



ASIC

Australian Securities & Investments Commission

Guidance referred to in ASIC Information Release 04-78

If you provide a financial service to a retail client via an intermediary (a secondary service) is the service caught by the retail client requirements?

Answer

Yes, your service may be caught by the **retail client requirements**. This FAQ explains when you will be caught by the retail client requirements and what you can do to avoid them. It also tells you what relief is available to assist you to meet your obligation to give the retail client your FSG.

What is a 'secondary service'?

In this FAQ, we call a financial service provided to a retail client via an intermediary¹ a 'secondary service'.

Why the need for this FAQ?

We have been asked how you decide whether or not a financial service is a secondary service. If the service is a secondary service, the retail client requirements of the law must be met.

However, if you take reasonable steps to prevent the secondary service from occurring, you may not be required to meet the retail client requirements. This FAQ considers secondary services when you are:

¹ The intermediary is simply the entity through whom your financial service is made available to the retail client.

- providing financial **advice**
- **dealing**, or
- providing a **custodial or depository arrangement**.

Concerns have been expressed to us about the difficulty in providing a Financial Services Guide (FSG) to a retail client where the licensee providing the secondary service does not have a direct relationship with that retail client. This FAQ lists a number of ways in which these practical difficulties could be resolved.

The intermediary should also consider whether they are providing a financial service to retail clients. The fact that an entity provides a secondary service to a retail client does not affect the question of whether the intermediary also provides a financial service to the retail client.

What are the retail client requirements?

If you provide a secondary service to a retail client, you may need to:

- have an appropriate retail Australian financial services (AFS) licence authorisation
- have appropriate dispute resolution processes
- provide an FSG about the service you are providing
- follow Policy Statement 146 *Licensing: Training of financial product advisers* [PS 146] and related training requirements if advice is provided, and
- satisfy general advice warning requirements if general advice is provided.

When is *financial product advice* a secondary service?

Your financial product advice is a secondary service if, subject to any other exemptions that may apply (such as in regulation 7.1.33B), you cause or authorise financial product advice to be given or directed to a retail client (within the meaning of s52).

Causing or authorising doesn't always need to be express. Therefore, you are likely to be providing a secondary service if:

- you know (or should know) that the advice or any part of it will be passed on to a third party (the recipient); and
- the advice is passed on and attributed to you.

However, you do not authorise the provision of advice by mere inactivity if you did not know or have reason to suspect that the advice might be passed on and attributed to you (*University of New South Wales v Moorhouse & Angus & Robertson (Publishers) Pty Ltd* (1975) 133 CLR 1 at pp 12–14 per Gibbs J).

In addition, if the intermediary provides financial product advice to the retail client as its own, without attributing it to you, it will not be financial product advice provided by you to the retail client. This is the case even if the advice provided by you to the intermediary helped that intermediary to formulate its own advice.

When is *financial product advice* not a secondary service?

If you meet all of the following **three requirements** we would ordinarily expect that you would not be providing financial product advice to a retail client, even if your advice is later passed on to them and attributed to you:

- **Requirement 1:** You expressly prohibit the intermediary (i.e. your wholesale client) from passing on your advice to any retail client.
- **Requirement 2:** You include a prominent statement in your advice to the intermediary that it is only intended for use by wholesale clients and must not be made available to any retail client.
- **Requirement 3:** There is no reasonable basis to believe that the intermediary will fail to comply with your express prohibition in Requirement 1.

Meeting these three requirements should amount to reasonable steps to prevent the secondary service from occurring. As a result, it is our view that you ordinarily would not be considered to be causing or authorising either directly or implicitly the giving or directing (dissemination) of your advice to retail clients via the intermediary.

When is there *no reasonable opportunity* to give an FSG?

Although s940B exempts a person providing financial services from having to provide an FSG where there is ‘no reasonable opportunity’, this exemption would not usually apply to secondary services. This is because you could obtain the contact details of the retail client from the intermediary.

Example 1

A financial planner seeks advice from a stockbroker about what share purchases should be made for a particular retail client. What can the stockbroker do to ensure that they do not provide a secondary service to the retail client?

ASIC comment: The stockbroker could give advice to the financial planner taking reasonable steps to prevent it from being passed on to the retail client as the stockbroker’s advice. The stockbroker could achieve this by meeting the three requirements listed above.

The financial planner could then formulate their own advice taking into account what the stockbroker has said.

Alternatively, if the stockbroker allows the financial planner to pass on the stockbroker's advice to the retail client the stockbroker would need to meet all the retail client requirements, including arranging for an FSG to be provided by the financial planner to the retail client on their behalf. This would be necessary because by allowing the financial planner to pass on their advice, the stockbroker is providing a secondary service to the retail client.

However, if the advice is not attributed to the stockbroker, the stockbroker will not be providing a secondary service to the retail client and will not be obliged to give their FSG to that retail client.

