25 October 2013

Ms Maria Hadisutanto
Lawyer, Strategy and Policy
Australian Securities and Investments Commission
GPO Box 9827
Melbourne, VIC 3001

Email: policy.submissions@asic.gov.au

Dear Ms Hadisutanto,

AFA Submission – Consultation Paper 214 – Updated Record-Keeping Obligations for AFS Licensees

The Association Of Financial Advisers Limited ("**AFA**") has been serving the financial advising industry for over 65 years. Its aim is to provide members with a robust united voice, continually improve practices and focus firmly on the exciting, dynamic future of the financial advising industry. The AFA also holds the client to be at the centre of the advice relationship and thus support policies that are good for consumers and their wealth outcomes.

With over six and half decades of success behind us, the AFA's ongoing relevance is due to our philosophy of being an association of advisers run by advisers. This means advisers set the agenda, decide which issues to tackle and shape the organisation's strategic plan.

Thank you for the opportunity to provide feedback on Consultation Paper 214.

We recognise the central importance of maintaining high quality records, including file notes. The retention of these records helps to ensure that financial advisers have access to the important records to support the ongoing provision of financial advice to their clients. Records are also very important for financial advisers in the event that they find themselves in a position where they need to explain their past advice. Whether this is for the purposes of internal dispute resolution, external dispute resolution, court action or investigations by ASIC, they are an invaluable record of what happened. We also believe that there is a point at which the marginal value of additional records or enhanced detail starts to decline. An appropriate balance on the issue of record keeping is particularly important as record keeping is necessarily time-consuming and costly.

We are concerned that the proposals in CP214 extend the obligations on record keeping beyond the point where there is sufficient additional value or consumer benefit. We are also concerned that there is a lack of necessary clarity in how these obligations would be interpreted. We believe that these obligations should have been issued prior to all the work that was done across the industry to prepare for FoFA. Issuing these obligations at this point will mean that substantial effort and costs will be duplicated. These proposals would require significant additional project activity.

The proposals place obligations on the licensee to undertake further onerous record keeping. This

might be reasonable in the salaried adviser or representative model; however it is more problematic in the self-employed or authorised representative model. Historically, authorised representatives have maintained the client files and the licensees have had a contractual right to access the client files. By putting this obligation on the licensees, in the absence of recognition of the current industry model, presents a major issue for these licensees. This would include wholesale changes to processes and significant additional system requirements in order for the licensee to have access to the client file and the records. It would also require changes to the Authorised Representative Agreements, which is a very substantial task. To implement all of this across the industry would involve significant effort and cost. We question the need for both licensees and authorised representatives to maintain copies of the client files.

We are aware that various statements by ASIC in recent years about licensees retaining copies of files when an adviser leaves a licensee has led to licensees making the provision of copies of client files as a mandatory requirement before they allow the adviser to transfer their clients to a new licensee. This involves significant cost for the advisers and in this fashion presents an obstacle that makes it more difficult for advisers changing licensee. We believe that changes of this nature should be implemented on a prospective basis (new clients or new advice), rather than applying retrospectively to existing clients.

These proposals do not provide for transitional arrangements. Due to the scale of some of the changes that would be required, it would take the industry in excess of 12 months to be prepared to comply with these requirements. There would need to be a more comprehensive transitional arrangement and the application should be limited to new clients beyond that commencement date.

In addition, we believe that it is appropriate to ask the question as to why ASIC is seeking to impose these obligations via a class order. The FoFA consultation and legislative process provided sufficient opportunity for the identification of the need for changes to the law. We are concerned that this represents a proposal for the addition of further legal requirements through a class order. Given that there are a range of reasons why licensees may not always be able to meet these obligations, there is a need for additional clarity with respect to the implications of non-compliance with this class order.

We recognise the need to modify Pro Forma 209, to reflect the removal of s945A. We believe that a better approach would be to limit the changes to reflect the application of obligations similar to the previous s945A requirements within the Best Interests Duty context.

More broadly on the issue of record keeping, as an industry it is necessary to develop high quality technical solutions for record keeping and retrieval that make this process efficient across a licensee business. The industry is still a long way from reaching this point.

Record-keeping obligations when giving personal advice to retail clients

We expect that these requirements will have a significant impact upon the advice process, which is likely to involve an increase in the cost of the provision of advice to consumers. We believe that it is necessary to reconsider the scale of the proposed additional obligations and limit the requirements to the priority issues. Any change to the record keeping requirements needs to allow for transitional arrangements and make provision for adequate lead time to enable the work to be undertaken.

