ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 39

Licensing: Financial product advisers—conduct and disclosure

December 2002

Your comments

You are invited to comment on the proposals and issues for consideration in this paper, including the explanation sections. All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential.

Comments are due by 21 February 2003 and should be sent to:

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You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

What this policy proposal is about

1 This policy proposal paper considers how certain conduct and disclosure obligations in Part 7.7 of the *Corporations Act 2001* ("Corporations Act") and the relevant regulations apply to the provision of financial product advice to retail clients.

2 It sets out our proposed policy for administering the law in relation to:

(a) providing financial product advice **(Section A)**;

(b) preparing and providing a Financial Services Guide ("FSG") **(Section B)**;

(c) preparing and providing suitable personal advice **(Section C)**; and

(d) preparing and providing a Statement of Advice ("SOA") **(Section D).**

3 These or similar topics were previously covered by:

(a) Policy Statement 121 *Investment advisory services: retail investor protection requirements* [PS 121]; and

(b) Policy Statement 122 *Investment advisory services: the conduct of business rules (s849 and s851)* [PS 122].

4 In this paper, we do not consider or provide guidance on the full range of conduct and disclosure obligations imposed by Part 7.7. Further, the proposals in this paper do not deal with:

(a) Part 7.7 obligations in so far as they may apply to classes of financial service other than financial product advice (eg dealing);

(b) laws in detail (other than Part 7.7) which may be relevant to the provision of retail financial product advice;

(c) financial product advice provided to non-retail clients;

(d) the definition in detail of "financial product advice" or "financial product"; or

(e) transitional issues.

5 This paper should be read in conjunction with the policy statements and guides we have previously issued on how we administer the new licensing regime, in particular, *Licensing: The scope of the licensing*

regime: Financial product advice and dealing – An ASIC guide (November 2001, updated November 2002). We suggest you also consider:

(a) Policy Statement 164 *Licensing: Organisational capacities* [PS 164];

(b) Policy Statement 167 *Licensing: Discretionary powers and transition* [PS 167];

(c) Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* [PS 168]; and

(d) *Licensing and disclosure: Making the transition to the FSR regime — An ASIC guide* (October 2001, updated November 2002).

6 The proposals in this paper are proposals only: they do not constitute final ASIC policy.

7 Until our policy is finalised (eg in a formal policy statement), we will:

(a) be guided by the analysis in this paper in our interpretation of the law; and

(a) consider applications for relief in relation to topics covered by this paper on a case-by-case basis. We will assess such applications for relief under Policy Statement 51 *Applications for relief* [PS 51] and Policy Statement 167 *Licensing: Discretionary powers and transition* [PS 167], taking into account the proposals in this paper (in particular, policy proposal paragraphs B3–B6).

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

Important note: The proposals, explanations and examples in this paper do not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act will apply to you. It is your responsibility to determine your obligations under the Corporations Act and regulations. The proposals, explanations and examples in this paper are at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive. You should treat the proposals, explanations and examples only as an indication of how we are thinking at this stage.

This paper is based on the legislation and regulations as at 12 December 2002. We will take into account any changes in the legislation or regulations in the finalisation of this policy. In particular, we will review our proposals, if necessary, in light of any draft regulations published in the coming months. For example, we may not proceed with the some or all of the relief proposed in this paper if regulations are made substantially covering the same topics. We also suggest that readers consider the draft regulations (if any) published by the Commonwealth Treasury (see www.treasury.gov.au).

Contents

Policy proposals

In this paper, we have four groups of policy proposals. For each group, we set out the proposals and identify issues we would like you to comment on. When necessary, we have also included explanations of our proposals.

Special note: There may be other issues that you consider important. *We are keen to hear from you on our general approach and what other issues you consider important, as well as your answers to our specific questions.*

A Providing financial product advice

Policy proposal	Your feedback
What is the difference between general advice and personal advice?	
A1 According to s766B(3), financial product advice is personal advice if (among other things) a reasonable person might expect the adviser to have considered at least one aspect of the client's personal circumstances (ie their objectives, financial situation or needs). Whether a reasonable person might expect the adviser to have considered at least one aspect of the client's personal circumstances is a factual question.	**A1Q1** Should ASIC provide guidance about the meaning of "objectives, financial situation or needs"? If so, please give details of the suggested guidance.
A2 In administering the law, we propose to take the following factors into account in considering whether financial product advice is personal advice within the meaning of s766B(3), rather than general advice: **(a)** did the adviser offer to provide personal advice (eg in an FSG or other material given to the client before the advice was provided); **(b)** does the adviser have an existing relationship with the client where personal advice is regularly provided to the client; **(c)** did the client request personal advice (including requesting advice as to what decision the client should make); **(d)** did the client give the adviser information about their personal circumstances; **(e)** was the advice directed towards a named or readily identifiable client or	**A2Q1** Are these appropriate matters for ASIC to take into account? Why or why not? **A2Q2** Are there any other matters that ASIC should take into account here? Please give details. **A2Q3** In relation to subparagraph (d), does it matter whether the adviser requested the information? Why or why not?

Policy proposal	Your feedback
clients; **(f)** does the advice appear on its face to be tailored to the client's personal circumstances (eg does it refer to information or assumptions specific to the client); and **(g)** does the advice contain or was it accompanied by the general advice warning (s949A). Note: These factors are not exhaustive, nor are they determinative. No one factor will determine whether advice is, or is not, personal advice. Whether advice is personal advice will always depend on the facts and circumstances.	

Explanation

What are the obligations under Part 7.7?

1 Part 7.7 requires a providing entity to comply with certain conduct and disclosure obligations when it provides financial product advice to retail clients. These conduct and disclosure obligations vary depending on whether the advice is general advice or personal advice.

> Note 1: Part 7.7 applies to all financial services. However, this paper considers Part 7.7 only in relation to financial product advice.
>
> Note 2: Part 7.7 applies once a providing entity (or where the providing entity is an authorised representative, the authorising licensee) obtains an Australian financial services (AFS) licence. For a discussion of the transitional provisions applying to Chapter 7 of the Corporations Act (including the licensing and product disclosure regimes), see *Licensing and disclosure: Making the transition to the FSR regime — An ASIC guide* (October 2001, updated November 2002).

General advice

2 For general advice, the key obligations are:

(a) preparing and providing a Financial Services Guide ("FSG") (see Section B); and

(b) ensuring that a general advice warning is given to the client (s949A).

3 Under s949A, whenever general advice is provided to a retail client, the providing entity must warn the client that:

> Note: See paragraph 5 of this Explanation for a discussion of who is the providing entity.

(a) the advice has been prepared without taking into account the client's objectives, financial situation or needs;

> Note: If the advice had taken into account one or more of these matters, the advice would be personal advice, not general advice.

(b) the client should therefore consider the appropriateness of the advice, in the light of their own objectives, financial situation or needs, before acting on the advice; and

(c) if the advice relates to the acquisition of a financial product, the client should consider the Product Disclosure Statement ("PDS") for that product before making any decision.

Personal advice

4 For personal advice, the key obligations are:

(a) preparing and providing a Financial Service Guide ("FSG") (see Section B);

(b) preparing and providing suitable personal advice (see Section C);

(c) if necessary, warning the client that the personal advice is based on incomplete or inaccurate information (s945B: see paragraphs 15–16 of the Explanation in Section C); and

(d) preparing and providing a Statement of Advice ("SOA") (see Section D).

Who is the "providing entity"?

5 Most of the obligations in Part 7.7 are imposed (directly or indirectly) on the "providing entity". Either an authorised representative of the licensee (if any) or the licensee itself is the providing entity. The table shows how this may work in different situations: see s941A, 941B and 944A.

Person giving advice	Providing entity
Licensee (eg a natural person who holds an Australian financial services (AFS) licence)	Licensee
Representative of a licensee (but not an authorised representative)	Licensee
Authorised representative of a licensee	Authorised representative

Note 1: See "Key terms" for a definition of "authorised representative". We maintain a register of authorised representatives of licensees: see our website (www.asic.gov.au).

Note 2: Ultimately, the licensee is responsible for compliance with Part 7.7. Even where an authorised representative is the providing entity, the authorising licensee has an overriding duty to ensure that the advice is provided in compliance with the law (this is in addition to the authorised representative's obligation to ensure their own compliance with the law). The licensee is obliged to take reasonable steps to ensure that their representatives comply with financial services laws generally, and more specifically, to ensure that the FSG, suitability and SOA obligations are complied with: see s912A, 945A, 952H and 953B. Where an authorised representative is the providing entity, the licensee will generally be subject to potential civil and criminal liability for any breach of the provisions of Part 7.7 by the authorised representative.

What is the meaning of "financial product advice"?

6 A recommendation or a statement of opinion, or a report of either of those things, constitutes financial product advice if it:

(a) is, or could reasonably be regarded as being, intended to influence a person or persons in making a decision about a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; and

(b) is not exempted from the definition of "financial product advice" (s766B).

Note: For a detailed discussion of financial product advice, factual information and some relevant exemptions, see *Licensing: The scope of the licensing regime: Financial product advice and dealing – An ASIC guide* (November 2001, updated November 2002).

What is the meaning of "retail client"?

7 The meaning of "retail client" depends on:

(a) the type of product the advice relates to; and

(b) the nature of the client (who the advice is for and how the product will be used) (s761G).

The table below shows how this may work in different situations.

Type of financial product	Retail client
Most general insurance[1]	The client receiving the advice *if*: (a) they are a natural person; or (b) the product is or would be used in connection with a small business (s761G(5) and (12)).
Superannuation or RSA	The client receiving the advice *unless* they are: (a) a trustee of a large superannuation fund; or (b) an RSA provider (s761G(6)).

[1] General insurance products for the purpose of this definition are motor vehicle, home building, home contents, sickness and accident, consumer credit, travel, and personal and domestic property insurance: reg 7.1.11–7.1.17. Section 761G(5)(b)(viii) allows for regulations to include other general insurance products – no such regulations have been made as at the date of publication, 12 December 2002.

Type of financial product	Retail client
Other	The client receiving the advice *unless*: (a) the price for the provision of the product or the value of the product is above the prescribed amount (reg 7.1.11–7.1.26); (b) the advice is provided for use in connection with a business that is not a small business (s761G(12)); (c) the client has net assets or net income in excess of the prescribed amounts (reg 7.1.28); or (d) the client is a professional investor (eg a licensee or APRA-regulated body: s9) (s761G(7)).

What is the difference between general advice and personal advice?

8 All financial product advice is either general advice or personal advice. Under the Corporations Act, personal advice has particular characteristics. The table below sets of the definitions of personal and general advice.

