



ASIC

Australian Securities & Investments Commission



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

An ASIC guide

November 2001

Updated November 2002

Important note

This publication is issued as a helpful guide to the licensing provisions. It is primarily intended to assist industry by providing general guidance about the questions you should ask and the issues you should consider in determining your obligations. Unlike a policy statement, the main purpose of the guide is not to explain the manner in which ASIC intends to administer or enforce the law.

This guide is not intended to be comprehensive or to describe how the licensing provisions will apply in every situation. It is your responsibility to determine your obligations under the Corporations Act (as amended by the FSR Act) and regulations. This guide does not purport to consider all the issues that may be relevant to determining the scope of the licensing provisions or your legal obligations. Further, in pursuit of clarity, this guide simplifies some provisions.

This guide does not constitute legal advice. We encourage you to seek your own legal advice to find out how the licensing provisions of the Corporations Act and regulations will apply to you.

At this stage, we have decided to issue a guide rather than a policy statement. However, in light of our regulatory experience and future relevant regulations (if any), we may further revise this guide, issue a policy statement, or issue some other form of document, such as worked examples.

This guide was first published in November 2001. It has been updated to reflect the regulations made before 1 November 2002 and to provide some clarifications. Because this guide has not been completely revised since before FSR commencement (ie 11 March 2002), it may refer to action ASIC "will" or "may" take after 11 March 2002. When reading this guide, please keep in mind that, in most cases, it is likely that ASIC has already taken that action or is taking it.

Contents

What this guide is about	4
A brief introduction to the licensing provisions	6
What is the meaning of “provide financial product advice”?	7
1.1 Introduction.....	7
1.2 What is “financial product advice”?	7
1.3 When is a communication exempt from the definition of “financial product advice”?..	9
1.4 When do you “provide” financial product advice?	10
What is the meaning of “deal in a financial product”?	13
2.1 Introduction	13
2.2 What is “dealing”?	13
2.3 What is “arranging”?	14
2.4 What conduct is exempt from the definition of “dealing”?	14
What obligations apply to providers of financial services?	16
3.1 Introduction	16
3.2 When do you satisfy the business test?	16
3.3 Does an exemption from the requirement to hold an AFS licence apply?	17
3.4 What obligations are imposed on licensees?	21
3.5 When do representatives need to hold an authorisation?	23
3.6 What obligations are imposed on representatives?	24
Key terms	25
Related papers	28
To find out more about FSR.....	29

What this guide is about

- 1 This guide considers the scope of the licensing regime in relation to financial product advice and dealing. It also summarises obligations that apply to providers of financial services.
- 2 The guide is based on the licensing provisions — Parts 7.6 to 7.8 of the *Corporations Act 2001* as amended by the *Financial Services Reform Act 2001* (FSR Act) (including relevant regulations).
- 3 It provides guidance on the following matters:
 - (a) What is the meaning of “provide financial product advice”?
(Section 1)
 - (b) What is the meaning of “deal in a financial product”?
(Section 2)
 - (c) What obligations apply to providers of financial services?
(Section 3)
- 4 This guide should be read in conjunction with the following policy statements relating to how we will administer the new licensing regime:
 - (a) Policy Statement 146 *Licensing: Training of financial product advisers* [PS 146];
 - (b) Policy Statement 164 *Licensing: Organisational capacities* [PS 164];
 - (c) Policy Statement 165 *Licensing: Internal and external dispute resolution* [PS 165];
 - (d) Policy Statement 166 *Licensing: Financial requirements* [PS 166];
 - (e) Policy Statement 167 *Licensing: Discretionary powers and transition* [PS 167].

For other financial services reform papers, see the *Related papers* section of this guide.

- 5 This guide does not consider transitional matters. ASIC provides guidance on transitional matters in *Licensing and disclosure: Making the transition to the FSR regime — An ASIC guide* (October 2001, updated November 2002) and *Making the transition to an AFS licence: pre-FSR licences and insurance broker registrations – An ASIC guide* (April 2002).

6 We have been asked by industry and consumer representatives to provide guidance on the subject of the scope of the licensing regime in relation to financial product advice and dealing. We have decided to issue this guide rather than a policy statement at this stage.

7 Unlike a policy statement, the main purpose of this document is not to explain the manner in which ASIC intends to administer or enforce the law. Rather, this document is primarily intended to assist industry by providing general guidance about the questions and issues you should consider in determining your obligations. In some cases, we express our view on the law to assist you to reach your own view. But in all cases you should seek your own legal advice where necessary.

