

20 August 2021

Email: hawking.submissions@asic.gov.au

Stephen Garofano
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Australian Securities and Investments Commission
100 Market Street
Sydney NSW 2000

Dear Stephen

CONSULTATION PAPER 346: THE HAWKING PROHIBITION – UPDATE TO REGULATORY GUIDE 38

The Stockbrokers and Financial Advisers Association (SAFAA) is the professional body for the stockbroking and investment advice industry. Our members are Market Participants and Advisory firms that provide securities and investment advice, execution services and equity capital-raising for Australian investors, both retail and wholesale, and for businesses. Practitioner Members are suitably qualified professionals who are employed in the securities and derivatives industry.

SAFAA welcomes the opportunity to provide feedback on ASIC *Consultation paper 346: The hawking prohibition: Update to RG 38* (Consultation Paper).

Introduction

The current prohibitions on hawking of securities have worked well for our industry. None of the instances of misconduct referred to in the Consultation Paper, such as selling super products in bank branches or unsolicited telephone calls by insurance providers to offer funeral and life insurance products to vulnerable consumers using pressure selling tactics, involved stockbrokers or investment advisers

We note that the revised anti-hawking prohibitions are considerably broader than the current provisions in that they cover the offer for issue or sale of any financial product without the exemptions in section 736(2) of the Corporations Act. In particular, the exemption for offers of listed securities made by telephone by a licensed securities dealer was well understood and relied upon by the industry. While the hawking prohibition does not apply to situations where personal financial advice is provided, it does apply to the provision of general advice. We consider that issues will arise as a result of this broadened scope and the capture of general advice. We consider that these new provisions are better suited to call centre situations where telephone operators are selling insurance or superannuation products. The broad nature of the provisions do not work for the stockbroking and investment advice sector.

While we welcome the opportunity to provide feedback on proposed changes to the regulatory guide, we note that the final guidance is expected to be released in September 2021, just before the commencement date of the provisions in October 2021.

Five other significant reforms are also commencing in October, all of which require significant changes to business systems and process and take effect at the same time industry is facing other challenges including from COVID-19 and renewed lockdowns. We were pleased to see ASIC's statement on 12 August 2021 that it recognised that there will be a period of transition as industry finalises implementation of additional compliance measures and that ASIC will take a reasonable approach in the early stages of these reforms provided industry participants are using their best efforts to comply.

We consider that there are still grey areas surrounding the new anti-hawking provisions and industry will need time to implement process and system changes. These changes must also be placed in the context of the challenges from the current lockdowns as well as the fact that this final guidance will be received close to the start date.

Our detailed responses to the questions raised in the Consultation Paper are below.

Detailed comments

Forms of contact subject to the prohibition

B1Q1 What forms of communication do you currently use, or foresee using, with consumers, and do you anticipate any practical issues raised by the prohibition in respect of those forms?

One of the biggest issues arising from the new provisions is that conduct that would have been previously exempted will now be captured if the adviser is providing general advice.

SAFAA's members currently use phone calls, email and text messages to communicate with clients. Our members' anticipate the following practical issues raised by the prohibition in respect of these forms of communication:

- Not all stockbroking or investment advice firms record telephone calls.
- Advisers rarely use scripts when speaking to clients.
- General advice that formerly was not caught by anti-hawking now is.
- An adviser may contact a client and provide both personal and general advice which makes the dividing line difficult to police.

This makes monitoring and supervising the hawking provision challenging.

We consider that the consent requirements are unworkable and we provide further details on the issues surrounding consent in our answers to question B2.

Additionally we seek clarification on whether text messaging and SMS is considered 'real time' or not. We seek further guidance and clarity on the scope of what information can be provided to a client where there is no expectation of a real-time response.

B1Q2 Is there any additional or alternative guidance you think would be useful in helping you design and monitor communication methods with consumers?

Due to the popularity of using text messages we seek clarification about whether text messages are considered 'real-time interactions that are in the nature of a discussion or conversation' and accordingly captured by the hawking prohibition.

The requirement that the consent provided by the client not be more than six weeks old is completely inappropriate and unworkable for stockbrokers and investment advisers. While it may be appropriate in the context of the sale of car insurance for example, which is a one-off transaction, it does not suit the stockbroking and investment advice industry where advisers have an ongoing relationship with their clients who expect them to contact them regarding stocks they hold as well as those in which they may have an interest. Requiring a client to renew their consent every six weeks is unworkable. As well as being costly to implement it would result in stockbroking and investment advice firms spending all their time chasing client consents and monitoring whether consents are up to date. Advisers would be unable to contact the clients to chase the consent as to do so may breach the provisions if they discuss listed securities with their clients. This requirement will also have significant impacts on retail clients who will not understand why they have to provide written consent every six weeks to enable their investment adviser or stockbroker to contact them to discuss their stocks.

An example where the proposed six week consent requirement is unworkable is in the area of capital raising. Stockbrokers and investment advisers contact retail clients to make them aware of capital raisings such as rights issues and placements. These issues have tight timeframes in which to respond. A requirement that advisers can only contact retail clients who have provided written consent within the previous six weeks will make it impossible to contact the client base who may be interested in participating. Retail shareholders are already disadvantaged as regards participation in capital raisings when compared to institutional investors. These requirements will only make it harder for retail clients to participate in capital raisings.

