additionally, the ABA understands that the legislature envisaged that AFS licensees would determine whether its arrangements and payments fall within the grandfathering provisions or qualify for an exemption and also would determine the records that should be kept to defend this decision should it be required to do so. We agree that an AFS licensee will need to keep sufficient documents to support the position taken in relation to compliance with the law. However, prescribing the manner in which a licensee is to record each and every instance where grandfathering or an exemption is being relied upon is not efficient or effective from a regulatory perspective, and ultimately will impose an unreasonable regulatory burden and increase compliance costs. Therefore, we consider that an alternative approach is necessary.

The ABA does not support the proposed record keeping requirements as it is unclear where and how the record keeping obligation rests, however, we assume with the AFS licensee that provides the general or personal advice and we assume that it is not intended to capture all individual arrangements and payments. We consider that regulatory guidance should clarify that the party providing the advice should have the obligation and responsibility to retain adequate records, being the AFS licensee that is the 'advice provider'. Product issuers/sellers should only be caught within the proposed record keeping requirements where they are themselves advice providers and otherwise are excluded and covered by the existing provisions and record keeping requirements.

The ABA believes that documenting at the licensee/product level is appropriate. It should be sufficient for copies of policy documents, compliance standards, agreements and contracts to be retained to demonstrate compliance for relevant transactions and payments accepted or made under those arrangements, rather than records relating to individual transactions or payments (made to employees or other parties). We consider that banks and banking groups should be able to retain:

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[5] The ABA notes that specifically, the new requirements include:

- records of any arrangement (or any change to an arrangement), on the basis of which the licensee considers that the conflicted remuneration provisions do not apply because of sections1528–1531;
- records of any payment made or accepted under arrangements to which the conflicted remuneration provisions in Division 4 and Division 5 of Part 7.7A do not apply to the licensee or its representatives and because of sections1528–1531; and
- where the licensee relies on section 963B or section 963C, or Division 4 of Part 7.7A of the Corporations Regulations, to form the view that a monetary or non-monetary benefit that is given to the licensee or its representatives is not conflicted remuneration, records demonstrating the circumstances on which this reliance is based.

- A record of the banks' employment arrangements and workplace agreements applied to particular staff functions and roles or job classifications and awards (i.e. an enterprise bargaining agreement (EBA), other workplace agreement and associated documents should be sufficient to demonstrate compliance for all payments relating to employees within banks and banking groups);
- Copies of remuneration documents (i.e. balanced scorecard policies, incentive schemes) pertaining to employee remuneration arrangements (i.e. salaries and other payments, e.g. performance benefits);
- Copies of a contract or agreement to demonstrate new arrangements between parties; and
- Copies of a contract or agreement or course of conduct to demonstrate the existing arrangement between parties (i.e. an arrangement is grandfathered and deemed non-conflicted).

Furthermore, the ABA believes that banks and banking groups should not be required to retain records relating to all decisions about conflicted remuneration. For example, we consider it should be sufficient to rely on the legal exemptions, such as exempt products or activities. Additionally, it should be sufficient for existing 'soft dollar' compliance arrangements to be used to capture records of information relating to non-monetary benefits, being existing registers maintained by AFS licensees (noting that a divergence from this approach would likely have an impact on PDS disclosure obligations).

The ABA does not support ASIC modifying the law, rather these matters should be addressed via regulatory guidance, which provides guidance to the industry on interpretation of the law and examples of how AFS licenses may be able to meet their obligations. We note that RG 246 states that employers should keep records of how an employee's performance benefit has been calculated (among other things, the employer's remuneration policy and documentation for how individual performance benefits are calculated are relevant records). Keeping records is essential to help the employer show that the presumption in section 963L of the Corporations Act can be rebutted. We recognise that an AFS licensee needs to take reasonable steps to ensure conflicted remuneration is not accepted, and therefore we consider that it should be adequate for banks and banking groups to retain records relating to policy and remuneration documents, and in particular relevant to staff functions and roles or job classifications and grades, but not individual employees. We do not believe that certain other documents (i.e. privileged legal advice) should be considered a record, and only available for ASIC to scrutinise if the bank agrees to release it.

Records in relation to the provision of intra-fund advice

The ABA notes that ASIC is proposing additional record keeping requirements to demonstrate evidence superannuation trustees', as well as AFS licensees acting under arrangement with a superannuation trustee, compliance with the intra-fund obligations[6]. Additionally, we note ASIC intends to update INFO 168 to provide an explanation of the additional record keeping requirements and how superannuation trustees charge members for advice directly or indirectly (i.e. collectively charge members for advice).

