



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 121

Facilitating online financial services disclosures

October 2009

About this paper

This consultation paper:

- highlights the key issues that arose out of the submissions we received on Consultation Paper 93 *Facilitating online financial services disclosures* (CP 93);
- sets out our revised proposals to facilitate the online delivery of financial services information under Pts 7.6–7.9 of the *Corporations Act 2001* (Corporations Act); and
- seeks the views of retail clients, product issuers and financial services professionals on our revised proposals and on what should be the default method of delivering financial services disclosures.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 13 October 2009 and is based on the Corporations Act and regulations as at 13 October 2009.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on facilitating online financial services disclosures. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator report and/or a Regulation Impact Statement: see Section D, 'Regulatory and financial impact'.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 11 December 2009 to:

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What will happen next?

Stage 1	13 October 2009	ASIC consultation paper released
Stage 2	11 December 2009	Comments due on the consultation paper
Stage 3	April 2010	Regulatory guide released

A Background to the proposals

Key points

In April 2008 we released a consultation paper (CP 93) to stimulate discussion on how to facilitate the use of online financial services disclosures.

This paper sets out our revised proposals on facilitating online disclosure. We are seeking comments on:

- our proposed relief to allow online delivery of Product Disclosure Statements (PDSs), Financial Services Guides (FSGs) and Statements of Advice (SOAs) via hyperlinks and references to website addresses (see Section B);
- our proposed good practice guidance on how providers can deliver disclosures online (see Section B); and
- whether paper disclosure or online disclosure should be the default method of delivering disclosures (see Section C).

Facilitating online disclosure

- 1 Financial services disclosures are often lengthy, paper-based documents that many retail clients find difficult to understand and engage with. We think that one way to make disclosure more user-friendly is by encouraging and facilitating the use of online disclosure. An advantage of online disclosure for retail clients is that it can incorporate more engaging forms of media and can be interactive. This can make the information more attractive and easier to read and understand for retail clients.
- 2 Online disclosure also has advantages for providers in reducing the costs of printing and mailing.

Consultation Paper 93

- 3 In April 2008, we released Consultation Paper 93 *Facilitating online financial services disclosures* (CP 93) to stimulate discussion on how to facilitate the use of online financial services disclosures.

Responses to consultation

Overview

- 4 We received 31 written responses to CP 93 from a variety of sources, including industry bodies, financial services providers and consumer representatives. We are grateful to respondents for taking the time to provide us with their comments.
- 5 The majority of submissions were highly supportive of our proposal to facilitate online financial services disclosures. Most submissions saw the potential for cost savings as well as improved disclosure to retail clients, although one submission thought that facilitating online disclosure would not increase retail client engagement with financial services disclosures and would, instead, make clients more vulnerable to internet scams and fraud (particularly phishing scams).
- 6 Some respondents wanted us to go further in facilitating online financial services disclosures. A number of respondents thought that our approach in CP 93 was too prescriptive, and expressed concerns that some of our proposals sought to impose conditions that are more restrictive than the current law.
- 7 We received comments from respondents in relation to the following issues:
- (a) the use of hyperlinks and websites to deliver financial services disclosures;
 - (b) what guidance we should give in relation to the use of online disclosure;
 - (c) client consent to receive online disclosure; and
 - (d) whether we should give relief to enable a provider to deliver annual superannuation information online without first having to obtain the consent of the retail client.

Use of hyperlinks and websites to deliver disclosures

- 8 In CP 93, we proposed to give conditional relief to enable a provider to deliver a financial services disclosure by sending retail clients an email:
- (a) notifying them that the disclosure is available from a website; or
 - (b) with a hyperlink to the disclosure.
- 9 Our proposal was in response to concerns expressed to us by industry that some providers are discouraged from delivering disclosures online because of uncertainty about what the law allows (in particular, whether the law permits delivery of financial services disclosures by making the information available via hyperlink). In particular, there was uncertainty about whether the requirement in regs 7.7.01, 7.9.02B, 7.9.63I and 7.9.75B of the

Corporations Regulations 2001 (Corporations Regulations) for a document given in electronic form to be presented in a way that allows the person to 'have ready access to it in the future' restricts the use of hyperlinks and references to website addresses because the information might not remain accessible through the link for an indefinite period.

