



ASIC

Australian Securities & Investments Commission

REPORT 278

Response to submissions on CP 167 Advertising financial products and advice services

February 2012

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 167 *Advertising financial products and advice services: Good practice guidance* (CP 167) and details our responses in relation 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. Please see Regulatory Guide 234 *Advertising financial products and advice services: Good practice guidance* (RG 234).

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A Overview/Consultation process

- 1 We released Consultation Paper 167 *Advertising financial products and advice services: Good practice guidance* (CP 167) on 30 August 2011. We were prompted to issue CP 167 because we recognise that consumers are heavily influenced by advertisements for financial products and advice services when making financial decisions and seeking financial advice.
- 2 CP 167 set out ASIC's proposals to help promoters and publishers:
 - (a) present advertisements that are accurate and balanced, and that help consumers make decisions that are appropriate for them; and
 - (b) comply with their legal obligations to not make false or misleading statements or engage in misleading or deceptive conduct.
- 3 We proposed that our guidance apply to:
 - (a) promoters of financial products and financial advice services. The promoter will sometimes be the product issuer, but can also be a third party such as a financial adviser, distributor or agent; and
 - (b) publishers of promotions about financial products and financial advice services.
- 4 We proposed that our guidance cover:
 - (a) the nature of the product;
 - (b) returns, benefits and risks;
 - (c) warnings, disclaimers, qualifications and fine print;
 - (d) fees and costs;
 - (e) comparisons;
 - (f) past performance and forecasts;
 - (g) the use of certain terms and phrases;
 - (h) the advertisement's target audience;
 - (i) consistency with disclosure documents;
 - (j) photographs, diagrams, images and examples; and
 - (k) the nature and scope of advice.
- 5 As well as the general content areas covered by our proposed guidance, we also proposed to give good practice guidance to assist promoters in developing advertisements for specific media, including:
 - (a) mass media, such as radio, television, newspapers, magazines and internet; and
 - (b) outdoor advertising.

Responses to consultation

- 6 We received 37 submissions from financial services providers and industry associations, law firms, consumer groups and media, advertising and publishing stakeholders. We are grateful to respondents for taking the time to provide us with their comments.
- 7 This report highlights the key issues that arose out of the submissions received on CP 167, and our responses to those issues. Feedback received on CP 167 was used to finalise our policy, which is published in Regulatory Guide 234 *Advertising financial products and advice services: Good practice guidance* (RG 234). Where relevant, this report explains where we have modified key aspects of the policy proposed in CP 167 in producing our final guidance.
- 8 Generally, respondents were supportive of the need for guidance in relation to misleading or deceptive advertising of financial products and advice services. However, a number of respondents had concerns with some aspects of the proposed guidance. We have revised our guidance to take account of many of these concerns. These matters are addressed in Section B of this report.
- 9 For a list of the non-confidential respondents to CP 167, see the appendix. Copies of these submissions are on our website at www.asic.gov.au/cp under CP 167.

B Response to submissions on CP 167

Key points

This section outlines the key issues covered in submissions received on CP 167, and our responses to those issues.

It covers:

- the purpose of our proposed guidance;
- the relationship between advertising and disclosure;
- scalability;
- the application of our proposed guidance to publishers;
- the audience;
- ratings;
- media-specific issues; and
- internet advertising.

Purpose of our proposed guidance

- 10 As described in paragraph 2, the purpose of our proposals in CP 167 was to help promoters and publishers:
- (a) present advertisements that are accurate and balanced, and help consumers make decisions that are appropriate for them; and
 - (b) comply with their legal obligations to not make false or misleading statements or engage in misleading or deceptive conduct.
- 11 CP 167 also stated that our proposed guidance was intended to ‘encourage promoters to create advertisements that not only meet the minimum requirements of not being misleading or deceptive, but also that help consumers make appropriate decisions’: see CP 167 at paragraph 6.
- 12 Many respondents were concerned that our proposed guidance extended the scope of the law. In particular, they did not think that whether an advertisement was balanced determined whether or not it was misleading or deceptive. They also interpreted the proposed guidance as encouraging a standard beyond the minimum requirements of the law.
- 13 Many respondents also queried whether it was the role of advertising to help consumers make appropriate decisions, given the requirements for providing formal disclosure documents. Respondents were concerned about this statement, saying that the purpose of an advertisement was to make

consumers aware of the relevant financial product, and that formal disclosure documents should play the primary role of ensuring that consumers make informed decisions. Some went further and said that consumers should not be encouraged to make decisions based on the advertisement alone.

- 14 Respondents were also concerned that the proposed ‘good practice guidance’ could be interpreted as mandatory legal requirements. These respondents commented that the purpose of the guidance should be merely to explain an advertiser’s current legal obligations, rather than expecting advertisers to meet a higher standard.

ASIC’s response

Our objective in CP 167 was to help promoters comply with their existing legal obligations. We did not intend to introduce a different or higher standard, or to impose a new level of regulation. However, we acknowledge that many respondents have not interpreted the proposed guidance in this way.

