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Dear Sir/Madam

RE: Report 391 – ASIC’s deregulatory initiatives

The Association of Superannuation Funds of Australia (ASFA) would like to provide this submission in relation to *Report 391 – ASIC’s deregulatory initiatives* (Report).

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% of the 12 million Australians with superannuation.

Executive Summary

While we appreciate that the Report considers matters of relevance to all ASIC regulated entities, our comments are made from the perspective of RSE licensees and their members. RSE licensees will typically also be holders of an Australian Financial Services Licence (AFSL), and have extensive disclosure obligations imposed under the *Corporations Act 2001* and *Corporations Regulations 2001*.

ASFA’s submission makes a number of comments in response to the recent and proposed ‘deregulatory initiatives’ outlined in the Report. Our recommendations in relation to these initiatives include:

1. Over the Counter (OTC) substituted compliance - ASIC should pursue amendments to the *ASIC Derivative Transaction Rules (Reporting) 2013* to implement one-sided OTC trade reporting for Phase 3 reporting entities.
2. Guidance and communication - ASIC should:
 - a) conduct targeted stakeholder consultation on all regulatory guidance material, including FAQs, information sheets and generic letters to RSE licensees and AFSL holders; and
 - b) make more information available regarding changes to existing regulatory guides, for example through provision of a ‘tracked changes’ version.
3. Electronic disclosure - ASIC should undertake a review of superannuation disclosure requirements with a view to increasing the ability of RSE licensees and AFSL holders to utilise electronic delivery methods.

4. Updated website - The ASIC website should be upgraded to provide for:
 - a) Clear dating and version control of documents;
 - b) An enhanced search engine to facilitate easier location of regulatory material; and
 - c) An automated 'webmaster' service to notify users when website has been updated.

We have also identified a number of further areas where we consider that scope exists to reduce the regulatory burden on stakeholders with minimal or no regulatory detriment. A number of these areas would require ASIC to discuss potential regulatory changes with Treasury and the Government and, in some cases, to also liaise with APRA. Our recommendations include:

1. Rationalisation of some requirements in relation to the superannuation product dashboard, including:
 - a) Deferral of consideration of the choice product dashboard until after the existing MySuper dashboard has been properly consumer tested and redesigned to make it more comprehensible and usable for consumers, and the revised MySuper dashboard has been implemented for a period of 12 months
 - b) The requirement for RSE licensees to include product dashboards with periodic statements should be replaced with a requirement to provide members with details of where to locate, on the RSE's website, the dashboards for its MySuper products and, when applicable, its choice products.
 - c) RSE licensees should be exempted from any requirement to provide product dashboards, or details of where to locate them on the RSE's website, with a member's exit statement.
2. Portfolio holdings - ASIC, APRA and Treasury, in consultation with the industry, should undertake a complete reconsideration of the reporting and disclosure requirements relating to an RSE's investment holdings.
3. Publication of documents and information on RSE websites – the requirement to publish on an RSE's websites specially created summaries of all significant event/material change notices for the last two years should be removed, and RSE licensee should instead be permitted to publish suitably redacted copies of the notices themselves.
4. To address difficulties in locating legislative provisions on areas such as disclosure requirements, ASIC should work with Treasury to have the *Corporations Act* and *Regulations*:
 - a) Amended over time, to provide a logical grouping of regulatory provisions according to subject matter; and
 - b) Made available on regulatory websites such as comlaw.gov.au in an annotated form, showing modifications.
5. To ensure that relief provided via Class Order is accessible to stakeholders and notified in a timely manner:
 - a) ASIC should endeavour to provide consistent, early notification to industry when a decision to provide relief has been made.
 - b) Class Orders should generally only be used to effect modifications to the *Corporations Act* and/or *Regulations* which are time-critical or short term in nature. Where it is necessary to use a Class Order to provide relief that is time-critical which is permanent or long-term in nature, the *Corporations Act/Regulations* should be amended to incorporate the relief at the first opportunity.
 - c) The *Corporations Act* and *Regulations* should be published on regulatory websites such as comlaw.gov.au in an 'annotated' form, alerting users to the existence and effect of any Class Order modifications.
6. Adviser standards - ASIC, Treasury and the Tax Practitioners Board should work together to ensure that, to the greatest extent possible, there is harmonisation between the standards imposed on providers of financial product advice and tax (financial) services.

A. Comments on specific matters raised in Report 391

A.1 Ongoing work and recent progress

A.1.1 Savings to business as a result of ASIC's international work

A.1.1.1 OTC substituted compliance

The Report notes at paragraph 25:

By ensuring consistency with international standards and by aligning our rules to those already in place in other major jurisdictions, our approach has also enabled market participants to leverage existing infrastructure and relationships, such as those established with derivative trade repositories for trade reporting, and minimise costs associated with implementing new requirements.

Under the *ASIC Derivative Transaction Rules (Reporting) 2013* (Rules), AFSL holders – which includes most superannuation funds that deal in ‘over the counter’ (OTC) derivative products (Phase 3 reporting entities) – are scheduled to commence OTC derivative reporting from 1 October 2014. This commencement timeframe is likely to be deferred and staggered in accordance with proposed ASIC relief.

As this reporting regime is new for superannuation funds it will not be possible (except for a limited number of funds owned by major banks) for them to leverage existing infrastructure and relationships, such as those established with derivative trade repositories. Trade reporting is a new and potentially expensive obligation for superannuation funds.

The Rules require two-sided reporting – both the “buy side” and the “sell side” have to report the same transaction. While two-sided reporting is required in certain jurisdictions, we understand there have been difficulties apparent with two-sided reporting under the European Markets Infrastructure Regulation regime, and we note that the US Commodity Futures Trading Commission adopts single-side reporting.

