



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 168

# Disclosure: Product Disclosure Statements (and other disclosure obligations)

6 September 2010

### About this guide

This is a guide for persons responsible for Product Disclosure Statements and other disclosure obligations (i.e. Australian financial services (AFS) licensees, authorised representatives and product issuers).

It gives policy guidance on preparing a Product Disclosure Statement (PDS) that complies with the PDS requirements in the *Corporations Act 2001* (Corporations Act). It sets out good disclosure principles and explains how ASIC will monitor the use of PDSs and enforce the PDS requirements.

Note: This guide does not cover the tailored PDS regimes for superannuation and simple managed investment products introduced by the Corporations Amendment Regulations 2010 (No 5). These regimes commence on 22 June 2011 for all new products, as well as for existing products where a supplementary PDS would be required, and on 22 June 2012 for all other PDSs: see *Shorter and simpler PDSs: Superannuation, managed investment schemes and margin lending* (INFO 133).

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This version was issued on 6 September 2010 and is based on legislation and regulations as at 6 September 2010.

Previous versions:

- Superseded Policy Statement 168 issued 28 May 2007 and rebadged as Regulatory Guide 168 on 5 July 2007
- Superseded Policy Statement 168B issued 13 May 2005
- Superseded Policy Statement 168A issued 28 November 2001

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

Under the Corporations Act, a retail client may receive a number of disclosure documents before acquiring a financial product.

ASIC has published some Good Disclosure Principles to help product issuers and other professionals in preparing a PDS. They will also be useful when preparing other disclosure documents for retail clients.

The Corporations Act facilitates the use of shorter, simpler PDSs by allowing short-form PDSs and incorporation by reference, and by applying a tailored disclosure regime to some products.

ASIC has procedures in place to monitor and assess PDSs once issued.

### Disclosure to retail clients acquiring financial products

- RG 168.1 Retail clients may receive a number of different documents providing disclosure prior to the issue of a financial product. Each document has its own purpose and relates to a different stage of the investment process, which can be characterised, from the perspective of a consumer, as follows:

**Table 1: Disclosure required at each stage of investment process**

<b>What service am I getting?</b>	Disclosure is in a Financial Services Guide (FSG)
<b>What advice am I getting?</b>	Disclosure is in a Statement of Advice (SOA) if the advice is personal
<b>What product am I buying?</b>	Disclosure is in a PDS and can be in a Short-Form PDS

### Good Disclosure Principles

- RG 168.2 This guide contains our Good Disclosure Principles to help product issuers comply with the disclosure requirements and also promote good disclosure outcomes for consumers. We encourage product issuers to consider these Good Disclosure Principles when preparing a PDS.
- RG 168.3 While these principles focus on PDSs, they may also be useful for advisers who must produce other disclosure documents to give to retail clients and for

those producing promotional publications about financial services and products.

- RG 168.4 The Good Disclosure Principles are:
- (a) disclosure should be timely;
  - (b) disclosure should be relevant and complete;
  - (c) disclosure should promote product understanding;
  - (d) disclosure should promote product comparison;
  - (e) disclosure should highlight important information; and
  - (f) disclosure should have regard to consumers' needs.
- RG 168.5 Product issuers are responsible for making sure that a PDS meets the requirements set out in Div 2 of Pt 7.9 of the Corporations Act and related regulations (PDS requirements). Generally, we will not vet any PDS prior to its release to consumers unless there are exceptional circumstances.
- RG 168.6 The PDS requirements are drafted to apply flexibly to any financial product. This means that we do not provide specific guidance about how the requirements apply to each and every financial product supplied to retail clients.

## Shorter, simpler PDS disclosure

- RG 168.7 The Corporations Act facilitates the use of shorter, simpler PDSs by allowing short-form PDSs and incorporation by reference, and by applying a tailored disclosure regime to some products.

### Short-Form PDSs

- RG 168.8 A Short-Form PDS is a document that summarises the key information in a PDS (e.g. information about the issuer, benefits, risks, costs, return, dispute resolution and cooling off) and complies with Div 3A of Pt 7.9 of the Corporations Act. A Short-Form PDS can be given instead of a PDS for all products except for those that are subject to a tailored PDS regime (see RG 168.10–RG 168.12).

### Incorporation by reference

- RG 168.9 A person who is responsible for a PDS can include certain statements or incorporate information 'by reference' if it is in writing and publicly available in a document other than the PDS or a Short-Form PDS: see RG 168.106–RG 168.116.

Note: For those products that are subject to a tailored regime, incorporation by reference is only permitted in certain circumstances: see RG 168.2513–RG 168.2816.

### Tailored PDS regime for general insurance products

- RG 168.10 There is a tailored PDS regime for general insurance products that:
- (a) removes certain PDS content requirements for general insurance products;
  - (b) removes certain PDS content requirements where the information is disclosed by the product issuer in another document (e.g. policy terms and conditions); and
  - (c) specifies how a product issuer is to disclose significant characteristics or features of a general insurance product and the rights, terms, conditions and obligations attaching to the product.

Note: See regs 7.9.15E and 7.9.15F of the Corporations Regulations 2001 (Corporations Regulations).

### Shorter, simpler PDS regime for specified products

- RG 168.11 The Corporations Regulations provide for tailored PDS regimes for specified products, including:
- (a) standard margin lending facilities (Sch 10C);
  - (b) First Home Saver Accounts (Sch 10B);
  - (c) superannuation products (other than a product that is solely a defined benefit scheme) (Sch 10D); and
  - (d) simple managed investment schemes (Sch 10E).

Note: This guide does not cover the tailored PDS regimes for superannuation and simple managed investment products introduced by the Corporations Amendment Regulations 2010 (No 5). These regimes commence on 22 June 2011 for all new products, as well as for existing products where a supplementary PDS would be required, and on 22 June 2012 for all other PDSs: see *Shorter and simpler PDSs: Superannuation, managed investment schemes and margin lending* (INFO 133).

- RG 168.12 These tailored PDS regimes:
- (a) remove some PDS requirements (in particular, the content requirements in s1013D) and modify others, substituting prescribed, product-specific content requirements; and
  - (b) require a maximum page length for a PDS.

Note: See Sch 10B–10E of the Corporations Regulations and INFO 133.

### **Additional information for superannuation product PDSs**

- RG 168.13 The trustee of a superannuation fund must include in its PDS information about the significant benefits, risks, features and costs of each investment option associated with the superannuation product.

### **How we monitor and assess PDSs**

- RG 168.14 We will monitor PDSs issued across all industry sectors using a risk-based approach to determine whether disclosure to consumers can be improved by the provision of further guidance. This monitoring and review process will be ongoing. Any proposed guidance may include:
- (a) more detailed guidance about desired disclosure outcomes; or
  - (b) disclosure examples in areas:
    - (i) that give rise to the greatest concern for consumers; or
    - (ii) where the importance of better disclosure becomes more apparent.
- RG 168.15 When considering whether to further develop our policy, we will pay particular attention to the objectives of the legislation to, among other things, provide investors with information so that they may compare a range of financial products and understand their risks.

Note: For example, ASIC has issued the following product-specific guidance: Regulatory Guide 45 *Mortgage schemes—Improving disclosure for retail investors* (RG 45) and Regulatory Guide 46 *Unlisted property schemes—Improving disclosure for retail investors* (RG 46).

## B Disclosure to retail clients acquiring financial products

### Key points

Retail clients may receive a number of different disclosure documents in the process of acquiring a financial product: RG 168.16–RG 168.18.

An FSG is prepared by the person providing advice and must contain information so that consumers can make an informed decision about whether to acquire a financial service: RG 168.19–RG 168.25.

An SOA is prepared by the financial adviser who provides personal advice and must contain information so that a retail client can make an informed decision about whether to act on the advice: RG 168.26–RG 168.35.

A PDS is prepared by or on behalf of the issuer or seller of the financial product and must contain sufficient information so that a retail client may make an informed decision about whether to purchase a financial product: RG 168.36–RG 168.52.

