



ASIC

Australian Securities & Investments Commission

REPORT 443

Response to submissions on CP 224 Facilitating electronic financial services disclosures

July 2015

About this report

This report highlights the key issues that arose in the submissions received on Consultation Paper 224 *Facilitating electronic financial services disclosures* (CP 224) and details our responses to those issues.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 221 *Facilitating digital financial services disclosures* (RG 221).

Contents

A	Overview	4
B	Enabling digital disclosure to be the default method	8
	Delivery of disclosures to an email address	8
	Provision of disclosures on a website or other digital facility.....	11
C	Facilitating the use of more innovative PDSs.....	12
	Relief	12
	Updated regulatory guidance.....	14
D	Digital delivery of credit disclosures	15
	Appendix: List of non-confidential respondents	16

A Overview

- 1 Internet usage is pervasive in Australia and technology is now such that we would expect to see more use of digital methods to create and deliver mandated disclosure information; yet many financial services disclosures remain lengthy, printed documents.
- 2 We initiated a consultation to examine whether there were further ways we could facilitate more digital disclosure because we understood from feedback, including submissions on Report 391 *ASIC's deregulatory initiatives* (REP 391), that providers wanted to distribute more disclosures digitally.
- 3 However, the legislation and regulations, and our current guidance, have not kept up with consumer and industry demand.

Consultation process

- 4 In Consultation Paper 224 *Facilitating electronic financial services disclosures* (CP 224), we consulted on ways to facilitate more digital disclosure, while preserving choice for both consumers and providers.
- 5 Specifically, we invited feedback on the proposals in CP 224 to:
 - (a) give providers an additional option for delivery of disclosures, which would enable them to meet the requirements of delivery if they publish disclosures digitally and then notify the client that the disclosure is available;
 - (b) make it clear that if a financial services provider has an email address for a client, they do not need consent to use that address to deliver disclosures digitally; and
 - (c) facilitate the use of more innovative Product Disclosure Statements (PDSs).
- 6 We also sought general feedback on whether similar digital disclosure principles should apply to credit.
- 7 This report highlights the key issues that arose out of the submissions received on CP 224 and our responses to those issues.
- 8 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 224. We have limited this report to the key issues.

- 9 For a list of the non-confidential respondents to CP 224, refer to the appendix to this report. Copies of these submissions are currently on the ASIC website at www.asic.gov.au/cp under CP 224.

Responses to consultation

- 10 We received 34 responses to CP 224 from businesses, industry representatives, consumer representatives and individuals. We are grateful to respondents for taking the time to send us their comments.
- 11 We met with industry and consumer representatives, both during and after the formal consultation period. We also met with some individual financial services providers to obtain more detailed feedback on some of our proposals.
- 12 Further to our consultation, we have issued updated guidance in Regulatory Guide 221 *Facilitating digital financial services disclosures* (updated RG 221), and made two ASIC instruments:
- (a) ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647; and
 - (b) ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649.
- 13 Almost all submissions received were supportive of the general principle of further facilitating electronic disclosure.
- 14 The main issues raised by respondents related to:
- (a) flexibility and technology neutrality;
 - (b) impact on consumer engagement with disclosures;
 - (c) importance of ensuring no consumer detriment;
 - (d) costs for providers; and
 - (e) cyber security.
- 15 The main benefits of further facilitating digital disclosure identified by respondents related to:
- (a) speed and convenience;
 - (b) cost savings relating to printing and postage; and
 - (c) consistency with societal trends towards increasing digital transactions.
- 16 Some submissions suggested that digital disclosure could be an issue for the proportion of clients who are more comfortable with paper disclosure and, in these cases, could exacerbate problems with poor client engagement with financial services disclosures. To mitigate this concern, we have included a