- 10 We received mixed responses to this proposal. Some submissions supported our proposed relief. However, others opposed the conditional relief, noting that relief is unnecessary because it is already possible under the law to deliver financial services disclosures in the ways set out in paragraph 8. They expressed concerns that the proposed conditions of relief were more onerous than the law itself. They stated that, if brought into effect, conditional relief would actually hamper and restrict the use of online disclosures by providers.
- 11 Some respondents suggested that instead of giving relief, we should clarify what is permissible under the current law, in order to give industry greater certainty and confidence in delivering financial services disclosures online. They said that any guidance should not be prescriptive so as not to restrict the ways in which information can be delivered online.

Guidance on online disclosure

- 12 In order to ensure that retail clients continue to receive clear, concise and effective information when disclosures are delivered online, we proposed in CP 93 that providers should apply the following basic principles when delivering disclosures online:
- (a) providers should allow retail clients to change their minds about receiving disclosures online at any time and at no cost (e.g. a retail client should have the ability to 'unsubscribe' from receiving disclosures via email);
 - (b) disclosures delivered online should be in a format that easily enables retail clients to print them; and
 - (c) if a disclosure is undelivered, providers should take further reasonable steps to attempt to deliver it (e.g. by sending it to an alternative email address of the retail client or by sending a hard copy to the client).
- 13 Most submissions agreed with our proposed guidance in paragraph 12(a) that providers should allow retail clients to change their minds about receiving disclosures online at any time and at no cost. However, of those respondents who agreed with our proposed guidance, some respondents thought that this requirement should not apply to 'fully online' products (i.e. financial services products that are sold on the basis that retail clients read the disclosure, apply for the product and monitor investments completely online).

- 14 Most submissions also agreed with our proposed guidance in paragraph 12(b) that disclosures delivered online should be in a format that easily enables retail clients to print them. However, one respondent said that there could be instances where it might be impractical for retail clients to print disclosures. They suggested that instead we should give guidance that disclosures should be in a format that easily enables retail clients to retain them for future reference.
- 15 We received mixed responses in relation to our proposed guidance in paragraph 12(c) that providers should take further reasonable steps to attempt to re-deliver undelivered disclosures. Just over half the submissions agreed with our proposed guidance, although one respondent suggested that we should provide more examples of what ‘further reasonable steps’ would be required to deliver a disclosure where an email containing a disclosure, or notifying retail clients of the availability of a disclosure, is returned to the sender undelivered.
- 16 However, other submissions disagreed with our proposed guidance. Some respondents said that it is difficult for providers to determine or monitor when an email containing a disclosure is undelivered, or is delivered to an email address that is no longer in use but which a retail client has not closed. They said that instead the onus should be placed on retail clients to inform the provider of any changes to their email address or if they have not received a disclosure.

Client consent to receive online disclosure

- 17 In CP 93, we also proposed to issue guidance that where the law requires providers to obtain the retail client’s consent to deliver financial services disclosures online, this consent must be positive, express and clear. We said that, in practice, providers would need to give retail clients an opportunity to make this choice and communicate it to the provider. We proposed to give guidance on consent in response to industry uncertainty about whether, under the current law, providers can deliver disclosures to a retail client online as long as the client’s consent to online delivery can be inferred, or whether the client’s express agreement to online delivery is required.
- 18 We received mixed responses to our proposed guidance. Some submissions agreed with our proposed guidance. One respondent expressed concern that many retail clients, if pushed, would provide email addresses even if they rarely or never check their email, and that in these circumstances those clients would not receive disclosures sent by email.
- 19 However, others disagreed with our proposed guidance. They said that, under the current law, providers are not required to obtain a retail client’s express consent to deliver disclosures online. Therefore, requiring a retail client’s consent to be positive, express and clear would impose an additional

burden on providers. They expressed the view that the law allows consent to be reasonably inferred from the conduct of a retail client, and that providing an email address to a provider should amount to inferred consent. Some submissions also said that there might be practical difficulties in obtaining a retail client's express agreement.

Relief for annual superannuation information

- 20 In CP 93, we proposed to give relief to enable trustees of superannuation entities to use a website as the default method of delivering annual superannuation information to members, without first having to obtain the consent of the member.
- 21 Most submissions agreed with our proposed relief. Many super funds saw the potential for significant printing and mailing cost savings. The Government recently changed the law to allow this: see Corporations Amendment Regulations 2009 (No. 3).

