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Scams Taskforce
Market Conduct Division
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By email to: scamspolicy@treasury.gov.au

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Dear Scams Taskforce

ASIC submission to the consultation on Scams Prevention Framework exposure draft legislation

The Australian Securities and Investments Commission (ASIC) welcomes the opportunity to provide a submission to Treasury in response to the exposure draft legislation to establish the Scams Prevention Framework (SPF).

ASIC is Australia's integrated corporate, markets, financial services and consumer credit regulator. Our statutory objectives under the *Australian Securities and Investments Commission Act 2001* (ASIC Act) include:

a) maintaining, facilitating and improving the performance of the financial system and entities in it; and

b) promoting confident and informed investor and consumer participation in the financial system.

ASIC's continuing investment scams disruption work, and our recent work examining the scams-related practices of Australian banks, demonstrates the prevalence of scam activity, and the need for uplift in industry responses to scams and consumers impacted by scams.

ASIC therefore welcomes the introduction of the SPF, which proposes a whole-of-ecosystem approach that imposes mandatory and enforceable obligations to drive action against scams.

We see the SPF reform as vital to ensuring increased protections for consumers from scam conduct and the serious harms that result.

ASIC has engaged closely with Treasury on this reform, and we welcome the progress made on legislation to implement the SPF. In light of our anticipated future role under the SPF for regulating banking sector compliance, this submission focuses on some opportunities to enhance the enforceability of the obligations in the banking sector.

1. Reducing complexity and supporting enforceability

The SPF is proposed to be established by detailed legislation, supplemented by a range of legislative instruments. We consider that the resulting regulatory regime is likely to create some uncertainty and complexity for regulators and sector participants.

Our experience has been that legislative complexity can create challenges for effective enforcement. When pursuing court action, ASIC is increasingly confronting legal difficulties arising from the complexity and design of the regimes we are seeking to enforce. These legislative design-related challenges have also been recognised in various case authorities and academic commentary.

The reliance on legislative instruments to prescribe key aspects of the regime will also impact regulators' implementation, administration and enforcement work in relation to the SPF. The content and timing of these instruments is not yet known. Further, legislative instruments can be varied or revoked at any point after they are made, they are subject to disallowance by Parliament, and they will typically expire after a fixed period, requiring them to be remade in order to continue in effect.

Submission

To simplify the SPF regime and support its overall certainty and enforceability, we recommend that the following matters be prescribed in the legislation itself:

a) the initial three sectors to be subject to the SPF—that is, the banking, telecommunications providers and digital platforms sectors;

b) the regulators responsible for administering the sector-specific scam codes for the initial three sectors; and

c) the alternative powers available to the sector regulators for investigation and monitoring of compliance with the sector-specific scam codes.

2. Regulator investigation and monitoring powers

Under the exposure draft legislation, the monitoring and investigation powers set out in the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) will apply by default to the regulators administering the sector-specific scam codes.

Our view is that the investigation and monitoring powers under the Regulatory Powers Act are, by their nature, not fit for purpose for monitoring and investigating compliance with the banking sector scams code.

If ASIC were required to rely on these Regulatory Powers Act powers, there would likely be a material reduction in the quantity, quality and scope of information that we could gather, compared with use of our existing investigation and information-gathering powers under the ASIC Act. It is therefore likely that our ability to investigate and enforce banking sector scams code breaches would be significantly impaired.

The exercise of the Regulatory Powers Act powers could also be unnecessarily intrusive and potentially oppressive for regulated entities.

In order that we can effectively regulate and enforce obligations under the banking sector scams code, we consider that ASIC's existing investigation and information-gathering powers under the ASIC Act should apply. These are longstanding powers used for the majority of ASIC's current surveillance and enforcement work, they are familiar to the banking sector and they are suitable for use in the SPF context.

Although the exposure draft legislation contains a mechanism for the Minister to declare by legislative instrument that alternative investigation and monitoring powers apply, our view is that this mechanism does not provide sufficient certainty about the availability and validity of the ASIC Act powers in the SPF context.

Submission

Consistent with submission (c) in section 1, we recommend that the legislation expressly provide for ASIC's existing ASIC Act investigation and information-gathering powers to apply for the purposes of monitoring and investigating compliance with the banking sector scam code.

3. Definition of 'scam'

The definition of 'scam' is critical for the SPF regime, as the anti-scam obligations under the SPF will not apply unless and until the definition is satisfied.

We consider that some aspects of the current definition of 'scam', including the deception element, could be interpreted as requiring the subjective intent of the scammer to be established.

As ASIC has previously raised, it is important for the enforceability of the SPF that the definition of 'scam' does not include subjective elements that require determining the state of mind of the scammer: see ASIC's February 2024 submission to Treasury's consultation paper *Scams: Mandatory industry codes*. Such elements are likely to be difficult or even impossible to satisfy, particularly at the time of the suspected scam conduct first being detected.

There is also some ambiguity as to the coverage of the 'scam' definition. It is unclear whether some types of conduct that we understand are intended to be captured by the SPF regime would satisfy the current definition.

Submission

To ensure appropriate coverage and to support enforceability, we recommend that adjustments to the definition of 'scam' in the legislation be considered to address the above. ASIC will continue to provide assistance to Treasury in this regard.

4. Other matters

Separate to this submission, we have previously raised a number of other matters with Treasury regarding this reform, including in our February 2024 submission to Treasury. We note that some of these matters remain outstanding, and we also encourage further consideration of these issues.

Please contact ASIC should you wish to discuss this feedback further.

Yours sincerely

Sarah Court

Deputy Chair, Australian Securities and Investments Commission