Personal advice	General advice
Financial product advice given or directed to a person (including by electronic means) in circumstances where: (a) the adviser has considered one or more of the client's objectives, financial situation and needs ("personal circumstances"); or (b) a reasonable person might expect the adviser to have considered one or more of those matters (s766B(3)).	All other financial product advice: s766B(4).

9 Policy proposal paragraphs A1–A2 set out our approach to considering whether financial product advice is general advice or personal advice.

What has the adviser considered?

10 An adviser need not consider all aspects of the client's personal circumstances (eg the client's objectives, financial situation and needs) for the advice to be personal advice. It is enough that either:

(a) at least one aspect of the client's personal circumstances was *actually* considered; or

(b) regardless of whether they were in fact considered, a reasonable person might *expect* the adviser to have considered at least one aspect of the client's personal circumstances (s766B(3)).

11 Whether the adviser has considered at least one aspect of the client's personal circumstances is a factual question. It depends on what the adviser actually considered in the process of preparing and giving the advice.

What might a reasonable person expect the adviser to have considered?

12 Whether or not a reasonable person might expect the adviser to have considered at least one aspect of the client's personal circumstances is also a factual question. However, it looks beyond what the adviser *actually* considered in the process of preparing and giving the advice.

13 Policy proposal paragraph A2 sets out factors that we believe are relevant when considering whether a reasonable person is likely to expect that the adviser has taken at least one aspect of the client's personal circumstances into account: s766B(3)(b).

Other circumstances

14 Advice may be personal advice even where:

(a) the advice is not given during a face-to-face meeting (eg where advice is given by telephone, in writing or by electronic means);

(b) the adviser has not had direct contact with the client and has not directly considered the objectives, financial situation or needs of that individual client (eg where advice is provided by a third person based on a script or computer software prepared by the adviser);

(c) the adviser is permitted to give advice on only one, or on a very limited range of financial products. However, in this case, the application of the suitability obligations applying to the

advice will vary (see policy proposal paragraph C9 and paragraphs 24–25 of the Explanation in Section C);

(d) the person to whom it is given or directed is not a natural person (eg where the client is a body corporate); or

(e) the adviser did not (subjectively) intend to provide personal advice (eg where the adviser has *in fact* taken into account at least one aspect of the client's personal circumstances).

Note: An adviser is not obliged to provide personal advice. They may choose to decline to provide personal advice (and would be required to do so if they are not authorised to provide personal advice).

What other laws apply?

15 All licensees are subject to the general obligation to conduct their business "efficiently, honestly and fairly": s912A(1)(a). We see the obligation in s912A(1)(a) as both:

(a) a stand-alone obligation that a licensee must satisfy; and

(b) an obligation that encompasses other obligations under an Australian financial services licence (see paragraph [PS 164.20] of Policy Statement 164 *Licensing: Organisational capacities*).

16 Advisers who provide financial product advice should also be aware of their common law obligations. Depending on the context in which the advice is given, these may include a duty to:

(a) fully disclose any conflict of interests that may affect the advice they provide; and

(b) adopt due care, diligence and competence in preparing advice to ensure that it is suitable for the purpose for which the clients to whom it is provided are reasonably likely to use the advice.

Note 1: "… Whenever a ... person who holds himself out as having expertise in advising on investments is approached for advice on investments and undertakes to give it, in giving that advice the adviser stands in a fiduciary relationship to the person whom he advises. The adviser cannot assume a position where his self-interest might conflict with the honest and impartial giving of advice ...": *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 370, per Brennan J at 385. Brennan J then goes on to explain the "heavy" duty upon an investment adviser who "proposes to offer the client an investment in which the adviser has a financial interest" and the steps (including disclosures) that such an adviser would need to take.

Note 2: These common law obligations may apply to wholesale advice and advice provided by persons who are exempt from the requirement to hold an AFS licence.

17 Failing to comply with these obligations may amount to a failure to conduct their financial services business "efficiently, honestly and fairly". This may give ASIC the grounds for exercising its administrative powers to revoke or suspend a licence after a hearing: s915C.

18 Where financial services (including financial product advice) are provided to retail clients, the *Australian Securities and Investments Act 2001* implies a warranty into the relevant contracts that:

(a) the services will be rendered with due care and skill; and

(b) where the purpose for which the services are being obtained is made known, the services will be reasonably fit for that purpose (s12ED).

B Preparing and providing an FSG

Note: This obligation applies to both general advice and personal advice.

Policy proposal

When must you provide an FSG?

B1 In administering the law, we will take the view that an FSG generally does not need to be provided *before* financial product advice is provided to a retail client where:

(a) the client requests that the advice be provided urgently (eg immediately or within a short period of time); and

(b) the advice is provided otherwise than in person (ie through a remote communication method like a telephone call) (s941D(2)).

In such cases, the FSG must be provided as soon as practicable after the advice has been provided and, at the latest within 5 days of providing the advice (unless there is no reasonable opportunity to provide the FSG).

B2 Where the providing entity does not know and has no reasonable way of finding out the name or contact details of the client, it will generally not be possible for an FSG to be given to that client. In such a case, we do not consider that a failure to give that client an FSG (at all) would amount to a breach of the FSG requirements: s940B.

Note: Some examples include financial product advice provided:

(a) during the course of a telephone call where the client declines to give their contact details; or

(b) in a media release.

Your feedback

B1Q1 Are there any practical problems with this interpretation of s941D? Please give details.

B1Q2 Is any relief needed to achieve this result? Please give details.

B2Q1 Are there any practical problems with this interpretation of s940B? Please give details.

B2Q2 Is any relief needed to achieve this result? If so, please give details.

B2Q3 Are there any other circumstances where the providing entity may not have a "reasonable opportunity" to provide an FSG? Please give reasons and your suggested guidance.

Policy proposal	Your feedback
What is our proposed relief?	
Product issuers	
B3 We propose to give product issuers (and their representatives) relief from the obligation to provide an FSG where: **(a)** they provide general advice in relation to a financial product that they issue (or a class of products that includes a product that they issue); and **(b)** the advice is not provided during a telephone call or meeting.	**B3Q1** Is this relief appropriate? Why or why not? **B3Q2** Are there other situations in which similar relief is needed? If so, what are they and why is it justified? **B3Q3** Are there any practical problems with the application of the limitation in subparagraph (b)? If so, how else could the relief be limited to ensure that consumers are not materially disadvantaged?
B4 The relief described in policy proposal paragraph B3 is likely to be conditional on the general advice including or being accompanied by: **(a)** a statement encouraging potential clients to consider the disclosure of remuneration, commissions and other benefits in the Product Disclosure Statement ("PDS") relating to the product; and **(b)** information about: **(i)** who is providing the advice (by name or by role) and their relationship to the issuer; **(ii)** who is the issuer of the product (including the fact that they are the issuer); and **(iii)** information about any benefits and associations that relate to the adviser as well as those that relate	**B4Q1** Are such conditions adequate to ensure that the relief does not materially disadvantage consumers? If not, why not? **B4Q2** Are there any situations in which such conditions could not be reasonably complied with? If so, give details and other means of ensuring consumers are adequately protected.

Policy proposal

to the issuer.

Note: The requirement to provide the general advice warning would also apply: s949A.

Personalised FSGs

B5 We propose to give relief in certain circumstances so that a natural person authorised representative who is an employee of a body corporate does not need to give their own FSG. The proposed relief will apply where:

(a) the employee instead gives an FSG prepared by their employer (the body corporate);

(b) both the employee and body corporate are authorised representatives of the same licensee; and

(c) the financial product advice is such that the identity of the employee is not likely to be material to the client's decision about whether to obtain the advice or act on it.

Note: For example, this relief could apply to:
(a) call centre staff receiving telephone calls from clients; and
(b) counter staff at rural outlets such as newsagents or pharmacies answering client queries,
where clients would have little interest in the identity of the employee and the employee is providing standardised advice.

Your feedback

B5Q1 Is this relief appropriate? Why or why not?

B5Q2 Should this relief be limited to the provision of general advice? Why or why not?

B5Q3 Are there other situations where similar relief is appropriate? Please give details and reasons why you believe relief is appropriate.

Policy proposal

B6 The relief described in policy proposal paragraph B5 is likely to be conditional on:

(a) the body corporate having reasonable grounds to believe that the employee will not be materially influenced by any benefits (monetary or otherwise) in relation to the advice;

(b) the advice being of a generic nature such that the body corporate has reasonable grounds to believe that the identity of the employee is not material to the client's decision about whether to obtain the advice or act on it; and

(c) the FSG prepared by the body corporate containing:

(i) generic information about the natural person who is providing the advice (eg by description of role) and their relationship to the body corporate; and

Note: For example, the FSG could state that the advice is to be provided by an adviser employed by XYZ Limited.

(ii) generic information about any benefits and associations that relate to the adviser.

Note 1: For example, the FSG could describe the types and ranges of benefits that advisers employed by the body corporate generally receive.

Note 2: The body corporate would still be obliged to fully disclose benefits and associations that relate to the body corporate itself: s942C(2)(f) and (g).

Your feedback

B6Q1 Are such conditions adequate to ensure that the relief does not materially disadvantage consumers? If not, why not?

B6Q2 Are there any situations in which such conditions could not be reasonably complied with? If so, please give details and other means of ensuring consumers are adequately protected.

B6Q3 Are there practical problems with the conditions in subparagraphs (a) and (b)? If so, how else could the relief be limited so as to protect the interests of retail clients and ensure that relief is limited to cases where the identity of the adviser is immaterial?

Policy proposal

How must you provide an FSG?

B7 Where a providing entity decides to provide an FSG by making it available in a manner agreed to by the client, we consider that the providing entity must take reasonable steps to ensure that the FSG will in fact be readily available to the client by that means: s940C(1)(a)(iii). This would include asking the client, when seeking their agreement, whether the proposed means of providing the FSG will be readily accessible to them.

Note: For example, before making an FSG available by publishing it on a publicly available website, the product issuer should ask whether the client has ready access to the Internet and ensure they know where the FSG will be located.

Can you combine an FSG and PDS?

B8 In our view, the relevant provisions of the Corporations Act do not permit a combination of two or more of the following in one document:

(a) a Financial Service Guide ("FSG");

(b) a Statement of Advice ("SOA"); or

(c) a Product Disclosure Statement ("PDS").

At this stage, we have no specific proposals to give relief to permit a combination of two or more of the above in one document. However, we are interested in your feedback on this issue, in particular about whether there are any circumstances where relief to allow a combined FSG and PDS is appropriate.

Your feedback

B7Q1 Are there any practical problems with this interpretation of s940C? Please give details.

B7Q2 If making an FSG available through a publicly available website is not practical, what other method of providing the FSG should be permitted? Please give details (including how reasonable access to timely information can be assured).

B8Q1 Are there any practical problems with this interpretation of the legislation? Please give details.

