ASIC's Deregulatory Initiatives

ABA's List of Deregulatory Opportunities

June 2014

Deregulatory Opportunity	Description	Reasoning
General comments		
ASIC Deregulatory Initiatives Report Paragraphs 48 – 75	Paragraphs 48 -75 set out a range of proposed legislative reforms to facilitate business (48-61), removing barriers inhibiting innovation in disclosure (62-69) and further deregulatory proposals.	Several of these proposals are mentioned in this table under this and subsequent headings. As a general response the ABA welcomes the proposals and looks forward to working with ASIC in an inclusive consultation process. ASIC's plans for this process and for other deregulatory proposals more generally, are requested.
Smarter more efficient regulation.		ASIC should feel able to address issues with little or no impact on the market and the investor swiftly.
Shorter relevant consultation papers and process.	Often consultation papers are overly lengthy, and ASIC can take considerable time to respond.	Industry can be left in a state of uncertainty on certain issues (CP145-CP168 and other related papers) without a clear understanding of when a matter will be finalised. Importantly, sufficient time should be allowed for a consultation to enable industry to fully assess impacts and prepare meaningful responses to proposed changes. An example of the delay by ASIC is CP 169. CP 169 was originally released in late 2011. Clarity on the position has been advised as at May 2014, with the Government's decision to progress with legislative change to the definition of a basic deposit product. As a result ASIC will now not be releasing a class order relief in response to CP169. The uncertainty associated with the long delay has caused significant concern from a broader Basel III compliance perspective. The lack of regulatory clarity has resulted in banks being delayed in progressing deposit initiatives to support their

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		Basel III LCR compliance. For regulatory consultations, it would also be useful for ASIC to advise the timeframes for when a CP will be released as a final RG. A further example of this is the lack of clarification by ASIC of its approach to the matters covered in temporary Class Order 14/41 concerning what are 'simple arrangement' facilities.
Peer review	ASIC should use analysis that is relevant to/reflects Australian market data and be subject to peer review.	Whilst ASIC strives to be in line with IOSCO principles it should be acknowledged that the principles do not always have a market consensus.
Electronic Communications (ePayments Code) to be amended.	The ePayments Code should be amended so that it can apply retrospectively to existing online accounts as at implementation date of the Code (20 September 2011).	This would allow industry and customers to benefit from a consistent application of the Code across all accounts.
ASIC's views and Regulatory Guides (RGs) need to be navigable and easy to find.	Not all ASIC's views or positions on certain matters can be found in ASIC RGs or in the one place. Organisation of the collective materials on a particular subject matter could be arranged and sign-posted accordingly including for updates.	For example, ASIC's views in relation to credit limit increases (CLIs), which were revealed during further discussions between ASIC and a member bank after the release of RG209 (Responsible Lending) but these views were not apparent in the RG. The industry could benefit from these views being published as part of RGs for transparency. Other instances can sometimes occur in, for example, speeches by ASIC Commissioners which appear to include statements that are seen as inconsistent with statements in an RG.
Implementation of changes and timing implications	For every change to regulatory policy banks require sufficient time to make the necessary direct and associated implementation measures.	It is a consistent message from the ABA and its members that regulatory change (including ASIC policy and guidance publications) requires time for banks to implement changes. This includes revising documentation, managing IT systems enhancements with other competing systems changes required to be made by the bank within limited (few) windows to do this in every year, staff training and

