



ASIC

Australian Securities & Investments Commission

## REGULATORY GUIDE 179

# Managed discretionary account services

Related instruments [CO 04/191]; [CO 04/192]; [CO 04/193]; [CO 04/194]

Chapters 5C and Part 7.6, 7.7 and 7.9

Issued 15/3/2004

*From 5 July 2007, this document may be referred to as Regulatory Guide 179 (RG 179) or Policy Statement 179 (PS 179). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 179.1) or their policy statement number (e.g. PS 179.1).*

## What this guide is about

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RG 179.1 This guide sets out how we will regulate managed discretionary account (MDA) services provided to retail clients under the *Corporations Act 2001* (Corporations Act).

RG 179.2 This guide sets out:

- A an overview of the MDA policy *see RG 179.4–RG 179.10*
- B how we define MDA services *see RG 179.11–RG 179.25*
- C our main policy in regulating MDA services *see RG 179.26–RG 179.61*
- D how our policy applies to MDA services with different arrangements *see RG 179.62–RG 179.80*

**E** transitional arrangements*see RG 179.81–RG 179.88*

RG 179.3 This guide does not apply to:

- (a) other types of managed investment schemes, such as investor-directed portfolio services (IDPSs) and IDPS-like schemes;
- (b) MDA services offered only to wholesale clients, as defined in s761G; and
- (c) administrative services such as nominee and custody services.

Note: For our policy on IDPS and IDPS-like services, see Regulatory Guide 148 *Investor directed portfolio services* (RG 148), and Regulatory Guide 149 *Nominee and custody services* (RG 149).

**Important note:** This guide does not constitute legal advice. Persons operating MDA services should seek their own legal advice. This guide is based on the legislation and regulations as at 11 March 2004. If there are relevant changes to the legislation or regulations, we will take those into account when updating this policy.

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## **A An overview of our MDA policy**

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### **Executive summary**

RG 179.4 This section is an overview of our policy. To fully understand our MDA policy, you need to read the main body of this guide and the associated Class Orders.

### ***How we define MDA services***

RG 179.5 Generally, MDA services are arrangements that involve a person (an MDA operator) managing a portfolio of assets for a retail client on an individual basis.

Note: See Section B for details of what we regard as an MDA service.

### ***Our main policy in regulating MDA services***

RG 179.6 MDA services involve a range of financial products and financial services, such as offering and trading in financial products, operating a custodial and depository service, and giving personal advice. Because of the individualised nature of the range of financial services involved, we will regulate persons contracting with retail clients to provide MDA services as providers of financial services rather than issuers of a financial product.

RG 179.7 We will apply a tailored regulatory approach, exempting MDA operators from the managed investments provisions in Chapter 5C and the product disclosure provisions in Chapter 6D and in Part 7.9 of the Corporations Act. However, to have the benefit of that relief, MDA operators must comply with the licensing and conduct provisions in Parts 7.6 and 7.7 of the Corporations Act and some additional conduct requirements designed to promote consumer protection.

RG 179.8 As the person contracting with the client to provide MDA services, the MDA operator will be responsible to the client for all the financial services and functions involved in the operation of these services, including those carried out by an agent of the MDA operator (such as an external contractor). These services include:

- (a) dealing in financial products in clients' portfolios (ie execution of trades);
- (b) custodial and depository services (custody services) relating to clients' portfolio assets; and
- (c) the preparation and/or review of the investment program included in the MDA service under our relief.

Note: See Section C for details of our main policy on MDA services.

### ***How our policy applies to MDA services with different arrangements***

RG 179.9 Not all MDA services are the same, so our policy is flexible to accommodate some different arrangements that may be involved in the operation of MDA services, including the following.

- (a) Another AFS licensee (an external MDA custodian) contracts directly with the MDA clients to provide custody services relating to the MDA service. In this case, the external MDA custodian is responsible to the client for the custody services.

Note: If an MDA operator engages another AFS licensee to obtain custody services relating to the MDA services it operates, that licensee is not an external MDA custodian but is an agent of the MDA operator.

- (b) Another AFS licensee (an external MDA adviser) deals directly with the client and is directly responsible to the client for providing personal advice relating to the MDA services by preparing or reviewing the investment program included in the MDA contract.

Note: If an MDA operator uses its own in-house adviser to prepare and/or review the investment program included in the MDA contract, such an adviser is an agent of the MDA operator and not an external MDA adviser.

- (c) Another AFS licensee provides dealing services to MDA clients by issuing their own financial products or by providing execution of trades. This would technically occur if the legal title to financial products in the client's portfolio are held by the MDA client and not by the MDA operator (or external MDA custodian). Because the MDA operator, and not the MDA client, makes the relevant investment decisions, we give some relief to the other licensee for certain dealing services.

Note: See Section D for details of how our MDA policy applies to varying MDA arrangements.

### ***Transitional arrangements***

RG 179.10 Our MDA policy comes into effect on 11 March 2004. To address any practical difficulties existing MDA operators may face in complying with the new policy and taking into account any systems changes necessary to accommodate the licensing requirements, we will provide some additional time for these operators to transition to the new policy.

Note: See Section E for details of our MDA policy transitional arrangements.

## B How we define MDA services

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### Our policy

RG 179.11 An MDA service is a managed investment scheme and a facility for making a financial investment with the following key features.

- (a) Clients give to the MDA operator money or money's worth or access to money or money's worth (client contributions): see RG 179.13–RG 179.14.
- (b) The MDA operator has the discretion to invest in financial products using client contributions without prior reference to the client for each transaction: see RG 179.15–RG 179.19.
- (c) Each client agrees with the MDA operator that assets derived directly or indirectly from that client's contributions are managed as a discrete portfolio belonging to the client: see RG 179.20–RG 179.23.
- (d) Each client has an understanding that they will derive benefits from the MDA service, including benefits from the MDA operator's expertise in investment selection and other services offered as part of the MDA service: see RG 179.24.
- (e) The clients include retail clients as defined in s761G: see RG 179.25.

Note 1: Any person engaged by the MDA operator to carry out any functions of the MDA service is an agent of the MDA operator (eg a custodian appointed by the MDA operator). However, external MDA custodians and external MDA advisers contract directly with MDA clients to provide those financial services and are directly responsible to the client—they are not agents of the MDA operator: see Section D for details of how we apply our policy to these persons.

Note 2: This policy does not apply to persons providing MDA services to wholesale clients only: see RG 179.28 for our policy where an MDA operator provides MDA services to both retail and wholesale clients.

Note 3: Industry uses different terminology to refer to services that may have the relevant features of an MDA service. For example, some services referred to as 'separately managed accounts', 'individually managed accounts', 'investment advisory programs' and 'managed discretionary portfolio services' may fall within our definition of an MDA service.

## Underlying principles

RG 179.12 For an arrangement to be treated as an MDA service, the MDA operator must have the discretion to make investments without referring to the client for each transaction.

## Explanations

### *Client contributions*

RG 179.13 A client could make contributions in two ways:

- (a) by giving the MDA operator money or other assets that could be readily converted to funds for investment purposes: eg the client transferring to the operator legal title to those assets; or
- (b) by giving the MDA operator only access to and control of these funds and assets: ie the client retains legal title to those assets and the operator is given access to or control of the assets for trading purposes through a power of attorney or other authorisation such as signatory arrangements.

Note 1: Cash management accounts and trust accounts operated for the purposes of providing non-discretionary trading services (such as those operated by brokers) are not MDA services, because they are not used for services involving discretionary trading by the operator.

Note 2: In the case of MDA services operated by persons dealing in derivatives, we will permit clients' funds and assets to be held in brokers segregated accounts.