B8Q2 Are there any circumstances where relief to permit the combination of two of more of these items (in particular, a combined FSG and PDS) in one document is appropriate? Please give details.

B8Q3 If so, what safeguards may be needed to ensure that consumers are adequately protected (eg presentation, timing, prominence and warnings)?

Policy proposal

What must you include in an FSG?

Information about remuneration, commissions and benefits

B9 In administering the law, we will take the view that an FSG should disclose in easy to understand language in one place:

(a) who will pay for the advice (eg the client or a product issuer);

(b) in what circumstances payments will be made;

(c) how the amounts will be calculated; and

(d) to whom payments will be made (s942B(2)(e) and 942C(2)(f)).

B10 Without limiting policy proposal paragraph B9 (and subject to policy proposal paragraphs B11 and B12), in administering the law, we will take the view that:

(a) the FSG should disclose whether the providing entity (or any associated persons) will be paid benefits (including commissions) by the client, the licensee or product issuer, or some combination of these;

Note: See "Key terms" for a definition of "associated person".

(b) where the amount of a particular benefit is not known at the time the FSG is given, the FSG need not disclose an actual dollar figure of this amount. However, the amount should be described by including ranges, comparisons, examples or formulas;

(c) where a fee is to be charged for the advice, the FSG should include the amount or hourly fee rate(s) in dollars;

Your feedback

B9Q1 Are there any practical problems with this interpretation of s942B and 942C? Please give details.

B10Q1 Are there any practical problems with this interpretation of s942B and 942C? Please give details.

B10Q2 Is there a level below which remuneration, commissions and other benefits need not be disclosed (eg a materiality threshold)? If so, what is the threshold and why?

Policy proposal

(d) where benefits (other than commissions) are payable to the providing entity (or any associated persons) by a third party in connection with the advice, the FSG should include a description of those payments and the range of benefits likely to be payable; and

(e) where a commission is to be paid to the providing entity (or any associated persons), the FSG should include an explanation of the range of commissions for different types of products with worked typical example(s) showing the dollar amount of initial and ongoing commissions which are likely to be received.

Note 1: For example, an explanation might say, "I receive 5–10% of the amount you invest, depending on the product recommended. For an investment of $10,000 in a typical equity fund, I receive $x upfront and $y per year. For an investment of $10,000 in shares, I receive $z upfront."

Note 2: A schedule of commission rates providing separate information for each of the products the providing entity may advise upon should not be included in the FSG.

B11 An FSG need disclose only that information about remuneration and other benefits that are *attributable* to the advice to be provided to the retail client: s942B(2)(e) and 942C(2)(f). Accordingly, in our view, benefits do not need to be disclosed where they are not (directly or indirectly) linked to or affected by the advice to be provided.

Note 1: Where an adviser receives an annual salary, it will generally be sufficient if the FSG discloses the fact that an annual salary is paid together with a general description of the factors (if any) that will influence its amount.

Note 2: For example, an adviser may be obliged to

Your feedback

B11Q1 Are there any practical problems with this interpretation of s942B and 942C? Please give details.

Policy proposal	Your feedback
disclose a "soft dollar" benefit (eg a prize or volume bonus) or pay-rise that they expect to receive if a certain level of sales are made.	
B12 In administering the law, we will take the view that where the providing entity is a licensee, the FSG need not contain separate information about the remuneration, commissions and other benefits of each representative of the licensee: s942B. Rather, the FSG should include a general explanation about how the licensee's representatives are remunerated: see policy proposal paragraph B10.	**B12Q1** Are there any practical problems with this interpretation of s942B? Please give details.
Note: For example, a licensee may disclose that their representatives are paid a combination of salary, commission and volume bonuses (for commissions and volume bonuses there should be a description of the relevant rates and ranges, and worked typical examples).	
Must you keep copies of FSGs?	
B13 To meet their obligations, we consider that licensees must ensure that copies of FSGs are kept for a reasonable period of time after they are provided.	**B13Q1** Are there any practical problems with this interpretation of the legislation? Please give details.
B14 We propose to impose a licence condition requiring licensees to keep (or cause or be kept) copies of FSGs for at least 7 years from the date that they are provided.	**B14Q1** In what circumstances (if any) is 7 years not appropriate? What would be a more appropriate period and why?
	B14Q2 In what circumstances (if any) is a licence condition not appropriate? How will the efficiency of dispute resolution and compliance processes be maintained in these circumstances?

Policy proposal	Your feedback
	B14Q3 Are there any practical problems with keeping records of FSGs for licensees that produce a large number of standardised FSGs? How might these problems be resolved at the same time as ensuring adequate records are maintained? Please give details.

Explanation

What is the purpose of an FSG?

1 A Financial Services Guide ("FSG") is a disclosure document provided to retail clients when considering whether to obtain financial services from a particular provider. Generally, providing entities must give an FSG to potential or new retail clients before providing them with financial services.

2 Retail clients may receive a number of different disclosure documents before or during a financial product transaction (eg the issue of a financial product). Each document has its own purpose and relates to a different stage of the transaction process, which can be characterised, from the perspective of a client, as:

(a) What service am I getting? (disclosure is in a Financial Services Guide);

(b) What advice am I getting? (disclosure is in a Statement of Advice if it is personal advice);

(c) What product am I buying? (disclosure is in a Product Disclosure Statement).

Note: For more information on the interaction between the three disclosure documents, see Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* [PS 168].

When must you provide an FSG?

3 An FSG is not required in a number of cases, including:

(a) where the financial product advice is general advice given in a public forum (on condition that information about remuneration, commissions and benefits is provided at the time the advice is provided) (s941C(4));

(b) where the advice relates to basic deposit products, non-cash payment products related to a basic deposit product, or travellers cheques (s941C(6) and reg 7.7.02(1));

(c) certain inquiries in relation to rental vehicles (reg 7.7.02(3));

(d) where the client already has an up-to-date FSG (s941C(1)); and

(e) where ASIC gives relief (see the proposed relief in policy proposal paragraphs B3–B6).

4 Where an FSG is required, it must generally be provided to the retail client as soon as practicable after it becomes apparent that financial

product advice is likely to be provided to that client: s941D(1). In any event, subject to s941D(2) and 940B, the FSG must be provided before the financial product advice is given.

5 An FSG may be provided later (eg after the financial product advice is provided) if:

(a) the client expressly asks for advice to be provided immediately (or by a specified time); and

(b) it is not reasonably practicable to provide the client with an FSG before the advice is provided (s941D(2)).

In such cases, the FSG must be provided as soon as practicable after the advice has been provided and, at the latest (subject to s940B) within 5 days of providing the advice: s941D(4). In any event, the information in s941D(3) must be provided at the time the advice is provided.

Note: Policy proposal paragraph B1 sets out our proposed view on when an FSG must be given in relation to urgent advice provided other than in person.

6 An FSG does not need to be provided if there is no reasonable opportunity to provide one: s940B. Policy proposal paragraph B2 sets out our proposed view on giving an FSG where the providing entity has no reasonable way of finding out the name or contact details of the client. We anticipate that this will normally only arise in the context of the provision of general advice.

7 An FSG contains important information a retail client should read and understand before deciding whether to obtain financial services from a providing entity. We encourage providing entities to:

(a) provide FSGs in enough time to give retail clients an adequate opportunity to consider the information they contain before deciding to whether to obtain financial services from the providing entity; and

(b) make their FSGs available to potential clients through their publicly available website (if any) and at their offices or branches.

What is our proposed relief?

Product issuers

8 Many product issuers provide general advice when they market their products. We propose to give issuers (and persons acting on their behalf) relief from the obligation to provide an FSG in connection with that advice: see policy proposal paragraphs B3–B4. This is consistent with the approach taken to general advice contained in a PDS or given

in a public forum (eg a television or radio advertisement): s766B(1) and 941C(4).

Personalised FSGs

9 To avoid unnecessary duplication, we also propose to give relief so that a natural person authorised representative who is an employee or director of a body corporate does not need to give their own FSG provided they give an FSG prepared by their employer (the body corporate) which contains certain information: see policy proposal paragraphs B5–B6. This relief is directed towards situations where:

(a) the identity of the individual adviser is immaterial to the client;

(b) the financial product advice is standardised or generic; and

(c) the adviser is relatively disinterested (ie not financially motivated in relation to the advice or whether it is acted on by the client).

How must you provide an FSG?

10 An FSG must be:

(a) provided either in writing or electronically; *and*

(b) either:

(i) delivered in person;

(ii) sent to the client or their agent; or

(iii) made available in a manner as agreed by the client (s940C(1)).

11 In our view, to make an FSG "available" to a client involves ensuring that the FSG is likely to be easily and practicably available to that client: s940C(1)(a)(iii). It is important that retail clients have timely access to the FSG and that any method of making the FSG available does not detract from this. As a consequence, in policy proposal paragraph B7, we suggest that, when seeking a client's agreement, providing entities take steps to ensure that the FSG will in fact be readily available to the client.

What must you include in an FSG?

12 An FSG must contain the information set out in the Corporations Act and regulations, which includes information about:

(a) the nature of an FSG and how it interrelates with other mandatory disclosure documents (eg the SOA and PDS);

(b) who will provide the service;

(c) how to contact the providing entity;

(d) how to provide instructions to the providing entity;

(e) the kinds of financial services offered;

(f) information about who the providing entity is acting for when providing the advice (where the providing entity is an authorised representative, this will include information about the authorising licensee);

(g) information about the means by which the providing entity (or any associated person) will be remunerated for the advice being offered to the retail client (including details of commissions);

Note: See "Key terms" for a definition of "associated person".

(h) details of any associations or relationships which might reasonably be expected to influence the providing entity in providing the advice; and

(i) details of the dispute resolution procedures that the licensee has in place (s942B(2) and 942C(2)).

13 Other information required to be contained in the FSG includes:

(a) where the providing entity provides execution-related telephone advice – certain information about obtaining a record of the advice (s942B(2)(g) and 942C(h));

(b) where the providing entity is acting under a binder – certain information about the binder and its significance (s942B(2)(i) and 942C(j));

Note: Generally, this would include an explanation of the circumstances in which the providing entity will be acting under a binder.

(c) where the providing entity (or authorising licensee) is a participant in a licensed market or clearing and settlement facility – a statement to that effect (s942B(2)(j) and 942C(k));

(d) information about any payments a third person has or will receive for referring another person to the providing entity (reg 7.7.04(1) and 7.7.07(1));

(e) where the providing entity is an authorised representative – the number allocated to them by ASIC (reg 7.7.05A); and

(f) where the advice is personal advice and commissions are expected to be received – a statement that the quantum or a description of the commissions will be found in the SOA (reg 7.7.04(2)(c) and 7.7.07(2)(c)).