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		procedures. Minimum implementation periods depending on the scale of changes required can range from 6 months up to 2 years for major regulatory events.
Other ASIC Processes and Procedures		
Investigation notices – notices seeking information on bank customers or brokers being investigated by ASIC are often very broadly drafted.	When ASIC is not investigating the bank itself, ASIC should initiate discussion about the subject of the investigation so the bank is able to assist with establishing exactly what information would be helpful.	This would reduce compliance costs incurred by the bank during back-end searches and would be more likely to provide ASIC with what it needs. It would be helpful from a regulated institution perspective if ASIC could consider the volume, age of information requested etc. when setting response timeframes for the information requested. Retrieval of this information may be more difficult and take longer. There are instances where following investigation, if the outcome is 'positive' a bank may not necessarily hear back from ASIC to advise that the investigation can be closed. It would be helpful if ASIC was able to confirm positive outcomes in all instances.
Relief applications (General).	ASIC, in response to applications for relief, may instead provide "no action letters" instead of substantive relief itself.	In areas where the law permits actual relief to be granted, granting relief will provide legal certainty and reduce ongoing compliance costs.
Contact points within conglomerate organisations should be utilised by ASIC.	The current relationship model used by APRA works well for both the regulator and the bank.	It would be useful if ASIC would consider a similar model to encourage a smoother exchange of information with larger conglomerate organisations. There are benefits of having key engagement partners, and there would be benefits for both the regulated institution and ASIC from centralising engagement. For example from an ASIC perspective, centralisation allows ASIC to have visibility over all engagements with an institution at an aggregate level.
ASIC should be working with other regulators to ensure there is consistency in approach.	Some banks still experience some inconsistencies in terms of how ASIC's expectations and	Specific examples include the interaction of ASIC's approach to Travel Money Cards and Unclaimed

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	approaches differ from those of other regulators.	Monies when compared with the APRA Financial Claims Scheme. Similar issues exist between proposed requirements for term deposits and Basel III liquidity standards. The Systemic Risk Questionnaire which ASIC recently asked banks to complete is an example where ASIC could have worked better with APRA to ensure consistency. In this instance ASIC requested data that was similar to APRA's G-SIB QIS, however the data was requested to be cut differently. ASIC advised that the questionnaire should have been easy to collate by leveraging off the G-SIB QIS. However additional complexity was added due to the request for data covering a different time period and methodology. The lack of coordination between regulators in this instance resulted in substantially additional work to meet both APRA and ASIC requirements.
Alignment of information requested by ASIC and APRA	There is lack of alignment of the information requested of banks from ASIC and APRA on remuneration. APRA's Prudential Standard APS 330 Public Disclosure remuneration disclosure requirements for Senior Manager and Material Risk Takers does not align to the Corporations Act 2001 requirements to disclose Key Management Personnel remuneration only.	Better alignment would simplify the process of disclosure for banks. The ABA has referred to this point in its submission to APRA.
Banks' concerns with uncertainty and delays in dealing with ASIC over its concerns.	ASIC identifies a concern and the bank provides its response to ASIC. A response back from ASIC confirming its final position is rare. If ASIC does respond, there is usually an extended delay between the bank's response to an ASIC notice and either ASIC's response or a subsequent request to seek further information.	Timely replies on responses to ASIC's concerns will reduce regulatory uncertainty and reduce compliance costs by minimising opportunities to make changes.
Investment Assessment and Key Fact Sheet	The use of a simple fact sheet in the provision of certain disclosures requires the completion of a secondary questionnaire by the	A key fact sheet combined with new media may be a better way of providing important disclosures to customers, but if the questionnaire is made mandatory and is used for

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	investor.	more than to assist with the investor's understanding, it will be adding an additional layer of complexity which will in turn detract from the original benefit of a simplified method of disclosing information.
AFSL and ASX Participant obligations	Harmonisation of Responsible Manager and Responsible Executive appointments	Duplication of appointments of Responsible Managers and Responsible Executive for ASX participants should be removed as part of the harmonisation of Market Integrity Rules
ASIC Regulatory Guides		
The ASIC Regulatory Guide 5 released in June 2013.	RG 5 requires listed entities to provide a greater level of detail in disclosure, including the listing of individual trades.	This granular, transactional level data creates a significant administrative and cost burden in producing the notices for little market or regulatory benefit. In most cases the requirement has resulted in the preparation of voluminous data and submitting notices up to 100+ pages from the previous average of 15-20 pages. Minor variations in share holdings and routine trading activity now trigger a significant compliance burden. This level of detail and associated cost goes beyond what is considered to be reasonable and proportionate to ensure market integrity and informed trading. For a financial institution that operates an asset servicing business, which routinely holds shares under custody on behalf of clients, RG 5 is onerous. While for a wealth business that operates a 'manager-of-managers model', the nature of the business gives rise to numerous relevant interests which requires the inclusion of significant data in the substantial shareholding notices in order to comply with RG5. This recent development could lead to a reassessment by current Australian market providers of their future involvement in the custody business. Questioned is the value

