



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 19

Licensing: The scope of the licensing regime: Financial product advice and dealing

April 2001

Your comments

You are invited to comment on the proposals and issues for consideration in this paper.

Comments are due by Thursday 7 June 2001 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 the licensing regime – Parts 7.6 to 7.8 of the *Financial Services Reform Bill 2001* (the Bill) – will apply to financial product advice and dealing. The proposals are based on the Bill introduced into Parliament on 5 April 2001. These proposals will be reviewed if the Bill is changed in its passage into legislation.

2 The policy proposals cover:

- (a) What is “financial product advice”? (**Section A**)
- (b) How is financial product advice regulated? (**Section B**)
- (c) Is the advice personal advice or general advice? (**Section C**)
- (d) What is dealing? (**Section D**)

3 These proposals will help you work out whether the licensing regime applies to different types of conduct, and if so, how the conduct is regulated. A flowchart in each section helps explain the proposals.

4 The Schedule sets out examples which illustrate how you can use the policy proposals to work out whether various activities amount to financial product advice, and how such advice is regulated. The Schedule does *not* include examples of dealing (Section D of this paper).

5 We will *not* provide comprehensive guidance on the full range of activities which amount to financial product advice and dealing.

6 The proposals in this paper do not consider the following class of financial service:

- (a) operating a managed investment scheme;
- (b) providing a custody or depository service; or
- (c) making a market;

7 This paper will cover some subjects that will be covered in more detail in our planned FSRB policy proposal paper *Licensing: Principals and representatives* for issue in May 2001.

Important note: The proposals in this paper do not constitute legal advice. You will need to seek your own legal advice to find out whether you need a licence. The policy and examples in this paper are at a preliminary stage only. The examples and the suggested conclusions may change as a result of the comments we receive. You should treat them only as an indication of how we are thinking at this stage.

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Policy proposals

We have four sections of policy proposals. For each of these proposed policies we have listed various aspects of those proposals that we are considering and have raised issues which we would like you to comment on. When necessary we have also included some explanations of our proposals.

Note: In this paper, we have included the explanations in the “Policy proposal” section. There is no separate “Explanation” section for each proposal.

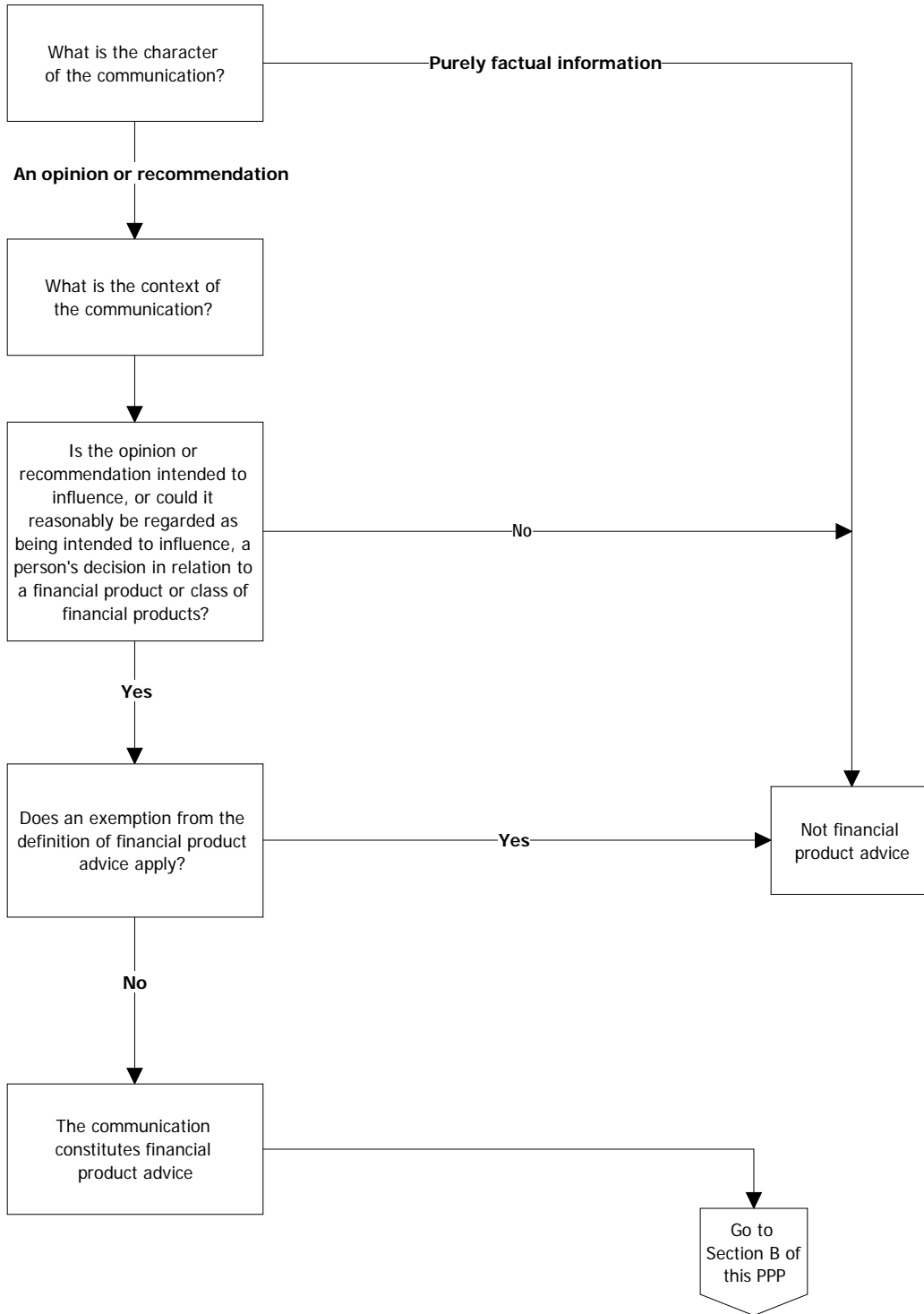
The Schedule sets out examples which illustrate how you can use the policy proposals to work out whether various activities amount to financial product advice, and how such advice is regulated.

Special note: We want to provide you with guidance about our plans for policy and processes as soon as we can to help you plan effectively. While we have done our best to cover the main issues, you will need to make your own preparation plans. It is possible we have missed some issues or have not taken into account the way the new legislation will affect specific industry situations. *We are keen to hear from you on our general approach, and what might be missing from it, as well as well as your answers to specific questions.*

A What is “financial product advice”?

Question

FL1 Section A is summarised in the flowchart on the next page. Is this flowchart useful? How could it be improved?



A What is “financial product advice”?

Policy proposal	Your feedback
<p data-bbox="277 485 862 611">How do we approach the definition of “financial product advice”?</p> <p data-bbox="277 638 862 743">A1 We think the definition of “financial product advice” in 766B involves working out three issues:</p> <ul data-bbox="331 770 862 1058" style="list-style-type: none"><li data-bbox="331 770 862 842">(a) the <i>character</i> of the communication: see policy proposal paragraphs A2 to A6;<li data-bbox="331 858 862 968">(b) the <i>context</i> in which the communication is made: see policy proposal paragraphs A7 to A15; and<li data-bbox="331 984 862 1058">(c) whether an exemption applies: see policy proposal paragraphs A16 to A20. <p data-bbox="277 1085 805 1169">What is the <i>character</i> of the communication?</p> <p data-bbox="277 1197 862 1415">A2 To work out the character of the communication, it is necessary to consider whether the communication involves any statement of “opinion” or a “recommendation” (or a “report” of either of those things).</p> <p data-bbox="277 1484 862 1738">A3 An opinion or recommendation may be direct or indirect, express or implied. To determine whether a communication involves an indirect or implied opinion or recommendation, you will need to consider the overall impression created by the whole communication.</p> <p data-bbox="277 1766 862 1908">A4 Communications which do not involve any opinion or recommendation are not financial product advice. Purely factual information is not an “opinion” or “recommendation” (or a</p>	<p data-bbox="901 1197 1305 1451">A2Q1 Is any guidance needed for the meaning of “opinion”, “recommendation” or “report”? If so, what guidance should be provided?</p>

Policy proposal

“report” of either of those things): see policy proposal paragraphs A5 and A6.

What is “purely factual information”?

A5 We consider “purely factual information” to be information that does not involve the expression of an opinion or recommendation and does not, therefore, constitute financial product advice.

A6 We think that information that satisfies each of the following three requirements is purely factual information:

- (a) the information must be based on, or derived from, underlying data that is generally available. Data which is available only on subscription (whether or not there is a fee) is not generally available; and
- (b) the information must not be presented in a way which gives an inaccurate impression or which contains an indirect or implicit opinion or recommendation to buy, hold or sell a financial product or class of financial products; and
- (c) the information must be objectively ascertainable. Information is not objectively ascertainable if its truth or accuracy could reasonably be questioned.

Notes: For example, a reproduction of a complete list of current market prices for a sector, eg mining stocks, would constitute purely factual information provided the information is not presented in such a manner as to suggest the purchase, holding, or sale of a financial product or class of financial products. On the other hand, the publication of the opening and closing prices for a selective list of stocks may involve an

Your feedback

A6Q1 Does this definition of purely factual information cause any practical problems for industry? If so, what are they and how can they be overcome?