Information about remuneration, commissions and benefits

14 An FSG must contain information about the means by which the providing entity (or any associated person) is remunerated for the advice being offered to the retail client (including details of commissions): s942B(2)(e) and 942C(2)(f). Where possible, information about remuneration, commissions and benefits should be disclosed in dollar amounts: reg 7.7.04(2) and 7.7.07(2). Where the total remuneration, commissions and other benefits is not able to be disclosed in a single amount, we consider that the FSG should set out dollar amounts of individual items where possible and should include worked typical example(s): see paragraph 14 of the Explanation in Section D.

15 Where the precise dollar amounts cannot be ascertained at the time the FSG is given, the FSG should include a description of the means by which the remuneration, commission or benefit will be calculated. This must be done "in a manner that is easy for the client to understand": reg 7.7.04(4) and 7.7.07(4). Possible methods that may be appropriate, depending on the circumstances, are:

(a) describing the range that the amount is likely to fall within (eg "we receive commissions between 2% and 4% of the amount invested");

(b) including a comparison between amounts payable in different circumstances (eg a comparison between the fees payable in relation to a typical investment in shares compared to a typical investment in a managed fund);

(c) including a worked example; or

(d) if fees are calculated according to an easily understood formula, describing the formula (eg "we charge a fee for our advice of $200 per hour") (reg 7.7.04(3) and (4)).

16 In policy proposal paragraphs B9–B12, we set out a number of specific items that we believe an FSG should contain in respect of different forms of remuneration. The description of the remuneration, commissions and benefits should include details of when and how the amount is paid. This would include details of who makes and who receives the payment.

17 Payments to reimburse the providing entity (or any associated person) for some of their operating costs (eg "back-office" payments, administration costs or marketing allowances) will need to be disclosed unless they are not directly or indirectly linked to or affected by the financial product advice: see policy proposal paragraph B11.

Information about associations or relationships with product issuers

18 An FSG must contain information about any associations or relationships between the providing entity (and associated persons) and product issuers that "might reasonably be expected to be capable of influencing" the providing entity in providing advice: s942B(2)(f) and 942C(2)(g). Where the providing entity is an authorised representative, this includes associations or relationships likely to influence the authorising licensee. As a matter of good practice, we suggest that providing entities that are themselves product issuers disclose this fact in their FSG.

> Note: For example, the FSG could include a statement that the licensee is owned by, or is a related company of, XYZ Limited (a product issuer).

Independence

19 An FSG must not describe the providing entity as independent unless the requirements of s923A are satisfied. These requirements cover a number of aspects of the providing entity's business, including remuneration, volume bonuses, gifts, benefits, restricted product lists, associations and relationships.

Clear, concise and effective

20 An FSG must be "worded and presented in a clear, concise and effective manner": s942B(6A) and 942C(6A). This is an overriding requirement, applying to all aspects of the FSG. To ensure that this requirement is met, we suggest providing entities take particular care with including extraneous information that is likely to confuse clients. Where extraneous material is included in an FSG, there are risks that:

(a) a retail client may not read, or may disregard or not understand, the importance of other information in the FSG; and

(b) a retail client might otherwise be misled or deceived.

21 To diminish these risks, we suggest that providing entities consider methods to ensure that extraneous material in a FSG is:

(a) clearly distinguishable from other information; and

(b) no more prominent than other information.

22 An FSG must not include material that is misleading or deceptive: s952B. In our view, an FSG that is not presented in a clear, concise and effective manner is more likely to be misleading or deceptive.

23 We encourage licensees and industry associations to develop guidelines and undertake consumer testing in relation to their FSGs. This may assist licensees to identify whether:

(a) the FSG is presented in a clear, concise and effective manner;

(b) the FSG is potentially misleading, deceptive or confusing; and

(c) there is additional information that consumers need.

24 We consider that providing entities should take into account the Good Disclosure Principles in Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* [PS 168] in preparing FSGs.

How up-to-date must information in an FSG be?

25 The information contained in an FSG must be up-to-date as at the time it is given: s941E. Where an FSG is no longer up-to-date, the providing entity will need to prepare an updated FSG for new clients. For existing clients, the licensee may either give them a new FSG or a supplementary FSG.

26 The obligation to give each retail client an FSG at or before the time that advice is provided is a continuing one. A new FSG is not required where the client already has an FSG containing all the information that a new FSG would be obliged to contain. Providing entities will need to consider whether the information contained in the original FSG is still up-to-date when providing further services to existing clients.

> Note: For example, Marco received an FSG from a financial adviser on 30 June 2002 and obtained financial product advice soon afterwards. When Marco contacts the adviser in January 2004, the adviser will need to consider whether the FSG given to Marco on 30 June 2002 is still up-to-date before providing further services to Marco. This will depend on what information the adviser would be obliged to include in a new FSG, had it been prepared in January 2004.

Can you combine an FSG and PDS?

27 As stated in policy proposal paragraph B8, our view is that the relevant provisions of the Corporations Act do not permit combining an FSG and PDS in one document. This is because the FSG must have the title "Financial Services Guide" (s942A), and the PDS must have the title "Product Disclosure Statement" (s1013B). A document with a title such as "Combined Financial Services Guide and Product Disclosure Statement" would not in our view satisfy either of these provisions. As stated in paragraph 2 of this Explanation, the Corporations Act provides for a scheme where retail clients receive different disclosure documents at different stages of the process before the provision of financial

product advice and the issue of a financial product. To allow a combined FSG and PDS may also dilute the consumer protection inherent in separate and specific disclosure documents provided at separate stages in the advice and product issue process and cause confusion for retail clients. However, we are conscious that there may be some circumstances where (without relief) a product issuer would be obliged to provide both a PDS and FSG and may be interested in combining them in one document. For this reason, we invite your feedback.

What will happen if you breach the FSG requirements?

28 It is an offence to provide a defective FSG: s952D and 952E. An FSG may be defective where:

(a) it contains a misleading or deceptive statement; or

(b) it omits material required by the Corporations Act or regulations (s952B).

29 If an FSG is defective:

(a) the providing entity (and the authorising licensee) may have committed an offence; and

(b) an affected person (eg a retail client) may take civil action for any loss or damages.

30 It is an offence to fail to provide an FSG when one is required: s952C.

Must you keep copies of FSGs?

31 Licensees are obliged to "do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honesty and fairly": s912A(1)(a). They also need to have:

(a) an adequate dispute resolution system; and

(b) processes in place to ensure that they are able to meet their obligation to notify ASIC of breaches and assist ASIC with compliance inquiries (s912D and 912E).

32 To meet these obligations, licensees need to ensure that copies of FSGs are kept for a reasonable period of time after they are provided: see policy proposal paragraph B13. We intend imposing a 7-year record-keeping requirement by licence condition: see policy proposal paragraph B14. The period during which records would need to be kept is broadly consistent with the period applying to financial records under

s1101C, and the statutes of limitations in the various States and Territories.

International approaches

34 Our proposed policy on preparing and providing FSGs takes into consideration equivalent disclosure requirements applicable to general and personal advice in overseas jurisdictions. For example, in the United States, Rule 204-3 under the *Investment Advisers Act* ("brochure rule") requires every investment adviser registered with the Securities Exchange Commission to deliver to each prospective advisory client a written disclosure statement, or "brochure", describing the adviser's business practices and educational and business background. An adviser must generally deliver this brochure before entering into any written or oral contract with a client. Other jurisdictions, such as the United Kingdom, Hong Kong and Singapore, require advisers to provide prospective clients with adequate information upon which they are able to make an informed decision as to whether to use the designated financial service.

C Preparing and providing suitable personal advice

Note: This obligation applies only to personal advice. For a discussion of the difference between general advice and personal advice, see Section A.

Policy proposal	Your feedback
C1 In preparing and providing personal advice to retail clients, providing entities must ensure that they satisfy all three elements of the "suitability rule": **(a)** the obligation to make reasonable inquiries into the client's relevant personal circumstances (the "client inquiries" requirement: s945A(1)(a)); **(b)** the process of investigating and considering the options available to the client (the "subject matter" requirement: s945A(1)(b)); and **(c)** the requirement to ensure personal advice is appropriate (s945A(1)(c)).	
The "client inquiries" requirement	
What must you ask a client?	
C2 Determining a particular client's relevant personal circumstances and determining what amounts to "reasonable inquiries" are factual questions: s945A(1)(a). While determination of these matters will depend on the facts and circumstances of each case, we propose to take the following matters into account in administering the law: **(a)** the client inquiries requirement cannot be avoided by disclosing to the client that you are providing "limited" or "basic" personal advice;	**C2Q1** Are these appropriate matters for ASIC to take into account? Why or why not? **C2Q2** Are there any other matters that ASIC should take into account in relation to the client inquiries requirement? Please give details. **C2Q3** In what circumstances (if any) would an adviser

Policy proposal

(b) where the potential negative impacts on the client if inappropriate personal advice is provided are more serious, the client inquiries requirement is more significant and more detailed inquiries are likely to be necessary;

Note: For example, for personal advice about insurance, an adviser may need to inquire about the cover desired by the client in the light of potential exclusions to such insurance (eg car insurance and exclusions for drivers under 25 years old).

(c) for personal advice concerning products with a relatively high risk of capital loss or failure to produce an expected outcome, the client inquiries requirement is more significant and will need to cover the client's tolerance of such risks;

Note: For example, for personal advice about investing in shares, an adviser would need to inquire about the client's aversion to, or tolerance of, the risk of losing their capital and/or not receiving anticipated levels of income.

(d) for personal advice recommending the replacement of one product with another, client inquiries need to take into account the specific requirement to consider the costs and risks of the switch;

Note: When recommending the replacement of products, additional disclosures are required in the SOA: s947D.

(e) for personal advice confined to simple products (eg car insurance), the relevant personal circumstances will be more limited than for a complex investment product;

(f) for an existing client, the client inquiries requirement can generally be satisfied

Your feedback

providing personal advice covering products with an investment component not need to make inquiries about a client's views about labour standards or environmental, social or ethical considerations: see s1013D(1)(l)? Please give details.

C2Q4 Should ASIC give further guidance in relation to the matters that an adviser may need to make inquiries about in the process of providing personal advice? If so, please give details of the suggested guidance.

Policy proposal

by ensuring that information already held about the client is up-to-date and complete (assuming the original personal advice was about a similar product and the original client inquiries were adequate); and

(g) for a client who has conflicting objectives, or is confused about their objectives or has difficulty articulating them, the client inquiries requirement will involve attempting to resolve and clarify the client's objectives.

Note: These factors are not exhaustive, nor are they determinative. No one factor will determine the scope of a particular client's relevant personal circumstances or whether particular inquiries are, or are not, reasonable. These matters will always depend on the facts and circumstances.

