



21 September 2021

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Australian Securities and Investments Commission
Level 7, 120 Collins Street,
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Dear Mr McDowell

Proposed updated amendments to the design and distribution obligations

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback to ASIC on its proposed updated amendments to the design and distribution obligations.

The FPA supports ASIC's proposed amendments as achieving the intent of the Treasury's announcement to remove the requirement for financial planners to report nil complaints or nil information to product manufacturers. Given this would have been the majority of reporting required by financial planners in relation to target market determinations (TMD), this administrative relief by the Government is a welcome outcome for the financial planning profession.

However, the FPA strongly encourages ASIC and the Government to urgently fix two outstanding reporting requirements that create further layers of unnecessary regulatory burden, duplication and costs on our members and the financial planning profession:

1. The requirement to report significant dealings
2. The open slather permission for product issuers to place additional reporting requirements on financial planners in each product's TMD.

Significant dealings

RG274 states the clear purpose of the requirement for financial planners to report to product issuers when they become aware of a significant dealing in the product that is not consistent with the TMD:

The obligation to notify the issuer of a significant dealing is intended to help the issuer make timely and appropriate decisions (for example, a decision to review a TMD) and to meet its obligation to report significant dealings to ASIC. (RG274.213)

Section 994G of the Design and Distribution Obligations Act (DDO Act) sets the significant dealing reporting obligations for product issuers:

If:

- a) *a person makes a target market determination for a financial product;*
and
- b) *the person becomes aware of a significant dealing in the product in relation to a retail client (**except an excluded dealing**); and*
- c) *the person becomes aware that the dealing is not consistent with the determination;*

the person must give written notice to ASIC as soon as practicable, and in any case within 10 business days, after becoming so aware.

Excluded dealing is defined in s994A of the DDO Act as:

excluded dealing means a dealing in a financial product that consists of arranging for a retail client to apply for or acquire the product, where the arranging is undertaken:

- (a) *by a person, or by an associate of a person; and*
- (b) *for the purpose of implementing personal advice that the person has given to the retail client.*

The DDO Act exempts product issuers reporting to ASIC dealings where the arranging is for the purpose of implementing personal advice about the product to a retail client. The FPA questions why providers of personal advice are required to make an assessment as to the significance of dealings in a product an advised client has invested in, and report such dealings to product issuers.

As stated in the FPA's previous submissions, the reporting and record keeping requirements in the DDO regime look at product regulation from the product perspective and the potential risk/harm posed to retail clients, as identified under the TMD, as a whole. This is appropriate and addresses a long-held concern of the FPA's of a gap in product regulation and consumer protection.

In contrast, when providing personal advice, financial planners consider the appropriateness of each product recommendation in relation to the individual client's circumstances and as one part of that client's broader financial plan. The best interest obligations in the Corporations Act and the standards of the new Financial Planner Code of Ethics, oblige financial planners to undertake significant product research and comparisons to determine whether a product is appropriate for that client's circumstances. The product must be suitable for the role it will play

in the financial plan to achieve the client's immediate and longer-term goals and meet likely future interests and needs. These obligations also require planners to clearly demonstrate that the client would be in a better financial position and that it would improve the client's financial wellbeing if the advice were followed. This will be different for each client of the financial planner.

Financial planners do not have a 'whole of market' view of investors of a particular product. Planners would only be privy to consumers who invest in a product if they are clients of the planner. If the planner has recommended the product through the provision of quality personal advice in the best interest of their client, the planner has considered all risks of the product in relation to the individual client's circumstances and determined that the product is appropriate.

ASIC's INFO Sheet 264 states that *...advice licensees and financial advisers will need to consider whether or not a dealing is significant in the circumstances.....[and] should also consider other factors including, for example, the....factors set out in RG 274.159 (where relevant).*

Even though 'dealings' involving the implementation of personal financial advice to retail clients are excluded from product issuers' significant dealing reporting requirements under s994G, the following table examines these factors in relation to personal financial advice.

