REPORT 223

Response to submissions on CP 121 Facilitating online financial services disclosures

December 2010

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 121 *Facilitating online financial services disclosures* (CP 121) and details our response to those issues.

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.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. For our final policy, please see Regulatory Guide 221 *Facilitating online financial services disclosures* (RG 221).

Contents

A Overview/Consultation process

1 In Consultation Paper 121 *Facilitating online financial services disclosures* (CP 121), we sought feedback on proposals to facilitate the online delivery of financial services disclosures. These proposals were developed as a result of feedback on our earlier consultation paper on online disclosure, Consultation Paper 93 *Facilitating online financial services disclosures* (CP 93).

2 In CP 121, we proposed to:

- give relief to enable providers to deliver Product Disclosure Statements (PDSs), Financial Services Guides (FSGs) and Statements of Advice (SOAs) via hyperlinks and references to website addresses; and
- issue good practice guidance to ensure that clients continue to receive clear, concise and effective information where disclosures are delivered online.

3 We also sought feedback on what should be the default method of delivering financial services disclosures. That is:

- electronic delivery unless the client requests paper delivery; or
- paper delivery unless the client consents to electronic delivery.

4 This report highlights the key issues that arose out of the submissions received on CP 121 and our responses to those issues.

5 This report is not meant to be a comprehensive summary of all responses received or a detailed report on every question from CP 121. We have limited this report to the key issues.

Responses to consultation

6 We received 25 responses to CP 121, including from industry bodies and a wide variety of financial services providers. We are grateful to respondents for taking the time to send us their comments.

7 The majority of submissions were supportive of our proposal to give relief to enable providers to deliver PDSs, FSGs and SOAs via hyperlinks and references to website addresses. Submissions were also generally supportive of our proposed good practice guidance on online disclosure. The key concerns raised by respondents about these proposals are addressed in Sections B and C.

8 However, responses were mixed on the issue of what should be the default method of delivering financial services disclosures. Feedback on this issue is discussed in Section D.

9 For a list of non-confidential respondents to CP 121, see the appendix to this report. Copies of the non-confidential submissions are on the ASIC website at www.asic.gov.au/cp under CP 121.

B Delivery of PDSs, FSGs and SOAs via hyperlinks and websites

Key points

In CP 121, we proposed to give relief to facilitate the delivery of PDSs, FSGs and SOAs via hyperlinks and references to website addresses.

While the majority of submissions were supportive of our proposal, a few respondents thought that we should not give relief to enable SOAs to be delivered via websites.

Several respondents also expressed concern about facilitating the delivery of PDSs, FSGs and SOAs via hyperlinks.

10 In CP 121, we proposed to give relief to enable providers to deliver PDSs, FSGs and SOAs by sending clients 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. We proposed this relief because, under the online disclosure provisions in Pts 7.6 and 7.9 of the *Corporations Act 2001* (Corporations Act), it is difficult from a practical perspective for providers to deliver PDSs, FSGs or SOAs in this way.

11 The majority of submissions were supportive of our proposal. However, a few respondents thought that we should not give relief to enable SOAs to be delivered via hyperlinks and websites. They were concerned that storing SOAs on a server external to the client may pose privacy risks, as SOAs are private disclosures containing personal information. However, one respondent suggested that this risk could be addressed by requiring clients to log on to a password-protected section of the provider's website to access the disclosure.

12 A few respondents thought that we should not facilitate the delivery of PDSs, FSGs and SOAs via hyperlinks because there is a risk that fraudsters could use hyperlinks to direct unsuspecting clients to illegitimate websites. They said that any move towards the use of hyperlinks could detract from work already done in fraud prevention and awareness education.