### Disclosure in the investment process

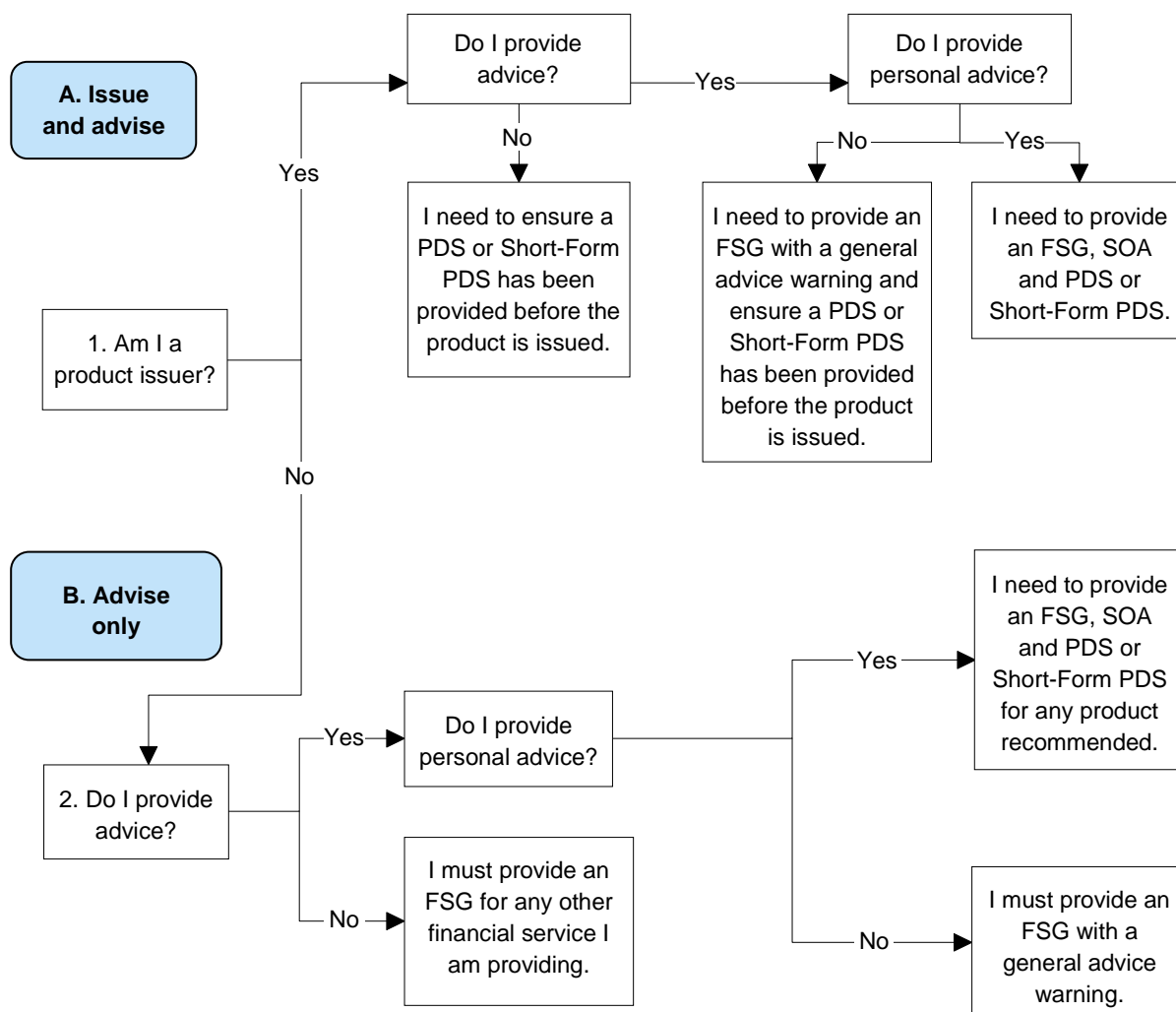
RG 168.16 Retail clients may receive a number of different disclosure documents prior to the issue of a financial product. Each document has its own purpose and relates to a different stage of the investment process:

- (a) when a client wants a financial service, disclosure is in the form of an FSG;
- (b) when a client is seeking financial advice, disclosure is in the form of an SOA; and
- (c) when a client wishes to buy a financial product, disclosure is in the form of a PDS (or Short-Form PDS).

RG 168.17 Each of these disclosure documents must be worded and presented in a clear, concise and effective manner.

Note: See s942B(6A) and 942C(6C) (FSG); s937B(6) and 947C(6) (SOA); and s1013C(3) (PDS).

RG 168.18 The flow chart at Figure 1 illustrates the operation of the disclosure framework.

**Figure 1: Flow chart of investment process and disclosure documents required**

## When a client wants a financial service

RG 168.19 A Financial Services Guide (FSG) is to be prepared by the person who will provide a financial service: see Div 2 of Pt 7.7 of the Corporations Act. It must contain information so that consumers can make an informed decision about whether to acquire a financial service.

RG 168.20 An FSG includes information such as:

- (a) who will provide the service;
- (b) the kinds of financial services offered;
- (c) information about who the service provider is acting for when providing the financial service;

- (d) information about the means by which the service provider is remunerated for the services being offered to the retail client including details of commissions; and
- (e) details of any associations or relationships that might be expected to influence a service provider in providing the service.

Note: See s942B and 942C.

RG 168.21 Regulations may provide further detail about what information an FSG is required to contain: see Div 2 of Pt 7.7 of the Corporations Regulations.

### **When must a client receive an FSG?**

RG 168.22 Generally, an FSG must be given before providing the financial service: see s941D(1). If 'time critical' criteria are met, then the service provider may give certain information verbally before providing the service without giving the full FSG: see s941D(2) and 941D(3). However, a full FSG must be provided within five days after the verbal statement is given, or sooner if practicable: see s941D(4).

### **When is an FSG not needed?**

RG 168.23 Certain offers of financial services do not require an FSG: see s941C. For example, an FSG need not be given if the client has already received:

- (a) an FSG that contains all information relevant to the client (see s941C(1)); and
- (b) a PDS and a 'statement' that together contain all of the information a new FSG would have had to contain (see reg 7.7.02A).

RG 168.24 Regulation 7.7.08A allows an FSG to be combined with a Product Disclosure Statement (PDS) or Short-Form PDS in certain circumstances, provided conditions are met: see Div 2A of Pt 7.7 of the Corporations Regulations.

Note: Section 1017K applies s942DA, 1013M and reg 7.7.08A to the Short-Form PDS.

RG 168.25 An FSG may not be combined with a PDS for a superannuation product, simple managed investment product, standard margin lending facility or a First Home Saver Account: see reg 7.7.08A.

## **When a client seeks financial advice**

RG 168.26 A Statement of Advice (SOA) is to be prepared by the financial adviser who provides personal advice: see Div 3 of Pt 7.7 of the Corporations Act. It

must contain information about the personal advice so that a retail client can make an informed decision about whether to act on that advice.

- RG 168.27 An SOA includes information such as:
- (a) a statement setting out the advice and an explanation of the basis on which it was given, including a warning if the advice is based on incomplete or inaccurate information;
  - (b) who has provided the advice;
  - (c) any remuneration or other benefit that a service provider or an associate may receive in connection with the advice that could influence the service provider;
  - (d) any other interests of the service provider or an associate that could influence the service provider; and
  - (e) any associations or relationships between the service provider or an associate and product issuers that could influence the service provider.

Note: See s947B and 947C.

- RG 168.28 Regulations may provide further detail about what information an SOA is required to contain: see Div 3 of Pt 7.7 of the Corporations Regulations.

### **When must a client receive an SOA?**

- RG 168.29 Generally, the SOA must be provided to the client when, or as soon as practicable after, that advice is provided. In any event, the SOA should be given before the adviser provides the client with any further financial service that arises out of or is connected with the advice: see s946C(1).
- RG 168.30 If an SOA is not given when the advice is provided, the service provider must inform the client verbally of certain matters. These include information about potential conflicts of interest and information about significant consequences that may accrue from replacing an existing financial product if a change of product is recommended: see s946C(2).
- RG 168.31 If an SOA is not given and the client requires a further financial service, the SOA must be given within five days after providing that further service, or sooner if practicable. If the further service is providing a financial product and a cooling-off period will apply, the SOA must be given before the start of the cooling-off period under s1019B(3), or sooner if practicable: see s946C(3).

### **When is an SOA not needed?**

- RG 168.32 An SOA is not required in certain situations when specific conditions are met and the advice is further advice: see s946B. However, in these

circumstances, the information set out in RG 168.27(c)–RG 168.27(e) must still be given.

Note: For further details about relevant conditions, see regs 7.7.09, 7.7.10AC, 7.7.10AD, 7.7.10AG, 7.7.10B, 7.7.10C and 7.7.10D.

- RG 168.33 An SOA is not required for advice about small investments and where advice does not recommend the purchase or sale of products, when specific conditions are met: see s946AA, s946B and reg 7.7.09A.
- RG 168.34 An SOA is not required for some specified products—for example, basic deposit products, related non-cash payment facilities, travellers' cheques, cash management trusts or general insurance products: see reg 7.7.10.
- RG 168.35 An SOA need not be given if the advice provided is only *general* advice. If the service provided by an AFS licensee or authorised representative to a retail client is general advice, the licensee or authorised representative must warn a retail client about the limitations of the advice in these circumstances: see s949A for further details.

Note: For further information about giving financial product advice, see Regulatory Guide 36 *Licensing: Financial product advice and dealing* (RG 36) and Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175).