A6Q2 Should there be a requirement for consumers to be given a warning when they are provided with purely factual information? (see Policy Statement 116 *Investment advisory services: licensing and “independent” advisory services* [PS 116] at [PS 116.22]) If not, why not and how else could consumers be adequately informed of the nature of the information?

Policy proposal

indirect or implicit opinion or recommendation.

For example, a summary of information or a selected quote is likely to be an opinion unless for instance policy proposal sub-paragraph A6(c) is satisfied.

What is the *context* of the communication?

A7 An opinion or recommendation is financial product advice only if:

- (a) the opinion or recommendation is intended to influence; or
- (b) the opinion or recommendation could reasonably be regarded as being intended to influence,

a person's decision in relation to a particular financial product or class of financial products.

Note: See 766B(1). For the purposes of this definition, the consumer may be a retail or wholesale consumer.

A8 Accordingly, there are two issues to consider in analysing the context of the communication:

- (a) the meaning of the expression "a person's decision in relation to a particular financial product or class of financial products" (see policy proposal paragraphs A9 to A11);
- (b) whether the opinion or recommendation is intended to influence, or could reasonably be regarded as being intended to influence, such a decision (see policy proposal paragraphs A12 to A15).

Your feedback

Policy proposal	Your feedback
<p><i>A person’s decision in relation to financial products</i></p> <p>A9 The expression “a person’s decision in relation to a particular financial product or class of financial products” includes decisions made by anyone to whom the advice is given or directed to buy, sell or hold a financial product. It would include:</p> <ul style="list-style-type: none"> (a) a decision to exercise a right or option to acquire or dispose of a financial product; (b) decisions to make additional contributions to an existing investment, or to increase or decrease the amount of regular contributions to an existing investment, or to reduce or increase insurance cover or benefits; (c) decisions about investment strategies or options within a fund; or (d) decisions to accept or reject a takeover offer. <p>A10 However, the expression “a person’s decision in relation to a particular financial product or class of products” does <i>not</i> include any of the following:</p> <ul style="list-style-type: none"> (a) a decision relating to something which is not a “financial product” as defined in the Bill, eg a credit facility; <p style="margin-left: 40px;">Note: See definition of “financial product” in 763A. See also 764A (specific classes of things that are financial products) and 765A (specific classes of things that are not financial products).</p> <ul style="list-style-type: none"> (b) a broad asset allocation decision (see policy proposal paragraph A11); or (c) a shareholder’s decision to vote for or against a resolution at a meeting. 	

Policy proposal	Your feedback
<p>A11 A broad asset allocation decision is a decision to allocate assets in a particular way, eg certain proportions in shares, fixed interest and real property. This needs to be distinguished from a person’s specific asset allocation decision in relation to particular financial products (eg interests in particular shares) or classes of financial products (eg mining shares). This is a continuation of the policy set out in Policy Statement 120 <i>Investment advisory services: mere referrals and other excluded activities</i> [PS 120] at [PS 120.31]–[PS 120.34].</p>	<p>A11Q1 Is further guidance necessary on the difference between broad and specific asset allocation advice? If so, what kind of guidance?</p>
<p>Intended to influence</p> <p>A12 Whether an opinion or recommendation is intended to influence, or could reasonably be regarded as being intended to influence, the decision of a consumer (C) is a question of fact. It is necessary to look at all the surrounding circumstances. Generally, the following factors should be considered:</p> <ul style="list-style-type: none"> (a) whether the author of the opinion (A) (or a person for whom A acts) stands to benefit depending on C’s decision, eg where A receives a commission if C buys a financial product; (b) whether A (or a person for whom A acts) is remunerated by C for the opinion or recommendation; (c) whether A has made any express or implied representations to C which would make it reasonable for a person in C’s position to rely on the opinion or recommendation (this would also include representations made by, or on behalf of, persons for whom A acts); (d) whether A is required by law to act in C’s interests, or has undertaken to do so; 	<p>A12Q1 Is any further guidance needed? If so, what guidance should be provided?</p> <p>A12Q2 Do any of these factors cause practical problems for industry? If so, what are they and how can they be overcome while still protecting the interests of consumers?</p>

Policy proposal	Your feedback
<p>and</p> <p>(e) whether a person in C's position is likely to be influenced by the reputation of A (or a person for whom A acts).</p> <p>A13 Where none of the factors in policy proposal paragraph A12 exists, the opinion or recommendation will probably not constitute financial product advice. This is particularly likely to be the case where there is a timely and prominent disclaimer to the effect that the recipient of the opinion or recommendation should not regard the communication as advice and should consider obtaining independent advice before making any decision.</p> <p><i>Mere referrals</i></p> <p>A14 A specific issue which arises is whether the mere act of referring a consumer to a licensee or to a representative of a licensee (a mere referral), without conveying any express opinion, constitutes the provision of financial product advice by the referring party. This issue arises because the mere referral may be considered to contain an implied opinion.</p> <p>In general, we consider that a mere referral to a licensee (or authorised representative) who advises on a wide range of financial products is unlikely to constitute financial product advice. However, we consider that a mere referral may constitute financial product advice where:</p> <p>(a) the referral is made to a licensee (or authorised representative) who advises on a narrow range of financial products (eg only managed funds and superannuation products issued within a single conglomerate group); and</p> <p>(b) the referring party receives a</p>	<p>A14Q1 Does our guidance cause practical problems for industry? If so, what are they and how can they be overcome while still protecting the interests of consumers?</p>

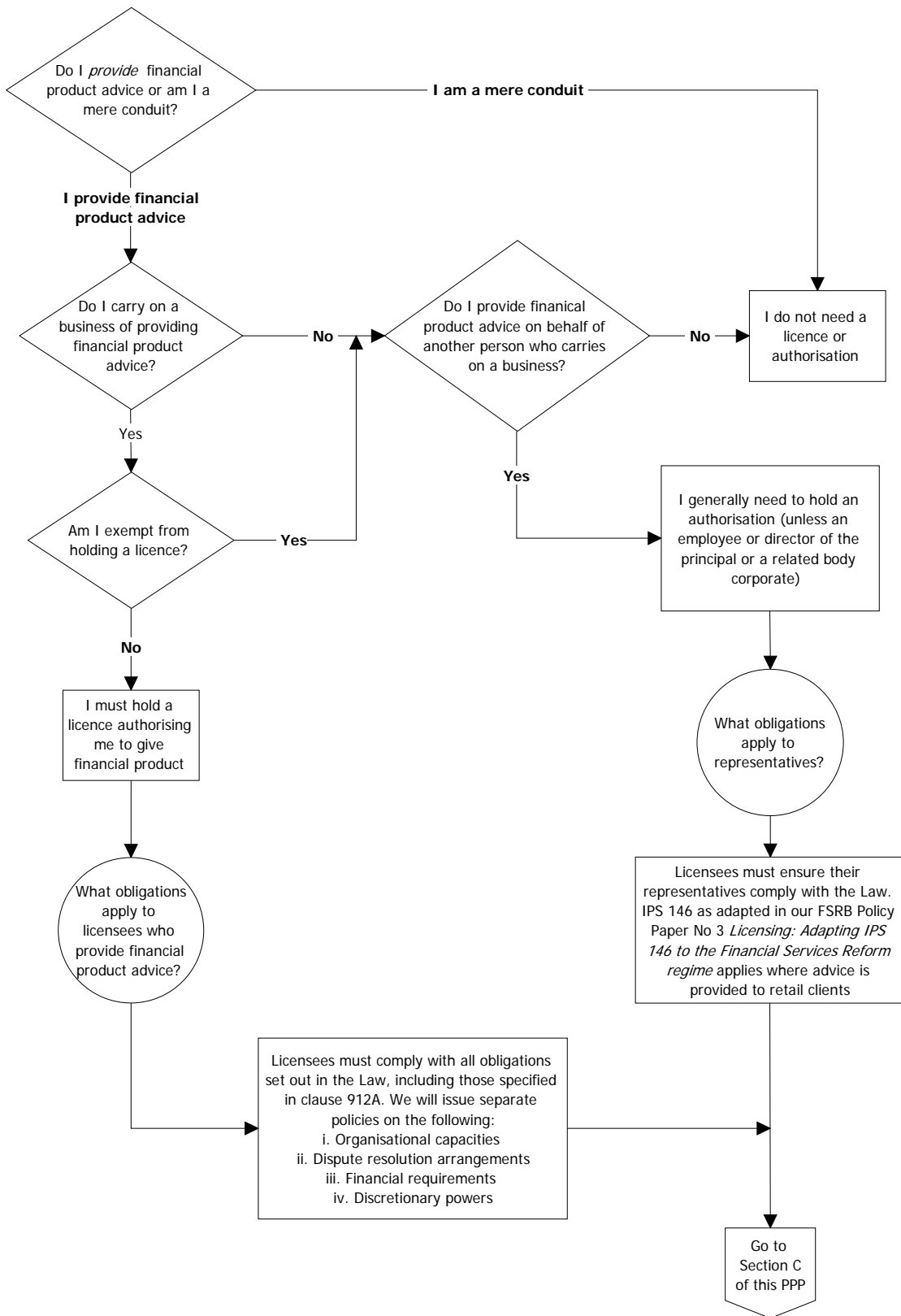
Policy proposal	Your feedback
<p>commission or other benefit that is dependent on any consumers' decisions.</p> <p>Example: If a bank teller refers customers to an authorised representative of the bank, the mere referral will probably not constitute financial product advice if the teller does not receive any commissions that are dependent on customers' decisions about particular financial products. The teller will not be regarded as providing financial product advice merely by receiving a flat fee for the referral provided the fee is not in any way dependent on whether the customer makes a decision about particular financial products.</p> <p>A15 We consider that similar principles to those in policy proposal paragraph A14 apply where a consumer can access a website of a financial service licensee via a link available on the website of an unlicensed internet portal operator. The link is analogous to a referral. If the licensee provides services for a very limited range of financial products, it is possible that the link will constitute implied financial product advice provided by the portal operator.</p> <p>Does an exemption from the definition of financial product advice apply?</p> <p>A16 An opinion or recommendation is not financial product advice if:</p> <ul style="list-style-type: none"> (a) it is an "exempt document": see policy proposal paragraphs A17 and A18; or (b) it consists solely of "legal advice": see policy proposal paragraph A19. <p><i>"Exempt document"</i></p> <p>A17 The precise scope of the expression "exempt document" will depend on the regulations under the Bill. It is expected to include, for example, Product Disclosure Statements. A</p>	

