

[PS 118]
**Investment advisory services: media,
computer software and Internet advice**

Chapter 7 — Securities

Issued 3/3/1997

Updated 12/1/2000

Purpose

[PS 118.1] This Policy Statement sets out ASIC's guidelines and enforcement policy in relation to a person providing investment advice in the media, in computer software and books, and on the Internet. It forms part of ASIC's investment advisory services series of Policy Statements.

[PS 118.2] The Policy Statement is structured as follows:

- Part I Definitions [PS 118.3]
- Part II Media advice [PS 118.4–118.21]
- Part III Computer software and books [PS 118.22–118.38]
- Part IV Internet advice [PS 118.39–118.59]

Part I: Definitions

[PS 118.3] In this Policy Statement:

- (a) “advice” means personal securities recommendations or general securities advice (see Policy Statement 122);
- (b) “adviser” means a natural person who provides advice relating to securities and includes both a licensee and a representative of a licensee;
- (c) “agent” means a representative of a licensee;
- (d) “ASG” means an Advisory Services Guide;
- (e) “general securities advice” means advice or reports on securities provided to a person without any express or implied (direct or indirect) recommendations that any particular transaction in those securities is appropriate to the particular investment objectives, financial situation or particular needs of that person (see Policy Statement 122 for details);
- (f) “investment advisory services” means advice on securities whether provided with another service (eg dealing or discretionary portfolio services) or on its own. It is used interchangeably with the terms “advisory services” and “securities advice”;
- (g) “Internet advice” means investment advice on securities provided using the Internet;
- (h) “investment products” means securities (eg shares, bonds and unit trusts) and superannuation products;
- (i) “Law” means the Corporations Law;
- (j) “licensee” means a holder of a dealers or an investment advisers licence under the Law;
- (k) “licensing provisions” means the requirements in Pt 7.3 to 7.7 of the Law and the relevant Corporations Law regulations;
- (l) “operating under a licence” means conducting a securities or an investment advice business under one’s own licence or acting as a representative of a holder of a dealers or an investment advisers licence;
- (m) “principal” means a “licensee” under the Law and these terms are used interchangeably;
- (n) “personal securities recommendation” means an express or implied (direct or indirect) recommendation made to a person (a client) that certain securities transactions are appropriate to that client, having regard to that client’s investment objectives, financial situation and particular needs (see Policy Statement 122 for details); and

- (o) “representative” means a “securities representative” as defined in s94 of the Law.

Part II: Media advice

Background

[PS 118.4] Persons who give investment advice on securities or publish securities reports using the media (eg newspapers, periodicals and information services such as radio or television which are generally available to the public) are referred to as media advisers. (Media advisers include publishers and proprietors of newspapers and periodicals as well as persons who contribute advice or prepare securities reports for publication in the media.)

[PS 118.5] Media advisers provide an important service to the markets by making the public aware of issues relating to securities and issuers. ASIC research indicates that media advisers are a significant source of information about securities and issuers for potential investors.

[PS 118.6] Although media advisers play a significant role in securities markets, they may not need a licence and are not regulated in the same way as other investment advisers. Media advisers do not need to hold a licence if they meet the requirements of s77(6). Section 77(6) applies to persons who provide advice, analyses or reports on securities which are published in newspapers and periodicals, transmissions or recordings when these are:

- (a) generally available to the public (eg in the case of newspapers and periodicals, not made available *only* on subscription); and
- (b) not intended solely or principally for the purpose of advising other persons about securities or publishing securities reports.

[PS 118.7] ASIC's guidelines on interpreting the media exemption are set out in the answers to the following questions:

- (a) When can media advisers provide investment advice without a licence?
- (b) When must media advisers have a licence?
- (c) What warnings should unlicensed media advisers include when they provide investment advice?

When can media advisers provide investment advice without a licence?