- requirement in ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647 and updated our guidance in RG 221 to specify that the client must be provided a clear opportunity to opt out of receiving disclosures digitally.
- 17 A few responses also expressed concerns that digital disclosure may magnify internet security issues (e.g. cyber crime) and information technology compatibility issues. We note that these risks currently exist with digital communications and our proposals are not intended to remedy this. Nevertheless, we acknowledge that in an environment of more digital disclosure, these risks may affect more consumers.
- 18 It is important to note that what we are enabling with our relief and updated guidance is incremental and is building on what is already allowed under the legislation and the relief we have given in the past.
- 19 Our aim is not to address the shortcomings associated with disclosure more broadly—although we hope that this work might make disclosure more engaging and accessible for some, and free up resources to invest in better disclosure.
- 20 We expect that our revised good practice guidance in updated RG 221 will help providers navigate their obligations and the general good practice principles more easily in the digital environment.
- 21 We have also recently highlighted security issues in Report 429 *Cyber resilience: Health check* (REP 429).
- 22 In finalising these proposals we have sought to achieve a balance between protecting consumers and facilitating business in the context of an increasingly digital environment. In this context, we particularly acknowledge submissions that raised concerns about the impact of our proposals on vulnerable and less digitally connected Australians.
- 23 While only 6% of Australians have never accessed the internet, we expect that there may be a small number of consumers for whom a switch to default digital disclosure results in disclosure not being received or accessed. This may be particularly the case for older Australians, and people on lower incomes. In some cases, this may have a neutral impact for particular consumers who are unlikely to engage with an alternative form of disclosure (such as printed). However, to help ensure consumers do not miss out on important information, the default delivery method must provide opportunities to change delivery methods.
- 24 Our proposal includes guidance to providers to ensure that providers are aware that, regardless of the form of the disclosure, their obligation is to give it to their clients. If those clients are not able to access digital disclosures, the provider should provide an alternative method of disclosure to that client. It

also includes guidance to providers as to how to make the transition to digital disclosure for existing clients—with appropriate notification and time to opt out.

- 25 We encourage providers to monitor access to and engagement with digital disclosures—something that cannot be done with printed and posted disclosure—which can help identify those customers who are not receiving or engaging with disclosure. As with all disclosure, we encourage providers to undertake consumer testing to identify what works and what does not in improving consumer engagement. The opportunity to do this is increased given the data generated from digital disclosure. This proposal will also free up resources that could be used for this purpose.
- 26 Other issues raised by submissions, but that are outside the scope of the current consultation, include consideration of the adoption of a holistic approach to technology neutrality across various legislation and other regulation affecting the financial services industry, including the *Electronic Transactions Act 1999*, the *Insurance Contracts Act 1984*, the *Life Insurance Act 1995*, the *Superannuation Industry (Supervision) Act 1993* and the ePayments Code.
- 27 We are committed to the principle of technology neutrality and are taking an incremental approach to implementation of changes to deliver this. In many cases, this will require legislative change. We will discuss these issues with Treasury as part of our deregulatory work.
- 28 Sections B–D of this report set out in more detail the issues raised during our consultation, the feedback received, and our responses to this feedback.

B Enabling digital disclosure to be the default method

Key points

This section outlines the key issues raised in submissions on Section B of CP 224 and our responses to those issues.

It covers the following proposals:

- We proposed that, if a financial services provider has an email address for a client, they do not need consent to use that address to deliver disclosures. We have also included our response to concerns expressed in some submissions regarding employer-provided email addresses.
- We proposed to provide relief to give providers an additional method for delivery of disclosures, which would enable them to publish disclosures digitally and then notify the client that the disclosure is available. In these instances, however, we proposed to require providers to give clients the opportunity to opt out of receiving disclosures digitally so as to accommodate the preferences of clients who are more comfortable receiving paper disclosures.

Delivery of disclosures to an email address

- 29 In CP 224, we proposed to update our guidance in RG 221 to make it clear that, if a financial services provider has an email address for a client, they do not need consent to use that address to deliver disclosures, in the same way that the provision of a postal address is sufficient consent for the delivery of disclosures to that postal address.
- 30 We stated that this means that, where the law allows delivery of disclosures to an email address that has been ‘nominated’ by the client or the client’s agent, the provider should be satisfied that the address has been nominated for that purpose—in the same way that a provider would be required to satisfy itself that a postal address had been nominated for the delivery of a disclosure. We think in most instances this will be clear from the context—for example, if a client has provided their email address as part of their application, the provider could deliver disclosures for that product to that email address.
- 31 Many submissions strongly supported this proposal, mainly for reasons of speed and convenience of disclosure delivery. Some respondents asked us to provide clearer guidance on whether consumers’ express consent is required for digital disclosure.

