22 January 2015

Ms Ashly Hope
Strategic Policy Advisor
Australian Securities and Investments Commission

By email only: ashly.hope@asic.gov.au

Copy via email only: chloe.youl@asic.gov.au

Dear Ms Hope

FSC submission to ASIC regarding electronic financial services disclosure (CP224)

The Financial Services Council (**FSC**) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, licensed trustee companies and public trustees. The FSC has over 125 members who are responsible for investing around $2.3 trillion on behalf of more than 11 million Australians.

Thank you for the opportunity to provide a submission in relation to the Australian Securities and Investments Commission's (**ASIC**) Consultation Paper 224: Facilitating electronic financial services disclosure (**Consultation Paper**) and the associated draft updated Regulatory Guide 221 (**Draft Regulatory Guide**), both of which were released in November 2014.

This submission reflects comments received from our members aimed at bringing the financial services disclosure regime into the modern, digital era. The FSC stands ready to assist ASIC in whichever way possible to better facilitate electronic financial services disclosure.

The structure of this submission is: summary; general comments; key Financial System Inquiry (**FSI**) recommendations; specific proposals & key issues; and next steps. An Appendix is attached to this submission which provides responses to specific questions posed in the Consultation Paper. The Appendix forms part of the submission and therefore should be considered by ASIC along with the remainder of this document.

Given ASIC's consultation occurred over the holiday period, the FSC recognises that its response was developed in a comparatively short timeframe. Consequently, the FSC welcomes further dialogue on this important subject as ASIC develops its approach to electronic financial services disclosure.

Summary

The FSC strongly supports ASIC's efforts to develop a more facilitative approach to electronic financial services disclosure. Consistent with the FSI's recommendations, we would welcome a shift in stance and legislative amendments to ensure that the Government's regulatory approach is

Financial Services Council Ltd
82 080 744 163
Level 24, 44 Market St
Sydney NSW 2000
+61 2 9299 3022
+61 2 9299 3198
info@fsc.org.au
fsc.org.au

technology neutral, supports industry innovation, and meets consumers' needs & expectations. Key outcomes from ASIC's consultation process should be:

- Promote technological neutrality in the delivery of financial services and products (via an updated Regulatory Guide and relevant class order relief);
- Enable electronic disclosure to be the default mode of delivery including through a push notification and a pull through of the disclosure by the consumer, with consumers able to elect to receive paper-based disclosure (via an updated Regulatory Guide and relevant class order relief);
- Ensure regulation of online disclosure is consistent across all the types of regulatory documents (via an updated Regulatory Guide and relevant class order relief);
- Allow existing financial products and services to be transitioned to the new disclosure regime (i.e ensure that the proposed shift in approach is not limited to new products or new customers);
- Where the above outcomes are not possible without legislative amendment, ASIC should refer the issues onto Treasury for its consideration and action; and
- To ensure transparency and a consultative approach, the draft Class Orders implementing any changes should be subject to public consultation with industry and other stakeholders.

This submission also highlights certain areas where further consideration is necessary by either ASIC or Treasury.

Regarding the specific proposals put forward by ASIC in the Consultation Paper:

- Proposal A1: Subject to our comments below, the FSC supports the proposal;
- Proposal B1: Subject to our comments below, the FSC supports the proposal;
- Proposal B2: Subject to our comments below, the FSC supports the proposal;
- Proposal C1: Subject to our comments below, the FSC supports the proposal; and
- Proposal D1: Subject to our comments in the Appendix, the FSC supports the proposal.

General comments

1. The FSC warmly welcomes ASIC's release of the Consultation Paper and Draft Regulatory Guide, both of which are aimed at better facilitating the provision of electronic financial services disclosure. This consultation process offers an ideal opportunity for Government and industry to work together to enhance the current regime. The FSC looks forward to an updated Regulatory Guide and class order being released in March 2015 (as foreshadowed by ASIC in the Consultation Paper).

2. As ASIC is aware, the FSC has long advocated for a more flexible approach by ASIC to electronic disclosure, including most recently during targeted industry consultations (see FSC submission dated 26 September 2014). We appreciate that the Consultation Paper and

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Draft Regulatory Guide address a number of our concerns. This submission reiterates certain points which we have previously made as well as highlighting further issues for Government (ASIC and Treasury) consideration.

3. The FSC remains committed to preserving consumer choice, and ensuring that adequate safeguards are in place to protect them. We are confident that this objective can be achieved whilst simultaneously liberalising the current disclosure regime. A move to allow financial services providers (**FSPs**) to deliver disclosures electronically as a default if they choose to do so will have significant benefits for both consumers and providers, including promoting innovation, reducing costs, and enhancing customers' experience. It will also be environmentally-friendly, preventing documents from being printed multiple times, if at all (noting that electronic documents are more readily accessible and searchable than paper versions).

4. We expect to see significant benefits as a result of ASIC's proposals. Depending on how they are adopted by FSPs and implemented by ASIC, we anticipate positive outcomes such as increased customer engagement, a reduction in 'lost' customers (especially for superannuation members) and the ability to learn from their interaction with disclosure which will enable insight into areas for improvement. We also anticipate savings from a reduction in printing costs (although this may be partially offset in the short-term by additional development costs associated with more innovative use of technology).

5. In particular, the FSC anticipates a number of key benefits will flow from ASIC's proposed shift in approach to electronic disclosures, including:
   - *Cost savings*: the financial costs and environmental costs of producing paper based documents are both significant and can be expected to grow. This coupled with the anticipated increase in costs of postal deliveries means that continuing to produce large volumes of paper based documents will become more expensive. This is a cost which is often indirectly borne by clients. While exact cost savings are difficult to estimate, several FSC members have estimated that their cost savings would be approximately $1.7m each annually if electronic disclosure was the default.
   - *Greater client awareness*: There is an opportunity to encourage "consumers to be more engaged and to make more informed decisions about their finances" (per page 193 of the FSI Final Report). The FSC anticipates that the interactive nature of the proposed solutions and the ability for the client to be shown and select the areas of disclosure documents that are of interest and relevant to that person will empower and facilitate better decisions than is currently the case. The FSC is aware from third party research that many consumers do not read disclosure documents and can be regarded as "disengaged". If, as the FSC believes is likely, the percentage of clients that read and understand the salient points of, for

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example, PDSs, can be increased, and the level of client engagement enhanced, then this will benefit both the client and FSPs.

- *Increased awareness of rights:* The FSC believes that a benefit of electronic communication is that printed material which, for example, warns of a 14 day cooling off period, could be delivered electronically, allowing clients additional time to consider their options and make sound financial decisions.

6. If technology neutral regulation is not adopted across the board, the FSC fears certain customer demographics that are technology-aware will be disadvantaged both in the short term and in the long term. This is the corollary of the argument outlined in the Financial System Inquiry Final Report (see pages 269-270) that electronic service delivery may result in older Australians being excluded. In particular, younger customers who as a demographic have demonstrated a high take-up rate for electronic communications, may disregard financial services that cannot be fully delivered electronically. In turn, this would negatively impact their savings and investment rates.

7. The FSC acknowledges that ASIC operates within the constraints of the law, particularly the *Corporations Act 2001* (**Corporations Act**), and that some of the matters raised in our submission are best addressed through legislative reform. Where this is the case, ASIC should raise the matter with Treasury for its action.

8. This notwithstanding, the FSC encourages ASIC to revisit its interpretation of the existing law (as it has sought to do in the Consultation Paper and Draft Regulatory Guide) so as to better facilitate the provision of financial services while ensuring that consumers are appropriately protected and informed.

9. As noted previously, FSPs are implementing new ways to build and enhance relationships with their customers in a digital environment characterised by rapid technological innovation. Much of the change has been driven by consumer demand for instant access to their financial services. Improvements in technology have facilitated better consumer engagement, including providing consumers with the ability to access their financial information in a timely, tailored and user-friendly manner.

10. The current antiquated regime is costly to product manufacturers (and ultimately consumers) and does not, in our view, provide superior consumer understanding or engagement compared to what is possible with various modes of electronic disclosure. This is particularly the case given an increasing proportion of consumers prefer and seek electronic communication as a means of accessing and understanding financial services and products. It is burdensome (and in some cases a deterrent) for consumers to be required to undergo additional administration (e.g requesting a paper copy of a disclosure document) before being provided with access to the relevant disclosures, with very little net benefit. As the Consultation Paper acknowledges, Australia is well past the 'tipping

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Financial Services Council Ltd ABN 82 080 744 163
Level 24, 44 Market St Sydney NSW 2000
+61 2 9299 3022 +61 2 9299 3198
info@fsc.org.au fsc.org.au

point' where electronic disclosure is appropriate for most disclosures (para 14, Consultation Paper).

