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Dear Geoff

## **ASIC Consultation Paper 167**

### **Advertising financial products and advice services: Good practice guide**

Thank you for the opportunity to comment on ASIC Consultation Paper 167 (CP 167).

The Australian Financial Markets Association (AFMA) is the leading industry association promoting efficiency, integrity and professionalism in Australia's financial markets and provides leadership in advancing the interests of all market participants. These markets are an integral feature of the economy and perform the vital function of facilitating the efficient use of capital and management of risk. Market participants perform a range of important roles within these markets, including financial intermediation and market making.

AFMA represents over 130 members, including Australian and international banks, leading brokers, securities companies, state government treasury corporations, fund managers, traders in electricity and other specialised markets and industry service providers.

AFMA supports the proposed guidelines in the draft regulatory guide and believes they will assist investors to make better informed decisions concerning financial products and services. However, the good practice guide is potentially too prescriptive and all-encompassing in certain respects. AFMA seeks clarification on a number of matters, which are set out in more detail in the attached Comments Table.

The overall themes of our comments can be categorised as follows:

### **1. Definition of 'advertisement'**

The regulatory guide should clearly define what exactly is meant by the term 'advertisement'. On reading the guide it appears that there is scope for all website content, recommendations and other documents sent directly to clients to be captured.

The common understanding of what is meant by 'advertising' would be any advertisement which seeks to induce the public to buy or invest in a product or service. However, the guide does not make any distinction between publicly available material seeking to induce a sale and publicly available material which could equally be considered to be an information piece – that is, there is no emotive language, suggestions or images, no rhetorical questions and so on.

### **2. Mass media v internet**

A distinction should be made between 'mass media' and the 'internet'. While the internet is a channel through which many people can be targeted or reached, the audience actually selects whether or not to view the content of websites. Many people use the internet as a source of obtaining information (and as a source of additional information to supplement advertisements seen in traditional forms of mass media), and the audience can view the content, which is generally more detailed than other forms of mass media, at their own pace and repeatedly if required. Furthermore, due to the content and style of radio programs and television programs, producers can assist promoters in targeting the desired audience for their particular product or service, however there is no way for a standalone website to prevent an inappropriate audience from viewing its content.

### **3. Complex products**

The good practice guide requires complex products to be appropriately targeted however the term 'complex product' is not defined within the guide, nor are any specific products identified.

### **4. Click throughs**

The proposed requirement to have all relevant information on the one page (without using click throughs) is unrealistic in terms of the methods by which people access the internet and particularly in regards to complex financial products (which necessarily require greater levels of explanation and disclosure). The guide suggests that if the material cannot be contained to one page then it is probably not appropriate to have the material available on the internet. People are able to access the internet on iPods, smartphones, iPads and other small devices – the reality is that it would be difficult to explain even simple financial products and services and make all the necessary disclosures, in a readable format, on any of these devices. The overriding consideration should not be whether all the relevant information is self-contained, but rather that all the relevant information is available and presented in a manner which does not serve to mislead or deceive.

## 5. Banners

The term 'banner' requires clarification. It is not clear whether the guide is referring to banners which are designed to induce interest only, or also to banners which simply contain a name or logo which then direct through to pages which contain the relevant information concerning a product or service.

## 6. Advertising that targets retail investors

While there is no direct reference in CP 167 or the draft regulatory guide, we assume that the good practice guide is aimed at advertising which has retail investors as the target audience. There are from time to time certain forms of advertising and marketing that are targeted only to wholesale and institutional investors. In these instances, provided that the advertising is effectively restricted to wholesale investors, a number of elements of the good practice guide are not relevant.

It would be helpful to clarify the scope of the guide in this regard.

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Please contact me on 02 9776 7997 or [tlyons@afma.com.au](mailto:tlyons@afma.com.au) if you would like to discuss any aspect of this submission.