ASIC recommended factor that advice licensees and financial advisers should consider to determine whether or not a dealing is significant	Personal financial advice requirements
<ul style="list-style-type: none"> ● <i>of those consumers who acquire the product, the proportion of consumers who are not in the target market, including the proportion of consumers acquiring the product who are part of a class that has been excluded from the target market</i> 	<p>The best interest duty and FASEA Code of Ethics require financial planners to only consider the client in front of them. A financial planner when making a recommendation is not in a position to consider, nor will have the information required to understand how the specific client they are advising sits within the entire, or a proportion of, the investors/members/holders of a specific product.</p>
<ul style="list-style-type: none"> ● <i>the actual or potential harm to consumers, including the amount of any financial loss, resulting from consumers who are not in the target market acquiring the product</i> 	<p>If the planner has recommended the product through the provision of quality personal advice in the best interest of their client, the planner has considered all risks of the product in relation to the individual client's circumstances, including the risk of potential harm or financial loss, and determined that the product is appropriate and as part of the client's financial plan would improve the client's financial wellbeing if the advice were followed.</p>
<ul style="list-style-type: none"> ● <i>the nature and extent of the inconsistency of distribution with the TMD (noting that distribution to</i> 	<p>While planners are expected to consider the TMD as a source of information about the</p>

<p><i>a consumer can be either more or less consistent with a target market along a continuous spectrum)</i></p>	<p>product, the provision and implementation of personal financial advice is excluded from the requirement to comply with the TMD. Clients may have specific goals within their broader financial circumstances which may require specific product solutions to ensure the goal is achieved. This includes goals where the clients risk capacity and risk tolerance are higher than their broader risk appetite.</p>
<ul style="list-style-type: none"> ● <i>the proportion of gross income or premium obtained for the product from consumers acquiring the product who are not in the target market, and</i> 	<p>The best interest duty and FASEA Code of Ethics require financial planners to only consider the client in front of them. A financial planner when making a recommendation is not in a position to consider, nor will have the information required to understand how the specific client they are advising sits within the proportion of gross income or premium obtained for the product holistically, let alone by those not within the target market.</p>
<ul style="list-style-type: none"> ● <i>the time period in which these acquisitions outside the target market occurred</i> 	<p>While the FPA agrees the timing of a contribution, investment or a purchase of a financial product may impact the ultimate outcome for the client, as noted, the product must first be in the client's best interests and appropriate for meeting their goals and objectives.</p>

These factors clearly demonstrate that the requirement to report significant dealings to product issuers oblige financial planners to make a detailed assessment about whether the investment made in a product by each client and their client base as a whole, is significant, not in relation to the advice, but in relation to the product as whole, which is not information available to the financial planner. Even if possible, this costly and time consuming regulatory burden is placed on financial planners even though the implementation of personal financial advice is an 'excluded dealing' and not required to be reported by product issuers in their significant dealing reports to ASIC, and product providers have the information available to do this without additional information from the financial planner.

Rather than providing additional consumer protection benefits, requiring financial planners to make such reports will only add to the cost of providing personal advice to clients, driving up the cost of advice for Australians. This is in contrast to the Government affordable advice agenda.

It is also concerning that a number of TMDs include as the product specific 'significant dealing' definition the requirements for this term as stated in the legislation or omit a significant dealing definition in preference for providing review triggers. (See Attachment 1.)

FPA recommendation

The FPA recommends:

- the requirement for providers of personal financial advice to retail clients to report and keep records on significant dealings to the product issuer be removed; and
- providers of personal financial advice to retail clients be obliged to report to the product issuer any dealing that involves the implementation of personal financial advice about the product that falls outside the class of consumer in the TMD, within 10 business days of the dealing. This personal financial advice provider obligation should be satisfied by a one-off notification provided to the issuer with the application to invest in the product.

This is in line with the above stated purpose in RG274.213 and the DDO Act as it will provide product issuers with the necessary information to make an assessment of the:

- ongoing suitability of the product for the identified 'class of consumer',
- appropriateness of the TMD, and
- quickly identify 'excluded dealings' to ensure accurate reporting of 'significant dealings' in the product to ASIC, in a timely manner.