8 Remember that this document is a guide only and does not constitute legal advice: it is your responsibility to determine your obligations under the Corporations Act and regulations. Your obligations are determined by the Corporations Act and regulations, not by this guide. This guide does not purport to consider all the issues that may be relevant to determining the scope of the licensing provisions or your legal obligations. Further, in pursuit of clarity, this guide simplifies some provisions.

9 We have previously issued two papers dealing with the scope of the licensing regime: FSRB Policy Proposal Paper (PPP) No 1 *Licensing: The scope of the licensing regime: Financial product advice and dealing* (April 2001) and FSRB PPP No 6 *Licensing: Principals and representatives* (June 2001). We received extensive comments on those policy proposal papers. In general, most comments reflected a desire for ASIC to provide guidance on the scope of the licensing regime. However, some comments also reflected concerns about the level of detail in the guidance. It is against this background that we have developed this guide. Being mindful of the comments we received, this guide does not attempt to cover the full range of issues raised in those policy proposal papers or in the submissions we received on them.

10 We have not proceeded with the proposals in those policy proposal papers and they do not represent ASIC policy.

11 We may, in light of our regulatory experience and future relevant regulations (if any), further revise this guide, issue a policy statement, or issue some other form of document, such as worked examples.

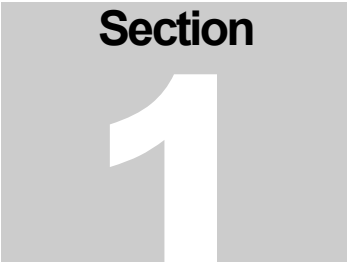
12 For information on the status of existing ASIC policy statements about the licensing, conduct and disclosure requirements referred to in Section C of PPP No 6, see Policy Statement 167 *Licensing: Discretionary powers and transition* [PS 167].

A brief introduction to the licensing provisions

- 12A** Generally, a person provides a financial service if they:
- (a) provide financial product advice;
 - (b) deal in a financial product;
 - (c) make a market for a financial product;
 - (d) operate a registered scheme;
 - (e) provide a custodial or depository service; or
 - (f) engage in conduct of a kind prescribed in the regulations: see s766A.

Section 1 of this guide explains the concept “provide financial product advice” while Section 2 explains the concept “deal in a financial product”. We may issue guidance in future concerning the other types of financial services.

13 A person will generally need to hold an AFS licence if they carry on a financial services business otherwise than as a representative of a licensee (unless an exemption applies). A person who provides financial services as a representative of a licensee will generally need to be authorised under the Corporations Act (unless the representative is an employee or director of the licensee or a related body corporate). The law imposes various obligations on licensees and representatives (see Section 3 of this guide).


 A grey rectangular box containing the word "Section" in a bold, black, sans-serif font at the top. Below the word is a large, white, stylized number "1" that is slightly offset to the right, creating a modern, minimalist design.

Section 1

What is the meaning of “provide financial product advice”?

1.1 Introduction

- 1.1.1 To determine the meaning of “provide financial product advice” in s766B, it is necessary to separately consider two questions:
- (a) What is “financial product advice”? (see Sections 1.2–1.3)
 - (b) When do you “provide” financial product advice? (see Section 1.4).

1.2 What is “financial product advice”?

- 1.2.1 A recommendation or a statement of opinion, or a report of either of those things, constitutes financial product advice under s766B if:
- (a) it 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 could reasonably be regarded as being intended to have such an influence (see paragraphs 1.2.2–1.2.10 below); and
 - (b) it is not exempted from the definition of “financial product advice” (see paragraph 1.3.1 below).

Note: There are two types of financial product advice under the Corporations Act, personal advice and general advice: see s766B(2)–(4). For a brief description of these two types of advice, see paragraphs 3.4.4–3.4.6 below. These paragraphs describe some key obligations that apply depending on whether a person is providing personal or general advice.

Consider the overall impression and circumstances

1.2.2 You will need to take into account the overall impression created by a communication, and all the surrounding circumstances in which it is provided, to determine whether it constitutes financial product advice in accordance with the test set out in s766B.

1.2.3 This will mean you need to consider, amongst other things:

- (a) the means by which the provider(s) of the communication (and their associates) are remunerated; and
- (b) any representations made to the person to whom the communication is provided (who may be a retail or wholesale client).

For example, a communication is more likely to be financial product advice if its provider (or associate) is remunerated by the client or stands to benefit depending on the decisions made by a client. This is because an intention to influence may be more readily inferred.

Factual information

1.2.4 If a communication does not involve a recommendation or a statement of opinion, or a report of either of those things, it is not financial product advice. Communications that consist only of factual information — ie objectively ascertainable information whose truth or accuracy cannot be reasonably questioned — will generally not involve the expression of opinion or recommendation and will not, therefore, constitute financial product advice.