Yours sincerely



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**Tracey Lyons**  
**Director Market Operations**

CP 167 Section/paragraph reference	Heading/subject	Comments
B1	<b>Promoters and publishers</b>	<p>There is a concern about ASIC's proposals relating to publishers, and that they could be read as attempting to impose a heightened responsibility on publishers.</p> <p>It is important that promoters who perform marketing compliance tests to their advertising be allowed to make their own judgements as to whether a piece of advertising is compliant, and as a result, suffer any consequences should the advertising be found to not be compliant (provided an advertisement does not blatantly disregard existing rules). If a heightened responsibility is imposed on publishers then there is potential for conflict over different interpretations on what is compliant, even where both parties have sought legal advice. Further, this will have an unnecessary financial implication with duplication of marketing compliance testing, and the likelihood that publishers who strengthen up their internal marketing compliance teams will pass that cost on to promoters.</p> <p>However, if ASIC is merely reiterating to publishers their existing obligations, then this should be stated more clearly.</p>
B2 Q1	<b>Proposed application of good practice guidance</b>	<p>It would be helpful if ASIC could clarify the scope of the good practice guidance with clear upfront definitions of what ASIC considers to be "advertising" or "advertisements" for the purposes of the guidance. In particular we seek clarity as to what types of advertisements could potentially be excluded. By way of example, RG 000.9 suggests that advertising is "any communication whose purpose is to inform consumers about or promote financial products or financial advice services." We request clarity as to whether an offering such as market commentary constitutes "advertising". From a financial services law perspective, the provision of views/forecasts in market commentary may in some instances constitute financial product</p>

		<p>advice if the commentator provides general advice on a class of financial products. This may lead to such market commentary being caught by the regulatory guide as promoting a financial advice service.</p> <p>We seek further guidance on whether the good practice guide applies to communications from product issuers to financial intermediaries such as research houses, dealer groups and financial advisers – for example, direct emails or industry journals – which are not intended to be provided to potential investors (and a warning would be included in such material that it is for adviser use only). Usually such communications provide more technical information that enables financial advisers to better understand and compare products.</p> <p>We also suggest a clear demarcation between the requirements applying to advertisements generally and those of formal disclosure documents such as product disclosure documents and prospectuses. Disclosure documents are comprehensively regulated under the Corporations Act and supplemented by specific ASIC guidance, and in our view it is not appropriate to apply the requirements of formal disclosure documents to all forms of advertising. For example, the proposal to ensure equal representation of risks versus benefits of a financial product in all forms of advertisements will have commercial impracticalities in banner advertisements and outdoor advertising. Further specific comments are set out below.</p>
C1 Q1 – Q3	<b>Purpose and scope of the good practice guidance</b>	<p>Good practice guidance is the right approach as opposed to prescriptive standards. However, in many instances (specifically noted in this response where appropriate), more examples are required of what ASIC considers to be compliant with its guidance and those advertisements that may not be included within the scope of the guidance at all - for example, advertisements that are about building brand awareness and not considered to be “financial promotions”, even if they are issued by a financial services provider.</p>
C2	<b>Nature of the product</b>	<p>The offering of financial products requires a large amount of product disclosure, together with some form of client suitability testing or vetting for products such as Contracts for Difference</p>

Q1 – Q4		<p>(CFDs), before a client can begin trading. It is not possible for a consumer to see an advertisement and then commence trading the product without going through several additional steps. These steps include the client giving to the provider, and receiving from the provider a range of additional information and disclosure about the product.</p> <p>Financial product advertisements should be accurate, balanced and above all should not be misleading. However, in terms of potentially lengthy product explanations that may be required within a simple advertisement, the guidance does need to take into account those highly regulated products where the advertisement is only the very first step before a client can be permitted to trade in the product. Further explanations are required from ASIC to clarify what it considers to be a “<i>clear and complete</i>” product explanation in these cases. Without further guidance, a self-contained product explanation may be ruled as lengthier than any form of advertising permits.</p> <p>In determining the requirement for a “<i>clear explanation</i>” of the nature of the product, ASIC also needs to consider the intent of the advertisement. For example, the advertisement may be promoting the manner in which a product is provided, and not the actual product. How this would impact the good practice guidelines and the required content of the advert is not clear.</p> <p>In summary, the need to “<i>..clearly explain the nature of the product in terms likely to be understood..</i>” and for the advertisement to be “<i>complete</i>” are far from clear in practice and require considerable additional explanation, some specific product consideration and worked examples together with clear exemptions.</p>
C3	<b>Returns, benefits and risks</b>	<p>We agree that benefits should not be given undue prominence compared with the risks. However, the proposed guidance that an advertisement should deal equally with risk discussion and disclaimers as it does with the benefits in the general body of the ad does not take into account the cost of advertising. If licensees are required to increase the size and</p>

