

[PS 114]  
**Policy Statement 114**  
**Undesirable advertising in the futures industry**

**Chapter 8 — Futures industry**

*Issued 28/10/1996*

**Headnotes**

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*Section 1205; ASC exercise of discretion to prohibit or control futures advertising; public interest.*

**Purpose**

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[PS 114.1] In this policy statement the ASC sets out what it will consider when exercising its power under s1205 of the Corporations Law (Law). Section 1205 deals with undesirable advertising. The ASC can prohibit a person from publishing or broadcasting statements about futures contracts, futures broking businesses and futures advice businesses unless the ASC first approves the form and content of the statements (s1205).

**Publishing and broadcasting statements**

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[PS 114.2] Subsection 1205(2) of the Law states:

“Where the Commission considers that, having regard to conduct that a person has engaged in, is engaging in, or proposes to engage in, it is in the public interest to do so, it may, by written order given to the person, prohibit the person from publishing or broadcasting statements about:

- (a) futures contracts; or
  - (b) businesses carried on, or proposed to be carried on, by persons and involving dealing in futures contracts on behalf of other persons; or
  - (c) futures advice businesses or proposed futures advice businesses;
- unless the form and content of the statements have first been approved by the Commission.”

A breach of an advertising prohibition order may result in a fine, a term of imprisonment, or both.

**[PS 114.3]** “Publish” and “broadcast” are defined in s1205(1) in broad terms. Publishing a statement means:

- (a) inserting it in a newspaper or periodical or causing it to be inserted;
- (b) publicly exhibiting it or causing it to be publicly exhibited; or
- (c) including it, or causing it to be included, in a document that is sent or delivered to a person, or thrown out or left where a person lives or works (regardless of whether they requested the statement).

Broadcasting a statement means transmitting it by wireless or television or causing it to be broadcast in these ways.

**[PS 114.4]** The ASC considers that the s1205 prohibition extends to undesirable advertising that is publicly accessible through on-line services or computer networks such as the Internet. The ASC considers statements are “publicly exhibited” on the Internet if they:

- (a) could be browsed on a web page; or
- (b) are sent unsolicited to people, for example, by someone who has purchased lists of electronic mail addresses.

**[PS 114.5]** If the ASC considers it is in the public interest, it will prohibit the publishing or broadcasting of undesirable advertising. The ASC will do this by giving a written order to anyone who has, is, or is proposing to, publish or broadcast advertisements which have not been approved by the ASC (s1205(2)). Before it does this, the ASC will give the person an opportunity to appear at a private hearing to make arguments and give evidence about the matter (s1205(3)).

## **The public interest**

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**[PS 114.6]** The ASC considers that two main public interest considerations should guide the use of its discretion under s1205(2). These public interest considerations are:

- (a) protecting members of the public (for example, potential buyers or sellers of futures contracts) from conduct which may mislead them about dealings in futures contracts, futures advice business or futures broking businesses; and
- (b) maintaining the integrity of the futures market.

**[PS 114.7]** Before exercising its discretionary powers under s1205, the ASC will look at the whole context in which a statement appears or a broadcast is, or may be, made. This will include looking at the conduct of the person when publishing statements and the content of the statement itself. The person may, for example, use high pressure sales approaches to attract the public to a particular product or service. The person may also act

dishonestly by including false and misleading statements in their advertising material.

## Unacceptable conduct

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**[PS 114.8]** Paragraphs 9 and 11 of this policy statement give examples of the types of conduct and advertising and promotional statements that the ASC considers unacceptable because they are not in the public interest. The list in para 9 outlines general forms of conduct which would prompt the ASC to act under s1205. The list in para 11 is more specific, with examples of the content of statements in advertising and promotional material which would concern the ASC. This list reflects futures industry advertising standards adopted by the Sydney Futures Exchange (SFE) and overseas futures exchanges. The examples given are illustrative, not exhaustive.