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		of being required to provide such granular data which for one bank requires approximately 6560 hours of management time to produce each year. It does not appear to provide an appropriate balance between achieving an informed market and level of disclosure. Direct costs for this change are incurred for the preparation of notices and unquantifiable indirect costs for improving internal systems to produce the level of granularity required in the reporting process. ASIC should amend RG5 to reduce this additional burden.
Regulatory Guide 165 – data collection on complaints.	There is concern about the requirement for banks to collect and retain information about customers' complaints concerning consumer credit matters. It is unclear what benefit there is to ASIC in banks collecting and retaining these data. RG165 provides relevantly: "You should record your complaints or disputes handling and take the utmost care in maintaining and preserving such items as electronic files and magnetic recording media. Complaints or disputes handling data are a useful means of tracking compliance issues or risks. We may require you to produce complaints or disputes data in certain circumstances. You should, therefore, keep this data in an accessible form."	RG 165 requirements should be reviewed to ensure that the costs of banks in complying with RG 165 are consistent with the benefit to ASIC in its ability to access this information in certain circumstances which it is assumed would be by exception rather than as a general rule.
RG 139: ASIC's supervisory role for the Financial Ombudsman Service (FOS)	FOS' Terms of Reference for which ASIC is ultimately responsible include ToR 13.1 which FOS has recently reported is giving rise to systemic compliance issues with respect to enforcement and recovery actions.	Evidently, ToR 13.1 may not be working effectively and should be reviewed. A review of the operation of ToR 13.1 was included by ASIC in its review of RG 139 and RG 165 in its CP 172 consultation which was published in December 2011 and completed in October 2012. A supplementary consultation (CP 190) was commenced in 2012 on the specific issue of small business complaints and ToR 13.1 which resulted in a change to ToR 13.1 (not available for a dispute involving

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		a small business credit facility of more than $2,000,000) commencing in January 2014. If ToR 13.1 continues to deliver unsatisfactory outcomes a review is needed.
Forms		
Electronic lodgment of forms	Many forms are not able to be lodged with ASIC electronically or in some cases not able to be completed electronically.	Making this facility available would streamline reporting and ease administration. In particular, ASIC could allow for the electronic lodging of form 7051 (half yearly accounts). Some business units may have over 300 accounts to lodge which entails approximately 50,000 pieces of paper to be printed, delivered and then processed by ASIC staff. On a related aspect, there have been instances where as an institution, following notification to ASIC of a change to Responsible Managers and /or Directors in Annual Compliance Certificates for ACLs and AFSLs; ASIC has then sought additional information. At times the connection between the information ASIC has requested in the forms and the further information ASIC has requested is not clear. The connection should be made clear. Furthermore, in relation to the annual ACL certification, the electronic form is not consistent with the requirements of the law and regulation: - Duplication of fit and proper certification should be removed for APRA regulated entities; - The electronic form should not be automatically populated with all directors of the company, rather, the company should populate the form with those Directors and Responsible Managers who are responsible for credit related matters.
Many forms require payment on lodgment	It can inconvenient for a large financial institution to arrange a	ASIC should provide a simple BPay facility for forms that would