We have revised the drafting of our final guidance to ensure that it is clear we are not seeking to introduce a different or higher standard than is imposed by the law. We do, however, note that following our good practice guidance will also help raise standards in advertising more generally: see RG 234.4.

It is not our intention to encourage consumers to make decisions based on advertisements alone. However, we believe that advertising can help consumers make appropriate decisions and have therefore retained this objective. We have also made it clear that advertising is not a substitute for a formal disclosure document in a consumer’s decision-making process.

Relationship between advertising and disclosure

- 15 Our proposed guidance in CP 167 stated that ‘advertisements should be complete so that consumers can assess the merits of the financial product or service being advertised’.
- 16 Respondents were concerned that our proposed guidance would make advertisements more detailed and lengthy and would encourage investors to think that they do not need to read the relevant disclosure document before making a decision. They also noted that the expectation of ‘completeness’ goes further than the existing law and imposes a disclosure regime on advertising.

ASIC's response

Our intention was not that an advertisement should address every aspect of a financial product, nor that an advertisement should contain the same information as a formal disclosure document.

To clarify this, we have deleted references to 'complete' in our final guidance and made it clear that we do not expect an advertisement to substitute for a formal disclosure document in a consumer's decision-making process. Rather, we are seeking to encourage more 'balanced' advertising (i.e. not just an unrealistic view of the 'upside' of the product or service): see RG 234.29.

Scalability

- 17 Some submissions argued that our guidance should take a 'scaled' approach, with different expectations depending on all relevant factors, including the advertising medium, the complexity of the financial product or advice service, and the risks associated with the product or advice. For example, some respondents argued that the guidance should adopt a more differentiated approach between simple, well-understood and low-risk financial products (where detailed information is not required) and more complex, high-risk products.

ASIC's response

We believe that the principles outlined in our proposed guidance are generally applicable to all advertisements for financial products and advice services.

We have not adopted a differentiated approach to advertisements for different types of financial products, although we note that the assessment of whether a particular advertisement is misleading or deceptive will depend on all the circumstances of the case, including the nature of the product.

Application of our proposed guidance to publishers

- 18 In CP 167, we proposed that our guidance would apply to:
- (a) *promoters* of financial products and financial advice services. The promoter will sometimes be the product issuer, but can also be a third party such as a financial adviser, distributor or agent; and
 - (b) *publishers* of promotions about financial products and financial advice services.
- 19 CP 167 noted that many different people can be involved in developing and distributing advertisements for financial products and services, including in-house marketing departments of financial services providers, advertising agencies and third party distributors. While these groups have different roles and functions, we think they should all be aware of our guidance. While the

primary responsibility for advertising material rests with the organisation placing the advertisement, a publisher may also have some responsibility for its content.

- 20 Many respondents expressed some concerns about applying our guidance to publishers. These concerns included:
- (a) that publishers are not experts on financial products, and are not properly equipped to assess the technical accuracy or appropriateness of representations made by a promoter to determine whether the representation is misleading or deceptive;
 - (b) that our proposed guidelines could impose an increased responsibility on publishers and, accordingly, there would be potential for conflict over different interpretations of what is misleading or deceptive, even where both the publisher and the advertiser have sought legal advice. This would have unnecessary financial implications with duplication of marketing compliance testing, and the likelihood that publishers who strengthen up their internal marketing compliance teams would pass that cost on to promoters. There were also likely to be practical difficulties (time constraints or deadlines) in applying the good practice guidance to publishers; and
 - (c) that publishers are currently subject to a number of advertising standards and codes and, accordingly, the industry is largely self-regulated. Further, the law adequately addresses the liability of publishers. Our guidance would effectively impose an onerous burden on publishers to police the accuracy of content in financial advertisements, which exceeds established legal principles in respect of publishers and their liability.
- 21 Some submissions agreed with our proposal that the good practice guidance should apply to publishers, but these submissions also stated that publishers should not have an obligation to assess whether an advertisement complies with the good practice guidance unless the publisher has contributed to the content of the advertisement or otherwise had an active involvement in the promotion of the financial product or advice service.

ASIC's response

As noted in our proposed guidance, 'it is a defence to a prosecution if the publisher received the advertisement for publication in the ordinary course of their publishing business and did not know, and had no reason to believe, that its publication would amount to an offence: s1044A, Corporations Act; s12GI(4), ASIC Act'.

It is not our intention to impose a higher level of regulation on publishers.

We have revised RG 234 to clarify our expectations in relation to publishers—that is, that we encourage publishers and media outlets who deal with advertisements for financial products and advice services to:

- understand their responsibilities when publishing advertisements; and
- refuse to publish, or cease publishing, an advertisement if we tell them the advertisement is the subject of regulatory action.