1.2.5 However, in some circumstances, a communication which consists only of factual information *may* amount to financial product advice, eg factual information which is presented in a manner which may reasonably be regarded as suggesting or implying a recommendation to buy, sell or hold a particular financial product or class of financial products.

A decision in relation to a particular financial product or class

1.2.6 A specific issue that arises is the meaning in s766B(1) of “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”. This expression includes any

decision to buy, sell or hold a particular financial product or class of financial products.

Examples include:

- (a) a decision to exercise a right or option to acquire or dispose of a financial product;
- (b) a decision to acquire an equitable interest in a financial product; or
- (c) a decision to accept or reject a takeover offer.

1.2.7 Subsection 766B(1) encompasses decisions made by consumers to make additional payments or contributions in relation to financial products held by them (whether or not the making of such additional payments or contributions involves the issue of a financial product: see s761E). It also encompasses decisions made by consumers about investment strategies or options which they may select within a fund.

1.2.8 Clearly, decisions that relate only to things that are not financial products (eg a credit facility as defined in s765A(1)(h)(i) and related regulations) are not caught by s766B(1).

1.2.9 Deleted.

Use of disclaimers

1.2.10 If your communications include information about financial products, but do not constitute financial product advice, you should consider giving consumers a disclaimer to the effect that you are not providing financial product advice, and that consumers should consider obtaining independent advice before making any financial decisions. This will help avoid misleading or confusing consumers about the purpose of the communication.

Note: A disclaimer will not, of itself, determine whether a communication constitutes financial product advice.

1.3 When is a communication exempt from the definition of “financial product advice”?

1.3.1 A communication is exempt from the definition of “financial product advice” in s766B if:

- (a) it is advice given by a lawyer in the circumstances set out in s766B(5)(a) or (b);
- (b) it is advice given by a registered tax agent in the circumstances set out in s766B(5)(c); or
- (c) it is a quote relating to the cost of a financial product or the rate of return on a financial product in the circumstances set out in s766B(6) or (7).

Note: Apart from these exemptions, you will not be providing financial product advice in any of the circumstance listed in paragraph 1.4.2 below. Even if you are providing financial product advice, you may not need an AFS licence or authorisation, depending on the circumstances: see Section 3 of this guide.

1.4 When do you “provide” financial product advice?

- 1.4.1 The licensing provisions apply to persons who “provide” financial product advice. The person who provides the advice will generally include the author(s) of the advice as well as the principal for whom they act. It also includes any other person who endorses the advice.

Circumstances where a person does not provide financial product advice

- 1.4.2 A person does *not* provide financial product advice in any of the following circumstances:
- (a) the conduct is the provision of an exempt document or statement (s766B(1). The expression “exempt document or statement” is defined in reg 7.1.08A;
 - (b) the person is a recognised accountant engaged in conduct referred to in reg 7.1.29(1) (other than conduct referred to in reg 7.1.29(2));

Note: The classes of “recognised accountant” have been set out in Class Order [CO 02/551].

- (c) the person’s conduct consists *only* of passing on, publishing, distributing or otherwise disseminating a document that contains financial product advice in the circumstances described in reg 7.1.31. This may include a publisher or Internet portal operator;
- (d) the person’s conduct occurs in the course of work of a kind ordinarily done by clerks and cashiers (s766A(3));

- (e) the person's conduct consists only of advising another person about the manner in which voting rights attaching to securities or interests in managed investment schemes may or should be exercised in the circumstances set out in reg 7.1.30;
- (f) the conduct is the provision of advice to another person that relates only to the structuring of remuneration packages for that other person's employees (reg 7.1.32);
- (g) the person's conduct consists only of providing a recommendation or statement of opinion in the course of, and as a necessary or incidental part of, the handling or settlement of claims or potential claims in relation to an insurance product (reg 7.1.33(1));
- (h) the person's conduct consists only of providing a recommendation or statement of opinion about the allocation of the funds among the general asset types listed in reg 7.1.33A. This exemption does not apply if the recommendation or statement of opinion relates to specific financial products or specific classes of financial product;
- (i) the conduct is the preparation of general advice by a product issuer about that issuer's own product(s) but only where a third party licensee gives the advice to its recipients (reg 7.1.33B). In this situation the licensee will be taken to be the provider of the financial product advice.

Note: Apart from these circumstances, you will not be providing financial product advice if the communication in question falls within an exemption listed in paragraph 1.3.1 above. Even if you are providing financial product advice, you may not need an AFS licence or authorisation, depending on the circumstances: see Section 3 of this guide, especially paragraph 3.3.1.