C3 To satisfy the client inquiries requirement, an adviser may need to ask additional questions and make additional inquiries to those they generally undertake: s945A(1)(a). Failure to do so may mean that they have not undertaken reasonable client inquiries and hence do not have a reasonable basis for the personal advice.

Does this requirement apply to all personal advice?

C4 The client inquiries requirement applies to *all personal advice*, regardless of whether the providing entity provides a more detailed or more basic advice service: s945A(1)(a). The nature and extent of the inquiries required will vary depending on the nature of the personal advice to be provided and does not necessarily require every adviser to conduct a detailed needs analysis for every client. However, advisers must undertake an

Your feedback

C3Q1 Are there any practical problems with this interpretation of s945A(1)(a)? Please give details.

C3Q2 What further guidance (if any) is needed? Please give details of the suggested guidance.

C4Q1 Are there any practical problems with this interpretation of s945A(1)(a)? Please give details.

C4Q2 To what extent (if any) do you think the application of the client inquiries requirement varies

Policy proposal	Your feedback
adequate level of inquiries to ensure that they have a reasonable basis for the personal advice they provide.	according to the business model of the adviser (eg basic, online or detailed financial planning advice)? Please give details and reasons.
The "subject matter" requirement	
C5 A providing entity must investigate and consider the options available to the client to form the basis of the personal advice (the "subject matter" requirement): s945A(1)(b). What is a reasonable level of consideration of, and investigation into, the subject matter of the personal advice is a factual question. It will depend on the facts and circumstances of each case, including the information obtained as a result of the client inquiries: see policy proposal paragraphs C2–C4.	**C5Q1** Are there any practical problems with this interpretation of s945A(1)(b)? Please give details.
How do you determine whether personal advice is "appropriate"?	
C6 Whether particular personal advice is appropriate is a factual question. It will depend on the facts and circumstances of each case. Generally, we consider that personal advice is appropriate if it demonstrates a reasonable match between the client's circumstances and the options available to a person in the client's circumstances: s945A(1)(c).	**C6Q1** Are there any practical problems with this interpretation of s945A(1)(c)? Please give details.
C7 In administering the law, we will pay particular attention to whether the recommended product, product class or strategy satisfies (or fails to satisfy) critical aspects of the client's relevant personal circumstances, such as the need for income or tolerance of risk. In some cases, the	**C7Q1** Are these appropriate matters for ASIC to take into account? Why or why not?

Policy proposal

inappropriateness of the personal advice will be obvious.

C8 In other cases, it may not be obvious whether personal advice is appropriate: s945A(1)(c). While determining appropriateness will depend on the facts and circumstances of each case, we propose to take the following factors into account in administering the law:

(a) whether similar benefits could have been obtained at a significantly lower cost, significantly lower risk or with a significantly higher probability of occurrence;

(b) whether significantly superior benefits could have been obtained at the same cost, risk or probability of occurrence;

(c) in the case of a recommendation to replace one product with another, whether the overall benefits of the new product are significantly lower than the old product, or whether the cost of switching significantly overrides any benefits of the switch; and

(d) whether there has been a significant failure to adequately consider possible future events, particularly where the event has a significant probability of occurring or would be likely to have a major adverse effect on the client.

Note: These factors are not exhaustive, nor are they determinative. No one factor will determine whether personal advice is, or is not, appropriate. Whether personal advice is appropriate will always depend on the facts and circumstances.

Your feedback

C8Q1 Are these appropriate matters for ASIC to take into account? Why or why not?

C8Q2 Are there any other matters that ASIC should take into account in relation to the appropriateness requirement? Please give details.

C8Q3 Is the concept of "significance" used in these factors sufficiently clear? If not, is another term more appropriate (please give reasons)?

Policy proposal

Your feedback

Does the suitability rule apply to personal advice on one or a limited range of products?

C9 The suitability rule applies to *all personal advice*, including personal advice on a single or limited range of products: s945A(1). If none of the products upon which the adviser is able to give advice is appropriate for a particular client, the adviser must either:

(a) decline to give personal advice; or

(b) advise the client that none of the products on which the adviser is able to advise are appropriate.

In these circumstances, the adviser may choose to refer the client to another adviser.

Note: For example, it would be inappropriate to recommend a savings account to a 20 year old for their retirement savings, even if the adviser was only authorised to advise on deposit products.

C9Q1 Are there any practical problems with this interpretation of s945A(1)? Please give details.

C9Q2 What further guidance (if any) is needed? Please give details of the suggested guidance.

What records must you keep?

C10 Licensees must keep (or ensure that their representatives keep) the following records for a reasonable period of time after the personal advice is provided:

(a) the consideration of the client's relevant personal circumstances and inquiries;

(b) the consideration of, and investigation into, the subject matter of the advice; and

(c) the reasons why the advice was considered appropriate

Note: This proposal does not apply to execution-related telephone advice where an SOA is not required: s946B.

C10Q1 Are there any practical problems with this interpretation of the legislation? Please give details.

Policy proposal	Your feedback
C11 We propose to impose a licence condition requiring licensees to ensure that these records are kept for at least 7 years from the date that the personal advice was provided to a retail client.	**C11Q1** In what circumstances (if any) is 7 years not appropriate? What would be a more appropriate period and why? **C11Q1** In what circumstances (if any) is a licence condition not appropriate? How will the efficiency of dispute resolution and compliance processes be maintained in these circumstances?

Explanation

What is the suitability rule?

1 The suitability rule is also known as the "reasonable basis" rule, or the "know your client" and "know your product" rules (s945A(1)). The suitability rule means that:

> "where personal advice is provided to a retail client, the providing entity must have a reasonable basis for that advice. The providing entity is required to ascertain the client's objectives and their financial situation and needs, investigate and consider the options available to the client, and base the advice on that consideration and investigation." (Revised Explanatory Memorandum to the *Financial Services Reform Bill* 2001 at paragraph 12.32).

2 The first CLERP 6 paper[2] explained the rationale of the suitability rule:

> "The suitability rule is designed to address the lack of sophistication of retail investors who, irrespective of the level of risk disclosure, may not be able to adequately analyse their investment needs or develop strategies to achieve their investment goals." (page 102)

3 The suitability rule highlights the importance of personal advice. Personal advice, by its nature, is likely to be relied upon by retail clients who may suffer significant loss if the advice is not of high quality. For this reason, the legislation imposes a specific obligation on providing entities to give due consideration to the client's circumstances and the subject matter of the advice, and to ensure that the advice is appropriate. The importance of this obligation is further highlighted by the fact that failure to provide appropriate personal advice is an offence: s945A(1).

4 Providing entities must ensure that personal advice provided to a retail client is suitable for that client: s945A. An adviser must not recommend a product or strategy where it would not be appropriate for that client. The suitability rule does not depend on the form in which the personal advice is provided (ie the obligation applies whether or not the advice is contained in an SOA, in writing or orally, on paper or electronically). The suitability rule applies to *all* personal advice.

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[2] *Financial Markets and Investment Products: Promoting competition, financial innovation and investment,* Corporate Law Economic Reform Program, Proposals for Reform: Paper No 6, Commonwealth Treasury, 1997

The "client inquiries" requirement

5 The process of undertaking reasonable inquiries of the client is the first element of the suitability rule: s945A(1)(a). These inquiries form part of the basis of the personal advice and are described in this paper as the "client inquiries" requirement. Meeting the requirement in s945A(1)(a) involves two tasks:

(a) considering what the client's relevant personal circumstances are; and

(b) making reasonable inquiries in relation to those personal circumstances.

6 An adviser providing personal advice must determine the client's relevant personal circumstances in relation to the advice being prepared. The client's relevant personal circumstances are "such of the person's objectives, financial situation and needs as would reasonably be considered to be relevant to the advice": s761A. The first step in this process is for the adviser to consider what aspects of the person's objectives, financial situation and needs are relevant to the advice being prepared.

What must you ask a client?

7 Once the adviser has determined the client's relevant personal circumstances, they must make "reasonable inquiries in relation to those personal circumstances": s945A(1)(a)(ii). In some cases, the responses the adviser receives to their inquiries will affect the adviser's determination of the client's relevant personal circumstances and may necessitate further inquiries. Advisers should not assume that the process is necessarily linear and that one set of inquiries will always be sufficient.

8 The Revised Explanatory Memorandum to the *Financial Services Reform Bill* 2001 states:

> "The level of inquiry and analysis required will vary from situation to situation and will depend on the advice requested by the client. The providing entity need only obtain and analyse sufficient information about the client to provide the advice requested or proffered. So, for example, a comprehensive analysis of the client's full financial position may not be necessary where the client has sought personal advice on a specific product." (paragraph 12.34)

9 The client inquiries requirement will vary both in determining the client's relevant personal circumstances and in the inquiries undertaken in relation to those circumstances. The nature of the personal advice will be a factor in determining what the client's relevant personal

circumstances are and in considering what are reasonable inquiries into those circumstances.

> Note 1: For example, where the subject matter of the personal advice is a single product that is simple and commonly understood (eg car insurance), both the client's relevant personal circumstances and the reasonable inquiries needed in relation to those circumstances are likely to be more limited.
>
> Note 2: Where the adviser proposes to recommend the replacement of one product with another product, additional disclosures are required. To give these additional disclosures, the adviser may need to undertake additional client inquiries. See paragraphs 19–20 of the Explanation in Section D.

10 What are a particular client's relevant personal circumstances and "reasonable inquiries" are factual questions. Determination of these matters will depend on the facts and circumstances of each case. However, we have set out in policy proposal paragraph C2 some factors that we propose to take into account in our administration of these provisions.

> Note: In question C2Q3, we ask about the need to make inquiries about a client's views about labour standards or environmental, social or ethical considerations. This relates to the requirement to include such information in a PDS covering products with an investment component: s1013D(1)(l). While we have not finalised our position about the extent to which we think advisers need to ask about these matters, we are interested in feedback on whether we should expect advisers to make such inquiries in most cases.

Does this requirement apply to all personal advice?

11 The client inquiries requirement applies regardless of how the providing entity carries on its business: s945A(1)(a). Regardless of whether the adviser's contact with the client is face-to-face, by telephone, through a third party or using electronic means (eg the Internet), they have to ensure that they satisfy their obligations to undertake reasonable inquiries.

12 Where client contact is not interactive (eg face-to-face), conducting reasonable inquiries may be more difficult. We believe that this is particularly so with more complex personal advice: providing entities will need to consider whether they are able to adequately conduct client inquiries using remote communication methods (eg telephone or Internet) for more complex personal advice. Of particular importance is the capacity to ask follow-up questions to ensure that the client understood earlier questions and that the information received by the adviser is relevant and complete.