## When a client buys a financial product

- RG 168.36 A PDS is to be prepared by or on behalf of the issuer or seller of the financial product: see s1013A. A PDS must contain sufficient information so that a retail client may make an informed decision about whether to purchase a financial product: s1013D.
- RG 168.37 The broad objectives of PDS disclosure are to help consumers compare and make informed choices about financial products. To achieve these objectives, the legislation requires that all information contained in a PDS must be worded and presented in a clear, concise and effective manner.
- RG 168.38 The content requirements of a PDS for financial products other than those that are subject to a tailored regime (see RG 168.10–RG 168.12) are set out in Subdiv C of Div 2 of Pt 7.9 of the Corporations Act. Briefly, a PDS includes information such as:
- (a) fees payable in respect of a financial product;
  - (b) risks of a financial product;
  - (c) benefits of a financial product; and
  - (d) significant characteristics of a financial product.

Note: For further details, see s1013C, 1013D, 1013E and Div 4 of Pt 7.9 of the Corporations Regulations.

## Application form

- RG 168.39 An application form must be attached to, accompany or be derived from a PDS: s1016A. The application form must contain the applicant's name, date of birth and address. Under reg 7.9.74(1) the address must be that of the actual applicant and cannot be the address of the AFS licensee or authorised representative advising the applicant. This is so the product issuer can identify the client. It is also consistent with the requirement that a PDS be 'given' to a client. The additional provision of a licensee's address for correspondence purposes is not prohibited—however, it is preferable for correspondence to also be sent to the client's own address.
- RG 168.40 For all financial products except those that are subject to a tailored regime (see RG 168.10–RG 168.12), where a regulated person (defined in s1021B: see 'Key terms') must give another person a PDS, the regulated person can give a Short-Form PDS instead, provided that certain conditions are met: see Div 3A of Pt 7.9 in Sch 10BA of the Corporations Act.

Note: For further information about Short-Form PDSs, see RG 168.103–RG 168.105.

## When must a client receive a PDS?

- RG 168.41 Generally, a PDS should be given to a retail client at or before the time:
- (a) a recommendation is made to buy a financial product;
  - (b) an offer is made to issue or arrange the issue of a financial product; or
  - (c) a seller makes an offer to sell the product if that sale requires disclosure.

Note: See s1012A, 1012B and 1012C.

- RG 168.42 For some superannuation and RSA products, the PDS may be given later if certain conditions are met: see s1012F and reg 7.9.04.
- RG 168.43 Where 'time critical' criteria are met for products specified by s1012G(1), the person responsible at the point of sale may give certain information verbally before providing the product without giving the full PDS: see s1012G. However, a full PDS must be provided as soon as reasonably practicable and in any event not later than five days after the product is issued or sold or when the confirmation requirement under s1012G is complied with.

Note: For more detail about the conditions that must be met, see regs 7.9.80C and 7.9.80D.

## When is a PDS not needed?

- RG 168.44 Under s1012D(2), a PDS is not required to be given if:
- (a) the client already holds a financial product of the same kind; and

- (b) the regulated person has reasonable grounds to believe that the client has received or had access to all of the information that the PDS would have been required to contain.

RG 168.45 A regulated person can establish that they have reasonable belief that the client has access to the required information by bringing the identity and location of each of the documents relied on to provide the required disclosure to their client's attention. Creating a list of documents and providing this list to the client would be a means to show reasonable grounds for believing that client was aware of the documents being relied on.

RG 168.46 Access to the documents being relied on must be reasonable, convenient and inexpensive for the client. If accessing the material would require material involvement by a third party (such as going to an internet cafe or a library to access an electronic version) or the proposed access is inconvenient or expensive, then it may be difficult to believe on reasonable grounds that the client had access to the information.

#### **Basic deposit products**

RG 168.47 Certain offers of financial products (e.g. basic deposit products) do not require a PDS: see s1012D, 1012E and the Corporations Regulations.

#### **Self-managed superannuation funds**

RG 168.48 Under s1012D(2A), an issuer or adviser is not required to give a PDS if:

- (a) the financial product is an interest in a self-managed superannuation fund (SMSF); and
- (b) the issuer or adviser believes on reasonable grounds that the member joining the fund has received, or has (and knows they have) access to all of the information that the PDS would be required to contain.

RG 168.49 While each member of an SMSF must be either a trustee or a director of the SMSF (if the trustee is a body corporate), and as such has an obligation to know about the fund in order to fulfil their duties, this does not, in itself, give an issuer or adviser reasonable grounds to believe that a prospective member has, or has access to, all of the information required.

RG 168.50 The issuer or adviser needs to make a decision about each prospective member and actively consider whether they have received, or have (and know they have) access to, all of the information that the PDS would need to contain.

#### **Group life insurance products**

RG 168.51 When a superannuation fund obtains a group insurance policy, a PDS for the insurance product does not have to be given to a member of the fund under

s1012H. This is because the insurer issues the policy to the trustee of the superannuation fund and not the member. The trustee must, however, ensure in its PDS for the superannuation product that the nature of fund benefits secured by group insurance arrangements and the identity of the external insurer are clearly and fully communicated to members.

RG 168.52 This situation must be distinguished from the obligation to confirm a transaction. We take the view that the acceptance of an insurance election is a transaction that must be confirmed under s1017F.

## C Good Disclosure Principles

### Key points

We have developed our Good Disclosure Principles to help in preparing a PDS—however, the principles will also be useful when preparing other disclosure documents and promotional publications given to retail clients.

The principles are:

- disclosure should be timely (see RG 168.57–RG 168.60);
- disclosure should be relevant and complete (see RG 168.61–RG 168.67);
- disclosure should promote product understanding (see RG 168.68–RG 168.83);
- disclosure should promote product comparison (see RG 168.84–RG 168.86);
- disclosure should highlight important information (see RG 168.87–RG 168.93);
- disclosure should have regard to consumers' needs (see RG 168.94–RG 168.101).

- RG 168.53 We have developed the Good Disclosure Principles, having in mind:
- (a) the PDS requirements and related provisions of Pt 7.9 (including the regulations made for the purposes of those provisions and the legislative objectives of these provisions);
  - (b) our own regulatory experience;
  - (c) past and current point-of-sale disclosure practices;
  - (d) relevant overseas regulatory analogies; and
  - (e) the results of relevant Australian and overseas research (including the results of relevant consumer research and user testing).
- RG 168.54 The Good Disclosure Principles are outcome focused. The key outcomes that we seek to achieve are to help consumers make better decisions and to help consumers compare financial products.
- RG 168.55 While the Good Disclosure Principles do not replace any legal requirements about product disclosure under the legislation, we believe that applying them to any process for preparing a PDS will improve the quality of disclosure, which in turn should help consumers make better decisions about financial products. The issue of quality of disclosure is reflected in a number of the PDS requirements and related provisions—in particular:
- (a) the requirement that the information included in the PDS must be worded and presented in a clear, concise and effective manner (see s1013C(3)); and

- (b) prohibitions on misleading or deceptive conduct or statements (e.g. see s1041E and 1041H). In some circumstances, confusing disclosure may be misleading.

RG 168.56 This means that product issuers should focus not only on the technical content requirements that apply to PDSs, but also the quality of the information being provided to consumers.

## 1 Disclosure should be timely

RG 168.57 In general, the Corporations Act requires a PDS to be provided to a consumer before that consumer applies for a financial product: see s1016A.

Note: Under s1012F and reg 7.9.04, for certain superannuation products a PDS may be provided later. Section 1012G and regs 7.9.80C and 7.9.80D also allow a PDS to be provided later in certain situations.

RG 168.58 We encourage product issuers to establish distribution procedures that maximise the time that a consumer has to read a PDS before making an application. This gives consumers the information they need at a time when it may influence their purchasing decision.

RG 168.59 A PDS must also be kept up-to-date. A product issuer should regularly review its PDS to make sure the information in it is current. An application by a consumer based on an out-of-date PDS may give rise to a right of refund under s1016E.

RG 168.60 We have granted limited relief from the requirement to update a PDS where the new information does not include any materially adverse information and where the new information is made available to consumers free of charge by some other means (e.g. through a website or a toll-free telephone service): see Class Order [CO 03/237] *Updated information in product disclosure statements*.

## 2 Disclosure should be relevant and complete

RG 168.61 The information in a PDS should be relevant to a consumer who is deciding whether to buy the financial product. It should also be complete.

RG 168.62 The content obligations of the PDS requirements set out broadly what categories of information will be relevant in a PDS. These include information about significant benefits and risks, the cost of the product, factors affecting returns, significant tax implications, and what dispute resolution procedures are available if there is a problem.

