



Investment & Financial Services Association Ltd

ACN 080 744 163

19 January 2007

The Manager – Investor Protection Unit
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Ruth

Re: Corporate and Financial Services Regulation Review

We refer to the Proposals Paper entitled 'Corporate and Financial Services Regulation Review' released on 16 November 2006. IFSA welcomes the opportunity to provide comments on the proposals raised in the paper and we greatly appreciate the extension of time during this busy period to lodge submissions with Treasury.

IFSA is a national not-for-profit organisation which represents the retail and wholesale superannuation, funds management and life insurance industries and has over 140 members who are responsible for investing over \$950 billion, on behalf of more than nine million Australians.

IFSA strongly supports the Government's desire to improve the overall effectiveness and efficiency of the corporate and financial services regulatory regime. We have a shared interest in ensuring that consumers and business benefit from the regulatory regime under which they operate and attach a high degree of importance to the corporations and financial services law reform project.

The attached submission provides comments on the proposals that are particularly relevant to our members.

We look forward to engaging in further consultation with you regarding the proposals and subsequently on any draft provisions of the Simpler Regulatory System Bill.

Please feel free to contact myself or Joseph Sorby on (02) 9299 3022 should you wish to further discuss the submission. We would be delighted to provide further information or clarify any of the matters raised therein.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Richard Gilbert', is written over a vertical red line.

Richard Gilbert
Chief Executive Officer



Investment & Financial Services Association Ltd

IFSA Submission

January 2007

**Corporate and Financial Services Regulation Review
Proposals Paper**

Chapter 1: Financial Services Regulation

Proposal 1.1

Scope of financial services advice — sales recommendation	
Proposal 1.1	Provide that in some situations, financial service providers may provide sales recommendations that are not considered to be financial advice.

IFSA response

IFSA welcomes the theme behind Proposal 1.1 – to address the not insignificant shortcomings of the present financial product advice regime to ensure that AFS Licensees and their authorised representatives are effectively able “to provide basic *advice* to clients about the suitability of financial products” such that consumers’ access to useful *advice* is not inappropriately limited.¹

IFSA notes that it has, on many occasions, sought to emphasise the importance of an appropriate financial product advice regime that is able to serve the interests of consumers and also alleviate the regulatory burden on AFS licensees.

However, while IFSA supports the intended objectives of the proposal, it does have serious reservations about the manner in which Proposal 1.1 seeks to achieve these objectives.

Consequently, IFSA believes that it would be preferable for these objectives to be achieved through appropriate and relatively simple modifications to the personal advice definition (see [Attachment A](#)), rather than via a significant re-engineering of the financial services regime that would itself raise a number of fundamental issues.

Importantly, IFSA is confident that working together with Government, the desired objectives can be delivered in a way that satisfies all major stakeholders. We look forward to engaging in further discussions to that end.

A further analysis of Proposal 1.1 follows.

Current law

Unfortunately, under the present Corporations Act definition of Personal Advice, any statement that has the potential to influence a person in relation to a financial product has the potential to become personal advice the moment the statement is made in consideration of any one of the person’s objectives, financial situation or needs.

The onerous disclosure obligations attached to personal advice means that a wide range of possible interactions between product issuers and advisers, and their clients are uneconomical. Product issuers are effectively deterred from providing people with educational tools like web calculators or basic information at call centres.

Consequently, the definition effectively restricts any advice which takes even one of the customer’s personal objectives, financial situation and needs into consideration

¹ See p13, Corporations and Financial Services Regulation Review – Proposal Paper, November 2006.

meaning that there is very little scope for providing limited advice or any sort of guidance or suggestions to consumers.

In effect, the present regulatory position distorts the economics surrounding the provision of certain types of financial advice such as:

- information about how a product might be able to be altered to better suit changed needs – e.g. reduce sum insured to make it more affordable, select a different excess level to deliver greater affordability, temporarily cease contributions to an investment during a period of hardship, etc;
- responding in a useful way to customers when they happen to provide personal information in the context of a conversation with an adviser;
- helping clients understand the risks and benefits of certain investment or insurance options;
- contacting an existing client with an insurance policy that is about to lapse and offering to alter the policy to better suit their needs or notify them of alternative insurance options that may be more suitable.

Assessing proposal 1.1

IFSA is of the view that Proposal 1.1 will not address a series of fundamental issues that presently exist with the financial product advice regime as identified above.

Proposal 1.1 seeks to address these issues by establishing an alternative “stream” to financial advice, namely a sales recommendation stream.

However, such a stream will not be available for superannuation products and will also not streamline the provision of financial product advice. This will result in significant additional compliance costs for those choosing to operate the two separate streams as they will need to maintain dual compliance systems and processes to support each.

Further, the proposal does not resolve the key issues around the cost of providing *advice* and providing greater access to *advice*. Instead, Proposal 1.1 merely provides a new stream for consumers to *acquire* financial products.

IFSA’s preferred approach

IFSA’s preferred approach, therefore, is for the component definitions of Financial Product Advice to be amended as outlined in Attachment A.

This modified definition has a number of advantages over Proposal 1.1, namely:

- It applies to all financial products that are the subject of financial product advice, whereas Proposal 1.1 excludes superannuation creating a regulatory distortion in the market for financial products.
- It also applies to facilities, such as calculators, profilers and case studies, that all fall outside the scope of the sales recommendation framework. Calculators and profilers are simple and easy to understand tools that enable investors to learn more about their financial situation and the products that are likely to meet their needs.
- Will not distort the market for financial products. Proposal 1.1, by excluding superannuation, may result in the increased selling of non-super financial

products at the expense of super products – including in cases where this is arguably inappropriate. In this regard, IFSA notes the considerable research it has conducted into the adequacy of Australian’s retirement savings and the Government’s policy around encouraging Australian’s to save for their retirement.

- Contrary to the likely impact of Proposal 1.1, proceeding with IFSA’s preferred approach will not result in a reduction in the supply of financial advice. Instead, the new definition will allow the advice process to be better tailored to consumers depending on the nature of the advice they are seeking.

IFSA looks forward to engaging in further discussions with Government on this matter and is confident that the desired objectives can be achieved by working within the existing framework of the *Corporations Act 2001*.

Proposal 1.2

Scope of financial services advice — Statement of Advice exemption — no product recommendation and no remuneration	
Proposal 1.2	Remove the requirement to provide a Statement of Advice when personal advice is provided that does not involve the recommendation of a product and no remuneration is received for, or in relation to, the advice. Instead, a Record of Advice would be required to be prepared by the adviser.

IFSA response

No remuneration restriction

IFSA believes that the restriction that no remuneration can be received for, or **in relation to**, the advice may pose challenges for licensees.

New customers

A difficulty that arises is that regardless of whether initial or preliminary advice is given, the adviser may receive remuneration “down the track” if the client subsequently purchases a product on the basis of the original or further advice. It could therefore be argued by the regulator that there was, in fact, remuneration associated with the advice, except that it was not contemporaneous with the advice.

IFSA therefore believes that without amendment, the exemption is likely to be of little use other than for initial free consultations for new clients.

Existing customers

The proposal will also make it very difficult for advisers to rely on the exemption when advising existing customers because it is likely that the remuneration they receive will relate to the advice given, even if only on the basis that a hold recommendation may be seen to benefit an adviser receiving trail commission.

IFSA therefore submits that the words 'or in relation to' should be removed from the proposed wording. Another approach would be to focus on whether the remuneration the adviser receives would increase if the client acts on the advice.

Additionally, there appears to be a problem where advisers receive remuneration from an alternate source, including for example where an employer pays for advice to be given to their employees. In these circumstances, as the remuneration does not affect the advice being given it should not be relevant to the ability of an adviser to rely on the proposed exemption.

If such remuneration is included, it will result in the cost of providing such advice to increase, affecting the willingness of employers to pay for or provide these types of employee benefits.

IFSA recommends that the proposal should focus on whether the remuneration the adviser receives would increase if the client acts on the advice.

Employer sponsored superannuation

IFSA believes that proposal 1.2 could also be extended to address the long standing issue around the provision of 'asset allocation' only advice to members of employer sponsored superannuation, particularly SGC funds. In these circumstances, the advice does not involve recommending the acquisition or disposal of a financial product or even increasing or decreasing an interest in the product – as the employer has already established the fund in which the employee is a member.

However, because the advice does involve a recommendation in relation to a specific financial product, with respect to how the funds provided by the employer are allocated across asset sectors based on the individual member's investment profile, personal advice obligations are usually triggered.

Generally, these members need to get advice about how to allocate their 9% employer contributions across different investment options within their superannuation investment and have difficulty in getting the advice given that advisers do not normally receive any direct remuneration relating to that advice, yet are expected to meet all the current obligations under the personal advice regime.

In these circumstances, IFSA proposes that there should be an exemption from the Statement of Advice (SoA) requirement which would reduce advisers' costs and may therefore make the advice more available to those who need it most.

The current exemption in regulation 7.1.33A is not workable for industry because it does not allow for advice about allocating funds between different superannuation options. The exemption only allows for advice about allocating funds between superannuation and other types of investments, such as shares or managed funds. The exemption should be widened by adding the following:

- investment options within a superannuation product;
- classes of shares, for example International or Australian shares; and
- investment-based products that predominately invest in a particular class of shares.

The final two exemptions would ensure regulatory neutrality between superannuation and other types of investment products.

Record of advice requirements

IFSA wishes to clarify whether the current record of advice (RoA) requirements will apply to the proposed RoA under 1.3. The current rules for the use of an RoA require that a previous eligible advice document, such as an SoA, has been provided. If this is the case, this requirement will need to reflect proposal 1.2 where an SoA is not required.

IFSA believes that having the same name for separate RoA documents, which serve different legislative purposes, may act to confuse planners and investors. IFSA wishes to clarify the level of detail and structure of proposed RoA under proposal 1.2.

Definition of recommendation

IFSA understands that it is often difficult to categorise a recommendation according to whether it pertains to a product or a class of products. There is confusion, within industry, regarding the two definitions of recommendation and how it works in practice.

IFSA submits that the exemption for situations where there is no product recommendation be clarified to exempt situations where there is no direct recommendation about a specific product.