		<p>scope of risk discussion and disclaimers, they will pay noticeably more for advertising or be forced to reduce the frequency of advertising.</p> <p>It would be helpful if the guide clarified what is meant by “undue prominence”.</p>
C4	<b>Warnings, disclaimers etc</b>	<p>We agree that such warnings should not be inconsistent with other content including headline claims, and that they should be appropriately prominent.</p> <p>We reiterate the point above, however that simple advertisements that are not considered to be financial promotions but building brand awareness should not be subject to the same risk warning requirements.</p> <p>Further guidance on the use of internet banners and similar online advertising where there are space constraints would be appreciated.</p>
C6 Q2	<b>Comparisons</b>	<p>Comparisons can be a useful educational tool in understanding the differences between particular products. Example 17 at RG 000.56 compares dissimilar products in such a way that consumers were led to believe a term deposit was similar to a debenture. However, we suggest that comparisons of products that do not have sufficiently similar features could be useful to show potential investors how a particular product works, provided that the comparison highlights the differences and risks, in addition to the similarities.</p> <p>Alternatively, product issuers could provide comparisons as an educational tool to financial advisers only, to help explain how a product works compared to other financial products. These comparisons would not be provided to potential investors.</p>
C7	<b>Past performance and forecasts</b>	<p>The proposal at C7(a) is that past performance information in advertisements should be accompanied by a warning that past performance is not indicative of future performance. However, the rationale for this requirement does not seem to justify it. It appears that ASIC is focussed on particular types of products (the example at RG.000.72 on page 58 relates to</p>

		<p>managed investment schemes). It is difficult to see the necessity for such a requirement across all financial products and services. For example, if a bank was voted best Australian bank of the year for the past three years and stated in its advertising that it had been voted “best Australian bank over the past 3 years”, would it also be required to state “this does not mean we will be awarded best bank in the future” ?</p> <p>It would be helpful if ASIC could refine the scope of the products this proposal is targeted to. Alternatively, clarification of what is considered to be a reference to “past performance” would assist.</p>
C8 Q1  Q8	<b>Use of certain terms and phrases</b>	<p>We seek further guidance on whether current practices adopted by industry will need to change regarding the use of certain terms and phrases, and in particular the use of the word “guarantee”. For example, we seek guidance on what is acceptable wording in disclaimers in advertisements for products issued by certain licensees that are covered by the Government Guarantee.</p> <p>RG 000.86 and Example 27 indicate that well-known identities, celebrities and media commentator should have reasonably held and informed opinions on the products or services they are endorsing. We seek guidance from ASIC on how licensees can meet this requirement – for instance, should a licensee provide the “endorser” with disclosure documents related to the offering and ask them to read the information and sign a declaration that they have a reasonable understanding of the product or service they are endorsing, or is some higher standard required?</p>
C9	<b>Target audience</b>	<p>We agree with all of the matters set out by ASIC regarding target audience.</p> <p>However, for products where some form of client suitability or vetting procedure is carried out before an account is opened and where a certain demonstrated level of financial understanding is required to be permitted to trade, these concerns should be very largely self-</p>