Example 2

A general insurance broker discusses particular details of the insurance needs of their retail clients with an underwriting agency. The general insurance broker then asks the underwriting agency what particular products the underwriting agency might recommend for those clients' circumstances.

ASIC comment: The underwriting agency could avoid providing a secondary service to the retail clients by taking the three reasonable steps listed above. The general insurance broker could then formulate their own advice taking into account what the underwriting agency has said.

Alternatively, if the underwriting agency allows the general insurance broker to pass on the underwriting agency's advice to the retail client the underwriting agency would need to meet all the retail client requirements, including arranging for an FSG to be provided by the general insurance broker to the retail client on their behalf. This would be necessary because by allowing the general insurance broker to pass on their advice, the underwriting agency is providing a secondary service to the retail client.

However, if the advice is not attributed to the underwriting agency, the underwriting agency will not be providing a secondary service to the retail client and not be obliged to give their FSG to that retail client.

Example 3

A research house issues a piece of research that includes general financial product advice to its various licensee clients. The licensee clients post that research on their websites in a location that can be accessed by their retail clients with an acknowledgment of the source of the research.

ASIC comment: Unless the research house has taken reasonable steps to prevent their advice being passed on to retail clients (such as the three reasonable steps listed above), they are likely to be providing financial product advice to the retail clients by implicitly causing or authorising the provision of their advice to the retail clients and would need to meet all of the retail client requirements.

If the research house allows the licensee clients to pass on the research house's advice to the retail client the research house would need to meet all the retail client requirements, including arranging for an FSG to be provided by the licensee clients to the retail client on their behalf. This would be necessary because by allowing the licensee clients to pass on their advice, the research house is providing a secondary service to the retail client.

Example 4

A research house issues a piece of research that includes general financial product advice and posts this on its website, which is accessible by the public. A licensee takes the information from the website and passes that information on to its retail clients as the research house's advice. The research house has no agreement or relationship with the licensee, and does not know the identity of the clients of the licensee.

ASIC comment: The research house will be providing the licensee with general financial product advice. Although the research house may also be providing general advice to retail clients of the licensee, the research house will not be required to give those clients a copy of its FSG if s940B applies. This is because s940B provides that no breach occurs where there is 'no reasonable opportunity' to provide retail clients with an FSG. This defence is likely to be available in this example because, in the circumstances described, the research house does not know, and has no reasonable way of finding out, the identities or the addresses of the retail clients receiving the information taken and disseminated by the licensee.

Example 5

An expert provides an expert's report to a client for inclusion in the client's PDS (or prospectus), which will be circulated to retail clients.

ASIC comment: The expert must meet all of the retail client requirements including having an appropriate retail Australian financial services licence authorisation and giving its FSG to the retail clients to whom its client gives its PDS (or prospectus).

When is *dealing* a secondary service?

If you are dealing (s766C) because you issue a financial product, the person acquiring the financial product is your client. In circumstances where you are dealing by applying for, acquiring, varying or disposing of a financial product on behalf of retail clients via an intermediary, the retail client will be your client. As this is a secondary service, you must meet the retail client requirements of the law.

Similarly, where the intermediary is an agent for a retail client, the retail client will be your client and you will provide a financial service to that retail client.

When is *dealing* not a secondary service?

If the intermediary is the agent of a retail client, but contracts in terms that imply that they are the principal, you can ordinarily treat the intermediary as the principal without inquiring further.

You will not provide a financial service to the retail client and do not need to treat the retail client of the intermediary as your client if the intermediary (or another wholesale client) acts as principal. For example, if the transaction is executed in the name of a trustee or custodian they will be your client and your obligations will be to them. The nature of those obligations will depend on whether the trustee or custodian is a wholesale or retail client.

Example 6

A fund manager in charge of a retail sub-account employs the services of a dealer. The fund manager has complete control and makes all of the day-to-day decisions on behalf of the retail client represented in the sub-account, but the retail client is the direct beneficiary of the sub-account assets. Is the dealer providing a secondary service to the retail client even though they may have no direct contact?

ASIC comment: If the financial products are in the name of the client, and the contract to deal is made by the fund manager as agent for the client, then the financial service is being provided by the dealer to the retail client. As the holder of the financial

assets, the retail client is entitled to all of the retail protections, including an FSG, from the dealer.

However, if client assets are held by the fund manager as trustee and the fund manager acts as principal in the transactions, then the fund manager is the dealer's client.

If the fund manager is operating an MDA under ASIC Class Order [CO 04/194] *Managed discretionary accounts*, then relief may apply from the requirement to give an FSG under paragraph 6 of that class order.

Example 7

A general insurance broker arranges insurance for their retail client through an underwriting agency that acts under a binder with the insurer.

