25 August 2021

Director
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: SDBConsultation@treasury.gov.au

Re: Single Disciplinary Body: Policy paper

The Australian Financial Markets Association (AFMA) welcomes the opportunity to comment to the Treasury on the Single Disciplinary Body: Policy Paper. With our membership of over 120 financial services firms, AFMA represents a wide spectrum of financial market participants operating in Australia. These include market participants and businesses that provide investment advice and related services to both retail and wholesale investors and businesses.

AFMA has previously made representations to Treasury and ASIC highlighting issues with the retail advice regime in Australia, the FASEA requirements and the fundamental legal conflicts with the elements of Code of Ethics. We welcome the Government's recognition of some of these issues with a major reform to wind up FASEA, expand the Financial Services and Credit Panel's (FSCP) role into a single disciplinary body and set up a transparent registration system.

While we appreciate it is a step in a positive direction, we continue to pursue more clarity in the implementation of these changes, removal of costly and duplicative requirements and their appropriate integration with existing jurisprudence. We also support close engagement between the Government and the industry to arrive at more practical outcomes that aim to improve the competitiveness in Australia's financial advice sector while upholding regulatory objectives and minimising misconduct.

We appreciate Treasury's consideration of the stakeholder feedback which highlighted concerns around an FSCP convening for large volumes of minor, immaterial and administrative matters, and recommendations for efficient disciplinary processes. We further support a meaningful scoping of sanctions that should be included on the Financial Advisers Register (FAR) to limit the negative effects on financial advisers relative to the gravity of misconduct.

We trust our comments below are of assistance. We welcome further engagement with the Treasury on the implementation of the Single Disciplinary Body and related considerations around the advice regime, applicable regulations, Code of Ethics and other matters.

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Convening a Financial Services and Credit Panel ('Panel')

Proposed criteria for ASIC to convene a panel

Considering that the outcomes from matters being undertaken by the single disciplinary body will have significant impacts on the financial advisers, AFMA supports clarity on the circumstances that will trigger ASIC convening a Panel.

We understand ASIC *must* convene an FSCP if the three proposed criteria are satisfied. We take this to mean that ASIC *must* convene a panel when the contravention satisfying criteria numbers 1 and 2 has resulted in *at least* one outcome from criteria number 3. However, clarity would be appreciated on whether ASIC will have the ability to convene a Panel in case the contravention or circumstance has not resulted in any of the proposed outcomes under criteria number 3.

We suggest that if ASIC does not have the ability or choice to convene a Panel in the event that *none* of the proposed results from criteria number 3 occur, the wording should clearly state that *at least one* of the proposed result should occur to ascertain ASIC convening a Panel.

Similar clarity should be extended to circumstances that may not lead to a panel being convened.

We note from our representations around the new Breach Reporting Regime that proposals for 'deeming' a contravention of a civil penalty provision to be a significant breach would have led to substantial reporting burdens both for licensees and for ASIC. Licensees would have had to report on breaches of the IDR standards that are unlikely to cause detriment to consumers. Based on industry feedback, the Government introduced welcome amendments to carve out certain civil penalty provisions from being deemed significant.

Considering this experience, we note the need for clear understanding around the role and powers of the single disciplinary body. We support an approach where the starting point specifies contraventions of certain sections of the Corporations Act, rather than an 'all in' approach where all contraventions are considered in scope, with subsequent carve-outs being introduced.

Definitions of 'serious' and 'repeated breach'

AFMA is concerned that the introduction of new defined terms connected with breach reporting of 'serious' and 'repeated breach' will further complicate an already complex environment associated with the new breach reporting regime. The proposals contained in Questions 3 and 4 for definitional regulations would introduce such additional complexity. The starting point should be reference to ASIC RG 78 and a consistent interpretative approach.

Contraventions involving Code of Ethics

We understand that ASIC *may not* convene a panel where a contravention involves a breach of the Code of Ethics which is a restricted civil penalty provision in the Bill. AFMA agrees with this approach.