ASFA very much supports a one-sided reporting regime for Phase 3 reporting entities. One sided reporting will significantly reduce costs and duplication. Further, it is also likely to provide greater accuracy and clarity for trade repositories with little or no loss of systemic transparency. One sided reporting is consistent with the Government's attempts to limit red tape and minimise the regulatory burden on industry participants.

ASFA has made separate submissions to ASIC as to the merits and cost savings associated with moving from a two-sided reporting regime to a one-sided reporting regime.

Recommendation 1:

ASIC should pursue amendments to the *ASIC Derivative Transaction Rules (Reporting) 2013* to implement one-sided OTC trade reporting for Phase 3 reporting entities.

A.1.2 Guidance and communication

A.1.2.1 Co-operation between regulators: APRA and ASIC reporting standards

In ASFA's view, close co-operation and liaison between all regulators with responsibility over superannuation entities is more critical than ever. The Stronger Super reforms, in particular, have highlighted the potential for duplication of regulatory requirements, or creation of substantially similar requirements, and for differences in interpretation or application of those requirements. In the interests of minimising regulatory burden and compliance costs, it is essential that this be avoided.

The Report notes that ASIC works closely with fellow Regulators to minimise overlap and streamline requirements where possible. The example used to illustrate this point is the recent joint letter issued by ASIC and APRA to RSE licensees¹, with a view to clarifying the relationship created by section 29QC of the *Superannuation Industry (Supervision) Act 1993* ("SIS Act") between ASIC disclosure requirements and the superannuation data required to be reported to APRA (section 29QC letter).

Section 29QC has generated a great deal of uncertainty and concern amongst RSE licensees, leading many to seek expert legal opinion about its potential scope and application.

We acknowledge the policy intent underpinning section 29QC, which is to ensure that disclosure is made on a consistent basis, to enable consumers to make comparisons between superannuation products, especially with respect to returns and fees. However, as the specifications of the APRA data reporting standards are primarily driven by the requirements of prudential supervision, these are not always consistent with appropriate consumer disclosure.

While the superannuation industry welcomed the regulators' efforts to clarify licensee's obligations, we note that there was no apparent consultation with industry stakeholders prior to issuing the section 29QC letter. Feedback received from ASFA members indicates that, rather than providing the desired clarification, the letter in fact created more confusion and uncertainty amongst RSE licensees and was inconsistent with legal advice obtained by many licensees in an attempt to ensure compliance.

As a result of our members' concerns, ASFA liaised with ASIC, APRA and Treasury, raising a number of specific concerns and requesting the deferral of section 29QC pending industry consultation.

We acknowledge that ASIC, APRA and Treasury have recently recognised industry concerns in relation to section 29QC, with ASIC issuing Class Order relief deferring the application of this requirement until 1 July 2015 so it can consult further on its application.²

ASFA welcomes this relief. We encourage ASIC to consult widely in relation to the scope and application of section 29QC, and are keen to remain involved in this process.

A.1.2.2 Regulatory Guidance

In ASFA's submission to the Treasury Discussion Paper: *Better regulation and governance, enhanced transparency and improved competition in superannuation* (Treasury Discussion Paper), released in November 2013³, we made extensive recommendations about improvements to the regulatory process which could be implemented to help minimise the regulatory compliance burden. In particular, we noted that effective regulatory outcomes require appropriate and timely guidance from regulators to help stakeholders comply with regulatory reform. We would welcome the opportunity to discuss in more detail with ASIC our thoughts on the regulatory process.

While the appropriate form for guidance will vary depending on the length and detail of the content, in many cases a brief but timely FAQ may provide more benefit than a more polished and lengthy guide that takes some months to produce and clear.

ASFA members appreciate the guidance ASIC provides on regulatory matters, both through formal Regulatory Guides (RGs) as well as its less formal guidance such as information sheets and frequently asked questions (FAQs). In ASFA's view, however, the less formal nature of FAQs and information sheets does not mean there is not a need for ASIC to consult with industry on their development – at least in the form of targeted consultation with industry associations as a minimum.

¹ASIC and APRA: The administration of section 29QC and APRA's reporting standards – letter to RSE licensees, 21 March 2014

² [CO14/541]

³ http://www.superannuation.asn.au/ArticleDocuments/1228/sub_Treasury_DP_Response_12Feb2014.pdf.aspx

While ASIC has conducted such targeted reviews of many Stronger Super related materials, we note that on some more recent occasions guidance material has been issued without any apparent industry consultation. On occasions, these materials have reflected a view which differs from industry expectations, reflected a potential misinterpretation of the law, or has simply been unclear.

For example, Info Sheet 197, issued on 17 June 2014, provides guidance on fee and cost disclosure requirements which take effect from 1 July 2014 (having been deferred from 31 December 2013 by a Class Order registered on 12 December 2013⁴). The information sheet includes the statement:

A trustee must also disclose fees gross of income tax. The fee the trustee discloses must not be reduced by any income tax deduction the trustee may be able to claim against costs. For example, if the gross fee is \$100 (ignoring GST for illustrative purposes only), the amount the trustee must disclose is \$100, rather than \$85 (assuming the fund's income tax of 15%). Any benefit of an income tax deduction relating to a fee should be received by the member through the deduction of a lower fee than is disclosed, or as lower tax on contributions or income.

The underlined text (our emphasis) has raised concern amongst ASFA members. It does not reflect the full breadth of current industry practice, which may involve RSE licensees applying the benefit of tax deductions in a range of other ways, such as via a direct credit to member accounts, or a credit to a general administration reserve in lieu of allocation to individual members.

The section 29QC letter referred to at A.1.2.1 above is a further example of guidance issued without prior consultation which has exacerbated, rather than alleviated, industry concerns.

Recommendation 2:

ASIC should conduct targeted stakeholder consultation on all regulatory guidance material, including FAQs, information sheets and generic letters to RSE licensees and AFSL holders.