Our revised proposals

- 22 We have significantly revised our proposals taking into account the submissions we received in response to CP 93. As a result, we have decided to seek further comments on the following before publishing our policy on facilitating online financial services disclosures:
- (a) our proposed relief to allow online delivery of PDSs, FSGs and SOAs via hyperlinks and references to website addresses (see proposal B1 in Section B);
 - (b) our proposed good practice guidance on online disclosure (see proposal B2 in Section B); and
 - (c) whether paper disclosure or online disclosure should be the default method of delivering financial services disclosures (see Section C).
- 23 As in CP 93, at this stage, we have limited our revised proposals to disclosures required under Ch 7 of the Corporations Act, as we understand that there is a high level of consensus on the need to facilitate online delivery of financial services disclosures. We will consider our policy for disclosures outside Ch 7 (e.g. Ch 6D disclosures or disclosures required under the National Consumer Credit Protection Bill 2009) at a later date.

B Proposed guidance and relief on delivering disclosures online

Key points

This section sets out our proposed guidance on how providers can deliver financial services disclosures online.

In our final guidance on online financial services disclosure, we will clarify that, under the current law, providers can deliver most financial services disclosures online using a variety of delivery methods, including by using email to notify retail clients that the relevant disclosure is available via hyperlink and/or from a website or other electronic facility: see paragraphs 24–29.

However, there is an argument that, under the current law, PDSs, FSGs and SOAs cannot be delivered via hyperlinks or references to website addresses. We propose giving relief to bring the position for PDSs, FSGs and SOAs into line with other financial services disclosures: see paragraphs 30–34 and proposal B1.

We have also revised the good practice guidance we propose to issue to help providers comply with the law when delivering disclosures online and to ensure that retail clients continue to receive clear, concise and effective information: see proposal B2.

Guidance on methods of online delivery

- 24 In our final guidance on online financial services disclosure, we propose to clarify that, under the current law, providers can deliver most financial services disclosures online using a variety of delivery methods, including by sending retail clients an email:
- (a) notifying the clients that the disclosure is available from a website; or
 - (b) with a hyperlink to the disclosure.
- 25 Providers should take into consideration our good practice guidance when delivering disclosures online: see proposal B2 and Table 1.
- 26 Except in relation to PDSs, FSGs and SOAs, we accept the submissions we received in response to CP 93 that the law already allows providers to deliver financial services disclosures through hyperlinks and references to website addresses: see paragraphs 8–11.
- 27 Our view is that the requirement in regs 7.7.01, 7.9.02B, 7.9.63I and 7.9.75B to allow the person to ‘have ready access to [the disclosure] in the future’

does not prevent the use of hyperlinks and references to website addresses in delivering disclosures. We think that this requirement is a general principle of delivering disclosures. It is up to providers to assess what is an appropriate form of delivery that allows a retail client to have access to the disclosure in the future. This could include the ability to save, download or print the disclosure.

- 28 However, we recognise the uncertainty regarding the requirement in regs 7.7.01, 7.9.02B, 7.9.63I and 7.9.75B. We believe that giving guidance to clarify what is permissible under the current law will facilitate the use of online disclosure by giving industry greater certainty and confidence in delivering financial services disclosures online.
- 29 We recognise that there will be other methods of delivery that are also possible under the law.

Proposed relief for PDSs, FSGs and SOAs

- 30 As mentioned in paragraph 26, we think there is an argument that PDSs, FSGs and SOAs cannot be delivered through hyperlinks or references to website addresses under the current law.
- 31 Where a provider, for example, sends an email to a retail client with a hyperlink or with a reference to the website address where the PDS, FSG or SOA can be found, it could be argued that the disclosure would not have been 'sent' to the client under s940C(1)(a)(ii), 940C(2)(b)(ii) or 1015C(1)(a)(ii). This is because the client would still need to take action to retrieve the disclosure upon receipt of the email.
- 32 Although, like other financial services disclosures, it is possible for PDSs, FSGs and SOAs to be made available to a retail client or their agent as agreed between the client or agent and the provider (s940C(1)(a)(iii), 940C(2)(b)(iii) and reg 7.9.02A(1)), the Corporations Regulations additionally require that PDSs, FSGs and SOAs be delivered in a way that allows the provider to be satisfied, on reasonable grounds, that the client or the client's agent has received the disclosure (see regs 7.7.01(2) and 7.9.02A(1)).
- 33 This could mean that a provider wishing to deliver a PDS, FSG or SOA via hyperlinks or references to website addresses must have a mechanism to track whether a retail client has accessed the disclosure on the website. It may not be sufficient that the provider merely be satisfied that the retail client has received an email or a paper notice notifying them of the availability of the disclosure. This may present practical difficulties for providers and discourage them from delivering PDSs, FSGs and SOAs online.