Audience

- 22 In CP 167, we proposed that:
- (a) advertisements should be capable of being clearly understood by the audience that might reasonably be expected to see the advertisements;
 - (b) advertisements should not state or imply that a financial product is suitable for particular types of consumers unless the promoter has assessed that the product is suitable for that class; and
 - (c) advertisements for complex products that are only appropriate for a limited group of consumers should not be targeted at a wider audience.
- 23 Some submissions commented that our proposed guidance was too strict in relation to an advertisement’s audience—that is, that it is unrealistic for ASIC to expect that an advertisement should be tested against the actual audience, rather than the target audience sought by the advertiser.
- 24 Some submissions also argued that our guidance should be confined to advertising to retail clients. This was to be consistent with the lesser level of protection provided to wholesale clients in the Corporations Act.

ASIC’s response

We have not amended our guidance on this issue.

We believe that it is appropriate for an advertisement to be assessed against the actual audience that might reasonably be expected to see it. While we acknowledge that an advertisement for a complex financial product aimed at the general public would not necessarily be misleading or deceptive, we have retained our guidance encouraging promoters to consider the complexity of the product when choosing the location of their advertisements.

Ratings

- 25 In CP 167, we proposed that, if an advertisement discloses a rating, the rating used should be properly explained, including the rating scale and where an investor can find out more information about the rating. We also proposed that, if ratings are used, the advertisement should state that ratings are only one factor to be taken into account when deciding whether to invest or take up a financial product.
- 26 Some respondents commented that this expectation was too onerous and could require too much space to be adequately covered in an advertisement.

ASIC's response

We have revised our guidance to state that, where a rating is used in an advertisement, the rating should be properly explained either in the advertisement itself or by including details of where an investor can obtain further information about the meaning of the rating and the rating scale: see RG 234.67.

Media-specific issues

- 27 In CP 167, we proposed that our guidance should apply to any advertising designed to inform consumers about or promote financial products or financial advice services, communicated through any medium, and that, where particular media raise specific issues in relation to misleading or deceptive advertising, we would include additional good practice guidance specific to that media.
- 28 We proposed to give good practice guidance to assist promoters in developing advertisements for specific media, including:
- (a) mass media, such as radio, television, newspapers, magazines and internet; and
 - (b) outdoor advertising.
- 29 Respondents generally agreed that our guidance should apply to advertising regardless of the medium—however, some respondents cautioned against adopting a ‘one size fits all’ prescriptive approach, which does not accommodate the variety of financial products and advice services and the media in which they may be advertised.

ASIC's response

We acknowledge that different advertising media will pose different challenges for ensuring that an advertisement is not misleading or deceptive. Our guidance does not apply prescriptive standards to the behaviour required for each advertising medium. Rather, our guidance sets out good practice principles, which apply generally to all forms of advertising—for example, promoters should consider the overall impression created by the advertisement.

Internet advertising

- 30 In CP 167, we proposed that:
- (a) internet advertisements should be self-contained. Consumers should not need to click through from an online advertisement to additional information on another website to ensure they are not misled; and
 - (b) promoters should consider the appropriateness of using new media channels for advertising if content limitations mean there is insufficient space to provide balanced information.
- 31 Respondents were concerned about our proposed guidance in relation to internet advertisements—particularly, the statements that internet advertisements should be ‘self-contained’ and that, if a promoter is unable to design a self-contained banner advertisement, the promoter should reconsider their desired message and whether to publish the advertisement using a different medium.
- 32 Most submissions said that our guidance on banner advertisements was particularly impractical and unrealistic and would restrict the use of new media. They noted that the space constraints of banner advertising meant that only limited information could be placed in the banner itself, making the expectation that it be self-contained unworkable. These respondents believed that banner advertisements adequately facilitate ‘click-through’ so that consumers may very easily obtain additional information about the advertised product.

ASIC’s response

We have modified our guidance to remove the expectation that advertisements be ‘self-contained’. Our guidance emphasises, however, that advertisers should consider the overall impression created by an internet banner advertisement when viewed for the first time and whether, by itself, this is misleading or deceptive: see RG 234.116. This guidance will also apply to advertisements through social networking and microblogging (e.g. Twitter).

As use of the internet for advertising continues to grow, consumers’ expectations and experiences in the online environment are evolving. We may adjust our guidance as we develop further regulatory experience and as internet advertising comes under further scrutiny by the courts.

Appendix: List of non-confidential respondents

- Abacus Australian Mutuals
 - Angas Securities Limited
 - ANZ
 - ASTRA Subscription Television Australia
 - Australian Association of National Advertisers
 - Australian Bankers' Association
 - Australian Finance Conference
 - Australian Financial Markets Association
 - Australian Online Advertising Industry
 - Burdish Marsh Partners
 - Canstar Cannex Pty Limited
 - Commercial Radio Australia
 - The Communications Council
 - Consumer Action Law Centre
 - Financial Planning Association of Australia
 - Financial Services Council
 - Financial Services Institute of Australia
 - Free TV Australia
 - Henry Davis York
 - Insurance Council of Australia
 - McCullough Robertson Lawyers
 - National Insurance Brokers Association of Australia
 - Outdoor Media Association
 - Perpetual Limited
 - Publishers' Advertising Advisory Bureau
 - RateCity
 - Westpac Group
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