When updating formal guidance materials, such as an existing RG, we note that ASIC often includes a brief and high level outline of the material changes in an accompanying media release.

While this is welcome, feedback from ASFA members indicates that it is not always sufficient to allow stakeholders to readily identify and understand the amendments. In addition, it requires users to consult a separate document (the media release), which is stored in a separate location on the ASIC website to the RG and – as time passes - becomes more difficult to locate.

It would greatly assist stakeholders if ASIC could produce 'tracked changes' versions of updated RGs, allowing users to see the 'before and after' picture. Alternatively, ASIC could include an outline of amendments either within the RG itself (within the 'document history' section of the RG or, if extensive, as an appendix) or as a separate document that appears with the RG on the ASIC website.

Recommendation 3:

ASIC should make more information available regarding changes to existing regulatory guides, for example through provision of a 'tracked changes' version.

ASFA has a number of more general concerns in relation to the way that guidance material is published and maintained on the ASIC website, these are outlined at A.2.5.2 below.

⁴ [CO13/1534]

A.2 New initiatives

A.2.1 Streamlining ASIC forms

ASFA welcomes the proposal to remove the forms outlined in table 1, Appendix 1 to the Report, in particular FS88, the PDS in-use notice. We understand that the information on this form is not actively used or monitored by ASIC and therefore welcome the removal of an apparently unnecessary lodgement obligation.

With regard to the forms identified for consolidation or simplification (table 2, Appendix 1) – and the creation of any new forms in the future - we note that the design of a form can have a significant impact on the compliance effort required by stakeholders. For example, ASFA members have indicated that they strongly prefer forms that are to be completed online to be pre-populated, to the extent possible, with information that is known and held on file by the regulator, such as licensee details. This allows stakeholders to efficiently make any necessary updates, additions or corrections to the recorded details, saving time and manual effort and thereby reducing the risk of data entry errors.

A.2.2 Proposed legislative reform to facilitate business

A.2.2.1 Proposed minor or technical law reform

ASFA supports the two areas of proposed minor or technical law reform outlined in Appendix 2 that impact directly on superannuation:

- Repeal of regulation 7.1.06B of the *Corporations Regulations* - as noted in the Report, regulation 7.1.06B merely duplicates regulation 7.1.05 and should be repealed.
- Repeal of sub-regulation 7.9.75(1A) of the *Corporations Regulations* - as noted in the Report, sub-regulation 7.9.75(1A) was a transitional provision. It has ceased to have any practical effect and should be repealed.

A.2.3 Removing barriers that inhibit innovation in disclosure

ASFA welcomes indications in the Report that ASIC is undertaking targeted consultation with market participants to identify the barriers to increased electronic disclosure, with a view to removing those barriers and facilitating more electronic disclosure where possible.

We note that ASIC last considered options to facilitate the electronic distribution of superannuation disclosure materials in 2009-10, culminating in the issue of Regulatory Guide 221: *Facilitating online financial services disclosures* in December 2010 (RG221). We have had discussions with Treasury as part of its 'modernising disclosure' consultation and would welcome the opportunity to discuss this matter further with ASIC.

Feedback from ASFA members indicates a strong appetite to utilise more innovative and efficient methods to communicate with their current and prospective members. In recent years, RSE licensees have adopted an increasingly sophisticated approach to delivering educational and informative material including webinars, video clips, apps for smartphones and tablets, as well as website layouts optimised for portable devices. Anecdotal evidence indicates that this has aided members' engagement with their superannuation.

In practice, it generally has not been possible for RSE licensees to apply a similar level of innovation to the delivery of disclosure materials required under law.

Regulated disclosure documents are subject to a high level of prescription as to content and, in some cases, format and layout. While this is understandable from the perspective of aiding consistency and comparability, it clearly limits the ability of RSE licensees to adopt innovative disclosure practices that may aid member engagement and comprehension. For example, the shorter PDS requirements in Schedule 10D of the *Corporations Regulations* dictate the layout of the PDS down to the number of pages, the font size, the headings to be used and the order in which material is to appear, as well as prescribing some of the text that must be included (regardless of whether it is applicable in the circumstances).

Accepting that public policy requires a high level of standardised content in regulated disclosure materials, the prescription as to format and layout tends to limit any potential innovation to enable an increased use of electronic distribution channels.

In this respect, we note that RG221 and the accompanying Class Order relief⁵ clarified ASIC's views on the circumstances in which key regulated disclosure documents can be provided via electronic delivery methods, explained whether (and when) express consent must be obtained before delivering regulated documents online and provided 'good practice guidance' on online disclosure.

In a number of cases, the positions stated in RG221 were a welcome departure from those ASIC had expressed in the past, and did facilitate an increased use of email and website channels to deliver regulated disclosure documents, for example by resolving concerns about the use of hyperlinks. It also recognised that growing numbers of consumers have access to email and internet services (whether at home, at work, or through portable devices such as smart phones and tablets), and are becoming increasingly comfortable with accessing information and transacting online.

However, the requirement that a member's express consent be obtained prior to the electronic delivery of regulated disclosure documents remains a very real barrier to achieving a substantial shift toward electronic disclosure. RG221 notes that providers of financial products – including RSE licensees – “are generally required to deliver paper disclosures to clients unless a client actively decides to receive financial services disclosures online (i.e. paper disclosure is the default method of delivering disclosures). Unless the law expressly provides otherwise, paper disclosures must be sent to those clients who have not nominated how they wish to receive disclosures.”⁶

In addition, we note that there is a somewhat inconsistent approach to electronic disclosure shown in even newly created disclosure obligations. For example:

- Section 29QB of the SIS Act requires a wide range of RSE information and documents to be published on the RSE's websites, and kept up to date at all times.
- In contrast, paragraph 7.9.20(1)(o) of the *Corporations Regulations*, in its unmodified form, requires an RSE licensee to include in a member's periodic statement the latest product dashboard for the investment option(s) held by the member. This is despite the dashboard being generic (not member-specific) information, which could readily be made available on the RSE website. Paragraph 7.9.20(1)(o) is currently subject to limited and conditional Class Order relief⁷ allowing RSE licensees instead to provide members with a website address for the dashboard. However this relief only applies to reporting periods ending before 1 January 2015 (see B.1.2 below for further comment about the requirement to include dashboards in periodic statements).