ASIC comment: The general insurance broker is dealing by arranging cover for the retail client: s766C(2). The mere fact that the broker asks the underwriting agency to place the cover does not mean that the underwriting agency is providing a secondary service to the broker's retail client if the underwriting agency is acting under a binder with the insurer. However, the insurer will be providing a financial service to the retail client by issuing a policy in the retail client's name.

When is a *custodial or depository arrangement* a secondary service?

If you hold financial products in trust for the retail client of an intermediary (instead of in trust for the intermediary) under an arrangement with that intermediary who has an arrangement with the retail client, you will be providing a custodial or depository service to the retail client: s766E. This is, therefore, a secondary service and you must satisfy the retail client requirements of the law. Of course, this is subject to any other exceptions in the law that may apply.

When is a *custodial or depository arrangement* not a secondary service?

By holding the financial products in trust for the intermediary (instead of in trust for their retail client) you will be providing a custodial or depository service to the intermediary, and not to their retail client.

How can you meet the FSG requirements if you are providing a secondary service?

Concerns have been expressed to us about the difficulty in providing an FSG to a retail client where the licensee or authorised representative (the secondary service provider) does not have a direct relationship with that retail client. Depending on the

circumstances, there are a number of ways in which this practical difficulty could be resolved:

1. Rely on ASIC class order relief:
 - (a) *General FSG relief*: Relief has been granted for secondary service providers from the consequences of failing to actually provide an FSG to retail clients where they enter into an arrangement with the intermediary for the intermediary to give the secondary service provider's FSG to those clients and where they have no reason to believe that the intermediary will not do so. Other conditions apply. This relief applies from 1 July 2005: see [CO 04/1571] for full details of the relief.
 - (b) *Transitional FSG relief*: In order to give secondary service providers reasonable opportunity to put into place the arrangements referred to under our general FSG relief, relief has been granted until 30 June 2005 for secondary service providers from the consequences of failing to actually provide an FSG to retail clients where they post their FSG on their website (if they have one) and made their FSG available to persons on request. Other conditions apply. This relief applies only until 30 June 2005: see [CO 04/1571] for full details of the relief.
 - (c) *FSG relief for experts*: Relief for secondary service providers where they provide an expert's report that is included in a third party's disclosure document such as a prospectus or product disclosure statement (PDS). This relief enables the expert to meet its obligation to give its FSG to retail clients by including the FSG as a separate and clearly identifiable part of the expert's report. Other conditions apply: see [CO 04/1572] for full details of the relief.
 - (d) *FSG relief for arrangers*: Relief for secondary service providers where they make offers to people to arrange for the issue of financial products pursuant to an arrangement with a product provider as referred to in paragraph 911A(2)(b) of the Act. Where this class order applies the secondary service provider's FSG can be included as a separate and clearly identifiable part of the product provider's PDS. Other conditions apply: see [CO 04/1573] for full details of the relief.
2. Arrange for the intermediary to give the secondary service provider's FSG to the relevant retail clients. In this case the intermediary would be acting on the secondary service provider's behalf. It would be up to the secondary service provider to structure its arrangements in a way that will give it sufficient certainty that the intermediary actually provides the FSG to the retail clients in a way that satisfies the secondary service provider's legal obligations. If the FSG is not provided they will have breached the law (unless they are under a mistake of fact: see s952C(2); and s6.1 and s9.1 of the Criminal Code); or

3. Structure the relationship with the intermediary in such a way that the secondary service provider avoids providing a secondary service to a retail client, which would mean that there is no obligation to provide an FSG to that person (see above for examples about how this could be achieved); or
4. Include requirements in the agreement with the intermediary for the intermediary to provide the secondary service provider with address details of the relevant retail clients – the secondary service provider could then provide its FSG to those clients; or
5. Prepare a combined FSG with the intermediary incorporating information about the financial service that you each provide to the retail client. Again, the secondary service provider will remain responsible for ensuring that the FSG is actually provided to the retail clients in a way that satisfies their legal obligations. The ability to provide a combined FSG is described in Policy Statement 175 *Licensing: Financial product advisers—Conduct and disclosure* at [PS 175.48]. There is no need for the parties preparing a combined FSG to be related or part of a conglomerate.

What obligations does the intermediary have?

If the intermediary is also providing a financial service to a retail client to whom they pass on a secondary service then they will also need to meet the retail client requirements.

In addition, because the intermediary bundles its financial service with the secondary service provider's financial service and then makes the bundle of services available to the retail client, we would expect that, in meeting its obligations under the law and its licence, the intermediary would explain what services are being provided, who is responsible for each service and how the retail client could contact the responsible service provider if the client has any questions or complaints. We would also expect the intermediary to inform their clients how to obtain an FSG from the secondary service provider.

Do you need more information?

Explanation about how a secondary service could arise when providing advice, dealing or providing a custodial or depository service is also provided in:

- QFS 114: Who is my client?
- QFS 7: I am a trustee or operator of an unregistered scheme. Do I need an AFS licence for providing a custodial or depository service?