Product issuer TMD requirements

Section 994B(5)(h) permits product issuers to place additional reporting and record keeping requirements on distributors, including providers of personal financial advice to retail clients:

(5) *A target market determination for a financial product must:*

(h) specify the kinds of information needed to enable the person who made the target market determination to identify promptly whether a review trigger for the determination, or another event or circumstance that would reasonably suggest that the determination is no longer appropriate, has occurred and, for each kind of information, specify:

(i) the regulated person or regulated persons that, under subsection 994F(5), are required to report the information to the person who made the determination; and

(ii) a reporting period for reporting the information under subsection 994F(5).

In relation to additional distributor reporting requirements being included in the TMD, INFO Sheet 264 states:

In setting out the types of information that must be provided, the issuer will need to consider what information (in addition to the information that the issuer can directly

obtain from other sources) is needed to ensure the issuer can promptly identify whether an event or circumstance has occurred that would reasonably suggest that the TMD for a product is no longer appropriate.

Example 7: *Managed Investments* of RG274 demonstrates the types of factors that may indicate to a product issuer that a review trigger has occurred:

An issuer of interests in a managed investment scheme could consider the following factors when identifying review triggers that may indicate that the target market is no longer appropriate or that the product should be redesigned:

- *any losses suffered by holders and whether the product is still likely to achieve its investment objective over time;*
- *whether the liquidity of the product has changed and whether the product is able to continue to offer regular withdrawals;*
- *the fees of the product compared to similar types of products;*
- *the taxation implications of the product compared to similar products;*
- *whether the product remains on approved product lists and menus for key distributors;*
- *the performance of the product relative to its investment objective, appropriate benchmarks (if any) and similar products (e.g. a change in expected performance in light of significant changes in market conditions such as an economic downturn);*
- *a significant increase in fund outflows; and*
- *the nature, number and outcomes of complaints.*

These factors are all identifiable based on information readily available to product issuers rather than in a direct engagement with a single client. For personal financial advice providers to identify information relevant to such factors would require time-consuming research and costly processes irrelevant to personal advice provision. This would be counter to ASIC regulatory guidance:

In determining what is reasonable issuers will likely need to take into account factors such as the risk of consumer harm occurring over the specified reporting period and the administrative demand placed upon the distributor. (RG274.113)

As previously stated, financial planners are permitted to provide personal financial advice that is inconsistent with the target market determination and must consider the risk capacity, tolerance, personal circumstances, and broader long-term interests of each client and provide financial advice that is in the best interest of their client.

ASIC's INFO Sheet 264 makes it clear that product issuers are permitted to place additional reporting and record keeping requirements on providers of personal financial advice outside of the information on complaints and significant dealings currently required in the law:

The issuer will need to determine what information, in addition to complaints and significant dealing information (see s994E(4) and (5) and RG 274.211–RG 274.219), will best assist it in meeting its review obligations. In deciding what information is necessary and reasonable to require distributors to provide, issuers should consider the information they already hold or can obtain from other sources.

Failing to comply with the reporting requirements in the product issuer's TMD attracts a civil penalty under s994F(3) in the DDO Act. This will trigger breach reporting, investigation, notification and compensation obligations for the advice provider.

The FPA suggests it is inappropriate to allow one commercial entity to create a civil penalty legal obligation on another commercial entity without going through due process and parliamentary scrutiny.

Of great concern to the FPA is the lack of parameters around the information product issuers can request from financial planners. As discussed above, providers of personal financial advice to retail clients are exempt from the requirement to be consistent with the TMD; and the implementation of personal financial advice is excluded from the product issuers' significant dealing reporting requirements making planners' significant dealing reporting and record keeping obligations redundant.

The examples of the reporting requirements included in product issuers TMDs provided in Attachment 2 demonstrates the fine line between reporting requirements financial planners are exempt from providing in the law, and the information required by product issuers in the TMD.

At a minimum, product providers should be restricted from including financial planner reporting and record keeping requirements in the TMD that are outside of or in contrast to the law. However, the FPA opposes reporting and record keeping requirements being placed on providers of personal financial advice by product issuers.

