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**By email: [policy.submissions@asic.gov.au](mailto:policy.submissions@asic.gov.au)**

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Dear Mr Leveritt

**ASIC consultation paper 167: Advertising financial products and advice services: Good Practice Guidance**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on consultation paper 167 and the attached draft Regulatory Guide (**RG**).

We are very supportive of the intent behind the draft RG and generally approve of the text. We make some observations and recommendations below.

**About Consumer Action**

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Since September 2009 we have also operated a new service, MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians experiencing financial difficulty.

**General comments**

We are very supportive of the proposal to develop good practice guidelines for advertising of financial products and advice services. We also broadly support the wording of the draft regulatory guide.

In particular, we agree with the principle stated at paragraph 17 that providers should strive to produce advertisements that assist consumers to make balanced decisions rather than simply attempting to avoid being misleading or deceptive. In our view, responsible marketing can be both effective for product promoters as well facilitate appropriate product choices by consumers.

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## Responses to specific questions

### Separate guidance for credit products and services

While we support the proposal for a separate guidance on credit advertising, we believe this should be done as a priority. Much of our organisation's casework concerns problems linked to use of credit products, many of which result in significant financial hardship. It is evident to us that general community understanding of the nature and risks of credit is poor. Improving disclosure in advertising will be a necessary part of the solution.

### Purpose and Scope

As a general principle we agree with the approach of establishing good practice guidance rather than prescriptive standards. However, we believe that prescriptive standards may be required in some circumstances.

One such circumstance will be where the product in question is unusually complex or risky, for example contracts for difference (CFDs). We note that ASIC has already released Regulatory Guide 227 on disclosure standards for over-the-counter contracts for difference so additional guidance on this topic may not be necessary. We approve of the requirement at RG 227.35 that advertisements for CFDs should include prominent warnings including that an investor risks losing substantially more than their initial investment. We suggest that similar requirements be applied to other products that ASIC considers are particularly complex or risky.

Other less complex products may also require prescriptive standards if ASIC becomes aware of significant or repeated poor advertising practice. One such product we believe warrants prescriptive guidelines is funeral insurance, for reasons we discuss below.

Another product that we believe requires prescriptive guidelines are timeshare holiday schemes, both because the product is very complex and because they are frequently marketed irresponsibly. Consumer Action frequently advises clients who have purchased holiday timeshare schemes, usually following high pressure sales presentations. Presentations tend to exaggerate the benefits of the scheme and do not sufficiently disclose the costs and risks involved, for example, that resale value may be much less than purchase price, that there may be availability problems with accommodation, and that ongoing fees are paid whether holiday credits are used or not.

#### **Recommendation:**

We recommend that the good practice guidance be complemented by prescriptive standards for products that are unusually complex or risky, or where ASIC becomes aware of significant or repeated examples of poor advertising practice. We suggest prescriptive guidelines are currently required for:

- funeral insurance policies; and
- holiday timeshare schemes.

## Nature of the product and overall impressions

Paragraphs 30 and 31 of the draft RG require that advertisements give a clear and complete explanation of the nature of the product. This is welcome, but we would add that not only should an advertisement explain the nature of the product, but the overall impression left by the advertisement gives an accurate representation of the product. While a fairly dull verbal explanation of the product could be complete and accurate, other words, images, music and tone can distract from that message and give a different impression.

For example, many financial products aimed at retirees are particularly complex and ripe for leaving misleading impressions. While most advertising include some statements about a product's risks, common imagery of smiling, secure older people living in good homes may outshine the risk messages. We accept that much imagery and tone may be "mere puffery", but we believe that the guidance should require the overall impression of advertisements to give an accurate impression.

Proposal D6 of the discussion paper and paragraph 123 of the RG discuss the need to consider the "overall impression" made by outdoor advertising. We believe this consideration should apply to all forms of advertisements. We understand this was identified as a problem for outdoor advertising because these advertisements will usually only be seen momentarily by a viewer passing in a car who is distracted by the task of driving. However, similar issues also arise with other forms of advertising, either because the audience is distracted by other elements of the advertisement or other things they are doing. This will exacerbate the tendency of audience members to notice only headline messages and miss less prominent ones. We suggest the "overall impression" principle should apply to all advertising.

### **Recommendation**

We recommend that the RG be amended to note that, as well as ensuring explicit description of the product is accurate and complete, promoters and publishers should ensure that advertisements give an overall impression that is accurate. In considering the overall impression of the advertisement, promoters and publishers should consider that an average audience member may not be giving the advertisement their full attention.

## Returns, benefits and risks

Proposal C3 of the consultation paper and the Risks section of the draft RG both discuss the need to give 'prominent' warnings about risks and not give undue prominence to benefits over risks. The concept of prominence is also used throughout the rest of the draft RG.