More broadly, it is our understanding that the current FASEA Code of Ethics will be transferred across to the Minister's responsibility. AFMA wishes to reiterate our previously noted serious concerns with the FASEA Code of Ethics in its current form. The FASEA Code of Ethics has a number of serious flaws that would need to be comprehensively addressed before it could form the basis of an advice ethical framework under the new legislative scheme.

As an example of the current issues with the Code, Standard 3 states:

You must not advise, refer or act in any other manner where you have a conflict of interest or duty.

There will be plenty of circumstances where individuals and firms have conflicts and it is still entirely appropriate to act, so long as their conflicts are properly managed. For example, brokerage being proportionate to investment is appropriate as many back-office costs (clearing, settlement, market data) are often directly or indirectly linked to the volume and value of completed trades. The risks for advisors also vary in proportion to the sums invested. On an ordinary reading of Standard 3, brokerage would create a conflict and create a bar to advising, referring, or acting.

Guidance on Standard 3 limits it to cases with 'actual conflict'. The key misunderstanding by the FASEA approach appears to be that a conflict needs to inappropriately influence actions to become an 'actual' conflict. This is incompatible with existing legal understanding and practice as conflicts are 'actual' when they merely have the potential to create inappropriate outcomes. This is different to 'potential' conflicts which are circumstances where there are no incentives to act inappropriately but in the future due to the particular circumstances there could be.

We have a number of other areas of concern with the Code and welcome engagement with the Treasury to produce a new Code that is fit for purpose.

Sanctions to be included on the Financial Advisers Register (FAR)

AFMA holds concerns that an adviser could be issued an administrative sanction by a panel due to contravention of a financial services law, which has a wide definition the Corporations Act and may involve a minor breach. In line with our comments above, we note that inclusion of such minor breaches would cause greater harm to advisers relative to the gravity of misconduct. Further, the end consumers will be burdened with information on the non-material contraventions included on the FAR. This may risk being counterproductive to the purpose of the FAR which is to assist consumers in efficiently finding suitable advisers.

Considering the above, AFMA welcomes the proposals that written warnings and reprimands issued by ASIC or the panel are not to be included on the FAR. We also support that given the proposed

criteria to ascertain whether a panel is to be convened, minor breaches should not be dealt with by a panel or recorded on the FAR.

We note the policy paper outlined the proposed sanctions to be included on the FAR, including for first-time offences and note that they will only be removed if the sanction has been revoked by the FSCP.

AFMA holds that sanctions that direct a financial adviser to undertake specified training, counselling or supervision will eventually become less applicable as the training, counselling and supervision is undertaken. We note that such sanctions should not reflect on the FAR forever unless they are specifically revoked. This may risk in providing in accurate picture of the financial adviser after they have taken the specified action. We also hold that this would not benefit consumers.

Implementation timeframe

We note that Treasury intends releasing exposure draft regulations later this year for public consultation in time for them to come into force on 1 January 2022. This is subject to the Bill passing the Senate.

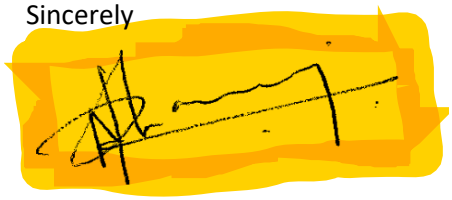
AFMA notes that the reforms occurring out of the Royal Commission and other inquiries will commence in October 2021, demanding significant work and resources from AFMA members and the wider financial services sector. These reforms are also taking place at the same time the industry is facing other challenges, including from COVID-19 and renewed lockdowns.

We welcome the announcement by ASIC that it would be taking a more facilitative approach to the new laws that take into account the context that firms are operating in, including the scale of the changes and the challenges arising from the current operating environment. We support that given the significant reforms currently underway, the short time frame until the start of the regime on 1 January 2022 will present challenges for our member firms.

AFMA recommends that the implementation date be delayed until 1 July 2022 to provide sufficient time for industry to prepare for the proposed regime.

For more information or if you have questions in relation to our submission please feel free to contact me at ndhanraj@afma.com.au or 02 9776 7994

Sincerely



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