- 34 Because the effect of the Corporations Act is uncertain, we propose to give relief to enable providers to deliver PDSs, FSGs and SOAs via hyperlinks and references to website addresses. Providers should take into consideration our good practice guidance when delivering disclosures under our proposed relief: see proposal B2 and Table 1.

Note: Notwithstanding our proposed relief, a provider needs to consider whether industry codes prohibit them from delivering PDSs, FSGs and SOAs via hyperlinks.

Proposal

- B1** We propose to give relief to enable providers to deliver PDSs, FSGs and SOAs via hyperlinks and references to website addresses, by modifying the law to expressly allow a provider to deliver a PDS, FSG or SOA by sending an email with a hyperlink to the disclosure or a written (paper or electronic) notice with a reference to a website address where the disclosure can be found.

Your feedback

- B1Q1 Do you agree with our proposed relief? If not, why not? In particular, do you think that the relief should apply to SOAs, given that they are private disclosures? Please give reasons.
- B1Q2 Please give details of the benefits of our proposed relief for providers and retail clients.
- B1Q3 Is our proposed relief likely to result in additional risks for retail clients? Please give details. If you think retail clients will bear additional risk, are there any ways this can be mitigated?
- B1Q4 Is our proposed relief likely to result in additional costs for retail clients? Please give details, including figures and reasons. If you think retail clients will incur increased costs, is this an acceptable policy outcome?

Proposed good practice guidance

- 35 We have significantly revised our proposed good practice guidance on online disclosure, taking into account the submissions we received in response to CP 93.

Proposal

- B2** We propose to issue the good practice guidance for online disclosure set out in Table 1, below, to ensure that retail clients continue to receive clear, concise and effective information where disclosures are delivered online. Our proposed good practice guidance applies to any method of delivering financial services disclosures online.

We propose to encourage providers to apply our good practice guidance when delivering financial services disclosures online. In some cases, our good practice guidance reflects regulatory requirements for delivering certain financial services disclosures.

Table 1: Proposed good practice guidance

Guidance	Explanation
<p>1 Disclosure documents should be easy to retrieve and read.</p>	<p>This is currently required by law for some types of online disclosure, including where delivering annual superannuation information by making it available on a website.</p> <p>Clear instructions should be provided on how to access the disclosure. The disclosure should be easy to find on the website, and the instructions should be clear and easy to understand.</p> <p>For example, if a provider gives instructions to access a disclosure on a website, the instructions should take the retail client directly to the disclosure or to a webpage with a direct link to the disclosure. Where the disclosure is a private disclosure, the instructions or the hyperlink to the disclosure should take the retail client directly to the relevant login page.</p> <p>If a provider makes the disclosure available through an electronic facility, they should give clear instructions on how to use the facility. Any documents notifying a retail client of the availability of a disclosure, such as letters, should include references to the website and provide instructions to the client on how to find and navigate the disclosure online.</p> <p>The generic website address or specific document address should be provided. It is up to the provider to determine which address is more appropriate for the retail client to easily access the disclosure.</p> <p>If a hyperlink to the disclosure is given, the hyperlink should take the retail client directly to the disclosure, not just to a website where the disclosure can be found.</p> <p>The hyperlink must take a retail client to the first page of the disclosure, and not to a subsidiary page (e.g. the hyperlink should not take the client straight to an application form).</p>
<p>2 Retail clients should be able to identify the disclosure.</p>	<p>For many types of disclosures the law requires that an electronic document is clearly identified as part of a specified disclosure document. This includes FSGs, SOAs, PDSs, annual superannuation information, confirmations of transactions and periodic statements.</p>