Proposal 1.3

Scope of financial services advice — threshold for requiring a Statement of Advice	
Proposal 1.3	Introduce a threshold into the Statement of Advice requirements such that a full Statement of Advice would only be required if the advice given is in relation to an investment amount that is above \$10,000, except in relation to superannuation. A Record of Advice would need to be kept for advice in relation to amounts smaller than this threshold.

IFSA response

IFSA welcomes this proposal and believes that with some amendment it is capable of providing meaningful relief to advisers and therefore significantly expanding access to robust financial advice.

While the Proposal suggests an investment amount of \$10,000 be used as the reference point for the exemption from having to prepare a SoA, IFSA would like to work with Government to develop what it believes is a more meaningful threshold.

Importantly, in arriving at a threshold, IFSA submits that the financial services regime needs to be considered in its entirety such that adequate regard is given to other consumer protection measures under the regime, such as:

- licensing requirements;
- consumer protection powers contained in the *ASIC Act 2001*;
- free access to external dispute resolution bodies;
- pending introduction of compensation arrangements for AFS Licensees that are unable to meet a successful claim for loss suffered as a result of breach of their obligations under Chapter 7 of the *Corporations Act 2001*.

IFSA also proposes that the following two key areas be included in the proposal:

- superannuation and retirement savings accounts; and
- insurance, including life risk insurance and sickness and accident.

Inclusion of superannuation

IFSA believes that superannuation is precisely the area where low cost advice needs to be made readily available, particularly if superannuation is advocated as the pre-eminent retirement savings vehicle.

The exclusion of superannuation is likely to mean that there will not be many situations where the exemption will operate as, rightfully, most personal advice would need to consider superannuation.

Ironically, the proposal may in fact favour recommendations pertaining solely to other eligible investments in place of superannuation.

Additionally, given the retirement savings gap that presently exists in Australia,² this is a serious issue that needs to be addressed by the proposal.

If the Government is concerned with the possibility of “miss-selling”, IFSA believes that it is significantly alleviated by the proposal’s low monetary threshold and by the quality of the regulatory framework underpinning superannuation – with super trustees now required to be licensed by APRA (many also by ASIC) and with advisers also subject to licensing and still subject to the requirement to provide “appropriate” advice – despite not having to prepare an SoA.

IFSA therefore advocates that in the broader interests of ensuring that those who would otherwise be unable to obtain advice in respect of a fundamental part of their financial affairs (planning for retirement), superannuation should be included within the proposal.

Inclusion of life risk insurance

IFSA recommends that the relief under proposal 1.3 should also be extended to include life risk insurance in the following situations:

- if the amount of life insurance cover recommended does not exceed:
 - a lump sum insured of \$500,000 for death and/or total & permanent disability cover; and/or
 - a lump sum insured of \$100,000 for trauma insurance; and/or
- for any life insurance (i.e. not savings) product, where the total premium in the first year will be less than \$500.

The above exemption for life risk insurance would significantly reduce the current compliance costs and perception that life insurance advice is not financially justifiable for smaller amounts of insurance.

In support of this recommendation, we address below some major “myths” associated with life risk insurance and also expand on the policy rationale for extending the proposal in this way.

Life insurance cover among Australian families

- There are over 5,530,000 families in Australia who have dependent children living at home.
- Rice Walker Actuaries estimate that the cover held by those with life insurance through their Superannuation represents 20% of the cover needed.

² IFSA estimated the retirement savings gap to be \$93 523 per person in 2005. See Retirement Incomes & Long Term Savings Policy Options, 2006 (<http://www.ifsa.com.au/public/content/ViewCategory.aspx?id=84>).

- When looking at the total population, on average only 4% of those with dependent children have life insurance more than 10 times earnings as recommended by Rice Walker.
- 10% have cover between 6 and 10 times earnings and 26% have cover between one and five times earnings.
- Most worryingly, six in 10 of those with dependent children have not got enough life insurance cover to look after their dependents for more than one year if they were to die.

IFSA's recent consumer research undertaken by TNS shows that although the need for life insurance is understood by most Australians, what is not appreciated is the level of cover required nor do they routinely seek advice. Thus, financial advisers have a critical role to play in addressing the underinsurance that currently exists in Australia.

The Financial Services Reform legislation brought with it the requirement that advisers complete a SoA in a number of situations. Dealer group analysis has determined that it can take anywhere between 5 hours and 12 hours to complete a SoA, depending on the complexity of the proposed financial solution. At a minimum cost of \$100 an hour, this would require a minimum premium of \$500 just to cover the cost of the SOA.³

With other administrative and resource expenses, advisers need to be able to recoup these costs to be in a position to discover and then advise potential clients.

As a consequence, financial advisers inevitably concentrate on the upper end of the markets, and relegate "middle Australia" to the unfortunate position of not receiving their advice.

To encourage qualified financial advisers to actively seek clients, then explain and determine what is adequate cover for them, there is a real need to reduce the costs associated with the provision of the advice. One way to achieve this is for relief to be provided from the SOA requirement under this proposal.

Rationale behind IFSA's proposed threshold

In making its recommendation, IFSA recognises that financial needs vary from person to person. IFSA has therefore developed a threshold which it believes meets an equivalent policy aim relevant to life insurance – that is, defining a threshold that represents an amount of life insurance cover for which the economics of providing advice do not add up such that advice in such cases is not typically available.

³ Survey of Genesys dealer group – Poll No 13 – February 2006

Coincidentally, the proposed life insurance threshold also aligns relatively closely with what IFSA believes is a reasonable estimate of the average level of cover that the “typical” Australian family requires. The recent IFSA underinsurance study reveals the following information:

Current average earnings	\$ 810.60 per week (Private and Public Sectors – All employees total earnings) ⁴
Current average mortgage	\$122,300 ⁵
Average level of other debts	\$ 7,600 ⁶
Average number of children per family	Between 1.73 and 1.76 birth rate ⁷
Average cost of raising a child	\$ 224,000 (from birth to age 20) ⁸

On the basis of this information, IFSA believes that the minimum level of life insurance cover would be:

\$ 122,300 mortgage
 \$ 7,600 other debts
 \$ 392,000 child costs (x 1.75 children)
 \$ 521,900

This amount would only enable the average Australian income earner to repay debts and cover the future costs of raising children. It does not address other future living expenses. This calculation is therefore very conservative because it assumes that the surviving spouse will be immediately able to return to work which is unlikely to be the case on most occasions.

For simplicity, IFSA therefore believes that for the purposes of this Proposal, the minimum level of life insurance cover should be \$500,000.

Similarly, IFSA believes that a minimum amount of trauma cover should also be included. Trauma insurance pays a lump sum in the event that the life insured suffers any one of a list of medical events (including but not restricted to heart attack, stroke, cancer, Multiple Sclerosis and dementia).

The provision of this lump sum allows the life insured to overcome any financial impact (which might be incurred through medical expenses, loss of income and any required apparatus, e.g. wheelchairs) that often accompany such events and thus allow them to concentrate on their medical recovery.

Again for simplicity, IFSA believes that the level of trauma cover should be two years’ salary, rounded to the nearest \$100,000.

Life insurance cover in superannuation

IFSA believes that there is a common myth about the amount and adequacy of life insurance provided through superannuation.

The TNS consumer research conducted in November 2006 revealed that many Australians believe that they have adequate life insurance cover through superannuation without actually knowing or considering their financial risk.

⁴ Australian Bureau of Statistics - Survey of Average Weekly Earnings, November 2005

⁵ Australian Bureau of Statistics - Publication 5609.0 – Housing Finance, Australia

⁶ Reserve Bank of Australia- Credit and Charge Card Statistics

⁷ Australian Bureau of Statistics - Publication 1301.0 – Year Book Australia, 2005

⁸ Investor – The Sun Herald – March 5, 2006

Some of the comments made by consumers who participated in the research included:

- *“I have super – why would I need to insure”*
- *“I have plenty of cover in my super”*
- *“The Government will look after things if something happened”*

Although many Australians are covered by life insurance, Rice Walker Actuaries have estimated that the cover held through their superannuation represents 20% of the cover needed. In addition, consumers are usually unaware of the level of cover, or even that they have cover through their superannuation fund.

Research conducted by Mercer Wealth Solutions reported a notable lack of understanding in this area:

“Mercer discovered that while all respondents said they were a member of at least one superannuation fund, only half (50%) claimed to have a life insurance policy. More than two in five (44%) stated they did not have any life insurance, while a further 6% were not sure.”

This is another important reason for consumers to gain access to a financial adviser who will be able to better inform them of their risk exposures in this area.

Life insurance is not complex

The view that life insurance is complex is also a myth. A standard life insurance product, usually referred to as a ‘term life’ product, pays the insured amount on the death of the life insured. The only exclusion in the product is for suicide within the 13 months of the policy starting.

Importantly, the cost of cover is not out of reach of most Australians, but advice is. When compared with a policy to cover a home which is not considered a complex product, the life insurance product is generally cheaper for a similar level of cover and contains less exclusions. IFSA would be happy to provide specific examples if necessary.

Consequently, when it comes to eligibility to claim under the policy, there is far more certainty with the life insurance product that a benefit will be paid. In fact, there is total certainty in the amount that will be received from the life insurance policy which cannot said to be the same for the homeowners’ policy.

Life insurance – meeting the promise

One of the purposes for having life insurance is to have funds available to pay for the immediate expenses facing those members of the family left behind such as funeral expenses and in some cases the cost of daily living.

Superannuation does not meet this need as in many cases the payment of a benefit can take many months. The Superannuation Complaints Tribunal’s (SCT) June 2006 quarterly bulletin reports 25% of its open complaints relate to the distribution of superannuation benefits. The 2006 September quarter bulletin reports that 19.6% of new complains relate to distribution of death benefits.

Graham McDonald, Chairperson, SCT writes

“It remains clear from the number of cases reported in this Bulletin received concerning death benefit distribution that this remains an area of continuing concern to the public. A superannuation death benefit may only be paid to a spouse (including de facto), a child, a person financially dependent on, or in an interdependency relationship with, the deceased or the executor of the estate and, failing any of those listed, the benefit may then be left to any other individual. Superannuation distribution may be by way of a binding nomination, restricted to recipients in the categories outlined, where the particular trust deed provides for it, otherwise the trustee must make a decision in which case the nomination made by the member will be but one guiding factor.”

Life insurance held outside of superannuation where the policy owner is not the life insured, can be settled as soon as the death certificate becomes available. This benefit is often overlooked when life insurance is being considered – another reason it is important that consumers receive appropriate advice.