ASIC's response

From the feedback we have received, we have updated our guidance (as proposed in CP 224) to make it clear that, if a financial services provider has an email address for a client, they do not need consent to use that address to deliver disclosures, in the same way that the provision of a postal address is sufficient consent for the delivery of disclosures to that postal address.

As requested, we have clarified in our guidance in updated RG 221.18–RG 221.20 that providers do not need consumers' express consent for digital delivery of disclosures.

- 32 Some submissions specifically asked for guidance as to whether a trustee could use the email address provided by the employer in the course of joining the member employee to an employer-nominated (default) superannuation fund.

ASIC's response

As there is no clear agency relationship between the employee and employer in this case, we have provided additional relief in ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647 to give certainty to a trustee of a superannuation fund who obtains an email address for a member as part of an employer-nominated superannuation arrangement that the trustee can use that email address for digital disclosure.

- 33 Many submissions asked us to confirm requirements when making the transition for existing clients to digital disclosure, including providing consumers with the option to opt out of digital disclosure. Some submissions also raised the question of whether an email address provided by a client to one party may be considered 'nominated' and hence useable for digital disclosure purposes by a different party.

ASIC's response

As requested, we have confirmed in updated RG 221.65–RG 221.69 that where providers intend to change the way they deliver disclosures to existing clients, we expect them to notify clients using their existing method of communication before doing so. The notification should provide a clear opportunity for the client to opt out of digital disclosure in the future. This will cater for those clients who are more comfortable receiving disclosure in an alternative form (e.g. paper disclosures).

We have also clarified Example 1 in updated RG 221 to show that a third party provider can be satisfied that a client's email address provided to it by an adviser is 'nominated' (and hence useable for digital disclosures)—since an agency relationship may be inferred in this circumstance. In view of this, we do not consider it necessary (as some respondents have suggested) for us to

mandate a standard warning to be issued to clients that their email addresses may be used by a third party for digital disclosures.

- 34 A few respondents asked us to clarify our expectations regarding bounce-backs of digital disclosure emails sent to clients, and what the providers' obligations were in these circumstances. Some submissions suggested that if bounce-backs occur, providers should contact the client or provide disclosure through another available method. Others suggested that we should clearly distinguish between a 'hard' bounce-back (e.g. undeliverable) compared with a 'soft' bounce-back (out-of-office) in our guidance.
- 35 Some submissions also asked us to clarify how the lost superannuation provisions of the *Superannuation Industry (Supervision) Act 1993* apply in the digital environment.

ASIC's response

Providers have an obligation under the law to 'give' or 'send' financial services disclosures. Where providers have attempted digital disclosure, email bounce-backs may provide reliable feedback that this obligation has not been discharged. Hence, we have stated in updated RG 221.66 that we suggest providers monitor bounce-backs and attempt an alternative method of delivery where a 'hard' bounce-back is received. We have provided further information in the 'good practice guidance' included in Table 2 in Section D of updated RG 221.

We have not provided specific guidance on lost superannuation because this is beyond the scope of RG 221.

- 36 Some submissions sought clarity on disclosures relating to fully digital products. Respondents also wanted to understand what alternative means of disclosure would be required, and some submissions suggested that providers should be able to restrict disclosures to digital means only.

ASIC's response

We have clarified in updated RG 221.29–RG 221.31 that for products that, as part of their terms and conditions, are sold as digital only, and where the client was clearly made aware of this at the time of purchasing the product, providers need not make available printed or printable copies of disclosures. If a provider seeks to change a product from having printed and posted disclosures available to a fully digital product, they must obtain the agreement of the holders of that product.

