ASIC Consultation Paper 224: *Facilitating electronic financial services disclosures ("CP 224")*

Feedback from Andrew Godwin, Melbourne Law School – 5 January 2015

Thank you for inviting public feedback on the issues covered in CP 224. These issues are relevant to a research project in which Professor Ian Ramsay and I are currently involved. This project is supported with funding from Melbourne Law School and the Centre for International Finance and Regulation and examines the international trend towards the use of short-form disclosure documents for retail financial products and the challenges that arise in this area. For information on the project, please see http://www.cifr.edu.au/project/Financial_Products_and_Short-form_Disclosure_Documents.aspx.

1. Introductory comments

1.1 In general, I support the proposal in CP224 'to facilitate more electronic disclosure, while preserving choice for both consumers and providers'. This should give consumers easier access to information to enable them to make informed investment decisions.

1.2 I also agree that it would make sense to consider aligning the treatment of financial services disclosure and credit disclosure.

1.3 I would, however caution against moving ahead too quickly on electronic disclosure, not because of concerns inherent in the proposal itself but because of the diverse ways in which technology and multi-media features might be used for this purpose and, consequently, the need to ensure that regulation does not fall behind developments in practice.

1.4 It is also difficult to comment on the proposed reform in the abstract without reviewing the specific ways in which technology and multi-media features might be used. In particular, it will be important to ensure that the use of technology does not increase the risks that consumers bypass important information or that important information gets lost among other information (e.g. marketing information) or ends up looking like 'blurb' or 'small print'.[1] In this regard, I agree with the concerns as expressed in CP 224 and the draft updated Regulatory Guide 221 ('RG 221') as follows:

> *[T]he electronic environment can present some challenges to certain consumers. There may be more opportunity for misunderstanding or distraction or important information being downplayed.*[2]
>
> *We also suggest that providers use caution in linking to marketing material that might distract from mandated disclosure material.*[3]

[1] For a discussion of these risk, see Andrew Godwin, "The Lehman Minibonds Crisis in Hong Kong: Lessons for Plain Language Risk Disclosure" (2009) 32(2) *The University of New South Wales Law Journal* 547.
[2] CP224, paragraph 52.
[3] CP 224, paragraph 55

As is the case for printed PDSs, we also expect providers to ensure that the method or form of the disclosure does not divert clients away from any parts of the disclosure. To ensure disclosure is clear, concise and effective, equal prominence should be given to each aspect of the product that the consumers should understand before purchasing the product.[4]

I set out a couple of suggestions below:

2. First suggestion – a link to the print PDS (or a pdf version of the print PDS) should be incorporated into the electronic format

2.1 I expect that providers will have concerns about having alternative formats for disclosure (i.e. electronic disclosure by default or printed disclosure by request) and the potential liability issues that might arise if discrepancies (or perceived discrepancies) emerge between the two.[5] For example, a consumer might complain that even though they were provided with information based on their preferred choice, they would have been better informed if they had received the information in the other format, and might seek to attach liability to providers on this basis.

2.2 This resonates with the concerns expressed in paragraph 25 of CCP224:

[W]e acknowledge that electronic delivery of disclosures does not necessarily offer the best outcome for all consumers and that preferred designs, formats and methods of delivery can vary from time to time, person to person, and disclosure to disclosure. We hope, however, that by making the regulatory environment genuinely technology neutral, we will enable providers to innovate and invest in better, more effective disclosure.

2.3 As a result, I would suggest that consideration be given to incorporating a link to the print PDS (or a pdf version of the print PDS) into the electronic, interactive format so that the latter is perceived as an enhancement of - rather than an alternative to or substitute for - the former.[6]

2.4 In this way, the print PDS would serve as a baseline format for disclosure and the consumer could choose as to whether to review the print version online (or print it out to read in hard copy) in addition to reviewing the information in the electronic, more interactive format. In other words, the two formats would not be perceived to be mutually exclusive or alternative choices.

2.5 Such an approach may also make it more likely that providers check the information in electronic format against the information in the print format to ensure that there are no

[4] RG221.63.
[5] For a discussion about liability concerns, see Andrew Godwin and Paul Rogerson, "Clear concise and effective – the evolution of product disclosure documents" in Shelley Griffiths, Sheelagh McCracken and Ann Wardrop (eds) *Exploring Tensions in Finance Law; Trans-Tasman Insights* (2014, Thomson Reuters).
[6] Similarly, a reference to the electronic, interactive format could be included in the print PDS.

discrepancies (perceived or otherwise). This would assist to comply with the requirement for the PDS to communicate the same information that is required by the shorter PDS regime.[7]

3. Second suggestion – further guidance should be provided as to how the 'clear, concise and effective' standard applies to both print disclosure and electronic disclosure

3.1 RG221 reminds providers of the 'overriding requirement that the information in the PDS must be worded and presented in a clear, concise and effective manner.'[8]

3.2 The move towards facilitating electronic disclosure highlights the challenges of applying the 'clear, concise and effective' standard to electronic disclosure and the need for specific guidance as to how it applies in this context. Without specific guidance, it is possible that the 'clear, concise and effective' standard will stifle innovation because providers will be uncertain about how it should be interpreted and applied to electronic disclosure.