The FPA also questions the appropriateness of the information requested by product issuers in some of the TMDs released to date.

When seeking personal financial advice, clients pay for the professional financial planners to use their skills, knowledge and experience to provide recommendations appropriate for and in the best interest of the client. This knowledge, skill set and experience takes commitment and hard work over many years to acquire, and when put into practice through the provision of personal advice, is the financial planner's intellectual property. Financial planners are also responsible for the outcomes of that advice.

The FPA is concerned that the DDO reporting requirements, particularly those included in TMDs released by some product providers, leave planner's intellectual property unprotected.

FPA recommendation

The FPA recommends removing product providers' ability to impose additional reporting and record keeping requirements on personal financial advice providers.

The FPA recommends ASIC provide urgent regulatory guidance setting appropriate limitations on the ability of product issuers to place additional reporting and record keeping requirements on financial planners about the product in the target market determination (TMD), including:

- where the law exempts planners from such requirements
- in relation to 'excluded dealings' and 'significant dealings'
- further information on complaints about a products
 - which have been referred by the planner to the issuer's IDR process, or
 - where the sharing of such information is inconsistent with the disclosure requirements in Privacy and AML/CTF laws.
- Information which is confidential to the client and not required by the product to assess the appropriateness of a TMD, e.g.
 - Other products
 - Holistic financial position

Complaints reporting

Also commencing 5 October 2021, the new Internal Disputes Resolution requirements in RG271 sets out how financial firms should meet ASIC's IDR standards. These include the requirement that financial firms, including personal financial advice providers, credit providers and unlicensed product issuers, have in-house processes to resolve complaints received about their products and services, including how they handle complaints.

When a complaint is received by a financial planner about a product, under RG271 the licensee is required to acknowledge the complaint within 24 hrs. To ensure the complaint will be covered by the ASFL's professional indemnity policy, the licensee will need to determine if the complaint involved an advice issue or a product issue. Advice related complaints will be handled within the licensee's dispute resolution processes. However, product related issues are generally excluded from advice providers' PI policies.

It is in the best interest of both the licensee and the client for the product issuer to be notified of all issues and complaints related to a product (only - not the advice) within a very short time frame. Product issues and complaints should be directed through the product provider's IDR process to ensure the complaint can be appropriately considered in line with the mandatory RG271 requirements.

Product complaints received by personal financial advice providers should only be required to be reported to a product issuer when a complaint is received, as opposed to reporting on a regular/quarterly basis or 'reporting period' set by the issuer. Thus, the process could be integrated into the distributor company's IDR process flow and be provided to a product issuer

within the new 30 day timeframe for IDR obligations, or as complaints arise or are identified by the AFSL as product related complaints, not advice complaints.

This will provide product issuers with the necessary complaint information and record keeping to determine if a review trigger has occurred, and when the number or type of complaints are factors that should be considered in relation to a reportable 'significant dealing'. Importantly, it will also enable the issuer to address the consumer complaint about the product within their own complaints handling processes.

Leveraging the mandatory IDR processes required under RG271 will help products receive the complaints information when it is most relevant, and reduce the regulatory cost of planners having to "save up" information for different reporting periods included in the TMDs. Such efficiencies will improve complaints and DDO outcomes for consumers.

FPA recommendation

Should FPA's recommendations made above not be implemented, the FPA recommends ASIC remove formal reporting periods which create unnecessary and unworkable record keeping and reporting requirements for financial planners and instead move to an "as required" reporting requirement based on financial services and product providers' IDR processes.

There is an opportunity for ASIC to create an alignment between dispute resolution and TMD reporting to remove further layers of unnecessary regulatory burden, duplication and costs on our members and the profession.

The FPA request the opportunity to discuss the issues and recommendations in this submission with ASIC as a matter of urgency. Please contact me ben.marshan@fpa.com.au or 02 9220 4500.