		<p>regulating.</p> <p>Financial services providers spend considerable time and effort to ensure that advertising is carried out in, and at, demographically suitable forums/times/media. However, this will not (and we suggest, cannot) totally prevent inappropriate or inexperienced investors from viewing an advertisement for a particular financial institution and its products. In the event that it would be inappropriate for such a person to become a client, then there are considerable checks, balances and protections in place at all stages of the client account opening process to ensure that such an outcome does not happen.</p> <p>It is obviously in the best interests of every financial product/service provider to ensure that marketing budgets are spent effectively, and that advertising is directed to the appropriate target audience. To further regulate this common-sense proposition seems only likely to add complexity and confusion as to what might be permissible and what is not.</p>
D1	<b>What advertising does the guidance apply to?</b>	<p>We reiterate the point that simple, short form advertisements that are not a financial promotion need to be carved out from the scope of the regulatory guide.</p> <p>The regulatory guide does not adequately distinguish between different types of advertising – for example, between a billboard and a brochure. If there is a concern that investors make their decision based on advertising and not on a PDS, we do not believe that concern is valid in the case of advertisements like billboards, newspapers or TV advertisements. But investors may start to form a view based on a brochure. The impact this has on the regulatory guide is that many of the proposed requirements are achievable and make sense in the context of a brochure, but are more difficult to achieve in the context of an ad in a paper.</p> <p>Additional guidance on banner advertisements and tiles would be useful. The purpose of banner advertisements and tiles is to provide a link to a webpage that contains more information and often, the offer document. We consider that a consumer, whilst attracted by</p>

		<p>the banner advertisement or tile, would be unlikely to make a decision based on the banner advertisement itself. We note the issues where consumers need to click through to additional information to ensure they are not misled, but if the statements in the banner advertisement themselves are not misleading (and are merely signposts to the full advertisement), then the banner advertisement should not need to be “self-contained”.</p> <p>The space constraints of banner advertising and tiles which means the full disclaimers could not fit readily into the banner or tile, would prevent this form of media by being used by the financial services industry.</p> <p>With the increasing use of social networking by the community generally to comment on financial products and services, we seek guidance from ASIC on how licensees can respond to such communication on social networking sites. Take for example an adviser discussion group on a site like LinkedIn that decides to discuss a specific product of a licensee, which results in some commentary that is not entirely accurate in the eyes of that licensee. This type of commentary does not appear to be captured by the regulatory guide, but if the licensee was to participate and make a comment to correct that misunderstanding, this would presumably be covered by the regulatory guide. We seek guidance from ASIC on how to address this - for instance, how a licensee could practically meet the requirements to contain a balanced view of risks/benefits and other requirements as outlined in the regulatory guide in its response.</p> <p>Given the increased use of social networking by some sectors of the community to research and comment upon financial products and services, the inability of, or difficulty for, licensees in participating in these forums could be detrimental to retail clients.</p> <p>In addition, search engine results (either natural (SEO) or paid for (PPC)) should be specifically excluded from the scope of the regulatory guide. While this is not listed in the media list on page 25 of CP 167, it is an area that should be dealt with clearly. It would be completely impractical to include internet search results, as natural SERPS (being the text results you see when you search the internet using a search engine such as Google) are based on what the</p>
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		search algorithms capture. The available character length for text in PPC SERPs makes inclusion of any risk warning impossible.
D2	<b>Mass media</b>	<p>We reiterate our comments in relation the target audience at C9 above and that the particular type of media where providers choose to advertise should be very largely self-regulating. To over-complicate this will lead to confusion and anomalies that are unnecessary and serve no benefit.</p> <p>We also note that given the content constraints of many forms of mass media, especially those developing mediums such as mobile internet, the requirement for ASIC to carve out advertisements building brand awareness rather than fully fledged financial promotions is more important than ever.</p>
D5	<b>Internet advertising</b>	<p>With regards to internet advertising (including over mobile phones, micro-blogging etc), we go into further detail on this subject below with our comments on the draft regulatory guide itself. While we agree with ASIC's intent that the guidance should be largely media neutral, given the realities of internet advertising, the very rapid evolution of this form of media, and its enormous uptake by the Australian public, we submit that extreme care should be taken to ensure the final guidance is future-proofed.</p> <p>We reiterate the point above that simple, short-form advertisements that are not a financial promotion need to be carved out from the scope of the regulatory guide.</p> <p>The proposed requirement that internet advertisements be self-contained poses problems for certain types of internet advertising such as banner advertisements. RG 000.18 effectively creates a prohibition on such banner advertising, and the view that the reader cannot leave the site where the banner is hosted in order to obtain all requisite information and disclosures, is too complicated for a banner advertisement. It may have the result of stopping banner advertising for financial products and services.</p>