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	cheque for the payment of small sums such as fees. The internal administration can mean lodgment is delayed for up to 5 days with multiple officers dealing with and dispensing the requisition.	streamline the process.
Form 5103 Directors Statement relating to application for registration of a managed investment scheme	The form requires a director's signature for each director on the same form. This takes a great deal of administrative time when responsible entities comprise non-executive directors working in various national locations.	The form could be amended to allow for separate pages for each director, or provide for an agent to sign on the director's behalf if the agent's authority is lodged in a similar way to the execution of a compliance plan.
Streamlining ASIC forms	ASIC's preliminary analysis has identified that approximately 10% of forms could be removed, consolidated or streamlined. Appendix 1 of the ASIC Deregulatory Initiatives Report lists the forms that might be considered for removal (Table 1) and consolidation or simplification (Table 2). A number of the forms identified for removal are currently required to be provided to ASIC under the law, but provide information that might not be necessary for ASIC to hold.	Subject to stakeholder comments, ASIC may suggest that these forms be removed through legislative amendment.
Proposal in paragraph 49 of ASIC's Deregulatory Initiatives Report: Simplifying wholly owned financial reporting relief.	APRA, ASIC and the Treasurer have been advised of this matter. The costs of preparing the audited parent entity accounts for a bank can be as high as $500,000 - $520,000, yet the information provides no or marginal utility to users.	Simplification required in the Corporations Act as recommended by ASIC.
Amending the content of the forms to be lodged under s671B (information about substantial holdings).	To address market concerns regarding Forms 603, 604 and 605.	Regulatory change to enable ASIC to work with market participants on form design.

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Discussing possible legislative changes with Treasury including other specific policy and regulatory issues		
Amend the definition of a basic deposit product (section 761A of the Corporations Act).	Amend the definition of a basic deposit product as including a 31 day notification term deposit. 31 day notification term deposits are encouraged through changes to liquidity requirements administered by APRA and introduced as part of the global banking reforms.	Law reform to provide clarity.
ASIC Class Order 14/41 extending the sunsetting period for 'simple arrangements' until a legislative change is made	Simple arrangements are clearly understood between the customer and the ADI. It does not require a variation to the credit contract as it is a one off event. To avoid increasing administrative costs to banks by introducing a written requirement for every simple arrangement we recommend that the class order relief be made permanent.	Make the NCCP Regulation on a simple arrangement permanent to provide clarity.
Revising the training and competency requirements and streamlining into a new and improved professional standards framework	Implement a holistic model for education, qualifications, training and competency as part of a professional standards framework for financial advisers (incorporating any new training and competency requirements for financial advisers registered under the TASA).	Co-regulation with industry driven solution to raise professionalism of the financial advice industry.
Simplifying wholly owned financial reporting relief.		To be developed with ASIC in a further consultation process
Review of ASIC Act particularly section 12DL.	Provisions such as s12DL should be brought into line with more modern means of satisfying consumers' needs and choices. Currently issuers are prevented from sending customers a credit or debit card until they have the customer's consent in writing. This means customers who apply for a product over the phone still need to provide a 'written request' for the card, despite having clearly shown the desire to receive the card by virtue of their original application. This can lead to a poor experience for customers who in applying for a product over the phone have shown a preference for interacting with their	The ASIC Act should be reviewed and amended to suit customer preferences and technological advances.