Policy proposal	Your feedback
<p>Statement of Advice is not an exempt document.</p> <p>Note: See 766B(6).</p> <p>A18 The “exempt document” exclusion makes it clear that providing a complete exempt document is not providing financial product advice. This means that a product issuer does not provide financial product advice merely by preparing and distributing an exempt document. However, we take the view that the selective presentation of information derived from an exempt document does not fall within this exemption and may, therefore, constitute financial product advice.</p> <p>“Legal advice”</p> <p>A19 “Legal Advice” means advice given by lawyers in their professional capacity about matters of law, legal interpretation or the application of the law to any facts: see 766B(5). This exemption does not permit any express or implied opinion or recommendation to be provided which is not legal in character.</p> <p>A20 There is no express exemption for accounting or taxation advice. Such advice may be financial product advice in some circumstances: see our general discussion in policy proposal paragraphs A1 to A18.</p>	<p>A19Q1 Is any further guidance needed here? If so, what guidance should be provided?</p>

B How is financial product advice regulated?

Question

FL2 Section B is summarised in the flowchart on the next page. Is this flowchart useful? How could it be improved?



B How is financial product advice regulated?

Policy proposal	Your feedback
<p>Do I provide financial product advice or am I a mere conduit?</p> <p>B1 The licensing provisions apply only to persons who “provide” financial product advice. For the purposes of determining whether a licence or authorisation under Part 7.6 is required, the persons we regard as “providing” financial product advice are:</p> <ul style="list-style-type: none"> (a) the author of the advice; and (b) where the author of the advice is acting on behalf of another person (the principal) in relation to the advice, the principal; and (c) any other person who endorses the advice. <p>B2 A person does not “provide” financial product advice where:</p> <ul style="list-style-type: none"> (a) the person acts as a <i>mere conduit</i> for advice provided by someone else: see policy proposal paragraphs B3 to B8 (in this case the actions of the mere conduit may be described as <i>passing on</i>, <i>giving</i>, or <i>directing</i> the advice, but not providing it); or (b) the person’s conduct is done in the course of work of a kind ordinarily done by clerks or cashiers (766A(3)): see policy proposal paragraph B5. <p>Mere conduits</p> <p>B3 A person (A) acts as a <i>mere conduit</i> if:</p> <ul style="list-style-type: none"> (a) the opinion or recommendation in question (being financial product 	<p>B3Q1 Is this a workable definition of a mere conduit? If not, why not</p>

Policy proposal	Your feedback
<p>advice) is wholly devised by another person (B) and the author of the opinion or recommendation (B) is disclosed;</p> <p>(b) A does not select, modify or exercise control over the content of the opinion or recommendation before it is passed on, given or directed to consumers (except as set out in policy proposal paragraphs B4 or B5);</p> <p>(c) B is not acting on behalf of A; and</p> <p>(d) A does not expressly or impliedly endorse or adopt the opinion or recommendation.</p> <p>B4 A does not cease to be a mere conduit merely by retaining or exercising the power to refuse to pass on material to consumers:</p> <p>(a) that is illegal or defamatory; or</p> <p>(b) when requested to do so by a body that has power under any law to make such a request; or</p> <p>(c) when required to do so by law.</p> <p><i>Clerks and cashiers exemption</i></p> <p>B5 A does not cease to be a mere conduit where A's actions in relation to the advice are limited to actions of a clerk or cashier: see 766A(3). We consider that the clerks and cashiers exemption applies to purely administrative or mechanical functions which do not involve the exercise of any independent judgment and which are provided in relation to a licensee's business.</p> <p>Example: A call centre telephone operator passes on factual information as well as financial product advice (being replacement value information for insurance purposes) to consumers. The advice is derived by applying personal information supplied by consumers to a screen-based calculator. This conduct falls within the clerks and cashiers exemption: see Example 2 in</p>	<p>and how should the term be defined?</p>

Policy proposal	Your feedback
<p>the Schedule. As to whether such conduct constitutes arranging, see policy proposal paragraph D7.</p> <p>More guidance on “mere conduits”</p> <p>B6 Whether A has expressly or impliedly endorsed a statement made by another person (B) is a question of fact. Our approach is to focus on the overall effect of the communication on the consumer. If a reasonable person would consider that the statement was provided by, or endorsed by, A, then A is not a mere conduit.</p> <p>B7 We consider that the following factors increase the risk that A will <i>not</i> be acting as a mere conduit of B:</p> <ul style="list-style-type: none"> (a) where A receives any remuneration or other benefit dependent on decisions made by consumers (as opposed to a flat fee or other benefit for acting as a conduit for the statement in question); (b) where A does not expressly and prominently state that the statement in question is provided by B, and not endorsed by A; or (c) where A’s reputation lends credence to the statement provided by B. <p>B8 Examples of persons who, <i>depending on the circumstances</i>, may be mere conduits include persons who merely display or distribute promotional material, publishers, call centre telephone operators and internet portal operators.</p> <p>Note: For examples of call centre telephone operators and internet portal operators, see Schedule 2 of this paper.</p>	<p>B7Q1 Do these factors cause any difficulties for industry? If so, what are they and how can they be overcome?</p> <p>B7Q2 Are there any other factors that increase the risk that A is not acting as a mere conduit? If so, what are they?</p>

Policy proposal	Your feedback
<p>Is a licence or authorisation required?</p> <p>B9 A person who “carries on a business” of providing financial product advice must hold a licence (unless an exemption applies: see policy proposal paragraphs B12 to B17).</p> <p>The “business” test</p> <p>B10 The “business” test is satisfied where a person provides financial services with system, repetition and continuity. The Explanatory Memorandum to the Bill states that “one-off transactions relating to the provision of financial services and financial products are unlikely to be caught by the new regime”: see page 99.</p> <p>B11 There is no requirement for a profit motive in order for the “business” test to be satisfied: see 761C of the Bill and s18 of the current Corporations Law. The implication for trustees of non-public offer superannuation funds is that the licensing obligation will not be avoided merely on the basis that the trustee is a non-profit entity.</p> <p style="padding-left: 40px;">Note: Policy proposal paragraphs B10 and B11 are a continuation of the policy set out in Policy Statement 116 <i>Investment advisory services: licensing and “independent” advisory services</i> [PS 116] at [PS 116.23]–[PS 116.28].</p> <p>B12 In general, a person (A) who provides financial product advice “on behalf of” another person (B) will be required to hold an authorisation from B (see 911B), unless A is an employee or director of B, or of a related body corporate of B. Also, B must be licensed.</p> <p style="padding-left: 40px;">Note: See 911A and 911B. We will issue further guidance outlining the circumstances in which a</p>	

Policy proposal

person providing financial services is required to hold their own licence or to hold an authorisation from a licensee in our planned FSRB policy proposal paper *Licensing: Principals and representatives* for issue in May 2001.

Are you exempt from holding a licence?

B13 The exemptions from the requirement to hold a licence are set out in 911A(2).

B14 A licence is not required where you provide financial services as a representative of a licensee: see 911A(2)(a). However, an authorisation may be needed under 911B.

B15 A body regulated by APRA is not required to hold a licence where the financial product advice is provided in the course of carrying on the business or undertaking which causes that APRA regulation to be required and where the service is provided only to wholesale clients.

Note: See 911A(2)(g). The expression “body regulated by APRA” is defined in 761A.

B16 Members of declared professional bodies do not need to hold a licence to provide financial product advice (this exemption does not apply to dealing).

Note: See 911A (2)(d) and Division 7 of Part 7.6 (918A–919E) concerning declared professional bodies.

B17 ASIC has power, by an exemption published in the *Gazette*, to exempt the provision of a service from the requirement to hold a licence.

Note: See 911A (2)(l). We plan to issue an FSRB policy proposal paper on *Licensing: Discretionary powers* in May 2001.

