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Ms Brooke Stewart
Senior Analyst, Financial Advisers
Australian Securities & Investments Commission
GPO Box 9827
SYDNEY NSW 2001

Westpac Place
Level 20, 275 Kent Street
Sydney NSW 2000
T: 02 8219 8684
E: Michael.wolter@westpac.com.au

Email: brooke.stewart@asic.go.au

Dear Ms Stewart

ASIC Consultation Paper 254 – Regulating digital financial product advice

The Westpac Group (**Westpac**) appreciates the opportunity to provide comments to the Australian Securities and Investments Commission (**ASIC**) on ASIC's *Consultation Paper 254 - Regulating digital financial product advice (CP 254)*.

We welcome the attention ASIC is bringing to this area. Establishing the basis for the provision of digital financial advice (**Digital Advice**) is important to ensure this evolving capability develops in a way that safeguards investors' and financial consumers' trust and confidence while supporting industry investment and facilitating innovation.

CP 254 poses a number of questions. Westpac's responses to these questions are set out in **Attachment A** below. To assist ASIC's review of Westpac's response, we offer these introductory comments:

- Westpac is committed to enhancing the accessibility of financial advice for its existing and future customers. We acknowledge that providing advice through channels such as Digital Advice is crucial in making financial advice more accessible and affordable for a larger proportion of Australians. Further, we believe that Digital Advice will provide consumers with greater choice in their engagement and interaction with banks and their products. As noted by many institutions across the financial services industry, including Westpac, Digital Advice reflects the trend toward digital technologies becoming the primary medium for the delivery of financial product advice in Australia.
- Westpac supports the proposed ASIC Regulatory Guidance (**Guide**) as it will provide a level of certainty and regulatory support to the continued development of this financial advice channel. We see Digital Advice as a key enabler for our overall vision to help our customers prosper and prepare for their best financial future. Westpac believes that Digital Advice technologies will significantly improve the accessibility of advice for more Australians by providing a more convenient medium through which advice can be obtained (particularly for self-directed investors) and by lowering the cost of obtaining advice in some circumstances.

- In order for Digital Advice to achieve this potential, we recognise that Digital Advice models have unique features not present in traditional advice channels that may benefit from specific guidance from ASIC. Some of these features include determining how Digital Advice Providers (**DAPs**) will comply with the “best interests duty” (**best interests duty**) under the *Corporations Act 2001* (Cth) (**Corporations Act**); what testing and control mechanisms will be in place to ensure effective development and management of systems; and the ongoing training and monitoring requirements of institutions and businesses (and their staff) who use Digital Advice technologies.
- Westpac welcomes ASIC’s guidance on the provision of advice delivered through digital mediums. Financial advisers already rely, to varying degrees, on a number of digital tools to provide advice. Therefore, Digital Advice that does not involve a human (as defined by the Guide) should be seen as one end of the spectrum of digitally supported advice that currently exists across the industry. As such, Westpac agrees that the *Corporations Act* is technologically neutral and any standards applied to the provision of Digital Advice should be no more or less stringent than those applied to more traditional methods.
- We consider that care needs to be taken so that any regulatory guidance does not embed a prescriptive regulatory model that inhibits innovation in this developing space. Further, we stress the importance of regulating both digital and non-digital advice in ways that do not create differences in the intensity of regulation of one form of advice over the other. The creation of a legal or regulatory distinction between these forms of advice, however unintended, invites confusion and complexity into a system that digital technologies are designed to avoid.

Westpac welcomes discussion with ASIC on the issues raised in this submission. Should you require any further information or to respond to this submission, please contact Michael Wolter on (02) 8219 8684 or by email at Michael.wolter@westpac.com.au.

Yours sincerely



Mark Spiers
General Manager, Advice
BT Financial Group



Brendan Doggett as delegate for Les Vance
Les Vance
Chief Risk Officer
BT Financial Group