- RG 168.63 Information in a PDS about contact details, cooling-off rights and access to external dispute resolution schemes should be clear and accessible. This is particularly important where there are multi-product issuers in one PDS and different information applies to each product issuer, or where an investor-directed portfolio-like service (IDPS) affects the cooling-off rights applicable to an underlying product.
- RG 168.64 When considering what information will be relevant and useful to a consumer for the purposes of decision making, a product issuer should consider:
- (a) the information needs of reasonable consumers of the class to whom the PDS is directed;
  - (b) the contractual or other arrangements under which the consumer holds a particular product;
  - (c) any relevant regulatory or other obligations applicable to the product (e.g. taxation);
  - (d) the most important information that consumers need, including, but not limited to, risk disclosure (this information should be highlighted: see also Good Disclosure Principle 5);
  - (e) making sure that all relevant information is presented together or is effectively cross-referenced; and
  - (f) if disclosure is contained in more than one document (i.e. where the PDS consists of two parts or where there is a supplementary PDS that must be read together with the PDS), making sure that the information that makes up the PDS is clearly identified and linked.
- RG 168.65 A consumer will want to easily find and understand information on the cost of a financial product and the risks and benefits associated with the financial product including, for example, if a product is described as 'guaranteed', the nature and extent of the guarantee, who provides the guarantee and the probability of the guarantee not being met.
- RG 168.66 The level of risk disclosure in a PDS will vary from product to product. In general, complex products that are not well understood need sufficient explanation of their risks to ensure consumers understand how the products work. Industry participants should not assume that consumers understand the risks involved in complex product offerings.
- RG 168.67 Disclosure that is not complete may constitute misleading or deceptive conduct or breach the content requirements of Pt 7.9.

### 3 Disclosure should promote product understanding

- RG 168.68 Section 1013C(3) states that the information included in a PDS ‘must be worded and presented in a clear, concise and effective manner’. We believe preparing PDSs that attempt to promote financial product understanding by consumers will assist issuers to comply with their obligation to present a PDS in a clear, concise and effective manner.
- RG 168.69 Under s1020E(1)(a)(ia), a stop order may be issued for a PDS that is not clear, concise and effective.

#### Using a range of communication tools

- RG 168.70 We encourage product issuers, when preparing a PDS, to consider using communication tools (e.g. text, tables, diagrams and graphs) that promote product understanding and comparability. Navigational aids, such as tables of contents and clear signposting, can help consumers to find information in the PDS more effectively. Product issuers should not, however, use communication tools in such a way that they are likely to confuse consumers.

#### Industry and legal jargon

- RG 168.71 Where possible, product issuers should try to avoid using industry and legal jargon in a PDS. If this cannot be avoided, then they should explain its meaning—for example, by including a glossary of technical terms. Product issuers should use plain language and, if necessary, illustrate explanations by providing simple examples.

#### Complexity of the product

- RG 168.72 Even where product issuers present information in plain language, the complexity of what is being described may create a barrier to consumers’ understanding.
- RG 168.73 For example, if a product issuer is offering multiple or ‘bundled’ financial products in a single PDS, it may need to pay particular attention to this principle so that consumers are not misled or confused by any material in the PDS.
- RG 168.74 A product issuer may also need to provide a greater level of disclosure if the product is not generally understood by consumers (e.g. if it is new or complex): see s1013F(2).
- RG 168.75 In some extreme instances, a product issuer may need to consider simplifying the item or system being described, as well as how information about it is disclosed. For example, some fee arrangements may be so

complex that they are difficult to describe in a manner that is clear, concise and effective.

### **Extraneous information**

- RG 168.76 If product issuers want to include extraneous material in a PDS, they should consider the overriding requirement that the information in the PDS must be worded and presented in a clear, concise and effective manner. Extraneous material includes advertising or promotional material by the product issuer or by a third party (e.g. advertising about other products, including financial products) or immaterial benefits associated with acquisition of the product that is the subject of the PDS.
- RG 168.77 If a product issuer includes extraneous material in a PDS, there are risks that:
- (a) a consumer may not read, or may disregard or not understand the importance of, other information in the PDS; and
  - (b) a consumer might otherwise be misled or deceived.
- RG 168.78 To diminish these risks, we expect product issuers will consider methods to ensure that extraneous material in a PDS is:
- (a) clearly distinguishable from other information; and
  - (b) no more prominent than other information.

### **Disclosing fees, charges and returns**

- RG 168.79 We believe that the need for clear, concise and effective disclosure is most relevant for the disclosure of fees and charges and, in the case of investment-based products, the disclosure of returns. Information about fees, charges and investment returns is a key consideration for consumers when making decisions about financial products, and research shows that it is often the most difficult information for consumers to understand.
- RG 168.80 Under the dollar disclosure provisions, various costs, fees, charges, expenses, benefits and interests must be stated as amounts in dollars in SOAs, PDSs and periodic statements (including exit statements). For further information about complying with the dollar disclosure provisions, see Regulatory Guide 182 *Dollar disclosure* (RG 182).

Note: See also Class Orders [CO 04/1430], [CO 04/1431], [CO 04/1432], [CO 04/1433], [CO 04/1434] and [CO 04/1435].

- RG 168.81 Division 4C of Pt 7.9 of the Corporations Regulations requires PDSs for superannuation products and PDSs for managed investment products to include a fees and costs template (although for superannuation products and simple managed investment products a simplified version of the template must be used in the PDS, with the full template incorporated by reference):

Sch 10D item 8 and Sch 10E item 8. The regulations include standard descriptions and calculation methods for fees and costs. These measures are designed to assist with clear, concise and effective disclosure of information about fees and costs and to allow for easier comparability of fees and costs information in PDSs for investment products. The enhanced fee disclosure regulations also apply to periodic statements for superannuation products and for managed investment products.

- RG 168.82 The types of product information that a consumer should be able to easily understand and compare include:
- (a) what the fees and charges are, the amount of fees (expressed as an amount in dollars where this is required), who the fees are paid to, what the fees are for, how and when the fees are paid, and how fees impact on returns;
  - (b) whether fees are variable and, if so, how and when they vary, including through negotiation or the impact of rebates or discounts (e.g. group life rebates);
  - (c) how returns are calculated and whether they are shown on a consistent basis. For example, if historical returns are disclosed for various investment strategies over different periods of time (e.g. 1, 3, 5 and 10 years), then, for each investment strategy, consumers should be able to understand whether or not the returns are shown on a consistent basis for each period. Generally, returns for financial products (including for different investment strategies of a financial product) covered by a PDS should be calculated on a consistent basis wherever possible; and
  - (d) typical and material factors that may affect returns, including risks.
- RG 168.83 If information about fees, charges and returns is not clear, concise and effective, comparability of products is harder to achieve.

## 4 Disclosure should promote product comparison

- RG 168.84 We believe the clarity and effectiveness of PDS disclosure is also improved by being drafted in a way that makes it easier for consumers to make comparisons:
- (a) between two or more competing financial products; and
  - (b) about options that may be available to them under the terms of a particular financial product. For example, where a consumer has the option to pay fees in two different ways, a comparison might be given to show the relative charges made for each option after various durations (e.g. 1, 3, 5 and 10 years).

- RG 168.85 Consumers (particularly less experienced consumers) will not always be able to identify what particular pieces of information (e.g. information about fees and returns) are designed to assist with comparison of product options or different financial products. Comparative information should be clearly identified so that consumers are better able to use it.
- RG 168.86 Product issuers can also facilitate comparability by complying with relevant industry standards and practices designed to harmonise approaches to certain key items of disclosure. In some cases, if a product issuer fails to follow industry practices that consumers would expect it to follow, it may mislead or deceive consumers.

## 5 Disclosure should highlight important information

- RG 168.87 A PDS may contain all the relevant information that a consumer needs to decide whether to buy a financial product, but consumers (particularly less experienced consumers) may still:
- (a) miss important points because of the way it is presented; or
  - (b) misunderstand the purpose of the information.
- RG 168.88 To minimise the risk that a PDS is misleading or deceptive because of the way that it is presented, the product issuer should consider giving prominence to:
- (a) key information about the financial product to reflect the relative importance of the information to consumers (e.g. information about benefits and risks should have similar prominence in the PDS). In the case of PDSs for capital protected products, it is particularly important to provide disclosure relating to events that could cause the capital protection to cease;
  - (b) ‘warnings’ associated with particular items of information (e.g. where past performance information is shown, a warning that this information should not be relied on as indicative of future performance, and where prospective financial information is included it should be accompanied by prominent disclosure on underlying assumptions, limits and risks (see Regulatory Guide 170 *Prospective financial information* (RG 170));
  - (c) information about significant unusual product features (e.g. non-standard features or features not normally associated with a particular type of product in the marketplace, such as some exclusions in the case of risk insurance claims that a particular product has but that are not common for other products of that type);
  - (d) information about significant product features which, while they are not unusual, may lead to a significant financial impact for a consumer (e.g.

the costs to a consumer of early termination or sale of an investment-based financial product (break costs), especially where the product may be sold to consumers with short-term investment objectives. To the extent that break costs cannot be calculated, an indication of the factors that may affect the quantum of those costs should be included);

Note: Clear, concise and effective disclosure about early termination or sale is particularly important in the case of PDSs for capital protected products, given the usual effect of such events is that capital protection ceases: see Report 201 *Review of disclosure for capital protected products and retail structured or derivative products* (REP 201).