"Prominence" will be an overarching theme in regulation of advertising and we suggest that lack of prominence will be the cause of much uncertainty over the meaning of advertisements. It is important that the meaning of "prominent" is clear. We suggest it should be defined in detail.

Paragraph 42 of the draft regulatory guide states that information about risks should "be given sufficient prominence to information about returns and benefits". This guidance should be more forthright and, at the very least, require that warnings of risks are as prominent as statements

regarding benefits. Given the 'hyperbolic discounting' behavioural bias—that is, the fact that we over-value immediate benefits and costs, and undervalue future benefits and costs—there is also a case that risks should be given greater prominence than benefits<sup>1</sup>.

**Recommendation**

We recommend that further guidelines be developed to define "prominence" for the purposes of the RG, including examples of when a warning, disclaimer or statement of risks will be prominent and when it will not.

**Recommendation**

We recommend that paragraph 42 of the RG be rephrased to state that information about risks should be "at least as prominent" as statements about benefits.

Warnings, disclaimers, qualifications and fine print

*Disclaimers etc in the main advertisement*

We strongly support the requirement at paragraph 48(c) of the guide that all warnings, disclaimers, qualifications etc should be included in the advertisement, not in any links. The Federal Court decision of *ACCC v Telstra* [2007] FCA 1904 found that an advertisement that directed consumers to a website for information about disclaimers was misleading.

*Use of fine print*

Much fine print on television advertisements is effectively impossible to read either because of the size or colour of the text, the length of time the text is on the screen or a combination of these factors. We acknowledge that this problem is not unique to financial product advertising.

We support the approach taken by the draft regulatory guide at paragraph 48(b) and 114 which requires that warnings (et cetera) should be prominent enough to be understood on the first viewing of the advertisement.

One example of good practice we are aware of are the series of television advertisements by Industry Super Funds which compare the performance of an industry fund against a for-profit fund. A disclaimer (to the effect that commissions and fees could change in the future) is added which is spoken at the same volume and speed as the rest of the advertisement rather than being included in fine print. This method communicates the disclaimer far more clearly than a fine print version.

Fees and costs

We approve of the intent of proposal C5 and paragraph 52 of the RG that, where fees and costs are discussed in an advertisement, a realistic impression of overall fees and costs should be given.

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<sup>1</sup> Louise Sylvan, *The Australian Collaboration Fact Sheet: Behavioural Economics*, available at: [http://www.australiancollaboration.com.au/factsheets/1.%20Behavioural\\_Economics.pdf](http://www.australiancollaboration.com.au/factsheets/1.%20Behavioural_Economics.pdf).

Funeral insurance policies are one example of a product where advertisements disclose fees and charges particularly poorly. A number of funeral insurance products are currently being advertised expressing the cost of the product as a small amount (around \$1 to \$5) per week for middle aged person (around 50). However, these advertisements do not disclose that the total price paid by the insured may be far more than the cost of the cover they are purchasing. For example, analysis by the Combined Pensioners and Superannuants Association of New South Wales found one policy that could cost a 50 year old up to \$140,000 for \$6,000 of cover.<sup>2</sup>

To our knowledge these advertisements also do not disclose that premiums can increase as the insured ages or that the insurer can unilaterally increase premiums.<sup>3</sup> Further, they do not to our knowledge disclose that an insured who cancels their cover loses all premiums paid.

We found this information disclosed on product websites and on PDS. However, as ASIC is aware, there is significant evidence that consumers do not rely on PDS and/or websites to make financial decisions.<sup>4</sup> Further, a consumer relying on the advertisement alone would be entirely unaware that they could pay thousands of dollars in premiums, their insurer could increase the premium and the insured would presumably have no recourse except to cancel their contract and forfeit all premiums paid.

In our view, a very poor standard of advertising is typical for this product and as recommended above, we believe prescriptive guidelines are warranted. Responsible, balanced advertising for this product would include prominent disclosure of the following points:

- that the weekly price quoted may increase with the age of the consumer, or at the election of the insurer;
- the likely total cost paid by the consumer to purchase the cover, considering possible price rises;
- that if the consumer cancels the contract for any reason and at any time, they forfeit all premiums paid. This means a consumer cancelling the contract is likely to lose hundreds or thousands of dollars.

## Ratings

Use of ratings may be misleading by omission if the ratings system measures only a limited number of providers or products in a particular market.