RG 179.14 When a client gives access to and control of the client's funds and/or other assets to an MDA operator, the operator has the power to use these funds or assets for operating the MDA service in the same way as if the operator held the legal title. We consider that these arrangements meet subparagraph (a)(i) of the definition of a managed investment scheme in s9 of the Corporations Act that deals with how people make contributions to the scheme: see RG 179.16 and RG 179.24 for how the other elements of this definition are met.

### *Trading discretions*

RG 179.15 In MDA services, the MDA operator makes trading decisions using its discretion. For this purpose, the client gives to the MDA operator an authority to acquire and dispose of financial products using the client's contributions, and also to balance investments in the client portfolio on an ongoing basis. This authority may allow the MDA operator to exercise its discretion under either:

- (a) a detailed investment program that identifies particular financial products or classes of financial products in which the client

contributions and assets, derived directly or indirectly from the client contributions, will be invested; or

- (b) a broad investment mandate that contains only an identified strategy or an objective.

Note: For more details about the investment program: see RG 179.39–RG 179.43.

RG 179.16 Trading discretions of this nature give the MDA operator the power to convert or dispose of the funds and assets representing that client's contributions when operating MDA services. We consider that these arrangements meet the requirement in subparagraph (a)(iii) of the definition of a managed investment scheme in s9, because the client has no day-to-day control over that client's portfolio assets (even if the client has the legal title to those assets and the discretionary trading is carried out under a power of attorney or other authorisation).

RG 179.17 If the arrangements under which a person carries out discretionary trading as an agent of another person are private arrangements (eg private arrangements using a power of attorney given by a family member), they may not be covered by our policy. This is because the person may not be carrying on a business to attract the licensing requirements under the Corporations Act.

Note 1: However, if a representative of a licensee undertakes discretionary trading on behalf of a family member of the representative, that trading would generally be part of the financial services business conducted by the representative's principal (ie the licensee).

Note 2: Refer also to Section 3.2 of Regulatory Guide 36 *Licensing: Financial product advice and dealing* (RG 36) for guidance on what may amount to carrying on a business.

RG 179.18 Although the client effectively delegates discretion to the MDA operator to select investments for the client's portfolio, the client may retain the right to direct the operator on matters such as the timing of the transfer or realisation of assets in the client's portfolio, and how the proceeds from the realisation of assets should be used. The MDA operator may also expressly reserve rights to recover amounts due from the client out of the assets in the client's portfolio (such as under margin lending arrangements, or for brokerage or other fees payable by the client). These arrangements do not necessarily detract from a service being an MDA service.

RG 179.19 However, if the trading discretion given to the operator is confined merely to the time or price at which transactions could be effected, we do not consider that arrangement to be covered by our MDA policy. However, in some circumstances, it may be an IDPS.

Note: For our policy on IDPS, see Regulatory Guide 148 *Investor directed portfolio services* (RG 148).

### ***Client portfolio management***

RG 179.20 As part of an MDA service, the MDA operator typically undertakes to:

- (a) manage the assets in each client's portfolio as a discrete portfolio;
- (b) provide reports to the client on the client's portfolio; and
- (c) follow the client's instructions on:
  - (i) the transfer and liquidation of assets in the client's portfolio; and
  - (ii) payment of proceeds from the realisation of assets,

subject to any prior contrary arrangements the operator may put into place to ensure the repayment of moneys owed by the client.

RG 179.21 As discussed in RG 179.13, assets in the client's portfolio under an MDA service could be held in two ways. The management of each client's assets as a discrete portfolio would involve:

- (a) where the legal title to the assets is held by the MDA operator (eg where the client has a beneficial interest in those assets): the identification of those assets as belonging to the particular client; or
- (b) where the legal title to the assets is held by the client: an authorisation arrangement, such as a power of attorney or a signatory arrangement.

RG 179.22 In either case, under the MDA service, the MDA operator must not pool one client's portfolio assets with any other client's portfolio assets for investment purposes (eg to access wholesale investments). This is because pooling would be inconsistent with the requirement to manage the client's assets as a discrete portfolio belonging to that client.

Note: As a condition of relief under this policy, an MDA operator will not be permitted to pool MDA clients' assets: see paragraph 22 of Class Order [CO 04/194].

RG 179.23 However, an MDA operator will typically carry out some transactional and other functions relating to client portfolios on a collective basis (such as placing bulk orders or conducting research into financial products in which portfolio assets are to be invested).

Note: Our policy does not prohibit effecting transactions between client portfolios. However, if an MDA operator is a participant of a licensed market, they may be subject to restrictions relating to those transactions under the market's operating rules.

**Benefits for clients**

RG 179.24 Generally, a client participates in an MDA service with an understanding that they will derive benefits, including from:

- (a) the MDA operator's expertise in investment selection; and
- (b) possible cost reductions in the services offered as part of the MDA service, which may include consolidated reporting and bulk ordering (although there is no pooling of different clients' portfolio assets for accessing wholesale investments: see RG 179.22).

When coupled with the other features of an MDA service (such as the client not having day-to-day control over their portfolio: see RG 179.16), we consider MDA services fall within the definition of both a managed investment scheme (s9) and a facility for making a financial investment (s763B).

**Retail clients**

RG 179.25 The protection provided by Chapter 5C and Part 7.9 applies only where financial services and financial products are offered to retail clients. Therefore, our relief from these provisions is generally needed only where MDA services are offered to retail clients, including where MDA services are provided to both retail and wholesale clients by the same operator: see RG 179.28.

## C Our main policy in regulating MDA services

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Note: This section applies to MDA operators who contract with the client to provide all the services involved in the operation of MDA services (ie dealing, custody services and financial product advice), although they may use other AFS licensees as their agents.

### Our policy

RG 179.26 If you contract with the client to provide MDA services, we treat you as the MDA operator. You are responsible to the client for all the financial services and functions involved in the operation of the MDA service. We give you relief from the managed investment provisions in Chapter 5C and the product disclosure provisions in Part 7.9 of the Corporations Act if you:

- (a) have certain AFS licence authorisations: see RG 179.30 and RG 179.31; and
- (b) comply with certain conditions: see RG 179.32–RG 179.59.

Note 1: You are not responsible to the client for any custody services provided by an external MDA custodian or personal advice provided to the client by an external MDA adviser. See Section D for details of how our policy applies for MDA services with different arrangements.

Note 2: Instead of offering MDA services under our Class Order relief, you may provide these services through a registered managed investment scheme. However, we do not think that you could operate MDA services as an IDPS because MDA services involve the MDA operator making investment decisions about financial products acquired for the client's portfolio. In an IDPS, the client, rather than the operator, makes the investment decisions. There are also other differences between IDPS and MDA services. In particular, under our Class Order relief, an operator is not permitted to pool different MDA clients' funds and assets for accessing wholesale investments: see RG 179.22.

RG 179.27 The following table sets out the AFS licence authorisations and other conditions that apply to you when you operate MDA services under our main relief: see Class Order [CO 04/194].