Question	Response
B1Q1	We support the need for good record keeping, however we seek to raise the following points: • The scope of what is required under B1(a) is unclear. The steps required to comply with the Best Interests Duty under s961B(2) are clearly set out. In terms of s961B(1) this is less clear. If the financial adviser relies upon the safe harbour in

Question	Response
	s961B(2), then they should not need to comply with record keeping under s961B(1). • With B1(b), this is reasonable in general terms, however there is a need for greater detail. In particular, we question what is required under s961B(2)(g), given how uncertain this obligation is. We consider that more clarity is required for this obligation, which might be delivered via an example. The requirements under s961B(2) would need to be built into the advice process and advice documentation. This will take a reasonable period of time. • We seek more guidance on what is required under B1(d). There remains a rather high level of uncertainty with respect to what is required in demonstrating priority to the interests of the client in the situation of conflict of interest. Documentation of records to support this requirement remains challenging. • We assume that in the majority of cases the ongoing fee arrangement is set out in the SoA (refer B1(e)). • With respect to the assignment of ongoing fee arrangements, this appears to indicate that a licensee would need to retain a full record of all assignments. We question why this would be necessary, particularly if it relates to a post commencement client, where grandfathering is not relevant. There is a need to address transitional arrangements under this requirement. It should only apply to new advice provided after the date of commencement, and then allowing for an implementation period.
B1Q2	We expect that these requirements will have significant implications for record keeping practices, the advice process and record keeping systems. It is our expectation that this will impact the fact find document, the advice process, including support documentation, and the statement of advice. In addition, the systems implications need to be considered as many advice practices are moving towards electronic record keeping as part of the financial planning system. We expect that the timeframe would be significant and the costs considerable, both in upfront and ongoing terms. For some large licensees it may not be possible to do this via a single system.
B1Q3	There are significant implications in these proposals, which are addressed above. The implications of this are the likely timing and cost of implementation. For these changes to be done properly there will be a significant amount of planning, design, build and implementation work involved. To the extent that these obligations might apply to existing clients there will be significant additional complications. In the case of many licensees, who operate an authorised representative model, there are a number of different approaches employed to record keeping and a number of different systems used. If the record keeping obligation rests with the licensee, then this can only be achieved by some form of electronic solution. The majority of businesses are simply not prepared for this. Making this transition will involve significant effort and additional upfront and ongoing costs.
B1Q4	Addressing the new obligations in RG 175 and RG 245 appears to be a reasonable approach. We suggest that there needs to be greater clarity as to what is required. There is always a risk that AFS Licensees, when faced with uncertainty will over-engineer the requirements. There is enough uncertainty with the record keeping requirements, to suspect that this will occur.

Record-keeping obligations in relation to conflicted remuneration

With respect to these requirements, we are concerned as to the practical reality of what has been requested. We are also concerned that there is a lack of clarity in what is expected. We also put forward the view that the requirements need to give consideration as to where the onus of proof rests. In the case of volume based benefits, the FoFA legislation places the onus on the provider/received to prove that it is not conflicted remuneration. Where the benefit is not volume based, the onus moves to any other party that is seeking to assert that it is conflicted remuneration. The record keeping obligations should reflect where the onus of proof resides.

It appears that this obligation applies to an AFS licensee (and representatives) who provide financial product advice to retail clients. It is unclear as to whether this applies to product providers who do not provide financial product advice to retail clients. The records that are kept by product providers are an important part of the overall record keeping model. This requires clarification.