11. The FSC notes ASIC's media release of 28 November 2014 in which it announced a pilot digital disclosure project whereby ASIC would develop and user-test a short, online 'key facts' sheet and a self-assessment tool, in conjunction with two FSPs. The results of this project will usefully feed into ASIC's ongoing consultation with industry regarding electronic financial services disclosure. The FSC will consider the preliminary results of the project once released by ASIC (expected in mid 2015), and welcomes the opportunity to participate in any future projects.

12. This submission does not purport to highlight every challenge posed by the current regulatory regime. Instead it highlights some of the key themes and issues, and proposes ways to address them, where possible. The FSC respectfully requests that ASIC consider the material outlined in this submission in keeping with the Government's commitment to minimal, efficient and necessary regulation, and the recent recommendations of the Financial System Inquiry (see below). The FSC notes that the Government itself is increasingly using electronic means, often through ASIC, to disclose information about financial services, for example, the forthcoming register of financial advisers will be available through an ASIC webpage.

13. It is critical that any ASIC guidance should be drafted in such a way that it does not limit providers to specific electronic disclosure mediums and is "future proofed" (i.e contains sufficient flexibility to adapt to new and unanticipated technologies).

14. We also acknowledge ASIC's parallel consultation with stakeholders as part of its red-tape reduction/deregulatory initiatives (ASIC Report 391), and warmly welcome this engagement (see FSC Submission dated 23 June 2014). We look forward to an update/report from ASIC on the outcomes of its consideration of submissions to ASIC Report 391 in due course.

Financial System Inquiry: key recommendations

15. Recognising the rapid pace of change, the final report of the FSI encouraged the Government to embrace innovation and adopt technology neutral regulation. In particular, the FSC strongly supports the following two key FSI recommendations:

- Remove regulatory impediments to innovative product disclosure and communication with consumers, and improve the way risk and fees are communicated to consumers: Recommendation 23; and
- Identify, in consultation with the financial sector, and amend priority areas of regulation to be technology neutral. Embed consideration of the principle of

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technology neutrality into development processes for future regulation. Ensure regulation allows individuals to select alternative methods to assess services to maintain fair treatment for all consumer segments: Recommendation 39.

16. As noted previously, the FSC has consistently advocated for technology neutral regulation and better Government facilitation of innovative disclosure. We encourage the Government to adopt the two FSI recommendations above. The FSC agrees that 'innovative disclosure can improve consumer engagement and understanding, and that industry should pursue innovative disclosure and alternative forms of communication' (FSI final report, page 215). ASIC's current consultation process can help support this shift in approach.

17. The FSC believes that electronic financial services disclosure is a critical area where government regulation and policy has not operated in a technology neutral manner. We ask that the Government and ASIC prioritise reviewing legislation for technology neutrality, and ensure that any future regulation operates consistently with this principle.

18. Further, we would support the Government adopting Recommendation 31 (increase the time available to industry to implement complex regulatory change – conduct post implementation reviews of major regulatory changes more frequently) as such a change would be complementary to the proposals outlined above.

19. In particular, we concur with the FSI final report that 'unnecessary compliance costs and poor policy processes are a concern' (page 260). Further, as noted by the Ernst & Young analysis of the cost effectiveness of regulatory processes for the FSI, the identified shortcomings have included (see page 258):
    - Unclear whether detailed costs and benefits of changes have been considered;
    - Gaps in industry consultation processes; for example, belated consultation; and
    - Optimistic implementation deadlines.

20. Taken together, these three FSI recommendations (recommendations 23, 31 and 39), if adopted by Government, would represent a significant step towards better cooperation and partnership with industry.

Specific proposals & key issues

Electronic disclosure as FSP's default method of delivery

21. The FSC welcomes ASIC's Proposal B1 to enable FSPs to deliver disclosures electronically as a default if they choose to do so, and agrees that such a step would yield benefits for both industry and consumers (CP224, page 12). As noted in the Consultation Paper at page 7, the current regulatory settings have not kept up with consumer and industry demand.

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22. More broadly, we encourage the Government to help enable business to be transacted digitally end to end: regulation should not make it more difficult and expensive to carry out business solely though digital channels. The final FSI report, and submissions to the Inquiry, reflected a strong appetite for this. Technology neutral regulation is central to this.

23. The FSC supports an opt-out from electronic disclosure for consumers who elect to receive paper, i.e that paper disclosure be provided free of charge by the FSP. However an exception should exist where a consumer has agreed to the terms and conditions of a 'fully-online' product (see page 20, Draft Regulatory Guide). In such a case, there should not be an obligation on the FSP to provide paper-based disclosure, given the consumer has clearly consented to a fully-online product, and the product has been structured on that basis (e.g. pricing). Where paper disclosures are required by a consumer who has purchased a 'fully-online' product, FSPs should be able to rely on terms and conditions that provide for the transfer of the consumer's interest to a different product or the return of the product to the consumer. To do otherwise would be to discourage the use of wholly online products, especially interactive/innovative PDSs. Any potential cost-saving from the use of such a PDS would be at least partially offset if required to also maintain paper disclosure documents.

24. Consequently, we also ask ASIC to review and update its guidance and Class Orders on financial services disclosures to better facilitate electronic disclosure. This would include amending ASIC Class Order 03/237 (Updated Information in Product Disclosure Statements) and Class Order 13/763 (Investor Directed Portfolio Services) to remove the requirement for paper copies, and to allow electronic notifications via means other than email (for example, mobile applications, SMS delivery).

25. The FSC requests that ASIC Regulatory Guide 221 make clear that a 'fully-online' product includes a product that can be transacted online, regardless of whether some of the transactions in relation to the product can also be conducted via other channels (eg via a support or sales call-centre). Product issuers should not be subject to additional regulatory requirements if they give their customers additional ways to transact in connection with their online products.

Failed electronic delivery

26. Regarding failed electronic delivery (e.g. email 'bounce-backs'), based on FSC members' experience, the following scenarios can arise for FSPs:
    - "Soft bounce" : Valid email address but the person has not received and therefore 'read' the email as the mailbox was full, they were on leave or for some other reason (e.g email treated as 'spam');
    - "Hard-bounce": the email address no longer exists (e.g an employee has left and the email address has been taken off the server); and

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- Personal email addresses that do not provide bounce-backs at all.

27. In the above scenarios, we support ASIC taking a pragmatic approach to the issue, noting that similar problems can arise for paper-based disclosure (eg: a person can change their postal address without notifying the FSP). Where the FSP is made aware that the electronic delivery has failed (eg. a 'bounce-back' is received by the FSP), we believe they should take reasonable steps to try and contact the consumer via other means as outlined on page 19 of the Draft Regulatory Guide). Further, there should be no impediment to obtaining updated electronic address details from agents, such as employers.

28. Where a postal address is no longer in use, but the mail is not returned to sender, FSPs are entitled to rely on section 29 of the Acts Interpretation Act 1901 (Cth). This section effectively provides service by post shall be deemed to be effected by properly addressing, prepaying and posting the document as a letter and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Accordingly, if the letter is not returned, there is no onus on an FSP to make further enquiries.

29. Similarly, where an email address is sent but no bounce-back message is provided to the FSP (and regardless of whether the email address is in use), the FSC believes there should not be an onus on the FSP to make further enquiries. Such an approach would ensure a technology neutral approach – i.e it would be unfair to require FSPs to take greater steps to ensure successful electronic delivery than they would were the disclosure delivered via the post.

Inconsistency between disclosure requirements

30. A key issue that has consistently been raised by industry is that regulations governing the delivery of disclosure documents differ across the range of financial products and services. For example, ASIC has provided Class Order relief (10/1219) to allow product disclosure statements (PDSs) and financial services guides (FSGs) to be delivered via hyperlink. Similarly, ASIC has provided Class Order relief (13/1621) to permit a responsible entity to issue an interest in a registered scheme to 'the acquirer' in response to an application submitted electronically on behalf of the acquirer through mFund and to rely on an electronic confirmation accompanying the application that the investor was given a PDS before the application was made. However statements of advice (SOAs) cannot be delivered via hyperlink. Insurance contracts are particularly saddled by outdated regulatory constraints (detailed below).

