

Dear Sir/Madam

## **Advertising and disclosure obligations**

As you may be aware, the Australian Securities and Investments Commission (ASIC) conducts regular reviews of advertising for superannuation products.

In particular, to coincide with the release of our Regulatory Guide 234 *Advertising financial products and advice services: Good practice guidance* (RG 234) and ASIC's increased focus on advertising issues more generally, ASIC is currently running a project that will look at advertising in the superannuation and managed investment scheme sectors.

The purpose of this letter is to remind trustees of their disclosure obligations under the *Corporations Act 2001* (Corporations Act), the *Australian Securities and Investment Commission Act 2001* (ASIC Act) and various ASIC Regulatory Guides, including RG 234.

ASIC is concerned that the commercial pressures associated with major law reform, such as Stronger Super, can drive advertising practices that may not consider the needs of consumers to have clear, accurate and balanced messages.

The information below illustrates some of the common issues ASIC has identified during its preliminary review of advertising campaigns for superannuation trustees. It serves as a useful list of issues that trustees may wish to consider when putting together advertising, promotional material and any other communication to members. This is a non-exhaustive list and ASIC's good practice guidance in RG 234 outlines other issues that you may wish to consider.

### **Advertising or promotional material – Common issues**

ASIC considers that advertising may be misleading or deceptive where:

- the statements do not give a balanced message about the returns, benefits and risks associated with an interest in the fund (RG 234.31).
- the warnings, disclaimers and qualifications in relation to the fund are not disclosed in a balanced manner and are not given sufficient prominence: see paragraphs (RG 234.45) to (RG 234.46).
- the document does not give a realistic impression of the overall level of fees and costs that a consumer is likely to pay: see (RG 234.52).
- the comparisons made in the document are not of products with sufficiently similar features to make the comparison relevant and not misleading, or the comparison ignores other features of the product: see (RG 234.56-60).
- the document does not provide a sufficiently prominent warning that the past performance of the fund is not indicative of future performance: see (RG 234.71).

In terms of the use of forward looking statements, Regulatory Guide *Prospective financial information* (RG 170) also provides useful guidance, in addition to the guidance in RG 234. Care should be taken that any forward looking statement has a reasonable basis. Further, it should be clear from the disclosure material that the future performance may not occur.

ASIC has recently noticed an increasing trend for superannuation trustees to offer cash incentives to encourage members to consolidate their super monies, or for new members to acquire an interest in the fund. These incentives include cash or other prizes, often through a lottery scheme.

While the use of such incentives is not prohibited in the superannuation context, trustees do need to be cautious that the use of these incentives does not distract a member from making an informed financial decision. Trustees need to ensure that their messages about their products and services remain balanced.

There are other issues aside from potentially making misleading or deceptive statements, which trustees need to consider. Particularly in direct mail outs to existing members, where a trustee may be encouraging a member to consolidate all of their superannuation into the trustee's fund, care needs to be taken not to provide personal advice when that advice may either not be appropriate or the trustee may not be licensed to do so.

If general advice is provided, the appropriate general advice warnings should be included.

### **Regulatory action**

The law provides ASIC and financial consumers and investors with a range of different remedies in cases where there are misleading or deceptive statements made. ASIC's RG 234, Part D, outlines how ASIC will deal with contraventions and the regulatory options for dealing with breaches of the misleading or deceptive conduct provisions in the Corporations Act, the ASIC Act or the AFS licensee obligations. These options include:

- seeking corrective disclosure from a trustee by issuing a letter of concern;
- issuing a stop order on disclosure documents (product disclosure statements and some advertising) – see s1020E of the Corporations Act;
- seeking injunctions to stop the disclosure being made – see s1324 of the Corporation Act and s12GD of the ASIC Act;
- seeking compensation for investors – see s12GM of the ASIC Act;
- issuing an infringement notice – see s12GXA of the ASIC Act; and
- issuing a public warning notice – see s12GLC of the ASIC Act.

Other action that may be taken includes seeking criminal charges, taking AFS licensing action or making banning orders. The type of regulatory response will depend on the circumstances of each case, including the seriousness of the contravention and its consequences.

### **Next steps**

ASIC encourages you to review your advertising and promotional material (including direct mail outs to members), and consider the guidance given in ASIC's RG 234.

ASIC also has a new Superannuation page on its website at [www.asic.gov.au](http://www.asic.gov.au), which includes information for superannuation trustees on a range of issues including shorter PDS disclosure and Stronger Super. We would encourage trustees to visit ASIC's website regularly as updates are included on this webpage as additional guidance from ASIC is released. If there are useful findings from ASIC's review of advertising and promotional practices, these will be included on our webpages for your consideration and to assist you in framing your next advertising and promotional campaigns.

Yours Sincerely

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