		Further clarity is needed on the requirement for consumers to be able to keep copies of advertisements - for example, banner ads that are constantly moving and changing. Many licensees keep copies of such ads that can be provided upon request, but cannot guarantee that a consumer would be able to print or save such an ad upon demand as it is revolving. This requires further thought to account for the practical realities of how internet advertising works.
D6	<b>Outdoor advertising</b>	We reiterate the point above that simple, short-form advertisements that are not a financial promotion need to be carved out from the scope of the regulatory guide.
E	<b>Regulatory and financial impact</b>	Without further clarification on the specific requirements of the draft regulatory guide, neither we nor our members are able to provide any reliable indication of the likely compliance costs or the effect on competition.
<b>Draft Regulatory Guide</b>	<b>Heading/subject</b>	<b>Comments</b>
<b>Section/paragraph reference</b>		
000.15	<b>Overview of good practice guidance</b>	<p>We agree with each element set out in this table with the following exceptions:</p> <p>(a) Nature of the product - not every advertisement is focused on the primary product offered. For example, it may be highlighting a new feature of the trading platform or the manner in which the product is offered. How and why these advertisements should deal with the requirement to explain the nature of the offered product in full in a self-contained manner needs further explanation and example.</p> <p>(b) Target audience - we refer to our comments above. We agree that financial products should not be stated or implied as suitable for any class of consumers who have not</p>

		been so assessed. Target audiences should be a self-regulating matter left to the promoters.
000.16 - Table 2	<b>Media-specific guidance</b>	Please refer to the comments about internet advertising at D5 above.
000.30-31	<b>Nature of the product</b>	Please refer to the comments in relation to RG 000.15 above.
000.42 and 000.45	<b>Risks</b>	We agree with the matters stated by ASIC in this section including that any advertising should not undermine the importance of any trading risks. That said, there are a large number of commonly used risk mitigation and trading tools available to financial services clients that, when used knowledgeably and effectively, can minimise many kinds of risks. Any advertising (including risk warnings) must equally be permitted to give these tools and account options the prominence they deserve.
000.47 – 000.51	<b>Warnings, disclaimers, qualifications and fine print</b>	<p>We agree that headlines must not be misleading and the remaining contents of the advertisement itself should not be inconsistent with the headline (or ultimately with the PDS).</p> <p>However, we disagree that using links to additional information or references to the PDS cannot be beneficial to a consumer, or that such links may render the advertisement itself misleading. In our view, there is arguably no financial product that can be fully and completely explained in a standard sized/length advertisement. This includes insurance policies, mortgages and all manner of very common financial products. Essentially, all such products have fine print and provided nothing is claimed within the advertisement that is inconsistent with the fine print, then providing a consumer with the route to find out more about the product is the essence of what advertising is about, not something to be viewed suspiciously or prohibited by regulation.</p> <p>One option that ASIC might consider is a “one click away’ policy. Using a banner as an example – as long as the banner content is accurate, balanced and not misleading or deceptive, then it should be reasonable that all the other information and full terms and</p>

