



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 38

The hawking provisions

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Important note: This guide was first published on 1 July 2002. It has been amended to reflect changes made to the Corporations Act by the *Financial Services Reform Amendment Act 2003*, Corporations Regulations, ASIC policy and instruments issued before 6 May 2005, and to provide some clarifications. Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements. This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act applies to you.

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What this guide is about

- 1 This document contains guidance on the hawking prohibitions contained in the *Corporations Act 2001* (“Corporations Act”). It provides general guidance only, and should not be relied upon as legal advice.
- 2 The body of this guide is set out in a question and answer format. It considers the following questions:
 - Q1 Which communications are caught?
 - Q2 When is a meeting or telephone call “unsolicited”?
 - Q3 What is the purpose of the meeting or telephone call?
 - Q4 Is the person an existing client?
 - Q5 What is meant by “because of” in the hawking prohibitions?
 - Q6 Are there any exemptions for securities and managed investments?
 - Q7 Are there any exemptions for other financial products?
 - Q8 What are the consequences of a breach of the hawking prohibitions?

For an explanation of some of the key terms used in the guide, see page 16.

- 3 We have published this guide to assist industry by providing general guidance on some of the questions and issues you should consider in complying with your obligations. However, we are unable to comment on every aspect of the hawking prohibitions or on every area of potential uncertainty. This guide does not attempt to consider all the issues that may be relevant to complying with the hawking prohibitions or your legal obligations. In some cases, we express our view on the law to help you reach your own view. But, you should seek your own professional advice where necessary.
- 4 It is your responsibility to determine your obligations under the Corporations Act and regulations. Due to the nature of the hawking prohibitions, their application will depend very much on the particular facts and circumstances of each case. As such, this document contains general guidance only. Further, in pursuit of clarity, this guide simplifies some aspects of the hawking prohibitions.
- 5 This guide is based on the Corporations Act as amended by the *Financial Services Reform Act 2001* (“FSR Act”), the *Financial Services Reform (Consequential Provisions) Act 2001*, the *Financial Services*

Reform (Consequential Provisions) Act 2002 and the *Financial Services Reform Amendment Act 2003* (“FSR Amendment Act”) as at 6 May 2005, and on the regulations made on or before 6 May 2005 for the purposes of those Acts. We may further revise this guide in light of our regulatory experience and any future changes to relevant legislation or regulations.

Note: This guide does not address Div 5A of Part 7.9 (unsolicited offers to purchase financial products off-market). A person who makes an offer to purchase financial products from another person should consider the application of Div 5A to that offer. Division 5A was inserted into the Corporations Act as a result of the FSR Amendment Act. Division 5A regulates unsolicited offers to purchase financial products off-market. For more information, see the Explanatory Memorandum to the Financial Services Reform Amendment Bill 2003 at pages 4–6.

A brief introduction to the hawking prohibitions

6 Under the Corporations Act, a person (the “offeror”) must not offer financial products for issue or sale in the course of, or because of, an unsolicited meeting or telephone call. An offer includes inviting an application for their issue or sale. An offeror includes issuers and sellers of financial products, as well as their agents and representatives.

Note 1: Sections 992A and 992AA were amended by the FSR Amendment Act to confirm that a reference in those sections to offering a financial product for issue or sale includes a reference to inviting an application for the issue or sale of the financial product: see s992A(5)(a) and 992AA(3)(a) and (b). See also the Explanatory Memorandum to the Financial Services Reform Amendment Bill 2003 at page 16.

Note 2: For more information on whether particular conduct amounts to the provision of financial product advice, see *Licensing: The scope of the licensing regime: Financial product advice and dealing — An ASIC guide*.

7 The hawking prohibitions aim to prevent pressure selling of financial products to retail clients (eg “badgering” and “boiler room” practices). While it would not be definitive, we will consider this purpose in our administration of the hawking prohibitions.

Note: See the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998 at paragraph 8.64 and *Financial markets and investment products: Promoting competition, financial innovation and investment* (the first CLERP 6 paper) at page 102.

