



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 8

Guidelines for internet discussion sites

June 2000

Your comments

We invite your comments on the *proposals and issues for consideration* in this paper.

Comments are due by 25 July 2000 and should be sent to:

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What this policy proposal is about

This policy proposal paper sets out the guidelines we will follow when applying the licensing requirements and the prohibitions against unconscionable conduct in the Corporations Law (Law) and the Australian Securities and Investments Act 1989 (ASIC Act) to Internet Discussion Sites (IDS).

These guidelines apply only to those IDS which contain information, opinions or advice about securities.

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Our policy proposal — issues for consideration

Policy proposal

Issues for consideration

Do IDS have to be licensed?

1 Where an Internet Discussion Sites (IDS) provides a facility for exchanging or disseminating information, opinions and advice about securities, the Law requires such a forum to operate under a licence. Under the Law, the term conducting an “investment advice business” (which requires a licence) is widely defined and encompasses activities of this kind.

2 Although technically all IDS which contain information, opinions and advice about securities must generally operate under a licence, we see sufficient policy reasons for allowing persons to operate IDS without a licence where specific guidelines are met.

3 This approach:

- (a) preserves the public’s freedom of speech and expression;
- (b) promotes an inexpensive and easy to access channel by which consumers can become better informed about securities and developments in securities markets; and
- (c) promotes consumer protection and market integrity by minimising the opportunity for market manipulation and unconscionable conduct that may be carried out using IDS.

Policy proposal	Issues for consideration
<p>What type of IDS can operate within the IDS guidelines?</p> <p>4 The IDS guidelines apply to IDS which:</p> <ul style="list-style-type: none"> (a) provide an internet facility for persons to display information, advice and opinions about securities (ie make “postings”), such as on web based bulletin boards; and (b) allow other persons to “view” such postings. <p>5 Internet facilities used for private communications between individuals (such as exchange of e-mails or private real time chat sessions) where the communications exchanged cannot be viewed by the members of the public do not come within these guidelines as such facilities do not generally attract the licensing requirements.</p>	<p>4A Are there other types of internet facilities to which the IDS guidelines should apply? If so, what are they and why should they be included?</p> <p>5A Are there other types of internet or electronic facilities used for private communications between individuals which should be brought within this exclusion? If so, what are they and why should they be excluded?</p>
<p>What are the IDS guidelines?</p> <p>6 The IDS guidelines comprise:</p> <ul style="list-style-type: none"> (a) disclosure and warnings to persons viewing the information, opinions and advice posted on an IDS (ie postings); (b) disclosure and warnings to persons who make or alter the postings; and (c) obligations that the IDS operator must satisfy. <p><i>Disclosure/warnings to persons viewing the postings</i></p> <p>7 An IDS must display these prominent warnings to persons before they access postings on the IDS:</p> <ul style="list-style-type: none"> (a) Neither the IDS operator nor the persons making the postings are licensed 	<p>7A Are these warnings appropriate? If not, why?</p> <p>7B Are there other types of warnings to viewers/users that should be included? Why</p>

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investment advisers. Therefore, before acting on the basis of what is said in a posting, you should either:

- (i) consider consulting a licensed adviser (ASIC's web site at www.asic.gov.au has a list of licensed advisers); or
 - (ii) visit ASIC's consumer website at www.watchdog.asic.gov.au for general guidance about investing;
- (b) Persons making postings are individually responsible for the accuracy and authenticity of their postings;
 - (c) Because the IDS operator and the persons making postings are not licensed investment advisers, you will have no access to ASIC approved dispute resolution schemes to recover any losses you may suffer by relying on the postings;
 - (d) Securities cannot be offered to you for sale or subscription on the IDS;
 - (e) You should contact the IDS operator or ASIC Infoline on **1300 300 630** if you suspect that any postings are inaccurate, based on inside information or likely to mislead and deceive viewers/users.

Disclosure/warnings to persons making the postings

8 An IDS must also display these prominent warnings to persons making the postings on the IDS. The warnings should also be accessible to other viewers/users of the postings:

- (a) You are personally responsible for your postings (including any alterations you make to postings). Therefore, you should take care to ensure the

Issues for consideration

should they be included?