Clerks and cashiers

1.4.3 A person's conduct occurs in the course of work of a kind ordinarily done by clerks and cashiers if it merely involves:

- (a) posting, handing out, or otherwise distributing or displaying, documents such as prospectuses, Product Disclosure Statements or Financial Services Guides (FSGs);
- (b) answering routine questions from consumers by giving factual information (see paragraphs 1.2.4–1.2.5 above), such as minimum investment amounts of funds accepted,

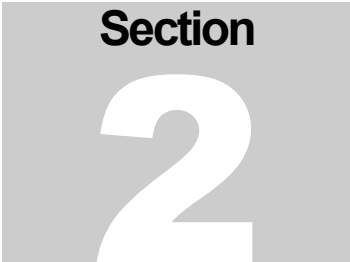
whether a particular offer is still open or the nature of investments made by a specific trust;

- (c) collecting payments (eg subscription monies) and issuing receipts;
- (d) performing the routine or administrative function of assisting consumers to complete application forms and send completed application forms to the relevant product issuer;

Note: This applies only where the consumer has already made the decision to acquire the financial product. It does not apply where the person helps the consumer make their decision to acquire the financial product.

- (e) performing other routine or administrative functions which do not involve a judgment about what financial products, or classes of financial products, are appropriate or should be considered by a consumer.

Note: This is not intended to be an exhaustive list of conduct which may fall within s766A(3). In interpreting s766A(3), it is important to note that the provision is prefaced with the words “to avoid doubt”. Licensees must monitor and supervise their clerks and cashiers to ensure that the licensee complies with its obligations relating to the provision of financial services: see Policy Statement 164 *Licensing: Organisational capacities* [PS 164].

A grey square graphic containing the word "Section" in a bold, black, sans-serif font at the top, and a large, white, stylized number "2" in the center.

What is the meaning of “deal in a financial product”?

2.1 Introduction

- 2.1.1 To determine the meaning of “deal in a financial product” in s766C, it is necessary to consider three questions:
- (a) What is “dealing”? (see Section 2.2)
 - (b) What is “arranging”? (see Section 2.3)
 - (c) What conduct is exempt from the definition of “dealing”? (see Section 2.4)

2.2 What is “dealing”?

- 2.2.1 The following conduct constitutes “dealing” in a financial product (unless an exemption applies: see Section 2.4):
- (a) applying for or acquiring a financial product;
 - (b) issuing a financial product;
 - (c) in relation to securities or managed investment schemes, underwriting the securities or interests;
 - (d) varying a financial product; or
 - (e) disposing of a financial product (s766C).

Note: However, a person is not “dealing” in the circumstances listed in paragraph 2.4.1 below.

- 2.2.2 Arranging for a person to engage in conduct referred to in paragraph 2.2.1 is also dealing unless the actions concerned amount to providing financial product advice (s766C(2)) or unless an exemption applies: see Section 2.4.

2.3 What is “arranging”?

- 2.3.1 “Arranging” refers to the process by which a person negotiates for, or brings into effect, a dealing in a financial product. The person who is arranging may be acting for a product issuer, seller or consumer.
- 2.3.2 Arranging includes “arranging contracts of insurance” as that expression has been interpreted in relation to the *Insurance (Agents and Brokers) Act 1984*. However, arranging is not limited to arranging contracts of insurance — it extends to all financial products.
- 2.3.3 The following factors are general indicators that your conduct may constitute arranging:
- (a) where your involvement in the chain of events leading to the relevant dealing is of sufficient importance that without that involvement the transaction would probably not take place (eg where you are the main or only person consumers deal directly with in a particular transaction);
 - (b) where your involvement significantly “adds value” for the second person;
 - (c) where you receive benefits depending on the decisions made by the second person.

Note: This list is not intended to be an exhaustive list of potentially relevant factors. In determining whether you are arranging, the presence (or absence) of any one or more of the listed factors is not conclusive.

- 2.3.4 As an example, the activities of an order router will generally involve arranging (ie where a service provider takes steps to bring into effect an acquisition or disposal of a financial product, albeit that another intermediary is also involved in the process and executes the customer’s order). On the other hand, the operator of a business introduction service will probably not be arranging where the operator does not play a significant role and does not benefit from investment decisions made by consumers.