Provision of disclosures on a website or other digital facility

- 37 In CP 224 we proposed to give relief to provide an additional method of delivery for most Ch 7 disclosures (where not already permitted), allowing providers to make a disclosure available on a website or other digital facility, provided clients:
- (a) are notified (e.g. by a link or a referral to a web address or app) that the disclosure is available; and
 - (b) can still elect to receive that disclosure by an alternative method of delivery, on request.
- 38 Respondents were generally supportive of this proposal, although some submissions sought clarification that our relief proposal related to an alternative or additional disclosure channel in situations where there was a pre-existing legal delivery obligation. A few respondents suggested that we prescribe a prominent consumer warning/caution so that recipients are aware that the communication relates to important information.

ASIC's response

As explained in our guidance in updated RG 221.31–RG 221.39, the relief we have provided under ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647 enables a provider to deliver most disclosures (where a pre-existing legal delivery obligation exists) by making a disclosure available on a website or other digital facility and notifying clients of the availability of that disclosure by any means, provided the notification is verifiable and able to be stored and retrieved.

These could include, for example, an email address, social media address, postal address, SMS or via an app that the client has logged into.

The following disclosures may be made in this manner: Financial Services Guides (FSGs) and Statements of Advice (SOAs); PDSs; ongoing disclosure of material changes and significant events; periodic statements; and information statements for Commonwealth Government Securities (CGS) depository interests.

The notification should contain details about how to access the disclosure and provide an option to the client to 'opt out' and have the disclosure delivered in full to either an electronic or postal address.

Where the disclosure contains personal financial information, the provider should ensure that the information is adequately secured, while also endeavouring to make retrieval as easy as possible for the client.

C Facilitating the use of more innovative PDSs

Key points

This section outlines the key issues raised in submissions on Section C of CP 224 and our responses to those issues.

It covers our proposals to:

- provide relief to encourage and facilitate the use of more innovative PDSs, such as interactive PDSs; and
- update our guidance in RG 221 to reflect this relief.

In both cases, we proposed safeguards to ensure consumers are not disadvantaged by more innovative PDSs.

Relief

- 39 In CP 224, we proposed to facilitate more innovative PDSs, such as interactive PDSs, by giving relief from:
- various provisions requiring an (identical) copy of a PDS to be given to a person on request and instead allowing a provider to give a copy of *any* current PDS for the relevant product or offer that may differ from a printed PDS;
 - the shorter PDS regime—provided the PDS communicates the same information that is required by that regime; and
 - the requirements for certain language to be included on the cover or ‘at or near the front of’ a PDS.
- 40 Many respondents suggested that our proposed relief be extended to FSGs and SOAs.

ASIC’s response

In response to this feedback, we have extended our relief to remove potential legal barriers to the use of more innovative PDSs, FSGs and SOAs. This is also consistent with our policy goal to have the same requirements applying across the different types of disclosure document. We have provided relief in ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649 and guidance in updated RG 221 to reflect this.

- 41 Several respondents submitted that, in relation to the shorter PDS regime, it was not sufficiently clear whether the wording requirements applicable to a shorter PDS would apply unchanged to a digital PDS, or whether it was

sufficient for the latter to include substantively the same or equivalent information as a printed shorter PDS.

ASIC's response

As requested by respondents, we have clarified in updated RG 221.80–RG 221.81 that we have given relief to the effect that only printable components of the shorter PDS count towards the page length requirement. Our relief applies to shorter PDSs relating to margin loans, some superannuation products and simple managed investment products.

- 42 Some submissions suggested that the requirement in s1016A of the *Corporations Act 2001* (Corporation Act) for an application form to accompany a PDS was a barrier to more innovative PDSs. This was because they were not clear about how the requirements to provide an eligible application form operated in this context.

ASIC's response

We think that the requirement in s1016A that an application form be 'included in or accompanied by' a PDS is wide enough to enable a provider to incorporate an application form into a digital PDS or to give the application form at the same time as the digital PDS. We have provided guidance in updated RG 221.91 to clarify this.

- 43 For the more innovative PDS proposals, some respondents suggested that we defer updating RG 221 until the results of our investor self-assessment project are available.