8 The hawking prohibitions are set out in the following sections:

- (a) s736 — for securities (eg shares and debentures);
- (b) s992AA — for managed investments (eg units in trusts); and
- (c) s992A — for other financial products (eg superannuation, life and general insurance, derivatives and deposit products).

Note: Sections 992A and 992AA were inserted by the FSR Act. Section 992A(3) is expressed to apply to all financial products, unlike s992A(1), which excludes securities and managed investment products. Concerns have been raised with us that:

- (a) for offers of securities and interests in managed investment schemes, s992A(3) may apply, in addition to s736 (for securities) or 992AA (for managed investments); and
- (b) both s992A(1) and 992AA may apply to interests in unregistered managed investment schemes.

We have issued Class Order [CO 02/641] confirming that s992A does not apply to securities, or interests in registered or unregistered managed investment schemes.

- 9** The hawking prohibitions will be breached if:
- (a) the offeror makes an offer to issue or sell a financial product (which includes inviting an application for their issue or sale);
 - (b) the offer is made in the course of (ie during), or because of, a meeting with or telephone call to a client or potential client (“consumer”); and
 - (c) the meeting or telephone call is unsolicited.

Note: There are some exemptions to the hawking prohibitions: see paragraphs A6.1 and A7.1–A7.3 in the Q&A section following. Both s992A and 992AA require proof of mental elements (eg recklessness and intention) in order to establish a criminal contravention of the provision. Section 736 stipulates that it is a strict liability offence, so there is no mental element for a breach of that section.

10 The prohibitions in s992A and 992AA apply only to offers that are made to retail clients. The prohibition in s736 does not apply where the relevant offer is made to sophisticated or professional investors: s736(2)(a) and (b).

11 Financial services licensees are obliged to take reasonable steps to ensure that their representatives comply with the financial services laws (which include the hawking prohibitions): s912A(1)(ca). Licensees should consider the matters set out in Section D of Policy Statement 164 *Licensing: Organisational capacities* [PS 164], including the need for licensees to have monitoring and supervision systems in place. In this regard, licensees should consider the effect of their remuneration structures on the adequacy of their supervision arrangements.

Note: For more information on compliance with [PS 164], see *Small business and your AFS licence: Compliance with Policy Statement 164*.

- 12** For general guidance on our approach to:
- (a) the meaning of “because of”, see paragraphs A5.1–A5.5 in the Q&A section following; and
 - (b) the meaning of “unsolicited”, see paragraphs A2.1–A2.7 in the Q&A section following.

13 This guide should be considered in the context of the general consumer protection provisions of the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (“ASIC Act”). Regardless of whether an offeror is subject to the hawking prohibitions for a particular transaction, the offeror needs to ensure that they comply with the prohibitions on:

- (a) unconscionable conduct (s12CA–12CC, ASIC Act; s991A, Corporations Act);
- (b) misleading or deceptive conduct (s12DA–12DB, ASIC Act; s1041E–1041H, Corporations Act); and
- (c) harassment or coercion (s12DJ, ASIC Act).

Q&A: General guidance on the hawking prohibitions

Q1 Which communications are caught?

A1.1 The hawking prohibitions apply only to unsolicited telephone calls and meetings.

Note: Section 992A(3) allows for regulations to include other means of communication under that section — no such regulations have been made as at 6 May 2005.

A1.2 The hawking prohibitions do not apply to unsolicited communications such as emails, letters, facsimiles, brochures or media advertisements (either press, radio or television). However, when using these communication methods, the offeror still needs to ensure that they comply with any other relevant laws, including the consumer protection provisions discussed at paragraph 13 in the previous section.

A1.3 The hawking prohibitions do not prevent an offeror using the communication methods described at paragraph A1.2 to encourage consumers to request future meetings or telephone calls (although the offeror would obviously need to ensure that any later meeting or telephone call complies with the hawking prohibitions).