Guidance	Explanation
<p>3 Providers should be satisfied on reasonable grounds that the retail client or their agent has received a copy.</p>	<p>This is required by law for some types of disclosures, including FSGs, SOAs, PDSs and notices of material changes and significant events.</p> <p>Reasonable grounds would include sending the disclosure to an email address provided by the retail client and tracking delivery of the email by return receipt to make sure the email is not returned undelivered. Where a provider becomes aware that a retail client has not received the disclosure (e.g. they receive an undeliverable email notice or the post is returned to sender) they should make reasonable attempts to contact the client by other means to give them the disclosure.</p> <p>We recognise that a provider may not be aware that a retail client has not received a disclosure that the provider delivered by making it available on a website. Providers should send an email or a paper notice to an address provided by the retail client notifying the client when the disclosure becomes available online.</p>
<p>4 Retail clients should be able to keep a copy so that they can access the disclosure in the future.</p>	<p>This is required by law for many types of disclosures, including FSGs, SOAs, PDSs, annual superannuation information, confirmations of transactions and periodic statements.</p> <p>This could include the ability to save an electronic copy.</p> <p>Where the disclosure is provided through a hyperlink or a reference to a website address or electronic facility, providers should:</p> <ul style="list-style-type: none"> • direct retail clients to take an electronic or, where practical, a printed copy of the disclosure; and • make sure the disclosure continues to be accessible from the link, at the website address or through the electronic facility, for a period that the provider considers is reasonable for that information—we think that a period of two years would be reasonable for most disclosures unless the disclosures have been superseded or updated sooner or have become out of date.
<p>5 Retail clients should be able to prove which version of the disclosure they relied upon.</p>	<p>The provider must retain a copy of all versions of the disclosure and use technology, where possible, to maintain records of when each version was available. As a matter of good practice, these records should be kept for a period of at least seven years (or as required by law).</p>
<p>6 Retail clients should be able to change their mind about receiving disclosures online at any time and at no cost.</p>	<p>Except in relation to fully online products, providers must make it easy for retail clients to unsubscribe from receiving disclosures online and to request paper copies of the disclosures at no cost to themselves.</p> <p>Although a retail client may initially consent to receiving disclosures online, they may subsequently discover that they have difficulties in accessing or reading disclosures online (e.g. because they do not have broadband internet access).</p> <p>Where a disclosure is sent to a retail client's email address, the reply email address should be active so that the client can respond if they need to.</p>

Guidance	Explanation
<p>7 Disclosure documents should be delivered in a way that does not unreasonably expose retail clients to security risks (e.g. phishing).</p>	<p>Where a provider delivers disclosures via email, it is preferable that the provider gives retail clients a reference to the website address where the disclosure can be found, along with instructions on how to access the disclosure, rather than a hyperlink to the disclosure. However, where a provider delivers a disclosure via an email with a hyperlink to the disclosure, the email should state that the retail client will not be asked to provide their personal details online (e.g. in order to access the disclosure).</p> <p>Providers should continue efforts to educate retail clients about internet scams and other security risks.</p>

Your feedback

- B2Q1 Do you agree with our proposed good practice guidance in Table 1? If not, why not? In particular, in relation to our proposed guidance in item 4, what do you think is a reasonable period for providers to ensure that disclosures remain accessible from a link, website or electronic facility?
- B2Q2 Are there any practical problems with our proposed good practice guidance? Please give details.
- B2Q3 Do you think the good practice guidance in Table 1 is useful? If not, what other guidance do you think is necessary to help providers comply with the law and to protect retail clients? For example, in relation to our proposed guidance in item 1, should we give further guidance that retail clients should be able to access a disclosure placed on a website with no more than three clicks?
- B2Q4 Is our proposed good practice guidance likely to result in additional compliance costs for providers? Please give details, including figures and reasons.
- B2Q5 Do you think our proposed good practice guidance is likely to result in additional risks or costs for retail clients? Please give details, including figures and reasons. If you think retail clients will incur increased costs, is this an acceptable policy outcome?

C Client consent to online disclosure

Key points

Generally, under the current law, a provider needs to obtain a retail client's express agreement before delivering financial services disclosures online (default paper disclosure): see paragraphs 37–39.

Default paper disclosure has the advantage of ensuring that disclosures are only delivered online to those retail clients who wish to receive and read disclosures in this way. However, there may be practical difficulties in obtaining a retail client's express agreement to receiving disclosures online.

One issue to be considered is whether ASIC should give relief to enable disclosures to be delivered online without first having to obtain client consent, as long as retail clients can elect to receive hard copies (default online disclosure): see issue C1 and paragraphs 40–45.