13 The client inquiries requirement applies regardless of whether the providing entity provides a more detailed or more limited advice

service: s945A(1)(b). Advisers must undertake a sufficient level of inquiries to ensure that they have a reasonable basis for the personal advice they provide.

14 To satisfy this requirement, in some cases a providing entity may need to:

(a) ask additional questions and make additional inquiries to those they generally undertake; or

(b) decline to give personal advice (if they are not in a position to undertake an adequate level of client inquiries).

Failure to do so may mean that they have not undertaken reasonable client inquiries and hence do not have a reasonable basis for the personal advice.

> Note: For example, advisers should not assume that asking a bare minimum of questions and basing their recommendation on the information received in response to those questions will necessarily satisfy the client inquiries requirement.

What warnings are required?

15 Providing entities must warn retail clients if they know or ought to know that personal advice is based on incomplete or inaccurate information: s945B. The providing entity must make reasonable inquiries and, if inadequate information is obtained, warn the client of this deficiency when the advice is provided.

> Note: A warning may not be given in lieu of reasonable inquiries. The warning requirement is in addition to the requirement to undertake reasonable inquiries.

16 The interaction between the suitability rule and the warnings a providing entity must give a client is explained in the first CLERP 6 paper[3]:

> "An intermediary which provides personal recommendations should make appropriate inquiries and provide warnings to a client who declines to disclose relevant information." (page 103)

The "subject matter" requirement

17 The process of investigating and considering the options available to the client is the second element of the suitability rule: s945A(1)(b).

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[3] *Financial Markets and Investment Products: Promoting competition, financial innovation and investment*, Corporate Law Economic Reform Program, Proposals for Reform: Paper No 6, Commonwealth Treasury, 1997

This forms part of the basis of the personal advice and is described in this paper as the "subject matter" requirement.

18 Policy proposal paragraph C5 discusses the providing entity's obligation to undertake such consideration of, and investigation into, the subject matter of the personal advice as is reasonable in the circumstances: s945A(1)(b). Determining what amounts to reasonable consideration and investigation will depend on the facts and circumstances of each case, including information obtained as a result of client inquiries.

> Note: For example, if client inquiries reveal the client is particularly risk averse, this will affect the consideration and investigation that the adviser will need to undertake before recommending a particular product to the client.

19 While the subject matter requirement is scalable, it applies regardless of the way that a providing entity carries on their business. Regardless of whether the providing entity conducts their own research or uses external product research, they have to ensure that they satisfy their obligation to consider and examine the subject matter of the personal advice. Therefore, if external research is used, the providing entity should take reasonable steps to ensure that the research is accurate, complete and up-to-date.

> Note: For example, an adviser might use product research issued by a research organisation that is affiliated with a product issuer. When using this research, the adviser must take reasonable steps to assess the quality of the research in terms of its impartiality and accuracy.

How do you determine whether personal advice is "appropriate"?

20 "Appropriate" personal advice is advice that is suitable or fit for its purpose: s945A(1)(c). The requirement that the personal advice be appropriate requires that the advice demonstrate a reasonable match between the client's needs and circumstances (as revealed by the client inquiries) and the recommended course of action, given the options available (as revealed by adviser's consideration and investigation of the subject matter of the personal advice).

> Note: For example, a recommendation to buy a product is appropriate if the attributes of the product (as ascertained through reasonable investigation) would satisfy the client's relevant personal circumstances as ascertained through the client inquiries.

21 Although the requirement that the personal advice be appropriate is an outcomes-based requirement, generally we expect that advisers will need to follow a systematic process to ensure that the personal advice

they prepare and give is appropriate. The legislation does not require that an adviser follow any particular process: it is the adviser's responsibility to ensure that they comply with the requirement to provide appropriate personal advice.

22 Whether particular personal advice is appropriate is a factual question. It will depend on the facts and circumstances of each case. In administering the law, we will consider all the circumstances of the advice, including the client inquiries, the product investigation and the suitability of the recommended product (if any) for its purpose, in forming a view whether the suitability rule has been complied with.

> Note: In some cases, whether personal advice is appropriate may not be clear. In policy proposal paragraph C8, we propose some matters that we will take into account in administering the law in these circumstances.

23 The legislation does not require that personal advice be ideal, perfect or best. To comply with the legislation, personal advice needs to be "appropriate". In our view, this means it needs to demonstrate a reasonable match between the client's circumstances and the options available (including those available other than through the adviser). This is supported by the fact that both the client inquiries and subject matter requirements contain a "reasonableness" element (ie an objective test).

Does the suitability rule apply to personal advice on one or a limited range of products?

24 The suitability rule applies to all personal advice, including advice on a single or limited range of products: s945A(1)(b). Accordingly, if none of the products upon which the adviser is able to give advice are appropriate for a particular client, the adviser must either decline to give personal advice, or advise the client that none of the products on which the adviser is able to advise are appropriate. The suitability rule does not permit an adviser to merely recommend the best product among the group of products about which the adviser is able to give advice, if none of them are actually appropriate for the client: see policy proposal paragraph C9.

25 Where an adviser is only able to advise on a limited range of financial products, they will still need a degree of awareness of alternative and comparable products to comply with the suitability rule. We believe this is necessary for the adviser to:

(a) form an assessment of whether any of the products upon which they are able to give advice is appropriate; and

(b) to make a decision whether they need to refrain from recommending any products to a particular client.

Failure to do so may mean that they do not have a reasonable basis for the personal advice.

> Note: An adviser should have some knowledge about a range of other comparable products. An adviser need not know about every comparable product available in the market. What is a reasonable range varies from case to case.

What happens if you breach the suitability rule?

26 Failure to comply with the suitability rule is a criminal offence. Further, an affected person (eg a retail client) may take civil action for any loss or damages as a result of failure to comply with the suitability rule.

What records must you keep?

27 We consider that the duties of a licensee require the licensee to ensure they (or their representatives) keep adequate records of personal advice provided to retail clients (whether the advice is provided verbally, in writing or electronically). We intend to impose a licence condition to require these records to be kept for at least 7 years: see policy proposal paragraph C11. The period during which records would need to be kept is broadly consistent with the period applying to financial records under s1101C, and the statutes of limitations in the various States and Territories.

> Note: A separate record-keeping requirement applies to execution-related telephone advice where an SOA is not required due to s946B. In such cases, the providing entity must keep a record of any execution related telephone advice it provides:
> (a) either in full or in summary form; and
> (b) for at least 90 days after the advice is provided (reg 7.7.09).

International approaches

28 Our proposed policy on preparing and providing suitable personal advice takes into consideration equivalent requirements for suitability in overseas jurisdictions. For example, in the United Kingdom, the Financial Services Authority has a "know your customer" and "suitability" test in the *Conduct of Business Sourcebook* (COB 5.2 and COB 5.3 respectively). These tests are based on the principle of relationships of trust and require a firm to take reasonable care to ensure the suitability of its advice. As with our proposed policy, the nature of the steps firms need to take will vary greatly, depending on the needs and priorities of the private customer, the type of investment

or service being offered, and the nature of the relationship between the firm and the private customer and, in particular, whether the firm is giving a personal recommendation.

29 Similar "know your client", suitability, and reasonable basis tests are adopted in Singapore and Hong Kong. In Singapore, s27 of the *Financial Advisers Act* sets out that licensees must have a reasonable basis for their advice and consideration should be given to a client's investment objectives, financial situation and particular needs. In Hong Kong, the Security and Futures Commission's *Code of Conduct for Persons Registered with the Securities and Futures Commission* outlines a general principle requiring a registered person to take all reasonable steps to establish each client's financial situation, investment experience, and investment objectives.

D Preparing and providing an SOA

Note: This obligation applies only to personal advice. For a discussion of the difference between general advice and personal advice, see Section A.

Policy proposal	Your feedback
What must the SOA disclose about the "basis" of the personal advice?	
D1 In administering the law, we will take the view that an SOA should: **(a)** clearly and unambiguously set out the adviser's recommendations (if any); and **(b)** clearly and succinctly set out the reasoning which led to the personal advice, including clear statements about: **(i)** the scope of the client inquiries undertaken; **(ii)** the client's relevant personal circumstances as ascertained through the client inquiries; **(iii)** the alternative options (including alternative products) considered and investigated by the adviser; and **(iv)** the reasons why the advice (including any recommended action) is considered appropriate (including reference to plausible options that were considered but not recommended): s947B(2) and 947C(2).	**D1Q1** Are there any practical problems with this interpretation of s947B and 947C? Please give details. **D1Q2** What further guidance (if any) is needed? Please give details. **D1Q3** To what extent may a providing entity rely on material in an SOA previously provided to a client to satisfy the elements of s947B(2) and 947C(2) described here? Please give details.

Policy proposal	Your feedback
What must you include in an SOA?	
Information about remuneration, commissions and other benefits	
D2 An SOA must contain information about any remuneration, commissions and other benefits that "might reasonably be expected to be or have been capable of influencing" the providing entity in providing the advice: s947B(2)(d) and 947C(2)(d). Whether any particular matter is reasonably likely to influence a person is a factual question. It will depend on the facts and circumstances. Note: See "Key terms" for a definition of "associated person".	**D2Q1** Is there a level below which remuneration, commissions and other benefits need not be disclosed (eg a materiality threshold)? If so, what is the threshold and why?
D3 Generally, we consider that any benefit (including a commission) received by a providing entity (or any associated persons) in relation to personal advice might reasonably be expected to be capable of influencing the providing entity in providing that advice. Two exceptions are: **(a)** where the benefit is an hourly fee paid by the client to the providing entity (or any associated persons) which does not depend on whether the client acts on the advice; and **(b)** where the benefit (eg commission) is rebated in full to the client.	**D3Q1** Are there any practical problems with this interpretation of the legislation? Please give details. **D3Q2** What further guidance (if any) is needed? Please give details. **D3Q3** Are there any other clear exceptions? If so, what are they and why?
D4 In administering the law we will take the view that an SOA should, in relation to all remuneration, commission and other benefits (however described) that are capable of influencing the providing entity, disclose in easy to understand language in one place in the SOA: **(a)** who provides the benefit and the source	**D4Q1** Are there any practical problems with this interpretation of the legislation? Please give details.