Life insurance and the financial adviser

As an indication, the premium payable to buy \$500,000 of life insurance is approximately \$400 in the first year. Based on this amount, it is understandable that a financial adviser is not inclined to spend the time or make an effort to seek out and assist a consumer with the compliance burden that goes with providing advice under the current SoA regime.

Therefore, we believe that by including life insurance in the proposal, consumers will have greater access to advice regarding their life insurance needs.

Calculation of the threshold

IFSA notes that the Proposals Paper refers to future investments being taken into account when calculating the threshold. IFSA submits that there needs to be a limit on the timeframe for taking future investments into account, otherwise the threshold will only have very limited application.

IFSA believes that an appropriate timeframe would be any investments the adviser reasonably expects the client will make, based on the adviser's recommendations, within one year of the advice being provided.

IFSA believes that if ongoing contributions are not factored in, then the relief will be of limited use because it will only apply to one-off investments and not the delivery of strategic advice which will typically involve recommendations of ongoing contributions.

Indexation of the threshold

IFSA believes that the threshold should be indexed to ensure that it remains appropriate over time. The method of indexation should ensure, however, that the amount is increased in whole numbers rounded to the nearest say \$5,000.

Without some indexation of this threshold, the issue which the proposal is aimed at addressing (access to financial advice for those with a relatively minor amount to

invest) is likely to remain as the threshold will increasingly become immaterial with the effect of inflation.

Proposal 1.4

Scope of financial services advice — Financial Services Guide exemption — public forum	
Proposal 1.4	Provide that a Financial Services Guide does not need to be provided at a forum where 10 or more retail clients attend, whether or not it is open to any person to attend the forum.

IFSA response

This proposal is supported by IFSA.

Proposal 1.5

Non-cash payment facilities	
Proposal 1.5	Streamline the disclosure requirements that apply to all non-cash payment facilities that are not related to a basic deposit product by applying the same limited disclosure requirements to these facilities. The disclosure requirements that currently apply to non-cash payment facilities related to basic deposit products would be maintained.

IFSA response

This proposal is supported by IFSA. However, and in the light of ASIC's recent information release regarding superannuation clearing houses (IR 06-34), IFSA believes that this proposal should be implemented on an urgent basis (by regulation or class order) so that those entities who were not providing product disclosure statements for the clearing house (on the basis of legal advice which is not consistent with ASIC's release), are not required to create one for the period between ASIC's release and implementation of the proposal.

Proposal 1.6

Sophisticated investors	
Proposal 1.6	<p>Adopt in Chapter 7 of the <i>Corporations Act 2001</i> a mechanism similar to provisions of Chapter 6D, which allow the financial services licensee to be satisfied that the investor is adequately equipped to be determined a wholesale investor.</p> <p>Under s708(10) in Chapter 6D, the determination of wholesale status is made through a financial services licensee in relation to an offer of a body's securities on the grounds that: the licensee is satisfied that the person to whom the offer is made has previous experience that allows them to knowledgeably assess the offer and that the licensee provides a written statement to the person of their reasons for being satisfied and the person to whom the offer is being made signs a written acknowledgement that they have not been provided disclosure in relation to the offer.</p>

IFSA response

IFSA supports this proposal and recommends that a wholesale fund manager should be permitted to rely on the assessment of the retail level or distributor licensee. Specifically, IFSA believes that each licensee should not be required to make their own assessment, rather they should be able to rely on an assessment made by another licensee.

It appears as though such an election to be treated as a sophisticated investor (wholesale client) can only be made with respect to an offer, rather than on an ongoing basis in respect of all dealings with a licensee.

IFSA therefore proposes that the proposal encompass additional flexibility such that a sophisticated investor is able to elect to be treated as a wholesale client either for the offer in question or on an ongoing basis until they provide further notice.

This will avoid individual assessments being conducted on an offer by offer basis in circumstances that are contrary to the client's wishes – i.e. where they wish to be treated as a wholesale client for all purposes.

Proposal 1.7

Cross-endorsement of authorised representatives	
Proposal 1.7	<p>Amend the cross-endorsement arrangements so that licensees are only jointly and severally liable for the conduct of their authorised representatives where those representatives provide financial services in relation to the same sub-class of financial product.</p>

IFSA response

IFSA believes that the proposal should not be limited to general insurance and should be extended to all financial products in order to ensure that AFSL holders can provide a broader range of financial services.

IFSA contends that other licensees should be able to rely on the relief when authorising representatives who have also been authorised by general insurers. If the proposal is not extended, other licensees could potentially be obliged to take up liability for general insurance products which they did not authorise the representative to distribute. Accordingly, IFSA recommends that the proposal is extended generally in order to guarantee that a licensee is only responsible for the sub-class of products they authorise a representative to distribute.

In order to provide further guidance to industry, IFSA proposes that a series of examples clarifying the term 'sub-class' be included in the legislation's explanatory memorandum. IFSA would be pleased to assist in the development of any such examples.

Proposal 1.8

Policy Statement 146 — training requirements	
Proposal 1.8	ASIC will review PS146 to consider the concerns raised about the training framework and any consequential revisions that may arise from other proposals in this paper, such as Proposal 1.1.

IFSA response

IFSA looks forward to working with ASIC on any consultation on PS146.

Sales recommendation competencies

Should Proposal 1.1 proceed, IFSA would again welcome the opportunity to be involved with ASIC in developing the appropriate competency standard for such sales representatives.

Proposal 1.9

Product activity and data collection	
Proposal 1.9	<p>Amend s1015D of the <i>Corporations Act 2001</i> to replace the current mechanism for reporting the requirements of the in use notice with a new mechanism, a standardised on-line report with a title such as a 'Financial Product Activity Report'.</p> <p>The Financial Product Activity Report will require the responsible person for a PDS (see s1013A(3)) to provide information in the standardised on-line report within five business days from when:</p> <ul style="list-style-type: none">• a financial product for which a PDS must be prepared is first recommended, issued or sold;• there is a change in the contact details previously reported on;• a financial product for which a report previously had to be made is withdrawn from being recommended, issued or sold;• a financial product for which a report previously had to be made is closed;• there is a change in the fees and charges set out in the enhanced fee disclosure table; or• changes are made in a supplementary or new PDS.

IFSA response

IFSA welcomes the proposed standardised on-line reporting facility. However, IFSA remains concerned about the broader regulatory need for the requirements given they will continue to impose some regulatory burden on industry.

IFSA wishes to further discuss ASIC's needs in this area and whether the proposed requirements can be further streamlined to minimise the regulatory impact on the industry.

Five-day reporting requirement

IFSA submits that the proposal to use the five day reporting requirement from the date 'recommended' is impractical as product providers are unable to determine a single date across multiple financial advisers.

As an alternative, IFSA recommends that for new PDSs, or supplementary PDSs, the five days should be measured from the 'Date Prepared' as included in the PDS for the purposes of 1013G of the *Corporations Act 2001*. Similarly, the measurement date when a product is withdrawn or closed should be the date that the provider advises as being the effective date.

Life risk insurance products

IFSA believes that there is also an ongoing problem of determining when a PDS is no longer used or is withdrawn for life risk insurance products where there will be a delay between making this decision and finalising underwriting of applications received under the PDS or in relation to the product before it was withdrawn or discontinued.

Proposal 1.11

Pooled superannuation trusts and product disclosure	
Proposal 1.11	The current exemption from licensing for dealing services provided by trustees of pooled superannuation trusts under the retail/wholesale client test should be extended in application to the product disclosure regime.

IFSA response

IFSA supports the extension of the current licensing exemption for dealing services provided by trustees of pooled superannuation trusts, particularly the \$10 million threshold for trustees of PSTs in giving a PDS to investors.

Proposal 1.12

Registered managed investment schemes investing in unregistered managed investment schemes	
Proposal 1.12	The restriction in s601FC(4) of the <i>Corporations Act 2001</i> will be amended to remove the prohibition on investments in unregistered schemes that are predominantly operated outside Australia and are not operated by the responsible entity itself, or any associate of the responsible entity.

IFSA response

IFSA supports the removal of the prohibition under section 601FC(4).

However, industry is concerned that the restriction will not be lifted for associates of the Responsible Entity (RE) and may actually impede legitimate forms of offshore investment.

For fund managers, this will impose restrictions that IFSA does not believe are justified from an investor protection perspective. Without the restriction on associates of the RE, IFSA members will nonetheless be required to make diligent investments on behalf of their funds and in most cases would have a better knowledge of the benefits and risks of a fund operated offshore by the associate of the RE.

Importantly, removing this limitation does not affect the RE's legal duty under paragraph 601FC(1)(c) to "act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests".

IFSA therefore recommends that subsection 601FC(4) be repealed on the basis that if the scheme available to retail clients must itself be registered, then through regulating the RE of that scheme ASIC has the power to deal with any issues or concerns in regards to underlying schemes.

Chapter 2: Company Reporting Obligations

Proposal 2.1

Executive remuneration	
Proposal 2.1	<p>Remove duplication by placing the requirements exclusively in the <i>Corporations Act 2001</i>. As part of this proposal:</p> <ul style="list-style-type: none">• all companies that are disclosing entities would be required to prepare an audited remuneration report;• the current requirements in AASB 124 paragraphs Aus25.2 to Aus25.7.2 would form the basis for the <i>Corporations Act 2001</i> disclosure requirements, but these will be supplemented to include disclosures currently required in the <i>Corporations Act 2001</i> that are not covered by the requirements in AASB 124;• the current requirements to disclose the maximum and minimum value of option grants and the aggregate value of options that have been granted, exercised or lapsed during the period would be repealed;• the remuneration disclosures would be required by all 'Key Management Personnel' as defined in the accounting standards, but the definition would be supplemented to mandate disclosure of the five most highly remunerated executives; and• a new disclosure requirement would be introduced requiring companies to disclose the board's policy on executives and directors entering into contracts to hedge their exposure to options or shares granted as part of their remuneration package and how the company enforces this policy.

IFSA response

IFSA supports rationalising the existing legal and accounting framework.

IFSA has previously argued for the need to rationalise the existing legal and accounting framework dealing with director and executive remuneration.

As a consequence, IFSA has previously suggested that it prefers the relevant requirements being wholly contained in the *Corporations Act*, where the government is able to exercise its own judgment and interpretation as to how the obligations ought to be applied in the Australian context – particularly where those requirements are qualitative in nature.