31. Accordingly, the FSC is grateful for ASIC's recognition in the Consultation Paper that FSPs should be allowed to send a hyperlink to a SOA, and its intention to amend class order relief accordingly (Consultation Paper, para 43). We understand that security concerns

Financial Services Council Ltd
82 080 744 163
Level 24, 44 Market St
Sydney NSW 2000
+61 2 9299 3022
+61 2 9299 3198
info@fsc.org.au
fsc.org.au

(such as phishing) were the reason for this difference between PDS and FSG disclosure on the one hand and SOA disclosure on the other, given the personalised nature of the information typically provided in SOAs. Since the issue of the Class Order relief (CO 10/1219) however, appropriate security safeguards have been developed and can be put in place.

32. More generally, current regulation remains primarily based on a document-centric approach which requires, for certain documents, that disclosure be made 'in writing' or in accordance with specific content and format criteria. Furthermore:

- Whilst the relief provided under ASIC Regulatory Guide 221 and Class Order [CO 10/1219] allows for PDSs, FSGs and SoAs to be delivered by email or written notice (in paper or electronic form) with a hyperlink to the disclosure, it effectively requires disclosure via email or a website, and does not facilitate delivery of disclosure documents via alternative technologies; and

- Specific disclosure requirements of some disclosure documents do not seem to cater for the successful delivery of disclosure material by way of electronic means. For example, the fact that an FSG, SOA and PDS each require a specified title to be placed on the "cover of", or at or near the "front of" the FSG, SOA or PDS (as relevant). Similarly, the requirement for an 'eligible application' to be an application that is attached to or accompanies a PDS (or copied or directly derived from such a form).

33. These regulations were not drafted at a time when use of electronic social media platforms or electronic applications was as frequent or widespread as today. For example, provision of disclosure documents via mobile phones, tablets, social media platforms, or streamed video and voice recordings are not explicitly contemplated. While this may have been appropriate when the law was first made, and even when Regulatory Guide 221 was first issued, it does not reflect today's technological and societal realities.

34. The FSC strongly supports technological neutrality which reflects those realities, consistent with Recommendation 39 of the FSI final report. Delivery of disclosure documents should be available in varied electronic form (eg. by email, hyperlink, standing facility or any other electronic means) so long as it is readily accessible to the consumer and a copy retainable by the consumer.

35. A further instance of inconsistent regulation is disclosure where a financial service is provided over the phone (for example, in a call centre environment). If quotes are provided over the phone to clients on various risk insurance products this often constitutes an offer and consequently, under s1012B of the Corporations Act requires the provision of a PDS before or at the time the quote is provided over the phone.

Financial Services Council Ltd
ABN 82 080 744 163
Level 24, 44 Market St
Sydney NSW 2000
+61 2 9299 3022
+61 2 9299 3198
info@fsc.org.au
fsc.org.au

36. As acknowledged by ASIC in the Explanatory Statement for Class Order 11/842 (relating to general insurances only), 'there are practical difficulties in giving a PDS during a telephone call' and therefore Class Order 11/842 modifies the requirement to give a PDS to enable a quote for a general insurance product over the phone. The Class Order provides for a regulated person to either be exempt from the requirement to give a PDS or to be able to give the PDS after the telephone call in which the quote is given.

37. For the same reasons as for general insurance, the FSC believes a similar approach should be taken for representatives providing a quote on a life risk insurance product over the phone.

Insurance Contracts – special impediments to electronic disclosure and obsolete requirements

38. There are particular impediments to insurance contracts which restrict the possibility of electronic disclosure. For example, the option to give a PDS by hyperlink in an email (as provided by ASIC Class Order 10/1219) arguably does not apply to insurance products because PDSs for insurance products typically include information, statements and notices required under the Insurance Contracts Act 1984 (Cth) (**ICA**). The ICA, when read in conjunction with the Electronic Transactions Act 1999 (Cth) (**ETA**), arguably requires such information, statements and notices to actually be "given in writing" where reasonably practicable, not just made available.

39. Life insurers are also subject to obligations under the Life Insurance Act 1995 (Cth) which pre-date electronic disclosure and no longer appear to be relevant. For example, under Part 10 Div 7, life insurers are required to place notices in local newspapers before replacing or satisfying a claim under a policy that has been lost or destroyed. These requirements are no longer necessary and appear obsolete in the face of greater electronic disclosure. For example, it is unlikely that an ineligible individual who finds a lost policy document would be able to make a successful claim as insurers maintain detailed records and usually conduct identification checks when a claim occurs.

40. Although ASIC has powers under the Corporations Act, the Superannuation Industry (Supervision) Act 1993 (Cth) and the National Consumer Credit Protection Act 2009 (Cth) to omit, modify and vary financial services provisions of that legislation, ASIC does not have the power to give relief from the requirements of the ICA and the ETA. Further, even if ASIC indicated that it would not take regulatory action if an insurer or an AFS licensee provided an insurance PDS by hyperlink in an email, rather than by attachment to an email, failure to provide an insurance PDS in accordance with the ICA could have adverse consequences for the management of claims.

41. Similar issues also arise in relation to all information, statements and notices required under the ICA.

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Financial Services Council Ltd
82 080 744 163
Level 24, 44 Market St
Sydney NSW 2000
+61 2 9299 3022
+61 2 9299 3198
info@fsc.org.au
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42. Accordingly, we ask ASIC to refer this matter onto Treasury for legislative amendment. In particular, we would ask Treasury to consider amendments clarifying that when a document or notice is made available electronically (including by sending an email or a hyperlink to a customer), this amounts to "giving" the notice or document for the purposes of the ETA and other relevant legislation such as the ICA. Such an approach would help promote consistent disclosure obligations across the range of financial products, and would action FSI Recommendations 23 and 39 which promote technological neutral regulation. We would further ask that Treasury consider amendments that remove obsolete requirements in relation to lost or destroyed life insurance policy documents under the *Life Insurance Act 1995*.

IDPS operators

43. ASIC's IDPS Class Order CO 13/763 requires an IDPS operator to "give" various documents to clients. Under paragraph 6 of the Class Order, the definition of "give" as inserted by notional Corporations Act sub-s 912AD(35) only allows information to be given by email if the client has agreed. The notional provision does not allow email as a default in the absence of agreement.

44. The FSC considers this Class Order should be amended to be consistent with ASIC's proposals for the giving of other documents, to allow email provision (or electronic access) as the default, with the client being able to request an alternative manner of provision (except if the product is fully online). We consider Class Order 13/763 should be amended to facilitate a transition to electronic provision or access as the default provision for both existing clients and new clients. (Please also see our other comments in this submission relating to amendments to other Class Orders.)

45. In addition, the current requirement that an IDPS Operator "give" each client a copy of the annual audit report should be amended so that the operator need only notify clients of the availability of the report (e.g. on-line) and the right to request a copy. This would be consistent with the legislative approach for superannuation fund annual reports.

46. The FSC understands from one of its Members that ASIC has already previously granted relief to an FSC Member which is an IDPS operator on terms equivalent or similar to the above. Hence, given individual relief has previously been granted by ASIC, and the issues apply more broadly, we consider incorporation in the Class Order is appropriate.

47. *(Unitholder meetings)*: FSC considers similar principles on electronic provision (or access) as the default method should also apply to unitholder meetings. We request ASIC to update RG 221, and any Class Orders which may be issued with the updated RG 221, accordingly.

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Provision of disclosures on a website or other electronic facility

48. The FSC supports Proposal B2 outlined in the Consultation Paper, to provide class order relief to provide an additional method of delivery for most Chapter 7 disclosures (where not already permitted), allowing FSPs to make a disclosure available on a website or other electronic facility, provided clients are notified (e.g via a link or a referral to a web address or app) that the disclosure is available; and can still elect to receive that disclosure via an alternative method of delivery, on request. This is subject to the exception noted above for fully online products (i.e that there be no requirement to have a paper disclosure document available).

49. Consistent with the underlying principle of technology neutrality, the FSC believes that a broad range of notification methods should be available for this purpose, including letters, email, SMS, telephone call (including voice-mail), app, face-to-face, and new methods which will emerge/evolve in time. It would be unhelpful to be overly prescriptive, for example by restricting use of hyperlink notifications to a sub-set of financial products. The method chosen by the notifier should allow easy movement from the notification mechanism to the disclosure document delivery mechanism.