8A Are these warnings to persons making postings appropriate? If not, why?

8B Are there other types of warnings that should be given to persons making postings? If so, what are they and why

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authenticity and accuracy of the information in your postings. If they contain misleading or deceptive information about securities, ASIC and persons acting on such information may take action against you;

- (b) If you include any hyperlinks to other sites, you may be held accountable for the information on those sites;
- (c) You should disclose in the postings if you have any vested interest in the securities to which your postings relate;
- (d) If there are complaints about your postings, those complaints will be passed on to ASIC for appropriate action; and
- e) If you are suspected of or found to be making unauthorised or illegal postings, your right to make postings will be withdrawn immediately.

Obligations of the IDS operator

9 An operator of an IDS must comply with these requirements:

- (a) Advise us if they are operating within the IDS guidelines;
- (b) Ensure that the IDS:
 - (i) contains all the disclosure/warnings they are required to provide as set out in policy proposals 7 and 8; and
 - (ii) provides a link from the IDS to our consumer website which has the IDS guidelines and other relevant information about investing;
- (c) Not make their own postings about any securities or issuers (ie postings by directors, employees, agents and other

Issues for consideration

should they be included?

9A Are any of these obligations for IDS operators inappropriate? If so why?

9B Are there other obligations that should be imposed on an IDS operator? If so, why?

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associates of the IDS operator);

- (d) Give us free access to their IDS and archived member information and postings, together with suitable search facilities (eg search by key words, user and company names and dates of postings);
- (e) Certify to us that they have reasonably adequate procedures and mechanisms to:
 - (i) properly identify persons making or altering postings on the IDS;
 - (ii) monitor whether any postings appear to be misleading or deceptive, or likely to amount to illegal or unauthorised activities (eg insider trading or unauthorised offerings of securities) and remove such postings;
 - (iii) withdraw immediately the right of access to persons making postings who reasonably appear to engage in any illegal, unauthorised or unconscionable conduct using the IDS;
 - (iv) notify us as soon as practicable of any complaints they receive about the postings, suspicious postings, and the identity of persons responsible for such postings, including persons whose right to make postings is withdrawn;
 - (v) archive and maintain:
 - (A) information about the identity of persons making postings (eg current email addresses, user names and passwords) for a period of at least six months after their membership

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<p>changes or ceases; and</p> <p>(B) records of actual postings, and session information about the source and path of postings for a period of at least six months; and</p> <p>(vi) prevent directors, employees, agents and other associates of the IDS operator making their own postings on the IDS.</p>	
<p>What are the consequences of not following the IDS guidelines?</p> <p>10 An IDS must either operate under a licence or follow the IDS guidelines. If an unlicensed IDS fails to meet the IDS guidelines, we may take enforcement action against the operators of such an IDS for conducting an unauthorised securities or investment advice business.</p> <p>11 Operating within the IDS guidelines does not mean that postings on the IDS are endorsed or authorised by ASIC. We may take appropriate enforcement action under the Law or the ASIC Act if any postings on an IDS are found to be misleading or deceptive or amount to illegal or unauthorised activities (eg insider trading, market manipulation or unauthorised offerings of securities).</p> <p>12 IDS operators and persons making postings on an IDS must also be aware that if the postings on the IDS are accessible to persons in countries other than Australia, they may need to comply with the laws of those countries.</p>	

Policy proposal	Issues for consideration
<p>Should licensees be allowed to operate IDS under the IDS guidelines?</p> <p>13 We prefer a flexible approach which would allow licensees to operate an IDS either as a licensed activity or within the IDS guidelines. However, we believe that consumers using an IDS facility should be informed clearly in some way if the service is provided as a non-licensed activity by a licensee to disassociate the IDS facility from their other licensed business activities.</p>	<p>15A Should a licensee be able to operate IDS under the IDS guidelines as a non-licensed activity? If so, what requirements should be imposed on such licensees to minimise the risk that users of such services may see the IDS as a licensed service?</p>

Explanation

Do IDS have to be licensed?