Your feedback

Policy proposal	Your feedback
<p>B18 The limited exemption from holding a licence for product issuers who “outsource” their distribution activities to a licensee (see 911A(2)(b)) does <i>not</i> relieve the product issuer from holding a licence if it provides financial product advice. (Accordingly, any financial product advice provided by the licensee in this situation must be provided in the licensee’s own capacity, and not on behalf of the product issuer.)</p> <p>What obligations apply to licensees who provide financial product advice?</p> <p>B19 Licensees must comply with the obligations set out in 912A and with any other obligations set out in the Law (as amended by the Bill). This includes a requirement to comply with all licence conditions imposed by regulation or by ASIC. The requirements also vary depending on whether advice is provided to retail or wholesale clients.</p> <p>B20 We will provide guidance on several licensee obligations, such as:</p> <ul style="list-style-type: none"> (a) organisational capacities; (b) external and internal dispute resolution arrangements; (c) financial requirements; and (d) discretionary powers. <p>Note: See our paper <i>Building the FSRB Administrative Framework</i> (April 2001) for a description of our other relevant policy publications issued or planned for issue.</p> <p>B21 The nature, scale and complexity of the regulatory obligations that apply to licensees will depend on the nature and extent of their activities.</p>	

Policy proposal

Note: For example, the requirements for a financial planner who advises on a full range of products will be different to the requirements for a person who advises on a single product.

What obligations apply to representatives?

B22 Some obligations in the Law are imposed directly on representatives. The primary obligation to ensure compliance with the Law is imposed on licensees, who are responsible for the conduct of their representatives.

Note: See 912A(c). See also Divisions 5 and 6 of Part 7.6 on representatives and the liability of licensees for the conduct of their representatives.

B23 Licensees must ensure that their representatives are adequately trained and competent: see 912A(f). Interim Policy Statement 146 *Training of authorised representatives* [IPS 146] continues to apply to the provision of financial product advice by representatives to *retail clients*.

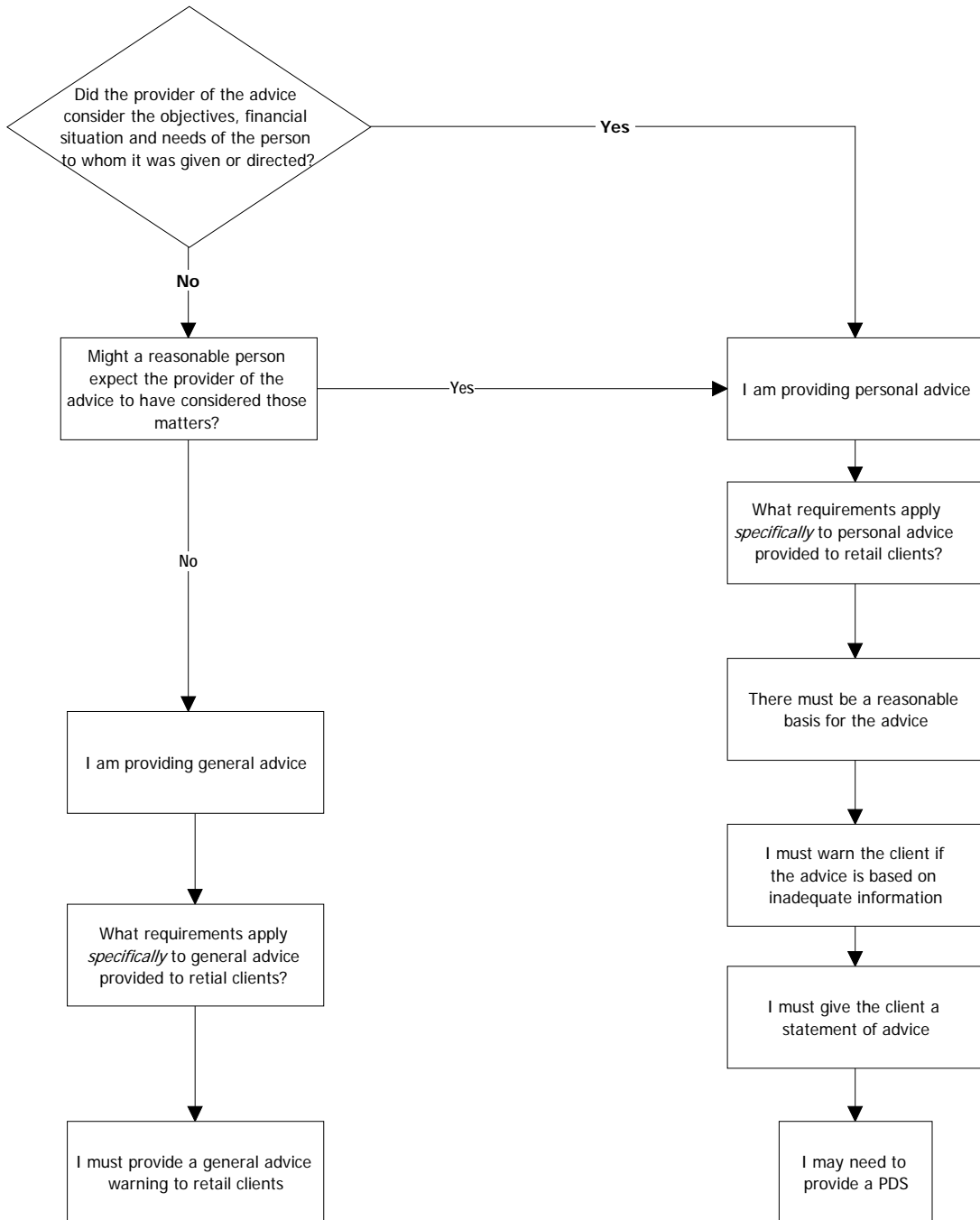
Note: See our FSRB Policy Proposal Paper No 3 on *Licensing: Adapting IPS 146 to the Financial Services Reform regime* (April 2001).

Your feedback

C Is the advice personal advice or general advice?

Question

FL3 Section C is summarised in the flowchart on the next page. Is this flowchart useful? How could it be improved?



C Is the advice personal advice or general advice?

Policy proposal	Your feedback
<p>Is the advice personal advice or general advice?</p> <p>C1 Financial product advice will be personal advice if the advice is given or directed to a person and the answer to either of the following questions is “yes”:</p> <ul style="list-style-type: none"> (a) did the provider of the advice consider the objectives, financial situation and needs of the person to whom it was given or directed? (b) might a reasonable person expect the provider of the advice to have considered those matters? <p>All other financial product advice is general advice.</p> <p style="padding-left: 40px;">Note: See 766B(3) and (4). Personal advice need not be confined to advice given during a face-to-face meeting: it may be given in writing or by electronic means.</p> <p>C2 Advice may be personal advice even where the provider of the advice is permitted to give advice on only one, or on a very limited range of financial products</p> <p>C3 Advice may be personal advice regardless of whether the person to whom it is given or directed is a natural person or not, eg a body corporate trustee.</p> <p>C4 Advice given or directed to a group of persons may be personal advice where the group has, collectively, a single set of objectives, financial situation and needs, eg</p>	

Policy proposal	Your feedback
<p>advice given to members of a family.</p> <p>C5 An issue arises as to whether advice passed on to a consumer by a mere conduit can constitute personal advice where the provider has not had direct contact with the consumer and has not directly considered the objectives, financial situation or needs of that individual consumer.</p> <p>We consider that such advice <i>will</i> be personal advice where the advice passed on by the mere conduit is, in fact, tailored to the consumer's particular circumstances (eg where the mere conduit uses a screen-based calculator to determine the particular advice to be passed on to the consumer: see also policy proposal paragraph B5 and Example 2 in the Schedule).</p> <p>C6 Advice presented at a seminar will generally not constitute personal advice, unless the group of people to whom the advice is directed have similar objectives, financial situations and needs. Similarly, advice presented in a newspaper or on a radio program will generally not constitute personal advice except to the extent to which it is given or directed to a specific person or to a group of people with common objectives, financial situations and needs.</p> <p>What requirements apply specifically to general advice?</p> <p>C7 In addition to the matters set out in Section B of this policy proposal paper and other requirements which apply to all advice, a person providing general advice to <i>retail clients</i> must provide a general advice warning: see 949A.</p>	<p>C6Q1 In what circumstances (if any) would advice in a newspaper based on a <i>hypothetical</i> situation constitute personal advice? Why?</p>