50. As a general principle, if a client and FSP are reasonably made aware of a range of notification methods in a PDS, then these should be acceptable to ASIC. By way of example, the FSC expects that electronic notifications would be "pushed" to clients advising of the availability of a disclosure document and the client will then "pull" the disclosure document from a website.

ASIC's interpretation of the law – consumer consent to electronic disclosure

51. While acknowledging the existing legislative constraints, the FSC believes that some of the challenges posed by the current regulatory regime could be addressed by ASIC adopting a more facilitative interpretation of the law. By recognising that there is some uncertainty in the current law regarding what is required to provide online disclosure, ASIC can take steps via its interpretation of the law and/or Class Order relief to better allow digital commerce.

52. Accordingly, we applaud ASIC's recognition in the Consultation Paper that 'if a financial services provider has an email address for a client, they do not need consent to use that address to deliver disclosures electronically, in the same way that the provision of a postal address is sufficient consent for the delivery of disclosures to that postal address' (Proposal B1, page 12). The removal of a purported obligation for express consent (as is the case under the current Regulatory Guide 221) would be a significant step forward, recognising that nomination of an address can often be implied (for example, by providing an email address).

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+61 2 9299 3022 +61 2 9299 3198
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53. On a related issue, industry would appreciate express recognition by ASIC that 'nomination' by a customer will include nomination by the customer's agent(s), including employer or financial adviser. For example, an employer enrolling an employee in a superannuation fund is clearly acting as the employee's agent for the purposes of 'nominating' an email address to receive electronic disclosures pursuant to section 940C(1)(a)(ii) or section 1015C(1)(a)(ii) of the Corporations Act. Employees often become a member of a superannuation fund because their employer enrols them in their default fund. Members' address information (including an electronic address) is received from employer-sponsors throughout the time the member holds the product and is updated by the FSP when it changes. FSPs may also contact employer-sponsors to verify members' details.

54. More broadly however, we ask ASIC to recognise that other instances of agency may exist (for example, financial advisers) and to recognise 'nomination' through such channels.

55. We note ASIC's statement that 'an approach to consent that differentiates between electronic addresses and postal address is no longer warranted, particularly given increased usage of the internet and digital technology, and consumer acceptance that provision of an email address to a business usually means that it will be used for the delivery of information from that business' (para 29, Consultation Paper).

56. With that in mind, the FSC seeks ASIC's confirmation that for existing customers, FSPs will be able to provide disclosures and other communications via email or other electronic means where the FSP already has their email or other electronic address (i.e without the need to go back to existing customers and ask for their express consent). If ASIC does not adopt this approach, it would mean that it would be continuing its overly conservative approach of requiring express consent (as articulated in para RG221.29 of the current Regulatory Guide 221).

57. Alternatively, we would expect that it would be sufficient to transition all existing clients to electronic disclosures, once they are notified via their existing delivery method that this change will take place, and providing them with the option of electing for paper-disclosure. If this transitional approach including notification to existing clients is required, we request ASIC confirm this transitional approach in its updated Regulatory Guide.

58. Finally, we ask ASIC to make clear that where a customer has consented (whether expressly or otherwise) to electronic disclosure, that consent should apply with respect to all financial products offered by that FSP or any related entity (subject to any privacy requirements and unless otherwise requested). To require consent for each individual product would be to impose an artificial layer of regulatory burden, with no benefit to consumers. In order to avoid further complexity and confusion, where a customer consents to online disclosure, we believe this consent should apply to all types of

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disclosures required for that particular financial product. For example, a customer should not be able to opt to receive annual statements online but significant notices via post/mail.

Limited applicability of the Electronic Transactions Act 1999 (Cth)

59. We note that some of the FSC's concerns regarding the electronic disclosure regime arise due to the inapplicability of the ETA. Specifically the ETA provides that where legislation requires a person to give information in writing, this will be taken to include where the person gives information via electronic means if: 1) it was reasonable to expect that the information would be readily accessible so as to be usable for subsequent reference; and 2) in cases where the Commonwealth is not the recipient, the recipient consents to the information being given by way of electronic communication. In particular, the ETA defines consent to include '*consent that can reasonably be inferred from the conduct of the person concerned*' [emphasis added].

60. While we note the Corporations Act and Regulations carve-out from the ETA (see Items 28-29, Schedule 1, Electronic Transactions Regulations), the FSC views the ETA's approach as being most in line with current technological developments and modern regulatory practice. The FSC supports legislative amendment to remove the Corporations Act/Regulations carve-out from the ETA, and would welcome ASIC adopting an approach which embraces the underlying logic of the ETA, as articulated in section 3:

> *The object of this Act is to provide a regulatory framework that:*
> *(a) recognises the importance of the information economy to the future economic and social prosperity of Australia; and*
> *(b) facilitates the use of electronic transactions; and*
> *(c) promotes business and community confidence in the use of electronic transactions; and*
> *(d) enables business and the community to use electronic communications in their dealings with government.*

61. The FSC believes the electronic disclosure requirements under the Corporations Act/ASIC regulatory regime should mirror this sound approach.

62. We note that the overall efficacy of the ETA is undermined by the exclusion of various pieces of significant financial services legislation (in addition to the corporations' legislation) from its coverage, including: the *Superannuation Industry (Supervision) Act 1993 and Regulations* (see Items 142-143, Schedule 1, ETA Regulations); *Australian Securities and Investments Commission Act 1989 and Regulations* (see Items 16-17, Schedule 1, ETA Regulations); and *Life Insurance Act 1995* (see Items 77-78, Schedule 1, ETA Regulations).

63. We would welcome the application of the ETA to these pieces of legislation, and we suggest that ASIC ask Treasury to consider whether these types of exclusions remain

Financial Services Council Ltd
ABN 82 080 744 163
Level 24, 44 Market St
Sydney NSW 2000
+61 2 9299 3022
+61 2 9299 3198
info@fsc.org.au
fsc.org.au

appropriate. For example, we see no specific benefit to retaining the requirement to provide notices under the *Life Insurance Act 1995* in paper form.

Personal financial information

64. In a number of places in the Consultation Paper and Draft Regulatory Guide, ASIC refers to emails and websites not being secure, and states that "personal information" should only be sent through secure means.

65. The FSC would appreciate clarification that ASIC is not referring to the privacy law definition of personal information, which includes the name and address of the client. Instead, we propose that the phrase "personal financial information" be used to avoid confusion.

ASIC interpretation – purported FSP obligation to ensure consumers access electronic disclosures

66. Regulatory Guide 221 states that if a PDS, FSG or SOA is delivered by hyper link or reference to a website address, the provider 'must have a mechanism to track whether a client has accessed the disclosure on the website' (RG221.23). In our view, that statement goes further than is currently required by regulation 7.9.02A of the Corporations Regulations.

67. There should not be an obligation to monitor whether the electronic version of the document has been accessed in the same way that there is no obligation to monitor whether a client opens a paper version of a PDS, FSG or SOA. Once the electronic version of a document has been made available to the consumer (e.g. on a website or on a private workspace), there should not be an onus on the FSP to ensure it has in fact been accessed. It is unreasonable to hold a FSP responsible if a consumer chooses not to read a document that has been sent to them.

68. We understand from discussions with ASIC, that ASIC does not in fact require FSPs to monitor whether the electronic version of a document has been accessed. To confirm this, the FSC would appreciate if this point was made clear in the updated Regulatory Guide, so as to avoid any misunderstanding.

Facilitating the use of more innovative PDSs

69. We welcome ASIC's Proposal C1 to facilitate more innovative PDSs and understand that this may require relief in relation to the existing requirement to provide a hardcopy of the PDS on request. Further guidance will be critical in order for FSPs to have certainty regarding their obligations. If the proposed relief requires that in addition to the "innovative" PDS, providers will also be required to prepare a printable PDS this may

Financial Services Council Ltd 82 080 744 163 | Level 24, 44 Market St Sydney NSW 2000 | +61 2 9299 3022 +61 2 9299 3198 | Info@fsc.org.au fsc.org.au

severely limit innovation due to the effort and cost involved in effectively doubling the number of PDSs required.