Policy proposal	Your feedback
of the benefit; Note: For example, an SOA may state, "my commission will be paid by the responsible entity out of the entry fee charged by the fund". **(b)** who receives the benefit; **(c)** in what circumstance the benefit is expected to be received; and **(d)** the amount of the benefit (or how it will be calculated): s947B(2)(d) and 947C(2)(d).	
D5 In administering the law, we will take the view that an SOA should set out dollar amounts for individual items where possible and should include worked typical example(s) where the total remuneration, commission and other benefits cannot be disclosed in a single amount: s947B(2)(d) and 947C(2)(d).	**D5Q1** Are there any practical problems with this interpretation of s947B and 947C? Please give details.
D6 As a matter of good practice, we encourage providing entities that are unable to disclose the total remuneration, commission and other benefits in dollar amounts at the time of giving the SOA to provide this information to their clients when it is available. For example, this could be done by doing any one or more of the following: **(a)** including the information in periodic client communications; **(b)** making it available to the client through a telephone or Internet facility; **(c)** including it in other communications required under the Corporations Act (eg a periodic statement or transaction confirmation).	**D6Q1** Are there any practical problems with this good practice guidance? Please give details. **D6Q2** Should this good practice guidance be mandatory? If so, how? **D6Q3** In circumstances (if any) would following this good practice guidance not be reasonably practical? Please give details.

Policy proposal	Your feedback
Must you keep copies of SOAs?	
D7 To meet their obligations, we consider that licensees must ensure that copies of each SOA are kept for a reasonable period of time after they are provided.	**D7Q1** Are there any practical problems with this interpretation of the legislation? Please give details.
D8 We propose to impose a licence condition requiring licensees to keep (or cause to be kept) a copy of each SOA for at least 7 years from the date that it was provided to a retail client.	**D8Q1** In what circumstances (if any) is 7 years not appropriate? What would be a more appropriate period and why? **D8Q2** In what circumstances (if any) is a licence condition not appropriate? How will the efficiency of dispute resolution and compliance processes be maintained in these circumstances?

Explanation

What is the purpose of an SOA?

1 A Statement of Advice ("SOA") is a disclosure document provided to retail clients when personal advice is given. The SOA must:

(a) set out the advice (including its basis); and

(b) identify certain matters (eg conflicts of interest) that the client should be aware of,

"for the purpose of [the client] deciding whether to act on the advice": s947B(3) and 947C(3).

2 The second CLERP 6 paper[4] describes the SOA as the "record" of the "suitability outcome" (section 3.5, page 45).

3 The first CLERP 6 paper[5] explains the importance of the conflicts disclosure in the SOA:

> "The disclosure of benefits received by an intermediary and any conflicts of interest assists clients in assessing the merits of a product recommendation and reduces the opportunity for advisers to act in self interest to the disadvantage of the client." (page 102)

4 ASIC will bear these legislative objectives in mind in administering the SOA provisions.

When must you provide an SOA?

5 Personal advice may be provided to a client:

(a) in an SOA; or

(b) in another form (eg verbal advice).

Where personal advice is provided to a retail client other than in an SOA, an SOA must be provided at the same time as, or as soon as practicable after, the advice is given: s946C. In any event, the SOA must be given before the providing entity provides any other services to the client.

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[4] *Financial Products, Service Providers, and Markets – An Integrated Framework. Implementing CLERP 6 Consultation Paper,* Corporate Law Economic Reform Program, Commonwealth Treasury, 1999

[5] *Financial Markets and Investment Products: Promoting competition, financial innovation and investment,* Corporate Law Economic Reform Program, Proposals for Reform: Paper No 6, Commonwealth Treasury, 1997

6 The client and providing entity may agree that an SOA need not be given where the advice is execution-related telephone advice. However, certain information about the providing entity's contact details and potential conflicts of interest must be provided at the time the advice is given. Specific record keeping obligations apply to execution-related telephone advice: s946B(1)–(3A).

Note: There are some exclusions from the execution-related telephone advice exception: see s946B(1)(b) and (c).

7 An SOA need not be given where the personal advice relates to one or both of:

(a) a basic deposit product; or

(b) a non-cash payment facility related to a basic deposit product: s946B(2) and (5).

However, certain information about the providing entity's contact details and potential conflicts of interest must be provided at the time the personal advice is given: s946B(3) and (6).

What must you include in an SOA?

8 An SOA must contain the information set out in the Corporations Act and regulations, which includes

(a) a statement setting out the personal advice;

(b) information about the basis on which the advice is or was given;

(c) the name and contact details of the providing entity (and the details of the authorising licensee, if different);

(d) information about any remuneration, commissions or other benefits that the providing entity (or any associated person) is to receive that "might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice"; and

(e) details of any interests (whether pecuniary or not, whether direct or indirect), associations or relationships which might reasonably be expected to influence the providing entity in providing the advice: s947B(2) and 947C(2).

Note: Where the personal advice is or includes a recommendation that the client replace an existing product, certain additional information must be included in the SOA: see paragraphs 19–20 of this Explanation.

9 In subparagraph (a) of policy proposal paragraph D1, we state that, in our view, the SOA must clearly and unambiguously set out the providing entity's advice. One of the primary purposes of the SOA is to

provide a record of personal advice. It is important that this record contain a clear and direct statement as to the personal advice (including any recommended course of action).

Note 1: For example, personal advice about general insurance would set out precisely the cover recommended.

Note 2: As a matter of good practice, we suggest that an SOA should be dated and, if relevant, set out the period of time during which the recommended course of action remains current.

10 One of the primary purposes of the SOA is to provide the client with the information they need to decide whether or not to act on the advice. In subparagraph (b) of policy proposal paragraph D1, we state that, in our view, the SOA must clearly and succinctly set out the various aspects of the reasoning that led to the personal advice. This helps the client to check whether advice has a factually-correct basis and ascertain the breadth (and limitations) of the adviser's investigations.

Information about remuneration, commissions and other benefits

11 Policy proposal paragraph D2 describes when remuneration, commissions and other benefits must be disclosed in an SOA. The test in s947B(2)(d) and 947C(2)(d) is an objective test: it is the reasonable capacity of the benefit to influence the providing entity in providing the advice that is the primary issue. It does not matter that the providing entity is not *in fact* influenced by the benefit.

Note: We do not propose to develop a definition of "influence" for these purposes.

12 We consider that any benefit received by a providing entity (or any associated person), other than commissions rebated in full and hourly fees paid by the client, in relation to personal advice might reasonably be expected to be capable of influencing the providing entity in providing the advice: see policy proposal paragraph D3. Even where the same level of commission is likely to be received for all of the products they recommend, we believe the commissions are reasonably capable of influencing their advice as the providing entity must still decide whether or not to recommend any products to a particular client.

Note 1: The fact that a commission is difficult or even impossible to rebate to clients does not preclude the commission from being reasonably capable of influencing the providing entity.

Note 2: Payments to reimburse the providing entity (or any associated person) for some of their operating costs (eg "back-office" payments, administration costs or marketing allowances) will need to be disclosed unless they are not reasonably capable of influencing the advice.

13 Without limiting the generality of policy proposal paragraphs D2-D4, we believe the SOA should include details of:

(a) remuneration (such as volume bonuses or incentives) paid to the adviser by their employer;

(b) initial and ongoing/trailing commissions (including commission splits, commissions paid by interposed structures such as investor directed portfolio service (IDPS) or master trust operators and also including "back office" commissions) other than commissions rebated in full to the client; and

(c) other benefits (such as "soft dollar" arrangements).

Note 1: For example, an SOA may state, "If you purchase the recommended product, I will receive a commission of $100 plus 3% of the amount invested. This amount comes out of the entry fee charged by the fund and is paid to me by the responsible entity. This means if you invest $10,000 I will be paid $400 commission."

Note 2: Benefits that involve some element of uncertainty or discretion but are still reasonably capable of influencing the providing entity should be disclosed.

14 Where the total remuneration, commissions and other benefits is not able to be disclosed in a single amount, we consider that the SOA should set out dollar amounts of individual items where possible and should include worked typical example(s). While reg 7.7.11 and 7.7.12 only requires dollar amount disclosure where the total amount of all remuneration, commissions and other benefits can be stated as a single amount, we suggest that the dollar amounts of individual items of remuneration, commissions and other benefits should be disclosed wherever possible. Regulations 7.7.11(3) and 7.7.12(3) require that the benefits disclosure be "presented in a manner that is easy for the client to understand". Australian and overseas research has consistently shown that dollar amount disclosure is generally easier for retail clients to understand than other methods such as percentages.[6] We also encourage the use of worked dollar examples: see reg 7.7.11(2)(a)(ii) and 7.7.12(2)(a)(ii).

15 In policy proposal paragraph D6, we encourage providing entities that are unable to disclose total benefits in dollar amounts at the time of giving the SOA to provide this information to their clients when it is available. It is important that clients are aware, at some stage, of the cost of the advice and the total benefits that the providing entity (and any associated persons) has received in relation to the advice.

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[6] Professor Ramsay, *Disclosure of Fees and Charges in Managed Investments: Review of Current Australian Requirements and Options for Reform*, ASIC, 2002

Information about associations or relationships

16 An SOA must contain information about any other interests, associations or relationships that "might reasonably be expected to be or have been capable of influencing" the providing entity: s947B(2)(e) and 947C(2)(f). Whether any particular matter is reasonably likely to influence a person is a factual question. It will depend on all of the facts and circumstances.

17 An adviser (or the authorising licensee) may be affiliated with a product issuer or an underwriter. For example, a member of a corporate group that comprises a product issuer may employ the adviser. Also, a member of a corporate group may act as an underwriter of a share issue. Where such affiliations might be reasonably expected to be capable of influencing the providing entity to make favourable recommendations about the products of the affiliated party, the affiliations must be disclosed to the client.

Independence

18 An SOA must not describe the providing entity as independent unless the requirements of s923A are satisfied. These requirements cover a number of aspects of the providing entity's business, including remuneration, volume bonuses, gifts, benefits, restricted product lists, associations and relationships.

Costs and benefits of replacing a product

19 Where personal advice recommends the replacement of one product with another (in part or full), additional disclosures are required in the SOA. The SOA must include a clear statement:

(a) that the client's existing product has been considered;

(b) of the cost of the recommended action (ie the disposal of the existing product and acquisition of the replacement product);

(c) of the potential benefits (pecuniary or otherwise) which may be lost; and

(d) of any other significant consequences of the switch for the client: s947B(2), 947C(2) and 947D.

For example, the SOA could include information about the exit fee applying to the withdrawal, the loss of access to certain rights or opportunities (eg insurance cover) associated with the existing product, and the entry and ongoing fees applying to the replacement product. Where possible, the costs and benefits of replacing the product should be expressed in dollar amounts.

20 Where a providing entity recommends that a client switch between:

(a) investment strategies available within a fund; or

(b) between an accumulation and pension stage in a fund,

the additional requirements in paragraph 19 will generally be required. To ensure that the SOA does include the basis of the advice, providing entities will generally need to provide this additional information when recommending significant decisions or elections in relation to options available under a financial product held by the client (regardless of whether the disclosure is technically required under s947D).

