



**ASIC**

Australian Securities & Investments Commission

## REPORT 313

# Response to submissions on CP 178 Advertising credit products and credit services

November 2012

### **About this report**

This report highlights the key issues that arose out of the submissions received on Consultation Paper 178 *Advertising credit products and credit services: Additional good practice guidance* (CP 178) and details our responses on 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* (RG 234).

Examples in this report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview/Consultation process

- 1 We published Regulatory Guide 234 *Advertising financial products and advice services: Good practice guidance* (RG 234) in February 2012. RG 234 sets out good practice guidance to help promoters comply with their legal obligations to not make false or misleading statements or engage in misleading or deceptive conduct.
- 2 Our guidance in RG 234, as published in February 2012, applies to all financial products under the *Australian Securities and Investments Commission Act 2001* (ASIC Act), which includes credit facilities. However, it focused primarily on advertising of investment and risk products and financial advice services.
- 3 We noted in RG 234 at the time of its publication that different considerations apply for advertising of credit products and services, so we would issue additional guidance in relation to credit. In general, many of the issues relating to misleading or deceptive advertising for these products and services also apply to credit products and credit services.
- 4 We published Consultation Paper 178 *Advertising credit products and credit services: Additional good practice guidance* (CP 178) in June 2012 to provide additional good practice guidance in relation to credit.
- 5 In developing our additional guidance on credit advertising, we found that most of our existing guidance in RG 234 can be readily applied to an expanded range of credit products and services, and need only be supplemented with limited additional guidance and examples that illustrate the guidance in the context of credit products and services. These additional examples and guidance are based on our experiences in the consumer credit jurisdiction (e.g. our proposed guidance on comparison rates and responsible lending).
- 6 The additional guidance and examples relating to credit, which we proposed in CP 178 to include in RG 234, cover the following areas:
  - (a) balanced messages about the returns, features, benefits and risks of the product or service, including warnings, disclaimers, qualifications and fine print;
  - (b) fees and costs;
  - (c) interest rates;
  - (d) comparison rates;
  - (e) product suitability claims in advertisements, including responsible lending;
  - (f) nature and scope of credit assistance; and
  - (g) restricted terminology ('independent', 'impartial' and 'unbiased'; 'financial counsellor'; and 'reverse mortgage').

## Responses to consultation

- 7 We received 10 submissions to CP 178 from financial services and credit providers and industry associations, consumer groups and publishing stakeholders. We are grateful to respondents for taking the time to provide us with their comments.
- 8 This report highlights the key issues that arose out of the submissions received on CP 178, and our responses to those issues. Feedback received on CP 178 was used to finalise our guidance, which is published in an updated version of RG 234. Where relevant, this report explains where we have modified key aspects of the policy proposed in CP 178 in producing our final guidance.
- Note: All paragraph references in this report to RG 234 are to the updated version of our guidance released in November 2012.
- 9 Generally, respondents were supportive of the proposed additional guidance in relation to misleading or deceptive advertising of credit products and 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.
- 10 For a list of the non-confidential respondents to CP 178, see the appendix. Copies of these submissions are on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 178.

## B Response to submissions on CP 178

### Key points

This section outlines key issues raised in submissions on CP 178, and our responses to those issues. It covers:

- prominence of the comparison rate;
- interest rates;
- consumer leases;
- internet advertising;
- comparison rate warnings; and
- obligations under the Credit Enhancements Act.

### Prominence of the comparison rate

- 11 The National Credit Code requires an advertisement to contain a comparison rate if it contains an interest rate. The comparison rate must ‘not be less prominent’ than the interest rate: s164. In CP 178, we proposed to give guidance that a comparison rate is likely to be less prominent than the advertised interest rate where:
- (a) it is smaller in size or faded in colour when compared to the interest rate;
  - (b) if an interest rate is published online, a consumer is required to ‘click through’ or additionally do something (such as move their cursor over the interest rate) to view the comparison rate; or
  - (c) the displayed comparison rate is not in close proximity to the displayed interest rate.
- 12 Some respondents requested additional guidance on how we will administer the requirement that a comparison rate be ‘not less prominent’ than the annual percentage rate. In particular, they sought clarification of our guidance about the size or colour of the comparison rate.

#### *ASIC’s response*

Our intention in relation to prominence was not to require that the comparison rate and the interest rate be exactly the same in font size and colour. We accept that an advertiser may still comply with their legal requirements even though they may wish to set out the comparison rate and the interest rate differently for aesthetic or branding reasons.

We will include additional guidance that ensuring that the comparison rate is no less prominent than the interest rate does not necessarily mean that they must be presented identically—for example, both in the same colour and against an identical background.

However, if the interest rate is bright and the comparison rate substantially less vivid by comparison, or blended into the background because of a lack of colour differentiation, then even if they are shown in the same font size it is likely the comparison rate would be considered less prominent: see RG 234.67–RG 234.68.