70. We support relief from the shorter PDS regime to enable innovation in electronic disclosure, however further industry consultation is necessary in order to reach a position that provides sufficient flexibility, while encouraging some level of consistency across the industry. The position reached must be sustainable to avoid further substantial change in the near future which may be costly and confusing.

71. While the FSC supports the proposed relief from the shorter PDS regime in Proposal C1(b), we note it would effectively create an 'in-between' PDS disclosure regime whereby neither the long form nor shorter PDS regime would fully apply to more innovative PDSs, such as interactive PDSs, thereby creating an uneven playing field between paper-based short PDSs and equivalent innovative/interactive PDSs.

72. To give effect to the proposed relief and remove any doubt about when it can be applied, what constitutes a 'more innovative PDS' or an 'interactive PDS' would also need to be clearly defined, for example by detailing certain essential elements that differentiate them from 'traditional' PDSs.

73. However, since these types of documents are obviously still evolving, care would need to be taken to ensure any such definitions recognise that technology is constantly developing and therefore do not inadvertently impose constraints to further development.

74. The FSC has previously submitted to Treasury that as a potential permanent solution to the temporary relief from the shorter PDS regime currently provided for certain products under ASIC Class Order [CO 12/749], which was recently extended to 30 June 2016, the shorter PDS regime should only be mandated for MySuper products offered on a stand-alone basis. In all other cases, the issuer should be allowed to determine the most appropriate PDS format.

75. An extended alternative to the FSC's previous proposal (and potentially simpler, holistic solution) which would not require the relief proposed under C1(b) in Consultation Paper 224 or the additional innovative/interactive PDS definitions noted above, would be to:
    - remove the mandated use of shorter PDSs for all products including MySuper products offered on a stand-alone basis;
    - allow issuers to choose the most appropriate form of PDS to issue; and
    - require all PDSs, whether long or short, to communicate at least the same information required under the shorter PDS regime but without the prescriptive requirements of the shorter PDS regime (ie equivalent to the currently proposed relief for more innovative PDSs). For long PDSs, this would effectively quantify certain content they must contain to satisfy the existing requirement that they

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provide all information that an investor reasonably needs in order to make an informed investment decision. ASIC must ensure that the content requirements and liability regime for shorter PDSs is not affected by any changes or Class Order relief. Any uncertainty in this area may have significant implications for due diligence processes and liability of preparers of PDSs under the shorter PDS regime.

This approach would effectively level the playing field as every PDS for a managed investment or superannuation (including MySuper) product, whether short/long or paper based/electronic, would have a minimum content requirement that would provide a reasonable basis for comparison by prospective investors.

76. As ASIC has already recognised with its proposed relief from the shorter PDS regime for innovative PDSs, nothing stifles innovation more than prescription.

77. In response to question C1Q3 of the Consultation Paper, the FSC agrees that it is unnecessary for prescriptive wording to be included in a more innovative PDS. The document simply needs to be identifiable as a PDS and the issuer should be allowed to determine how this is best achieved in the context of the particular innovative PDS structure. Similarly, the FSC believes it would be unhelpful to mandate the use of a 'time clock' in an innovative PDS, as there is no equivalent requirement for paper (i.e a notice is not sent with a paper PDS advising the customer that it will take a certain amount of time to read and/or digest the document). Again, ASIC must ensure that the content requirements and liability regime for shorter PDSs is not affected by any changes or Class Order relief. Any uncertainty in this area may have significant implications for due diligence processes and liability of preparers of PDSs under the shorter PDS regime.

78. In relation to the requirement for mandated language to appear "at or near the front of the PDS", we believe a common sense approach can be taken to enable this to be accommodated in a similar fashion in innovative web based PDSs. ASIC could provide guidance such that the mandated language is to appear prominently on the initial web page, without the need for readers to scroll on a standard desktop browser. Guidance would need to be flexible enough to allow for emerging technologies, and variations such as readers viewing the standard desktop page on a mobile device.

79. The FSC has considered the situation where an innovative/interactive PDS differs in some significant way from the printable version and seeks ASIC guidance on this. The FSC is of the view that where the client has placed reliance on some aspect of the innovative/interactive PDS which differs from the printable version then the innovative/interactive PDS version should take priority.

80. The FSC believes that section 1016A of the Corporations Act is a particular barrier to the development of innovative/interactive PDSs as it requires that an application form must be

Financial Services Council Ltd 82 080 744 163 | Level 24, 44 Market St Sydney NSW 2000 | +61 2 9299 3022 +61 2 9299 3198 | info@fsc.org.au fsc.org.au

copied or directly derived from a form included in or accompanying a PDS. A multi-media PDS may not satisfy the requirements of section 1016A, and therefore we ask that ASIC provide relief from this section accordingly.

81. Careful consideration would need to be given to the very prescriptive area of fee disclosure, which mandates the use of:

- a prescribed consumer advisory warning;
- a prescribed preamble to the fees and costs table;
- a prescribed fees and costs table;
- a prescribed form of a fee example;
- specific headings;
- for superannuation products, specific fee definitions.

It would be essential for ASIC to provide guidance on the ability to provide innovative disclosure on fee disclosure.

82. Regarding the good practice guidance for electronic disclosure outlined in the Draft Regulatory Guide, the FSC has reservations regarding the 'no more than three clicks' proposal. We believe this is unnecessarily prescriptive and does not accord with the principle of technology neutral regulation.

83. Subject to our comments above, the FSC believes that the proposed ASIC relief to allow more innovative PDSs should be extended to other types of disclosure such as FSGs and SOAs. This approach would be consistent with harmonising regulation across financial products and services, and reflect the reality of modern technologies (see C1Q5).

84. In addition, in order to facilitate the use of electronic disclosure as well as facilitating electronic transactions and communications (all of which assist in consumer engagement), we request that ASIC consider, to the extent feasible, facilitating the use of e-signatures (or alternatives) for electronic transactions and communications. This will support a productive electronic exchange between a FSP (e.g. an adviser or product issuer) and their client. We understand that this may also require consideration and input by Treasury.

Disclosure obligations– Chapter 2G and Chapter 2M, Corporations Act

85. FSPs may also be subject to disclosure obligations under Chapter 2G and Chapter 2M of the Corporations Act. For the purposes of consistency with ASIC's guidance in relation to the financial services disclosure requirements in Chapter 7, and to allow FSPs to adopt a consistent approach in relation to their various disclosure requirements, the FSC asks that ASIC provide additional guidance in the updated Regulatory Guide in relation to the following disclosure requirements:

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- A notice of a meeting of a company's members may be given 'by sending it to the fax number or electronic address (if any) nominated by the member' (section 249J(3)(c)). Similarly, a notice of a meeting of a registered scheme's members may be given 'by sending it to the fax number or electronic address (if any) nominated by the member' (section 252G(3)(c)). *ASIC should confirm that, if a company or responsible entity of a registered managed investment scheme has been given an email address and a postal address by the member, the company or responsible entity may use either address for the purposes of giving a notice of a meeting.*

- A company may send a proxy appointment form to members under section 249Z. A responsible entity of a registered managed investment scheme may similarly send a proxy appointment form under section 252X. The provisions do not specify how the proxy appointment form may be sent. *ASIC should confirm that the proxy appointment form may be given by the company or the responsible entity in the same way as it gives the notice of meeting, by sending it to an electronic address nominated by the member.*

- A company or registered scheme may also notify members under sections 314(1AA)(c) and section 314(1AB) in relation to the giving of annual reports. Under section 314(1AD), a member may be notified for the purposes of those provisions by electronic means 'only if the member has previously nominated that means as one by which the member may be notified'. *ASIC should confirm that, if a company or responsible entity of a registered managed investment scheme has been given both an email address and a postal address by the member, the company or responsible entity may use either address for the purposes of giving a notice.*

86. The FSC seeks the above confirmations from ASIC in order to ensure that the law applies in a technology neutral manner, consistent with our long-standing position and the final FSI report (Recommendation 39).

'Fully-online products' – other regulatory barriers - superannuation

87. The current regulatory regime contains rules which stifle fully-online superannuation products. Two of the most notable requirements are:
    - the need for a binding death benefit nomination to be in writing, signed by the member and witnessed (regulation 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**"SIS Regulations"**);
    - in relation to rollovers:
        i. the prohibition against transferring a member's benefit without their consent, which must be either written consent or another form of consent determined by the Regulator (regulations 6.27B, 6.28 and 6.29 of the SIS Regulations);

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ii. the requirement for a member of a superannuation fund to request a rollover in writing (regulation 6.33 of the SIS Regulations).