Alternatively, the policy aspects of the requirements should be contained in the Act, with the quantitative elements in the Standard. This approach would also significantly aid in simplifying the application of the two without affecting our compliance with international standards.

Therefore, IFSA is open to any further discussions aimed at removing unnecessary duplication between the *Corporations Act* and Accounting Standards.

Hedging of director remuneration

IFSA, along with the Australian Institute of Company Directors, Australian Employee Ownership Association and the Australian Shareholders Association, is in the process of finalising guidance to companies on this issue within our updated 'Executive Equity Plan Guidelines'. The wording proposed to be included in the Guidelines states:

Companies should have a written and published policy covering the period before and after the vesting of securities where executives might seek to acquire and/or trade in financial products issued over the company's securities by third parties which operate to limit the economic risk of the equity plan.

Pre-vesting hedging activities should be prohibited, particularly where the company has informed the market that a portion of executives' remuneration is 'at risk'.

The company's policy should also require executives to disclose any post-vesting hedging activities to the company. Any breaches of company policy should be treated seriously, and where appropriate, disclosed to the market.

IFSA supports an outcome consistent with the approach above, noting that it goes beyond that which appears to be proposed under this proposal.

IFSA also notes that the revised draft ASX Corporate Governance Council Principles have sought to address this issue with the following references contained in the revised text of the draft principles:

[In relation to establishing a company trading policy]

3. Require designated officers to provide notification to an appropriate senior member of the company, for example, in the case of directors, to the chair, of intended trading, including entering into transactions or arrangements which operate to limit the economic risk of their security holdings in the company. No prior notification is needed for dividend reinvestment plans and the like. (ASX Corporate Governance Council *Exposure Draft of changes 2 November 2006*, page 21)

[In relation to cautioning companies about not inadvertently misrepresenting the alignment of shareholders and executive's interests]:

Where a company makes any representations about the alignment of a director's or senior executive's interests, the company should take into account the extent to which that director or senior executive has an economic interest in the relevant securities. (As above, page 22)

[In relation to equity based remuneration]

Appropriately designed equity-based remuneration, including stock options, can be an effective form of remuneration when linked to performance objectives or hurdles.

Equity-based remuneration has limitations and can contribute to 'short-termism' on the part of senior executives. Accordingly, it is important to design appropriate schemes. The terms of such schemes should clearly prohibit entering into transactions or arrangements which limit the economic risk of participating in unvested entitlements under these schemes.⁴⁹

[Footnote 49] The vesting of any entitlements under these schemes should be timed to coincide with any trading windows under a trading policy adopted by the company for the purpose of Recommendation 3.2. (As above, page 36)

The ASX Council has very effectively raised the bar on corporate governance practices in listed companies. IFSA therefore suggests that Treasury consult closely with the Council prior to releasing any draft provisions on this matter to ensure that regulatory overlap does not arise.

Proposal 2.8

Electronic distribution of annual reports	
Proposal 2.8	<p>Amend the default option for receiving annual reports to be via an entity's website. Hard copies will be sent only to members who request them.</p> <ul style="list-style-type: none">• The proposal will apply to all reports prepared under s314 of the <i>Corporations Act 2001</i>, including concise reports (where a company, registered scheme or disclosing entity has elected to prepare a concise report).• Where an entity does not have a website, or does not wish to distribute annual reports electronically, it may continue to send hard copies of the annual report.• An entity will be required to notify members in writing of their right to elect to receive the hard copy of the annual report.• Each year, the entity will need to directly notify each member when the annual report is available on their website and where it can be located.• Entities will be required to ensure that the annual report is 'reasonably accessible' on their website.• A member may continue to make a standing request to receive a hard copy of the annual report and the entity will be required to comply with such a request by the deadline set out in s316(2) of the <i>Corporations Act 2001</i>.• A hard copy of the annual report will continue to be sent free of charge, unless the member has already received a copy free of charge.

IFSA response

IFSA's response below deals with electronic distribution of regulated disclosure documents relating to financial products generally.

SECTION 1: SUMMARY OF IFSA RECOMMENDATIONS

1. IFSA welcome Proposal 2.8 to encourage the electronic distribution of s314 annual reports. We believe, however, that the retention of s314(4) does not assist this outcome and ought to be deleted or clarified.
2. Where possible, we recommend that the outcome envisaged under Proposal 2.8, ie. that information may be made available on websites and, as far as practicable, require hard copies to be sent to members who request them, should be extended to other regulated disclosure documents, especially for:
 - additional fund information required to be given by superannuation trustees (s1017DA);
 - ongoing disclosure of significant events and material changes (s1017B) ("significant event notices");
 - periodic statements (s1017D);
 - obligation to give additional information on request (s1017A); and
 - transaction confirmations (s1017F).

For those without a current e-mail address, we believe hard copies should still be despatched for these holders. For those with e-mail addresses and the regulated disclosure documents have been published on websites, product issuers would notify either electronically or by other means when any of the documents become available.

3. To facilitate item 2 above, we recommend the law should be amended either by regulatory amendment or ASIC relief:
 - to clarify the meaning of 'electronically' to include e-mails (with or with documents attached and/or hyperlinks to documents), and/or web publications (see also reg 7.9.75A, s1017B(3) or s1017F(6));
 - to broaden the requirement relating to what can constitute a copy for future access to include an electronic copy that can be saved and/or printed (see reg 7.9.75B(1) or reg 7.9.63I(1)); and
 - To amend subregulations 7.9.75B(2) and 7.9.63I to allow of e-mail notifications, with or without hyperlinks to web publications or attachments, when regulated disclosure documents become available electronically. Also, the two subregulations are currently unhelpful, a regulated disclosure document, often a separate document like a web publication or an attachment, should not have to form part of an e-mail notification.
4. Many product issuers have previously collected a huge number of e-mail addresses from existing holders and investors without necessarily obtaining specific consent to use these addresses for the purpose of distributing regulated disclosure documents.

Regulated disclosures should be allowed to be distributed or made available using these addresses with or without specific consent or customer nomination. While this is not prohibited under the law, IFSA urge Regulators, Government and Treasury to actively endorse and promote this, in conjunction with industry, electronic communication and e-commerce using previously collected e-mail addresses.

We recommend that our regulatory environment should be conducive to allow industry the full flexibility of using various IT solutions at its disposal to communicate and do business with its members and customers.

5. While we do not make any recommendations for the electronic distribution of point of sale disclosures, such as Product Disclosure Statements (s1015C), supplementary PDS's, requests for additional information (s1017A), IDPS Guides and Financial Services Guides (s941D), we do raise some of the issues relating to e-distribution and e-commerce that should be given serious consideration. For example, there are still regulatory barriers for online applications. Subject to appropriate conditions, we believe an eligible application should also include online applications. Consideration should also be given for the removal of other barriers to facilitate e-commerce.

This submission discusses and provides the reasons for our recommendations on how the legislation can be amended, and how our regulators can support the electronic distribution of the various types of regulated disclosure documents.

SECTION 2: DIFFERENT TYPES OF REGULATED DISCLOSURE DOCUMENTS

Proposal 2.8 is another important step toward recognising the widespread availability and uptake of information technology in Australia. It supports Recommendation 5.20 of the Regulation Taskforce Report released January 2006 which IFSA had also welcomed. We submit that the same reasons underpinning this proposal and the Taskforce recommendation should also be adopted for other regulated disclosure documents relating to financial products ("regulated disclosure documents"). We are encouraged by the statement on page 103 of the Taskforce report that:

"While the Taskforce has initially confined this to company annual reports, it considers that there would be merit in extending such arrangements to other amenities such as superannuation funds and managed investment schemes."

As regulated disclosure documents are many and varied, we have identified, broadly, three types listed below as a useful starting point for the ensuing discussions and recommendations:

- a. Non-personalised disclosures to existing product holders – these include fund information for super e.g. audited fund accounts (s1017DA), annual financial reporting to members (s314), and significant event reporting requirements (s1017B) – see Section 3.
- b. Personalised disclosures to existing product holders – such as periodic statements (s1017D) and transaction confirmations (s1017F) – see Section 4.
- c. Point of sale documents – such as PDS's, IDPS Guides and related disclosures – see Section 5, which are not personal.

SECTION 3: NON-PERSONALISED DISCLOSURES TO EXISTING PRODUCT HOLDERS

Non-personalised disclosure documents sent to existing holders are disclosure documents that are not specific to a member or a product holder. Three types of regulated disclosure documents may be described as 'non-personalised', ie. (i) annual reports (CA s314), (ii) super fund information (s1017DA), and (iii) significant event notices (s1017B).

These regulated disclosures are often available on a website without the need for secure access. Electronic distribution of these documents should be encouraged because they are so easily and effectively disseminated in this way. A simple email that contains a hyperlink to the disclosure document, which describes the required disclosure, and which contains clear instructions about the possibility of obtaining hard copies upon request, should suffice for the purpose of meeting the obligations to provide information.

We believe Proposal 2.8 is most easily adaptable to fund information and significant event notices. Section 3.1 below sets out our comments in response to Proposal 2.8 on Annual Reports. Section 3.2 contains our recommendations for extending the proposal to super fund information (s1017DA), and significant event notices (s1017B).

3.1 Annual Reports (s314)

We have already indicated our support for Proposal 2.8 to allow companies, registered schemes and disclosing entities to make CA s314 annual reports available on their websites and require hard copies to be sent only to members who request them. A couple of matters referred to in the Proposal 2.8, however, remains unclear and should be clarified as they have the potential to undermine stated policy intent.

3.1.1 Clarify or delete s314(4)

Firstly, it is unclear the reason for the retention of s314(4), which states “A company, registered scheme or disclosing entity may send a report referred to in subsection (1) to a member using electronic means if the member has nominated that means as one by which the member may be sent reports referred to in that subsection.” This sits in contrast with the Regulation Taskforce’s recommendation and its rationale for the recommendation to make electronic communication the default requirement. (p103 of the Regulation Taskforce Report)

IFSA Recommendation: *We believe s314(4) will cause confusion and could potentially undermine Proposal 2.8 and recommend that the subsection be either clarified or deleted. The law should clearly allow distribution of annual reports to be made:*

- a. in writing; or*
- b. electronically; or*
- c. by some other method that is subject to an agreement between holder and issuer; or*
- d. by some other method that is subject to an agreement between holder’s agent and the issuer.*

Our preferred solution is for the adoption of some of the wording in current regulation 7.9.75A in conjunction with an explanation to the regulations that “electronic” distribution should include, among other things, making annual reports available on the internet and require hard copies to be sent only to investors who request them.