## Interest rates

- 13 In CP 178, we proposed to include an example illustrating that, if an advertisement states that a discount interest rate will apply for a short time at the beginning of a loan (e.g. a honeymoon rate or interest-free period), the advertisement should also state, in an equally prominent manner, how long the discount rate will apply to the loan and what the interest rate will revert to at the end of the discount period (e.g. ‘After 6 months, the applicable rate will be our standard variable rate, currently 12.99% p.a.’).
- 14 Some submissions commented that there should not be a requirement that an advertisement for a discount interest rate must in all cases include the reversion rate. These submissions also questioned the need for the discount period and the reversion rate to be ‘equally prominent’ to the discount rate. One respondent suggested that it should be sufficient for this information to be provided in the body of the advertisement or through a disclaimer, rather than stated with equal prominence to the headline claim.

### *ASIC’s response*

Our overall policy objective is that advertisements should give a ‘balanced message’ about the product or service. This does not mean that an advertisement should include all information about a product or service, but the information that it does provide should not create an unrealistic expectation for consumers.

We will provide guidance that if an advertisement includes details of a discounted interest rate or fees, it should state, with equal prominence, the period for which the discount applies.

The advertisement should also describe what the interest rate or fee reverts to (e.g. the standard variable rate), but this need not be stated with equal prominence as the discount rate or fees. The degree of prominence required would depend on any unusual features of the discount rate or period.

For example, if the advertisement is for a honeymoon interest rate on a home loan and the reversion rate is something other than the lender’s standard variable rate, or if the advertisement is for a discount interest rate for a balance transfer on a credit card and the reversion rate is the higher cash advance interest rate rather than the standard purchase interest rate, we would expect this to be stated more prominently.

The advertisement need not state the current amount of the discount rate or fees, unless the advertisement puts emphasis on savings that would be obtained during the discount period only, but without clarifying that these savings would not continue during the entire period of the loan: see RG 234.62–234.64.

## Consumer leases

- 15 In CP 178, we proposed to include an example, in the ‘target audience’ section of RG 234, illustrating our guidance about the suitability of a product for a particular audience.

**Example 44: Misrepresenting the nature of the product**

An advertisement by a motor vehicle dealer may promote the availability of ‘finance’ for consumers seeking to purchase a vehicle. The advertisement should not state or imply that the finance will be appropriate for a person seeking to purchase a vehicle if the finance promoted, or the option that delivers an advertised price or payment amount, is in fact a lease.

- 16 Some respondents were concerned that requiring the product to be described as a ‘lease’, rather than a loan, would effectively reduce the commercial appeal of these types of arrangements. They argued that, although finance leases do not provide a formal option under the terms of the lease for the consumer to purchase the goods at the end of the lease period, there is a well established informal practice where vendors will generally sell the goods to the consumer at a nominal or reduced price at the end of the lease period. They argued that the existence of this informal practice means that a finance lease is functionally equivalent to a loan, and so should be allowed to be advertised using similar terms such as ‘finance’ or ‘loan’.

*ASIC’s response*

We believe that many consumers may not be aware of the difference between a lease and a loan, so that an advertisement for ‘finance’ would be misleading if the consumer wished to use the finance to purchase the goods, but was instead offered a lease.

While the informal approach may be standard practice in some industry sectors, it does not reflect the legal obligations of the parties. There is a particular risk that vulnerable consumers may not be able to obtain the goods at the end of the lease period.

Confusion between leases and loans arises in other areas also, such as rental arrangements that give the impression of being a sale by instalments, but are actually a lease where the consumer does not necessarily have the right to purchase the rented goods at the end of the rental period.

We propose to retain our guidance about misrepresenting the nature of the product, as well as illustrate this issue in other contexts than just motor vehicle finance: see Example 8 in RG 234.

## Internet advertising

- 17 Our guidance in RG 234 states that if warnings, disclaimers and qualifications are required, they should not be inconsistent with other content in the advertisement, including any headline claims. They should also have sufficient prominence to effectively convey key information to a reasonable member of



the audience on first viewing of the advertisement. Statements referring the consumer to another website or webpage, or a document such as a Product Disclosure Statement (PDS), prospectus or contract, will not be sufficient to correct a misleading or deceptive headline claim: see RG 234.48–RG 234.49.

- 18 RG 234 also states that the more that a qualification is required to balance the information contained in the headline claim, the more prominently placed the qualification should be: see RG 234.47.
- 19 Some respondents argued that if the product and conditions are complex, some content will not work in online banner advertising and may not be appropriate where powerful claims are made that require prominent disclosure of qualifications. They suggested that the guidance should clarify that the type of qualification used depends on how surprising are the terms and conditions.
- 20 One respondent argued that an online advertisement that allows a consumer to ‘click through’ to further information is not a limitation but an enhancement for consumers and businesses that use electronic media for advertising. There is no detriment to a customer’s ability to access knowledge about a product or understanding of its application because customers are familiar with the features and operations of these newer forms of media.

#### *ASIC’s response*

We acknowledge that an advantage of online media is that it can incorporate more engaging forms of communication and can be interactive. This can make information more attractive and easier to read and understand for consumers. We will provide additional guidance that providing a facility for a consumer to access additional information, such as by ‘click through’ to another webpage, can be an effective way of providing additional information and helping the consumer engage. However, providing a facility for a consumer to access additional information such as a ‘click through’ cannot be used to correct a misleading overall impression in the advertisement.