[PS 118.8] Media advisers do not need a licence if they are advising other persons about securities or publishing securities reports (or holding out as engaging in such an activity) in the following situations:

- (a) When they are the proprietor or publisher of a newspaper or periodical containing the advice or report. To be eligible for this exemption their newspaper or periodical must be generally available to the public (eg available not *only* on subscription) (s77(6)(a));
- (b) When they give advice or publish securities reports in the course of, or by means of, a transmission made by means of an information service. To be eligible for this exemption they must make the transmission using an information service which is generally available to the public. The person may be a user, owner, operator or provider of the information service. An “information service” includes a broadcasting, teletext or on-line database service (s9), (s77(6)(b)); or
- (c) When they give advice or publish reports in sound, video or data recordings which they make generally available to the public. This means that they supply copies to, or allow the recording to be heard or seen by, the public (s77(6)(c)).

[PS 118.9] The above exemption does not apply to newspapers, periodicals, transmissions and sound, video and data recordings, the sole or principal purpose of which is to advise other persons about securities or to publish securities reports (s77(7)).

[PS 118.10] Employee media advisers do not have to hold proper authorities if they contribute securities advice or prepare securities reports for publication in newspapers and periodicals which:

- (a) are generally available to the public (ie other than only on subscription); and
- (b) do not have as their sole or principal purpose advising other persons on securities or publishing securities reports.

This is because the principals of these media advisers, ie the proprietors or publishers of the newspapers and periodicals, do not have to be licensed. (A similar exclusion may apply to employees who contribute advice or prepare securities reports for publication by means of transmissions using an information service, or sound, video or data recordings, which are generally available to the public.)

[PS 118.11] However, these employee media advisers, being “financial journalists” (see the following paragraph for the definition), must maintain a register of interests (see s880).

[PS 118.12] The word “financial journalist” is defined in the Law as an unlicensed person who in the course of their business or employment contributes advice or prepares analyses or reports about securities for publication in newspapers or periodicals, in the course of, or by means of, an information service or in sound, video or data recordings (s879(1)).

When must media advisers have a licence?

[PS 118.13] ASIC considers that media advisers will lose the benefit of the media exemption (described in [PS 118.8–118.9]) when:

- (a) they give investment advice intended to induce persons to enter into securities transactions;
- (b) they give direct or indirect personal securities recommendations in newspapers and periodicals; or
- (c) they make direct or indirect personal securities recommendations in transmissions using an information service, or in sound, video or data recordings.

Investment advice to induce securities transactions

[PS 118.14] When a media adviser receives commissions or other benefits from an issuer of securities, or any other person who has an economic or other interest in the outcome of the transaction (eg a dealer underwriting a share issue), the media adviser is dealing in securities (see Policy Statement 116 [PS 116.30–116.36] for details). This is because investment advice which *induces* people to enter into securities transactions is considered to be a dealing activity, to which the exception in s77(6) does not apply. Therefore, the media adviser must operate under a licence.

Personal securities recommendation in newspapers

[PS 118.15] When a person publishes direct or indirect personal securities recommendations (see the definition of “personal securities recommendation” in Part I [PS 118.3]) in a newspaper or periodical which is generally available to the public, ASIC considers that they must operate under a licence. This is because such recommendations, being reasonably likely to be considered by their intended readers as solely or principally intended for use as advice on securities, will fall within the underlying policy of s77(7) (see [PS 118.9]). (*Note:* employee media advisers who contribute such recommendations for publication must hold a proper authority, see [PS 118.10]).

[PS 118.16] To avoid this possibility, and also the difficulty in complying with the know-your-client requirement in s851 in relation to advice intended for broad circulation (see Policy Statement 122 for details of this obligation), these persons should only publish or contribute general securities advice. (See the definition of “general securities advice” in Part I [PS 118.3]).

Personal securities recommendation using information services

[PS 118.17] When a media adviser gives direct or indirect personal securities recommendations in a transmission made in the course of or by means of an information service, or in a sound, video or data recording which is made available to the public, ASIC considers that the person giving such recommendations should operate under a licence (for example, this type of advice may be given by a talk-back radio host). This is because such recommendations, being reasonably likely to be considered by their intended users as solely or principally intended for use as advice on securities, will fall within the underlying policy of s77(7) (see [PS 118.9]).