3.1.2 Clarify the conditions to Proposal 2.8

Secondly, the conditions to Proposals 2.8 would only be achievable and beneficial to members provided they do not undermine the intention to make electronic distribution the default method for distributing the reports. We note that an entity, under these conditions, will have the obligation:

- to notify members in writing of their right to receive the hard copy of the annual report;
- to notify members in writing once a year, of when the annual report is available on their website and where it can be located; and
- to ensure that their report is ‘reasonably accessible’ on their website.

IFSA Recommendation: *To ensure the notification referred to above do not impose an unnecessary requirement to send hard copies of information, IFSA recommend the following:*

- *Allow companies, schemes and disclosing entities the flexibility to use*

existing e-mail addresses already collected from holders or potential customers to distribute the notifications without product holders necessarily agreeing to this; and

- *Facilitate the use of hyperlinks. This is a simple and effective way of telling members when the reports are available and where to locate them. Hyperlinks are no different to receiving an attachment from a member's perspective.*

To meet the conditions under Proposal 2.8, notifications in electronic form can mirror the requirements in regulation 7.9.75B subject to some minor amendments to clearly allow for hyperlinks and attachments (see also our recommendation below under section 3.2). Notifications can still be despatched physically where no current e-mail address has been provided.

3.2 Fund Information (s1017DA) and Significant Event Notices (s1017B)

3.2.1 Additional disclosure obligations for superannuation trustees (Section 1017DA)

Section 1017DA permits regulations to contain additional obligations for superannuation trustees to provide information.

Regulations 7.9.31 to 7.9.42 are made pursuant to section 1017DA. These regulations set out the disclosure requirements to provide superannuation fund information to product holders ("fund information"). They replaced the reporting obligations contained in the *Superannuation Industry (Supervision) Regulations 1994* (Cth) ("SIS") and are generally consistent with old SIS requirements. Examples of fund information include audited fund accounts and information about fund asset allocation.

3.2.2 Ongoing disclosure of material changes: significant event notices (s1017B)

The requirement for ongoing disclosure of material changes under s1017B affects funds that do not operate under the continuous disclosure regime. Issuers are required to notify product holders of any material change to a matter, or significant event that affects a matter since the issue of the PDS.

The reason for this requirement is to ensure existing holders that fall outside the continuous disclosure regime can receive timely information about any materially adverse changes affecting their investments, such as, though not limited, increases in fees or charges (see pp. 155-156 of the Explanatory Memo to the Financial Service Reform Bill 2001).

3.2.3 Electronic distribution of fund information and significant event notices

There is no compelling reason why fund information and significant event notices cannot be distributed via the published content of a website, similar to that proposed under Proposal 2.8 for Annual Reports. Like Annual Reports, fund information and significant event notices are by and large generally available. The information is not specific to a particular holder. There is no overarching dissimilarities in consumer protection terms affecting the distribution of either document, hard copies will still be available upon request and the conditions relating to notification as per Proposal 2.8 are appropriate subject to our comments above about electronic notifications.

IFSA recommendation: To extend Proposal 2.8 for Annual Reports to:

- i. s1017DA fund information relating to superannuation and
- ii. s1017B significant event notices.

Also, IFSA believes hard copies should be sent to those who have not provided a current e-mail address. Product issuers should also be allowed to notify electronically the availability of the regulated disclosure document for those holders with current e-mail addresses.

To facilitate the above, the law should be amended either by regulatory amendment or ASIC relief:

- to clarify the meaning of 'electronically' to include e-mails (with or with documents attached and/or hyperlinks to documents), and/or web publications (amend reg 7.9.75A and s1017B);
- to broaden the requirement relating to what can constitute a copy for future access to include an electronic copy that can be saved and/or printed (amend reg 7.9.75B(1)); and
- To amend subregulations 7.9.75B(2) to allow of e-mail notifications, with or without hyperlinks to web publications or attachments, when regulated disclosure documents become available electronically. Also, the two subregulations are currently unhelpful, a regulated disclosure document, often a separate document on a web publication or an attachment, should not have to form part of an e-mail notification.

SECTION 4: PERSONALISED DISCLOSURES TO EXISTING PRODUCT HOLDERS – S1017D PERIODIC STATEMENTS AND S1017F TRANSACTION CONFIRMATIONS

Personalised disclosures contain specific and personal information about a holder. They include periodic statements like annual and exit statements (s1017D) and transaction confirmations (s1017F). Section 4.1 of the submission addresses issues relating to periodic statements. Section 4.2 deals with transaction confirmations.

4.1 Periodic statements (s1017D)

IFSA believes that periodic statements are some of the most significant regulated disclosures to existing product holders because they contains important information about the holder's investments, such as:

- opening and closing balance;
- termination value of the investment;
- details of transactions in relation to the product during the reporting period;
- any increases in contributions;
- return on investments during the reporting period;
- details of any change in circumstances affecting the investment since the previous period; and
- amounts paid by the holder (expenses, fees and charges) of the financial product in respect of the financial product.

Periodic reporting requirements under s1017D affect financial products that have an investment component including managed investment products, superannuation products, RSA products, investment life products, deposit products and other products prescribed by the regulations. The maximum reporting period is 12 months unless the holder exits in under 12 months or ASIC otherwise permits. The purpose of periodic statements is to give holders information they need to understand their investment (see pp. 156-157 of the Explanatory Memo to the Financial Service Reform Bill 2001).

4.1.1 Electronic distribution of periodic statements

Due to the personal nature of these disclosures, they cannot be generally available on websites. Where electronic means are used to disseminate the information, product issuers must ensure secured access. This could be achieved in two ways:

- Provide pin number access to holders to the relevant page on a website. Currently, most IFSA members would obtain consent from product holders to set up pin number access.
- Send the information to specific holders and insert an e-mail attachment, say in PDF format, with the required information.

Market practice for giving these disclosures are varied. Many issuers are providing secured personalised access to ongoing disclosures. Some are giving the information as hard copies only. Also, despite the increased availability of secured personal electronic access, issuers continue to send hard copies of the relevant regulated disclosure documents to holders.

IFSA recommendation: *Product issuers should be allowed to:*

- (a) *set up secured access to holders and use existing e-mail addresses already collected from holders and customers to disseminate log in details without holders nominating or agreeing to this. Hard copies can be provided upon request or where no current e-mail address has been provided; or*
- (b) *where e-mail is used, allow the use of hyperlinks and/or attachments. As periodic statements are personal, investors would be taken to either a dialogue box or a webpage where log in details may be keyed in.*

Our drafting suggestion is to amend regulation 7.9.75B in the manner described in section 3.2 above. The only practical difference between personalised and non-personalised disclosures is secured online access for the latter. Nothing in the law currently prevents this.

4.2 Transaction Confirmation

The other personalised ongoing disclosure obligation to existing product holders is transaction confirmations under s1017F. As a general rule the issuer of a financial product will be required to confirm any transactions of a retail client in relation to that product. Confirmation must be effected as soon as reasonably practicable either by:

- confirmation by the product issuer (ie. in writing or electronically); or

- establishing of a facility enabling the client to confirm for themselves. The client must consent to the use of such a facility to satisfy the confirmation requirements. It is significant to note that consent may be expressed or implied (subsections 1017F(5) to (7) and regulation 7.9.63I)).

(see Explanatory Memorandum to the Financial Services Reform Bill 2001, p157)

The electronic delivery method of transaction confirmations is different to the other regulated disclosures because of an express provision for a “facility”. Consent to the use of a facility may be expressly given by the holder or implied where the holder has not advised that he or she does not agree to use the facility as a means of obtaining the confirmations (s1017F(5A)(b)).

Where no facility is provided, the product issuer is still obliged to send a transaction confirmation either in writing or electronically, which means confirmations can be sent by e-mails with or without attachments.

However, due to a lack of a conducive regulatory environment for using e-mail addresses collected from holders without express consent, there remains a significant barrier to more widespread use of e-mails. Moreover, there remains some lingering doubt as to the operation of reg 7.9.63I on confirmation of transaction in electronic form.

IFSA estimates over 100 million pages of paper or 530 ton of paper were sent out last year for super confirmations alone, resulting in over \$85 million in administration costs. The ideal solution would be to distribute confirmations by e-mail.

IFSA Recommendation: *To broaden the requirement relating to what can constitute a copy for future access to include an electronic copy that can be saved, archived or printed (amend reg 7.9.63I).*

Section 5 addresses and provide our views on the issue of express consent to use e-mail addresses already collected from product holders and investors.

SECTION 5: GOVERNMENT AND REGULATOR SUPPORTING THE USE OF E-MAIL ADDRESSES ALREADY COLLECTED FOR ELECTRONIC DISTRIBUTION WHERE EXPRESS CONSENT WAS NOT OBTAINED

IFSA recommendation: *Many product issuers have previously collected a huge number of e-mail addresses from existing holders and investors without necessarily obtaining direct consent to use these addresses for the purpose of distributing regulated disclosure documents.*

Regulated disclosures should be allowed to be distributed or made available using these addresses with or without specific consent or customer nomination. While this is not strictly prohibited under the current law, IFSA urge Regulators, Government and Treasury to actively endorse and promote, in conjunction with industry, electronic communication and e-commerce using previously collected e-mail addresses.

We believe our regulatory environment should be conducive to allow industry the full flexibility of using various IT solutions at its disposal to communicate and do business with its members and customers.

One of the aims of the Financial Services Reform Bill was to facilitate the use of technology-driven solutions to satisfy the legislative disclosure requirements. In this regard, the second reading speech states that:

The Bill will remove regulatory barriers to the introduction of technological innovations and assist Australia's financial services industry to meet the technological challenge posed by the spread of e-commerce.

Also, approaching shareholders is a time-consuming and costly task, and response rates are often low. This rationale was identified by the Regulation Taskforce when making Recommendation 5.20 and subsequently endorsed by the Government. The same rationale can be made for regulated disclosures that is the subject of this paper.