ASIC's response

We think it is appropriate to facilitate providers' delivery of SOAs by sending clients a written notice with a reference to a website address. This is because other financial services disclosures (including private disclosures) can already be delivered in this way. While there may be privacy risks associated with the delivery of SOAs via websites because SOAs are private disclosures, it is likely that these risks will be somewhat mitigated because providers may need to comply with privacy laws when delivering SOAs in this way (e.g. by only making SOAs available on a password-protected section of their website).

We also consider it appropriate to give relief to facilitate the delivery of PDSs and FSGs via hyperlinks if a client agrees to receive disclosures online, given that other financial services disclosures can already be delivered in this way under the Corporations Act.

We recognise there is a risk that fraudsters may use hyperlinks to direct unsuspecting clients to illegitimate websites. To address this risk, we have given guidance in Regulatory Guide 221 *Facilitating online financial services disclosures* (RG 221) encouraging providers to supply clients with a reference to a website address where the disclosure can be found, rather than a hyperlink to the disclosure. We have also given guidance that providers should continue efforts to educate clients about internet scams and other security risks.

However, we consider there is a greater risk that clients will be exposed to security risks, such as phishing, where SOAs are delivered via hyperlinks. Unlike PDSs and FSGs, SOAs are private disclosures, which consumers would normally expect to access online by providing their personal details. Therefore, we have not given relief in Class Order [CO 10/1219] *Facilitating online delivery of PDSs, FSGs and SOAs* to enable SOAs to be delivered via hyperlinks.

C Good practice guidance

Key points

In CP 121, we proposed to issue good practice guidance to ensure that clients continue to receive clear, concise and effective information when disclosures are delivered online.

While submissions were generally supportive of our proposed good practice guidance, a number of issues were raised by respondents.

Item 1: Disclosure documents should be easy to retrieve and read

13 In CP 121, we proposed to issue good practice guidance that disclosure documents should be easy to retrieve and read.

14 There was a high level of support for this proposed guidance. However, one respondent expressed the view that it should not be necessary for a hyperlink to take a client directly to a disclosure, provided that clear instructions are given on how to find the disclosure online.

15 Another respondent recommended that, so providers are not precluded from notifying clients of the availability of disclosures via SMS (for example), providers should be able to make instructions on how to access a disclosure available at the access point (e.g. on a website) and not just in the notice to a client of the availability of the disclosure.

16 We also sought feedback on whether we should give further guidance that clients should be able to access a disclosure placed on a website with no more than three clicks, to ensure that disclosures are easy to retrieve where they are made available via a website.

17 A number of respondents thought that imposing such a requirement would be overly prescriptive. They said that in some cases, owing to the structure of a particular website, it would not be possible to ensure that clients are able to access disclosures with no more than three clicks, and the expense involved in restructuring a website to allow this would be unwarranted.

ASIC's response

We have modified our guidance in item 1 of Table 1 in RG 221 so that it is not necessary for a hyperlink to take a client directly to a disclosure, provided that clear instructions are given on how to access the disclosure online.

We have also clarified in our guidance that providers can make available instructions on how to access a disclosure at the access point (e.g. on the relevant website).

We acknowledge that, in some cases, it may be difficult for a provider to ensure that clients are able to access a disclosure placed on a website with no more than three clicks. Nevertheless, we believe that it would be much easier for clients to find a disclosure on a website where they are able to access the disclosure with no more than three clicks. As such, we think it is appropriate to encourage providers to do so where possible as a matter of good practice.

Item 3: Providers should be satisfied on reasonable grounds that the client or their agent has received a copy

18 In CP 121, we also proposed to issue good practice guidance that providers should be satisfied on reasonable grounds that the client or their agent has received a copy of the disclosure. We suggested in our guidance that reasonable grounds would include sending the disclosure to an email address provided by the client and tracking delivery of the email by return receipt, to make sure the email is not returned undelivered.