[PS 118.18] Media advisers have to comply with the licensing provisions of the Law when they lose the benefit of the media exemption (in s77(6)) and are in the business of providing investment advice. (See Policy Statement 116 [PS 116.23–116.28] for details of what constitutes conduct of a business.)

What warnings should unlicensed media advisers include when they provide investment advice?

[PS 118.19] ASIC does not see any net regulatory benefit in seeking Law reform to remove the media exemption in s77(6). However, ASIC recognises that retail investors may not always realise that securities advice and reports in the mass media may not be suitable for their own individual investment needs and financial situation. As a result, retail investors may act on advice in the mass media without assessing if it is really suitable for their own needs and circumstances.

[PS 118.20] ASIC considers that when media advisers operate within the media exemption and provide advice or reports containing general securities advice (see the definition of “general securities advice” in Part I [PS 118.3]), the advice should include clear warnings about the limitations of the advice (see Part IV of Policy Statement 121 [PS 121.72–121.84] for appropriate warnings). ASIC also considers that media advisers are required under the common law to disclose any material conflict of interest they may have when providing advice or reports on securities (see Policy Statement 122 [PS 122.37–122.39] for common law duties).

[PS 118.21] There is no requirement in the Law for unlicensed media advisers to include such warnings. Therefore, ASIC has sought Law reform to incorporate this requirement in the Law. Until this requirement is in place, ASIC encourages unlicensed media advisers to include appropriate warnings and disclosures in their media advice as a matter of best practice.

Part III: Computer software and books

Background

[PS 118.22] ASIC is aware of an increase in the popularity of computer software and books and services (especially software packages containing investment guidelines and formulae). These products play an increasingly significant role in influencing investment decisions of investors, in much the same way as investment advice provided in other forms. ASIC provides these guidelines on how and when these products and services are regulated under the licensing provisions in the Law.

[PS 118.23] The guidelines ASIC will follow when deciding if persons providing computer software and books containing investment guidelines and formulae need a licence are set out in answers to the following questions:

- (a) Do persons who provide computer software and books containing investment guidelines and formulae require a licence?
- (b) When can a person rely on the “purely factual information only” exclusion?
- (c) When can a person rely on the “publicly available and not intended to be updated” exclusion?
- (d) What warnings are needed on computer software and books?

Do persons who provide computer software and books containing investment guidelines and formulae require a licence?

[PS 118.24] The Law does not expressly deal with computer software and books containing investment guidelines and formulae. The term “investment advice business” is broadly defined in s77(1) as a business of advising other persons about securities, or a business in the course of which securities reports are published (a securities report is defined as a report or analysis about securities, s9).

[PS 118.25] Therefore a person needs to operate under an appropriate licence if they are in the business of providing software packages, books or information circulars containing: direct or indirect personal securities recommendations; general securities advice; or reports or analysis about *specific* securities. They must operate under a dealers licence if inducing other persons to enter into securities transactions. Otherwise they need an investment advisers licence (see Policy Statement 116 [PS 116.30–116.36] for details of this distinction).

[PS 118.26] The licensing provisions of the Law are technically applicable to providers of these products. However, ASIC does not consider that there is any net regulatory benefit in regulating persons who are in the business of providing such computer software and books when these products:

- (a) only contain purely factual information on specific securities without any element of advice or opinion (see Policy Statement 116 [PS 116.20–116.22]); or
- (b) are generally made available to the public (ie not provided on subscription only) and are not intended to be supplemented or updated.

[PS 118.27] However, ASIC wants to ensure that investors are aware that investment guidelines and formulae in computer software and books may have some limitations. Therefore, persons who wish to obtain the benefit of ASIC's non-enforcement policy must incorporate appropriate warnings in their computer software and books to draw the attention of investors to those limitations (see [PS 118.38] for warnings).

When can a person rely on the “purely factual information only” exclusion?

[PS 118.28] Computer software contains factual information (eg past performance of securities or issuers) *as well as* interpretative functions. Often such interpretative functions are based on predetermined investment guidelines and formulae which are derived through an interactive process involving the user. For example, a user of a computer package keys information (such as their personal needs and investment objectives) into the computer. This triggers the formulae which provides directions or recommendations relating to the possible sale or purchase of securities.