Yours sincerely



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¹ The Financial Planning Association (FPA) is a professional body with more than 12,000 individual members and affiliates of whom around 8,500 are practising financial planners and 5,207 are CFP professionals. Since 1992, the FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of the Future of Financial Advice reforms.
- The FPA was the first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- We built a curriculum with 18 Australian Universities for degrees in financial planning through the Financial Planning Education Council (FPEC) which we established in 2011. Since 1 July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- When the Financial Adviser Standards and Ethics Authority (FASEA) was established, the FPEC 'gifted' this financial planning curriculum and accreditation framework to FASEA to assist the Standards Body with its work.
- We are recognised as a professional body by the Tax Practitioners Board.

Attachment 1: Examples of TMD 'significant dealings' definitions

Challenger Guaranteed Annuity

Section 994F(6) of the Act requires distributors to notify the issuer if they become aware of a significant dealing in the product that is not consistent with the TMD. Neither the Act nor the Australian Securities and Investments Commission (ASIC) defines when a dealing is 'significant' and distributors have discretion to apply its ordinary meaning. Challenger will rely on notifications of significant dealings to monitor and review the product, this TMD, and its distribution strategy, and to meet its own obligation to report significant dealings to ASIC. Dealings outside this TMD may be significant because:

- they represent a material proportion of the overall distribution conduct carried out by the distributor in relation to the product, or
- they constitute an individual transaction which has resulted in, or will or is likely to result in, significant detriment to the customer (or class of customer).

In each case, the distributor should have regard to the nature and extent of the inconsistency of distribution with the TMD (which may be indicated by the number of red or amber ratings attributed to the customer).

CFS FirstWrap Plus Superannuation

This TMD does not include a definition of what constitutes a 'significant dealing' for this product. It includes a list of review triggers:

Where CFS determines that one of the below review triggers has occurred, we must undertake a review of this TMD:

1. Receipt of a Product Intervention Power order from ASIC requiring CFS to cease retail distribution of this product.
2. Receipt of a significant or unexpectedly high number of complaints from customers who have acquired this product, regarding the product design, features, availability and any distribution condition that would reasonably suggest that this TMD is no longer appropriate.
3. Occurrence of a significant dealing(s) outside of the TMD that would reasonably suggest that this TMD is no longer appropriate.
4. Material change to key product features, investment objectives, terms and conditions that would reasonably suggest that this TMD is no longer appropriate.
5. The Target Market and product attributes described in this TMD is found to include materially incorrect or misleading information that reasonably suggests that this TMD is no longer appropriate.
6. A significant number of investment options (excluding fixed term investments) have become illiquid and are no longer able to offer withdrawals, which reasonably suggests that this TMD is no longer appropriate.
7. The trustee of this product makes a determination for purposes of s52(9) of Superannuation Industry (Supervision) Act 1993 (Member Outcomes Assessment) that the financial interests of the customers who hold this product are not being promoted.

8. Changes to legislation have come into effect which materially impact upon the design or distribution of the product and reasonably suggests that this TMD is no longer appropriate.

Clearview Income Protection and Accidental Income Protection

This TMD does not include a definition of what constitutes a 'significant dealing' for this product. It includes a list of review triggers:

We may review this TMD as a result of:

- us forming a view that the product is no longer consistent with the likely objectives, needs and financial situation of the retail clients in the target market
- product performance being materially inconsistent with our expectations
- product design changes which we consider to be material and impact the target market
- complaints or feedback which in our view indicate a material distribution or product design issue
- new or amending legislation which significantly impacts this product's design and/or distribution
- us becoming aware of significant dealings outside the target market
- regulator feedback that is likely to have a significant impact on the product

MLC - MLC Insurance; MLC Insurance (Super); MLC Insurance (Wrap or SMSF)

	Review triggers	Assessment information	Timeframe	Who is responsible
1	The commencement of a significant change in law that materially affects the product design or distribution of the product or class of products that includes this product. Note: This trigger is a mandatory review. The product issuer may choose to undertake a review even if the above review trigger is not met.	Any relevant regulation, legislation and/or ASIC instruments relating to the change in law.	As new changes are introduced.	MLC Limited with information supplied.
2	Product performance is materially inconsistent with the product issuer's expectations, having regard to: product claim ratios; the number of paid, denied and withdrawn claims; the number of policies sold; and policy lapse rates.	During the review period, the expected and actual: <ul style="list-style-type: none"> • claims ratio; • number of paid, declined and withdrawn claims; • number of policies sold; • number of policies lapsed. 	Aligned to TMD Review Period.	MLC Limited.