Note: For example, an unsolicited letter may contain a reply slip for a consumer to specifically request that the offeror telephone the consumer at a future time and date convenient to the consumer. If the consumer returns the reply slip, requesting a telephone call from the offeror, the telephone call requested in these circumstances is not unsolicited merely because the original letter was unsolicited.

A1.4 An offeror may also make unsolicited telephone calls about financial products other than securities or managed investments, as long as they comply with all of the exemption requirements set out in s992A(3)(a)–(e): see paragraphs A7.1–A7.3 below.

Q2 When is a meeting or telephone call “unsolicited”?

A2.1 For a breach of the hawking prohibitions to occur, the offer of financial products to the consumer must be made during, or because of, a meeting or telephone call that is “unsolicited”. Whether a particular meeting or telephone call is solicited or not depends on the particular facts and circumstances. Generally, we consider a meeting or telephone call to be unsolicited unless it takes place in response to a **positive, clear and informed request** from a consumer. The following paragraphs contain some general guidance on the concept of a positive, clear and informed request.

Note: For a further discussion of:

- (a) the purpose of the meeting or telephone call, see paragraphs A3.1–A3.2; and
- (b) the application of the hawking prohibitions to existing and new clients, see paragraphs A4.1–A4.3.

A2.2 **Positive:** A positive request involves an active step by the consumer. As a matter of good practice, we suggest that offerors ensure that meetings or telephone calls are positively requested. A request should involve some conscious decision by the consumer. Generally, we consider this would involve either:

- (a) a request contained in a stand-alone document or communication which demonstrates the consumer’s decision; or
- (b) for a potential request contained in a larger document (eg an application form), that the potential request is clearly brought to the attention of the consumer so that they can expressly decide whether or not to make the request.

A2.3 A meeting or telephone call is not solicited merely because the consumer fails to request that the meeting or telephone call not take place after being given an opportunity to do so. For example, the fact that a consumer did not opt out of receiving future telephone calls when given an opportunity to do so on an application form usually does not mean that subsequent telephone calls from the offeror are solicited. A consumer’s failure to opt out usually does not constitute a positive act of requesting a meeting or telephone call.

A2.4 Clear and informed: Generally, we consider a meeting or telephone call is unsolicited unless it takes place in response to a clear and informed request from a consumer. We recognise that some requests will be fairly general and others more specific.

Note: For example, a consumer may request a meeting or telephone call simply to discuss “savings” or “investments”. On the other hand, a consumer may request a meeting or telephone call to discuss “car insurance” or “Australian equity funds”.

A2.5 The nature of the meeting or telephone call being requested by the consumer should be clear from the language of the request. The request should make clear which financial products or classes of financial products the consumer wishes to discuss. As a matter of good practice, we suggest that offerors:

- (a) encourage consumers to specify which financial products or classes of financial products they wish to discuss;
- (b) provide consumers with enough information to allow them to carefully consider whether to request the meeting or telephone call; and
- (c) if in doubt, confirm the scope of the meeting or telephone call requested by the consumer.

A2.6 A meeting or telephone call may be requested for one or more purposes, and the request may take a number of forms. It may relate to a single meeting or telephone call or be ongoing (ie a general request to have meetings or receive telephone calls for a particular purpose over a period of time). Further, the purpose or purposes of a meeting or telephone call may change during the meeting or call. In any case, the request should be positive, clear and informed.

A2.7 Obviously, a consumer may cancel a request at any time leading up to the meeting or telephone call. We consider that the request need not necessarily be cancelled in the same manner or form in which it was originally made. Any communication to the offeror or its representative that expresses a clear intention to cancel the request should be sufficient. Once cancelled, obviously the offeror can no longer rely upon the request.

Q3 What is the purpose of the meeting or telephone call?

- A3.1** Generally, we consider that a meeting or telephone call requested by a consumer is only solicited for any financial products (or classes of financial products) that are reasonably within the scope of the request.
- A3.2** Determining the scope of a consumer's request requires a consideration of all of the surrounding circumstances, including:
- (a) the actual words of the request;
 - (b) any previous dealings between the consumer and the offeror; and
 - (c) what a reasonable person would expect to discuss during the meeting or telephone call.