[PS 118.29] Similarly, an investment adviser makes inquiries into the client's investment objectives, financial situation and particular needs before applying their own knowledge and skill to assess what securities are appropriate to that client. In ASIC's view, any computer package containing formulae and guidelines which carry out an interactive process to provide investment recommendations perform a similar function to an investment adviser.

[PS 118.30] The factual information in interactive software packages can often be updated or supplemented when information on which the formulae or guidelines are based is outdated. Updating may be done either by the user or through the assistance of a service provider/third party. The updating or supplementing feature strengthens, rather than detracts from, the investment advice nature of the interpretative function of these software packages.

[PS 118.31] ASIC considers that persons are conducting an investment advice business within s77(1) of the Law if they are in the business of providing computer software which:

- (a) in addition to providing purely factual information, performs interpretative functions based on predetermined formulae and guidelines ; and
- (b) gives users securities advice or recommendations directly or indirectly (eg buy or sell triggers).

[PS 118.32] They must be licensed regardless of whether or not such software packages or books contain:

- (a) information that is intended to be updated or supplemented; or
- (b) investment formulae and guidelines which can either be directly used for making investment decisions or enable users to derive advice/recommendations.

[PS 118.33] Because these products or services provide more than purely factual information about securities, persons in the business of providing such products and services must have an appropriate licence. (If there are no commissions or benefits provided by product issuers which make advice a dealing function, they can operate under an investment advisers licence.)

[PS 118.34] Persons who are in the business of providing computer software and books containing purely factual information about securities must include the warnings set out in [PS 118.38].

When can a person rely on the “publicly available and not intended to be updated” exclusion?

[PS 118.35] It is difficult to distinguish very general investment philosophies, techniques or analytical approaches contained in computer software packages and books from specific formulae and guidelines on securities that could be readily used for making investment decisions. The very general investment philosophies and approaches are unlikely to be relied on, particularly by less sophisticated investors, to the same extent as specific formulae and guidelines on investing in securities.

[PS 118.36] The widespread use of such information makes it administratively impossible for ASIC to assess it and draw a distinction. ASIC is of the view that this type of information is less likely to be acted on by users as a substitute for investment advice/recommendations if it is:

- (a) generally available to the public (ie not only on subscription); and
- (b) not intended to be updated or supplemented.

[PS 118.37] Therefore, a person who is in the business of providing computer software and books containing investment guidelines and formulae concerning securities does not need to operate under an appropriate licence when such information is generally made available to the public (ie not provided only on subscription) and is not intended to be updated or supplemented. However, these persons must include the warnings set out in [PS 118.38]. (*Note:* if the information is within the purely factual information exception as described above, although intended to be supplemented or updated and provided only on subscription, a licence would not be required either.)

What warnings are needed on computer software and books?

[PS 118.38] ASIC will not require persons who provide computer software and books which contain either purely factual information about securities or investment guidelines and formulae generally made available to the public and are not intended to be updated or supplemented to be licensed. As a condition of not requiring a licence, ASIC will require these persons to include in the computer software and books warnings to the following effect. The warnings must make it clear to users that:

- (a) the information is not suitable to be acted upon as investment advice;
and
- (b) it may be advisable to obtain investment advice before making any investment decisions relying on the information provided.

Part IV: Internet investment advice

Background

[PS 118.39] As the Internet has become more accessible to the public, there has been an increase in the number of persons providing investment advice on securities using the Internet. Internet advice may take a number of forms including investment advice on a homepage or investment advice sent by electronic mail (“e-mail”).

[PS 118.40] ASIC considers that most of the licensing provisions apply to investment advice on the Internet in much the same way as they apply to investment advice on any other medium.

[PS 118.41] These guidelines will assist persons to comply with the licensing provisions in the Law when providing investment advice on securities using the Internet.