19 Many respondents expressed the view that tracking delivery of emails by return receipt would be impractical and ineffective. Respondents noted that some email services do not have a return receipt facility. One respondent said that, in any case, return receipts can be an unreliable indicator of the actual receipt of an email as confirmations of receipt can be received by a provider even where an email has been blocked by a client's spam filter. Also, it is possible for clients to block return receipts from being sent from their email account. Some respondents expressed the view that the systems changes required to enable the delivery of emails to be tracked by return receipt would be unduly onerous, especially where a client has already agreed to receive disclosures online.

20 Some respondents suggested that, instead, providers should be able to assume that correctly addressed and sent electronic communications have been received by clients. One respondent said that the onus should be on clients to ensure that the email address they have provided remains valid and active if they choose to receive disclosures online, although another respondent disagreed. Some respondents expressed the view that the absence of an undelivered email should be reasonable grounds for believing that a client has received a disclosure.

21 One respondent asked that we give further guidance on what would constitute a reasonable attempt to contact a client by other means to deliver a disclosure if the provider becomes aware that a client has not received a disclosure.

ASIC's response

We recognise that it may be difficult for providers to be satisfied on reasonable grounds that the client or their agent has received a copy of a disclosure when the disclosure has been delivered online, as tracking delivery of emails by return receipt may be impractical and ineffective.

We have modified our guidance in item 3 of Table 1 in RG 221 to say that providers should, instead, use their reasonable efforts to ensure that the client or their agent receives a copy of the disclosure. This could be achieved by, for example:

- delivering the disclosure to an electronic address provided by the client; or
- when a disclosure is delivered by making it available on a website, sending a paper or electronic notice to an address provided by the client, notifying the client when the disclosure becomes available online and how it can be accessed.

We have also provided some examples in RG 221 of other ways in which a provider can contact a client to give them a disclosure if the provider becomes aware that a client has not received a disclosure.

Item 4: Clients should be able to keep a copy so that they can access the disclosure in the future

22 In CP 121, we proposed to issue good practice guidance that clients should be able to keep a copy of the disclosure so that they can access it in the future. So that clients can keep a copy of the disclosure, we proposed that the provider should ensure that 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 reasonable for that information.

23 Submissions were generally supportive of our proposed guidance. However, respondents were divided on the issue of what would be a reasonable period for providers to ensure that disclosures remain accessible from a link, website or electronic facility. Some respondents said that it may not be practical for providers to ensure that disclosures remain available from a link for two years, as websites may be improved from time to time or changed out of necessity (e.g. in the event of a company merger). Respondents also thought that providers should not be required to continue to make a disclosure available from a link if a product or service is no longer available and there are no longer any clients affected by it.

24 Some respondents expressed the view that it should be sufficient that a client can obtain a copy of the disclosure within a reasonable period of time, regardless of the disclosure's location. They said that providers should be able to place the disclosure elsewhere on the web, provided that it is

reasonably easy to find. Alternatively, it should be sufficient that clients are able to obtain a copy of the disclosure by contacting the provider via telephone.

> *ASIC's response*
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> We have clarified in item 4 of Table 1 in RG 221 that we think that a period of two years would be a reasonable period for most disclosures to remain accessible from a link, website or electronic facility, unless the disclosures have been superseded or updated sooner, or have become out-of-date (e.g. because the product or service is no longer available and there are no longer any clients affected by it).
>
> We have also modified our good practice guidance to state that if a provider is unable to continue to make the disclosure available from the specified link, website address or electronic facility for a period of two years, they should make it easy for clients to request an electronic copy of the disclosure at no cost to the client (e.g. by providing a toll-free telephone number or an electronic address clients can use to request a copy).

Item 6: Clients should be able to change their mind about receiving disclosures online at any time and at no cost

25 Submissions also generally agreed with our proposed good practice guidance in CP 121 that clients should be able to change their mind about receiving disclosures online at any time and at no cost.