While it is encouraging that Government has acknowledged the widespread adoption of information technology and endorsed recommendations for default electronic distribution of Annual Reports, the matter of electronic distribution has continued to be met with caution by the regulator and with Treasury. This has not provided product issuers with the confidence that the law affecting electronic distribution of most regulated disclosure documents may be interpreted as supporting the view that it can be the default method of distribution, with hard copies to be provided upon request.

IFSA considers that Treasury, Government and the regulators are right to be cautious in embracing electronic distribution as being the default method of distribution given the technology is still relatively newer than physical addresses. We submit, however, that too much caution is preventing more efficient and effective ways of communicating and doing business with holders and customers. The use of information technology is now subject to new laws, such as those affecting privacy and spam. E-mails are not only a very efficient method of communicating with consumers, they are also very well regulated.

SECTION 6: POINT OF SALE DISCLOSURES

6.1 Product Disclosure Statements and Requests for additional information

It is our understanding that draft legislation due out shortly for consultation may contain some draft amendments affecting product disclosure statements. IFSA will provide more detailed submissions in relation to electronic distribution of point of sale disclosures like PDS's and related documents, such as Supplementary PDS's (Div 2 Part 7.9) and requests for additional information (s1017A), upon release of the draft legislation.

IFSA is also liaising with ASIC regarding the operation of s1012IA particularly for superannuation PDS's. ASIC has recently issued a Policy Statement entitled "Superannuation: Delivery of Product Disclosure for Investment Strategies" which has profound impact on the providers of superannuation wrap. Electronic delivery of product disclosures of the underlying strategies is considered as a possible solution for disclosures to new investors.

Given the separate reform process in relation to PDS and work in progress around s1012IA, we do not make detailed submissions here in respect of either matter. We do, however, propose that the electronic distribution of PDS's has the potential to

deliver to investors information they need in a significantly more timely manner, and could potentially ease the burden for product issuers of delivering hard copies personally to investors each time. To give effect to proper electronic distribution of PDS's, we propose the following matters should be considered more thoroughly:

- The law appears to emphasise the giving of PDS's and not on investors taking the initiative to obtain PDS's. While not strictly prohibited, the validity of online application forms accompanying online PDS's is ambiguous at best, even where the application forms are not printable. *We strongly recommend that consumers and/or their agents who take the initiative to download or read PDS's from websites should also be allowed to apply online. The definition of "eligible application" (s1016A(1)) is a barrier to this.*
- Where PDS disclosures may be incorporated by reference, to allow access to the disclosures online. This is an effective way of giving investors quick access to relevant disclosures.
- The requirements of s1015C on how a PDS is to be given requires either PDS's to be given personally or an address to be nominated. Requests for PDS's can come in many forms including via a call or service centre, financial planner and a service branch, by phone, fax or e-mail. It would be beneficial for investors and issuers if e-mail addresses already collected from customers can be used to distribute PDS's and related supplementaries without prior consent of recipient.
- The physical distribution of PDS's to employees in the case of corporate superannuation is logistically challenging. The ability to use e-mails and hyperlinks directing employees to relevant web page may allow employees to obtain the relevant information more readily. The use of hyperlinks, in particular, do not appear to satisfy the requirement that a statement has been given as hyperlinks in and of themselves do not constitute a PDS.
- Section 1012IA establishes an additional layer of complication for the delivery of disclosures of underlying strategies for trustees of superannuation funds. While ASIC has acknowledged these difficulties, the two options available under its recent PS 184 presents further difficulties. Greater flexibility for electronic distribution, particularly in the removal of the strict investor consent requirement of s1015C (described in the previous bullet point) could relief issuers from much of the burden imposed.

6.2 Investor Directed Portfolio Service Guides

One other point of sale disclosure relates to the obligations for IDPS operators. While IDPS's are not a financial products as such, we understand a separate process with ASIC on addressing IDPS issues is currently in progress.

It is worth noting, however, that ASIC's policy on giving IDPS related documents in electronic form, including the actual IDPS, the quarterly reports and the annual reports, is governed by the principle (PS 148.102) that the information should reasonably be expected to result in it being received by the person or agent. There is no comparable test in the Corporations Act for any of the regulated disclosure mentioned in this paper.

On hyperlinks, ASIC requires that the recipient must have agreed to receive the documents in that form.

We urge that the solution for electronic distribution relating to IDPS's should at least be consistent to that of other disclosure documents. We recommend also that ongoing disclosure requirements, such as quarterly reports and annual reports, arising from ASIC's IDPS policy and related class order should lend themselves to electronic distribution in methods contemplated for annual reports and proposed for other ongoing disclosure like those for periodic statements.

6.3 Financial Services Guides

We also urge a solution for electronic distribution of FSGs consistent with the methods already proposed in relation to the other disclosure documents.

The purpose of an FSG is to ensure that retail clients are provided with sufficient information that enables them to consider whether they should obtain a financial service prior to a decision. Being able to distribute an FSG electronically should deliver to investors more timely information they need about the services.

Under s941D, FSG's must be given to a person as soon as practicable after it becomes apparent to the providing entity that the financial service will be, or is likely to be, provided to the client, and must in any event be given to the client before the financial service is provided.

We also believe electronic distribution of the FSG as proposed may also assist product issuers to ensure they meet the potentially tight time frames that section 941D imposes.

SECTION 7: PERCEIVED DISADVANTAGES AND OTHER DRAWBACKS ASSOCIATED WITH ELECTRONIC DISTRIBUTION OF FINANCIAL PRODUCT DISCLOSURES AND HOW THEY MAY BE OVERCOME

Perceived disadvantages of electronic distribution should be viewed as relative to paper based ones. There are in fact many similarities between sending information by e-mail and by other electronic means vs. delivery to a physical address:

- Both physical and e-mail addresses go out of date from time to time.
- Both have incorporated mechanisms to inform the sender that the address may be out of date. eg. delivery failures via e-mails vs returns to senders by post.
- Both often rely on third parties to ensure the message reaches its destination.
- Information sent via e-mails or via the postman can both be stored, misplaced, sent to the wrong address or remain unread.
- Both are subject to unscrupulous operators.

We believe that despite perceived disadvantages, electronic communication is no different to physical mail, it can in fact be better managed than physical mail and is a more effective way of communicating with product holders and potential customers.

The following explores some of the myths associated with the perceived greater advantages of physical delivery, compared with the perceived disadvantages of using e-mails and how they may be managed or overcome:

7.1 E-mail addresses go out of date more quickly than physical addresses

We submit that it is not necessarily always the case that e-mail addresses go out of date faster than physical addresses. People can move homes more often than they change e-mail addresses. There are currently 5.7 million lost superannuation accounts worth \$9.7 billion according to Peter Dutton Assistant Treasurer's office. We believe this represents a significant, but often overlooked, failure of our paper based system of delivery.

Nonetheless, to address the problem of out of date e-mail addresses, most e-mail facilities have a feature that enable delivery failures to be notified. Senders can then make further attempts before taking steps to update details. Physical addresses can still be used as a fall back.

This compares with physical addresses, where there can be no guarantee that returns to senders will be made.

7.2 Not everyone has an e-mail address

One disadvantage of e-mail addresses is that the method of delivery is new and not everyone has one. Physical addresses have been around a long time and most people have somewhere to live. Our recommendations in this submission is not for the removal of the requirement to send information via physical addresses altogether. We support that measures should be put in place to ensure investors, members and/or holders of financial products should either:

- be notified by e-mail or conventional mail that the information is available (by hyperlink where possible) or
- have the required disclosures be forwarded as hard copy where no e-mail address exists such as for periodic statements and transaction confirmations; or
- to give the option to product holders to request for a hard copy, such as for s314 annual reports and super fund s1017DA information like audited annual accounts.

7.3 Harder to store information contained via hyperlinks or e-mail attachments

One of the barriers frequently cited against the use of hyperlinks appears to be that information contained therein is more difficult to store. This is not true. Most reports and disclosures that are delivered via internet websites can be stored and/or printed as hard copy. It is unclear if product holders are storing or saving the necessary information, but this is a matter for investor education.

In any event, where storing information is considered prudent and necessary, the law often prescribes 7 years as being the prescribed time under which an important document should be stored.

7.4 E-mails are more susceptible to fraud and unscrupulous operators

ASIC has recently taken action on David Tweed who have been making unsolicited offers to certain shareholders to buy their shares for almost half their market value. According to ASIC, unscrupulous operators making these types of offers often target older Australians, who may be more at risk of falling victim to this kind of scam.

Older Australians are less likely to receive information electronically, highlighting the fact that paper based distribution of information are just as susceptible to scams and mischief as electronic distribution.

As mentioned above, given the laws applying to privacy and spam, we believe that electronic distribution is well regulated in financial services, and effective measures can be put in place to minimise the damage of unscrupulous operators.

SECTION 8: BENEFITS OF ELECTRONIC DISTRIBUTION

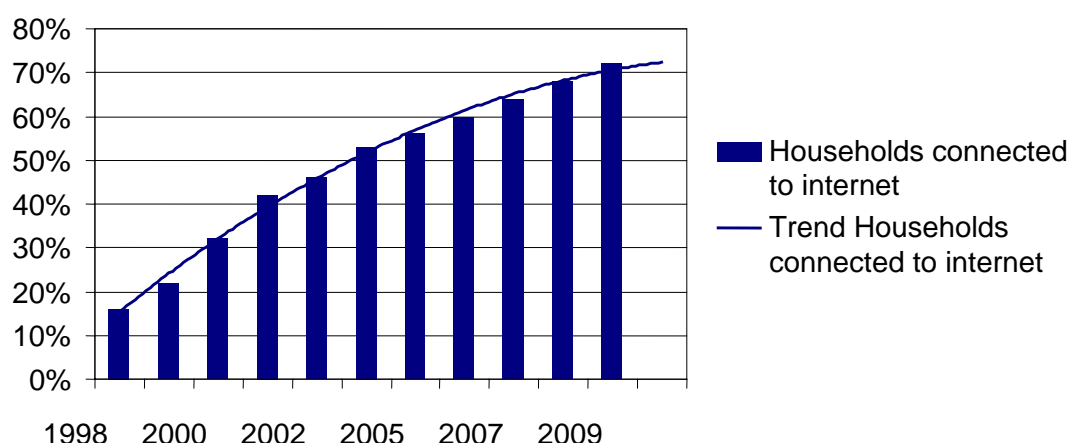
In addition to the benefits of electronic distribution over physical distribution inferred above, the following are other potential benefits for consumers and the financial services industry if the use of electronic distribution can be increased.