- (e) other significant details (e.g. information about who is going to provide any ongoing services for the product or particular aspects of the product, and how to contact them); and
- (f) key information about the financial product in a summary at the front of the PDS.

RG 168.89 As discussed in REP 201, retail investors need to be provided with sufficient information in the PDS to adequately assess counterparty risk, and disclosure should be sufficiently prominent to reflect the nature of the risk.

RG 168.90 In assessing whether a PDS contains sufficient disclosure to enable a retail investor to make an assessment of counterparty risk, we will consider a range of things including:

- (a) how information is disclosed in the PDS about the financial position and performance of the issuer (or, for over-the-counter (OTC) issuers, whether an undertaking has been included in their PDS that the latest financial statements will be provided to any potential investors on request);

Note: For the disclosure of information about financial position and performance, we have granted limited relief from the requirement to update a PDS where the new information does not include any materially adverse information and where the new information is made available to consumers free of charge by some other means (e.g. through a website or a toll-free telephone service): see Class Order [CO 03/237] Updated information in product disclosure statements.

- (b) the risk management and compliance systems of the issuer;
- (c) the criteria used by the issuer to choose hedging counterparties; and
- (d) where there is only a very small number of hedging counterparties, the identities of those hedging counterparties.

RG 168.91 Where the issuer holds client money, we consider that an AFS licensee needs to clearly and prominently disclose in its PDS how it deals with client money. This includes when, and on what basis, it makes withdrawals from client money, and the nature of the counterparty risk for client money used for derivatives (see Regulatory Guide 212 *Client money relating to dealing in OTC derivatives* (RG 212)).

- RG 168.92 The size of the typeface, the layout, the use of colour and graphics, the order in which information is presented, as well as the location and boldness of information, are all relevant to whether a consumer's attention is likely to be drawn to the information they most need. Product issuers should consider these issues when making sure that a PDS is clear, concise and effective.
- RG 168.93 Where a PDS is made up of several documents, we expect that the product issuer will give particular attention to helping consumers find the information most relevant to their decision and how this is linked to relevant information in other documents.

## 6 Disclosure should have regard to consumers' needs

- RG 168.94 The information and communication needs of consumers should be taken into account when preparing a PDS. This will help the responsible person to meet both:
- (a) the content obligations of the PDS requirements (see s1013D(1)); and
  - (b) the 'clear, concise and effective requirement' (see s1013C(3)).
- RG 168.95 This might include:
- (a) monitoring carefully the class of consumers to whom the PDS is directed;
  - (b) producing a PDS that is based on a format that has been consumer tested;
  - (c) producing a PDS that has taken into account feedback (including complaints) from consumers about past or current point-of-sale offer documents used by the product issuer;
  - (d) personalising the information contained in the PDS for the consumer; or
  - (e) improving the quality of the disclosure in the PDS to promote product understanding by consumers (e.g. drafting a PDS to improve the comparability of competing financial products—see also Good Disclosure Principle 4).

### Consumer testing

- RG 168.96 Consumer testing may identify areas of the PDS that are potentially misleading and deceptive or confusing, or it may identify additional information that consumers need.
- RG 168.97 Consumer testing can occur at an industry level as a basis for developing an industry standard for individual products or classes of product. In some cases, however, product issuers may need to consider consumer testing of

the actual PDS proposed for consumers. Consumer testing may be particularly useful for complex products.

### **Consumer feedback and complaints**

- RG 168.98 Regardless of whether consumer testing is undertaken prior to the issue of a particular PDS, the ongoing review of a PDS (e.g. to determine whether supplementary information is needed) should take into account any feedback and, in particular, any complaints from consumers about the PDS (or relevant aspects of earlier kinds of point-of-sale offer documents used by the product issuer).
- RG 168.99 Complaints, including those resolved internally and those referred for external resolution, are an important source of information about any consumer problems with, or misunderstandings caused by, the information in a PDS.

### **Personalised information**

- RG 168.100 Research has generally found that personalised information is more widely read and retained by consumers because it is seen as more important and relevant. An example of personalised information is using customer-specific information as a basis for projections associated with life insurance products.
- RG 168.101 We envisage that there is greater opportunity for tailoring a PDS, or using personalised information, where:
- (a) electronic technology (including interactive technology) is used to provide the PDS to consumers; or
  - (b) relevant personal details of the consumer are known by the product issuer prior to the provision of the PDS.

## D Shorter, simpler Product Disclosure Statements

### Key points

A Short-Form PDS can be given for some financial products, provided that certain conditions are met: see RG 168.103–RG 168.105.

Certain information that must be included in a PDS may be ‘incorporated by reference’: see RG 168.106–RG 168.116.

Some products (including general insurance, standard margin lending facilities and First Home Saver Accounts) are subject to tailored PDS regimes: see RG 168.117–RG 168.126.

For most PDSs, a supplementary PDS can be used to correct misleading or deceptive statements or omissions, and/or to update information, contained in the original PDS: see RG 168.127–RG 168.128.

- RG 168.102 The Corporations Act facilitates the use of shorter, simpler PDSs by allowing Short-Form PDSs and incorporation by reference, and by applying a tailored disclosure regime to some products.

### Short-Form PDSs

- RG 168.103 For all financial products except those that are subject to a tailored regime, where a regulated person must supply a PDS to a client, the regulated person can give a Short-Form PDS instead, provided that certain conditions are met: see reg 7.9.61AA and Div 3A of Pt 7.9.

Note: PDS requirements for general insurance products are discussed at RG 168.117–RG 168.122. PDS requirements under the shorter, simpler PDS regime for standard margin lending facilities and First Home Saver Accounts are discussed at RG 168.124–RG 168.126.

- RG 168.104 The Short-Form PDS is intended to help product issuers avoid the problem of lengthy and complex product disclosure documents by allowing them to present a summary document rather than a full-length PDS. In general, a Short-Form PDS summarises the key information in a PDS (e.g. information about the issuer, benefits, risks, costs, return, dispute resolution and cooling off) and complies with Div 3A of Pt 7.9.
- RG 168.105 Where a regulated person must give another person a PDS for a financial product, they can instead give the other person a Short-Form PDS unless (s1017H(1)):
- (a) the other person requests a (full) PDS (s1017H(2)); or
  - (b) the financial product is a general insurance product (s1017H(4)).

Note: For further guidance on preparing a PDS, or Short-Form PDS, combined with an FSG, see RG 175. A Short-Form PDS cannot be combined with an SOA: s1017K, which applies s947E to the Short-Form PDS.

## Incorporation by reference

### Products *not* subject to a shorter, simpler PDS regime

- RG 168.106 For all financial products except those that are subject to the shorter, simpler PDS regime (see RG 168.124), a person who is responsible for a PDS can decide not to include in it certain statements or information that would otherwise be required to be included: reg 7.9.15DA. This statement or information can be ‘incorporated by reference’ if it is in writing and is publicly available in a document other than the PDS, including electronic sources such as the internet. The information cannot be incorporated from a Short-Form PDS.
- RG 168.107 Incorporation by reference is designed to help product issuers reduce the length of disclosure documents by allowing some of the required information to be incorporated by providing a reference in the PDS to another document instead of including the information in full in the PDS.
- RG 168.108 A PDS can incorporate information by reference if the PDS:
- (a) refers to the information;
  - (b) provides sufficient details about the information to enable a person to:
    - (i) identify, by a unique identifier, the document or part of the document that contains the information;
    - (ii) locate the information; and
    - (iii) decide whether or not to read, or obtain a copy of, the information; and
  - (c) states that a copy may be obtained from the responsible person, on request, at no charge.
- RG 168.109 If a client requests a copy of the information, the responsible person must provide it as soon as practicable at no charge.
- RG 168.110 Any information that is incorporated by reference into the PDS is taken to be included in the PDS and is therefore subject to all provisions relating to a PDS. This means that the incorporated information must be clear, concise and effective and must not be misleading or deceptive.
- RG 168.111 The following information must be included in a PDS and cannot be incorporated by reference (reg 7.9.15DA(4)):
- (a) a description, in summary, of the key features of the product (including significant benefits and significant characteristics of the product);

- (b) a description, in summary, of the key risks of the product;
- (c) the name and contact details of the issuer of the product and, if applicable, the seller of the product;
- (d) information about the dispute resolution system that covers complaints by holders of the product and how to access it;
- (e) information about any cooling-off regime;
- (f) the fees and costs with worked examples;
- (g) an explanation of adviser remuneration with worked examples; and
- (h) the consumer advisory warning.

RG 168.112 The PDS and information incorporated by reference must be kept by the responsible person for seven years. If the PDS must be lodged with ASIC, the information incorporated by reference must also be lodged.