Attachment A

ASIC Proposal A1: We propose to release draft Regulatory Guide 000 <i>Providing digital financial product advice to retail clients (RG 000)</i> to assist digital advice providers in complying with the law.	
ASIC Question	Westpac Response
<p>A1Q1 Overall, is the proposed guidance helpful? If not, why not?</p>	<p>Overall the Guide is helpful. However, additional assistance to DAPs could be offered by addressing the following issues:</p> <ul style="list-style-type: none"> • The Guide is directed at DAPs that involve no human intervention (except for the human review of the advice generated by such platforms). Westpac understand there to be a number of different types of DAPs, some of which involve varying degrees of human intervention. Absent further clarification from ASIC, Westpac interprets the Guide only to apply to those DAPs that require no human intervention. • Westpac anticipates that some DAPs will use non-financial advisers (such as home finance managers) to facilitate a client's journey through the platform. Their role would focus on drawing a client's attention to certain features of the platform, particularly for clients who are not technologically savvy. Westpac would be interested to know if ASIC has considered whether additional guidance is required for such an arrangement. • It would be helpful if ASIC considered providing additional guidance on the interaction between DAPs and Approved Product Lists, particularly where replacement product advice is involved. The <i>Corporations Act</i> currently requires certain issues to be considered when providing such replacement advice however, it falls short of providing direction on the prioritization of issues such as fees compared with efficacy of investment processes. This will be a key design consideration for DAPs. • Westpac expects that DAPs may collect a client's personal data for the purpose of identifying their relevant circumstances in a number of ways. For example, a DAP may collect a client's personal data by incorporating a digital fact find capability into the platform which the client would be required to complete. ASIC's view in relation to DAPs sourcing personal data from other sources (such as records held in other databases within an organisation or third parties) would be helpful.
<p>A1Q2 Is our proposed</p>	<p>When providing personal advice to a retail client, DAPs must provide advice that is in the best interests of the client (s961B(1) of the <i>Corporations Act</i>). Section 961B(2) of the <i>Corporations Act</i> sets out a 'safe harbour' for complying with the best interests duty. We note that ASIC has not provided specific guidance as to how each element of the safe harbour (s961B(2)) can be satisfied by</p>

<p>guidance (in Section D of the draft regulatory guide) helpful in assisting digital advice providers to provide scaled advice that is in the best interests of clients? If not, why not?</p>	<p>a DAP.</p> <p>Westpac understands that ASIC’s view is that a DAP is capable of complying with each of those safe harbour steps and ensuring that the resulting advice is appropriate (s961G) by giving appropriately scaled advice (i.e. personal advice that is limited in scope) to a client.</p> <p>Timing issues</p> <p>There are a number of instances in Section D of the guide where ASIC makes reference to the timing of actions that should be taken by the DAP. Additional guidance as to what satisfies these timing requirements would be helpful. Specifically, we ask ASIC to clarify the following:</p> <ul style="list-style-type: none"> • In RG 000.92, ASIC makes reference to communication to clients regarding the scaled nature of the advice being “<i>timely</i>” and provided at “<i>the right time in the decision making process</i>”. • In RG 000.94, ASIC makes reference to “<i>at key points of the advice process, inform the client about the limitations and potential consequences of the scope of advice</i>” and “<i>throughout the advice process, inform the client about key concepts and the risks and benefits associated with the advice being provided</i>”. <p>Filtering</p> <p>With respect to the “<i>triage</i>” or “<i>filtering</i>” process, the Guide recommends that DAPs filter out clients for whom the advice being offered is not suitable, or who want advice on a topic outside the scope of advice being offered (RG 000.94). Specifically, in RG 000.96, ASIC state that “<i>A robust filtering process will test, at key points in the digital advice process, whether the advice being offered is suitable and in the best interests of the client.</i>”</p> <p>Westpac is concerned about guidance that suggests we are required to adhere to a best interest duty before the actual advice is given to the client. The reference to “<i>key points in the digital advice process</i>” could infer that the best interest duty must be complied with prior to the actual advice being given.</p> <p>Westpac suggests, to avoid uncertainty, that references to advice being “<i>suitable</i>” be replaced with references to advice being “<i>appropriate</i>”, given this is the language used in the <i>Corporations Act</i> (for example in s961G).</p> <p><u>Filtering in practice</u></p> <p>Westpac notes that filtering may occur throughout a client’s journey through a Digital Advice platform. To illustrate, we anticipate</p>
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that a client may need to be filtered:

- before the client enters the Digital Advice platform, because the client does not agree to the scoped nature of advice provided by the platform;
- during the digital fact-find process due to the client's personal circumstances (for example, a client is filtered out because it becomes apparent that they have complex financial needs which cannot be met by the advice provided through the particular Digital Advice platform);
- during the goal-setting phase, because the client's goals do not fit within one of the predefined goals set out in the platform (this assumes the particular platform does not contain a "free text" goal setting capability); or
- during the strategy-generation phase, due to the nature of the financial product which underpins the advice being sought (for example, if a client is seeking advice in relation to a financial product and the platform is not able to conduct a reasonable investigation into that product because it cannot obtain data from a reliable source about such a product).