- 8.1 Growth of internet access in households
- 8.2 More timely information
- 8.3 Education and increase financial literacy
- 8.4 Cost reduction
- 8.5 Reduced burden on the environment

8.1 Growth rate and expected growth of internet availability in Households

Accordingly to the ABS, the majority of households in Australia have access to the internet and this will increase to 60% by 2007. With currently over 55% of households⁹ and 70 percent Australian businesses¹⁰ having internet access, the enforcement of a paper-based system of communication is no longer the most technologically effective means of delivering timely information to members and investors. See chart below:

Growth and Estimated Growth of Internet Access in Households



Source: ABS – Household use of information technology 2004/2005 (Estimates developed using straight line analysis of actual growth rates of internet availability).

⁹ Source: ABS Household Use of Information Technology (2004-05), released 15 December 2005

¹⁰ Source: Business Use of Information Technology, 2002-03 (8129.0).

8.2 More timely information

Currently, over 27 million¹¹ superannuation and non-superannuation statements are sent out annually in hard copy format to investors. The cycle for these statements to be created and distributed can take up to three months - for large Financial Service Providers (FSP) it can take up to 6 weeks just for the documents to be printed (as the whole industry, not just funds management, requires printing services at this time of year e.g. listed companies' annual report, distribution statements). Once the documents are printed, mail distribution houses package the documents and Australia Post delivers them. This may take another week or more assuming the address of the investor is correct.

If these documents were sent out electronically, investors could receive their annual statement up to 5 weeks earlier than is currently the status quo.

8.3 Educational / increased financial literacy

More interactive and effective communication with investors will result in increased client familiarity and understanding of superannuation and the financial system in general, as people will feel more fully informed.

The aim of the Australian Government's Financial Literacy Foundation (put in place when Superannuation Choice was introduced) is to increase the financial literacy of the community. Thus it would be a win win for both the Government's initiative and investors' education if electronic communication was facilitated.

The following statistics support the fact that as the availability of technology increases investors take more notice of their financial situation. However, Australians still have some way to go in comparison with the US.

- Investors who use their online access to their financial institutions websites do so on average 4.2 times per month.
- In the US this figure rises to 6.2 times per month according to IPSOS – Insight statistics November 2004.

8.4 Cost reduction

The electronic distribution of reports and notifications required under the legislation has the potential to save industry participants millions of dollars annually in administrative costs. This cost reduction will provide an avenue for market forces to potentially enable lower fees to customers, which is an opportunity that does not currently exist.

IFSA estimates that the economic benefits resulting from the removal of existing legal barriers is between \$130 million (conservative estimate) to \$435 million (optimistic estimate¹²). On an on-going individual superannuation account basis the potential saving would be approximately \$14 per account. This saving is not expected in year one and is more likely to be achieved over a 3 to 5 year period.

¹¹ Source: APRA June 2004 annual superannuation bulletin statistics

¹² Figures based on IFSA's Costings model, can be provided upon request.

The potential cost saving for the superannuation industry “only” on an annual basis, assuming only 60 percent of investors select to take up this method of communication, is \$260 million.

Hard copy annual superannuation account statements alone cost over \$100 million to produce annually. Postage costs for sending these documents to the 27 million superannuation investors cost over \$20 million.

The provision of documents to investors electronically will help reduce superannuation and non-superannuation providers’ administration costs. Although there is no obligation for industry providers to pass on all or part of the savings to their customers, market competition is intensifying, with superannuation choice of fund being one area which is encouraging competition (as has already been seen with some of IFSA’s member companies reducing their fees by up to 32 percent).

8.5 Reduced burden on the environment

Assuming 24 pages of paper are sent to 9 million investors per year. This amounts to 216 million pages or 1199 tons of paper per year or 2664 trees¹³. If more readily accessible means of electronic communication were available, this environmentally unfriendly practice would not need to occur each and every year.

¹³ <http://www.sims.berkeley.edu/research/projects/how-much-info-2003/print.htm>

Chapter 5: Fundraising

Proposal 5.6

Stapled securities disclosure	
Proposal 5.6	Extend the application of the provisions regarding replacement prospectuses to combined prospectus/PDSs prepared for offers of stapled securities comprising one or more shares and one or more units in managed investment schemes.

IFSA response

IFSA supports this proposal to provide greater symmetry between the prospectus and PDS regimes as they apply to stapled securities.

IFSA also welcomes the confirmation that a regulation will allow for incorporation of information by reference into a PDS. This also has the potential to streamline disclosure in this area by allowing material to be incorporated by reference between both documents such that each is able to be targeted most effectively.

Chapter 7: Compliance

Proposal 7.1

Breach reporting period	
Proposal 7.1	Amend the breach reporting requirements in the <i>Corporations Act 2001</i> and in the prudential Acts to require that breaches must be reported to the regulators as soon as practicable, and in any event within 10 business days after the breach is first notified to a person responsible for compliance. However, it is not proposed to amend the timeframe where entities are currently required to report a breach immediately.

IFSA response

IFSA welcomes the theme behind proposal 7.1 and notes that under the separate Minister for Revenue and Assistant Treasurer's Proposal's Paper it is proposed to streamline reporting of common breaches to APRA (1.4) and align the 'materiality' aspect of breaches generally (1.1).

IFSA submits that the 'significance' test under Chapter 7 of the *Corporations Act 2001* should also carry over to the prudential legislation and the same terminology should be used in both, i.e. the test should be 'significant' breaches in both.

Accordingly, proposal 7.1 should be clear that 'significant' breaches must be reported as soon as practicable, and in any event within 10 business days after the 'significant' breach is first notified to a person responsible for compliance.

Additionally, IFSA proposes that the concept of "likely breach" be removed from the law. In practice, industry diligently endeavours to determine whether a breach has occurred and report it once it has identified that it is significant. There is an ongoing risk that at a point in this process a breach may appear likely when in fact, after due investigation and enquiry, it may be immaterial or not constitute a breach.

As a result, IFSA believes that the "likelihood" aspect of the trigger is unnecessary and inappropriate.

Proposal 7.2

Australian Business Number reference	
Proposal 7.2	Remove the requirement of a financial services licensee to cite the AFSL number in disclosure documents and other relevant documents (in Corporations Regulation 7.6.01C) and require the licensee to cite their ABN. The licensee will also be required to state that they are an AFSL licensee.

IFSA response

The ABN does not always align with an incorporated body's ACN which must be included in a company's public documents (section 153 of the *Corporations Act*

2001). Therefore, the ABN may not be the most appropriate disclosure mechanism for a licensee.

IFSA believes that if the proposal is implemented, it should be amended to indicate that an AFSL holder cites their ABN and that for a corporate licensee they cite their ABN if the last nine numbers are from their ACN, failing which they cite the ACN.

IFSA recommends that this proposal should be an alternative to the current requirements. In practice, a licensee should be able to continue to cite their AFSL number if they elect to do so.

[EXTRACT FROM CORRESPONDENCE PREVIOUSLY PROVIDED TO THE
INVESTOR PROTECTION UNIT, TREASURY]

1. IFSA proposal to amend the definitions of personal and general advice

1.1 Definition of Personal Advice

The current definition of personal advice is broad. Any statement that has the potential to influence a person in relation to a financial product has the potential to become personal advice the moment the statement is made in consideration of any one of the person's objectives, financial situation or needs.

The onerous disclosure obligations attached to personal advice means that a wide range of possible interactions between product issuers and advisers, and their clients are uneconomical. Product issuers are deterred from providing people with educational tools like web calculators or basic information at call centres. Limited advice in the form of web calculators and simple guidance provided at call centres, for example, have been regulated to the brink of extinction while client's seeking advice on a limited range of products or limited personal circumstances struggle to find a provider given the regulatory uncertainty. Our advice regime has failed, in this regard, to empower many consumers to seek knowledge and guidance about their own financial situation.

For the reasons above, we propose the definition of "personal advice" should be substantially narrowed. We suggest the definition below and in 1.2 of this paper to replace the current definitions contained in Section 766B ("Financial Product Advice") for "personal advice" and "general advice":

We propose that the definition of "personal advice" should be as follows:

Section 766B(3) – For the purposes of this Chapter, a person (provider) gives personal advice if:

- (a) the provider makes a statement that is a recommendation to a particular person that the person should deal in, or make a decision to increase, reduce or hold an interest in a particular financial product; and*
- (b) a reasonable person under the circumstances would believe that the provider has made such a recommendation.*

For the avoidance of doubt, a recommendation is not personal advice if it is not a statement to which s766B(3) applies and the following requirements are met:

- (i) the provider clearly and prominently states that the person should make their own decision whether the product is suitable for the person; and*
- (ii) the statement in subparagraph (i) is made:*
 - (A) during the same meeting or telephone call; or*
 - (B) in the same document; or*
 - (C) on the same page of an Internet site; or*
 - (D) otherwise, at the same time,*

as the recommendation.

As a result, personal advice will no longer be triggered merely because a provider of advice has considered one or more of a person's objectives, financial situation and needs.

1.2 Definition of general advice

The narrowing of the "personal advice" definition will lead to a broadening of the definition of "general advice".

We propose that the definition of "general advice" should be as follows:

766B(4) For the purposes of this Chapter, general advice is financial product advice that is not personal advice because it is not a recommendation to a particular person that the person should deal in, or increase, reduce or hold an interest in a particular financial product

1.3 Regulatory impact of the IFSA proposed definition of personal and general advice

We believe the regulatory impact of the above definitions have the following advantages:

- i. The onus to ensure a statement falls either as personal or as general advice remains with the provider of advice.
- ii. The definition of personal advice becomes much narrower and enables the giver of advice more scope to make statements that are unambiguously general advice, while ensuring safeguards are in place such that statements made may be clear as to their limitations.
- iii. We believe that our new definition have been drafted to deter certain conduct and behaviours such as misselling or pressure selling. This is because where personal advice is not intended, it would be prudent for the provider of advice to avoid creating an impression (to a person that is reasonable) that personal advice has been provided, and to inform clients that they should make their own decisions in addition to any general advice warnings that may be appropriate. Any recommendation to deal in a particular financial product stands to be personal advice and will be subject to the more onerous disclosure obligations of SoA regime.
- iv. We believe consumers will ultimately benefit from the new definition as a result of improved ability to take responsibility for their financial future. This is because of the enhanced ability to gather information and to obtain advice that is clear from more freely available sources. Freer flow of information between advisers and product issuers to consumers will also enhance competition, create more savvy investors and assist comparability between product issuers, while also giving clear disclosure of the limitations of advice that is provided.
- v. It is also easy to enforce. Anyone can call a customer service centre or access a web calculator.