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	financial institution in that way. The existing requirement appears to have its origins when the majority of banking business occurred in person, usually at a branch, meaning written consent could be provided more easily. One bank reports it receives approximately 90 over-the-phone applications for credit and debit cards each day. On average, 65 per cent of applications will be approved.	
Current regulation of credit assistance providers	Franchised representatives of banks are expressly excluded from the credit assistance provider definition but not their employees. This has created inequity in the market due to branch structures where form rather than substance has been the focus in the regulation. Where a bank has a unique Owner Managed Branch network it is inappropriately and unfairly burdened with credit assistance provisions under the National Consumer Protection Act (NCCP) as franchisee staff are considered credit assistance providers under the NCCP.	The NCCP should be amended or other comparable regulatory relief should be provided.
The ePayments Code data collection and reporting on unauthorised transactions.	The data collection and reporting model was finalised by ASIC in January this year with an appropriate transitional period for banks to develop the data capture and reporting systems and start the data collection and reporting processes. This followed a lengthy and detailed consultation between the ABA, member banks and ASIC. A RIS for the Code was developed for the OBPR but the RIS was completed before the detail of the data collection and reporting model had been worked out. ASIC approached the data collection and reporting model with the explicit expectation that to comply, Code subscribers would incur substantial implementation and compliance costs.	In the absence of an appropriate RIS, Code subscribers should have a clear rather than a general explanation and appreciation of what ASIC's specific purpose is for requiring these Code subscribers' data and whether a simpler more cost effective solution or solutions to meet this objective is/are available.

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	This left a fundamental concern for subscribers over the need for and in what way ASIC proposed these subscribers' data should be collected and reported to ASIC and to what use these data would be put taking into account the costs to industry to comply. ASIC's stated position was that these data are required to perform its obligations under the ASIC Act which provides (among other things) in section 12A: "ASIC has the function of monitoring and promoting market integrity and consumer protection in relation to the payments system by: (a) promoting the adoption of approved industry standards and codes of practice; and (b) promoting the protection of consumer interests; and (c) promoting community awareness of payments system issues; and (d) promoting sound customer-banker relationships, including through: (i) monitoring the operation of industry standards and codes of practice; and (ii) monitoring compliance with such standards and codes."	
Electronic Transactions Acts and alignment for or with other legislative measures.	Clause 64 of the ASIC Deregulatory Initiatives Report states that ASIC is undertaking targeted consultation with market participants to identity barriers to increased electronic disclosure. The ABA recommends that electronic disclosure should progress as one of the priorities in this deregulatory project. Two priority specific examples are: (1) Regulation 10(1) of the Electronic Transactions Regulations (Cth): • Regulation 10(1) is ambiguous about whether written consent is	The ABA welcomes this initiative and proposes to assist ASIC with a bank expert panel on aligning existing legislative requirements within an appropriate electronic regulatory framework. A specific aspect of electronic transacting and communication could include examining the requirements for a bank under the NCCP (including the National Credit Code) in obtaining a consumer mortgage from its customer and identifying any barriers to obtaining the mortgage in a completely electronic environment as to form, execution/granting by the mortgagor

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	required before documents (like terms and conditions and letters of offer) can be sent to customer electronically. • It sets out the disclosures that are to be made to customers when collecting their consent. While it doesn't clearly state that the consent needs to be written in order to send documents electronically, it implies it by stating that a customer may consent to electronic delivery only after being told that, 'if written consent is given', paper versions will not be provided, and they should check their emails regularly and they can withdraw consent at any time. In the face of this uncertainty, a prudent approach is to require written consent from the customer. • Whether or not written consent is required from the customer makes a substantial impact on the ability to deliver documents electronically. While supporting the need for specific, informed consent, there should flexibility in the form of consent required. Ideally the regulations would be consistent with the Electronic Transactions Act itself, which allows consent for electronic communications to be in forms other than writing. At the very least, it should be clear whether written consent is required. (2) Regulation 28L of the NCCP Regulations: • Regulation 28L purports to govern the electronic delivery of certain Chapter 3 documents. It therefore crosses over with the scope of regulation 10 of the ETA Regulations which deals with all documents under the NCCP Act. • It is also inconsistent with regulation 10 in that its wording does not imply in any way that written consent is required to deliver the Ch 3 documents electronically. • This raises two questions – first, why does 28L exist given regulation 10, and secondly, why is it	and the manner of its retention to the extent these barriers exist for the purposes of the national electronic conveyancing system operated by PEXA. There have been encouraging developments in the area of electronic disclosures with the 2013 amendments to the Insurance Contracts Act to allow the electronic communication of product disclosure statements. There is scope for further reform to better accommodate the changing way consumers prefer to receive information and interact with financial services providers.