Express acknowledgement in the Guide that filtering can occur at the above stages of the process may provide DAPs greater clarity in relation to how it can comply with the best interests duty.

Other filtering considerations

Westpac believes that it would be helpful if ASIC recognise that clients often have multidimensional objectives, financial situations and needs. A client who presents to a DAP seeking a number of types of advice (that they have explicitly or implicitly communicated), may be able to obtain one type of the sought advice from the platform (in-scope advice), however may have to go elsewhere (such as to a financial adviser) to obtain the other types of the advice sought (out-of-scope advice). In this scenario, the DAP may filter the client out of the platform with respect to their out-of-scope advice needs while keeping them in the platform for their in-scope advice needs. We believe it would be possible, through communication with the client, to satisfy the best interest duty and the requirement to give appropriate advice in this scenario. This is analogous to existing practices in the industry whereby clients are provided advice from different specialist advisers. Westpac is concerned that the CP 254, as currently drafted, would impose a more onerous requirement to filter clients out of the advice process for DAPs relative to human advisers which could not meet the principle of technologically neutral regulation.

Westpac expects DAPs that provide advice in relation to a select number of subjects may:

- seek to limit the facts it gathers from clients on the basis that only some facts will be relevant to the nature of the advice being explicitly or implicitly sought; and/or

- determine that the facts that it could gather from clients are not reasonably considered to be relevant to advice sought on the subject matter (where the advice being sought is the scoped advice that the client agreed to at the outset).

Further recognition and guidance by ASIC around the complexity of filtering process would be helpful (for example, by way of including worked examples).

Better Position

At the ninth bullet point of RG 000.94, ASIC expressed its expectation that the DAP “*explain why the client is likely to be in a better position if they follow the advice*”. Our preference would be that this guidance is consistent with that given in RG 175.398 and includes the language “*as a matter of good practice*”.

Reviewing Digital Advice

RG 000.102 states “*We expect file reviewers to assess all the information and use their judgment in forming a view on the quality of advice provided. This may involve file reviewers considering any additional information, as appropriate, to form a view on the quality of digital advice provided.*” Westpac is concerned that the reference to “*all the information*” is cast too broadly and is subsequently uncertain. We believe that it would be appropriate for the Guide to hold DAPs to existing standards for monitoring and supervision activities which require the reviewers to consider information determined to be “*relevant*” or “*appropriate*”.

Inconsistencies and Education

In subparagraph (a) of RG 000.99, it states that ASIC expects, in circumstances where a client provides inconsistent answers in relation to their circumstances, that the DAP identify the inconsistencies and provide the client with additional educational information and an opportunity to change their input. In our view, this guidance has the propensity to create two additional and broad obligations for DAPs. With respect to “*inconsistencies*”, it may be that DAPs are not capable of detecting all inconsistencies and that, from an advice perspective, this is acceptable because those inconsistencies are of a minor or immaterial nature (for example, details regarding the client’s age (in some circumstances) or address). Accordingly, it would be helpful if the Guide required DAPs to detect inconsistencies that have an impact on the advice provided.

In relation to “*educational information*”, we are of the view that there is no existing or independent obligation for Westpac to provide “*educational information*” to clients (although it may do so as part of its value proposition), and that this reference should be removed from the Guide.

Subparagraph (b) of RG 000.99 makes reference to contacting clients to “*discuss*” inconsistent responses. This infers that a verbal conversation would need to take place outside of the Digital Advice platform to resolve the inconsistency. Westpac would

like ASIC to recognise that such inconsistencies could also be resolved using a digital medium.

Algorithms

It would be helpful if all references to “algorithms” and their testing are included in one section of the Guide. We therefore suggest that those references in RG 000.103 be removed and dealt with in the section of the Guide titled “*Monitoring and testing algorithms*”. This section of the Guide also makes reference to “*test scenarios*” and it would be helpful to understand what ASIC means by this term.

In relation to RG 000.105, while Westpac supports taking immediate steps to rectify any problems with an algorithm used by a Digital Advice platform, there is concern that of the defects that could be detected in an algorithm, some would be of a minor and technical nature. It would be helpful if the Guide recognised that for defects which have no impact on the quality of advice provided, it may be appropriate for the DAP to continue providing advice using the algorithm whilst the defect is resolved.