**Table 1: The conditions that apply to you when you operate MDA services under our main relief**

<b>Condition of relief</b>	<b>Relevant paragraph(s)</b>
<b><i>Need for an AFS licence</i></b>	
You must have a specific AFS licence authorisation for MDA services.	RG 179.30
You must hold an AFS licence that has other authorisations relevant to the MDA services you operate.	RG 179.31
<b><i>Additional disclosure through an FSG</i></b>	
You must include certain additional information in the Financial Services Guide (FSG) you give to each retail client about the MDA service.	RG 179.36–RG 179.37
<b><i>MDA contract and investment program</i></b>	
You must contract with each retail client to act honestly and in the best interest of the client, exercise due care and diligence, give priority to the client's interests and not use information about the client to your advantage or cause detriment to the client.	RG 179.38
You must include in the MDA contract an investment program that complies with certain requirements.	RG 179.39–RG 179.43
You must ensure that the investment program for each retail client is reviewed at least once every 12 months.	RG 179.44–RG 179.45
<b><i>Compliance issues</i></b>	
You must ensure that each MDA client's portfolio assets are managed as a discrete portfolio belonging to that client.	RG 179.46
You must report non-compliance.	RG 179.47

<b>Condition of relief</b>	<b>Relevant paragraph(s)</b>
You must have, and comply with, adequate documented compliance measures and arrange for their audit.	RG 179.48–RG 179.49
<b><i>Client instructions, reporting and record keeping</i></b>	
You must comply with each retail client's instructions on corporate actions and communications about portfolio assets.	RG 179.50–RG 179.51
You must have mechanisms to report regularly to the client to enable the client to monitor the performance of and trading in their portfolio.	RG 179.52–RG 179.54
You must maintain records of the documents provided to each retail client.	RG 179.55–RG 179.56
<b><i>Consumer protection measures</i></b>	
You must not invest assets in any retail client's portfolio in unregistered schemes, except in certain circumstances.	RG 179.57–RG 179.58
You must maintain professional indemnity (PI) insurance that meets certain requirements.	RG 179.59

### ***MDA services with both retail and wholesale clients***

RG 179.28 If you provide MDA services to both retail and wholesale clients, you can operate your MDA services under our main relief: see RG 179.26 and RG 179.27. However, for the MDA services you provide to wholesale clients, you do not have to:

- (a) contract with each wholesale client to act honestly and in the best interest of the client, exercise due care and diligence, give priority to the client's interests and not use information about the client to your advantage or to cause detriment to the client;
- (b) give an FSG relating to the MDA service;
- (c) enter into an MDA contract to operate the MDA service in a certain manner;
- (d) comply with certain requirements for the investment program;

- (e) provide information about the performance of that client's portfolio;
- (f) maintain records of the documents provided to each wholesale client;  
and
- (g) refrain from investing in unregistered schemes.

Note 1: You must still meet all the other conditions of relief in RG 179.27: for instance, have a specific AFS licence authorisation for MDA services, other relevant AFS licence authorisations and maintain adequate documented compliance measures.

Note 2: Our relief does not prevent you from voluntarily contracting with your wholesale clients to provide MDA services on similar conditions as required for MDA services you provide to retail clients. But, by not doing so, you do not breach the conditions of our MDA relief.

## Underlying principles

RG 179.29 Because of the individualised nature of the financial services involved, we will regulate MDA operators as providers of financial services, rather than as issuers of a financial product. We will apply a tailored regulatory approach that takes into account the particular nature of the financial services involved in the operation of MDA services, because MDA services are in some ways different to normal registered managed investment schemes and IDPSs.

## Explanations

### ***Need for an AFS licence***

RG 179.30 You must have a specific AFS licence authorisation to operate MDA services before you contract with a retail client to provide these services under our relief: see RG 179.32–RG 179.33 for details about how we will assess your application.

Note: As a transitional measure, you may provide MDA services without this authorisation until 10 December 2004: see Section E for details.

RG 179.31 In addition to the AFS licence authorisation for MDA services, you must also have AFS licence authorisations to:

- (a) deal in financial products;
- (b) give financial product advice; and

Note: You do not need this authorisation if an external MDA adviser prepares and reviews the investment program included in the MDA contract: see Section D for details of how our policy applies in this case.

## (c) operate a custody service.

Note: You do not need this authorisation if:

- (a) the client holds the legal title to financial products in the client's portfolio; or
- (b) an external MDA custodian directly contracts with the client to provide custody services (see Section D for details of our policy applies in this case).

## How will we assess your application for AFS licence authorisations?

RG 179.32 When we assess your application for these AFS licence authorisations, we will consider whether you have the competency and ability to provide financial services involved in the operation of MDA services under our relief.

RG 179.33 We will base our licensing assessment on:

- (a) the general requirements in:
  - (i) Regulatory Guide 164 *Licensing: Organisational capacities* (RG 164) (so far as those requirements apply to dealing in financial products, custody services and giving financial product advice);
  - (ii) Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165); and
  - (iii) Section C of Regulatory Guide 166 *Licensing: Financial requirements* (RG 166); and
- (b) the more specific requirements in:
  - (i) Section D of Regulatory Guide 130 *Managed investments: Licensing* (RG 130) (except the compliance committee requirements); and
  - (ii) Regulatory Guide 132 *Compliance plans* (RG 132); and
  - (iii) Regulatory Guide 133 *Managed investments: Scheme property arrangements* (RG 133) (except the compliance committee requirements) where the client (or a client's agent) does not hold the legal title to portfolio assets.

Note: We will apply these requirements as if references to managed investment schemes were to MDA services.

## Duty to act honestly and with reasonable care and diligence

RG 179.34 We will apply to you some obligations modelled on those imposed under Chapter 5C to:

- (a) act honestly (s601FC(1)(a));
- (b) exercise due care and diligence (s601FC(1)(b));

- (c) act in the best interests of the clients and give priority to your clients' interests (s601FC(1)(c)); and
- (d) not use information you have about the client to gain an advantage for yourself or any other person or to cause detriment to the client (s601FC(1)(e)).

We will require that these obligations form part of the AFS licence conditions for an MDA operator before we grant a specific MDA authorisation.

RG 179.35 We will also require you to undertake these obligations contractually with each retail client to whom you provide MDA services. You must also accept liability to clients for acts and omissions of persons you engage to perform functions relating to the operation of your MDA services, such as employees and external contractors, as if they were your acts and omissions. We impose these obligations to ensure that MDA clients have a level of protection that is comparable to the protection given to members of a registered managed investment scheme.

### ***Additional disclosure through a financial services guide***

RG 179.36 Before entering into an MDA contract with each retail client, you must give to that client a financial services guide (FSG) that:

- (a) complies with the requirements in Division 2 of Part 7.7; and
- (b) includes the following additional information and statements in as much detail as a client would reasonably require to make an informed decision to participate in the MDA service:
  - (i) information about any significant risks associated with investing through the MDA service;
  - (ii) information about how the client may give instructions to you on corporate actions (eg proxy voting) and communications relating to financial products in the client's portfolio assets;
  - (iii) a statement that the client must first enter into an MDA contract with you before the MDA service can be provided;
  - (iv) a statement that the MDA contract will include an investment program that is prepared in accordance with the requirements in Division 3 of Part 7.7 and that the investment program will contain the following information:
    - (A) the nature and scope of the discretions that you will be authorised and required to exercise;
    - (B) any significant risks associated with the MDA contract;

- (C) the basis on which the MDA contract is considered to be suitable for the client; and
- (D) warnings about the importance of any limitations relating to the MDA contract which the client must consider before signing the MDA contract;

Note: For details about the investment program that must be included in the MDA contract: see RG 179.39–RG 179.43.

- (v) any other information that might reasonably be expected to have a material influence on the decision of a reasonable person (as a retail client) about whether to use the MDA service; and
- (vi) a statement that the FSG complies with the conditions of our relief.

RG 179.37 We consider that MDA clients (and prospective clients) can make informed decisions and compare similar services by supplementing the disclosure requirements in the Corporations Act relating to financial services rather than requiring you to comply with the disclosure provisions of Part 7.9.