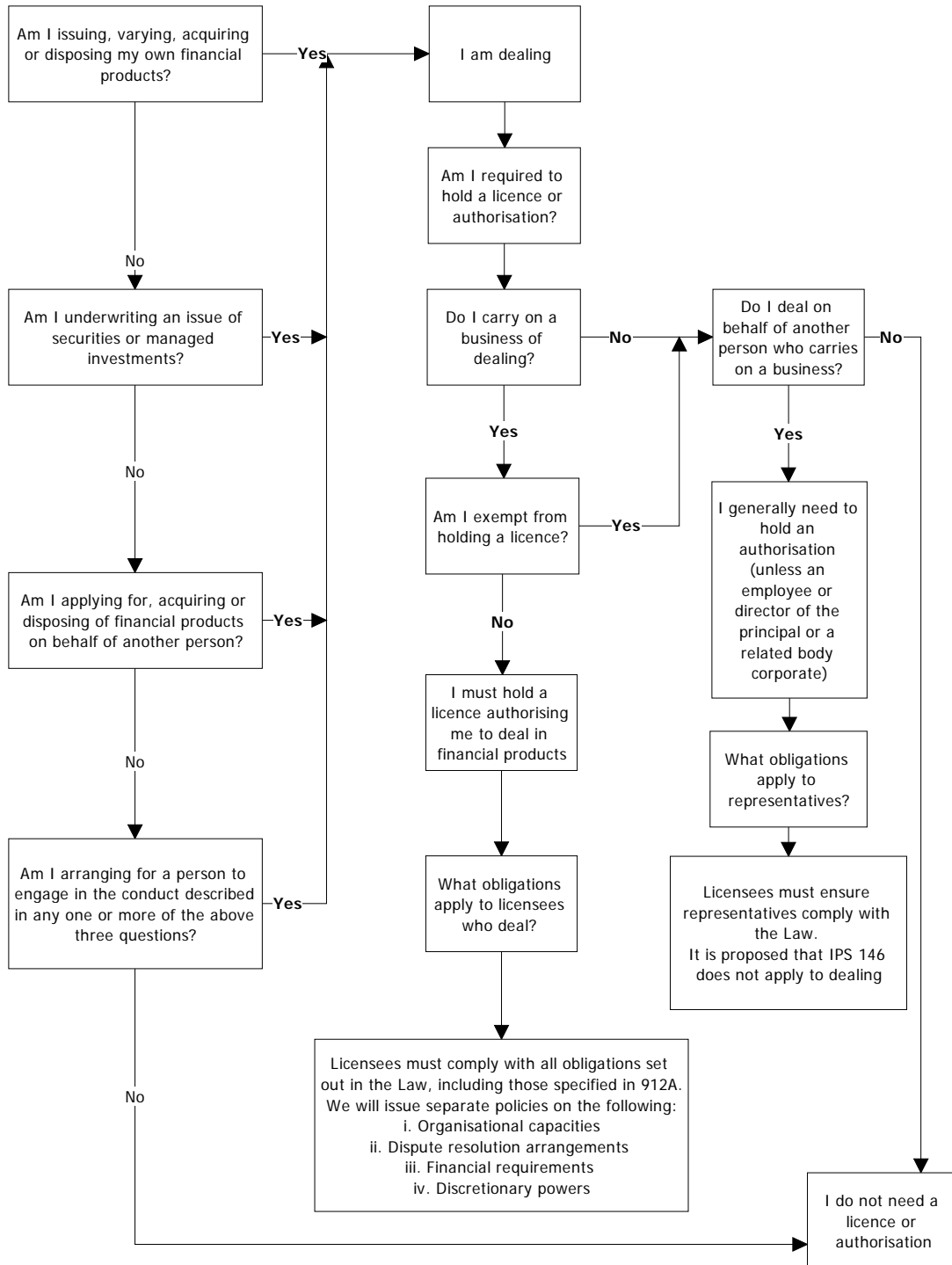
Policy proposal	Your feedback
<p>What requirements apply <i>specifically</i> to personal advice?</p> <p>C8 In addition to the matters set out in Section B of this paper and other requirements which apply to all advice, a person providing personal advice to <i>retail clients</i> must:</p> <ul style="list-style-type: none">(a) have a reasonable basis for the advice provided;(b) warn the client if the advice is based on insufficient personal information; and(c) give the client a Statement of Advice. <p>Note: See Part 7.7. The client may also need to be given a Product Disclosure Statement under Part 7.9.</p>	

D What is dealing?

Question

FL4 Section D is summarised in the flowchart on the next page. Is this flowchart useful? How could it be improved?

SCOPE OF THE LICENSING REGIME: FINANCIAL PRODUCT ADVICE AND DEALING



D What is dealing?

Policy proposal	Your feedback
<p>What is dealing?</p> <p>D1 Dealing includes:</p> <ul style="list-style-type: none"> (a) an issuer of financial products issuing, varying, acquiring (ie repurchasing) or disposing of those financial products; (b) a person underwriting an issue of securities or managed investments; (c) a person applying for, acquiring or disposing of financial products on behalf of another person (who may be a consumer or a product issuer); or (d) arranging for a person to engage in conduct referred to in sub-paragraphs (a)–(c): see policy proposal paragraphs D3 to D6. <p>Note: See 766C.</p> <p>D2 Dealing does <i>not</i> include:</p> <ul style="list-style-type: none"> (a) applying for, acquiring, or disposing of financial products as a principal, except in the case of product issuers dealing in their own financial products: see 766C(3); or (b) dealing by a body corporate (other than an investment company) in its own securities. <p>Note: See 766C(4)–(5). This exemption does not provide relief where the body corporate provides financial product advice.</p> <ul style="list-style-type: none"> (c) conduct done in the course of work of a kind ordinarily done by clerks or cashiers: see 766A(3); or (d) insurance claims handling. 	

Policy proposal

Note: However, if insurance claims handlers provide financial product advice or if they engage in conduct referred to in policy proposal paragraph D1, they *will* be providing a financial service, and will therefore generally require a licence or authorisation.

What is arranging?

D3 We consider that “arranging” includes all actions or steps involved in negotiating for, or bringing into effect, the issue or sale of a financial product to a consumer (or for the disposal or variation of a financial product held by a consumer, or for an issue of securities or managed investments to be underwritten).

This will include negotiations about the contractual terms and conditions attaching to the financial product or the consideration to be paid in relation to the transaction (whether or not any transaction actually eventuates). A person may be arranging even if they undertake only some (but not all) the actions or steps necessary to bring into effect the transaction.

D4 Arranging includes “arranging contracts of insurance” as that expression has been interpreted in relation to the *Insurance (Agents and Brokers) Act 1984*. However, under the Bill, arranging is not limited to insurance – it can apply to any financial product.

D5 However, we consider that the following actions do *not* constitute arranging:

- (a) actions which amount to the provision of financial product advice (in which case the actions will be regulated as financial product advice: see 766C(2));
- (b) actions which have no connection with

Your feedback

D3Q1 What other commercial situations or circumstances require ASIC guidance on “arranging”? If so, what guidance should be provided and why?

D3Q2 Do you agree with our analysis on “arranging” as described in policy proposal paragraphs D3 to D5? Are there any other circumstances which you consider do not constitute arranging? Please explain your comments and provide details.

Policy proposal	Your feedback
<p>the issue, sale, disposal of or variation of a financial product (eg this will generally apply to loss adjustors);</p> <p>(c) actions done in the course of work as done by clerks and cashiers: see 766A(3). The actions covered by this exemption are purely administrative or mechanical functions which do not involve the exercise of any independent judgement and which are provided in connection with a licensee's business; and</p> <p>(d) actions which amount to nothing more than a referral or introduction to a licensee (or representative of a licensee) provided the referring party:</p> <p>(i) does <i>not</i> participate in any way in negotiations about the contractual terms and conditions attaching to the financial product or the consideration to be paid for the transaction; and</p> <p>(ii) makes the referral as an incidental part of another business (ie the referring party must not offer or provide a discrete referral service).</p> <p>Arranging – some examples</p> <p>D6 An example of conduct which <i>would</i> normally constitute arranging is a typical order routing service, under which the service provider takes steps to bring into effect an acquisition or disposal of a financial product, albeit that another intermediary (eg an overseas intermediary) is also involved in the process and executes the customer's order. (Order routing services are typically offered as discrete services, and do not therefore fall within the referrals exemption.)</p> <p>D7 Examples of conduct which would <i>not</i></p>	

Policy proposal	Your feedback
<p>normally constitute arranging are:</p> <ul style="list-style-type: none"> (a) call centre telephone operators in the circumstances described in the example following policy proposal paragraph B5: see the clerks and cashiers exemption (766A(3)); and (b) travel agents who <ul style="list-style-type: none"> (i) suggest that consumers should consider taking out travel insurance; (ii) state that specified travel insurance can be organised through the travel agency; (iii) distribute product disclosure statements; (iv) help consumers complete application forms; and (v) post those forms to the insurer. <p>These actions fall within the exemptions for clerks and cashiers and referrals.</p> <p>Is a licence or authorisation required?</p> <p>D8 The approach set out in policy proposal paragraphs B10 to B12 applies.</p> <p>D9 Dealers who do not provide financial product advice will only need to hold a licence authorising them to deal. Dealers who also provide financial product advice will need to hold a licence authorising them to conduct both activities.</p> <p>Are you exempt from holding a licence?</p> <p>D10 The exemptions from the requirement to hold a licence are set out in 911A(2) of the Bill.</p>	