1 We consider that persons who operate IDS which carry postings about information, opinions and advice about securities may require to be licensed under the Law because the relevant definitions are wide. Section 77(1) of the Law defines an investment advice business as a business of advising other persons about securities, or a business in the course of which a person publishes securities reports. The term “securities report” is defined in s9 to mean an analysis or report about securities, and the term “publish” is defined in s9 to mean publishing “...by any means, *including* ... by broadcasting or televising or in a cinematograph film...”.

2 If an IDS carries postings of information, opinions and advice about securities, and they are made available to the public (ie published) with system, repetition and continuity to satisfy the test of conduct of an investment advice business, those activities fall within these definitions. As a result, an IDS operator conducting such activities will be required to operate under a licence (ie have a licence in their own right or operate as a representative of a licensee who will be legally responsible for the operation of the IDS).

What type of IDS can operate within the IDS guidelines?

3 The proposed definition of IDS to which the IDS guidelines apply is designed to bring within its scope only those IDS facilities which are most likely to attract the licensing requirements in the Law. The key characteristics of such IDS are that:

- (a) they are generally marketed as internet facilities dedicated for posting information, opinions and advice about securities; and
- (b) the postings are accessible to a wide group of persons other than the authors of the postings (ie public access).

4 The range of internet facilities available for private communications among individuals is wide, varied and constantly evolving. Relatively, only a small proportion of them may comprise IDS of the kind which are most likely to attract the licensing requirements in the Law.

5 It is neither intended nor feasible for us to regulate all internet facilities used for private communications or the providers of such

facilities purely on the basis that the communications are about securities. Providers of internet facilities used by individuals for private communications such as e-mail access providers are generally mere service providers. Such facilities are not provided for any dedicated purpose such as giving information, opinions or advice about securities. Therefore, even if such services are used for private communications between individuals about securities, the providers are not subject to the licensing requirements in the Law.

6 Further, persons communicating privately about securities using such internet facilities are also generally unlikely to be conducting their activities with “system, repetition and continuity” to satisfy the conduct of a business test. As a result, their private communications, although relating to securities, would not attract the licensing requirements in the Law as they are not conducting an investment advice business.

7 Therefore, the IDS guidelines only apply to internet facilities used for private communications between individuals and providers of such facilities where they fall within the definition in paragraph 4 of the policy proposals.

What are the IDS guidelines?

8 The IDS guidelines comprise:

- (a) disclosure and warnings to persons viewing the information, opinions and advice posted on an IDS (ie postings);
- (b) disclosure and warnings to persons who make or alter the postings; and
- (c) obligations that the IDS operator must satisfy.

9 There are two types of risks which are intended to be addressed by these requirements. First, persons who do not have advisory competencies may in effect be able to reach wide audiences who may act on information, opinions and advice posted on an IDS as if it is formal investment advice. The proposed disclosure/warnings to persons who access postings on an IDS are designed to minimise this risk.

10 Secondly, as is becoming increasingly more evident, there is a real risk that postings on an IDS may be easily used for unauthorised and/or illegal activities, such as offering securities for subscription/sale without required disclosures, insider trading or market manipulation. This risk is addressed by:

- (a) the disclosure/warnings requirements to persons making postings on IDS; and
- (b) the specific positive obligations imposed on IDS operators, which will also help us monitor activities on IDS more effectively.

What are the consequences of not following the IDS guidelines?

11 IDS operators have two options when operating their IDS:

- (a) they can operate the IDS as a fully licensed activity. In this case they will be treated as adopting/endorsing the material contained in the postings that are displayed on the IDS and are fully accountable to users who act on reliance of the postings. This would generally mean that such licensees will have to have both adequate expertise (ie advisory competencies) and resources to be able to screen the postings for their accuracy and authenticity; or
- (b) operate within the IDS guidelines. In this case, the IDS operator must fully comply with the guidelines.

12 If a person operates an IDS of the kind defined in paragraph 4 of the policy proposals, otherwise than either as a licensed activity or within the IDS guidelines, that person is generally likely to be conducting an unlicensed investment advice business. Therefore, we will take appropriate enforcement action against such a person.

13 IDS may be accessible by persons in jurisdictions other than Australia. Where this is the case, IDS operators and persons making postings may come within the jurisdiction of other regulators. Even if an IDS is operated as a licensed activity or within the IDS guidelines, enforcement actions may be taken against such operators by regulators in those overseas jurisdictions.