In RG 000.58, ASIC note: “*digital advice businesses are unique in that they are entirely technology driven. As such, we expect digital advice licensees to have at least one person who has an understanding of the technology and algorithms used to provide digital advice. We do not expect all digital advice licensees to understand the specific computer coding of an algorithm—however, we expect your understanding to include having people within the business who understand the rationale, risks and rules behind the algorithms underpinning the digital advice*”.

We believe that this guidance does not adequately address the reality that some DAPs may not be entirely technology driven and may outsource the creation and operation of algorithms to third parties. We are unclear as to how a person who does not understand the coding of an algorithm could be expected to understand the rationale, risks and rules of such an algorithm. We believe the better guidance would be to direct DAPs to adhere to all legal and regulatory obligations when outsourcing the development and management of algorithms to a third party and to ensure that the testing regime relating to algorithms as set out in the Guide (subject to the clarification sought in this response) is adhered to. It would also be helpful if ASIC could provide guidance as to whether any additional disclosure should be given to clients, where the DAP has outsourced the creation and operation of algorithms to third parties.

At bullet point eight of RG 000.94, ASIC express their expectation that the DAP “*explain what dispute resolution processes are available to the client if they wish to make a complaint*”. In our view, we would include “(i.e. in a Financial Services Guide)”, as ASIC have done at bullet point six of RG 000.94. We suggest this addition because applicable dispute resolution processes are already addressed in FSGs. It would be cost-efficient for the DAPs to rely on the existing disclosure regime for retail clients.

and competence standards for advisers. To assist existing AFS licensees that may have a responsible manager who meets these standards, we propose a transition period of six months.

Note: See RG 000.44 – RG 000.51 of the draft regulatory guide for more details

ASIC Question	Westpac Response
<p>B1Q1 Do you agree with this proposal? Please provide supporting arguments.</p>	<p>We believe ASIC's proposal to ensure that at least one Responsible Manager (RM) within the digital advice licensee holds the prescribed level of competence could be further clarified for the benefit of DAPs. For example, is ASIC's intent to have a RM who is competent in relation to the provision of Digital Advice specifically, or is this meant to be interpreted more broadly? If the former, it seems that ASIC's expectation is for this person to have an advanced technical background. Such a prescriptive approach may potentially stifle innovation and act as a barrier to attracting broader talent into the financial services industry.</p> <p>Westpac supports standards that are consistent with those set out in <i>Regulatory Guide 105 Licensing: Organisational competence (RG 105)</i> and the requirements set out in s912A(1)(e) of the <i>Corporations Act</i>.</p>
<p>B1Q2 Do you agree that, if the changes proposed in the Corporations Amendment (Professional Standards of Financial Advisers) Bill 2015 become law, at least one responsible manager should: (a) meet the new higher training and competence standards (i.e. have a degree or</p>	<p>Yes, although there should be a transition period provided for to encourage an influx of skills from a broader industry background.</p> <p>In any event, we would expect any proposal to be in line with s912A(1)(e) of the <i>Corporations Act</i> and RG 105.</p>

<p>equivalent, pass an exam, complete a professional year and undertake continuing professional development); and (b) comply with the proposed ethical standards (i.e. comply with a code of ethics and be covered by an approved compliance scheme)?</p>	
<p>B1Q3 Are there any aspects of the proposed higher training and competence standards in the Corporations Amendment (Professional Standards of Financial Advisers) Bill 2015 that should not apply to at least one responsible manager of a digital advice licensee?</p>	<p>No.</p>

<p>B1Q4 Is the proposed transition period of six months long enough for existing AFS licensees to comply with the requirement to have a responsible manager who meets the minimum training and competence standards? If not, why not?</p>	<p>We believe that a six-month period is adequate provided that the licensee has a RM qualified under the standards set out in RG 105. Alternatively, the initial transition period could be extended to a 12 month period with options for ASIC to provide feedback on the process employed by the licensees.</p>
<p>B1Q5 Please provide feedback on any costs or benefits that may apply to your business under the proposal.</p>	<p>This proposal will result in better oversight and management of the provision of Digital Advice and related services.</p>
<p>ASIC Proposal C1: We propose to issue guidance on the ways in which we think digital advice licensees should monitor and test the algorithms underpinning the digital advice being provided.</p> <p>Note: See RG 000.69 – RG 000.70 of the draft regulatory guide for more details.</p>	
<p>ASIC Question</p>	<p>Westpac Response</p>
<p>C1Q1 Do you think we should be more detailed in our</p>	<p>Overall the proposed guidance on Monitoring and Testing is helpful and in line with existing Monitoring and Supervision obligations under <i>RG 104 – Licensing: meeting the general obligations</i>. However, we encourage ASIC to provide principles based guidance on monitoring and supervision of Digital Advice that recognises different arrangements are likely to require different approaches. This guidance should address the unique practical differences and limitations that are likely to exist with the</p>