⁵ [CO10/1219]

⁶ Regulatory Guide 221 *Facilitating online financial services disclosures*, December 2010 – see para 221.31

⁷ [CO13/1534]

In ASFA's view, there would be considerable value in ASIC undertaking a comprehensive review of superannuation disclosure requirements with a view to examining the scope to move toward greater use of electronic delivery methods. We would welcome the opportunity to participate in such a review.

Recommendation 4:

ASIC should undertake a review of superannuation disclosure requirements with a view to increasing the ability of RSE licensees to utilise electronic delivery methods.

A.2.4 'Sunsetting' legislative instruments

ASFA welcomes ASIC's indication that it is reviewing Class Orders with a view to determining which can be removed (or allowed to sunset), and which need to be extended/renewed.

We have a number of more general concerns and recommendations in relation to the Class Order process, which are outlined at B.5 below.

A.2.5 New guidance and communication projects

A.2.5.1 ASIC strategic outlook

ASFA endorses ASIC's intention to provide industry with greater transparency about the work it is doing to ensure a 'no surprises' approach to regulation. The proposal to publish a 'strategic outlook' identifying the risks consumers, markets and market participants face, and the regulatory responses ASIC intends to pursue to address those risks, is welcomed.

A.2.5.2 Updated ASIC website

ASFA's submission to the Treasury Discussion Paper⁸ included extensive comments detailing our concerns regarding the useability of many Government websites, and the integrity of the information contained within them. Many of those concerns are directly applicable to the ASIC website, and we strongly recommend that ASIC take these concerns into consideration as part of any update.

(i) Material published on the website is frequently undated and outdated

A number of Information Sheets and Frequently Asked Questions⁹ (FAQs) in relation to the recent Stronger Super reforms appear – or have appeared - on the website as undated webpages. There is also a notable delay in updating Information Sheets and FAQs to reflect changes in the regulatory environment.

This raises the risk that users may unknowingly rely on outdated guidance material. It creates uncertainty and makes it difficult and time consuming for users to ascertain whether the material has been updated since it was last viewed, and/or reflects the current view of ASIC as to the state of the law. The Government's own 'webguide' notes that the potential ramifications of failure to effectively manage website content include legal exposure if users act upon incorrect or outdated information on the site¹⁰.

Recent examples of concern include:

- FAQ B1, as it relates to the product dashboard for choice products, and FAQ C1, relating to portfolio holdings disclosure, still refer to these obligations commencing on 1 July 2014 despite Class Order [CO14/443], registered on 22 May 2014, deferring the date for compliance until 1 July 2015.

⁸ http://www.superannuation.asn.au/ArticleDocuments/1228/sub_Treasury_DP_Response_12Feb2014.pdf.aspx, refer sections B.5.2 and B.5.3

⁹ These FAQs are located here: <http://www.asic.gov.au/asic/asic.nsf/byheadline/Stronger+Super+FAQs?openDocument>

¹⁰ webguide.gov.au - managing content - content management

- Certain fees and costs disclosure obligations which were scheduled to commence from 31 December 2013 for superannuation funds were deferred by a Class Order registered on 12 December 2013. The relevant FAQ on the website, E1, was not updated until 21 March 2014.
 - While the page of FAQs related to Stronger Super¹¹ contains a 'date last modified' note in the footer, there is nothing to indicate the date on which the individual FAQs were published or amended (although one FAQ, E1, is shown as having been *updated* on a specific date).
 - Similarly, while the webpage on which each Stronger Super information sheet appears contains a 'date last modified' note in the footer, there is nothing to indicate the date that the information sheet itself¹² was published.
 - The updating of the summary page for the Stronger Super reforms¹³ appears to be somewhat inconsistent. For example, a new Information Sheet, Info 197¹⁴, was issued on 17 June 2014 regarding fee and cost disclosure requirements for superannuation funds under the reforms, but not added to the list of relevant Information Sheets on the Stronger Super reforms page.
- (ii) Where regulatory documents are updated or withdrawn, previous versions are removed from the website instead of being archived in an accessible manner.

ASIC, as with many other regulators and government agencies, has a tendency to update webpages without archiving a prior version. This makes it extremely difficult for a regulated entity to demonstrate that they were in compliance with the regulator's guidance as at a given point in time. To take an extreme example, an entity might act in reliance on published guidance material that is subsequently amended to such an extent that the action taken by the entity is no longer compliant, or the guidance material may even be removed altogether. Without proper version control, document dating and access to archives containing the material previously displayed on the website, the entity would be unable to demonstrate that it was in compliance at the relevant point in time. To mitigate this risk, the entity would effectively be required to store a dated hard copy of every web page containing material that has been relied upon in the course of its decision-making processes.

The webguide notes that websites are Commonwealth records and agencies must meet their legal obligations for retention and disposal of records under the *Archives Act 1983*¹⁵, and refers to various guidance provided to agencies by the National Archives of Australia¹⁶. The average stakeholder (or indeed, even the relatively well-informed one) would not know how to go about accessing records archived in this manner, short of making an application under the Freedom of Information laws, and generally there is nothing on the face of individual regulator websites to alert them to the existence of such archived records.