## Honesty and disclosure to clients

**[PS 114.9]** The ASC will consider exercising its discretion under s1205(2) if statements (for example in advertisements) or broadcasts:

- (a) are false, or misleading or likely to mislead the public;
- (b) fraudulently induce persons to deal in futures contracts;
- (c) omit or misstate facts so that they make the statement or broadcast misleading or deceptive;
- (d) contain statements of opinion that are not clearly identified as such; or
- (e) do not have a reasonable basis in fact.

**[PS 114.10]** The ASC will generally be prepared to use its power to make an order under s1205(2) when that is the most effective way of protecting members of the public or of maintaining the integrity of Australian futures markets.

## Contents of advertisements and promotional material

**[PS 114.11]** The following are examples of the type of statements which would prompt the ASC to consider exercising its discretion under s1205(2) of the Law:

- (a) futures advertisements and promotional material suggesting that futures trading is appropriate for all persons;
- (b) statements which may give a false indication of a person's association with industry bodies, scale of activities, resources or services which may be supplied;
- (c) statements which may give a false indication that the person is acting as principal when in fact the person is acting as an agent;

- (d) statements which may give a false indication of the independence of a person when, for example, the person receives commissions or other benefits from, or has ownership links with a product provider which may create a product bias that influences recommendations or advice which that person gives;
- (e) references to potential profits from futures trading which are not accompanied by a balanced and equally prominent reference to the potential loss of funds from futures trading;
- (f) reference to past trading profits without including a statement that past results are not a guarantee to future performance;
- (g) statements containing selective information about the past performance of futures contracts or the person's business which may exaggerate success or disguise poor performance;
- (h) statements including simulated or hypothetical results that might be derived from a particular trading system without an accompanying statement clearly stating that the results are simulated or hypothetical and do not necessarily indicate actual results;
- (i) statements referring to simulated or hypothetical results without giving details of the actual futures prices that were used as a basis for the trading system. For example, if the system was based on SFE share price index futures contracts for December 1995 and reference is not made to that fact;
- (j) references in futures advertisements to "limited risk" without a clear statement of the extent of the risk involved;
- (k) statements containing potentially misleading statistical material.

**[PS 114.12]** The ASC does not consider the omission of information about management fees from advertisements as false and misleading in itself. However, the ASC supports the disclosure of management or advisory fees in statements or broadcasts. Disclosure of this kind gives the public a greater appreciation of the costs associated in dealing with a particular advertised product, particularly when the management or advisory fee is a significant amount.

## **Advice on advertising**

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**[PS 114.13]** If a member of the SFE or another futures exchange is unsure about whether it is appropriate to publish or broadcast a particular statement about futures contracts or a futures broking business, they should consult with that exchange.

**[PS 114.14]** If a person is not a member of a futures exchange and is uncertain about whether a proposed statement should be published or

broadcast, they can ask the National Futures Industry Team at the ASC New South Wales Regional Office. This team can give them guidance.

**[PS 114.15]** The ASC also recommends people refer to the SFE Guidelines on Promotional Material. The SFE Guidelines apply specifically to SFE members. However, in the ASC's view, they are a useful summary of preferred practice on publishing and broadcasting of statements about futures contracts and futures broking and advice businesses generally.

## Licensing in the futures industry

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**[PS 114.16]** People who are planning to publish or broadcast statements about their futures broking or futures advice businesses, or about futures contracts, should be aware of the futures licensing provisions of the Law. If the provisions apply, they should ensure that they are appropriately licensed.

**[PS 114.17]** The ASC has issued Futures Industry Licensing Guidebook which is designed to help people understand the licensing provisions of Chapter 8 of the Law. If you need clarification about licensing phone:

- (a) the ASC's Corporate Relations Unit on 02 9911 2095 for a copy of the Licensing Guidebook; or
- (b) the Futures Industry Team at the NSW Regional Office on 02 9911 2200 to discuss your particular licensing requirements.