2.4 What conduct is exempt from the definition of “dealing”?

- 2.4.1 You are not dealing where:
- (a) you deal on your own behalf, unless you are a product issuer dealing in your own products (s766C(3));

- (b) you are a government or local government authority, a public authority or instrumentality or agency of the Crown, or a body corporate or an unincorporated body, and you deal in your own securities (s766C(4));

Note: A body corporate or an unincorporated body is not exempt under s766C(4) if it is an investment company: see s766C(5).

- (c) you act as a sub-underwriter (s766C(6));
- (d) your conduct occurs in the course of work of a kind ordinarily done by clerks and cashiers (s766A(3)): see paragraph 1.4.3; or
- (e) you deal in an insurance product as a necessary or incidental part of handling or settling insurance claims or potential claims (reg 7.1.33(2)).

Note: Even if you are dealing, you may not need an AFS licence or authorisation, depending on the circumstances: see Section 3 of this guide, especially paragraph 3.3.1.

Section

3

What obligations apply to providers of financial services?

3.1 Introduction

- 3.1.1 You will need to hold an AFS licence if you carry on a financial services business in this jurisdiction, unless an exemption in s911A(2) (or regulations made for the purposes of that provision) applies. For example, due to the exemption in s911A(2)(a), you do not need an AFS licence to provide financial services as a *representative* of a licensee.

Note: “In this jurisdiction” is defined in s911D.

- 3.1.2 To determine whether you need to hold an AFS licence you need to consider:
- (a) whether you satisfy the business test (see Section 3.2);
 - (b) whether an exemption in s911A(2) applies (see Section 3.3).
- 3.1.3 The obligations imposed on licensees are summarised in Section 3.4.
- 3.1.4 You will generally need to be authorised under the Corporations Act if you provide financial services as a representative of a licensee, unless you are an employee or director of that licensee or a related body corporate. This is explained further in Section 3.5. The obligations imposed on representatives are summarised in Section 3.6.

3.2 When do you satisfy the business test?

- 3.2.1 The business test is satisfied where a person provides financial services with system, repetition and continuity. Paragraph 11.5

of the Explanatory Memorandum to the *Financial Services Reform Bill 2001* states that “one-off transactions relating to the provision of financial services and financial products are unlikely to be caught by the new regime”. There is no requirement for a profit motive in order for the business test to be satisfied.

3.3 Does an exemption from the requirement to hold an AFS licence apply?

Exemptions under s911A(2)

3.3.1 The exemptions from the requirement to hold an AFS licence are set out in s911A(2) and regulations made for the purposes of that provision. For example, you do not need to hold an AFS licence in relation to the following conduct (this is an inclusive list):

- (a) you provide financial services as a *representative* of a licensee (or as a representative of a person exempt from the requirement to hold an AFS licence) (s911A(2)(a)); see paragraphs 3.3.2–3.3.5 below;
- (b) you are a product provider who *issues, varies or disposes of* a financial product pursuant to an arrangement with a licensee as specified in s911A(2)(b);
- (c) you are a product issuer who *varies or disposes of* a financial product at the direct request of the product-holder (rather than through an intermediary) (s911A(2)(c));
- (d) you provide *general advice* by publishing a newspaper or periodical which is generally available to the public (otherwise than only on subscription) and where the sole or principal purpose of the newspaper or periodical is not the provision of financial product advice (s911A(2)(ea));
- (e) you provide *general advice* in transmissions made by means of an information service where the transmissions are generally available to the public and where the sole or principal purpose of the transmissions is not the provision of financial product advice (s911A(2)(eb));
- (f) you provide *general advice* in sound recordings, video recordings or data recordings which are made publicly available and where the sole or principal purpose of the recordings is not the provision of financial product advice (s911A(2)(ec));

- (g) you provide the service *only* to wholesale clients *and* you are a body regulated by the Australian Prudential Regulation Authority (APRA) *and* the service is one in relation to which APRA has regulatory or supervisory responsibilities (s911A(2)(g));
- (h) you *deal* in a financial product in the capacity of trustee of a non-public offer superannuation entity (reg 7.6.01(1)(a));
- (i) you *deal* in a financial product in the capacity of trustee of a pooled superannuation trust (PST) where the PST is not used for the investment of assets of a regulated superannuation fund (reg 7.6.01(1)(d));
- (j) you *deal* in a financial product in the capacity of trustee of a PST where the regulated superannuation fund investing its assets in the PST has net assets of at least \$10 million (reg 7.6.01(1)(b));
- (k) you *deal* in a financial product in the capacity of trustee of a PST where the regulated superannuation fund investing its assets in the PST has net assets of at least \$5 million where you reasonably expect that the superannuation fund will have net assets of at least \$10 million within 3 months (reg 7.6.01(1)(c));
- (l) you provide a *financial service* that consists *only* of a “referral”, that is:
 - (i) informing another person that a licensee (or one of its representatives) is able to provide a particular financial service or class of financial services; and
 - (ii) giving that other person contact details for the licensee or representative.