Note: While each situation will depend upon its facts, the following examples give some guidance on our general view of the application of the hawking prohibitions:

- (a) A consumer sees their doctor for a medical examination. To the consumer's surprise, during the consultation the doctor offers to issue an insurance product to the consumer. *Generally, the meeting would be unsolicited for the offer of the insurance product.*
- (b) A consumer visits a travel agent to arrange an overseas holiday. During the meeting with the travel agent, the agent offers to issue travel insurance to the consumer. *Generally, the meeting would be solicited for the offer of travel insurance, as a discussion of travel insurance would be within the scope of the meeting request. This example relates to the particular circumstances of the travel industry and should not be interpreted as a general view about the sale of insurance together with other goods or services.*
- (c) A consumer telephones their bank and leaves a message for someone to call them about obtaining a credit card. During the subsequent telephone call, the call centre operator offers to sell or issue a managed investment product to the consumer. *Generally, the telephone call would be unsolicited for the offer of the managed investment product.*

The above examples are illustrative only and should not be taken to apply to all circumstances of the same or a similar nature. Nor should the examples be taken to be exhaustive or to establish general rules.

Q4 Is the person an existing client?

- A4.1** Depending on the circumstances, a meeting or telephone call with an existing client may be unsolicited for the purposes of the hawking prohibitions.

Note: Some offers of securities and managed investments to existing clients are exempt: see paragraph A6.1.

- A4.2** As discussed at paragraph A2.6, consumer requests may relate to a single contact or be ongoing. An existing client may request that the offeror contact them on an ongoing basis — for products of the type previously acquired by the person or for new products. To be effective the request by a client must be positive, clear and informed: see paragraph A2.1.

- A4.3** Assuming the further contact is not for financial products outside the scope of the request, it would generally be treated as solicited. Where a meeting or telephone call relates to products of a type already held by the client, it might be easier to show that a discussion of offers of those products is reasonably within the request of the client (and, therefore, solicited).

Note: As well as the hawking prohibitions, offerors should ensure that contact with existing clients complies with the consumer protection provisions discussed at paragraph 13 in the previous section.

Q5 What is meant by “because of” in the hawking prohibitions?

- A5.1** For a breach of the hawking prohibitions to occur, the offer of financial products to the consumer must be made during, or “because of”, an unsolicited meeting or telephone call.
- A5.2** We consider that an offer is made because of a meeting or telephone call if the offer is caused by, or a result of, the meeting or telephone call. According to the *Macquarie Dictionary*, “because” means “for the reason that; due to the fact that”.
- A5.3** By their nature, causation tests often identify numerous causes for a particular outcome, some of which are remote and insignificant. We consider that an offer will not be “because of” an unsolicited meeting or telephone call where the connection between the offer and the meeting or telephone call is insignificant or trivial.

Note: Where an offer follows an unsolicited meeting or telephone call between a consumer and an intermediary who is not an employee or agent of the offeror, there will not be a criminal breach of the hawking prohibitions by the offeror unless the necessary mental elements (eg recklessness and intention) are present: see the Commonwealth Criminal Code. Both s992A and 992AA require proof of mental elements (eg recklessness and intention) in order to establish a criminal contravention of the provision. Section 736 stipulates that it is a strict liability offence, so there is no mental element for a breach of that section.

A5.4 Determining whether an offer is causally connected with an unsolicited meeting or telephone call (“initial unsolicited contact”) will depend on all the facts and circumstances, including:

- (a) the nature of the initial unsolicited contact;
- (b) how much time has elapsed between that contact and the offer; and
- (c) whether there are any intervening events that should be regarded as breaking the causal nexus.

Note: For example, the causal nexus may be broken if:

- (a) since the initial unsolicited contact, the consumer has obtained personal advice (and the appropriate Statement of Advice) on the product; or
- (b) a significant period of time has elapsed since the initial unsolicited contact (or any other contact with the offeror).

