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“FOFA Update”

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FOFA – where we're at right now

Oct 2007 – start of GFC

Feb 2009 – announcement of PJC inquiry (Ripoll inquiry)

Nov 2009 – Ripoll inquiry releases report with 11 recommendations

Apr 2010 – 1st FoFA information pack released

Apr 2011 – 2nd FoFA information pack released

Aug 2011 – FoFA draft legislation released (Tranche 1)

Sep 2011 – FoFA draft legislation released (Tranche 2)

Oct 2011 – FoFA bill introduced (in part) to Parliament

Apr 2012 – expected passage of FoFA legislation through Parliament

Jul 2012 – commencement of FoFA measures



FOFA Tranche 1 & 2 and FOFA Bill

- Draft legislation provides a further level of clarity on the following proposed measures:
 - Best interests duty (draft)
 - Opt-in regime (Bill)
 - Broadening ASIC powers (Bill)
 - Bans on conflicted remuneration payments, etc (draft)
 - Ban on asset based fees for geared investments (draft)
- Introduces an overall anti-avoidance provision applying to FOFA measures (Bill)

Best interests duty

- The following key obligations will apply when personal advice is provided to retail clients:
 - An obligation to act in the best interests of the client
 - An obligation to give priority to client interests over the interests of the planner, the planning practice and the licensee
 - An obligation to provide appropriate advice
 - An obligation to warn if there is incomplete or inaccurate information
- New provisions will replace existing requirements under:
 - Section 945A (reasonable basis for the advice)
 - Section 945B (obligation to warn client if advice is based on incomplete or inaccurate information)

Best interests duty

- “The provider must act in the best interests of the client when giving the advice”
- There are 10 stated minimum steps that must be taken in acting in the best interests of the client, including:
 - Identifying objectives, financial situation and needs of the client that are disclosed to the provider by the client through instructions
 - Identifying the subject matter of the advice that has been requested by the client
 - If it’s reasonably apparent that information given by client is incomplete (for its purposes) or inaccurate, to make inquiries to obtain complete and accurate information
 - If it’s reasonably apparent that objectives/needs could be better achieved/met if client obtained advice on another subject matter (whether in addition or substitution) to advise the client in writing of that fact
 - Assessing if objectives/needs can be met through means other than the acquisition of financial products

Opt-in

- Applies to ongoing fee arrangements from 1 July 2012
 - Fee disclosure notices required for all clients
 - Opt-in (renewal) notice required only for new clients
- New clients are those who have not been provided with personal advice by the licensee or representative before 1 July 2012
- Obligations only apply whilst the ongoing fee arrangement has not been terminated
- An **ongoing fee arrangement** is defined as an arrangement under which:
 - A retail client agrees to pay a fee for personal advice
 - The fee doesn't relate to advice that, at the time the arrangement is entered into, has already been given
 - The arrangement is at least 12 months in duration
 - The fee is not solely in relation to an insurance premium

Opt-in

- Requirements:
 - Fee disclosure statement
 - Must give the client a fee disclosure statement within 30 days following the 12 month anniversary date
 - Subsequent fee disclosure statements must be given within 30 days following the 12 month anniversary of the day the last fee disclosure statement was given
 - Must state ongoing fees paid in preceding 12 months and anticipated ongoing fees for next 12 months
 - Must provide details of services client was entitled to receive and those received in past 12 months
 - Must provide details of services client is entitled to receive in the following 12 months and those the adviser expects the client will receive

Opt-in

- Requirements
 - **Renewal notice**
 - Must give to client within 30 days following the 24 month anniversary date
 - Thereafter must give within 30 days following the 24 month anniversary of last renewal date
 - Must be in writing

Ban on conflicted remuneration

- Non-prescriptive definition of conflicted remuneration being introduced
 - Some specific examples of what is conflicted remuneration
 - Some examples of what is not conflicted remuneration
- Ban on payment / receipt of conflicted remuneration then introduced with effect from 1 July 2012

Ban on conflicted remuneration

- **Conflicted remuneration** is any benefit (monetary or not) given to a licensee / representative who provides financial product advice to a retail client, where the nature of that benefit (or the circumstances in which it is given) might:
 - Influence the choice of product recommended by the planner to the client, or
 - Otherwise influence the financial product advice given to the client
- Those things prescribed to be conflicted remuneration are:
 - A benefit that is dependent on the **total value of financial products** of a particular kind (or kinds) recommended by the licensee or representative to a (class of) retail client
 - A benefit that is dependent on the **number of financial products** of a particular kind (or kinds) recommended by the licensee or representative to a (class of) retail client
 - A benefit that is dependent on the **total value of investments** of a particular kind (or kinds) made by (class of) retail clients to whom the licensee or provides financial product advice

Ban on conflicted remuneration

- **What are the conflicted remuneration bans?**
 - A licensee must not accept conflicted remuneration.
 - A licensee will be in breach if one of its representatives accepts conflicted remuneration.
 - An authorised representative will be in breach if they accept conflicted remuneration.
 - An employer must not pay conflicted remuneration to its employees.
- **In addition there are further bans:**
 - Issuers or sellers of a financial product cannot give any benefit (monetary or non-monetary) to a licensee or representative of a licensee who provides financial product advice to retail clients.
 - Licensees are prohibited from accepting volume based shelf space fees. This also includes discounts (ie a reduced fee rather than a separate payment) unless it represents a reasonable value for scale efficiencies.

Ban on asset based fee on geared investments

- Only applies in relation to financial product advice provided to a person as a retail client
- An asset based fee is a fee that is dependent upon the amount of funds used or to be used to acquire financial products for the client
- Licensees and authorised representatives are prohibited from charging asset based fees on geared funds to be used for acquiring financial products
- Ban only relates to the geared portion (ie the actual borrowed amount) that the client themselves has borrowed (ie does not apply where the investment itself has any internal gearing).

FoFA Tranche 1 & 2

- Other comments were made in the course of releasing these two tranches of draft legislation, but further details are not yet available
 - What constitutes professional development activities
 - Grandfathering of existing arrangements
 - Accountants licensing exemption
 - Restriction on use of the term “financial planner”
 - Wholesale v retail client definition

“Thanks”

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