Unless you are a representative of the licensee (or a related body corporate of the licensee), you must disclose any benefits (including commission) that you (and your associates) are to receive in respect of, or that are attributable to, the service (reg 7.6.01(1)(e) and (ea));

- (m) you are an employer-sponsor *dealing* in a financial product only by paying contributions on behalf of an employee into a superannuation product or retirement savings account (RSA) product (reg 7.6.01(1)(h));
- (n) you are a trustee of a superannuation fund *dealing* in a financial product only by paying the benefits of a member

into a superannuation product or RSA product (reg 7.6.01(1)(ha));

- (o) you are an RSA provider *dealing* in a financial product only by paying the benefits of an RSA product holder into a superannuation product or RSA product (reg 7.6.01(1)(hb));
- (p) you are an employer-sponsor *dealing* in a financial product only by arranging for the issue of a superannuation product to an employee (reg 7.6.01(1)(hc));
- (q) you provide the service as a sub-custodian in the circumstances set out in reg 7.6.01(1)(k);
- (r) you *advise* other persons about, and *arrange* for the use of, non-cash payment facilities in the ordinary course of your business, but only if you do not provide financial services as a significant part of your business (reg 7.6.01(1)(l));
- (s) you *deal* on your own behalf in (but do not make a market in) derivatives or foreign exchange contracts for the purpose of managing a financial risk that arises in the ordinary course of a business, but only if you do not deal in derivatives or foreign exchange contracts as a significant part of your business (reg 7.6.01(1)(m));
- (t) you are a product issuer providing *general advice* in the media (reg 7.6.01(1)(o)).

Note 1: You need to consider this list of exemptions only if you are providing a financial service. If you are not providing a financial service, you do not need to hold an AFS licence.

Note 2: The media exemptions referred to in paras 3.3.1(d) - (f) are subject to a condition concerning the disclosure of remuneration and pecuniary or other interests set out in reg 7.6.01B.

Note 3: This is not an exhaustive list of conduct for which an AFS licence is not required. You should also consult the regulations.

Factors to consider to determine whether you are acting as a principal or representative

- 3.3.2** In order to determine whether the exemption from the requirement to hold an AFS licence in s911A(2)(a) applies, you need to consider whether you are acting as a principal or as a representative of a principal. The exemption applies only if you are acting as a representative of a principal.

- 3.3.3** The following factors are general indicators that you may be acting as a principal and not as a representative:
- (a) if your conduct is not monitored and supervised by someone else;
 - (b) if you hold out that you are a principal;
 - (c) if your conduct is not covered by anyone else's compensation arrangements (eg professional indemnity insurance);
 - (d) if client assets are held in an account in your name;
 - (e) if clients are directed to pay any fees owing in relation to the provision of financial services into an account in your name;
 - (f) if you receive commissions directly from product issuers;
 - (g) if you have ownership of, access to, or liability for, client information.

Note: This is not intended to be an exhaustive list of potentially relevant factors. In determining whether you are acting as a principal, the presence (or absence) of any one or more of the listed factors is not conclusive.

- 3.3.4** You may handle money without thereby being treated as a principal, namely, where you perform purely administrative or mechanical functions such as accepting and banking cheques drawn in favour of a licensee or accepting and depositing insurance premiums in an insurance broker's trust account.

- 3.3.5** In relation to sub-paragraph 3.3.3(b) above, you will not be holding yourself out to be a principal merely by placing your name on your business documentation (such as letterhead, business cards and promotional material) provided:

- (a) the documentation makes it clear that you are acting as a representative of a licensee (and not as a principal); and
- (b) the licensee for whom you act (and the licensee's AFS licence number) is clearly disclosed.

Note: It will also be important to ensure that the documentation is not confusing or misleading to consumers. The position set out above is a continuation of the policy in Part III of PS 117 *Investment advisory services: Acting as a representative* [PS 117].

3.4 What obligations are imposed on licensees?

General licensee obligations

3.4.1 If you are a licensee you must comply with the obligations set out in s912A and s912B, which may be summarised as follows:

- (a) you must do all things necessary to ensure that the financial services covered by the AFS licence are provided efficiently, honestly and fairly;
- (b) you must comply with your AFS licence conditions;
- (c) you must take reasonable steps to ensure that your representatives comply with the financial services laws;
- (d) you must have available adequate resources;
- (e) you must maintain the competence to provide the financial services;
- (f) you must adequately train your representatives and ensure that they are competent to provide the financial services;
- (g) you must have a dispute resolution system which satisfies s912A(2) where financial services are provided to retail clients;
- (h) you must have adequate risk management systems; and
- (i) you must have compensation arrangements where financial services are provided to retail clients.