- 36 We understand that there is industry uncertainty about whether, under the current law, providers can deliver disclosures to a retail client online as long as the client's consent to online delivery can be inferred, or whether the client's express agreement to online delivery is required.

Current law on client consent to online disclosure

- 37 We believe that generally, unless the law provides otherwise, a provider must obtain a retail client's express agreement before delivering financial services disclosures online. A retail client's consent can be verbal or in writing.

Note: Under the current law, some disclosures can be delivered online without first obtaining client consent. For example, reg 7.9.75BA allows regulated super funds to deliver annual superannuation information to members by putting it on a website, without having to obtain the consent of their members first, as long as they provide members with paper copies if they want them. Also, s1017F(5)(b) and (5A)(b) allow providers to deliver a confirmation of transaction to a retail client by means of a standing facility, without having to obtain the consent of the client first, as long as the client is informed about the availability of the facility and does not object to the information being delivered in this way.

- 38 We think that where a provider wishes to deliver a disclosure under a provision enabling disclosures to be sent to an electronic address 'nominated' by the retail client or the client's agent (e.g. s940C(1)(a)(ii) and 1015C(1)(a)(ii)), they will need to ensure that the client or agent has expressly agreed to receive the disclosure via the relevant method of delivery. This is because the word 'nominated' means that the electronic address must have been *identified* by the retail client or the client's agent as

the address for sending disclosures. Therefore, it is necessary for the provider to make the retail client clearly aware that when the client provides their electronic address, disclosures will be delivered online.

- 39 Where a provider wishes to provide a financial services disclosure online under a provision enabling disclosures to be made available as agreed between a retail client or their agent and the provider (e.g. s940C(1)(a)(iii)), they will also need to ensure that the client or agent has expressly agreed to receive the disclosure via the relevant method of delivery.

Default method of disclosure—paper or online?

- 40 Accordingly, under the current law, providers are generally required to deliver paper disclosures to retail clients unless a retail client actively decides to receive financial services disclosures online (i.e. paper disclosure is the default method of delivering disclosures). Paper disclosures must be sent to those retail clients who have not nominated how they wish to receive disclosures.
- 41 Default paper disclosure has the advantage of ensuring that disclosures are only delivered online to those retail clients who wish to receive and read disclosures in this way. There is a subset of retail clients (predominantly older clients) who, while they have access to the internet, do not use it regularly or feel comfortable with online communication.
- 42 However, some submissions on CP 93 said that there are practical difficulties in obtaining a retail client's express agreement to receiving disclosures online. This is posing a barrier to some providers delivering disclosures online.
- 43 In order to facilitate online disclosure, one option is for ASIC to give relief to enable disclosures to be delivered online without first having to obtain retail client nomination or agreement, as long as retail clients can elect to receive hard copies (default online disclosure).

Note: Section 16 of the *Spam Act 2003* prohibits the sending of unsolicited commercial electronic messages. Therefore, even if ASIC were to give relief to facilitate default online disclosure, a provider may still need to obtain a retail client's consent before delivering an SOA or PDS by email.

- 44 This would allow a provider to deliver disclosures to a retail client online unless the client requests paper delivery. The retail client must be given a clear opportunity to opt out of online delivery (except in relation to fully online products). We think that this would give some protection to retail clients who do not have access to the internet or who do not feel comfortable with online communication, as they can still request paper disclosures.

45 We believe that default online disclosure has advantages for providers in reducing the costs of printing and mailing. However, there could be additional costs incurred by retail clients (e.g. printing costs). There is also a risk that some retail clients will miss the opportunity to opt out of online delivery and will not receive disclosures. For example, they might forget to respond to the notice giving them the option to receive paper disclosures. Also, some retail clients may provide an email address at the time of applying for a financial product or service, even though they rarely or never check their email. If the notice giving them the option to receive paper disclosures is subsequently sent to them via email, they might not read it, and therefore may not be aware that they need to access their disclosures online.

Issue

- c1** We seek your feedback on what should be the default rule for delivering financial services disclosures. Depending on the feedback we receive, we propose to give either:
- (a) guidance that generally, under the current law, paper disclosures must be sent to those retail clients who have not nominated how they wish to receive disclosures (i.e. guidance that default paper disclosure applies); or
 - (b) relief to allow providers to deliver disclosures online without first having to obtain client consent (i.e. relief to facilitate default online disclosure).