26 However, some respondents expressed concerns about our guidance that when a disclosure is sent to a client's email address, the reply email address should be active so that the client can respond if they need to. They said that emails notifying clients of the availability of a disclosure are often automatically generated emails and that with current technology it is impossible to reply to the email itself. Also, requiring the reply email address to be active may invite spammers to target the provider's email address. Respondents suggested that, instead, providers should be able to supply an alternative email address for these purposes, similar to the approach to unsubscribe facilities in the *Spam Act 2003*.

> *ASIC's response*
>
> We have modified our guidance in item 6 of Table 1 in RG 221 so that providers are able to supply an alternative email address that clients can use to unsubscribe from receiving disclosures online.

D Client consent to online disclosure

Key points

In CP 121, we also sought feedback on whether the default method of delivering financial services disclosures should be paper delivery or online delivery.

Submissions on this issue were divided. Some respondents thought that online delivery should be the default method of delivering disclosures.

However, other respondents thought that paper delivery should remain the default method of delivering disclosures because there are still some consumers who will not or who cannot access disclosures via the internet.

27 In CP 121, we also sought feedback on whether the default method of delivering financial services disclosures should be paper delivery or online delivery.

28 Submissions on this issue were divided. Some respondents thought that online delivery should be the default method of delivering disclosures and that providers should be able to deliver disclosures online without first having to obtain client consent, as long as clients can elect to receive hard copies of disclosures (default online disclosure).

29 Those respondents who were supportive of default online disclosure said that it would allow providers to overcome practical difficulties in obtaining a client's express agreement to receiving disclosures online and reduce the costs of printing and mailing. Other benefits of online disclosure cited by respondents included that it would allow disclosures to be delivered to clients more quickly and may result in greater consumer engagement with disclosures, since online communication is generally the preferred method of communication for people in generations X and Y.

30 However, other respondents thought that paper delivery should remain the default method of delivering disclosures and that clients should be required to opt in to receiving disclosures online (default paper disclosure).

31 One respondent noted that, while rates of computer usage and access to high-speed internet services may be higher among younger people, those currently approaching retirement age—who need to consider their investment options more closely—may not be as highly represented online. Some respondents said that there are still some consumers who will not or who cannot access disclosures via the internet. For these classes of people, default paper disclosure is much less likely to result in clients being uninformed or under-informed.

32 However, some respondents who supported default paper disclosure thought that default online disclosure should apply to fully online products (i.e. financial services products that are sold on the basis that clients will read disclosures, apply for the product and monitor their investments completely online).

ASIC's response

We acknowledge that there are benefits to default online disclosure.

However, given the divergent responses received on this issue, we think that paper delivery should remain the default method of delivering financial services disclosures at this point in time. We note that, according to the research report *Australia in the Digital Economy, Report 2: Online Participation*, published by the Australian Communications and Media Authority in May 2009, only 48% of Australians over 65 years old are connected to the internet compared with 78% for other age groups. Furthermore, only 30% of Australians aged over 65 have broadband in their home and 44% have never used the internet. As such, we think there is a risk that default online disclosure will result in this significant group being uninformed or under-informed.

We consider it unnecessary to give relief to facilitate default online disclosure for fully online products. This is because clients are likely to have already consented to receiving disclosures online when signing up for the product.

Appendix: List of non-confidential respondents

- Association of Superannuation Funds of Australia Limited
- Australasian Compliance Institute
- Australian Bankers' Association
- Australian Finance Conference
- Australian Institute of Superannuation Trustees
- AXA Asia Pacific Holdings Limited
- AXA Financial Planning & Charter Financial Planning
- Corporate Super Association
- CPA Australia
- Financial Planning Association
- Financial Services Council
- Insurance Council of Australia
- Law Council of Australia
- Macquarie Investment Management Limited
- Mercer Legal Pty Ltd
- National Insurance Brokers Association
- Plan B Trustees Limited
- Rice Warner Actuaries
- Tower Australia Limited and InsuranceLine Pty Ltd
- Trustee Corporations Association
- UniSuper Management Pty Limited