[PS 118.42] The guidelines are set out under the following headings:

- (a) When does an Internet adviser need a licence?
- (b) When does an Internet adviser not require a licence?
- (c) How should an Internet adviser comply with the licensing provisions?
and
- (d) What is ASIC’s enforcement policy on cross border transactions on the Internet?

When does an Internet adviser need a licence?

[PS 118.43] A person who places information about securities on the Internet may require a dealers or an investment advisers licence if they are in the business of providing direct or indirect securities recommendations, general securities advice or publishing analysis or reports on securities.

Whether carrying on a business

[PS 118.44] The common law requirements of system, continuity and repetition need to be satisfied for a person to be considered as carrying on a securities or an investment advice business using the Internet. Whether there is such a business will be a question of fact in each case. The Law expressly states that a business may be carried on otherwise than for profit (s18). Therefore, even if the Internet adviser does not get paid for giving the advice, the activity may still amount to a business if it is done with system, continuity and repetition (see Policy Statement 116 [PS 116.23–116.28] for more details).

[PS 118.45] A person's activities on the Internet may be just one part of their overall business activities. A reference to a business of a particular kind includes a reference to a business of that kind that is part of, or carried on with, any other business (s19). Therefore, the person's business does not have to be carried on wholly on the Internet.

[PS 118.46] A person's activities on the Internet may be just one part of their overall securities or investment advice business. For example, a stockbroker may have a homepage with reports about securities or tips on securities. In this case, the licensing requirements, including the Conduct of Business Rules will apply to all of the securities or investment advice business including the Internet advice in much the same way (see [PS 118.54–118.55]).

[PS 118.47] If a person holds out on the Internet that they are an investment adviser or that they carry on a securities business, they must have a licence. They will need a licence regardless of whether or not they are in fact carrying on a business.

Does an Internet adviser need a dealers or an investment advisers licence?

[PS 118.48] A person who is in the business of providing investment advice or reports or analysis on securities on the Internet may need a dealers licence instead of an investment advisers licence if the Internet adviser receives commissions or other benefits from product providers for providing that advice, recommendation or report (see Policy Statement 116 [PS 116.30–116.36] for details of this distinction).

When does an Internet adviser not require a licence?

Purely factual information provided on the Internet

[PS 118.49] A person publishing purely factual information about securities on the Internet does not have to be licensed. To come within this exclusion, such a person must:

- (a) not provide any direct or implicit advice or opinion on securities (see [PS 118.26]); and
- (b) provide warnings (see [PS 118.38]).

Can an Internet adviser come within the media exception?

[PS 118.50] ASIC considers that it is generally difficult for a person to come within the media exemption to be exempted from the licensing provisions in the Law when giving investment advice on the Internet.

[PS 118.51] To come within the media exemption, the Internet advice should be made, by means of a transmission using an *information service* which must:

- (a) be generally made available to the public (s77(6)(b)); and
- (b) not be solely or principally for the purpose of advising other persons about securities or publishing securities reports (s 77(7)).

[PS 118.52] An “information service” is defined in s9 as a broadcasting service; an interactive or broadcast videotext or teletext service or a similar service; an online database service or a similar service; or any other prescribed service (no other services have been prescribed). The Internet does not fit neatly into any of these descriptions although it has elements of each of them.

[PS 118.53] Although a transmission on the Internet containing investment advice on securities may be generally available to the public, in many cases the sole or principal purpose of the transmission will be to advise other persons about securities or publish securities reports (see s77(7)). Therefore, ASIC considers that it will be generally difficult for an Internet adviser to establish that they do not need a licence because they come within the media advice exemption in s77(6).

Internet hosts publishing issuers’ electronic prospectuses

[PS 118.53A] ASIC has adopted a no-action position in relation to the application of the licensing provisions of the Law to Internet hosts who wish to display third party prospectuses on their websites. (ASIC has also granted fundraising relief to the Internet hosts: see the second exemption of Class Order [CO 99/790]. The relief allows Internet hosts to act as service providers and distribute electronic prospectuses through the Internet.)

[PS 118.53B] By publishing electronic prospectuses on a website dedicated to providing that service it is possible that the Internet host is conducting an investment advice business because they are carrying on a business of publishing securities reports and the Internet host arguably requires a licence.