Promoters should be particularly careful if using a facility for a consumer to access additional information where an advertisement is on a third party website, rather than an advertisement on the product or service provider’s own website. Where a consumer views an advertisement on a third party website, the consumer will have less motivation to actually access that additional information, as doing so will necessarily interrupt their current online activity.

## **Comparison rate warning**

- 21 Our guidance in RG 234 says that warnings or notices that are required to be included in an advertisement under various provisions of the *Corporations Act 2001* (Corporations Act) or other laws, rather than because they qualify a headline claim, do not necessarily need to be as prominent as the headline claim.

- 22 In CP 178 we proposed to include the following guidance about the inclusion of the comparison rate warning in an advertisement:

While the comparison rate warning reminds consumers to look at both the cost and features of a loan, we acknowledge that the rate itself will be of primary interest. Accordingly, the comparison rate warning need not be as prominent as the headline figure in the advertisement. However, the warning must be given in the same form as the comparison rate is given (i.e. in spoken or written form) unless the credit advertisement is on television, the internet or other electronic display medium: reg 99, National Credit Regulations.

- 23 Some respondents suggested that the regulatory guide clarify that, when an internet banner advertisement is used, the interest rate and comparison rate should be included in the banner (and should be of equal prominence)—however, the statutory comparison rate warning could be included on a ‘click through’ landing page.

#### *ASIC's response*

We acknowledge that consumers are primarily interested in the comparison rate itself as a rough guide to the overall cost of the loan; the comparison rate warning gives additional details about how the comparison rate is calculated, but the rate itself will be of primary interest to consumers.

We will provide additional guidance that, where an advertisement is in the form of an online banner advertisement, it may not always be possible to include the warning on the same page as the comparison rate. It will be sufficient that, at a minimum, the advertisement contains a clear link or reference to the warning, and the reference should be as proximate to the comparison rate as possible. The reference should use clear language to help make the consumer aware that it is important information they should consider before making a decision about the product (e.g. ‘comparison rate warning’ or ‘important information about the comparison rate’): see RG 234.71.

## Obligations under the Credit Enhancements Act

- 24 The *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Credit Enhancements Act) introduces a number of new regulatory obligations for providers of short-term and small amount credit contracts. These new obligations include a prohibition on providing credit assistance, restrictions on rollover of the credit contract, and limitations on fees and interest that may be charged.
- 25 Some respondents requested ASIC provide specific guidance on these new obligations. The guidance sought generally related to the application of the Credit Enhancements Act, rather than issues relating specifically to advertising.
- 26 The main issues under the Credit Enhancements Act on which guidance was sought were as follows:

- (a) The Credit Enhancements Act imposes restrictions on permitted fees and charges associated with small amount credit contracts. For example, respondents sought guidance on the use of terms such as fixed-fee, charges, default fees and one low fee—and how these costs may differ from costs based on interest rates. Our guidance in RG 234 says that, where a fee or cost is referred to in an advertisement, it should give a realistic impression of the overall level of fees and costs a consumer is likely to pay: see RG 234.54.
- (b) The Credit Enhancements Act imposes a maximum interest rate cap of 48% on small amount credit contracts. Respondents sought guidance on how this interest rate cap should be calculated.
- (c) The Credit Enhancements Act requires providers of short-term and small amount credit contracts to give borrowers information about the availability of low-interest or no-interest loans. Respondents were concerned that dissemination of this information through these lenders may create a misleading impression in the minds of consumers that they will be successful in gaining a low-interest or no-interest loan when the reality is that very few applicants are eligible under these schemes.

27 We note that the concerns raised by respondents on this issue relate to the application of the Credit Enhancements Act more broadly, rather than just concerns about advertising.

28 In CP 178 we proposed to include guidance on some of the new provisions of the Credit Enhancements Act where they relate to advertising, such as the use of the restricted terms ‘financial counsellor’, ‘independent’ and ‘reverse mortgage’. We have retained this guidance in RG 234 (see RG 234.98–RG 234.100) because it is important to highlight that some terms are restricted by the National Credit Act and care should be taken with their use in advertising.

#### *ASIC's response*

We will not provide specific guidance in RG 234 on the obligations under the Credit Enhancements Act.

RG 234 is intended to provide general guidance for providers of all types of financial and credit products and services. Where RG 234 includes examples relating to specific products or services, these examples are intended to be illustrative of the general principles about misleading or deceptive advertising, rather than specific guidance for providers of particular products or services.

We will continue to monitor compliance with the Credit Enhancements Act during its implementation to determine whether further guidance is necessary. If it is necessary to provide guidance on the obligations under the Credit Enhancements Act (or other guidance for credit providers that is not related to advertising), we will consider separately communicating this guidance to industry.

## Appendix: List of non-confidential respondents

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- Australian Bankers' Association
  - Australian Finance Conference
  - Consumer Action Law Centre
  - Consumer Credit Legal Centre
  - Finance Industry Delegation
  - Mortgage & Finance Association of Australia
  - National Financial Services Federation
  - Publishers' Advertising Advisory Bureau
  - The Westpac Group
-