Stockbrokers and investment advisers should be carved out of the consent requirements altogether so that the current situation applies. Alternatively, a 12-month consent period would be preferable.

B1Q3 Do you currently use unsolicited real-time contact to advertise or provide consumers with information about your products? If so, what types of information do you provide, and how to you communicate it?

As a general comment, stockbrokers and investment advisers are in telephone contact with their clients about matters such as research recommendation changes and corporate actions affecting their clients' portfolios. This could be in the context of personal advice or general advice. It is important to note that these conversations are not about attempting to upsell a client to buy their manufactured product. These conversations are about listed investment products issued by others. The current exemption for offers of listed securities made by telephone by a licensed securities dealer takes this important distinction into account.

We recommend that the current exemptions contained in section 736 (c) and (d) of the Corporations Act be retained.

Nature of the consent required for contact

B2Q1 Do you anticipate any practical issues in seeking consumer consent? Please give details.

Our comments regarding the practical issues in seeking consumer consent for clients of stockbrokers and investment advisers are detailed in our answer to question B1Q2.

As a matter of interest we note the example provided in the guidance involving ‘Good deal derivatives’. In that scenario, a firm attempts to make offers of OTC products to clients who have not bought or sold securities with them in the last 12 months. This offer would be caught by existing anti-hawking provisions. The new provisions are not required to prohibit this type of conduct.

B2Q2 Is there any additional or alternative guidance you think would be useful to help you design internal policies and processes to ensure compliance with the new prohibition? Please give details.

Our members have asked for guidance on the following exemptions:

- Investor Directed Portfolio Service – Is it only the platform that is exempted from the provisions or are the underlying products that sit on the platform also exempted?
- Will the ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2017/184 be repealed?

B2Q3 Do you anticipate any practical issues associated with your implementation of our guidance on the creation and maintenance of records, including practices that may help offerors meet their obligations?

As discussed in our answer to B1Q1 not all stockbrokers and investment advice firms record phone calls and advisers don’t use scripts when talking to their clients. This is because stockbrokers and investment advisers provide bespoke advice to their clients, as is called for under the best interests duty. As noted, an adviser may contact a client and provide both personal and general advice which makes the dividing line difficult to police.

We would welcome practical guidance on mobile phone logging, recording text messages and email filing.

We also anticipate practical issues with respect to consent and the 6 week time frame.

Establishing the scope of the consumer’s consent

B3Q1 Do you agree with our proposed guidance on offering products that are within reasonable scope of a consumer’s consent? If not, why not?

We consider that the proposed guidance on this point makes sense. Our members are most likely to discuss the establishment of a cash management account with clients. We recommend that ASIC provide clarification that basic banking products are exempted from the hawking prohibitions and that an adviser can discuss the establishment of a cash management account with their client without being caught by the prohibition.

B3Q2 What products do you commonly cross-sell or bundle together for sale or issue? Does the prohibition raise practical issues for these practices?

Stockbrokers and investment advisers do not commonly cross-sell or bundle products together – this is more likely to be conduct undertaken by insurers. As discussed above however, advisers do discuss the establishment of a cash management account with clients.

Advisors may also offer products on platforms including IDPS which is exempt. There is currently no guidance with respect to IDPS and how it applies. Particularly about how to treat the underlying financial products held on an IDPS. Advisors would commonly offer a breadth of products held on the IDPS. Our members would like

practical guidance on how to address each underlying financial product that is on such platform and whether they are exempt or not.

B3Q3 Is there any additional or alternative guidance you think would be useful to help you design or update your processes and procedures for your staff to identify the products that are within the scope of a consumer's consent?

If the provision of general advice is caught by the hawking prohibition, significant changes will need to be made to processes and procedures for staff to ensure that all relevant products are included in the scope of the client's consent. SAFAA members would appreciate additional guidance on matters such as internal processes, file notes and phone calls as well as some examples for scenarios involving shares, managed funds and ETFs. At the moment the regulatory guide only includes one example for shares, all the other scenarios are for insurance and superannuation products.

Many advisors provide personal and general advice. There currently is not a lot of commentary on how to treat the two. We would welcome practical guidance and additional commentary/examples about how to address this, particularly general advice and execution only instructions which fall outside the personal advice exemption.

Additionally, we would welcome practical guidance on the prescribed regulations that were issued recently, particularly about renewals and how this would work with a range of products (not just term deposits and insurance). What steps can advisors take to ensure they are compliant when calling a client to 'renew'? During that call could advisors also ask the client and check up on their other investments?

Adding new guidance on the right of return

SAFAA has no comment on the right of return. This is more appropriate for insurance products rather than listed investment products.

Conclusion

If you require additional information or wish to discuss this submission in greater detail please do not hesitate to contact SAFAA's policy manager, Michelle Huckel, at [REDACTED].

Kind regards

A handwritten signature in black ink, appearing to be 'JF' with a large flourish and '6x' written below it.

Judith Fox
Chief Executive Officer