3.3 As I have previously noted:[9]

(a) The intention behind the 'clear, concise and effective' standard appears clear enough: disclosure documents should be worded and presented in a manner that investors can clearly understand; in line with plain language principles, they should be concise and include no more verbiage than necessary; and they should ultimately be effective in terms of providing investors with the information that they need in order to make an informed investment decision.

(b) For a number of reasons, however, it is not always easy to achieve this standard. First, investors, particularly retail investors, have limited financial literacy and do not always understand the information, however 'clearly' it may have been worded and presented. Second, there is a natural tension between the need to be 'comprehensive' in terms of giving investors all of the information that they need in order to make an informed investment decision and the need to be 'concise', particularly if conciseness is determined by reference to the length of disclosure documentation.[10] Third, an assessment as to whether disclosure is 'effective' will inevitably involve subjective considerations, many of which fall to be determined by reference to the circumstances of the specific investor.

(c) The challenges have increased, and the goal of achieving this standard has become more illusory, as jurisdictions have moved towards prescribing the maximum length of printed disclosure documents for certain financial products.

[7] CP224, paragraph 18.
[8] RG221.52.
[9] See Godwin and Rogerson, above n 5.
[10] There is no express length requirement in determining whether disclosure is "concise". However, it might be argued that length will inevitably be a factor to take into account in circumstances involving printed documents.

(d) There has not been much case law or guidance in relation to the interpretation of 'clear, concise and effective'.[11] ASIC's Regulatory Guide 228 suggests that it should be read as a compound phrase and that each word should qualify the operation of the other words.[12]

(e) The lack of guidance as to how the 'clear, concise and effective' standard should be interpreted creates concerns on the part of providers. This is partly because of the extent to which failure to comply with this standard might inform the question of civil liability in the context of defective disclosure.[13]

3.4 It is likely that these concerns will increase in an electronic context, where information is often arranged and presented in ways that differ from the print format.

3.5 As a result, I would suggest that in addition to providing good practice guidance, as in Section D of RG 221, ASIC should provide specific guidance as to how the standard should be interpreted. This could be achieved along similar lines to New Zealand, where the Financial Markets Authority has provided guidance as follows:[14]

> *Disclosure documents are clear[15] 'if they use plain language, are logically ordered and easy to navigate; highlight important information; and explain complex information in plain language and include a clear explanation of any necessary jargon.'[16]*
>
> *"Concise" refers to the presentation of specific information rather than the overall length of the disclosure document.[17]*
>
> *Effectiveness involves an overall assessment of whether a disclosure document provides adequate and accurate information for investment decision making.[18]*

3.6 For the sake of completeness, I note that different jurisdictions have adopted different disclosure standards, some of which may be more appropriate for electronic disclosure. Although the 'clear, concise and effective' standard has been adopted in Australia, New Zealand and Hong Kong, the following jurisdictions have adopted different standards:

- 'clear and simple language' (Singapore)
- 'clearly expressed and written in language…that is clear, succinct and comprehensible' (EU under the new regulation for PRIIPS)

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[11] The AAT has previously noted the inherent conflict between brevity and clarity: see the decision in *Re Wright Patton Shakespeare Capital Ltd and Australia Securities and Investment Commission* (BC200810525); [2008] AATA 1068.

[12] RG 228.22: 'The requirement for "clear, concise and effective" disclosure should be read as a compound phrase so that each word qualifies the other. This means that it is inappropriate to focus on one word in the phrase at the expense of others.'

[13] See Godwin and Rogerson, above n 5.

[14] Financial Markets Authority, *Guidance Note: Effective Disclosure* (June 2012) ('Guidance Note').

[15] This could be re-worded as 'Disclosure information is clear..'

[16] Guidance Note, paragraph 53.

[17] Guidance Note, paragraph 57.

[18] Guidance note, paragraph 58.

- ‘concisely and in plain language’ (Canada)

In addition, some jurisdictions link the disclosure standard to the ability of retail investors to understand. For example:

- Hong Kong requires disclosure to be made ‘in such manner as to be readily understood by the investing public’;
- Singapore requires disclosure ‘in clear and simple language that investors can easily understand’ ;
- Canada defines ‘plain language’ as ‘language that can be understood by a reasonable person, applying a reasonable effort’; and
- The EU request disclosure to be ‘written in language and a style that communicate in a way that facilitates the understanding of the information’.

3.7 Although I would not necessarily identify a need to modify the standard that is adopted in Australia, I would suggest that more detailed guidance be provided on how the standard applies to electronic disclosure. I would be happy to provide further comments and suggestions in this regard.

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