Note: Sub-paragraphs 3.4.1(d) and 3.4.1(h) above do not apply if the licensee is a body regulated by APRA within the meaning of s3(2) of the *Australian Prudential Regulation Authority Act 1998*.

3.4.2 The licensee remains ultimately responsible for all the financial services provided under its AFS licence, regardless of how those services are provided.

Conduct and disclosure obligations

3.4.3 Licensees must also comply with various obligations under the Corporations Act and other financial services laws, including (but not limited to):

- (a) various obligations in Part 7.6, including the obligation to notify us of breaches of licensee obligations under s912A, the obligation to provide us with assistance and the obligation to quote the AFS licence number in documents;

- (b) the financial services disclosure obligations in Part 7.7 where the licensee is the “providing entity”. This includes an obligation, in most circumstances, for the providing entity to give an FSG where the financial service is being provided to a retail client (s941A);
- (c) the further financial services conduct obligations set out in Part 7.8;
- (d) some product disclosure obligations under Chapter 6D (in the case of securities) or Part 7.9 (in other cases); and
- (e) the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

Note: Some of these obligations also apply to persons other than licensees.

Additional obligations — financial product advice

3.4.4 There are additional obligations under Part 7.7 where the providing entity provides financial product advice to retail clients. These obligations vary depending on whether the advice is personal advice or general advice. Personal advice is financial product advice given or directed to a person (including by electronic means) in circumstances where:

- (a) the provider of the advice has considered one or more of the person’s objectives, financial situation and needs; or
- (b) a reasonable person might expect the provider to have considered one or more of those matters (s766B(3)).

All other financial product advice is general advice.

Note: The definition of financial product advice is set out in paragraph 1.2.1.

3.4.5 Generally, if you are the providing entity and the financial service is the provision of personal advice to a retail client, you must:

- (a) make reasonable inquiries into the relevant personal circumstances of the client and have a reasonable basis for the advice (s945A);
- (b) warn the client if the advice is based on incomplete or inaccurate information (s945B); and
- (c) give the client a Statement of Advice (s946A).

- 3.4.6** If the advice is general advice, you do not need to comply with the obligations referred to in paragraph 3.4.5 above. However, if general advice is provided to a retail client, the providing entity must warn that client that the advice does not take account of the client's objectives, financial situation or needs in accordance with s949A.

3.5 When do representatives need to hold an authorisation?

- 3.5.1** In general, if you provide financial services in this jurisdiction as a representative of another person (a principal), you need to hold an authorisation under the Corporations Act from that principal (who must in general hold an AFS licence). You do not need to hold an authorisation if:

- (a) you are not providing financial services;
- (b) you are an employee or director of the principal (or a related body corporate of the principal) and the principal holds an AFS licence and the other requirements of s911B(1)(a) are satisfied;
- (c) you are an employee of an authorised representative of the principal, but only if the principal holds an AFS licence and the financial service is the provision of a basic deposit product (or a facility for making non-cash payments that is related to a basic deposit product) and the other requirements of s911B(1)(c) are satisfied;
- (d) you are a licensee providing the financial service under your own AFS licence (s911B(1)(d) and 911B(3)); or

Note: As a licensee you cannot be the authorised representative of another licensee except in relation to a binder: see s916D and 916E.

- (e) if the financial services you provide would be exempt under s911A(2) if they were instead provided by the principal (s911B(1)(e)).

- 3.5.2** Under s766A(4) a person is not regarded as operating a registered scheme merely because they act as an agent or employee of another person who does. This means that if an agent of the operator of a registered scheme merely acts in connection with the operation of the scheme, and does not provide a financial service of a type referred to in s766A(1)(a), (b), (c), (e) or (f), they will not have to hold an authorisation.

Note: The responsible entity remains responsible for the acts of its agents: see s601FB(3).

3.6 What obligations are imposed on representatives?

3.6.1 The primary obligation to ensure compliance with the financial services laws is imposed on licensees, who are responsible for the conduct of their representatives (as defined in s910A). However, some obligations in the law may apply directly to representatives, including (but not limited to):

- (a) the financial services disclosure obligations in Part 7.7 where the representative is the providing entity (including the additional obligations relating to financial product advice described in paragraphs 3.4.4 to 3.4.6);
- (b) some product disclosure obligations under Chapter 6D (in the case of securities) or Part 7.9 (in other cases); and
- (c) the consumer protection provisions of the ASIC Act.