In ASFA's view, aside from any archiving obligations imposed under the *Archives Act*, ASIC should consider maintaining access to superseded materials within their website.

¹¹ <http://www.asic.gov.au/asic/asic.nsf/byheadline/Stronger+Super+FAQs?openDocument>

¹² <http://www.asic.gov.au/asic/asic.nsf/byheadline/Stronger+Super?openDocument>

¹³ <http://www.asic.gov.au/asic/asic.nsf/byheadline/Stronger+Super?openDocument>

¹⁴ <http://www.asic.gov.au/asic/asic.nsf/byheadline/Superannuation-trustees--fees-and-cost-disclosure-requirements?openDocument>

¹⁵ webguide.gov.au - recordkeeping - archiving a website

¹⁶ For example: [Archiving Web Resources: Guidelines for Keeping Records of Web-based Activity in the Commonwealth Government, March 2001](#)

- (iii) The website is difficult to navigate and would benefit from improvements to the site layout, search tools and features.

Feedback from ASFA members indicates that they often find it difficult to locate information on the ASIC website. Given the volume of regulatory material that is now made available online, the quality and useability of a regulator's website is important. The inability to readily – and reliably - locate material on regulator websites raises a number of issues, including:

- Inefficiency, in the sense that it takes longer than it should to locate material;
- The risk of non-compliance, where a trustee does not locate regulatory material dealing with a particular matter and therefore reasonably concludes that none exists; and
- Financial cost, where a trustee resorts to obtaining legal advice because of a lack of confidence in their ability to locate all relevant regulatory material.

We note that most government and regulatory websites allow users to subscribe to receive automated email alerts when material on the site has been updated – for example, the Treasury, ATO and APRA websites. These 'webmaster alert' and related subscription facilities vary in sophistication, but all play a valuable role in making users aware of changes to the regulatory environment in a timely manner. We recommend that ASIC ensures that it makes a similar service available on its website as a part of the planned update.

Recommendation 5:

The ASIC website should be upgraded to provide for:

- Clear dating and version control of documents;
- An enhanced search engine to facilitate location of regulatory material; and
- An automated 'webmaster' service to notify users when websites have been updated.

B. Further comments – additional areas for potential deregulatory activity

In addition to the current and proposed deregulatory initiatives identified in the Report, ASFA has identified a number of further areas where scope exists to reduce the regulatory burden on stakeholders with minimal or no regulatory detriment.

While we acknowledge that the resolution for a number of these matters is not directly – or wholly – within ASIC's control, we note that the Report called for "suggestions for regulatory change that ASIC might discuss further with Treasury and the Government".

B.1 Product dashboard

B.1.1 Requirement to prepare dashboards for choice products

ASFA members continue to raise with us concerns about the forthcoming requirement to publish a product dashboard for choice products¹⁷. In part, these concerns are informed – and strengthened – by RSE licensees' experience in developing the dashboard for their MySuper product.

¹⁷ Corporations Act, subsection 1017BA(1)

We note that the Government recently canvassed industry views on the choice product dashboard as part of the Treasury Discussion Paper. ASFA's submission in response to that paper stated our view that questions about the specific content for the choice product dashboard should be deferred until the existing MySuper product dashboard has been properly consumer tested and redesigned to make it more comprehensible and usable for consumers, and the revised MySuper product dashboard has been implemented for a period of 12 months.¹⁸

After the closure of submissions on the discussion paper, the Government deferred the commencement of the choice product dashboard requirements until 1 July 2015¹⁹ and committed to releasing draft legislation for further consultation prior to finalising the dashboard requirements²⁰. While the deferral was welcome, we note with some concern that any conversation with industry about revised dashboard requirements – for either MySuper or choice products – is yet to commence.

While our submission in response to the Discussion Paper outlined our views on the specific disclosure items proposed for inclusion in the choice product dashboard, we have a more conceptual issue about whether a dashboard is in fact warranted for choice products.

In introducing the concepts of 'MySuper' and 'choice' products, the stronger super reforms created an environment where one type of product – the MySuper product – is required to have certain prescribed characteristics, and will therefore have a degree of commonality and comparability between funds. In contrast, choice products are subject to significantly less prescription. The design of choice products will vary significantly both within and between RSEs, and as a result they are inherently less comparable than MySuper products.

We note that there have been significant changes to PDS requirements over recent years to provide, to the extent possible, comparability between products (for example, the 'shorter PDS' requirements²¹). To the extent that choice products have features which can sensibly be highlighted for comparison, these will already be disclosed in the product's PDS, and the obligation to publish a separate dashboard for choice investment options will merely duplicate much of this disclosure. Duplication of this information and its maintenance (updates), as currently proposed, will create significant additional costs and complexity.

We welcome the Government's announcement on 5 May 2014²² deferring the commencement date of the choice dashboard requirements "to enable further consumer testing and determine whether we need to refine the dashboard". ASFA is keen to participate in any industry consultation in relation to the dashboard requirements.

Recommendation 6:

Consideration of the choice product dashboard should be deferred until the existing MySuper dashboard has been properly consumer tested and redesigned to make it more comprehensible and usable for consumers, and the revised MySuper dashboard has been implemented for a period of 12 months.

¹⁸ http://www.superannuation.asn.au/ArticleDocuments/1228/sub_Treasury_DP_Response_12Feb2014.pdf.aspx, refer comments on Part 3A

¹⁹ Senator the Hon. Mathias Cormann, Acting Assistant Treasurer: Media Release - Providing greater stability and transparency in the superannuation system, 5 May 2014; [CO14/443]

²⁰ Senator the Hon. Mathias Cormann, Acting Assistant Treasurer: Media Release - Providing greater stability and transparency in the superannuation system, 5 May 2014

²¹ Corporations Regulations, Schedule 10D

²² Senator the Hon Mathias Cormann, Acting Assistant Treasurer: Media Release - Providing Greater Stability and Transparency in the Superannuation System, 5 May 2014

B.1.2 Requirement to include product dashboards in members' periodic statements

Paragraph 7.9.20(1)(o) of the Corporations Regulations currently requires an RSE licensee to include the relevant product dashboard(s) with a member's periodic statement. This requirement is currently subject to transitional Class Order relief²³ which instead allows RSE licensees to include a link to the location of the dashboard on the RSE's website. This relief only applies to reporting periods ending before 1 January 2015.