Section 2 below provides examples and case studies of how our definition can work in practice, including with web calculators, in customer service centres, and asset allocation advice.

2. Current advice regime vs our new approach – examples and case studies

The following examples or case studies provide an illustration of the effect the current advice regime and the outcomes of our proposed new approach with the narrower personal advice definition:

2.1 Calculators and profilers

We define calculators and profilers to mean a facility that is made available to a person electronically (say on a website) or physically (eg. a brochure or CD Rom) that provide advice by processing or making calculations of input sought from a user that may include an amount, a figure or from a selection of choices.

Calculators and profilers are simple and easy to understand tools that enable investors to find out more about their financial situation and the products that are likely to meet their needs. They can be easily accessible on issuers' websites and they are educational and useful for investors to easily find out about different products from different issuers. Calculators are great for illustrating to consumers the issues they ought to consider when making a decision about investing or purchasing insurance and have rarely been the subject of complaints.

Effect of current advice regime:

Currently, it is possible to come to a view that any generic financial calculators that make numerical calculations relating to financial products, even where no advertising or promotion is evident, are providing personal advice, and must be subject to onerous Statement of Advice (SoA) requirements. ASIC has granted relief so that calculator providers do not need to issue a SoA to users. Relief is subject to some quite prescriptive conditions.

ASIC is rightfully apprehensive about giving broad SoA relief to providers of calculators since the SoA regime is designed to provide the necessary protection to investors when making investment decisions. Any relief that seeks to retain regulatory neutrality to support this fundamental policy position will understandably lead to conditions that are at least comparable to those of the SoA regime. Seen from this perspective, ASIC's relief may be regarded as a substantial easing of stated policy. The only problem is, if the full SoA obligations were to be imposed on providers of calculators and profilers, no one will be providing these facilities. Seen from this other perspective, ASIC's relief provides only mild incentives to facilitate only very generic calculators.

Our new approach:

The policy governing the current advice regime while well intentioned, does not promote good disclosure or achieve good consumer outcomes. It does not, for example, take the context, warnings and disclaimers relating to the advice into account when making the distinction between personal and general advice, and therefore whether disclosure should be more or less onerous.

IFSA believes a reasonable person using a web calculator to get an idea about a financial product for his or her financial situation is unlikely to form the conclusion that personal advice is provided because he or she is not paying for the privilege to use the calculators, would not expect a SoA to be provided, and did not ask for a SoA to be provided. On the contrary IFSA contends that the average consumer would view calculators as nothing more or less than a self help tool provided for the convenience of consumers to assist and educate them in making their own decisions about their financial circumstances and not as providing 'personal advice'.

Our proposed definition of general and personal advice would oblige a calculator or profiler provider to clarify that a calculator's or a profiler's outputs are not recommendations and should not be used to make decisions about a financial product or class of financial products.

2.2 Customer service centres

Customer service or call centres are important medium by which product issuers communicate directly with retail customers. They can also be important places where investors find out more about various financial products.

Current advice regime:

The current advice regime effectively restricts any advice which takes even one of the customer's personal objectives, financial situation and needs into consideration. There is very little scope for providing limited advice or any sort of guidance or suggestions to consumers. For example, the current regime would restrict the ability of licensed operators from the following:

- A person rings up, a customer service operator finds out that the person is nearing retirement by referring to a database or asking a few questions. The operator would be prevented from making general statements over the phone about the various pension and annuity products that may be suitable, even when queried.
- A lender who would know that the client has huge loan repayment obligations and a family to support is prevented from saying that income protection insurance may be a good idea for many people in similar situations.
- Call centre operator receives a phone call from a client who says she cannot afford her life insurance cover and would like to exit. The operator is currently prevented from suggesting a cheaper product or from mentioning the potential benefits that will be lost.

IFSA submits that product manufacturers should be able to give limited advice in the form of guidance and suggestions via their customer service or call centres based on a limited understanding of the client's circumstances without triggering all the expense and complexity of FSG's and SoA's.

Our new approach:

Our proposed new approach will make it possible to limit advice to persuasive statements without making them personal advice as long as the statements adhere to providing guidance, making suggestions, while avoiding recommendations.

Moreover, given the context of a query at a customer service centre, we believe it would be unlikely that a reasonable person will believe that personal advice is given. The new definition would oblige product manufacturers to ensure, additionally, that their customer service operators either make no recommendations to transact a financial product, or state or imply that a financial product is either suitable or not suitable for the person.

Using the examples above, the customer service operator could potentially:

- Refer to particular pension and annuity products and mention some of their benefits, but care will have to be taken to ensure that the person making the inquiry is aware that the service operator is not qualified to make a recommendation.
- The lender could suggest to the customer the benefits of income protection and/or life insurance particularly where there are dependents to support and that this is something that may need some consideration.
- If the client has already made the decision to exit the life policy the call centre operator will have to act on the instruction since any action to prevent the client from exiting is likely to constitute a recommendation to hold. The operator will not, however, be prevented from suggesting a cheaper product and discussing the benefits that may be lost from a lack of life cover. If the client has not made a decision to exit the life policy the operator may still suggest a lower cost cover and discuss benefits of the current policy and lower cost policy.

In all the cases above, the provider of advice will have to state clearly that the client or potential client will have to make their own decision about the financial products discussed.

2.3 Asset allocation advice

Asset allocation advice is not advice about dealing in, increasing or reducing an interest in a financial product. It is, however, advice about the different choices that a person could make when considering different investment options or strategies. For example, a cash fund, a balanced fund and a growth fund are different classes of asset allocation that could all be available under an employer sponsored super fund, a master trust or a super trust product. Asset allocation advice is commonly given to a customer in a corporate super environment where the money to invest is already available and no product advice relating to increase, hold or reduce is given, but that advice is nonetheless given in relation to the underlying options or investment strategy.

Current advice regime

All asset allocation advice is probably personal advice under the current advice regime. It would be financial product advice because it can influence a person in making a decision in relation to an interest in a particular product and personal advice because the advice will invariably involve considering at least one of the person's objectives, financial situation and needs. Accordingly, giving asset allocation advice will probably attract SoA obligations.

Our new approach

We submit that asset allocation advice should not be personal advice so long as the advice does not involve a recommendation to deal, increase, decrease or hold an interest in a financial product. The current personal advice definition is a blunt instrument, particularly in relation to members of Superannuation Guarantee Charge funds where the only contribution is the compulsory 9% by the employer, and appears to deter asset allocation advice even where:

- the person accepting the advice would not normally be paying the adviser anything for the advice; and
- the adviser has made it clear that the asset allocation advice does not represent advice to deal, increase, decrease or hold an interest in a financial product.

Our new approach would treat asset allocation advice as general advice so long as certain precautions are taken to ensure the person receiving the advice is aware that the advice may only be guidance, or not intended to influence the person to make a decision to buy, sell or hold the financial product and that a full financial plan may still be available if this is needed.

3. Scaleable Advice or limited (scope of) advice under Division 3 of Part 7.7 (reasonable basis obligation)

We have so far limited our submission to the boundaries between personal and general advice as per item 1.17. We would like to raise a related theme of scaleable advice where advice is unambiguously personal advice. We believe an adviser and their client must be allowed to determine the extent and coverage of personal advice. Advisers should be allowed to limit personal advice to products that the adviser is allowed to advise on, such as those on an approved list, or to the client's specific personal circumstances.

3.1 Reasonable basis obligation

We recommend that Division 3 of Part 7.7 of the Corporations Act should be amended to allow limited personal advice or scaleable advice where personal advice is given. Scaleable or limited personal advice is personal advice limited to particular financial products or personal circumstances of the client.

The amendments will not affect other obligations relating to the personal advice regime. The provider will still be required to have a reasonable basis for the advice and have regard to a person's relevant personal circumstances and that the personal advice should be appropriate to the client (Section 945A).

Any amendments should require the adviser to set out clearly defined parameters or limitations such as what the advice is not designed to achieve. The issue of scaleable advice appears to have been contemplated in Part 2 ASIC's Guide on Super Switching, which allows advice limited to a 'to fund' only.

3.2 Switching advice

The absence of financial products on a licensee's approved product list often means that advisers cannot give advice on many 'from' funds in cases where a client may be contemplating a switch from one product to another. People could have many

reasons to consider switching. Consolidating super funds is a common one and changing funds as circumstances change is another.

There are also many reasons why products may be excluded from a product list. For example:

- licensees will not give advice on products they are not qualified to advise on
- licensees do not wish to accept the liability of the large number of products
- literally thousands of products are very old to which information may be scarce
- circumstances simply do not warrant the consideration or research of all the products
- licensees are required to have adequate compensation arrangements (Section 912B). Many secure this with Professional Indemnity Insurance (PII) however many PII underwriters will only provide cover where advice and dealing is restricted to the licensees Approved Product List (APL).

Recent enforcement action by ASIC appears to be undermining adviser's ability to limit the extent of personal advice that can be provided. For example,

- ASIC is prohibiting advisers from giving advice altogether in the case of a potential switch where the 'from' fund are not contained in an approved list of products.
- ASIC's actions are also mandating the inclusion of particular financial products in to approved product lists against the wishes of many licensees. We feel strongly that licensees should be able to determine a list of products that they are comfortable and qualified to advise on.

That such views can be pursued demonstrates that the law contains significant ambiguity which must be addressed.

IFSA feels strongly that advisers cannot be obliged to give advice on financial products where they are not trained or qualified to give advice. Moreover, the 'from fund' trustee already has an obligation to provide the relevant 'from fund' information upon request under regulation 6.34 of the SIS Act. For these reasons, we urge that Treasury consider a new proposal to amend Division 3 of Part 7.7 of the Corporations Act to enshrine the scalability of personal advice in our legislation.

We have not provided possible drafting solutions but would be happy to consider one or facilitate any further discussion.