Note: Some of these obligations also apply to persons other than representatives.

Key terms

Note: In this guide, references to particular financial products have the same meaning as in the Corporations Act (egs: “superannuation fund”; “RSA product”; and “non-cash payment facility”).

In this guide:

“AFS licence” means an Australian financial services licence under s913B that authorises a person who carries out a financial services business to provide financial services

Note: This is a definition contained in s761A.

“APRA” means the Australian Prudential Regulation Authority

“ASIC” means the Australian Securities and Investments Commission

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

Note: This is a definition contained in s761A.

“[CO 00/241]” (for example) means a reference to an ASIC class order (in this example numbered 00/241)

“Corporations Act” means the *Corporations Act 2001* as amended by the FSR Act and includes regulations made for the purposes of the Act

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

- (a) makes a financial investment (see s763B);
- (b) manages financial risk (see s763C);
- (c) makes non-cash payments (see s763D)

Note: See Div 3 of Part 7.1 for the exact definition.

“Financial Services Guide” means a document that must be given to a retail client in relation to the provision of a financial service in accordance with Div 2 of Part 7.7

Note: See s761A for the exact definition.

“FSG” means a Financial Services Guide

“FSR Act” means the *Financial Services Reform Act 2001*

Note: The provisions contained in Schedule 1 form part of the Corporations Act from FSR commencement (ie 11 March 2002). Schedule 1 contains the financial services licensing provisions under Parts 7.6 to 7.8 and the financial product disclosure provisions under Part 7.9.

“FSR commencement” means 11 March 2002, the date fixed by proclamation under s2(2) of the FSR Act on which Schedule 1 of the FSR Act commenced

Note: Schedule 1 contains the financial services licensing provisions under Parts 7.6 to 7.8 and the financial product disclosure provisions under Part 7.9.

“licensee” means a person who holds an AFS licence

“new regulatory regime” means the financial services licensing and product disclosure regime under the Corporations Act (as amended by the FSR Act)

“Part 7.9” (for example) means a Part of the Corporations Act after FSR commencement (ie 11 March 2002) (in this example numbered 7.9), unless a contrary intention appears

“Product Disclosure Statement” means a document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Part 7.9

Note: See s761A for the exact definition.

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

“PST” means a pooled superannuation trust as defined in the *Superannuation Industry (Supervision) Act 1993*

“reg 7.6.04” (for example) means a regulation of the *Corporations Regulations 2001* (in this example numbered 7.6.04)

“regulations” means the *Corporations Regulations 2001*

“representative” of a licensee means:

- (a) an authorised representative of the licensee; or
- (b) an employee or director of the licensee; or
- (c) an employee or director of a related body corporate of the licensee; or
- (d) any other person acting on behalf of the licensee

Note: This is a definition contained in s910A.

“RSA Act” means the *Retirement Savings Account Act 1997*

“s912A” (for example) means a provision of the Corporations Act after FSR commencement (ie 11 March 2002) (in this example numbered 912A), unless a contrary intention appears

“Statement of Advice” means a document that must be given to a retail client in relation to the provision of personal advice in accordance with Subdivisions C and D of Div 3 of Part 7.7.

Note: See s761A for the exact definition.

Related papers

This guide is one of a number of publications on the implementation of the *Financial Services Reform Act 2001*.

The related policy statements are:

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

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

Policy Statement 165 *Licensing: Internal and external dispute resolution* [PS 165]

Policy Statement 166 *Licensing: Financial requirements* [PS 166]

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

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

Policy Statement 169 *Disclosure: Discretionary powers and transition* [PS 169]

Policy Statement 172 *Australian market licences: Australian operators* [PS 172]

Other relevant related documents are:

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

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

Australian Financial Services (AFS) Licensing Kit (Version 2, October 2002)

Making the transition to an AFS licence: pre-FSR licences and insurance broker registrations — An ASIC guide (April 2002)

Pro Forma 209 *Australian Financial Services Licence conditions* [PF 209]

The hawking prohibitions — An ASIC guide (July 2002, updated October 2002)

Financial Advisers – What type of AFS licence authorisations and assessment do you need to apply for? An ASIC guide (August 2002)

You can download copies of these documents from the ASIC home page at www.asic.gov.au.

(Follow the link from “Financial Services Reform” on the top right of our home page.)

You can also get copies of these documents from ASIC Infoline on 1300 300 630.

To find out more about FSR

Visit the FSR page on our website at www.asic.gov.au:

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