Your feedback

- C1Q1 Which should be the default rule for delivering disclosures—default paper disclosure or default online disclosure? Please give reasons for your answer.
- C1Q2 If you support default paper disclosure, do you think there should be any exceptions where it is appropriate for us to facilitate default online disclosure?
- C1Q3 If you support default online disclosure, do you think there should be any exceptions? For example, should paper disclosure still apply to private disclosures (e.g. periodic statements) or to notices of material changes and significant events under s1017B? Please give reasons for your answer.
- C1Q4 If you support default online disclosure, should paper disclosure still apply to point-of-sales disclosures, such as FSGs and PDSs? If you think default online disclosure should apply to point-of-sales disclosures, how do you think this could work in practice, given that there is no finite and known class of recipient?

- C1Q5 What opt-out mechanism should apply in relation to default online disclosure? For example, do you think it would be appropriate to require a provider to send a paper notice (rather than an electronic notice) giving a retail client the option to receive paper disclosures? Are there any other ways to mitigate the risk that retail clients will miss the opportunity to opt out of online disclosure?
- C1Q6 Should our relief to allow default online disclosure be subject to any other protections?
- C1Q7 Is default online disclosure likely to result in additional costs for retail clients? Please give details, including figures and reasons. If you think retail clients will incur increased costs, is this an acceptable policy outcome?

D Regulatory and financial impact

- 46 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:
- (a) facilitating business activity, by making compliance with the disclosure delivery requirements easier;
 - (b) making it easier for retail clients to receive more timely information; and
 - (c) ensuring that retail clients have control over how they receive information.
- 47 Before settling on a final policy, we will comply with the requirements of the Office of Best Practice Regulation (OBPR) by:
- (a) considering all feasible options;
 - (b) if regulatory options are under consideration, undertaking a preliminary assessment of the impacts of the options on business and individuals or the economy;
 - (c) if our proposed option has more than low impact on business and individuals or the economy, consulting with OBPR to determine the appropriate level of regulatory analysis; and
 - (d) conducting the appropriate level of regulatory analysis—that is, by completing a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).
- 48 All BCC reports and RISs are submitted to the OBPR for approval before we make any final decision. Without an approved BCC report and/or RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 49 To ensure that we are in a position to properly complete any required BCC report or RIS, we ask you to provide us with as much information as you can about:
- (a) the likely compliance costs;
 - (b) the likely effect on competition; and
 - (c) other impacts, costs and benefits,
- of our proposals or any alternative approaches: see ‘The consultation process’, p. 4.

Key terms

Term	Meaning in this document
annual superannuation information	Information that a trustee of a superannuation entity is required to provide under s1017DA (does not include private disclosures)
Ch 7 (for example)	A chapter of the Corporations Act (in this example, numbered 7)
Corporations Act	<i>Corporations Act 2001</i>
Corporations Regulations	Corporations Regulations 2001
default online disclosure	A method of disclosure whereby a provider can deliver a disclosure online without obtaining the prior consent of a retail client, provided that the client can still elect to receive a hard copy of the disclosure
default paper disclosure	A method of disclosure whereby a provider needs to obtain a retail client's consent first before delivering a disclosure online
electronic facility	An electronic medium for accessing or sending information
financial services disclosure	A disclosure required under Pts 7.6–7.9
FSG	Financial Services Guide
fully online product	A financial services product that is sold on the basis that it is fully online (i.e. that retail clients will read disclosures, apply for the product and monitor their investments completely online)
PDS	Product Disclosure Statement
private disclosure	A disclosure that a provider gives to a member or retail client containing personal information relating to the member or client or their investment. Examples include SOAs, periodic statements of a retail client's holding under s1017D and confirmations of transactions under s1017F
provider	Any person (including a responsible entity, product issuer, Australian financial services licensee or authorised representative) who is required to give a financial services disclosure to retail clients under the Corporations Act or an instrument of relief
Pt 7.6 (for example)	A part of the Corporations Act (in this example, numbered 7.6)

Term	Meaning in this document
reg 7.7.01 (for example)	A regulation in the Corporations Regulations (in this example, numbered 7.7.01)
s1017F (for example)	A section of the Corporations Act (in this example, numbered 1017F)
SOA	Statement of Advice