Policy proposal	Your feedback
<p>D11 A body regulated by APRA is not required to hold a licence where the dealing occurs in the course of carrying on the business or undertaking, which causes that APRA regulation to be required and where the service is provided only to wholesale clients.</p> <p>Note: See 911A(2)(g). The expression “body regulated by APRA” is defined in 761A.</p> <p>D12 Product issuers do not need to hold a licence where their only dealing activities involve the issue, variation or disposal of its financial products according to 911A(2)(b). For this exemption to apply, the product issuer must not provide financial product advice.</p> <p>D13 ASIC has power, by an exemption published in the <i>Gazette</i>, to exempt the provision of a service from the requirement to hold a licence.</p> <p>Note: See 911A (2)(1). We plan to issue an FSRB policy proposal paper on <i>Licensing: Discretionary powers</i> in May 2001.</p> <p>D14 Members of a declared professional body are <i>not</i> exempt from the requirement to hold a licence if they deal in financial products. This means, for example, that members of declared professional bodies who provide financial product advice and do not wish to be licensed must not arrange for the issue of a financial product to their clients: see policy proposal paragraphs D3 to D7.</p> <p>What obligations apply to licensees who deal?</p> <p>D15 The approach set out in policy proposal paragraphs B19 to B21 applies.</p>	

Policy proposal	Your feedback
<p data-bbox="277 321 764 407">What obligations apply to representatives?</p> <p data-bbox="277 428 837 646">D16 Some obligations in the Law are imposed directly on representatives. The primary obligation to ensure compliance with the Law is imposed on licensees, who are responsible for the conduct of their representatives.</p> <p data-bbox="277 678 846 896">D17 Licensees must ensure that their representatives are adequately trained: see 912A(f). We propose that the requirements of [IPS 146] do not, however, apply to representatives who deal without providing financial product advice.</p> <p data-bbox="375 934 870 1035">Note: See our FSRB Policy Proposal Paper No 3 on <i>Licensing: Adapting IPS 146 to the Financial Services Reform regime</i> (April 2001).</p>	

Schedule: Examples of activities which may amount to financial product advice

The examples set out in this Schedule illustrate how to use the policy proposals in this paper to work out whether various activities amount to providing financial product advice and, if so, how such advice is regulated (Sections A and B of this paper). Some examples also consider the difference between personal advice and general advice (Section C of this paper).

Note that these examples do *not* consider whether the conduct in question may amount to dealing (Section D of this paper).

The examples in this Schedule relate to activities typically undertaken by the following persons:

- 1 Internet portal operators
- 2 Call centre telephone operators
- 3 Travel agents
- 4 Talk-back radio presenters
- 5 Newspaper columnists

Important note: Do *not* rely on the examples below to help you work out whether you are providing financial product advice or need an Australian financial services licence or authorisation. Each case will depend on its own specific circumstances and context. You should obtain your own legal advice on whether your activities come under the licensing provisions and, if so, how your activities will be regulated. The policy and examples in this paper are at a preliminary stage only. The examples and the suggested conclusions may change as a result of the comments we receive. You should treat them only as an indication of how we are thinking at this stage.

Questions

EXQ1 Are there any other important activities on which guidance is needed? If so, what are those activities and why is guidance needed? (We will *not* be attempting to provide comprehensive guidance on the full range of activities.)

EXQ2 Would further detail make the examples in this Schedule more helpful? If so, what additional level of detail should be provided?

EXQ3 Should ASIC provide guidance for dealing? If so, what guidance should be provided and why?

EXQ4 Do you disagree with any of the conclusions reached about the application of the Law in any of the examples in this Schedule? If so, please explain why.

Example 1: Internet portal operators

Consider the following example:

- (a) an internet portal operator (portal operator) operates a website;
- (b) various investment advisers, brokers and fund managers put promotional material (consisting of factual information and advice) about financial products on the operator's site;
- (c) on entering the site, viewers see:
 - (i) a prominent disclaimer stating that:
 - (A) the advice on the site is general advice only and does not consider individual viewers' objectives, financial situations and needs;
 - (B) the portal operator does not in any way endorse the advice on the site; and
 - (C) viewers should consider seeking their own independent advice before making investment decisions; and
 - (ii) a link to a consumer information site such as ASIC's consumer website at **www.fido.asic.gov.au**;
- (d) viewers can click on links that take them from the portal operator's site to other websites, some of which are operated by licensees who offer a wide range of financial products and services to viewers;
- (e) the portal operator receives remuneration from the operators of linked sites;
- (f) the portal operator does not endorse, select, modify or exercise control over the content of material on its website, except that it retains the right to remove, or refuse to transmit, material it considers may be illegal or defamatory.

The following tables consider these questions:

- A** Does the portal operator's site contain financial product advice?
(see **Section A** of this paper)

And if so:

- B** What regulatory requirements apply to the portal operator in relation to the advice? (see **Section B** of this paper)

As to whether the portal operator is "arranging" and, therefore, dealing, see policy proposal paragraphs D3 to D7 of this paper.

A What is financial product advice?	
Question	Answer
Q1 The <i>character</i> of the communications – Do the communications consist of opinions or recommendations? (see paras A2 – A6 of this paper)	Yes – the communications placed on the site by investment advisers, brokers and fund managers are not confined to purely factual information.
Q2 The <i>context</i> of the communications - Are the opinions or recommendations intended to influence, or could they reasonably be regarded as being intended to influence, a person’s decision in relation to a financial product or a class of financial products? (see policy proposal paragraphs A7 to A15 of this paper)	Yes – the communications placed on the site are authored by investment advisers, brokers and fund managers – they consist of promotional material relating to financial products – these entities stand to benefit if consumers make a decision to buy the financial products.
Q3 Are the communications exempted from the definition of financial product advice? (see policy proposal paragraphs A16 to A20 of this paper).	No.
Answer: The communications are financial product advice.	

B How is financial product advice regulated?	
Question	Answer
Q4 Is the portal operator <i>providing</i> financial product advice or is it a mere conduit? (see policy proposal paragraphs B1 to B8 of this paper).	The portal operator is a mere conduit. The portal operator does not, therefore, need to hold a licence or an authorisation. The portal operator is a mere conduit because the material is wholly devised by other persons. The portal operator does not exercise any control over the content of material placed on its site (apart from removing defamatory or illegal material) and does not endorse or adopt the material.
Answer: The portal operator is not <i>providing</i> financial product advice and is not required to hold a licence or authorisation. (However, the investment advisers, brokers and fund managers who place the communications on the website <i>will</i> be providing financial product advice.)	

In this example, the portal operator is a mere conduit, transmitting material wholly devised by others. The operator is not regarded as *providing* financial product advice, and consequently is not required to hold a licence or authorisation.

The mere fact that the portal operator provides links to the websites of licensees providing a broad range of financial products does not, of itself, amount to the provision of advice by the portal operator: see policy proposal paragraph A15 of this paper.

The investment advisers, brokers and fund managers who place the communications on the website *will* be providing financial product advice and will, therefore, generally require a licence or authorisation.

When may a portal operator need a licence or authorisation?

The facts of the above example can be changed to illustrate situations in which the portal operator may be required to hold a licence or authorisation:

- (a) the portal operator adds a feature to its site that offers viewers a questionnaire about their objectives, financial situation and needs. On the basis of their answers to the questionnaire, viewers are given information and advice about selected financial products; or
- (b) the operator uses data mining techniques to determine what types of product the viewer is interested in (based on the viewer's conduct on the site), then gives the viewer information about those types of product.

On these varied facts, the portal operator is no longer a “mere conduit” transmitting material devised by others. The portal operator may be providing financial product advice in these circumstances.

If the portal operator is providing financial product advice, it will normally be required to hold a licence or an authorisation from a licensee. Follow the flow charts at the beginning of Sections A, B and C of this paper to work out the obligations which will apply to the portal operator if it is providing advice.

Questions

EXQ5 Should it make any difference whether the portal operator is a relatively unknown company or a major corporate entity with a significant retail brand? Would the mere fact that a major corporation operates the site be taken as an implicit endorsement of the material on the site? Please briefly explain your answer.

EXQ6 In what circumstances will a portal operator be providing financial product advice by utilizing questionnaires or data mining techniques? When will such advice constitute personal advice? Please briefly explain your answer.

Example 2: Call centre telephone operators

Consider the following example:

- (a) an insurer utilises an “outsourced” telephone call centre;
- (b) a telephone operator at the insurer’s call centre gives customers purely factual information about the general insurance products available from the insurer;
- (c) customers sometimes ask the telephone operator for help in determining the appropriate amount of insurance for their needs;
- (d) the telephone operator uses a screen-based calculator supplied by the insurer to provide this help (this may involve, for example, advising customers of property replacement values that are reasonable estimates);
- (e) the screen-based calculator is based on figures produced by (ie authored by) and given to the telephone operator by a person within the underwriting department of the insurance company; and
- (f) insurance cover is issued to the customer.

In this example, the telephone operator’s communications are made on behalf of the insurance company, which holds a licence authorising it to provide financial product advice.

The following tables consider these questions:

- A** Do the telephone operator’s communications amount to financial product advice? (see **Section A** of this paper)

And if so:

- B** What regulatory requirements apply to the telephone operator in relation to the advice? (see **Section B** of this paper)
- C** Is the advice personal advice or general advice? (see **Section C** of this paper)

<i>A What is financial product advice?</i>	
Question	Answer
Q1 The <i>character</i> of the communications – Do the communications consist opinions or recommendations? (see policy proposal paragraphs A2 to A6 of this paper)	Yes – The replacement values are opinions – while they are reasonable estimates, they are not purely factual information.
Q2 The <i>context</i> of the communications – Are the opinions or recommendations intended to influence, or could they reasonably be regarded as being intended to influence, a person’s decision in relation to a financial product or a class of financial products? (see policy proposal paragraphs A7 to A15 of this paper)	Yes – the insurer stands to benefit depending on customers’ decisions. There is an implied representation that customers may rely on the opinions about replacement values. Further, customers may be influenced by the reputation of the insurer (see policy proposal sub-paragraphs A12(a), (c) and (e) of this paper).
Q3 Are the communications exempted from the definition of financial product advice? (see policy proposal paragraphs A16 to A20 of this paper).	No
Answer: The communications are financial product advice.	