Question	Response
B2Q1	We have significant concerns with the practicality of what has been proposed. It needs to be recognised that ASIC have separately discussed in RG 246 that arrangements exist at multiple levels from product provider to licensees, from licensees to advice businesses (corporate authorised representatives) and from advice businesses to advisers. These obligations will most likely impact each of these levels. We believe that it is reasonable for AFS licensees to maintain a register of all existing product provider/licensee arrangements which are covered under the grandfathering provisions. The obligation should be at a high level, rather than at a detailed level. We believe that licensees will have knowledge of which advice businesses are entitled to grandfathering. We question whether licensees need to have records of each client arrangement that is subject to grandfathering. Licensees typically don't maintain records at the client level. This requirement appears to place an obligation on them to do that. Unless the licensee has a leading edge electronic record keeping system and consistent processes across all representatives, this proposal is impractical. There would be significant additional costs with very limited additional benefits. In terms of the obligations under B2(b), we highlight that benefits are typically paid on a monthly or fortnightly basis. Thus in any year, for one client holding one product, there can be as many as 26 payments. It does not seem practical to keep records at this level. (a) In terms of a more cost effective solution, licensees should keep a register of all product provider arrangements that are subject to grandfathering. Advisers should maintain records of which clients are subject to grandfathering. (b) The conflicted remuneration exemptions in s963B are largely product related. In this case record keeping should only be required at the product level, not the client level. With respect to non-monetary benefits, there is already a non-monetary benefit register, which should be sufficient for these purposes. There is no reference to the existence of this register in the Consultation Paper.
B2Q2	We have questioned the practicality of what is proposed. We are also uncertain as to the specifics of the obligations in terms of conflicted remuneration. We are highly concerned about the impact of these proposals on practices, processes and systems.
B2Q3	As set out below there are likely to be significant practical difficulties involved with these

Question	Response
	requirements, including where the records are kept, the systems to support record keeping and the quantity of records required. If these obligations were to proceed as proposed, it would take the industry a significant period of time to implement, and thus we would suggest that there is a need for sensible transition arrangements.
B2Q4	We believe that these proposals are excessive and need to be reduced in terms of scope and requirements. Updated guidance through RG 246 is appropriate; however there is a need for the illustration of examples to assist licensees to understand these requirements.

Record-keeping obligations when giving intra-fund advice

We offer the following feedback on this section:

Question	Response
B3Q1	We believe that it is appropriate for trustees to keep records of the advice provided to members and how the cost of that advice has been covered. In terms of this obligation, there needs to be a practical means of recording these costs. We are not certain that the proposal is practical and that it can be achieved in a cost effective manner. The obligation to separately cost the provision of personal advice, where it is charged to a specific member, including the documentation of the methodology for the calculation, appears particularly demanding and costly. With respect to AFS licensees acting under an arrangement with a trustee, we do not believe that they should have a separate obligation in this area. It is most likely that they will not have all the details with respect to the arrangement and how the trustee intends to charge the member for the cost of the advice or service. Whilst the trustee may put in place an arrangement with a licensee for the provision of intra-fund advice to their members, the services will typically be provided by an authorised representative. Since the licensees typically don't have direct access to the client files, these record keeping obligations would make it very difficult for licensees. The obligation should rest with the trustee and to the extent that they wish to place reliance upon the AFS licensee, then this would be their decision. The AFS Licensee is an outsourced service provider and should not have a direct obligation.
B3Q2	When it comes to recording the cost of delivering advice services to a member who will be charged directly, there needs to be access to simplistic mechanisms to undertake these calculations. This might include the trustee setting fees for specific types of services or enabling charges based upon a pre-set hourly charge-out rate. The prospect of separately costing each piece of advice seems to be excessively impractical. As stated above in B3Q1, we do not believe that the obligation should apply at the outsourced AFS Licensee level.
B3Q3	Trustees will need to build systems to record the services provided to members and activity based costing systems to calculate and record the cost of the provision of those services. As stated above in B3Q1, we do not believe that the obligation should apply at the outsourced AFS Licensee level.

Question	Response
B3Q4	In our view the most significant practical difficulty rests with the obligation under B3(b)(i) to include details of the method of calculation and why any estimation applied in the calculation is reasonable.
B3Q5	We believe that an update to INFO 168 is the appropriate means of documenting the obligations; however we would recommend that an example is provided to make the expectations clearer.

Conclusion

We thank you for the opportunity to provide feedback on the proposal with respect to record keeping obligations for AFS licensees. In our view these proposals have significant implications and will be very challenging for the industry to comply with. We do not believe that there would be any material additional value for consumers and advisers to warrant the significant cost that would be involved. There are a number of practical difficulties and complications that need to be considered. These proposals are placing significant additional requirements on licensees, where there are already significant cost and operational pressures. Additional requirements of this scale should have been included in the original legislation and been built as part of the main FoFA project activity. We believe that a regulatory impact analysis will highlight the extent of change and cost involved in these proposals.

Should you have any questions, please do not hesitate to contact me on

Yours sincerely,

Philip Anderson

Chief Operating Officer