### **Products that are subject to a shorter, simpler PDS regime**

RG 168.113 For those products that are subject to more highly prescribed PDS content requirements (see RG 168.124) incorporation by reference is only permitted in certain circumstances: regs 7.9.11E, 7.9.11P and 7.9.11X.

RG 168.114 A PDS can incorporate information by reference if the PDS:

- (a) includes a concise description of the matter; and
- (b) ensures that the reference to the matter is clearly distinguishable from the other contents of the PDS.

RG 168.115 The incorporated document must:

- (a) be in writing;
- (b) be clearly distinguishable from any other matters that are not applied, adopted or incorporated;
- (c) be publicly available in a document other than the PDS; and
- (d) be identifiable (by including the date on which the version was prepared in a prominent position at or near the front of the version) so that a person who, at a particular time, is considering the product can identify the version that is relevant to the product at that time.

RG 168.116 The incorporated material must be accessible by the client reasonably easily and reasonably quickly.

## **The PDS framework for general insurance products**

RG 168.117 The Corporations Regulations provide for a tailored PDS regime for general insurance products by:

- (a) removing certain PDS content requirements for general insurance products;
- (b) removing certain PDS content requirements where the information is disclosed by the product issuer in another document (e.g. policy terms and conditions);
- (c) specifying how a product issuer is to disclose significant characteristics or features of a general insurance product and the rights, terms, conditions and obligations attaching to the product; and
- (d) removing the requirement for some significant benefits of general insurance products to be stated in dollar terms.

### **Which PDS content requirements apply to a PDS for a general insurance product?**

- RG 168.118 The *Insurance Contracts Act 1984* (Insurance Contracts Act) imposes a number of disclosure requirements, including disclosure to a person of the risks associated with holding a general insurance product. The purpose of removing certain PDS content requirements is to reduce the duplication of information between the PDS and the policy terms and conditions for general insurance products.
- RG 168.119 Under reg 7.9.15E, a PDS for a general insurance product must include the following more detailed information to satisfy the requirement in s1013D(1)(f) (i.e. to disclose information about any other significant characteristics or features of the product):
- (a) the terms and conditions of the policy document (within the meaning of the Insurance Contracts Act); and
  - (b) any information that the product issuer would have to provide to the person under s35(2) or 37 of the Insurance Contracts Act before the contract of insurance has been entered into.
- RG 168.120 Regulations 7.9.15C(4) and (5) provide that, where a significant benefit must be stated in dollar terms but can only be determined after the PDS has been produced (e.g. because the product issuer (usually the insurer) must assess the risk of the applicant, or the applicant has not yet nominated desired levels of insurance cover), the information can be stated in the PDS in at least one of the following formats:
- (a) as a range of amounts in dollars;
  - (b) as a percentage of a matter that is mentioned in the statement; or
  - (c) as a description.

The applicant must also be given a document stating the dollar amount of the cost or benefit within five business days of the product being issued.

- RG 168.121 We have granted relief under [CO 04/1431] *Dollar disclosure: Costs of derivatives, foreign exchange contracts, general insurance products and life risk insurance products* where the amount of costs or benefits cannot be stated for the client within five business days (i.e. where it is still unknown).

### **Which PDS content requirements do not apply to a PDS for a general insurance product?**

- RG 168.122 Under reg 7.9.15D, a PDS for a general insurance product does not have to include information about:
- (a) amounts deducted from a common fund (s1013D(1)(d)(iii));
  - (b) commissions or other similar payments that might impact on returns (s1013D(1)(e));
  - (c) any significant taxation implications of financial products of that kind (s1013D(1)(h));
  - (d) how the client can access any other information about the financial product that might be available (s1013D(1)(j));
  - (e) the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment (s1013D(1)(l));
  - (f) any significant risks associated with holding the product (s1013D(1)(c)); and
  - (g) other information that might materially influence a decision to acquire the product (s1013E).

### **Bundled insurance products**

- RG 168.123 If there is more than one insurer for a bundled insurance product, each insurer is responsible to the holder of the bundled insurance product for some or all of the risks or obligations covered by the product: s764A(1A). All insurers will therefore be joint issuers of the product under s1013A(3A) and are responsible for all of the statements made in the PDS.

## **Shorter, simpler PDS regime for specified products**

- RG 168.124 The Corporations Regulations provide for tailored PDS regimes for specified products, including:
- (a) standard margin lending facilities (Sch 10C);
  - (b) First Home Saver Accounts (Sch 10B).
  - (c) superannuation products (other than a product that is solely a defined benefit scheme) (Sch 10D); and

- (d) simple managed investment schemes (Sch 10E).

Note: This guide does not cover the tailored PDS regimes for superannuation and simple managed investment products introduced by the Corporations Amendment Regulations 2010 (No 5). These regimes commence on 22 June 2011 for all new products, as well as for existing products where a supplementary PDS would be required, and on 22 June 2012 for all other PDSs: see INFO 133.

### **The PDS framework for standard margin lending facilities**

RG 168.125 From 1 January 2011, a tailored PDS regime will apply to PDSs for standard margin lending facilities. The tailored regime for standard margin lending facilities:

- (a) removes the usual PDS content requirements for financial products in s1013D;
- (b) substitutes new PDS content requirements which are more prescriptive and specifically address the key information a person acquiring a superannuation product would wish to know (Sch 10C); and
- (c) requires a maximum page limit of four A4 pages (or equivalent) for the PDS, with an expectation that the person responsible for the PDS will make substantial use of incorporation by reference to provide additional information for clients.

### **The PDS framework for First Home Saver Accounts**

RG 168.126 The Corporations Regulations provide for a tailored PDS regime for First Home Saver Accounts by:

- (a) removing the usual PDS content requirements for financial products in s1013D;
- (b) substituting new PDS content requirements which are more prescriptive and specifically address the key information a person acquiring a superannuation product would wish to know (Sch 10B); and
- (c) requiring a maximum page limit of four A4 pages (or equivalent) for the PDS.

## **Supplementary PDSs**

RG 168.127 Section 1014A describes a supplementary PDS as a document by which a person who has prepared a PDS can, among other things, correct misleading or deceptive statements or omissions, and/or update information contained in the original PDS. However, in some cases, issuing a new PDS may be better than issuing a supplementary PDS to correct a misleading or deceptive statement.

Note: For the disclosure of information about financial position and performance, we have granted limited relief from the requirement to update a PDS where the new information does not include any materially adverse information and where the new information is made available to consumers free of charge by some other means (e.g. through a website or a toll-free telephone service): see Class Order [CO 03/237]  
*Updated information in product disclosure statements*

RG 168.128 A supplementary PDS is not available in the case of a PDS for a product that is subject to a tailored regime mandating the maximum length of the PDS. If the person who has prepared a PDS needs to update information contained in the original PDS, or correct a misleading or deceptive statement or omission, a new PDS must be issued.

## E How we monitor and assess PDSs

### Key points

We will conduct selective compliance reviews of PDSs to determine whether they comply with the PDS requirements.

We may review PDSs that we think are open to compliance risk. We also may review PDSs as part of a targeted project, in response to a complaint or at random.

### Our general approach

- RG 168.129 Our approach to monitoring PDSs and enforcing the PDS requirements is underpinned by two key principles:
- (a) promoting compliance with the PDS requirements and achievement of their objectives; and
  - (b) providing certainty and transparency in the processes that we will adopt in fulfilling our regulatory responsibilities.

### Lodging PDSs with ASIC and in-use notices

RG 168.130 PDSs for managed investment products that state or imply that the product will be able to be traded on a financial market must be lodged with ASIC prior to their release to consumers: see s1015B(1). We must be notified about other PDSs as soon as practicable after a copy of the PDS is first given to consumers, and in any event not less than five business days after it is first given to someone in a recommendation, issue or sale situation: see s1015D(2). We do not require notification in advance of a PDS being given to consumers.

RG 168.131 Making a material change to a PDS has the effect of making it a new PDS, so that a new notification to ASIC must be made. Material changes may include:

- (a) the correction of a misleading or deceptive statement in the earlier PDS;
- (b) the addition of material required but omitted from an earlier PDS; or
- (c) an update or addition to, or removal of, information contained in the earlier PDS.

RG 168.132 Immaterial changes to a PDS may include:

- (a) a minor change to presentation; or
- (b) a trivial change to content (e.g. the correction of typographical errors).

RG 168.133 However, a change to a PDS will only be immaterial if:

- (a) the amended PDS remains clear, concise and effective; and
- (b) the amended PDS is not defective—that is, it does not include a misleading or deceptive statement, nor is there an omission from the PDS of information required to be included in it.

## Compliance reviews

RG 168.134 We will conduct selective compliance reviews of PDSs to determine whether they comply with the PDS requirements.

RG 168.135 We may review certain PDSs:

- (a) that we consider as open to compliance risk (e.g. products marketed to vulnerable consumer groups or products that are highly complex);
- (b) if we receive credible information from external sources (e.g. consumer complaints) about a PDS that warrants undertaking a review; or
- (c) at random.