[PS 118.53C] However, ASIC considers that there is no net regulatory benefit in requiring a person to be licensed as an investment adviser if they are acting purely as a service provider distributing electronic prospectuses via the Internet.

[PS 118.53D] As a result, ASIC will not take any enforcement action against a person in relation to their operation of a website dedicated to the publication of electronic prospectuses without holding an investment adviser’s licence provided that the person:

- (a) does not accept any financial reward for providing access to any electronic prospectus through the website which is attributable in whole or in part to the level of subscription in the securities the subject of that prospectus. However, ASIC does not object to the person charging fees based on volumes of data or numbers of hits;
- (b) does not promote by any method (whether via the website or otherwise), investment in any securities to which the electronic prospectus accessible through the website relates or provide any opinion or advice in relation to investment in those securities, whether directly or implicitly. (For example, it is not acceptable for the person to advertise that a particular issuer's current electronic prospectus is available on the website. However, advertising that current electronic prospectuses (without reference to specific prospectuses) can be downloaded from the website is permissible);
- (c) does not promote by any method (whether via the website or otherwise) the website as being a means by which investment in particular securities may be promoted or by which opinions or advice in relation to investment in securities may be given;
- (d) does not make any representations about the commercial prospects of any issuer whose securities are the subject of an electronic prospectus accessible through the website;
- (e) does not publish any notice on the website except as permitted by Class Order [CO 99/790], without complying with the Law;
- (f) does not assume any responsibility for determining the information to be contained in the paper counterpart of any electronic prospectus accessible through the website or the sequence in which that information is presented;
- (g) includes a prominently displayed warning on the website to the effect that:
 - (i) the information contained on the website is not suitable to be acted upon as investment advice; and
 - (ii) it may be advisable to obtain investment advice before making any investment decisions relying on the information provided.

[*Historical Note:* [PS 118] was amended 12/1/2000 by inserting paras [PS 118.53A]-[PS 118.53D].]

How should an Internet adviser comply with the licensing provisions?

[PS 118.54] In addition to being licensed (or operating as a representative of a licensee — see Policy Statement 117 for details relating to conduct as a representative), an Internet adviser is required to comply with the following requirements:

- (a) the Conduct of Business Rules (ie s849 and s851 of the Law) when making personal securities recommendation on the Internet (see Policy Statement 122 for details);
- (b) ASIC's retail investor protection requirements such as the requirement to provide an Advisory Services Guide, provide warnings where general securities advice is given (see Policy Statement 121 for details of these requirements).

[PS 118.55] As the Internet advice will generally be made available to users who have varying needs and circumstances (except in the case of advice by e-mail), ASIC considers that Internet advisers will generally only be able to provide general securities advice and not personal securities recommendations on the Internet (see the definitions of "general securities advice" and "personal securities recommendations" in Part I [PS 118.3] and Policy Statement 122 for details of this distinction). Therefore, it is particularly important that a person providing general securities advice on the Internet provides the required warnings to the effect that:

- (a) the advice has not been prepared taking into account the particular investment objectives, financial situation and needs of any particular investor; and
- (b) as a result, investors using the Internet advice should assess whether it is appropriate in light of their own individual circumstances before acting on the advice.

What is ASIC's enforcement policy on cross border transactions on the Internet?

[PS 118.56] The licensing provisions will apply to investment advice sent by overseas Internet advisers using e-mail addresses of Australian investors. The provisions of the Law may also apply to investment advice provided on an Internet site (eg a homepage outside Australia) that is accessible in Australia.

[PS 118.57] The provisions of the Law may also apply to persons who place investment advice on the Internet in Australia for use by persons outside Australia.

[PS 118.58] ASIC recognises that it can be difficult to enforce the Law fully in relation to persons who provide investment advice on the Internet who are located in overseas jurisdictions.

[PS 118.59] To overcome this difficulty, ASIC will work closely with other regulators to ensure that the interests of Australian investors are protected and that confidence in the integrity of the Australian securities market is maintained.