Feedback from ASFA members indicates that they remain concerned at the prospect of being required to include dashboards with member statements on the basis it has the genuine potential to confuse members, and will also involve significant additional cost.

A member's periodic statement discloses information tailored to the member, with both fees and investment performance information specifically customised at a member level. In contrast, the dashboard contains generic, product level, information - the calculations of returns are not time or money weighted and instead represent a kind of 'average' measure across the investment, while the fees are for a "representative member".

Including the dashboard with the member's periodic statement implies a degree of personalisation and has the potential to confuse and mislead members. The generic nature of the dashboard information would be more apparent to members if it were located on the fund's website, as opposed to being included in the member's periodic statement, which contains information that is specific and particular to that member's experience in the fund.

The members' periodic statement is already a lengthy document. There is a considerable risk, and anecdotal evidence, that members are overwhelmed with the volume of existing disclosure. Adding additional, generic, information to the periodic statement is likely to reduce, rather than improve, member engagement with, and comprehension of, superannuation.

The requirement to include additional pages in periodic statements is also inconsistent with the shift to electronic communications. ASFA members have indicated that the additional changes to systems, production and postage costs to include dashboards in periodic statements is significant.

As an alternative, ASFA strongly recommends that paragraph 7.9.20(1)(o) be amended to allow RSE licensees to provide members, with their member statements, with details of where to locate on the RSE's website the dashboards for its MySuper products and the dashboard type information (essentially, the current PDS) for its choice products.

Recommendation 7:

The requirement for RSE licensees to include product dashboards with periodic statements should be replaced with a requirement to provide members with details of where to locate on the RSE's website the dashboards for its MySuper products and the dashboard type information for its choice products.

B.1.3 Requirement to provide dashboards with exit statements

The requirement in paragraph 7.9.20(1)(o) to include the relevant product dashboard(s) with periodic statements includes statements covering the period when the member exits the fund (exit statements).

In ASFA's view there is no public policy purpose to be served in providing – publically available - dashboard information to a member who has already made the decision to exit the RSE.

In B5.2 below, we note that ASIC has provided Class Order relief over a number of years to exempt RSE licensees from complying with a requirement to provide information about long term returns in members' exit statements in Corporations Regulation 7.9.20AA. There are obvious parallels between this situation and the application of paragraph 7.9.20(1)(o) to exit statements.

²³ [CO13/1534]

In ASFA's view any requirement to provide members with product dashboards - or details of where to locate them on the RSE's website - on a periodic basis should not apply to the period in which a member exits the RSE.

Recommendation 8:

RSE licensees should be exempted from any requirement to provide product dashboards, or details of where to locate them on the RSE's website, with a member's exit statement.

B.2 Portfolio holdings

While the proposed portfolio holdings disclosure requirements for RSE licensees²⁴ have been deferred to 1 July 2015²⁵, feedback from ASFA members indicates continued concern about the development of these requirements. To some extent, RSE licensees' concerns have been strengthened by their experience with the new APRA reporting forms dealing with investment related information.

There is particular concern that the model adopted for portfolio holdings disclosure may impose significant cost and effort on RSE licensees, and this may be out of proportion to the enhanced transparency the measure aims to deliver to RSE members and other stakeholders.

We note that the Government recently canvassed industry views on portfolio holdings disclosure²⁶, and has committed to releasing draft legislation for further consultation prior to finalising the disclosure requirements²⁷.

In ASFA's view, what is required is a complete reconsideration of the entire suite of reporting and disclosure requirements relating to an RSE's investment holdings, with a view to providing a solution which provides an appropriate level of transparency for RSE members and industry stakeholders, while addressing RSE concerns about the volume and cost of disclosure and issues around commercial sensitivity of the information. This would necessarily involve ASIC, APRA and Treasury liaising with each other and consulting jointly with industry.

Recommendation 9:

ASIC, APRA and Treasury should undertake a complete reconsideration of the reporting and disclosure requirements relating to an RSE's investment holdings.

B.3 Publication of documents on fund websites

ASFA members have continued to raise concerns regarding the level of information and documents required to be published on a fund's website, under section 29QB of the *Superannuation Industry (Supervision) Act 1993* and regulation 2.38 of the *Superannuation Industry (Supervision) Regulations 1994*.

In particular, trustees are concerned at the requirement in paragraph 2.38(1)(h) to publish "a summary of each significant event or material change notice made to members within the previous 2 years". The requirement to publish a summary of each significant event or material change notice, rather than a copy of the notice itself, in effect requires trustees to create a new disclosure item, purely for the purposes of publication, rather than publishing an already existing document (redacted to protect members' privacy). Despite ASIC's FAQ D2²⁸, it is not entirely clear what constitutes an acceptable 'summary', therefore, as well as additional work, trustees are exposed to the risk of breaching section 29QB where their 'summary' is found to be insufficiently detailed.