3	Significant or unexpectedly high number of complaints regarding product design, product availability, claims and distribution condition that would reasonably suggest that the TMD is no longer appropriate.	Complaints (as defined in section 994A(1) of the Act) and the nature of the complaints regarding product design, product availability, claims and distribution condition.	As soon as practicable, or in any event, within 10 business days after the end of each calendar quarter.	MLC Limited and our Distribution Partners.
4	Material change to key product design, features, and/or fees that would reasonably suggest that this TMD is no longer appropriate.	Notification of proposed material change to key product design, features, and/or fees.	As material changes are made.	MLC Limited.
5	Significant Dealing in the product which the regulated person becomes aware is not consistent with the TMD.	A dealing in the product which the distributor (as the regulated person) becomes aware is not consistent with this TMD.	As a significant dealing is identified.	MLC Limited and our Distribution Partners.

Attachment 2: Examples of distributor reporting requirements included in TMDs

Challenger Guaranteed Annuity

Distributor reporting requirements		
Reporting requirement	Reporting period	Which distributors this requirement applies to
Complaints (as defined in section 994A(1) of the Act) relating to the product design, product availability and distribution. The distributor should provide all the content of the complaint, having regard to privacy.	Within 10 business days following the end of the March and September quarters (note this can be done in two separate quarterly reports if required)	All distributors
Significant dealing outside of target market, under section 994F(6) of the Act. See Definitions for further details.	As soon as practicable but no later than 10 business days after the distributor becomes aware of the significant dealing	All distributors

CFS FirstWrap Plus Superannuation

Review trigger information requirements:

Information	Provider	Reporting frequency
Complaints The number, nature and outcomes of complaints received in relation to this product's design, features, availability and distribution (including where that number is zero). The distributor should provide all the content of the complaint, having regard to privacy.	Distributor	Quarterly
Dealings outside the target market Where a financial adviser arranges the product acquisition on behalf of their client, they must confirm within the product application form: <ul style="list-style-type: none"> whether they believe the consumer is in the Target Market; whether the product application supports the implementation of personal financial product advice; and where the consumer is not in the Target Market, the reasons why the consumer was not in the Target Market. 	Distributor	Quarterly
Significant dealing outside the target market The nature and the circumstances of the significant dealing (including why the dealings occurred outside the Target Market), the date range of when the significant dealing occurred, the number of consumers to whom the report relates, whether personal financial advice was provided (in writing) and whether consumer harm or detriment has or likely occurred as a result of the significant dealing.	Distributor	As soon as practicable, but no later than 10 business days after the distributor becomes aware of the significant dealing.

Clearview Income Protection and Accidental Income Protection

Information type	Specific requirements	Reporting period	How information can be provided
Complaints	All complaints received by the licensee which relate to the product design or distribution of IP or Accidental IP Cover.	The reporting period is the 6 months to 31 March and 30 September. Reports must be provided within 10 days of the end of each reporting period. ClearView strongly encourages distributors to submit complaints as they receive them.	For information on how to report complaints and significant dealings visit clearview.com.au/tmd
Significant dealings	All significant dealings that are not consistent with the TMD.	As soon as practicable but no later than 10 business days after the distributor becomes aware of the significant dealing.	

MLC - MLC Insurance; MLC Insurance (Super); MLC Insurance (Wrap or SMSF)

- Complaints and the nature of the complaints regarding product design, product availability, claims and distribution condition. Complaints must be reported as soon as practicable, or in any event, within 10 business days after the end of each calendar quarter.
- A significant dealing in the product which the regulated person becomes aware of is not consistent with the TMD. These should be reported as they are identified.