		conditions are only “one click away” on a campaign or landing page. Consumers already know that to gain more information on a banner or in social media and micro blogging sites, they must click through to that information.
000.52 – 000.54	<b>Fees and costs</b>	We support ASIC’s intent to ensure complete transparency of fees and costs.
000.71	<b>Awards</b>	<p>There are potentially lengthy explanatory requirements set out in CP 167 in relation to awards, and the requirements of this aspect of the proposal are not entirely clear.</p> <p>Please clarify what ASIC believes is required in the following circumstances:</p> <ul style="list-style-type: none"> <li>(a) where a provider advertises separately within an award-granting publication;</li> <li>(b) where, once an award is won, payment is made for the use of an award provider’s logo.</li> </ul> <p>The view of our members is that neither of these events is something that compromises the integrity of the award or requires disclosure. These are simply commercial realities that are unrelated to the independent granting of the award. Specific explanations of such matters or the amount of any financial contribution (especially in the limited confines of an advertisement) may be impractical without any benefit to retail clients, and could be commercially sensitive.</p>
000.87 – 000.90	<b>Target audience</b>	Please see comments above on this subject. We agree with the matters set out by ASIC in this section, however our view is that this should be largely self-regulating.
000.92 – 000.93	<b>Complexity</b>	RG 000.93 states that that “ <i>..the more complex the product, the less likely it can be advertised in limited space</i> ”. ASIC should clearly articulate those advertisements (such as those creating brand awareness rather than financial promotions) that are not included within the scope of

		<p>the guidance together with the status of advertisements that focus on very discrete matters, such as a particular pricing offer or trading platform advantage that may be the subject of the advertisement.</p> <p>It is too simplistic to suggest that advertisements for a particular product are not suitable on a particular forum given the space constraints. ASIC's overriding concern should be that the advertisement is not misleading or deceptive, and that it is accurate and balanced.</p>
000.107 – 000.108	<b>Distinguishing advertising and program content</b>	<p>The guidance needs to clarify how it applies to program sponsorship - for example, sponsorship of a particular program or sporting event that is intended to build brand awareness. The very point of sponsorship is brand building and in the course of any coverage there will be mention made of the name of a sponsor together with some mention of the products they offer. Corporate logos will also be made visible in some way.</p> <p>Our view is that sponsorship is obviously recognisable as such and should not be included in the scope of the regulatory guide.</p>
000.116 – 000.121	<b>Internet advertising</b>	<p>We refer to our comment at D5 above.</p> <p>Forums such as mobile phones are very rapidly growing area of advertising spend. Australia has one of the highest penetrations of smartphone use in the world at 37%, with that set to rise to 50% in the coming year<sup>1</sup>. Some of our members believe this use to be even higher. If the use of mobile phones by the public to surf the internet is evolving at such a rapid pace, then any regulations affecting advertising in such a forum needs to be very carefully considered. We agree that advertising must be clear, balanced, and accurate, and should not be misleading or deceptive. But we disagree that the space constraints of advertising in such media should be so restrictive. We believe that more proportional consideration should be</p>

<sup>1</sup> [www.google-au.blogspot.com/2011/09/smartphones-at-dinner-table-smartphone.html](http://www.google-au.blogspot.com/2011/09/smartphones-at-dinner-table-smartphone.html)

		<p>given to all the other technical offerings (such as links or click throughs) to ensure the message presented is wholly in accordance with these requirements, without needing to appear up front and all together with every other part of the advertising content.</p> <p>These requirements will impact the entire financial services industry and yet the space constraints of various media in relation to the advertising of many products appear to have been pre-judged. Little regard has been paid to the fact that communication between a client and provider is often two-way throughout the account opening process, which is not as simple as a client simply seeing an advertisement and then starting to trade.</p> <p>We are of the view that ASIC has pre-emptively gone too far in its judgment of this particular matter in relation to the various media available and its absolute emphasis on “<i>self-containment</i>”. The draft regulatory guide runs the strong risk of causing the financial services sector to be unnecessarily left without a significant consumer forum in which to advertise. We believe this would be an unintended result and not one that will serve the interests of the Australian investing public.</p>
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