Clear, concise and effective

21 SOAs must be "worded and presented in a clear, concise and effective manner": s947B(6) and 947C(6). We believe that an SOA is more likely to be presented in a clear, concise and effective manner where it sets out the personal advice and its basis as described in policy proposal paragraph D1.

> Note: Where the SOA is long, providing entities should consider including a summary and table of contents (or other means to enable a reader to navigate the document easily).

22 An SOA must not include material that is misleading or deceptive: s952B. In our view, an SOA that is not presented in a clear, concise and effective manner is more likely to be misleading or deceptive.

23 We consider that providing entities should take into account our Good Disclosure Principles in Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* [PS 168] in preparing SOAs.

What happens if you breach the SOA obligations?

24 It is an offence to provide a defective SOA. An SOA may be defective where it:

(a) contains a misleading or deceptive statement; or

(b) omits material required by the Corporations Act or regulations: s952B.

25 If an SOA is defective:

(a) the providing entity (and the authorising licensee) may have committed an offence; and

(b) an affected person (eg a retail client) may take civil action for any loss or damages.

26 It is an offence to fail to provide an SOA when one is required: s952C.

Must you keep copies of SOAs?

27 Licensees are obliged to "do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honesty and fairly". They also need to have:

(a) an adequate dispute resolution system; and

(b) processes in place to ensure that they are able to meet their obligation to notify ASIC of breaches and assist ASIC with compliance inquiries: s912D and 912E.

To meet these obligations, licensees need to ensure that copies of SOAs are kept for a reasonable period of time after they are provided: see policy proposal paragraph D7. We intend imposing a 7-year record-keeping requirement by licence condition: see policy proposal paragraph D8. The period during which records would need to be kept is broadly consistent with the period applying to financial records under s1101C, and the statutes of limitations in the various States and Territories.

International approaches

28 Our proposed policy on preparing and providing a SOA takes into consideration equivalent requirements in overseas jurisdictions. Some overseas jurisdictions highlight the importance of the fiduciary duty of financial product advisers in ensuring they provide their clients with advice that has a reasonable basis and for ensuring it is well documented. For example, in Singapore, the Monetary Authority of Singapore's *Notice on Recommendations on Investment Products* requires advisers to provide to clients a document containing a summary of information gathered in relation to the "know your client" obligation, any recommendation made to the client, and the basis for the recommendation. This document is to be provided to the client prior to engaging in services associated with the designated financial product.

Regulatory and financial impact

We have considered the likely regulatory and financial impact of the policy proposals in this paper. Based on the information that we currently have, we believe that our proposals strike an appropriate balance between facilitating financial services activity and investor protection. To ensure that we have achieved an appropriate balance, we are also developing a Regulatory and Financial Impact Statement (RIS).

The RIS will address the following seven key elements:

1 Issue/problem

This will discuss the nature and magnitude of the problem.

2 Objective(s)/analysis of the problem

The objective(s), or the outcome sought in relation to the identified issue / problem, will be addressed.

3 Options / solutions

This will identify all the alternative options that could achieve the objective(s) stated above for dealing with the issue being considered (eg no specific action; ASIC policy proposal; media release; information statement; self regulation/quasi regulation; codes of conduct; and co-regulation, compliance and enforcement strategies).

4 Impact analysis (costs and benefits) of each option

Impact analysis will include:

(a) analysis of the benefits and costs of the options, including any restriction on competition for different persons affected;

(b) identification of persons or bodies affected by the problem; and those that will be affected by the solutions or options identified (ie applicant/proponent of issue; other interested parties, consumers, business and government);

(c) a consideration of how each of the proposed options will affect existing Act, regulations or policies;

(d) identification and categorisation of the expected impacts of the proposed options as likely benefits or likely costs against each of the person/bodies identified as likely to be affected;

We will try to quantify these effects where possible (for example, will there be any restriction on competition as a result of the proposed regulation?)

Costs to businesses affected by a regulatory initiative might include: administrative costs; complying with new regulatory standards; licence fees; delays etc.

Costs to consumers affected could also include higher prices for goods and services; reduced utility of goods and services; delays and more difficult or expensive options for seeking redress.

(e) benefits of the options will also be identified (even where they are not quantifiable); and

(f) the data sources used and assumptions made in making these assessments will be identified.

5 Consultation

The consultation undertaken in the policy process will be detailed.

6 Conclusions and recommended option

The preferred option(s) will be given, and reasons why.

7 Implementation and review

This will discuss how the proposed option will be administered, implemented, or enforced (eg instrument of relief, policy statement, practice note, no action letter).

8 Important details sought from you

In order for us to fully assess the financial and regulatory impact of our proposals, we invite you to consider possible options that would achieve our objectives, comment on the impact that these policy proposals might have, and in particular, give consideration to the costs and benefits of these proposals. Where possible, we are seeking both quantitative and qualitative data.

Any comments that we receive will be taken into account when preparing our final RIS.

Development of policy proposal

We have developed this policy proposal paper by considering:

(a) the intention of the *Financial Services Reform Bill* 2001 as indicated in the first and second CLERP 6 papers, Explanatory Memorandum to the Bill and the Second Reading Speech in the House of Representatives on the introduction of the Bill into Federal Parliament;

(b) the Report on the Bill by the Parliamentary Joint Committee on Corporations and Securities issued in August 2001;

(c) the Government's response to the Report, issued on 29 March 2001;

(d) relevant comparisons with current legislative requirements for the regulation of financial services activity under the law;

(e) relevant comparisons with current legislative requirements for the regulation of financial services activity in similar overseas jurisdictions (in particular, the United States, United Kingdom, Canada, Hong Kong, and Singapore);

(f) a review of existing ASIC policies and practices relevant to the regulation of financial services activity under the law; and

(g) a review of public submissions on the Exposure Draft Bill issued by the Government in February 2000.

Key terms

In this policy proposal:

"adviser" means a person who provides financial product advice

"ASIC" means the Australian Securities and Investments Commission

"associated person" means

(a) in the context of an FSG:

(i) where the providing entity is a licensee – a related body corporate of the licensee, a director or employee of the licensee or a related body corporate and any associate of any of these people;

(ii) where the providing entity is an authorised representative – an employer of the authorised representative, the authorising licensee(s), an employee or director of the authorising licensee(s) and an associate of any of these people;

(b) in the context of an SOA:

(i) where the providing entity is a licensee – a related body corporate of the licensee, a director or employee of the licensee or a related body corporate and any associate of any of these people;

(ii) where the providing entity is an authorised representative – an employer of the authorised representative, the authorising licensee(s), an employee or director of the authorising licensee(s) and an associate of any of these people

"authorised representative" of a financial services licensee means a person authorised by the licensee, in accordance with s916A or 916B to provide a financial service services on behalf of the licensee

Note: This is a definition contained in s761A.

"authorising licensee" means the licensee on whose behalf a representative provides financial services

"client inquiries requirement" means the requirement referred to in policy proposal paragraph C2

"Corporations Act" means the *Corporations Act 2001* and includes regulations made for the purposes of that Act

"execution related telephone advice" has the meaning set out in s946B(1)

"financial product" means a facility through which, or through the acquisition of which, a person does one or more of the following:

(a) makes a financial investment (see s763B);

(b) manages financial risk (see s763C);

(c) makes non-cash payments (see s763D)

Note: This is a definition contained in s763A.

"financial product advice" means a recommendation, a statement of opinion or an interpretation of information, or a report of any of those things, that:

(a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or

(b) could reasonably be regarded as being intended to have such an influence;

but does not include anything in an exempt document

Note: This is a definition contained in s766B.

"Financial Services Guide" (FSG) means a document that must be given to a retail client before the provision of a financial service in accordance with Part 7.7

"general advice" means financial product advice that is not personal advice

Note: This is a definition contained in s766B.

"licensee" or "financial services licensee" means a person who holds an Australian financial services (AFS) licence

Note: This is a definition is contained in s761A.

"new licensing regime" means Chapters 7.6 to 7.8 of the Corporations Act

"PDS" means a Product Disclosure Statement

"personal advice" has the meaning set out in s766B(3)

"Product Disclosure Statement" (PDS) means a document that that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Part 7.9

"providing entity" has the meaning set out in paragraph 5 of the Explanation in Section A

"PS 136" (for example) means an ASIC policy statement (in this example numbered 136)

"representative" of a financial services licensee means:

(a) an authorised representative of the licensee;

(b) an employee or director of the licensee;

(c) an employee or director of a related body corporate of the licensee; or

(d) any other person acting on behalf of the licensee

Note: This is a definition contained in s910A.

"retail client" has the meaning set out in s761G

"s782" (for example) means a section of the Corporations Act (in this example numbered 782)

"Statement of Advice" (SOA) means a document that that must be given to a retail client in relation to the provision of personal advice in accordance with Part 7.7

"subject matter requirement" has the meaning set out in policy proposal paragraph C5

"suitability rule" has the meaning set out in policy proposal paragraph C1 and paragraphs 1–4 of the Explanation in Section C.

What will happen next?

Stage 1

12 December 2002	ASIC policy proposal paper released

Stage 2

21 February 2003	Comments due on the policy proposal
March-April 2003	Drafting of policy statement

Stage 3

May 2003	Final policy statement released

Your comments

You are invited to comment on the proposals and issues for consideration in this paper. All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential.

Comments are due by 21 February 2003 and should be sent to:

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Regulatory Policy Branch
Australian Securities & Investments Commission
GPO Box 9827
Sydney NSW 2001
email: erica.gray@asic.gov.au

You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

Related papers

Building the FSRB Administrative Framework — Policy to implement the Financial Services Reform Bill 2001 (April 2001) and *Supplement* (September 2001)

Corporate disclosure: Strengthening the financial reporting framework, Corporate Law Economic Reform Program, Proposals for Reform: Paper No 9, Commonwealth Treasury, 2002

Financial Products, Service Providers, and Markets – An Integrated Framework. Implementing CLERP 6 Consultation Paper, Corporate Law Economic Reform Program, Commonwealth Treasury, 1999

Financial Markets and Investment Products: Promoting competition, financial innovation and investment, Corporate Law Economic Reform Program, Proposals for Reform: Paper No 6, Commonwealth Treasury, 1997

Licensing and disclosure: Making the transition to the FSR regime — An ASIC guide (October 2001, updated November 2002)

Licensing: The scope of the licensing regime: Financial product advice and dealing — An ASIC guide (November 2001, updated November 2002)

Policy Statement 51 *Applications for relief* [PS 51]

Policy Statement 146 *Licensing: Training of financial product advisers* [PS 146]

Policy Statement 164 *Licensing: Organisational capacities* [PS 164]

Policy Statement 167 *Licensing: Discretionary powers and transition* [PS 167]

Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* [PS 168]

The Hawking prohibitions – An ASIC Guide (July 2002, updated October 2002)

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