Should licensees be allowed to operate IDS under the IDS guidelines?

14 Licensees can provide an IDS facility as a licensed activity by meeting the relevant advisory conduct standards for that service. However, they may prefer to provide that service under the IDS guidelines due to difficulty in complying with some of the advisory conduct standards which apply to licensees operating IDS facilities and/or the costs associated with compliance.

15 However, using a licensee's name, especially if it is a well known trade or business name, for an IDS facility raises the risk that

the service will be seen by users as a licensed activity. Therefore, it will generally be difficult for licensees to disassociate any IDS facility they provide from their licensed business activities. Consumer expectations about the credibility of postings on an IDS provided by a licensee may be higher than when using postings on an IDS provided by a non-licensee.

16 Although we prefer a flexible approach which allows licensees to operate an IDS either as a licensed activity or within the IDS guidelines, we believe that consumers using an IDS facility should be informed clearly if the service is provided as a non-licensed activity by a licensee. We are seeking public comments about whether or how reasonable consumer expectations that arise in this context can be fully met by licensees if they are allowed to operate IDS as a non-licensed activity.

Regulation Impact Statement

Problem

1 We are aware, from the enquiries we receive from market participants that IDS (Internet Discussion Sites) are an increasingly popular method through which information, opinions and advice about securities (postings) is disseminated to wide audiences which comprise both sophisticated and retail consumers. We are concerned that consumers may rely on such postings as if they contain formal investment advice, when in fact they are not provided by licensed professional advisers. We are also concerned that there is a risk that postings on IDS may be easily used for unauthorised and/or illegal activities such as offering securities for subscription or sale without required disclosure, insider trading or market manipulation.

2 Technically, licensing requirements apply to IDS which contain postings about securities if such activities are conducted with system, repetition and continuity to amount to conduct of an investment advice business.

3 However, applying the licensing requirements to operators of IDS and persons making postings on IDS does not necessarily lead to practical outcomes. Often providers of IDS, while having technology expertise to operate such facilities, do not have the advisory competencies required to obtain a licence. Therefore, imposing our licensing requirements on such persons may lead to lower supply or increased costs to consumers of such services or such services being operated in breach of the relevant laws. Monitoring IDS operations is also not easy because of the constantly evolving nature of the information technology used for providing IDS facilities.

Objectives

4 The objectives of the proposals is to enable IDS to be established that allow persons to exchange and disseminate information, opinions and advice about securities with as little regulatory hindrance as possible while, at the same time, promoting consumer protection and market integrity.

Options

5 We considered four options for regulating IDS:

Option 1 - Require all IDS operators to be licensed as investment advisers by meeting ASIC's standards licensing criteria for investment advisers. Such criteria include IDS operators being able to meet the advisory competencies in ASIC PS 138 and having membership with an ASIC approved alternative dispute resolution (ADR) scheme;

Option 2 - Adopt a modified licensing approach where a different set of criteria for licensing IDS is applied. This option will involve, among other things, the development of a different set of competency standards than that is provided under PS 138;

Option 3 - Not apply the licensing requirements to IDS provided the identified consumer protection risks (such as consumers unduly relying on material on an IDS which is not professional investment advice) and market integrity risks (such as increased opportunity to conduct unauthorised or illegal activities using an IDS) can be adequately addressed through other means. This option involves the development of specific guidelines within which IDS can be operated without a licence so that the identified risks are addressed by meeting those guidelines;
or

Option 4 - Not applying the licensing requirements at all.

Impact analysis

6 The key stakeholders likely to be affected by the following proposals include IDS operators, persons making postings on IDS, licensees and consumers who view postings on IDS.

7 The first option which requires licensing of IDS operators under the current criteria for advisory services will add significant costs to IDS operations. For example, they will need to incur the costs of:

- (a) having as their responsible officers persons who meet the advisory competencies required under PS 138;
- (b) resources to be able to formally scrutinise and assess each posting to ascertain its creditworthiness as investment advice;
- (c) membership with an ASIC approved ADR scheme; and

(d) lodgement of a performance bond upto \$20,000.