<p>guidance on the ways in which we think digital advice licensees should monitor and test algorithms? If so, what additional guidance should we provide?</p>	<p>following examples:</p> <ul style="list-style-type: none"> • In circumstances where software is outsourced, the software provider may not provide direct access to the algorithms for testing in order to protect the software providers intellectual property rights; • It is foreseeable that machine learning algorithms may be utilized during the provision of Digital Advice. These algorithms evolve by themselves and do not lend themselves to fixed decision trees as contemplated by RG000.69; • The Guide requires the reconstruction of previous versions of the DAP algorithm for a seven year period which may not be possible where a major hardware or operating system change occurs that is not backward compatible. <p>It would be helpful for ASIC to refine its guidance on monitoring and testing algorithms to cater for the circumstances outlined above.</p>
<p>C1Q2 Please provide feedback on any costs or savings to your business as a result of this proposed guidance.</p>	<p>If, as we propose in response to C1Q3 below, the self-certification proposal is not introduced as a requirement, the proposed monitoring and testing requirements would not introduce a material increase to our operational costs.</p>
<p>C1Q3 Do you think we should introduce a self-certification requirement which would require digital advice licensees to certify that their algorithms have been adequately monitored and</p>	<p>Westpac believe ASIC should not introduce a self-certification requirement for DAPs; nor should it prescribe further guidance on how DAPs should monitor and test algorithms at this point in time.</p> <p>If ASIC were to introduce a self-certification requirement, this possibly suggests that further regulation is required for the content of such self-certification. We believe further consultation would be required if ASIC decides to impose a self-certification requirement.</p> <p><i>Not an appropriate comparison between the practices of market participants with the Digital Advice licensees</i></p> <p>CP 254 refers to the certification requirement of market participants' documentation and system for automated order processing (AOP). This is not a fair comparison for two reasons:</p> <ul style="list-style-type: none"> • First, the certification requirement that relates to electronic trading is a current legal requirement under Part 5.6 of the ASIC

<p>tested?</p>	<p>Market Integrity Rules to which market participants are legally bound. There is no current legal requirement which mandates a certification requirement that relates to provision of Digital Advice to retail clients; and</p> <ul style="list-style-type: none"> • Second, the AOP is process-driven and its ultimate measure is whether a trade was successfully lodged and executed by the market participant. This should be distinguished from Digital Advice situations where the ultimate measure is the quality of advice. Therefore, it would be more appropriate and effective for the DAPs to review the content of the advice generated by a Digital Advice platform, as opposed to having in place a self-certification requirement. <p><i>Complying with the financial services licensee' general obligations</i></p> <p>In our view, any monitoring or testing requirements should be no different to what are required under the general obligations pursuant to s 912A of the <i>Corporations Act</i>. These general obligations apply to all financial services licensees regardless of whether they are DAPs or not.</p> <p>We do not think it is practicable for the DAPs to create a separate set of requirements to comply with s 912A of the <i>Corporations Act</i>. For example, where defective Digital Advice is detected, the remediation activity in relation to such a defect should not deviate, or be significantly different from, the DAPs remediation activity in relation to defective non-digital advice.</p> <p>Consequently, the Guide should make reference to s912A of the <i>Corporations Act</i> when it refers to how the DAP should monitor and test algorithms. Without such reference it would appear that the DAPs are required to have risk management processes in place which are beyond what is required under s 912A(1)(h) of the <i>Corporations Act</i>.</p>
<p>C1Q4 Should we require independent third-party monitoring and testing of algorithms? If so, in what circumstances would this be warranted?</p>	<p>We do not believe there should be a requirement for independent third-party monitoring and testing of algorithms. The <i>Corporations Act</i> does not specifically mandate an audit to be carried out by an independent third-party in relation to algorithms used by DAPs (or other tools used by providers of non-digital advice), and therefore the Guide should not impose such an obligation.</p>