88. In 2002, APRA issued a Determination to facilitate the provision of non-written consent to rollovers. However, this is over 12 years old now and has not been updated in light of the SuperStream changes to the rollover rules which still require written consent (and do not enable a regulator to issue a determination).

89. Accordingly, we ask ASIC to refer these matters onto Treasury for legislative amendment. Such an approach would help action FSI Recommendations 23 and 39 which promote technologically neutral regulation.

Miscellaneous – product dashboards

90. More broadly, ASIC's Class Order for conditional relief from the requirement to include the latest product dashboard in periodic statements was recently extended for a further six months so that it now applies to periodic statements for reporting periods ending before 1 July 2015. (CO 14/1217 extends the second exemption in CO 13/1534 for a further six months so that it now applies to periodic statements for reporting periods ending before 1 July 2015.)

91. In February 2014, the FSC submitted to the *Treasury Superannuation Discussion Paper: Better regulation and governance, enhanced transparency and improved competition in superannuation*. We consider it important that the final ASIC policy in ASIC's revised RG 221 is consistent with the Government's final policy (when announced) in relation to disclosure aspects such as product dashboards in periodic statements. For example, we would like to see any product dashboard requirement (following any Government announcement in response to the Superannuation Discussion Paper), be able to be provided in a manner consistent with the spirit and intent of the underpinning principles consulted by ASIC in CP 224. (Please let us know if you would like a copy of FSC's February 2014 submission to the Treasury Superannuation Discussion Paper.)

Next steps

92. The FSC reserves the right to make further comment in relation to the Consultation Paper, Draft Regulatory Guide, and any relevant Class Orders. We acknowledge that ASIC regularly consults with the FSC, including on electronic financial services disclosure, and that this feedback could be part of our regular engagement.

93. We would like to reiterate, on behalf of our members, that the FSC highly values its engagement with ASIC, and the constructive relationship that exists between our two organisations.

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94. Prior to finalisation of ASIC's review of its approach to electronic financial services disclosure, we request a meeting with ASIC, the FSC and a group of our members (who have assisted in preparing this submission). We would also appreciate early ASIC consultation with the FSC on relevant draft Class Orders so as to ensure they operate in the manner intended and do not create unexpected consequences.

Please feel free to contact me on (02) 8235 2520 or Stephen Judge, General Counsel, on (02) 8235 2526, if you have any questions, or would like to clarify, any points made in our submission.

Yours sincerely,

Christian Gergis
Legal Counsel

Financial Services Council Ltd
82 080 744 163
Level 24, 44 Market St
Sydney NSW 2000
+61 2 9299 3022
+61 2 9299 3198
info@fsc.org.au
fsc.org.au

Appendix to FSC Submission re CP224: ASIC's list of proposals and questions

PROPOSAL	FEEDBACK	
A1: We are considering the threshold options set out in paragraph 18. Depending on feedback, we propose to implement Options 1–3 to further facilitate electronic disclosure. This feedback seeks your overarching views; more detailed questions on the particular proposals are in Sections B and C.	**A1Q1**	**Do you agree that we should further facilitate electronic disclosure, or take Option 5 (i.e. no change)? Please provide reasons.** *Yes – we strongly agree that ASIC should further facilitate electronic disclosure. See FSC submission at paras 1-13, in particular.*
	A1Q2	**What benefits do you consider will result from our proposed approach?** *Please refer to response to A1Q1 above; FSC submission at paras 3-6.*
	A1Q3	**What disadvantages do you consider will result from our proposed approach?** *No significant disadvantage is envisaged resulting from the implementation of ASIC's proposed approach. However, in some instances, further relief and guidance would provide greater advantages for both providers and consumers. See detailed comments in FSC submission.*
	A1Q4	**Are there any other options we should consider to meet our regulatory objective of further facilitating electronic disclosures and encouraging the use of more innovative PDSs, while ensuring that consumer choice about the method by which they receive disclosures is not removed?** *Where consumers purchase a fully online product, financial services providers (FSPs) should not be obliged to provide a paper alternative: see FSC submission, para 23.* *Further proposals/options to better facilitate electronic disclosure and e-commerce are outlined at FSC submission, paras 38-42 (re insurance contracts); paras 85-86 (re Chapter 2G and 2M Corporations Act disclosure obligations).*
B1: We are proposing to update our guidance in RG 221 to make it clear that, if a financial services provider has an email address for a client,	**B1Q1**	**Do you agree with this proposal? Please give reasons for your answer** *Yes – we agree with this principle, including as it would uphold technological neutrality, and hence competitive neutrality. See FSC submission at paras 21-25, 52-58.*

they do not need consent to use that address to deliver disclosures electronically, in the same way that the provision of a postal address is sufficient consent for the delivery of disclosures to that postal address. Providers should still be satisfied that if the relevant provision requires the address to be 'nominated', that the email address has been nominated. We think in most circumstances this would be clear from the context (see draft updated RG 221.33), such as when a client provides an email address as part of an application.		*Regarding nomination, see response to B1Q8 below, and FSC submission at paras 55-58.*
	B1Q2	**Are there other barriers to using email addresses for delivery of disclosures?** *We do not envisage any significant barriers to using email addresses for delivery of disclosures. Email will often be a more reliable form of communication than (changing) postal addresses. Accessing records (e.g. disclosures) is also typically easier via electronic means rather than paper.* *See FSC submission at paras 16-17 for a summary of FSC's views on technology neutrality.*
	B1Q3	**What are the consequences of making this change? For example, are there significant numbers of clients who have supplied email addresses and who currently do not have disclosures delivered to those email addresses, but who would be able to under this proposal?** *ASIC should facilitate transitioning existing customers to the new proposed electronic disclosure regime. For example one FSC member has advised that they have email addresses for around 40% of customers, but only 14% of customers currently receive disclosures electronically. Providers will need to consider existing processes and procedures and develop new processes and procedures to address matters such as:* *(a) Notification and implementation of a new (default) delivery method;* *(b) Creation of new disclosures or modification of existing disclosures to adapt to the new (default) delivery method;* *(c) Fraud mitigation and risk management; and* *(d) Consideration of regulatory implications (e.g. undeliverable e-mail notifications and the Superannuation (Unclaimed Money and Lost Members) Act 1999).* *(e) How this change applies to existing clients (who have already provided e-mail addresses).*
	B1Q4	**Do you agree that the provision of an email address means a client or potential client is comfortable with all forms of disclosure being delivered to that email address? If yes, are there any consumers or groups of consumers for whom this might not be the case?**

		Yes, just as for the postal delivery method, there are no material distinctions between the various forms of disclosure (or peculiarities about the electronic delivery method) that would render electronic delivery unsuitable. *Therefore, in relation to the second question posed, no, the provision and implied use of an email address indicates a client possesses the requisite comfort and capability to receive disclosures electronically. Clients can elect to 'opt-in' to paper based disclosure, should they wish.*
	B1Q5	**When a provider is seeking an address from a client or potential client, should there be any information, warnings or advice given about the potential ways the address might be used?** *No, subject to compliance with Australian privacy law and principles, there are no peculiarities with regard to electronic delivery methods that necessitate special information, warnings or advice. No such warning is required when asking for a postal address.*
	B1Q6	**Are there particular kinds of disclosure for which consumers might be more or less likely to prefer electronic delivery?** *No, there is no subset of disclosure that naturally lends itself to a particular method of delivery. However, electronic delivery would be preferable to postal for the following reasons:* *(a) Availability and accessibility of disclosures are not linked to any geographic location;* *(b) Enhanced ability to search and navigate through (especially voluminous) disclosures;* *(c) Consumers are generally more likely to have access to printing facilities, rather than scanning facilities; and* *(d) The speed of electronic delivery over postal delivery.*
	B1Q7	**Does it matter to whom the consumer provided the email address?** *No, subject to compliance with Australian privacy law/principles and, in circumstances where an agency agreement exists, appointing an adviser to act on a consumer's behalf in certain circumstances.* *Intra-group products: where consumers indicate*