<i>B How is financial product advice regulated?</i>	
Question	Answer
Q4 Is the telephone operator <i>providing</i> financial product advice or is it a mere conduit? (See policy proposal paragraphs B1 to B8 of this paper).	The telephone operator is a mere conduit. The telephone operator does not, therefore, need to hold an authorisation. The telephone operator is a mere conduit because the information provided to customers is wholly devised within the underwriting department of the insurance company. The telephone operator does not exercise any control over the content of the information (other than by applying personal information supplied by the customer to a screen-based calculator, which is an act of a clerk or cashier) and does not endorse or adopt the material.
Answer: The telephone operator is not providing financial product advice and does not, therefore, require an authorisation. (However, the author of the underwriting information will be providing financial product advice.)	

<i>C Is the advice personal advice or general advice?</i>	
Question	Answer
Q5 Does the advice consider the objectives, financial situation and needs of the customer, or might a reasonable person expect the advice to have considered those matters?	Yes – although the author has not directly considered the objectives, financial situation and needs of any individual customer, the advice about replacement values passed on by the telephone operator is, in fact, tailored to the customer’s particular circumstances.
Answer: The advice is personal advice.	

In this example the telephone operator is a mere conduit, transmitting financial product advice wholly devised by others. The telephone operator does not cease to be a mere conduit merely by determining the information to be given to customers based on an application of simple information supplied by the customer to a screen-based calculator. This is because such conduct falls within the clerks and cashiers exemption. Accordingly, the telephone operator does not *provide* financial product advice and, consequently, is not required to hold an authorisation. (As to whether the telephone operator is “arranging” and, therefore, dealing, see policy proposal paragraphs D3 to D7 of this paper).

In this example, the author of the underwriting information *is* providing financial product advice. This means that the author must hold an authorisation and the person for whom the author acts (ie the insurance company) must hold a licence authorising it to provide financial product advice.

The advice provided by the author of the underwriting information (and passed on as a mere conduit by the telephone operator) is personal advice. This means that there must be a reasonable basis for the advice (945A). It also means that the customer must be given a Statement of Advice (Division 2 of Part 7.7). In this example, the scope of the advice is limited, ie it is designed solely to assist the customer in determining replacement values. We consider that the obligations in Part 7.7 should be read in light of this limited scope.

These results can be avoided only if the telephone operator gives customers purely factual information only. This would mean that

customers could not be informed about replacement values or any other matters that were not purely factual.

Questions

EXQ7 Do you agree that call centre operators in these circumstances are not subject to the conduct and expertise requirements for representatives of a licensee? Please briefly explain your answer.

EXQ8 Do you agree that the author of underwriting information in these circumstances should be subject to the conduct and expertise requirements for representatives of a licensee? Please briefly explain your answer.

EXQ8 Do you agree that the advice passed on by telephone operator in these circumstances is personal advice (see policy proposal paragraphs B5 and C5)? Please briefly explain your answer.

Example 3: Travel agents

Consider the following example:

- (a) a travel agent company (the company) carries on a business of selling holiday packages to retail customers;
- (b) promotional material and product disclosure statements offering travel insurance are produced by the relevant insurer. They are handed out to customers who buy holiday packages from the company. The logo of the company appears on these documents;
- (c) as standard company practice, individual travel agents employed by the company suggest that customers should consider taking out insurance, and refer customers to particular insurance which can be organised through the company, but make it clear that the decision to take out insurance remains with the individual customer;
- (d) individual travel agents do not make any express or implied representations which compare the insurance offered in the brochure with any other travel insurance product;
- (e) individual travel agents do not answer any questions from customers about the insurance, but rather suggest that the customer raise any queries with the insurer;
- (f) the company (but not the individual travel agents) receives benefits from the insurer dependent on the level of sales of the insurance product offered in the brochure;
- (g) the insurer holds a licence authorising it to advise on its own financial products.

The following tables consider these questions:

- A** Do the communications of the individual travel agents constitute financial product advice? (see **Section A** of this paper)

And if so:

- B** What regulatory requirements apply to the individual travel agents and the travel agent company? (see **Section B** of this paper)

As to whether the travel agent company or individual travel agents are “arranging” and, therefore, dealing, see policy proposal paragraphs D3 to D7 of this paper.

<i>A What is financial product advice?</i>	
Question	Answer
Q1 The <i>character</i> of the communications – Do the communications consist opinions or recommendations? (see policy proposal paragraphs A2 to A6 of this paper)	Yes – promotional material and product disclosure statements (para (b)) will almost certainly contain opinions. The suggestion to consider taking out travel insurance and the referral (para (c)) may also involve an implied opinion.
Q2 The <i>context</i> of the communications - Are the opinions or recommendations intended to influence, or could they reasonably be regarded as being intended to influence, a person’s decision in relation to a financial product or a class of financial products? (see policy proposal paragraphs A7 to A15 of this paper)	Yes – the promotional material and product disclosure statements are clearly intended to influence customers’ decisions (the insurer stands to benefit from customers’ decisions.) However, it is unlikely that the suggestion to consider taking out travel insurance and the referral involves the provision of financial product advice, applying the criteria in policy proposal paragraphs A7 to A15 of this paper.
Q3 Are the communications exempted from the definition of financial product advice? (see policy proposal paragraphs A16 to A20 of this paper).	This will depend on the definition of “exempt document”. It is expected that product disclosure statements will be exempt documents. It is assumed that the promotional material will not fall within the exempt document exemption.
<i>Answer:</i> The communications are financial product advice.	

<i>B How is financial product advice regulated?</i>	
Question	Answer
<p>Q4 Is the travel agent company <i>providing</i> financial product advice or is it a mere conduit? Are the individual travel agents providing financial product advice or are they mere conduits? (see policy proposal paragraphs B1 to B8 of this paper).</p>	<p>The travel agent company is not a mere conduit. This is because it has placed its logo in the promotional material, thereby endorsing the financial product advice provided by the insurer. The receipt of benefits from the insurer also increase the risk that the travel agent company would not be acting as a mere conduit. Accordingly, the travel agent company needs to hold an authorisation from the insurer.</p> <p>However, the individual travel agents are mere conduits. They do not endorse the promotional material and do not benefit from customers' decisions. They do not need to hold an authorisation.</p>
<p>Answer: The travel agent company is providing financial product advice and must, therefore, hold an authorisation from the insurer.</p> <p>(However, the individual travel agents are not providing financial product advice.)</p>	

Question

EXQ10 Do you agree with these conclusions? Please briefly explain your answer.

Example 4: Talk-back radio presenters

Consider the following example:

- (a) a presenter runs a talkback radio program on which she takes questions from listeners about their financial situations and investment requirements;
- (b) at the start and during the radio program, the presenter always states that she is not fully aware of listeners' circumstances, recommends they obtain their own independent advice before making investment decisions, and suggests where they can get general information about investing;
- (c) the presenter expresses broad opinions on various aspects of the economy and the investment scene;
- (d) the presenter sometimes makes specific suggestions about how listeners should allocate their investments among broad asset classes (eg shares, real estate, cash);
- (e) the presenter describes the features of various financial products, but takes care to ensure she only provides purely factual information, eg the subscription closing date for a current share offer;
- (f) the presenter is careful to talk about a broad range of financial products and to avoid expressing opinions on specific products;
- (g) the presenter always discloses whether she has an interest in any financial product she describes; and
- (h) the presenter is paid a flat weekly amount for appearing on the radio program, and receives no other remuneration in connection with the program. The presenter does not receive any fee, commission or other benefit dependent on any decision made by listeners to buy, sell or hold any financial product upon which any opinion is expressed during the program.

The following table considers the following question:

- A** Does the presenter provide financial product advice? (see **Section A** of this paper)

<i>A What is financial product advice?</i>	
Question	Answer
Q1 The <i>character</i> of the communications – Do the communications consist opinions or recommendations? (see policy proposal paragraphs A2 to A6 of this paper)	Yes – paras (c) and (d) are opinions, not purely factual information (although (e) is purely factual information and, therefore, is not financial product advice).
Q2 The <i>context</i> of the communications - Are the opinions or recommendations intended to influence, or could they reasonably be regarded as being intended to influence, a person’s decision in relation to a financial product or a class of financial products? (see policy proposal paragraphs A7 to A15 of this paper)	No – we consider that it is extremely unlikely that the opinions in paras (c) or (d) could be said to constitute financial product advice. Opinions that merely influence asset allocation decisions are not financial product advice (see policy proposal paragraph A11 of this paper).
<i>Answer:</i> The communications are not financial product advice.	

When may a presenter need a licence or authorisation?

The facts of the above example can be changed to illustrate a situation in which the presenter would be required to hold a licence or authorisation.