### ***MDA contract and investment program***

RG 179.38 You must enter into an MDA contract with each retail client before providing MDA services to that client under our relief. That contract must include:

- (a) an investment program that meets certain requirements: see RG 179.39–RG 179.43);
- (b) obligations to act honestly and in the best interest of the client, exercise due care and diligence, give priority to the client’s interests and not use information about the client to your advantage or to cause detriment to the client: see RG 179.34 and RG 179.35; and
- (c) statements that you will be responsible to the client for:
  - (i) the functions that you have contracted to perform; and
  - (ii) acts and omissions of any persons that you have engaged to perform those functions, as if they were your acts or omissions; and
  - (iii) compliance with:
    - (A) the conditions of our relief;
    - (B) the MDA contract including the investment program (except where the client has agreed in writing to a variation); and
    - (C) any representations included in the FSG for the MDA service.

## Investment program

RG 179.39 We consider that the provision of MDA services may involve giving financial product advice in a number of ways. For example:

- (a) where the operator offers the financial product constituted by the MDA service to clients, an offer document, unless it is an exempt document, may be financial product advice; and
- (b) where the operator offers the MDA service and/or the investments that are to be made through the MDA service as financial products suitable for the particular client, that is personal advice.

RG 179.40 We consider the investment program to be a critical aspect of any MDA service. Our requirements relating to the investment program are designed to promote retail client protection and, also, to provide flexibility in the nature of the investment program that may be included in an MDA contract. For example, the program could be very detailed and identify financial products or classes of financial products in which the operator of the MDA service would invest, or it may contain a broad investment strategy or an identified goal that allows the operator a broad discretion to make investments to achieve an agreed outcome.

RG 179.41 Against this background, we have designed our requirements relating to the investment program on the basis that it involves giving personal advice. Therefore, you must ensure that the investment program you include in the MDA contract:

- (a) is appropriate for the client and states why it is considered appropriate for the client;
- (b) complies with the requirements in subdivisions C and D of Division 3 of Part 7.7 of the Corporations Act, unless there is a separate statement of advice (SOA) that meets these requirements; and
- (c) sets out, in as much detail as is necessary for the client to clearly understand:
  - (i) the nature and scope of the MDA contract, including the nature and scope of the discretions that you will be authorised to exercise under that contract;
  - (ii) any significant risks associated with the MDA contract;
  - (iii) the basis on which you consider the MDA contract to be suitable for the particular client in light of that client's personal objectives, needs and financial circumstances (client's relevant circumstances);
  - (iv) how the client may give instructions to you to make any changes to the MDA contract;

- (v) warnings that the MDA contract:
  - (A) may not be suitable for the client if the client has provided to you limited or inaccurate personal information about the client's relevant circumstances; and
  - (B) may cease to be suitable for the client if the client's relevant circumstances change; and
- (vi) when and by whom the MDA contract will be reviewed.

RG 179.42 To ensure that the investment program meets the requirements in Division 3 of Part 7.7, you must:

- (a) have a reasonable basis for recommending that the MDA contract is suitable for the particular client in light of the client's relevant circumstances (s945A);

Note: Before making the suitability statement that is required under our relief to be included in the investment program, the operator must follow the requirements in s945A.

- (b) give certain warnings where incomplete or inaccurate personal information is given by the client (s945B); and
- (c) give an SOA (which is the means by which the advice is provided) containing certain information (s946A and s947B).

Note 1: For general guidance on the obligations of a provider of financial product advice: see RG 36. For discussion of our policy on compliance by advisers with the conduct and disclosure obligations in Part 7.7 of the Corporations Act: see Regulatory Guide 175 *Licensing: Financial product advisers — Conduct and disclosure* (RG 175).

Note 2: See Section D for details of how our policy applies where there is an external MDA adviser.

RG 179.43 An MDA operator could meet their obligation relating to an SOA under Division 3 of Part 7.7 and our conditions of relief in one document (ie the investment program included in the MDA contract). This could be done by:

- (a) displaying prominently on the cover of the investment program the title 'Statement of Advice' (s947A(1));
- (b) including in the investment program all the other information required to be included in an SOA (such as the information relating to remuneration, benefits and other interests of the provider and its associates required under s947B(d),(e) and (f)); and
- (c) to the extent the investment program contains discretions that authorise or require the MDA operator to replace financial products in the client's portfolio, including the additional information that must be provided to the client under s947B(5) in the investment program.

Note 1: Our relief does not prevent an MDA operator from using a separate SOA to comply with Division 3 of Part 7.7, instead of including it in the investment program.

Note 2: Any changes to the investment program must also comply with the SOA requirements, however any new SOA might refer to information in a previous SOA: see RG 175.127.

### Annual review of the investment program

RG 179.44 You must ensure that the investment program is reviewed in light of the particular client's relevant circumstances at least once every 12 months. This is to ensure that each retail client obtaining MDA services has an MDA contract that continues to be suitable for that client.

RG 179.45 You must:

- (a) comply with Division 3 of Part 7.7 (including the requirement to give an SOA) when conducting the annual review;
- (b) include with the annual investor statement you must send to the client, information about:
  - (i) when the investment program was reviewed;
  - (ii) the basis on which you consider the MDA contract continues to be suitable for the client in light of the client's relevant circumstances; and
  - (iii) if any changes to the MDA contract are considered necessary (including its termination) in light of any changes in the client's relevant circumstances — whether and when those changes have been or will be made.

Note 1: Our policy does not restrict the ability for an MDA operator to have the investment program reviewed more frequently than annually. In that case, an SOA consolidating the outcomes of those reviews and setting out the suitability of the program for the particular client must still be prepared and provided to the client annually.

Note 2: One document may meet the SOA requirement and the conditions of our relief—see RG 179.43.

## **Compliance issues**

RG 179.46 You must ensure that each MDA client's portfolio assets are:

- (a) held or caused to be held separately from the assets of any other person (including those of other clients) and in trust for the relevant client;
- (b) held in an account that complies with s981B if they are held as cash; and
- (c) held in a manner that clearly identifies them as assets of the particular client.

Note: For MDA services that involve derivatives trading on a licensed market, we permit clients' funds and assets to be held in a client segregated account operated by a market participant if proper accounts are kept of each client's entitlements against the MDA operator.

## **Non-compliance**

RG 179.47 If you become aware that you can no longer meet or have breached any condition of our relief that is, or is likely to be, a significant breach you must notify ASIC in writing of details of the breach as soon as practicable after you become aware of it.

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### **How to notify ASIC about non-compliance**

You must notify ASIC:

- as soon as practicable; and
- in writing addressed to  
The Assistant Director  
FSR Regulatory Operations  
Australian Securities & Investments Commission  
GPO Box 9827  
Melbourne Vic 3001

You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

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## **Compliance measures and audit**

RG 179.48 You must:

- (a) have and maintain adequate documented measures to ensure compliance with your obligations under our Class Order and the Corporations Act relating to the provision of MDA services; and

- (b) arrange for a registered company auditor to audit and lodge with ASIC, along with your annual financial statements under s989B, a statement from the auditor as to whether:
  - (i) you have met the documented compliance measures during the financial year to which the financial statements relate; and
  - (ii) the documented compliance measures have met the conditions of our relief during the financial year.

RG 179.49 These requirements are designed to ensure that an operator of MDA services will have and maintain adequate compliance measures to provide MDA services. They are the same requirements as for IDPSs.

### ***Client instructions, reporting and record keeping***

RG 179.50 You must:

- (a) if the MDA contract expressly imposes a duty on you to consider exercising any rights that relate to the client's portfolio assets (such as rights in relation to sale, consenting to corporate actions or making dividend reinvestments) — fulfil those duties as provided in the MDA contract; or
- (b) if the MDA contract does not impose such a duty:
  - (i) give to each retail client, as soon as practicable after receipt, a copy of all the communications that are relevant to the exercise of any rights that relate to that client's portfolio assets; and
  - (ii) take reasonable steps to implement any instructions given by the client about how any rights relating to the asset are to be exercised.