²⁴ Corporations Act, section 1017BB

²⁵ [CO14/443]

²⁶ as part of its Discussion paper: *Better regulation and governance, enhanced transparency and improved competition in superannuation*, released in November 2013

²⁷ Senator the Hon. Mathias Cormann, Acting Assistant Treasurer: Media Release - Providing greater stability and transparency in the superannuation system, 5 May 2014

²⁸ <http://www.asic.gov.au/asic/asic.nsf/byheadline/Stronger+Super+FAQs?openDocument>

ASFA recommends that ASIC pursues amendments to paragraph 2.38(1)(h) to remove the requirement to publish a summary of the significant event/material change notice, instead allowing RSE licensees to publish appropriately redacted copies of the notices themselves. In the interim, ASFA recommends that ASIC provides Class Order relief to that effect.

Recommendation 10:

The requirement to publish on an RSE's websites a summary of all significant event/material change notices for the last two years should be replaced with a requirement that RSE licensees publish suitably redacted copies of the notices themselves.

B.4 Difficulty locating relevant legislative requirements

ASFA members frequently raise with us the difficulty they experience in locating all of the relevant requirements in the *Corporations Act* and *Regulations*. Provisions are seemingly scattered throughout the Act and the Regulations, as well as different parts of the Regulations, including multiple schedules, rather than being grouped according to the subject matter they address.

This fragmentation of the law impedes a user's ability to readily identify, with certainty, all of the regulatory provisions which apply to a particular matter. As such, it reduces the accessibility of the law, increases the potential for inadvertent non-compliance, and creates a heavy reliance on costly expert legal advice.

Fragmentation can occur in all legislation if care is not taken to ensure that provisions are grouped in a logical manner. It is, however, a particular issue with the *Corporations Act* and *Regulations* as the Act is frequently modified by way of amendments inserted into the schedules to the *Regulations*.

An example that is frequently raised with ASFA relates to superannuation fund disclosure requirements, which are spread across multiple divisions within the *Corporations Act* and *Regulations* and have been the subject of numerous modifications over a number of years.

To take periodic statements as a specific example, we note that section 1017D sets out rules about the provision of periodic statements to holders of financial products, including superannuation products. Section 1017D has subsequently been amended many times via modifications inserted into the schedules of the *Regulations* to incorporate additional rules - see for example items 7.1, 12.1, 14.3, 14.4 and 16.1 in Schedule 10A. None of these modifications are apparent on the face of section 1017D when the Act is viewed from the official 'comlaw.gov.au' website, although 'pointer' provisions have in some cases been inserted into the body of the *Regulations* (not the Act) to refer the reader to Schedule 10A²⁹.

Fragmentation of the law in this manner makes it difficult for stakeholders to locate relevant legislative positions and increases the risk of inadvertent non-compliance.

Recommendation 11:

ASIC should work with Treasury to have the *Corporations Act* and *Regulations*:

- a) amended over time, to provide a logical grouping of regulatory provisions according to subject matter; and
- b) made available on regulatory websites such as comlaw.gov.au in an annotated form, showing modifications.

²⁹ See for example *Corporations Regulations* 7.9.24, 7.9.51 and 7.9.60

B.5 Provision of Class Order relief

Timely relief from onerous regulatory requirements is generally welcomed by industry, particularly when there has been insufficient time for implementation or a lack of certainty as to the requirements. ASFA does, however, have three general concerns in relation to Class Orders.

B.5.1 *Timely notification about the making of a Class Order*

ASFA has observed a number of occasions when the granting of Class Order relief is delayed to such an extent that fund trustees have had no option but to make all efforts to ensure a state of readiness to comply, regardless of the cost involved. For example:

- (i) Regulations³⁰ were registered on 28 June 2013 imposing obligations as to disclosure of fees and costs information in Product Disclosure Statements with an intended effective date of 31 December 2013, then subsequently deferred by Class Order registered on 12 December 2013³¹. An ASIC media release informing the industry that the relief had been granted was not issued until 16 December 2013 (although we understand that ASIC had communicated directly with a number of trustees who had made a specific application for relief).
- (ii) Regulations³² were registered on 6 August 2013, imposing an obligation to separately disclose Government co-contributions and Low Income Superannuation Contributions with immediate effect. These were substantially ameliorated by a Class Order registered on 28 November 2013³³, but no public announcement of this relief was made.

In each case it appears that, while the decision had been made within ASIC to grant relief some time before the Class Orders were registered, ASIC was unable to convey this to the industry. As a result, many fund trustees continued to incur costs and expend effort in order to comply with these requirements, which were then ameliorated or deferred. These monies, efforts and resources could have been diverted instead towards ensuring compliance with other pressing obligations.

ASFA's submission in response to the Treasury Discussion paper³⁴ highlighted the above examples and encouraged Government and ASIC to consider whether scope exists to provide earlier notification to industry when a decision to grant relief has been made.

In this respect, we are pleased to note that on two more recent occasions, ASIC staff contacted ASFA and other industry associations to advise that Class Order relief had been approved to provide relief from two superannuation related disclosure obligations³⁵. In doing so, ASIC enabled the relevant information to be conveyed to trustees immediately, rather than waiting for the formal registration of the Class Orders some days later³⁶. While this notification was welcomed, we query whether it would not be possible to provide even earlier notification – at the point that ASIC has formally decided to issue Class Order relief.

Recommendation 12:

ASIC should endeavour to provide consistent, early notification to industry when a decision to grant relief has been made.

³⁰ Superannuation Legislation (MySuper Measures) Amendment Regulation 2013

³¹ Class Order [CO 13/1534]

³² Superannuation and Corporations Legislation Amendment (Low Income Superannuation Contribution) Regulation 2013

³³ Class Order [CO 13/1420]

³⁴ http://www.superannuation.asn.au/ArticleDocuments/1228/sub_Treasury_DP_Response_12Feb2014.pdf.aspx, see section B.4.4

³⁵ Superannuation Industry (Supervision) Act 1993, section 29QB and subsection 29QC(1)

³⁶ [CO14/509], made on 6 June 2014 and published on the ASIC website but not yet, at the date of writing, appearing on the Federal Register of Legislative Instruments and [CO14/541], made on 6 June 2014 and registered on 13 June 2014

B.5.2 Appropriate duration of relief provided via Class Order

ASFA's second area of concern relates to the use of Class Orders to provide long-term relief in circumstances where an amendment to the underlying regulatory material would be more appropriate.