RG 168.136 We will determine compliance risk for a product or class of products from time to time, having regard to the financial services environment that prevails at a particular time, trends in consumer complaints we receive and our general regulatory experience.

RG 168.137 This approach is consistent with our overall surveillance and enforcement philosophy and seeks to strike a balance between our regulatory responsibilities and finite resources.

RG 168.138 We may conduct a review on:

- (a) an individual PDS (individual assessment);
- (b) a number of PDSs for a particular class of product or products (product-based assessment); or
- (c) PDSs of a particular product issuer or conglomerate including a number of product issuers (institutional assessment).

RG 168.139 While a PDS has no expiry date, issuers must keep a PDS up-to-date. We may take enforcement action if changes in circumstances mean that the PDS becomes misleading or incomplete.

Note: For further information about up-to-date PDSs, see s1016E, reg 7.9.13A and [CO 03/237].

## Assessing misleading and deceptive conduct

RG 168.140 When assessing whether a PDS appears to be misleading or deceptive, we will pay particular attention to:

- (a) statements about future matters such as forecasts (they should have reasonable grounds);

Note: For further guidance on statements about future matters in PDSs, see RG 170.

- (b) statements about past performance;
- (c) statements of opinion (they should be formed honestly and reasonably);
- (d) the likely overall impression of the PDS;
- (e) the use of illustrations or examples to highlight an aspect of the disclosure being provided;
- (f) the use of disclaimers;
- (g) ambiguous statements;
- (h) whether statements draw inaccurate, unfair or inappropriate comparisons;
- (i) the currency of information; and
- (j) how information is set out and the prominence given to particular pieces of information.

### Statements about future matters

RG 168.141 A statement about any future matter is misleading or deceptive if the maker does not have reasonable grounds for making it. For example, a statement about prospective financial information based on a number of hypothetical assumptions is unlikely to be based on reasonable grounds.

Note: For further guidance on disclosure of prospective financial information, see RG 170.

### Statements about past performance

RG 168.142 Care should be taken when showing past performance information including, in particular, giving consideration to any misleading or deceptive representation that may arise from:

- (a) the currency of past performance information (e.g. does the information need to be updated, including by means of a supplementary PDS?);

Note: For more guidance, see RG 23.12A–RG 23.12J. These paragraphs continue to apply with necessary adaptations as set out in RG 169.

- (b) the length of time a product or investment strategy has been in existence or the investment period selected;

- (c) the periods for which past performance information is shown (e.g. different sub-periods in the life of any past performance information may produce entirely different past performance figures);
- (d) whether the past performance information is shown in accordance with any industry standards;
- (e) any explicit or implicit suggestion of a link between past performance and future prospects;
- (f) the use of hypothetical or reconstructed past performance figures;
- (g) changes in the state of the market such that returns in the short to medium term are likely to be significantly less than the past performance being quoted; and
- (h) changes in the method or mechanism by which the investment strategy is implemented (e.g. appointment of a new investment manager).

RG 168.143 A statement about past performance should be accompanied by a prominent warning that past performance is not necessarily a guide to future performance.

### Statements of opinion

- RG 168.144 A statement of opinion that amounts to a representation may be misleading or deceptive in the following circumstances:
- (a) an opinion may be a statement about a future matter, in which case it must be based on reasonable grounds. If this is not the case, the expression of opinion may be regarded as misleading or deceptive;
  - (b) an opinion may convey that there is a basis for the opinion, that it is honestly held, and when expressed as the opinion of an expert that it is honestly held on rational grounds involving the application of the relevant expertise. If this is not the case, the expression of opinion may be regarded as misleading or deceptive (see *Bateman v Slayter* (1987) ATPR 40–762); and
  - (c) a statement of opinion involving a state of mind may convey the meaning (expressly or by implication) that the maker had the particular state of mind when the statement was made and, commonly, that there was a basis for having that state of mind. If this is not so, such a statement may constitute misleading or deceptive conduct (see *Stanton v ANZ Banking Group* (1987) ATPR 40–755).
- RG 168.145 A statement of opinion may become misleading or deceptive if it continues to be published when the maker no longer holds the opinion or the grounds on which it was made have substantially changed.

- RG 168.146 A PDS may only include a statement made by a person, or information based on a statement made by a person, if that person has consented to its inclusion in the PDS: s1013K.

### Overall impression of PDS

- RG 168.147 In assessing the overall impression conveyed by a PDS, we will:
- (a) identify the relevant section of the public to whom the offer was made; and
  - (b) consider the range of people within that section of the public.

The PDS should be intelligible to reasonable members of the class to whom it is directed: see *Fraser v NRMA Holdings Ltd* (1995) 15 ASCR 590.

- RG 168.148 Consumer testing documents may help issuers identify whether people are or are not actually misled by a document (although it is not necessary to prove that someone has been actually misled to establish misleading and deceptive conduct).

### Illustrations or examples

- RG 168.149 Illustrations or examples should be provided on a consistent basis and be accompanied by a clear explanation of:
- (a) the facts and assumptions on which they are based (e.g. an illustration of the effect of fees on the actual returns of an investment should indicate what fees are included in any calculation); and
  - (b) their purpose (e.g. an illustration of the effect of fees on returns is not a forecast of the end benefit payable).

### Disclaimers

- RG 168.150 Disclaimers about statements may not be effective if they are not sufficiently prominent to clearly counterbalance the effect of a misrepresentation clearly made. A disclaimer should generally be able to be seen and understood by those who otherwise might be misled: see *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535.

### Ambiguous statements

- RG 168.151 Ambiguity may constitute misleading or deceptive conduct if one or more of the reasonably possible meanings is misleading or deceptive.

## Comparisons

- RG 168.152 The comparison of the performance of a product to a benchmark or a competitor should be done in a careful manner. For example, comparison of a financial product against a benchmark assuming that returns are reinvested may be misleading or deceptive if, in fact, it is not possible to reinvest returns. Also, comparison of returns for different investment strategies may be misleading or deceptive if the returns for each investment strategy are not calculated and shown on a consistent basis, or there is no explanation of the basis on which returns information is being provided.

## What we do when there are disclosure concerns

- RG 168.153 When we detect or are made aware of valid *prima facie* disclosure concerns about a PDS, we may notify the issuer of our concerns before serving an interim stop order.
- RG 168.154 However, if delay could be prejudicial to the public interest, we may impose an interim stop order without consulting the issuer, pending resolution of our concerns at a hearing.
- RG 168.155 Our approach to issuing stop orders during the exposure period under Ch 6D of the Corporations Act is set out in Regulatory Guide 152 *Lodgment of disclosure documents* (RG 152) at RG 152.49. PDSs that are not required to be lodged, and to which no exposure period applies, may be subject to a stop order at any time.
- RG 168.156 In deciding whether to take enforcement action on a particular PDS, we will consider whether the PDS appears to:
- (a) be misleading or deceptive;
  - (b) contain all relevant information;
  - (c) meet the other general and specific content requirements of Pt 7.9; and
  - (d) be worded and presented in a clear, concise and effective manner.
- RG 168.157 In making our assessment, we will also take into account:
- (a) any changes that have occurred since the date of the PDS that could make it deficient;
  - (b) the circumstances surrounding the preparation of the PDS;
  - (c) the extent to which the Good Disclosure Principles in Section C have been followed;
  - (d) the circumstances in which the PDS was given to the consumer; and
  - (e) whether any industry standards or codes have been adhered to.

- RG 168.158 When determining the scope or terms of a stop order we will have regard to the nature of the financial product and the potential impact of the order on the interests of consumers (e.g. the impact on renewals for general insurance).

## Defective PDSs

- RG 168.159 Where the responsible person who prepares the PDS (in most cases the issuer) becomes aware that a PDS has become defective in a way that materially adversely affects retail clients, s1016E generally requires the issuer to take remedial action.
- RG 168.160 Remedial action can include refunding any money received, giving the applicant a supplementary PDS or new PDS and one month to withdraw their application, or giving them a supplementary PDS or new PDS as well as one month to return the product and receive a refund.
- RG 168.161 If a client has applied for a product on the basis of an out-of-date or otherwise defective PDS that is contrary to s1016E, they are entitled to return the product and obtain a refund under s1016F.
- RG 168.162 An investor can only exercise this right within one month of the date of issue of the product. An investor may not realise within that timeframe that their application was made under a defective PDS.

## Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence
ASIC	Australian Securities and Investments Commission
[CO 04/1432] (for example)	An ASIC class order (in this example numbered 04/1432)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
dollar disclosure provisions	Provisions of the Corporations Act and Corporations Regulations that require various costs, fees, charges, expenses, benefits and interests to be stated as amounts in dollars unless ASIC grants relief Note: See s947B(2)(h), 947C(2)(i), 947D(2)(d), 1013D(1)(m), 1017D(5A) and regs 7.7.10A–7.7.11, 7.7.11B–7.7.13B, 7.9.15A–7.9.15C, 7.9.19A–7.9.19B, 7.9.20A–7.9.20B, 7.9.74A–7.9.75 and 7.9.75C–7.9.75D
fees	Costs that a consumer will pay for a product or service. These include commissions and, unless the context requires otherwise, all government charges
financial product	Generally a facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> <li>• makes a financial investment (see s763B);</li> <li>• manages financial risk (see s763C);</li> <li>• makes non-cash payments (see s763D).</li> </ul> Note: See Div 3 of Pt 7.1 for the exact definition.
FSG	Financial Services Guide—A document that must be given to a retail client for the provision of a financial service in accordance with Div 2 of Pt 7.7 Note: See s761A for the exact definition.
FSR Act	<i>Financial Services Reform Act 2001</i> or the Corporations Act (as amended by the FSR Act) Note: The provisions contained in Sch 1 of the FSR Act formed part of the Corporations Act from 11 March 2002. Schedule 1 contains the financial services licensing provisions under Pts 7.6–7.8 of the Corporations Act and the financial product disclosure provisions under Pt 7.9.

Term	Meaning in this document
Insurance Contracts Act	<i>Insurance Contracts Act 1984</i>
managed investment provisions	Chapter 5C of the Corporations Act and related regulations
PDS	Product Disclosure Statement—A document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 Note: See s761A for the exact definition.
PDS requirements	The requirements set out in Div 2 of Pt 7.9 and related regulations
Pt 7.9 (for example)	A part of the Corporations Act (in this example numbered 7.9)
reg 7.6.04 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.6.04), unless otherwise specified
regulated person	A regulated person is defined in s1011B as: <ul style="list-style-type: none"> <li>(a) an issuer of the financial product; or</li> <li>(b) a seller of the financial product if the sale takes place in circumstances described in subsection 1012C(5), (6) or (8) (secondary sales that require a Product Disclosure Statement); or</li> <li>(c) any financial services licensee; or</li> <li>(d) any authorised representative of a financial services licensee; or</li> <li>(f) any person who is not required to hold an Australian financial services licence because the person is covered by: <ul style="list-style-type: none"> <li>(i) paragraph 911A(2)(j); or</li> <li>(ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or</li> <li>(iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l); or</li> </ul> </li> <li>(g) any person who is required to hold an Australian financial services licence but who does not hold such a licence.</li> </ul>
responsible person	The person who, or on whose behalf, a Product Disclosure Statement for a financial product is required to be prepared Note: See s1013A(3) for the exact definition.
retail client	A client defined as such under s761G and Ch 7, Pt 7.1, Div 2 of the Corporations Regulations

Term	Meaning in this document
RG 168 (for example)	An ASIC regulatory guide (in this example numbered 168)
RSA Act	<i>Retirement Savings Account Act 1997</i>
s912A (for example)	A provision of the Corporations Act (in this example numbered 912A), unless otherwise specified
Short-Form PDS requirements	The requirements set out in Div 3A of Pt 7.9 inserted into the Corporations Act by reg 7.9.61AA and Sch 10BA of the Corporations Regulations
SIS Regulations	Superannuation Industry (Supervision) Regulations 1994
SOA	Statement of Advice—A document that must be given to a retail client for the provision of personal advice in accordance with Subdivs C and D of Div 3 of Pt 7.7 Note: See s761A for the exact definition.

## Related information

### Headnotes

financial products, Financial Services Guide (FSG), Good Disclosure Principles, industry standards or codes, misleading or deceptive conduct, PDS requirements, Product Disclosure Statement (PDS), Short-Form Product Disclosure Statement (Short-Form PDS), promotions, Statement of Advice (SOA)

### Class orders

[CO 02/141] *Experts: citing in Product Disclosure Statements*

[CO 02/143] *Financial product market research*

[CO 02/191] *Product disclosure—requirements for issuers of financial products who lodge opt-in notices*

[CO 02/260] *Product Disclosure Statements—application forms created by a licensee*

[CO 02/286] *Obligation to provide Product Disclosure Statement: s1012B*

[CO 02/608] *Warrants: relief from PDS requirements for secondary sales*

[CO 02/1075] *Travellers' cheques and confirmation of transactions*

[CO 03/237] *Updated information in product disclosure statements*

[CO 03/606] *Financial product advice—exempt documents*

[CO 03/1092] *Further relief for joint product disclosure statements*

[CO 04/239] *Factoring arrangements—licensing, hawking and disclosure relief*

[CO 04/1055] *Information in a Financial Services Guide given in time critical situation*

[CO 04/1430] *Dollar disclosure: Unknown facts or circumstances*

[CO 04/1431] *Dollar disclosure: Costs of derivatives, foreign exchange contracts, general insurance products and life risk products*

[CO 04/1432] *Dollar disclosure: Interest payable on deposit products*

[CO 04/1433] *Dollar disclosure: non-monetary benefits and interests*

[CO 04/1434] *Dollar disclosure: Transitional relief*

[CO 04/1435] *Dollar disclosure: Amounts denominated in a foreign currency*

[CO 06/636] *Superannuation: Delivery of product disclosure for investment strategies*

[CO 09/210] *Intra-fund superannuation advice*

## **Regulatory guides**

RG 23 *Updating and correcting prospectuses and application forms*

RG 36 *Licensing: Financial product advice and dealing*

RG 45 *Mortgage schemes—Improving disclosure for retail investors*

RG 46 *Unlisted property schemes—Improving disclosure for retail investors*

RG 49 *Employee share schemes*

RG 53 *The use of past performance in promotional material*

RG 78 *Breach reporting by AFS licensees*

RG 148 *Investor directed portfolio services*

RG 152 *Lodgment of disclosure documents*

RG 169 *Disclosure: Discretionary powers*

RG 170 *Prospective financial information*

RG 173 *Disclosure for on-sale of securities and other financial products*

RG 175 *Licensing: Financial product advisers—Conduct and disclosure*

RG 179 *Managed discretionary account services*

RG 182 *Dollar disclosure*

RG 183 *Approval of financial services sector codes of conduct*

RG 184 *Superannuation: Delivery of product disclosure for investment strategies*

RG 188 *Disclosure in reconstructions*

RG 189 *Disclosure relief for rights issues*

RG 190 *Offering securities in New Zealand and Australia under mutual recognition*

RG 212 *Client money relating to dealing in OTC derivatives*

## Legislation

*Corporations Act 2001*, Chs 5C, 6D, Pts 7.6–7.9, Pt 7.1 Div 3, Pt 7.7 Div 3, Pt 7.9 Div 2, s761G, 913B, 941A, 941B, 941C, 941C(1), 941D(1)–(4), 942B, 942B(4), 942B(6A), 942B(7), 942C, 942C(4), 942C(6A), 942C(7), 942DA, 944A, 946A, 946B, 946C(1)–(3), 947B, 947B(4), 947B(6), 947C, 947C(4), 947C(6), 947D(4), 947E, 949A, 949B, 1012A–1012G, 1012D(2A), 1012D(2B), 1012F, 1013A, 1013C, 1013C(1), 1013C(3), 1013D, 1013D(1), 1013D(1)(1), 1013D(4), 1013DA, 1013E, 1013F(2), 1015B, 1015B(1), 1015D(2), 1016A, 1016E, 1017C, 1017B, 1019B(3), 1020E, 1041E, 1041H, 1438(3)

*Corporations Regulations 2001*, Pt 7.9 Div 4, regs 7.1.29, 7.6.01C, 7.7.01(2), 7.7.02, 7.7.02(5A), 7.7.07D, 7.7.08A, 7.7.09, 7.7.10, 7.7.14, 7.7.20, 7.9.07D–F, 7.9.07J, 7.9.02A, 7.9.04, 7.9.11, 7.9.11(2), 7.9.13A, 7.9.15A, 7.9.15C, 7.9.15D, 7.9.15DA, 7.9.15DB, 7.9.15E, 7.9.15F, 7.9.16G, 7.9.80C–D, 10.2.81, 10.2.214, Sch 10B, Sch 10BA, Sch 10C–10E

*Acts Interpretation Act 1901*, s15AA

*Insurance Contracts Act 1984*, s35(2), 37

*Superannuation Industry (Supervision) Regulations 1994*, reg 4.02

## Cases

*Bateman v Slayter* (1987) ATPR 40–762

*Fraser v NRMA Holdings Ltd* (1995) 15 ASCR 590

*Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535

*Stanton v ANZ Banking Group* (1987) ATPR 40–755

## Reports

REP 201 *Review of disclosure for capital protected products and retail structured or derivative products*

## Media and information releases

INFO 94 *Notification requirements for Product Disclosure Statements*

INFO 99 *Disclosure of credit ratings in Australia*

INFO 133 *Shorter and simpler PDSs: Superannuation, managed investment schemes and margin lending*