RG 179.51 Depending on the contractual arrangement with the client, the MDA operator may receive communications relating to financial products held in the client's portfolio (eg annual reports, takeover documents, or documents concerning proxy voting in corporate actions). Our requirements are designed to ensure that the client's rights relating to any matters affecting their portfolio are protected.

### **Client reporting**

RG 179.52 You must provide to each retail client either:

- (a) quarterly reports that:
  - (i) are given within one month after the end of 31 March, 30 June, 30 September and 31 December in each year; and

- (ii) contain information detailing:
  - (A) all transactions effected as part of the MDA service, including any liabilities incurred in relation to those transactions;
  - (B) the value of the assets (including any cash held in a trust account) in the client's portfolio; and
  - (C) all revenue and expenses (including fees and charges) relating to the MDA service during the relevant quarter; or
- (b) electronic access to information on a substantially continuous basis where:
  - (i) the client agrees to obtain the relevant information electronically instead of receiving quarterly reports;
  - (ii) you have no reason to doubt that the client can electronically access this information; and
  - (iii) the information details:
    - (A) all transactions effected as part of the MDA service including any liabilities incurred in relation to those transactions;
    - (B) the value of the assets (including any cash held in a trust account) in the client's portfolio;
    - (C) all revenue and expenses (including fees and charges) relating to the MDA service during the relevant quarter;
    - (D) all transactions up to a date no more than 48 hours before the time of access and a reasonable valuation of the non-current assets in the client's portfolio as at that time; and
    - (E) a statement of the time at which the information is current.

RG 179.53 You must also give to the client within three months of the end of each financial year an annual investor statement that contains:

- (a) a summary of the information contained in quarterly reports: see RG 179.52;
- (b) a copy of the report of a registered company auditor containing the following opinions:
  - (i) whether the internal controls and other procedures of the MDA operator and any other person acting on behalf of the operator were suitably designed and operated effectively to ensure that the information provided in the quarterly reports or electronically on an on-going basis (as relevant) for the financial year is not materially misstated; and
  - (ii) whether the aggregate of assets (other than assets held by a client), liabilities, revenue and expenses shown in the clients' annual

investor statements for the financial year have been properly reconciled to the corresponding amounts shown in the audited reports prepared by the custodian; and

- (iii) whether the auditor has any reason to believe that the information provided in the quarterly reports or electronically on an on-going basis and the annual investor statement is materially misstated; and
- (c) a copy of the annual review of the investment program: see RG 179.54.

Note 1: You can use the same registered company auditor you employ to conduct the compliance audit under RG 179.48 to carry out the audit of the adequacy of your systems to produce quarterly reports or on-going electronic information.

Note 2: To form the necessary view as to the adequacy of the MDA operator's systems to produce reports referred to above without material misstatements, it is not necessary for the auditor to review each client's file. Where the normal audit procedures permit an audit based on random or risk based samples of client files, such procedures would be sufficient to form this view. If there is an external MDA custodian providing custody services, your auditors may rely on the audited reports provided by the external MDA custodian for the purposes of their audit: see Section D for details of how our policy applies where there is an external MDA custodian.

Note 3: Where you have adopted alternative measures to address any inadequacies of your systems to produce reports referred to above without any material misstatements, the auditor must form a view about the adequacy of those alternative systems adopted.

RG 179.54 These reporting and audit requirements are designed to:

- (a) enable the client to monitor the performance of and trading in their portfolio and thereby address the possible risk of excessive trading of portfolio assets; and
- (b) promote accountability on the part of the operator in implementing the investment program, including any changes to it following its review.

### Record keeping

RG 179.55 You must keep, for at least seven years after it has last been in use, a copy of:

- (a) a financial services guide (FSG);
- (b) an MDA contract; and
- (c) any other document required to be given under our relief (eg investment program/SOA and annual report),

where you have given such a document to an MDA client.

Note: These documents may be kept electronically.

RG 179.56 These requirements are designed to ensure that the key documents relating to an MDA service — such as the FSG, the MDA contract, the SOA (which we anticipate is likely to be included in the investment program), the investment program (if not part of the SOA) and annual reports provided to the client — are maintained for at least seven years after they have last been used. Given the personalised nature of MDA services, documents given to the client under our relief need to be maintained for compliance purposes.

Note: It is not necessary to keep a separate copy of any non-personalised document given under our relief on each client file (such as a generic FSG given to all MDA clients) if the operator maintains a generic copy of that document and records showing the date on which it was provided to the client: see RG 175.57.

### ***Consumer protection***

RG 179.57 You must not include in each retail client's portfolio, investments in:

- (a) interests in a managed investment scheme that is not a registered scheme, unless it would be permitted if the MDA service were a registered scheme: see Class Order [CO 98/55]; or
- (b) interests in a scheme that is not required to be registered under paragraph (e) of the definition of 'managed investment scheme' in s9 (that is, a scheme which is not required to be registered because the promoter and all investors in the scheme are related bodies corporate).

RG 179.58 We consider that clients using MDA services for investments are similar to investors in registered schemes. Both are retail investors relying on the MDA operator's competence and skills to acquire and manage assets to generate profits or other benefits for the client. Registered schemes are prohibited from investing in unregistered schemes. To provide a similar level of protection to retail clients using MDA services, we require that portfolio assets of MDA clients are not invested in interests in unregistered schemes, except where those investments would be permitted if the MDA service were a registered scheme: see [CO 98/55].

### **Professional indemnity and fraud insurance**

RG 179.59 You must maintain an insurance policy covering professional indemnity and fraud by officers and employees that:

- (a) is adequate having regard to the nature of the activities carried out by you in relation to the MDA service; and
- (b) covers claims amounting in aggregate to whichever is the lesser of:
  - (i) \$5 million; or

- (ii) the aggregated average value of the portfolio assets of all your MDA clients during the last 12 months or if you have not operated for 12 months, the amount reasonably estimated to be the aggregated average value of client portfolio assets during the first 12 months of operation.

Note: A participant of a licensed market can count any insurance cover they already have for the purposes of compliance with the operating rules of the relevant market if it meets the requirements above.

### ***MDA services with both retail and wholesale clients***

RG 179.60 If you provide MDA services only to wholesale clients, you do not have to rely on our MDA relief to provide those services, because the managed investment provisions in Chapter 5C and the disclosure requirements in Part 7.9 do not apply to such services. However, you will need our relief if you provide MDA services to both retail and wholesale clients, because you might not be able to rely on:

- (a) the s601ED(2) exemption, because it requires that all clients be persons to whom a PDS is not required to be issued; and
- (b) s601ED(1), because you may have more than 20 members or you may qualify as a person who is in the business of promoting this type of managed investment scheme.

RG 179.61 The Corporations Act requirements about personal advice, on which some of the conditions of our MDA relief are modelled (eg the requirements relating to FSG and the investment program), do not apply to financial services provided to wholesale clients. Therefore, we do not apply those conditions to MDA services provided to wholesale clients. Instead, we apply only the requirements that have a general application, because they cannot be separated from the conditions that otherwise apply to MDA services provided to retail clients under our relief.

## D MDA services with different arrangements

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Note 1: This section sets out how our MDA policy is varied where an MDA service:

- (a) has an external MDA custodian;
- (b) has an external MDA adviser; and
- (c) involves an arrangement where the client, instead of the MDA operator or an external MDA custodian, holds the legal title to portfolio assets.