Consider the situation where the presenter gives opinions or recommendations about particular financial products or classes of financial products in response to listeners’ questions. In these circumstances, it is likely that she will be providing financial product advice, at least to the listener who asked the question, and probably to the radio audience as well. This is particularly likely to be the case where the presenter’s reputation is likely to influence listeners generally in making decisions to buy or sell financial products. The disclosure referred to in para (b) would not be sufficient to avoid this conclusion. In any event, it is clear that the presenter’s opinions would constitute advice if the presenter obtained a benefit from any decision of any listener to buy or sell the financial products that were the subject of the opinion: see policy proposal paragraph A14 of this paper. In these circumstances, the presenter would need to hold a licence or authorisation that permitted financial product advice to be provided: see Section B of this paper.

On these varied facts, is the advice personal advice or general advice? The advice is given or directed to the listener who asked the question over the telephone and to the radio audience. The advice provided to the listener who asked the question is likely to constitute personal advice because the presenter will have given the advice in response to the particular circumstances of that person. However, the advice given to the general audience is almost certainly general advice: it would not be reasonable for members of the audience to consider that the presenter had considered their particular circumstances. Further, the radio audience is likely to have diverse objectives, financial situations and needs.

Questions

EXQ11 Is it correct to say that opinions about financial products expressed on a talk-back radio program in response to caller's questions are personal advice in relation to the caller, but general advice in relation to the radio audience? Please briefly explain your answer.

EXQ12 What practical problems arise if talk-back radio presenters are required to provide a Statement of Advice to callers? Should callers to talk-back investment programs be treated differently from other recipients of personal advice? If so, how and why?

EXQ13 Is it possible to remove opinions on financial products expressed in the context of a talk-back radio program from the category of personal advice by giving appropriate warnings and disclaimers? Please briefly explain your answer.

Example 5: Newspaper columnists

Consider the following example:

- (a) a journalist writes a column in the financial pages of a daily newspaper;
- (b) the sole or principal purpose of the *newspaper* is not to assist readers in making decisions to buy, sell or hold financial products;
- (c) the sole or principal purpose of *journalist's column* is not to assist readers in making decisions to buy, sell or hold financial products;
- (d) the journalist's column expresses broad opinions on various aspects of the economy and the investment scene;
- (e) the column sometimes contains comments on current takeovers, including the merits of accepting current takeover offers;
- (f) the column sometimes contains comments on events that are likely to affect the performance of particular financial products or classes of financial product;
- (g) the journalist always discloses whether he has an interest in any financial product on which he comments;
- (h) whenever opinions are expressed about buying and selling financial products, the column includes a prominent disclaimer that readers should not rely on the column as advice and should consider obtaining their own independent advice; and
- (i) the journalist is paid a salary (or, if a freelance journalist, a flat weekly amount for writing the column) and receives no other remuneration in connection with the column. The journalist does not receive any fee, commission or other benefit dependent on any decision made by readers to buy, sell or hold any financial product upon which any opinion is expressed in the column.

The following table considers the following question:

- A** Does the newspaper columnist provide financial product advice? (see **Section A** of this paper)

<i>A What is financial product advice?</i>	
Question	Answer
Q1 The <i>character</i> of the communications – Do the communications consist opinions or recommendations? (see policy proposal paragraphs A2 to A6 of this paper)	Yes – paras (c), (d) and (e) are opinions.
Q2 The <i>context</i> of the communications - Are the opinions or recommendations intended to influence, or could they reasonably be regarded as being intended to influence, a person’s decision in relation to a financial product or a class of financial products? (see policy proposal paragraphs A7 to A15 of this paper)	Probably not. It is extremely unlikely that the opinions in para (c) would constitute financial product advice. It is less clear whether the opinions in paras (d) and (e) constitute financial product advice. However, the combination of the following factors tends to suggest that the opinions are not financial product advice: <ul style="list-style-type: none"> • the fact that the journalist does not stand to benefit in any way from readers’ decisions; • the fact that it is not the sole or principal purpose of either the newspaper or the journalist’s column to assist readers in making decisions to buy, sell or hold financial products; and • the presence of a prominent disclaimer.
Answer: The communications are probably not financial product advice.	

When may a presenter need a licence or authorisation?

The facts of the above example can be changed to illustrate situations in which the journalist would be providing financial product advice and would, therefore, be required to hold a licence or authorisation. We consider that in *each* of the following three circumstances, the journalist would probably be providing financial product advice:

- (a) if the sole or principal purpose of journalist's column was to assist readers in making decisions to buy, sell or hold financial products (eg if the column was an investment advice column or a column which answered readers' questions about specific investments). The column is particularly likely to involve the provision of financial product advice if the journalist's reputation is likely to influence readers in making decisions to buy or sell financial products. The disclaimer referred to in para (h) would not be sufficient to avoid this conclusion;
- (b) if the column appeared in a publication whose sole or principal purpose was to assist readers in making decisions to buy, sell or hold financial products (eg if the column appeared in an investment magazine);
- (c) if the journalist stands to benefit from decisions of readers to buy, sell or hold any financial product upon which any opinion is expressed in the column.

Question

EXQ14 Do you agree with these conclusions? Please briefly explain your answer.

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 law, regulations or policies;

- (d) identification and categorization of the expected impacts of the proposed options as likely benefits or likely costs against each of the persons/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 business 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).

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 Bill as indicated in the 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 2000;
- (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) a review of existing ASIC policies and practices relevant to the regulation of financial services activity under the law; and
- (f) a review of public submissions on the Exposure Draft Bill issued by the Government in February 2000.

Key terms

In this policy proposal:

“ASIC” means the Australian Securities and Investments Commission;

“authorised representative” of a financial services licensee means a person authorised by the licensee, in accordance with 916A or 916B to provide a financial service services on behalf of the licensee;

Note: This is a definition contained in 761A

“Bill” means the *Financial Services Reform Bill 2001*;

“dealing”, subject to the exemptions in 766C, means the following conduct:

- (a) applying for or acquiring a financial product;
- (b) issuing a financial product;
- (c) in relation to securities or managed investment interests – underwriting the securities or interests;
- (d) varying a financial product;
- (e) disposing of a financial product;

Further, arranging for a person to engage in conduct referred to in sub-paragraphs (a)–(e) is also dealing in a financial product, unless the actions concerned amount to providing financial product advice;

Note: This is a definition contained in 766C

“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 763B);
- (b) manages financial risk (see 763C);
- (c) makes non-cash payments (see 763D);

Note: This is a definition contained in 763A

“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 766B

“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;

“financial services licensee” means a person who holds an Australian Financial Services Licence;

Note: This is a definition is contained in 761A

“general advice” means financial product advice that is not personal advice;

Note: This is a definition contained in 766B

“Law” means the Corporations Law (including as intended to be replaced by the *Corporations Bill 2001*);

“licensee obligations” means the obligations imposed on a licensee under the Law, and includes those set out in 912A;

“managed investment provisions” means Chapter 5C of the Law;

“old Law” is the Law before amendment by the Bill;

“PDS” means a Product Disclosure Statement;

“personal advice” has the meaning set out in 766B(3) of the Bill;

“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;

“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 910A

“retail client” has the meaning set out in 761G;

“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;

“PS 136” (for example) means an ASIC policy statement (in this example numbered 136);

“982A” (for example) means a clause of the Bill;

“s782” (for example) means a section of the Law.

What will happen next?

Stage 1

26 April 2001 ASIC policy proposal paper released

Stage 2

May/early June 2001 Consultation period on the contents of this policy proposal paper

7 June 2001 Comments due on the policy proposal

15 June to September 2001 Drafting of policy statement

Stage 3

Mid to late September 2001 Policy statement released

Your comments

You are invited to comment on the proposals and issues for consideration in this paper.

Comments are due by Thursday 7 June 2001 and should be sent to:

Roxanna Irvin
FSR Project Office
Regulatory Policy Branch
Australian Securities & Investments Commission
GPO Box 4866
Sydney NSW 1042
email: FSRProjectOffice@asic.gov.au

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

Related papers

This policy proposal paper is part of a set of seven documents issued together in April 2001 on the implementation of the *Financial Services Reform Bill 2001*. As outlined in our paper *Building the FSRB Administrative Framework*, we intend to issue further proposal papers in the coming months all related to the implementation of the Bill.

The related documents issued together in April are:

Building the FSRB Administrative Framework – Policy to implement the Financial Services Reform Bill 2001

Licensing: The scope of the licensing regime: Financial product advice and dealing

FSRB Policy Proposal Paper No 1

Licensing: Organisational capacities

FSRB Policy Proposal Paper No 2

Licensing: Adapting IPS 146 to the Financial Services Reform regime

FSRB Policy Proposal Paper No 3

Disclosure: Product disclosure statements (and other disclosure obligations)

FSRB Policy Proposal Paper No 4

Disclosure: Discretionary powers and transition

FSRB Policy Proposal Paper No 5

Licensing Process Guideline: How do you get an Australian Financial Services Licence?

Copies of policy proposal papers

Download them from the ASIC home page:

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(follow the links from “Financial services reform” that is on the top right of our home page)

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To find out more about FSRB

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- (a) click “Financial services reform” on the top right of our home page
- (b) register for our free update email service which alerts you to our latest developments.