In ASFA's view, the power to make Class Order modifications is extremely useful as a means of effecting an amendment or providing relief that is time-critical or has a short lifespan. Class Orders should not, however, be used on an ongoing or recurring basis to effect a long-term or permanent amendment to the Corporations Act or Regulations.

By way of example, [CO10/630], first issued in July 2010, exempted fund trustees from the requirement to specify, in periodic statements given to members who were exiting the fund, information about long term returns prescribed by Corporations Regulation 7.9.20AA. The explanatory statement to [CO10/630] notes the decision by the (then) Minister to refine the long term return disclosure requirements for superannuation funds, including providing an exemption for exit statements. The Class Order relief was given "pending the commencement of the proposed amending regulations"; however those amending regulations have never been made. Regulation 7.9.20AA, as it appears in the 'current' consolidation on comlaw.gov.au, still requires long term return information to be included in exit statements, although ASIC has continued to provide relief from the requirement via a series of extensions to [CO10/630]³⁷. In each case the extension was provided only a short time before the relief was due to expire.

The above example highlights the uncertainty that can be created when regulatory amendments to formalise Class Order relief do not eventuate. As the expiry date for each extension of the relief has approached, stakeholders have been uncertain whether it would be extended or whether they would – at short notice – be required to begin complying with the unmodified law.

ASFA considers that where the modification effected by a Class Order has a long-term or permanent effect, it should be incorporated into the Act/Regulations whenever they are next amended. We acknowledge that this is a matter which is not directly within ASIC's control, but recommend that ASIC discuss with Treasury options to prioritise regulatory amendments necessary to formalise modifications that have already been effected via Class Order.

Until such time as the relevant modification has been given effect to as a regulatory amendment, the principal Act/Regulations, as published on regulatory websites such as comlaw.gov.au, should be annotated to draw attention to the existence and location of the modification (this is discussed further under B.5.3 below).

Recommendation 13:

Class Orders should generally be only used to effect modifications to the Corporations Act and/or Regulations which are time-critical or short term in nature. Where it is necessary to use a Class Order to provide relief that is time-critical but which is permanent or long-term in nature, the Corporations Act/Regulations should be amended to incorporate the relief at the first opportunity.

B.5.3 Certainty regarding the current state of the law, including modifications

As indicated above, the provision of Class Order relief from an obligation in the Corporations Act/Regulations is not readily apparent on the face of those instruments.

Viewed from the perspective of an industry participant, Class Orders therefore make it more difficult to identify readily, and with certainty, the regulatory provisions which apply to a particular matter. As such, they reduce the accessibility of the law and increase the potential for inadvertent non-compliance. They also create a tendency for trustees to seek legal advice 'just in case' there are relevant modifications that they have not themselves been able to locate, or to resolve confusion about how the modified law operates.

³⁷ most recently via [CO14/425]

In ASFA's view, once a Class Order has been issued, the Act/Regulations, as published on regulatory websites such as comlaw.gov.au, should be annotated in some way to draw attention to the existence and location of the modification. While many commercial publishers of regulatory material provide 'annotated' versions drawing attention to modifications, it should not, in our view, be necessary for stakeholders to utilise a commercial (paid) service simply to obtain certainty as to the current state of the law. Trustees are entitled to be able readily to identify the existence of all legal and regulatory obligations which affect them. If "ignorance of the law is no excuse", this is accompanied by a complimentary obligation on the part of the lawmakers to make the law readily accessible.

Recommendation 14:

The Corporations Act and Regulations should be published on regulatory websites such as comlaw.gov.au in an 'annotated' form, alerting users to the existence of any Class Order modifications.

B.6 Adviser standards

ASIC has recently conducted industry consultation on proposed enhancements to the training standards for people who provide financial product advice³⁸, as regulated under the Corporations Act and Regulations. We understand that the intention is to retain the current training standards³⁹ as 'base level' standards, and introduce two further regimes of training with (proposed) effect from 2015 and 2019.

We note that since the enactment of the *Tax Agent Services Act 2009*, the Tax Practitioners Board ("TPB") has been developing and implementing a regime for the registration of persons providing tax (financial) services. These services involve the provision of certain 'tax agent services' by an AFS licensee or representative, in the course of advice usually given by an AFS licensee or representative. We understand that the qualifications and relevant experience requirements for tax (financial) advisers are currently being determined by Treasury.

As a result of the tax agent services regime, an AFS licensee and their representatives may now find themselves subject to regulation by both ASIC and the TPB under discrete sets of obligations – both of which are currently undergoing review or finalisation.

Feedback from ASFA members has stressed the need for the outcomes of ASIC's current review of adviser standards to ensure that any new standards are harmonised with those put in place by the TPB for tax (financial) services and that we avoid the creation of two separate, and different, sets of rules.

Recommendation 15:

ASIC, Treasury and the TPB should work together to ensure that, to the greatest extent possible, there is harmonisation between the standards imposed on providers of financial product advice and tax (financial) services.

* * * *

³⁸ ASIC, Consultation Paper 212: *Licensing: Training of financial product advisers – Updates to RG 146, June 2013*

³⁹ As set out in ASFA Regulatory Guide 146 *Licensing: Training of financial product advisers*

I trust that the information contained in this submission is of value. If you have any queries or comments in relation to the content of our submission, please contact Senior Policy Adviser, Julia Stannard, on (03) 9225 4027 or by email jstannard@superannuation.asn.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Fiona Galbraith', written in a cursive style.

Fiona Galbraith
Director, Policy