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	inconsistent? The wording of 28L is preferred and should apply to all NCCP Act documents as it does not imply written consent is required.	
National Credit Code section 195. Notice in writing of change of address.	Section 195(3) of the NCC provides relevantly: "(3) If a person nominates an address under paragraph (1)(a) or (2)(a), the person may, by notice in writing to the person giving the notice or other document referred to in subsection (1), change the nominated address or cancel the nomination." In a branch setting, customer convenience suggest that it would be preferable to avoid a process of a customer having to complete an additional action of some sort in order to satisfy the "in writing" requirement after having advised the bank of a change of address and the bank having recorded that instruction. For the call centre, the requirement is even more problematic given there is no easy way for the customer to immediately provide written notification. The solution would be to send the customer an SMS and have them reply confirming the new details. However if the customer does not reply the bank is left with the situation where it has been instructed to change the address but it is unable to change its address record. Given the intention of the provision is to ensure notices sent by the bank reach the customer this is not an ideal outcome.	Amend section 195 to remove the requirement of "writing" and replace it with a "notification" (or comparable expression) but not by prescribing the means of notification.
Simple managed investments scheme key fact sheet.	ASIC proposes to enable issuers of a simple managed investment scheme to give investors: (1) a key fact sheet with prescribed content and (2) a tool for investors to assess their understanding of the facts in the fact sheet. This will replace the need to issue a PDS. ASIC is planning a pilot of this proposal.	Although this proposal is targeted to wealth products there is support for applying this to credit too. The ABA encourages the move towards replacement disclosure rather than additional disclosure. See also above regarding investor self-assessment and key fact sheets generally under. "Other ASIC

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		Processes and Procedures".
Harmonising ASIC market integrity rules.	Harmonise the ASIC market integrity rules of all exchanges operating in Australia (currently there are eight rule books) into a single unified rule book, such that trading will take place on the basis of one set of minimum requirements.	Support project with target for completion by the end of 2016.
'Sunsetting' class orders (class waivers) that are no longer required and reviewing the conditions of continuing class orders.	ASIC is accelerating the consideration of 400 existing sunsetting class order instruments. Where these instruments need to be continued, the focus will be on simplifying and rationalising the content and conditions of the instruments.	The ABA supports the initiative being undertaken by ASIC. Regulation must remain relevant and appropriate with the passage of time. It should not be a case of 'set and forget' and requirements should be regularly assessed for ongoing relevance. This is particularly important for financial services which is a typically dynamic industry impacted by technological advancements, product innovation and changing consumer behaviours. The use of post-implementation reviews (PIRs) or sunset clauses are excellent means to measure the ongoing appropriateness of regulation. If a regulation is no longer meeting its desired objective or the objective itself is no longer relevant then a timely repeal should be considered. Consideration should be given to the timeliness of PIRs or sunset clauses; in some cases the impacts of regulation will be quickly apparent but, in other cases, the unintended consequences of regulation will only be revealed over time. A case-by-case approach to the timeliness of such reviews is encouraged, and could be canvassed as part of the initial consultation for a regulatory change. Further, an observation is that the existence of 400 class orders due to expire from 2015 suggests there may be a wider issue with regulation in general – i.e. that is not targeted or specific enough.

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Improvements to auditor resignation requirements to allow more flexibility for public companies.	ASIC proposes to allow auditors of a public company to resign at any time, conditional on market disclosure being made on the details of the resigning and incoming auditor, and the reason for the change.	This is supported by the ABA.
Licensing and regulation of third party litigation funding companies (TPLFs) as financial services providers.	The Productivity Commission has recommended in its draft report on access to justice for TPLFs to be licensed as financial services providers under the Corporations Act.	ASIC's support for this approach is requested. It will be important to ensure that for TPLFs there is complete coverage of the regulatory elements to which other financial services providers are subject, particularly the general licensing obligations under section 912A.