Australian Banking Association

13 November 2018

The Manager
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600
email: ProductRegulation@treasury.gov.au

Dear Sir / Madam

Corporations Amendment (Design and Distribution Obligations and Product Intervention Powers) Regulations 2018

The Australian Banking Association (ABA) welcomes the opportunity to provide this submission to the Treasury on the Corporations Amendment (Design and Distribution Obligations and Product Intervention Powers) Regulations 2018.

In submissions on successive drafts of the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Power) Bill 2018 (the Bill), ABA members noted their support for the intent of the design and distribution obligations (DDO) to assist "consumers select appropriate financial products by requiring issuers and distributors to appropriately market and distribute financial products." In the context of complex financial products and/or products that carry investment risk, disclosure in isolation can be ineffective. We support the observation in the Financial Systems Inquiry Final Report that "these issues have contributed to consumer detriment from financial investment failures, such as Storm Financial, Opes Prime, Westpoint, agribusiness schemes and unlisted debentures."

During consultations on the Bill the ABA has drawn attention to some aspects of the regime that we believe should be reconsidered. For the purposes of these regulations, our remaining concerns are set out below.

Basic deposit products / basic banking products

- The extension of the regime to basic *banking* products, as opposed to the earlier expressed intention to include only basic *deposit* products would subject products such as direct debit facilities to the DDO without any apparent benefit to consumers.
- Basic deposit products should not be subject to the DDO regime. ABA members have taken steps to improve consumer outcomes – including those associated with basic deposit products – under the Banking Code of Practice. This, coupled with the simple character of basic deposit products, renders the application of the regime unnecessary.

The regulations extend the application of the DDO regime to *basic banking products*. This goes beyond the intention expressed in the Explanatory Memorandum to the Bill which was limited to the inclusion of *basic deposit products*. As noted in the Explanatory Statement to the regulations, the definition of 'basic banking products' in the Corporations Act includes 'basic deposit products' but also includes non-cash payments (which includes direct debit and other online banking facilities, for example - see section 763D of the Corporations Act); and facilities for providing traveller's cheques.

In our view there would be no benefit to consumers for the DDO to apply to the additional products caught by the broader definition – i.e. 'basic banking products'. For example, it is unclear what could

usefully be said in a target market determination (TMD) for a direct debit facility. These and like products are relatively simple, and likely to be suitable for any consumer.

If the TMD obligations are to be extended to basic products at all, this should be confined to basic deposit products and not to basic banking products, as flagged in the Explanatory Memorandum to the Bill.

That said, it should be noted that it remains the case that the ABA does not support the extension of the DDO to basic deposit products. The policy intent of the DDO is to overcome the identified deficiencies of disclosure, such as "consumer disengagement, complexity of documents and products, behavioural biases, misaligned interests and low financial literacy." It also intends to reduce the likelihood of failures such as Storm Financial or Opes Prime. It is not clear how including basic products furthers this objective, nor what the expected benefits for consumers will be, particularly as basic deposit products are excluded from the disclosure regime.

The inclusion of basic deposit and basic banking products in the DDO regime does not further the stated policy intentions and complicates their provision without providing useful consumer protection.

In consultation rounds, Treasury noted that the intention of this regime is to make issuers consider which markets are appropriate for particular products. In relation to basic products, Treasury has argued that certain fee structures or product categories – such as term deposits – may not be suitable for all.

In our view, the concerns raised by Treasury will be addressed under the Banking Code of Practice when it becomes operational next year. The new banking code requires banks to investigate the source of customers' income. If they have a government card, the bank must proactively provide them with information about the low-fee and fee-free accounts that they have.

In this way the industry has taken steps to improve consumer protections around basic deposit products, especially for vulnerable and low-income customers. In light of those steps, the application of the DDO regime to basic products would be superfluous.

In addition, flexibility and convenience for consumers in matters such as opening new accounts will be reduced if complexity is added to the process in order to comply with DDOs. There are circumstances where the ability to swiftly and easily open an account can be critical – some situations associated with family and domestic violence, for example. Unnecessarily complicating such processes by adding to the existing regulatory burden is undesirable, especially if corresponding consumer benefits cannot be demonstrated.

In this regard we note the statement in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry's Interim Report that "given the existing breadth and complexity of the regulation of the financial services industry, adding any new layer of law or regulation will add a new layer of compliance cost and complexity. That should not be done unless there is a clearly identified advantage.…"

If the inclusion of basic deposit products by these regulations is to be maintained, very simple basic deposit products that will likely be suitable for all should be carved out. This would avoid unnecessary cost and complexity brought about by the application of the regime to these products.

Wholesale ADI debentures

- The regulations should be amended to ensure that it does not unintentionally (or indirectly) apply to wholesale debentures issued by ADIs.

Consistent with the intention expressed in the Explanatory Memorandum to the Bill, these regulations extend the TMD obligation to debentures issues by Authorised Deposit-taking Institutions (ADIs). Consistent with the general framework of the Bill, we understand the intention is that a TMD need not be prepared in respect of wholesale debentures issued by ADIs. However, the effect of the current drafting in these regulations combined with that in proposed section 994B(2)(b)(ii) of the Bill, is that the TMD requirement is triggered where any person engages in retail distribution conduct in relation to the product. In our view this places an unnecessary and costly burden on ADIs as the TMD obligation (and

associated liability if there is failure to meet that obligation) can be triggered by circumstances outside the ADI's control. In effect, to avoid risk of liability, an ADI issuing wholesale debentures would need to monitor all dealing in the debentures to ensure there is not retail distribution conduct and the TMD liability is not triggered.

The anomaly outlined above could be addressed by qualifying the application of the TMD obligation to ADI-issued debentures which "save only for section 708(19) of the Corporations Act, a person would be required under Part 6D.2 of that Act to prepare a disclosure document".

Yours faithfully

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