ASIC's response

Our proposals in CP 224 were primarily aimed at removing regulatory impediments to digital disclosure, while our investor self-assessment project seeks to encourage innovation in digital disclosure. While related, the two projects have a different focus.

The investor self-assessment project is a joint project with industry. As we announced in November 2014 (see Media Release (14-317MR) *ASIC digital disclosure project to boost investor understanding*), we are currently trialling a key facts sheet and an 'investor self-assessment' to accompany the key facts sheet.

The key facts sheet would be a shorter disclosure document of around two to three pages and could be presented in innovative ways, such as interactive or video elements. We are investigating whether shorter and more innovative disclosure is likely to be more engaging for many investors.

The investor self-assessment would accompany the key facts sheet and would consist of a short series of questions that would

be made available to investors to complete (on an optional basis) so that they can test their understanding of the information in the key facts sheet before making a decision whether to invest. The investor self-assessment is not intended to assess the investor's financial literacy more generally or to assess the suitability of the product for the investor.

Our aim is to facilitate more innovative disclosure through both of these projects—in removing regulatory impediments on the one hand, and in working with industry to develop new approaches on the other.

Updated regulatory guidance

- 44 In CP 224 we proposed to update our guidance in RG 221 to:
- (a) make it clear that we think Pt 7.9 of the Corporations Act operates to allow a provider to have more than one PDS for a single financial product on offer, such as a version able to be printed and a digital version;
 - (b) make it clear that the requirement that a consumer can identify the information that is part of the PDS is particularly important in the case of more innovative PDSs; and
 - (c) include further guidance on the use of more innovative PDSs, including updating our good practice guidance on digital disclosure.
- 45 Many respondents commented that it was important for digital disclosure to be easy for consumers to use and understand, and also that requirements relating to digital disclosure should not be overly prescriptive. Respondents also acknowledged that innovative disclosure raises more challenges about producing 'clear, concise and effective' disclosure.

ASIC's response

We have provided guidance in updated RG 221.87–RG 22.104 to accommodate innovative PDSs, FSGs and SOAs. We have also revised our good practice guidance for digital disclosure in Section D of updated RG 221. To facilitate more innovative disclosures, our guidance is principles based, not prescriptive.

The requirement that disclosure be clear, concise and effective applies to digital disclosure too and our good practice guidance is aimed at helping ensure that clients receive clear, concise and effective information when disclosures are delivered digitally.

D Digital delivery of credit disclosures

Key points

This section outlines the key issues raised in submissions on Section D to CP 224 and our responses to those issues.

- 46 In CP 224 we sought feedback on aligning the treatment of financial services disclosures and credit disclosures. We recognised that different requirements apply to disclosures relating to credit services—in particular, the requirement for written consent to digital disclosure in some cases.
- 47 Submissions were broadly supportive of aligning the financial services and credit disclosure regimes, but some submissions suggested caution in aligning the two, given the different demographics of credit clients compared to financial services clients.

ASIC's response

We will undertake further work on digital delivery of credit disclosures and will consult with Treasury.

Appendix: List of non-confidential respondents

- Association of Superannuation Funds of Australia (ASFA)
 - ASX Limited
 - Australian Bankers' Association (ABA)
 - Australian Finance Conference (AFC)
 - Australian Institute of Superannuation Trustees (AIST)
 - Australian Super
 - CHOICE
 - Commonwealth Bank of Australia (CBA)
 - Consumer Action Law Centre
 - Customer-Owned Banking Association
 - Ernst & Young (EY)
 - Financial Counselling Australia (FCA)
 - Financial Planning Association of Australia (FPA)
 - Financial Rights Legal Centre
 - Godwin, Andrew
 - Home Loan Experts
 - Independent Fund Administrators & Advisers Pty Ltd (IFAA)
 - Industry Super Australia
 - Insurance Council of Australia
 - Law Council of Australia's Superannuation Committee
 - Mercer
 - Property Funds Association (PFA)
 - Telstra Super
 - UniSuper
 - Westpac Banking Corporation
 - Wilkins, Richard
-