### **Recommendation**

We recommend that the Ratings section of the RG be amended to note that ratings

<sup>2</sup> Accessed 31 October 2011 from [http://www.cpsa.org.au/index.php?option=com\\_content&view=article&id=336:the-140000-funeral-the-pitfalls-of-funeral-insurance-&catid=23:funerals&Itemid=54](http://www.cpsa.org.au/index.php?option=com_content&view=article&id=336:the-140000-funeral-the-pitfalls-of-funeral-insurance-&catid=23:funerals&Itemid=54)

<sup>3</sup> InsuranceLine Funeral Plan PDS. Accessed 26 October 2011 from [http://www.insuranceline.com.au/Downloads/FP\\_Brochure.pdf](http://www.insuranceline.com.au/Downloads/FP_Brochure.pdf). Australian Seniors Insurance Agency Funeral Insurance Plan PDS, p 11. Accessed 26 October 2011 at [http://www.seniorsfuneralplan.com.au/resources/pdf/ASIA\\_Funeral\\_PDS.pdf](http://www.seniorsfuneralplan.com.au/resources/pdf/ASIA_Funeral_PDS.pdf)

<sup>4</sup> ASIC, Submission to PJC Inquiry into Financial Products and Services in Australia, page58-9, available at: [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC-submission-PJC-Financial-Products-and-Services-Inquiry-2009.pdf/\\$file/ASIC-submission-PJC-Financial-Products-and-Services-Inquiry-2009.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC-submission-PJC-Financial-Products-and-Services-Inquiry-2009.pdf/$file/ASIC-submission-PJC-Financial-Products-and-Services-Inquiry-2009.pdf).

should only be used in advertising if the ratings system covers all major products in that particular field.

### Use of certain terms and phrases

ASIC should consider more prescriptive guidelines that either ban the use of certain terms or only allow their use when certain conditions apply. Terms that would be subject to prescriptive guidelines would be those that ASIC believes are commonly misused and have high emotive impact in financial product advertising. Examples could include “free”, “secure” or “guaranteed”. To our knowledge, these terms could rarely if ever be applied without qualification to financial products.

Similar reform has been made recently by the Australian Communications and Media Authority’s *Reconnecting the Customer* report which required telecommunications providers to refrain from using the term “cap” which was commonly used in a misleading manner. Proposed amendments to the *National Consumer Credit Protection Act 2009* will restrict use of the term “financial counsellor/ing” and “interest free”.

#### **Recommendation**

We recommend that the RG provide more prescriptive guidance around certain terms which are commonly misused.

### The advertisement's target audience

We approve of the intent of proposal C9 and paragraph 87-90 of the draft RG that advertisements should be able to be understood by the audience that might reasonably see them and that advertisements for complex products should not be targeted at wider audiences than is appropriate.

However, determining which venues will be suitable to advertise complex financial products will be difficult, as even specialist publications targeted at financial sector professionals will also be accessed by casual investors. We suggest that advertisements for products too complex or risky for a non-professional audience should include 'health warnings' stating key risks and that consumers should seek professional advice before deciding to purchase or invest.

#### **Recommendation**

We recommend that the Target Audience section of the RG be amended to note that advertisements for particularly complex or risky products should include high impact warnings.

### Consistency with disclosure documents

We support the guidance at RG paragraph 94 that statements in advertisements should be consistent with those in disclosure statements. However it is also important that the impression given by the advertisement is consistent with the disclosure statement.

As noted above, advertisements make use of a variety of sensory cues to communicate a message, and a well crafted advertisement can create a different impression to a static disclosure document, even if the same words are used.

**Recommendation**

We recommend that paragraph 94 of the draft RG be amended to note that statements and the overall impression of an advertisement should be consistent with statements in corresponding disclosure documents.

Application to all forms of advertising

We agree with proposal D1 that the advertising guidance should apply to advertising communicated through any medium. We see no reason for any exemptions.

**Further recommendations**

Engaging consumers

While the draft regulatory guide will help improve the quality of advertising in this market, more could be done by ASIC to assist and engage consumers.

**Recommendation:**

We recommend that ASIC:

- make examples of poor advertising included in the draft RG publicly available (perhaps on the MoneySmart website) to make consumers aware of common problems; and
- encourage consumers to report financial advertising that they find misleading, unclear or otherwise unsatisfactory (perhaps through the MoneySmart website). This would assist ASIC to keep up to date with emerging problems.

Further research

Targeted behavioural advertising and particularly internet behavioural advertising (for example, tracking of a consumer's activities online such as their search histories and web pages visited) is an emerging problem area. While not exactly relevant to this consultation, we're particularly concerned about credit or 'debt relief' spruikers targeting vulnerable people identified through information provided by credit reference agencies and/or previous internet usage.

**Recommendation:**

We recommend that:

- ASIC conduct further research into internet and behavioural advertising and consider the need for any further guidance or regulation for providers using these tools; and
- ASIC move to ensure that consumers are not monitored for the purposes of creating behavioural advertising unless they have opted in to receive it.

Please contact David Leermakers on 03 9670 5088 or at [david@consumeraction.org.au](mailto:david@consumeraction.org.au) if you have any questions about this submission.

Yours sincerely

**CONSUMER ACTION LAW CENTRE**



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