Note 2: An MDA service may have only one of the above variations or any combination of them.

### Our policy

#### ***MDA services with an external MDA custodian***

##### External MDA custodian

RG 179.62 An MDA service has an external MDA custodian if a person other than the MDA operator:

- (a) directly contracts with a retail client to provide custody services; and
- (b) the custody services relate to the MDA services provided to that client by the MDA operator.

RG 179.63 We give to an external MDA custodian the same relief we give to the MDA operator: see RG 179.26. To have the benefit of that relief, the external MDA custodian must comply with the conditions set out in the following table.

**Table 2: Conditions of relief that apply to an external MDA custodian**

Conditions of relief	Relevant paragraph(s)
The external MDA custodian must:	
<ul style="list-style-type: none"> <li>• hold an AFS licence that authorises them to deal and operate custody services for retail clients</li> </ul>	As for an MDA operator: see RG 179.31
<ul style="list-style-type: none"> <li>• report non-compliance</li> </ul>	As for an MDA operator: see RG 179.47

Conditions of relief	Relevant paragraph(s)
<ul style="list-style-type: none"> <li>• contract with each retail client to whom they provide custody services to act honestly and in the best interest of the client, exercise due care and diligence, give priority to the client's interests and not use information about the client to your advantage or to cause detriment to the client. Records of the contracts should also be maintained.</li> <li>• give a Financial Services Guide (FSG) to each retail client that complies with Division 2 of Part 7.7 and gives as much detail as is necessary for the client to clearly understand the functions they perform as an external MDA custodian and the division of responsibility between them and the MDA operator for the MDA services. Records of the FSGs should also be maintained.</li> </ul>	As for an MDA operator: see 179.38
<ul style="list-style-type: none"> <li>• ensure that each MDA client's assets are managed as a discrete portfolio</li> </ul>	As for an MDA operator: see RG 179.46
<ul style="list-style-type: none"> <li>• maintain professional indemnity (PI) insurance that meets certain requirements</li> </ul>	As for an MDA operator: see RG 179.59
<ul style="list-style-type: none"> <li>• not knowingly cause or procure the MDA operator to breach the conditions of the MDA operator's relief or the other requirements of the Corporations Act</li> </ul>	

### MDA operator who has an external MDA custodian

RG 179.64 If you operate an MDA service that has an external MDA custodian, you can operate that service under our main relief (see RG 179.26), subject to the following variations of the conditions of that relief:

- (a) you do not need to have an AFS licence authorisation to provide custody services to retail clients; and
- (b) the FSG you give to each MDA client under our main relief must contain some additional information: see RG 179.72.

***MDA services with an external MDA adviser*****External MDA adviser**

RG 179.65 An MDA service has an external MDA adviser if a person other than the MDA operator:

- (a) contracts directly with a retail client to prepare or review an investment program; and
- (b) the investment program is, or is intended to be, included in the MDA contract between that client and the MDA operator.

RG 179.66 We do not give any MDA specific relief from the licensing and conduct requirements that apply to an external MDA adviser who prepares or reviews an investment program that is, or is to be, included in an MDA contract.

**MDA operator who has an external MDA adviser**

RG 179.67 If you include in the MDA contract an investment program prepared and reviewed by an external MDA adviser for the client, we will give the MDA operator, in addition to the relief under our main policy (see RG 179.26), relief from Part 7.7 of the Corporations Act, subject to the following variations of the conditions of our main relief:

- (a) you do not need an AFS licence authorisation to give financial product advice to retail clients in regard to general advice contained in any offer document;
- (b) you must offer your MDA services through an FSG that meets certain conditions: see RG 179.74; and
- (b) you must comply with certain conditions relating to the preparation and annual review of the investment program by the external MDA adviser: see RG 179.75–RG 179.77.

***MDA services where the client holds the legal title to portfolio assets***

RG 179.68 If an MDA client holds the legal title to the financial products in that client's portfolio, we will give relief from:

- (a) the FSG requirements in Division 2 of Part 7.7 to any person who provides certain dealing services (ie execution of trades) relating to the clients' portfolio assets; and
- (b) the disclosure provisions in Part 6D.2 or Part 7.9 (as applicable) to persons who issue their own financial products to MDA clients.

RG 179.69 We give this relief to those persons on condition that they:

- (a) do not knowingly cause or procure the MDA operator to breach the conditions of the MDA operator's relief or the requirements of the Corporations Act;
- (b) do not knowingly engage in misleading or deceptive conduct in relation to the MDA service;
- (c) inform ASIC in writing as soon as practicable after they have become aware that they have engaged in conduct referred to in (a) or (b) above in relation to the MDA service and that is, or is likely to be, a significant breach; and
- (d) hold appropriate AFS licence authorisations to provide dealing services to retail clients.

Note: An MDA operator does not need any additional relief where the client holds the legal title to portfolio assets.

## Underlying principles

RG 179.70 We recognise that MDA services may be structured in a number of different ways. This includes having different financial services forming part of the MDA services being provided directly to MDA clients by persons other than the MDA operator. Our policy is flexible enough to accommodate these different arrangements, but it must be clear to MDA clients what those arrangements are and who is responsible for the delivery of those services.

## Explanations

### *Where an MDA service has an external MDA custodian*

#### External MDA custodian

RG 179.71 We give to an external MDA custodian the same relief we give to an MDA operator. However, we tailor the conditions of that relief so that they apply to the provision of custody services to ensure that retail clients obtaining those services have a similar level of protection as is available to them where the MDA operator provides custody services. In addition, an external MDA custodian must not knowingly cause the MDA operator to breach the conditions of our relief. This is because the MDA operator has to rely on the external MDA custodian for the purposes of providing MDA services under our relief.

### MDA operator who has an external MDA custodian

RG 179.72 Where an MDA operator has an external MDA custodian, the MDA operator is not responsible to the MDA clients for the custody of their portfolio assets. This is because the external MDA custodian, instead of the MDA operator, is directly responsible to those clients for the safe custody of the client's assets. However, to ensure that retail clients clearly understand the division of responsibilities between the MDA operator and the external MDA custodian, the MDA operator must include in the FSG they give to each retail client:

- (a) a statement that the MDA operator does not provide custody services relating to the MDA services;
- (b) the name and details of the external MDA custodian who is responsible for the custody services; and
- (c) information, in as much detail as would be reasonably required, for the client to clearly understand the division of responsibilities between the MDA operator and the external MDA custodian in managing the client's portfolio assets under our relief. For example, how the client's instructions relating to corporate actions and communications relating to financial products in the client's portfolio assets are to be carried out and by whom.

Note: Where an external MDA custodian provides custody services to an MDA client, the client would generally get two FSGs (ie the FSG provided by the MDA operator and the FSG provided by the external MDA custodian). However, an FSG could cover two providing entities: see RG 175.48 for details about combined FSGs.

### ***Where an MDA service has an external MDA adviser***

#### External MDA adviser

RG 179.73 We do not consider it is necessary for an external MDA adviser who prepares or reviews an investment program that is, or is to be, included in an MDA contract to have any relief from the licensing and conduct requirements so far as those provisions apply to their advice. They are directly responsible to the client for the financial product advice contained in the investment program. They must have an AFS licence with an authorisation to give financial product advice to retail clients and fully comply with the conduct requirements relating to personal advice in Part 7.7 of the Corporations Act (including the provision of an FSG and an SOA to the client) with regard to their advice.