The ABA does not support the proposed record keeping requirements as it is unclear where and how the record keeping obligation rests, however, we assume with the AFS licensee that provides the personal advice (i.e. superannuation fund trustee, third party advice provider, or third party administrator) and we assume only applying to personal advice and not applying to collectively charged intra-fund advice providers. We consider that regulatory guidance should clarify that the party providing the advice to the superannuation member should have the obligation and responsibility to retain adequate records.

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[6] The ABA notes that specifically, the new requirements include:
- the advice, including a note to identify whether the cost of the advice is allowed to be charged to a member or members other than the recipient and, if so, on what basis—unless the cost is in fact wholly charged or borne in one or more of the following ways:
- charged to the member receiving the advice;
- borne by the licensee if the licensee is not the trustee or an associate; and/or
- charged to a person other than the trustee or an associate; and
- if the cost of the personal advice is not allowed to be charged to a member or members other than the recipient, a note identifying:
- how much it cost to provide the advice, including details about the method of calculation and why any estimation applied in the calculation is reasonable; and
- how much the member receiving the advice was charged for the advice and how the cost was otherwise borne or charged.

As with comments above, requiring both superannuation fund trustees and advice providers to retain records is unnecessary and would impose substantial administrative complexity and compliance costs across the industry.

Furthermore, the ABA does not support the proposed record keeping requirements because where personal advice is provided to a superannuation member and the client agrees to this service and the fee, this is a "fee for service" and permissible by the FOFA and Stronger Super provisions. We consider the existing disclosure obligations regarding disclosure of fees are adequate.

Compliance and enforcement

The ABA supports AFS licensees being able to comply with the record keeping requirements by retaining material, electronic or records in another format for at least 7 years from the date of the advice. We consider that technology will continue to drive innovation in the offer of financial products and services and the delivery of disclosures and communications to consumers, and therefore the record keeping requirements should accommodate these developments. Consequently, we consider that the record keeping requirements should explicitly permit written, electronic, digital and other formats.

The ABA believes that it is unclear how AFS licensees will be required to keep records in a manner that enables the information to be readily provided for a particular period upon request to ASIC. For example, Regulation 7.8.11A allows an AFS licensee a month to collate the information requested and does not require centralised management of records. In practice, the proposed record keeping requirements would require a centralised system and register and allow ASIC to request potentially any and all records from the licensee and their representatives. We consider this is unreasonable and would impose unnecessary administrative complexity and compliance costs across the industry. Furthermore, *RG246.84* should be amended to ensure correct reference to the Corporations Regulations[7].

The ABA recognises that ASIC has indicated it intends to take a facilitative approach to compliance with, and enforcement of, the additional record keeping requirements until 30 June 2014. The industry has faced substantial legal and regulatory reform due to the significant changes associated primarily with the FOFA and Stronger Super reforms. However, banks and banking groups have also recently faced significant changes to business and operational practices due to international reforms focused on prudential and financial markets regulation associated with the post-GFC G20 reform agenda. Major projects have needed to be implemented and managed involving significant time and resources across business units and impacting across banking systems. Therefore, we appreciate that ASIC has indicated it will take a facilitative approach to AFS licensees taking reasonable steps to implement further internal changes to compliance systems and other policies, procedures and processes in order to comply.

However, the proposed record keeping requirements could have a substantial impact on banks and banking groups, and across the industry. It is indicated that the class order instruments and updated regulatory guidance is to be finalised by the end of this year giving limited time for industry to implement any necessary changes. The proposed record keeping requirements could not just require significant internal changes to technology and document management systems, but also substantial changes to external technology and document management systems and industry arrangements (noting that changes may impact systems within corporate groups and across AFS licensees). There are no transitional arrangements outlined in the consultation paper. We consider that industry will require adequate time and resources to make any necessary changes, and the substantive nature of the proposed record keeping requirements means it would be difficult for industry to comply by 1 July 2014. The proposed mandatory compliance period is inadequate.

[7] Regulation 7.8.11A requires records of benefits under section 963C(b) (small value benefits between $100 and $300), or benefits under section 963C(c) (education or training purpose) and section 963C(d) (information technology software and support).

Implementation costs

The ABA has not been able to thoroughly assess the direct and indirect costs of the proposed record keeping requirements as the impact could be across banking systems. However, we believe that the new and additional record keeping requirements could impose substantial initial and ongoing compliance costs on the industry, and in particular require all AFS licensees and their advisers to implement new policies, procedures processes and systems and industry arrangements. For example, the technology build/upgrade and IT implementation costs alone could be in excess of $100 million across the industry. We consider there needs to be a balance between the imposition of additional regulatory burden, red tape and compliance costs and the associated benefits – we do not see the additional benefit to the client of the proposed record keeping requirements, and ultimately the additional costs will be passed through as increased costs to customers and retail clients.

Yours sincerely,

Diane Tate