8 In addition, some of the licensing requirements may neither be easily applied by nor appropriate for the IDS operators. For example, the conduct standard relating to the issue of Advisory Services Guides may be inappropriate for IDS given the vast and unknown number of persons accessing an IDS. Similarly, the know-your-client requirement may be inappropriate for material displayed on an IDS.

9 We have no exemption and modification powers through which formal relief from these conduct standards can be provided to IDS operators. Therefore, once licensed, IDS operators will need to comply with these conduct standards, unless they obtain no-action relief from ASIC (which may involve further costs).

10 Therefore, the imposition of the licensing requirements may have the undesired effect of removing from the easy reach of consumers an effective communication channel through which they can better inform themselves about securities and developments in securities markets.

11 The second option of developing modified licensing criteria, although overcomes the current lack of a tailored criteria for granting a licence to IDS operators, does not overcome other problems associated with licensing which are noted above.

12 The third option involves non-enforcement of the licensing requirements on condition that IDS operators comply with specific guidelines that are designed to address identified consumer protection and market integrity risks.

13 The proposed guidelines address the identified risk that consumers may unduly rely on postings on an IDS as professional investment advice through warnings/disclosure to such consumers. These disclosures/warnings to consumers alert them that the postings are not provided by licensed advisers and therefore are not professional investment advice. IDS must further assist consumers by providing links to ASIC's website which has key information for investors.

14 The proposed IDS guidelines are also designed to promote market integrity by minimising the risks of unauthorised and illegal activities being conducted using IDS. To achieve this outcome, we are proposing two types of requirements:

(a) specific warnings/disclosure to persons making postings on IDS. These warnings alert persons making postings on

IDS to the legal consequences of engaging in unauthorised or prohibited conduct such as insider trading or market manipulation which should promote better compliance; and

- (b) obligations imposed on IDS operators. These requirements are designed to make it easier for us to monitor activities on IDS through measures such as the ability to trace the identity of persons making postings and access to such information.

15 The fourth option involves not enforcing the licensing requirements without requiring IDS operators to comply with any conditions such as under Option 3. This option is not capable of addressing the identified consumer protection and market integrity risks associated with the operation of IDS which are noted above.

Consultation

16 These policy proposals will be subject to a consultation period of five weeks during which we will consult with key stakeholders including current operators of IDS. We will also consult with overseas regulators who are currently looking at this issue such as the Financial Services Authority in the UK and the Securities and Exchange Commission in the US.

Conclusion and recommended option

17 At this stage, ASIC prefers the third option which does not involve licensing but instead relies on specific guidelines which must be met by IDS operators to be able to operate IDS without a licence. This is because it removes the application of the licensing requirements and associated costs, particularly as licensing is not the most appropriate form of regulation of IDS operations for the reasons noted above. This approach also provides flexibility as it does not preclude the ability of licensees to operate fully licensed IDS, although such services may be offered at a higher cost.

Implementation and review

18 We propose to implement the final policy by 15 August 2000 after any revisions resulting from public consultation with relevant stakeholders and interested parties within the next five weeks. We also propose to review the final policy two years after implementation or earlier if the Financial Services Reform legislation results in changes to the relevant laws.

19 The implementation of the third option will involve publication by ASIC of the relevant guidelines (eg via ASIC webpage) within

which IDS operators may operate their IDS without being licensed. We may take enforcement action against persons operating IDS unless they have a licence or operate within those guidelines.

Key terms

In this policy proposal:

“IDS” means an Internet Discussion Sites;

“IDS operator” means a person (natural or legal person) who is responsible for the provision of an IDS facility;

“IDS guidelines” mean the IDS guidelines set out in this paper;

“Law” means the Corporations Law;

“licensee” means a holder of a dealers or an investment advisers licence under the Law;

“person” includes a legal person;

“postings” mean information, opinions and advice that is displayed on an IDS;

“view” means the ability to read postings on an IDS.

What will happen next?

Stage 1

20 June 2000

Release of the PPP for public comment

Stage 2

20 June to 25 July 2000

Public consultation

Stage 3

15 August 2000

Policy released

Your comments

We invite your comments on the proposals and issues for consideration in this paper.

Comments are due by 25 July 2000 and should be sent to:

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