### MDA client who has an external MDA adviser

RG 179.74 However, an MDA operator who includes in the MDA contract an investment program prepared and reviewed by an external MDA adviser for the client must:

- (a) have no reason to believe the investment program does not comply with the requirements in Division 3 of Part 7.7; and
- (b) include in the FSG it gives to MDA clients under our relief (see RG 179.36–RG 179.37) the following additional information in as much detail as is necessary for the client to clearly understand:
  - (i) the name and details of the external MDA adviser who is responsible for the preparation and/or review of the investment program;
  - (ii) the information in subparagraphs (b)(i), (ii), (iv) and (vi) of RG 179.36 (if the investment program does not include that information); and
  - (iii) a statement that the investment program contains:
    - (A) the basis on which the external MDA adviser considers the MDA contract to be suitable for the client; and
    - (B) the required warnings in subparagraph (c)(v) of RG 179.41.

Note: Where an external MDA adviser prepares and reviews an investment program included in an MDA contract for the client, the client would generally get two FSGs (ie the FSG provided by the MDA operator for the MDA service and the FSG provided by the external MDA adviser for the financial product advice). However, an FSG could cover two providing entities: see RG 175.48 for details.

RG 179.75 Where an MDA operator relies on an external MDA adviser to undertake the annual review of the investment program, the MDA operator:

- (a) must have no reason to believe that the external MDA adviser who conducted the annual review of the investment program had not met with the relevant requirements (eg under Part 7.7) when reviewing the program; and
- (b) must also include with the annual investor statement the MDA operator sends to the client: see RG 179.53:
  - (i) a copy of the annual review report; or
  - (ii) if the MDA operator has reason to believe that the annual review report has already been given to the client, information required under subparagraph (b)(iii) of RG 179.45, to the extent that information is not included in the annual review report already given to the client.

Note: The same external MDA adviser who prepares the investment program does not have to undertake its annual review. Different external MDA advisers may carry out these tasks. They must separately comply with their obligations under the Corporations Act when providing their services and are directly responsible to the client for those services.

RG 179.76 We do not envisage that an MDA operator needs to undertake a comprehensive review of the investment program or its review report to form a view under paragraph (a) of RG 179.74 and RG 179.75. By forming this view, the MDA operator does not endorse the investment program or the review report.

RG 179.77 These requirements are designed to ensure that retail clients obtaining MDA services which have external MDA advisers:

- (a) have investment programs that continue to be suitable for them; and
- (b) clearly understand that a person other than the MDA operator is directly responsible to them for the suitability of that investment program.

### ***Where the client holds the legal title to portfolio assets***

RG 179.78 Where the MDA client holds the legal title to their portfolio assets, technically, persons providing dealing services or issuing their financial products, provide certain dealing services to the MDA client, rather than to the MDA operator. However, functionally, these MDA services are no different to MDA services where the MDA operator (or an external MDA custodian) holds the legal title to the client's portfolio assets. In both cases, the effective investment decisions are made by the MDA operator and not by the MDA client.

RG 179.79 Therefore, we give relief from the FSG and some of the product disclosure statement (PDS) disclosure requirements so far as they apply to persons providing execution services or issuing their financial products to MDA clients where the client holds the legal title to those assets:

- (a) to ensure that there is a consistent level of regulation of MDA services; and
- (b) to remove the cost of unnecessary disclosure.

RG 179.80 If an MDA client holds the legal title to financial products in the client's portfolio, the MDA operator does not need any additional relief. However:

- (a) the MDA operator should ensure that, in managing the client's portfolio assets, the assets are clearly identified as available for transactional functions under the MDA contract and the reporting requirements in RG 179.52; and
- (b) the MDA operator must, if the client directs all communications relating to the portfolio assets to be sent to the MDA operator, ensure that the requirements in RG 179.50 are met, as if the MDA operator held the legal title.

## E Transitional arrangements

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### Our policy

RG 179.81 Our MDA policy comes in to effect on 11 March 2004. However, when and how persons operating MDA services will need to comply with our new policy will vary depending on whether you are:

- (a) a participant of the Australian Stock Exchange (ASX) or Sydney Futures Exchange (SFE), or an ex-associate participant of SFE (Group 1): see RG 179.85;

Note: We have given certain relief to SFE participants and ex-associate participants who operate MDA services until 11 March 2004. We have now extended that relief until 11 December 2004 (see [CO 02/186] and [CO 02/1022]). We have also extended our existing no-action position relating to ASX participants until 11 December 2004. Our no action position extends to schemes even if they only involve wholesale clients.

- (b) an existing non-market participant MDA operator (Group 2): see RG 179.86;
- (c) a new MDA operator starting MDA services before 11 December 2004 (Group 3): see RG 179.87; or
- (d) a new MDA operator starting MDA services on or after 11 December 2004 (Group 4): see RG 179.88.

Note: Instead of operating MDA services under our MDA policy, you can operate MDA services by fully complying with Chapter 5C and Part 7.9 or under any available exemptions from these provisions.

### Underlying principles

RG 179.82 Our transitional arrangements aim to provide:

- (a) flexibility to address practical difficulties some existing MDA operators may face in transitioning to the new MDA policy; and
- (b) some time for any ASIC and industry systems changes that need to be made to accommodate the licensing requirements relating to MDA services.

### Explanations

RG 179.83 Persons who wish to operate MDA services under our policy must have a specific AFS licence authorisation for MDA services: see

RG 179.30. We will issue this authorisation with effect from 11 December 2004.

Note 1: We will make a further announcement later this year about when applications for this authorisation can be made (however we anticipate they will be able to be made from around September 2004).

Note 2: In addition to the specific AFS licence authorisation to operate MDA services, you must also have other appropriate authorisations that are relevant to the MDA services you operate: see RG 179.31.

RG 179.84 As a transitional measure, we will allow existing MDA operators to operate MDA services under our new policy without this specific AFS licence authorisation for MDA services between 11 March 2004 and 10 December 2004 where you:

- (a) form a reasonable view (ie make a self-certification) that you could comply with the conditions of our MDA relief: see [CO 04/194];

Note: When you make the self-certification, you must keep a record of it, including the processes you followed in making it. You must have your responsible officer/s sign off on the self-certification.

- (b) lodge a reliance notice with ASIC at the required time;

Note: For details about the time for lodging the reliance notice: see paragraph (b) of RG 179.85, RG 179.86 and RG 179.87.

- (c) comply with the conditions of that relief and any applicable existing AFS licence conditions.

Note: For example, you must continue to comply with any discretionary portfolio account service (DPA) conditions in your licence until they are removed at the time you obtain the specific AFS licence authorisation for MDA services. These DPA conditions are consistent with the conditions of relief under our new policy.

### ***When you must comply with our new MDA policy***

Group 1: Participants of ASX or SFE, or ex-associate participants of SFE

RG 179.85 You have two options:

- (a) Option A: delay your transition to the MDA policy until 11 December 2004. In this case, you must comply with the conditions of your existing relief; or
- (b) Option B: make your transition at any time between 11 March 2004 and 10 December 2004. In this case, you must:

- (i) make a self-certification that you can comply with the conditions of our MDA relief; and
- (ii) lodge a reliance notice with ASIC within three months from the date of your self-certification.

Note 1: Your transition to the new policy becomes effective when you make the self-certification and start complying with the conditions of our MDA relief (see [CO 04/194]). Until then, you must continue to comply with the conditions of your existing relief, which we have now extended until 11 December 2004.

Note 2: In both cases, to continue MDA services beyond 11 December 2004, you must obtain a specific AFS licence authorisation for MDA services with effect from 11 December 2004. In order to obtain your licence in time you should apply for it comfortably before this date.

### Group 2: Existing non-market participant MDA operators

RG 179.86 You must transition to the new MDA policy as soon as practicable and in any case by 11 June 2004. To do so, you must:

- (a) make a self-certification that you could comply with the conditions of our MDA relief by 11 June 2004; and
- (b) lodge a reliance notice with ASIC by 11 June 2004.