		that they wish to have personal contact information imported from another financial product, for the purposes of applying for and holding another financial product, providers should be permitted to use that information. See FSC Submission at para 58.
	B1Q8	**Do you have comments or views on our example in draft updated RG 221: see Example 1 at RG 221.35?** *Yes, these are as follows:* *(a) Big Company should not be required to satisfy itself that Rahini has 'nominated' this address for the purposes of receiving that disclosure. Provision of the email address by an agent should be regarded as an authority to use that email address for the purposes of receiving disclosures electronically.* *(b) This obligation should be Anna's, acting with due diligence and care, understanding of the product and following discussions with Rahini, regarding her delivery preferences and acting as her agent.* *(c) This should not be a consideration if the product provider articulates in its PDS (or elsewhere as appropriate) that this is a fully online product or online disclosure is only available.* *Expecting an email address may be provided for some disclosures, but not others, should be considered erroneous. As with postal addresses, no consideration is given to whether it is valid or was 'nominated' for that purpose. To take a different approach would be inconsistent with technological neutrality.* *Additionally, a means of obtaining, distinguishing and recording the preferred delivery methods/destinations of a client, on a disclosure-by-disclosure basis, is a difficulty within the financial services industry.*
	B1Q9	**For providers, how do you currently determine that an address (postal or email) has been nominated for the purposes of delivery of disclosures such as PDSs and Financial Services Guides (FSGs)?** *Providers each develop and implement policies, procedures and controls, appropriate to the nature of their business, risk and operational environments, to achieve compliance with their statutory and regulatory obligations.*

		Generally, providers determine that an address (postal or email) has been nominated for the purposes of delivery of disclosures, by including fields to nominate a preferred address in product application forms.
	B1Q10	**Do you think that emailed disclosures are more or less likely to be lost (e.g. through changes to email addresses or misdelivery) than posted disclosures? Please provide supporting evidence if possible.** *For the following reasons, e-mailed disclosures are less likely than postal disclosures to be lost:* *(a) E-mails are often archived;* *(b) E-mails can be printed (and printing facilities are more likely to be available to clients than scanning facilities); and,* *(c) E-mails are not linked to a geographical location.* *Where a disclosure is lost, reissue of the disclosure can also generally be delivered faster than posted disclosures.* *Further, if the e- mail directs clients to an online facility, there is no risk of misdelivery, as the disclosure will always be accessible and available.*
	B1Q11	**Do you think that there is an issue with frequency of change of email addresses? Do you have any data to show frequency of change of email addresses?** *ABS statistics (4102.0 - Australian Social Trends, Dec 2010) show that 43% of people aged 15 years or over had moved house in the preceding five years. This increases dramatically in certain demographics with over 60% of people in the 20-34 age groups moving house in the preceding five years (with over 80% of 25-29 year olds moving in the preceding five years). Some of those who had moved in the previous five years had moved multiple times with over 10% of the movers having moved five or more times in that period. Given this high population mobility it does not appear more likely that emailed disclosures will be lost than disclosures sent by post – indeed the opposite seems true.* *Given the mobility of the population, in the current technological environment, there is no problem with*

		frequency of change of email addresses. Indeed many clients change their postal address more often than email address.
	B1Q12	**Are there any particular contexts in which the current requirement for a client to 'nominate' an address would provide a barrier to efficient electronic disclosure—for example, obtaining an address for clients who acquire products through a third party such as an employer or other agent?** *Yes, please refer to response to B1Q8 above.*
	B1Q13	**Where there is a provision allowing a disclosure to be notified, sent, given, provided or delivered electronically, do you need any further guidance on whether you can use an email address, that you hold, to satisfy such a requirement?** *Existing clients should be transitioned to the new proposed disclosure regime- see FSC submission, para 56-57.*
	B1Q14	**Is there any other guidance or relief required to facilitate the delivery of disclosures by email to clients?** ***Guidance:*** *(a) Retroactivity – Clarity is required as to how ASIC's proposed changes will apply to existing clients and if not, how providers may change the default delivery method. See FSC submission at para 56-57. We would expect that it would be sufficient to transition all existing clients to electronic disclosures, once they are notified via their existing delivery method.* *(b) Joint/Trust Accounts – Clarity is required on ASIC's expectations on the delivery of disclosures where an account has one or more individuals linked (e.g. joint and trust accounts) and whether delivery to a designated primary email address is sufficient or whether all individuals linked to an account must receive disclosures to email addresses each designate. We expect that ASIC would treat online delivery to one joint holder as delivery to both holders, consistent with the treatment of joint account holders for receiving hard-copy disclosures, and in line with the relevant disclosure document or application form.* *(c) Fully Online Products – Clarity is required where alternative methods of delivery to electronic would not be suitable. For example, where a new client has agreed to the terms and conditions of a fully online product. In this instance, providers should not be*

		required to provide any alternative (non-electronic) disclosure delivery methods. Clients should be bound by the terms and conditions of the product, which will articulate the available methods of disclosure delivery the product provider intends to offer. See FSC submission at para 23. *(d) E-mail 'bounce-back' procedure – Clarity is required regarding ASIC's expectations in the event of (undeliverable) e-mail 'bounce-backs' and its relevance and interaction with statutory and regulatory requirements, which exclusively contemplate postal-based scenarios (e.g. Superannuation (Unclaimed Money and Lost Members) Act 1999). Please see FSC submission at paras 26-29 regarding our suggested approach.* *(e) The role of agents – Clarity is required regarding the role and responsibility of agents in delivering disclosures to clients. Please see FSC submission at paras 53-54 which outlines our view regarding the need for ASIC to recognise agents as capable of providing the necessary consent/notification.* **Relief:** (a) *'Nominated' e-mail address – Where law requires disclosure to be delivered to a 'nominated' address, relief should be provided such that the email address provided by the client, or their agent, is deemed to be 'nominated' for that purpose.* (b) *Fully Online Products – Relief should be granted to remove a provider's obligation to give an opt-out option on fully online products.* (c) *Online Facilities – Relief should be granted to deem that any disclosure's requirement for the provider to "notify", "send", "give", "provide" "make available to" or "deliver" is satisfied when the provider makes it available on an online facility.*
	B1Q15	**Please estimate any cost savings your business would expect to realise from this change.** *Precise cost savings are difficult to estimate, however several FSC members have estimated that cost savings would be approx. $1.7m each annually, if electronic disclosure was the default.*
	B1Q16	**Please estimate any additional costs that consumers might be expected to incur as a result of this change.** *We do not anticipate that consumers would experience additional costs. Instead consumers would likely see a fall in costs over time, as savings and competitive*

		pressures are passed on.
B2: We propose to give class order relief to provide an additional method of delivery for most Ch 7 disclosures (where not already permitted), allowing providers to make a disclosure available on a website or other electronic facility, provided clients: (a) are notified (e.g. via a link or a referral to a web address or app) that the disclosure is available; and (b) can still elect to receive that disclosure via an alternative method of delivery, on request.	**B2Q1**	**Do you support this additional method of disclosure? Please give reasons for your answer.** *Yes, see FSC submission, at paras 48-50. However in relation to Proposal B2(b), providers should not be compelled to provide non-electric disclosure in circumstances that articulate a product's acceptable methods of delivery or the product is fully online.*
	B2Q2	**Should clients be notified each time (via their existing method of communication) of the availability of the disclosure on a website or other electronic facility?** *Generally, there is no requirement to notify clients of availability, contemporaneously or prior to the provision of disclosures via postal delivery. Therefore, providers should be entitled to exercise discretion whether notification each time, or other means of communicating the availability of disclosures, is suitable. For example, a client could be notified promptly via email of a disclosure being available on a website where email is the agreed method of communication.* *However, where clients have agreed to the use of a standing facility or electronic application which contains relevant disclosures, an email should not be necessary. Notifications would be made through the facility or application.*
	B2Q3	**What are acceptable methods of notification (e.g. letter, email, SMS, voice call, or other)?** *All of the above are acceptable methods of notification. In addition to these, any other methods articulated in the PDS (and therefore agreed between the provider and client), should be acceptable. This would afford providers greater flexibility to adapt to technological advances and consumer preferences in the future. See FSC submission, at paras 49-50, in particular.*
	B2Q4	**How should notifications be made? Are there any design considerations you would suggest in the notice to help ensure clients do not miss the opportunity to access their disclosures? What guidance should ASIC give on this issue?** *Providers should be entitled to exercise discretion as to how notifications should be made, with regard to*