Note 1: We give you relief with effect from 11 March 2004 so that you can transition by 11 June 2004. Your transition to the new policy becomes effective only when you make the self-certification and start complying with the conditions of our MDA relief: see [CO 04/194].

Note 2: To continue MDA services beyond 11 December 2004, you must apply for and obtain a specific AFS licence authorisation for MDA services with effect from 11 December 2004. In order to obtain your licence in time you should apply for it comfortably before this date.

### Group 3: New MDA operators starting MDA services before 11 December 2004

RG 179.87 You must operate MDA services under our new policy. To do so, you must:

- (a) make a self-certification that you could comply with the requirements of our MDA policy; and
- (b) lodge a reliance notice with ASIC before offering MDA services under our relief.

Note 1: Your transition to the new policy becomes effective only after you make the self-certification, lodge the reliance notice and start complying with the conditions of our MDA relief: see [CO 04/194].

Note 2: To continue MDA services beyond 11 December 2004, you must apply for and obtain an AFS licence authorisation for MDA services with effect from 11 December 2004. In order to obtain your licence in time you should apply for it comfortably before this date.

#### Group 4: New MDA operators starting MDA services on or after 11 December 2004

RG 179.88 You must operate MDA services under our new policy. Before you do so, you must apply for and obtain an AFS licence authorisation for MDA services.

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#### How to lodge a reliance notice

You must:

- form a reasonable view (ie make a self-certification) that you could comply with the conditions of our MDA relief and set out the reasons for that view in writing; and
- have that document signed and dated by a responsible officer; and
- send the document to:  
The Manager  
FSR Legal and Technical Operations  
Australian Securities & Investments Commission  
GPO Box 9827,  
Sydney, NSW 2001

As at the date of this policy there is no other form that the document needs to take. See class order [CO 04/194] for further details.

## Key terms

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RG 179.89 In this guide, terms have the following meaning.

**AFS licence** An Australian financial services licence issued under s913B.

**ASIC** Australian Securities and Investments Commission.

**ASX** Australian Stock Exchange Ltd.

**Chapter 5C** (for example) A Chapter of the Corporations Act (in this example numbered 5C).

**[CO 98/55]** (for example) An ASIC class order (in this example numbered 98/55).

**client** A person to whom an MDA operator provides services.

**client contributions** Contributions of money or money's worth made by that client to the operator in the manner described in RG 179.12.

**client's portfolio and client's portfolio assets** Financial products and other assets derived directly or indirectly from the client's contributions.

**Corporations Act** The *Corporations Act 2001* as amended by the FSR Act and includes regulations made for the purposes of the Corporations Act.

**custody services** Custodial and depository service as defined in s766E.

**discretionary portfolio account (DPA)** Has the meaning given to it in ASIC Pro Forma [PF 209] *Australian financial services licence conditions*.

**ex-associate participants** Each person in the class of persons referred to in Schedules A and B of ASIC Class Order [CO 02/1022] *Sydney Futures Exchange Limited — associate participants*, or any class order that replaces it.

**external MDA adviser** An AFS licensee who deals directly with a retail client and is directly responsible for personal advice to that client through preparing or reviewing an investment program included in an MDA contract.

**external MDA custodian** An AFS licensee who directly contracts with a retail client to provide custody services relating to an MDA service operated by an MDA operator.

**financial product** A facility through which, or through the acquisition of which, a person does one or more of the following:

(a) makes a financial investment (see s763B);

- (b) manages financial risk (see s763C);
- (c) makes non-cash payments (see s763D)

Note: This is a definition contained in s763A. See also s763B–765A.

**financial product advice** A recommendation, a statement of opinion or an interpretation of information, or a report of any of those things, that:

- (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
- (b) could reasonably be regarded as being intended to have such an influence;

but does not include anything in an exempt document

Note: This is a definition contained in s766B.

**FSG** A Financial Services Guide required by s941A or 941B to be given in accordance with Division 2 of Part 7.7

Note: This is a definition contained in s761A.

**FSR Act** *The Financial Services Reform Act 2001.*

**FSR commencement** 11 March 2002, the date fixed by proclamation under s2(2) of the FSR Act on which Schedule 1 of the FSR Act commenced.

**IDPS** An investor directed portfolio service and has the same meaning given to ‘IDPS’ in ASIC Class Order [CO 02/294], or any class order that replaces it.

**IDPS-like service** Has the same meaning given to ‘IDPS-like scheme’ in ASIC Class Order [CO 02/296], or any class order that replaces it.

**investment program** The document required to be included in an MDA contract that meets the requirements in RG 179.39–RG 179.43.

**licence** An Australian financial services licence.

**licensee** The holder of an Australian financial services licence.

**market participant** A participant of a licensed market.

**MDA contract** The contract between the MDA operator and a retail client relating to the provision of an MDA service under our relief.

**MDA operator** A person who contracts with a client to provide MDA services under our relief, and includes any agent of that operator.

**MDA service** A managed discretionary account service as defined in RG 179.10.

**MIS** A managed investment scheme as defined in the Corporations Act.

**nominee and custody service (NCS)** Has the same meaning as in ASIC Class Order [CO 02/295], or any class order that replaces it.

**Part 7.7** (for example) A part of the Corporations Act (in this example numbered 7.7).

**PDS** (Product Disclosure Statement) A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Part 7.9.

**s761** (for example) A section of the Corporations Act (in this example numbered 761).

**SFE** Sydney Futures Exchange Ltd.

**SOA** A Statement of Advice required by s946A to be given in accordance with Subdivisions C and D of Division 3 of Part 7.7.

Note: Where expressions in this guide (e.g 'retail client' or 'Statement of Advice') are defined in the Corporations Act, those expressions have the same meaning as in the Corporations Act, unless otherwise indicated.

## Related information

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RG 179.90

### Headnotes

Managed investment schemes; financial product advice; financial services; discretionary portfolio accounts; managed discretionary accounts

### Class orders and pro formas

[CO 02/186] *SFE Corporation Limited — managed discretionary accounts*

[CO 02/1022] *Sydney Futures Exchange Limited—operation of managed discretionary accounts by associate participants*

[CO 04/191] *Managed discretionary accounts*

[PF 209] *Australian Financial Services Licence conditions*

### Policy statements

Superseded Policy Statement 131 *Managed investments: Financial requirements* [SPS 131]

### Regulatory guides

RG 36 *Licensing: Financial product advice and dealing*

RG 130 *Managed investments: Licensing*

RG 132 *Compliance plans*

RG 133 *Managed investments: Scheme property arrangements*

RG 134 *Managed investments: Constitutions*

RG 136 *Managed investments: Discretionary powers and closely related schemes*

RG 148 *Investor directed portfolio services*

RG 149 *Nominee and custody services*

RG 164 *Licensing: Organisational capacities*

RG 165 *Licensing: Internal and external dispute resolution*

RG 166 *Licensing: Financial requirements*

RG 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

RG 169 *Disclosure: Discretionary powers and transition*

RG 175 *Licensing: Financial product advisers — Conduct and disclosure*

### **Legislation**

Corporations Act Chapter 6D, Chapter 7 Part 7.7, Part 7.9.

### **Consultation papers**

CP 43 *Managed discretionary account services* (April 2003)

### **Information releases**

[IR 02/11] *ASIC undertakes review relating to managed discretionary accounts* (28 June 2002)

[IR 02/19] *Sydney Futures Exchange associate participant Class Order relief* (27 September 2002)

[IR 04/1] *ASIC policy approach to the regulation of managed discretionary account services*

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