		the specific characteristics and nature of their product. See FSC submission, at paras 48-50, in particular.
	B2Q5	**Do you have any data on the likelihood of clients printing their own copies of relevant disclosures when they are made available online?** *Material information is not available to respond to this question. However, clients are living in an increasingly paperless society where disclosure documents and alike are more likely to be read on a computer screen or mobile phone rather than in hard copy. Indeed many work-place document management/filing systems are 'paper-less'.*
	B2Q6	**Do you think we should restrict the use of hyperlinks in notifications?** *No - It would be unhelpful to restrict the use of hyperlink notifications to a sub-set of financial products.*
	B2Q7	**Please provide feedback on the costs to your business of:** **(a) developing or modifying an electronic facility;** **(b) printing and mailing disclosures (including, where possible, volumes and expected changes in volumes based on the proposal); and** **(c) any savings you would expect to make were this proposal implemented.** *See FSC submission, at paras 4-5.*
	B2Q8	**Please estimate any costs that consumers might be expected to incur as a result of this change.** *We do not anticipate that consumers would experience additional costs. Instead consumers would likely see a fall in costs over time, as savings and competitive pressures are passed on.*
C1: We propose to facilitate more innovative PDSs, such as interactive PDSs, by giving relief: (a) from various provisions requiring a copy	**C1Q1**	**Do you have any comments on our proposals for relief in proposal C1(a) regarding copies of the PDS?** *The proposal in C1(a) is supported subject to our detailed comments at FSC submission, paras 69-84.*
	C1Q2	**Do you have any comments on the relief from the shorter PDS regime in proposal C1(b)? Do you have any other suggestions as to how this might be achieved? Do you think communicating 'the same**

of a PDS to be given to a person on request and instead allowing a provider to give a copy of any current PDS for the relevant product or offer—meaning a provider can give a different printed PDS, even if technically it is not a 'copy'; (b) from the shorter PDS regime, provided the PDS communicates the same information that is required by that regime; and (c) from the requirements for certain language to be included on the cover or 'at or near the front of' a PDS so they can equally apply to a more innovative PDS.		**information' is an appropriate limitation on a more innovative PDS?** *See FSC submission, at paras 69-84. ASIC must ensure that the content requirements and liability regime for shorter PDSs is not affected by any changes or Class Order relief. Any uncertainty in this area may have significant implications for due diligence processes and liability of preparers of PDSs under the shorter PDS regime.*
	C1Q3	**Do you think that our proposed requirement** **Do you think that our proposed requirement proposal C1(c) that the mandated language be included 'at or near the front of the PDS' will accommodate more innovative PDSs?** *See FSC submission, at paras 78-79.*
	C1Q4	**Are there any further legislative barriers to your use of more innovative PDSs, including interactive PDSs?** *See FSC submission, at paras 69-84. ASIC should provide clear guidance around minimum requirements that innovative/interactive PDSs must satisfy to give providers comfort they have discharged their responsibilities.* *A pragmatic, facilitative approach should be taken, for a suitable period of time, by ASIC toward providers who elect to utilise innovative/interactive PDSs.*
	C1Q5	**Do you think any of our proposed relief should be extended to other types of disclosure, such as FSGs and SOAs?** *Yes – see FSC submission, at para 83.*
C2: We propose to update our guidance in RG 221 to: (a) make it clear that we think Pt 7.9 operates to allow a provider to have more	**C2Q1**	**Do you agree with this proposal? Please give reasons.** *Yes, however providers should only be required to maintain one type of PDS, at their discretion (see our response to Proposal C1).*
	C2Q2	**Do you consider that there are any other areas where a lack of clarity of our view would prevent or discourage you from producing a more innovative PDS?**

than one PDS for a single financial product or offer, such as a version able to be printed and an interactive version; (b) make it clear that the requirement that a consumer can identify the information that is part of the PDS is particularly important in the case of more innovative PDSs; and (c) include further guidance on the use of more innovative PDSs and update our 'good practice guidance' on electronic disclosure to help ensure consumers receive clear, concise and effective information when disclosures are delivered electronically and in electronic form (see Section D of draft updated RG 221).		*Please refer to our response to C1Q4 above.*
	C2Q3	**Are there any other risks to consumers that may be more apparent in the electronic environment?** *There are no new significant risks specific to these proposals. The electronic environment in Australia is mature and has been used by the financial services industry for many years.*
	C2Q4	**Do you think, where it does not already, any of our proposed updated guidance should be extended to other types of disclosures, such as FSGs and SOAs?** *Yes – we generally support consistent disclosure obligations across financial products and services, in order to minimise regulatory burden and costs.*
	C2Q5	**Do you agree with our updated good practice guidance in Section D of draft updated RG 221?** *Generally yes, however there are reservations with regard to its "no more than three clicks" guidance – see FSC submission, at para 82.*
	C2Q6	**Do you think complying with our updated good practice guidance would be too onerous?** *Generally no, however please refer to response to C2Q5 above.* *We consider it is important that ASIC's good practice guidance not be prescriptive in relation to the specificity of location on websites. Rather, the guidance should be principles-based.* *Point 5 of the table (page 19 of the draft RG 221) suggests that "a provider should direct clients" to take a copy of information accessed on-line. We believe a provider should provide a mechanism for clients to access a copy, and should take reasonable steps to make clients aware of the ability to access a copy, however we think ASIC's guidance (in requiring providers to "direct clients to take … a copy") is inappropriate and overly prescriptive and we do not support an obligation on providers to "direct clients to take (or access) a copy". It should be sufficient for the provider to inform the client how they may access the document, rather than provide a direction to them to take or access a copy as this is unduly prescriptive.*

	C2Q7	**Is there anything else you think would be usefully covered in our good practice guidance?** *Please refer to response to B1Q14 above.*
D1: We are considering aligning the treatment of financial services disclosures and credit disclosures in the future.	**D1Q1**	**Do you agree we should align the treatment of financial services disclosures and credit disclosures? Please give reasons for your answer.** *Yes, proposals to update the facilitation of electronic disclosures should be extended to credit disclosures.* *This would:* *(a) Reflect the current technological environment;* *(b) Maintain consumers expectations and preferences of communication;* *(c) Provide greater accessibility to disclosures;* *(d) Enable better record keeping for consumers;* *(e) Enable providers to give those disclosures to consumers more promptly; and* *(f) Make postal and electronic delivery preferences consistent.*
	D1Q2	**Have you encountered barriers to the electronic provision of credit disclosures? If so, what are those barriers?** *The main barrier is the requirement for express consent prior to being able to send information electronically. CP 224 mentions inertia and customer reluctance to change a default position, and the FSC's members have found this often to be the case, e.g. with moving to electronic statements.* *One FSC member gave as an example that even though a large percentage of credit card customers use on-line banking facilities, and have electronic access to their transaction history daily and statements monthly, a far smaller percentage has opted in to online credit card statements. This has resulted in increased cost of delivering paper statements that many customers never open.* *The FSC considers that for both initial disclosures (e.g. pre-contractual and contract documents) and ongoing disclosures (statements) electronic delivery should be the default position. Further, that the default position should apply to new and existing customers, with appropriate notice and opportunity for customers to*

		opt-in to paper if required. *A second barrier is the requirement (e.g. under the electronic transaction provisions incorporated into the National Credit Code and the equivalent ePayments Code requirements) that disclosures be able to be printed and/or stored by the customer. Where for example, documents are delivered to a tablet or mobile device, it may not always be clear whether the customer is able to store the document on the device, or forward the documents to another electronic address using their tablet or mobile device. The law should be flexible enough to allow the documents to be deemed given so long as the documents can be viewed on the tablet or mobile device and a copy of the documents is sent to the customer (e.g. by logging into a website) if a copy of the document is required for printing or downloading.* *Client barriers in products such as reverse mortgages have meant that there may be continued client demand for printed disclosure.* *The regulatory framework (e.g. NCCP guarantors disclosures) has meant that we have been unable to consistently apply electronic provision of credit disclosures to all parties, resulting in continued printed disclosures.*
	D1Q3	**Please estimate any compliance cost savings you would expect to realise if provisions for credit disclosures were aligned with our proposals for financial services disclosures.** *Material information on cost savings is not available to respond to this question.* *For online only products, providers should be able to mandate electronic delivery as a condition to the product (ASIC has already approved this going forward for new customers, but we suggest it also be extended to existing customers).*