The above examples are illustrative only and should not be taken to apply to all circumstances of the same or a similar nature. Nor should the examples be taken to be exhaustive or to establish general rules.

A5.5 Generally, we consider that the following are unlikely to, of themselves, break the causal nexus:

- (a) the consumer obtaining general advice;
- (b) the consumer receiving a prospectus or Product Disclosure Statement (PDS); or
- (c) a disclaimer by the offeror or a declaration by a consumer to the effect that the offer is not because of the initial unsolicited contact.

Q6 Are there any exemptions for securities and managed investments?

A6.1 Yes. With securities and managed investments, an unsolicited meeting or telephone call will not attract the hawking prohibitions if **at least one** of the following applies:

- (a) the resulting offer is of listed securities or managed investments and is made by telephone by a licensee; or
- (b) the resulting offer is made by a licensee through whom the consumer has bought or sold securities or managed investments (as the case may be) in the previous 12 months: s736(2) and 992AA(2).

Note: As discussed at paragraph 10 in the previous section, the prohibition in s736 does not apply where the relevant offer is made to sophisticated or professional investors: s736(2)(a) and (b).

Q7 Are there any exemptions for other financial products?

A7.1 Yes. With other financial products (ie those other than securities and managed investments), an unsolicited telephone call is exempt if the offeror follows the procedure set out in s992A(3)(a)–(e). There is **no** equivalent exemption for meetings on financial products that are not securities or managed investments.

Note: As discussed at paragraph 10 in the previous section, the prohibitions in s992A and 992AA apply only to offers that are made to retail clients.

A7.2 A telephone call is exempt if **all of the following requirements** are met:

- (a) the offeror calls the consumer only during the hours prescribed by the regulations;

Note: As at 6 May 2005, under reg 7.8.22, the prescribed hours are between 8 am and 9 pm (and not at all on any Sunday, New Year's Day, Australia Day, Good Friday, the Monday following Good Friday (Easter Monday), Anzac Day, Christmas Day and 26 December (Boxing Day)).

- (b) the consumer is not listed on the “No Contact / No Call” register (maintained by the offeror);
- (c) the consumer is provided with an opportunity to be listed on the “No Contact / No Call” register and to select the time and frequency of any future contacts;

- (d) the consumer is given a PDS before becoming bound to acquire the financial product;

Note: Section 992A(3)(c) does not necessarily require that the consumer already have the PDS at the time of the call, as long as the consumer is given the PDS “before becoming bound to acquire a financial product”.

- (e) the consumer is clearly informed of the importance of using the information in the PDS when deciding whether to acquire the financial product; and
- (f) the consumer is given the name and contact details of the product issuer, an indication of the nature of the information contained in the PDS relating to the financial product and the option of electing to have any information in the PDS read out to them: see reg 7.8.22A and s992A(3).

Note: The offeror must not influence a consumer’s decision to elect not to receive information contained in the PDS, other than asking the consumer if they wish to receive any such information: see reg 7.8.22A(3B).

A7.3 Before an offeror relies on this exemption, they will need to ensure that they can satisfy all of these requirements for the particular telephone call. Where one or more are not practicable, the offeror should consider either:

- (a) not making the telephone call; or
- (b) ensuring that no offers are made in the course of, or because of, the telephone call.

Q8 What are the consequences of a breach of the hawking prohibitions?

A8.1 A breach of the hawking prohibitions is a criminal offence. The maximum penalties are:

- (a) a fine of \$2750 for an individual or \$13,750 for a body corporate;
- (b) 6 months gaol; or
- (c) both.

A8.2 The consumer may also have a right to:

- (a) return the product (s738 and 992A(4)); or
- (b) undertake civil proceedings against the offeror (s1324).

Key terms

In this guide:

“ASIC” or “we” means the Australian Securities and Investments Commission

“ASIC Act” means the *Australian Securities and Investments Commission Act 2001* and includes regulations made for the purposes of the ASIC Act

“[CO 00/241]” (for example) means a reference to an ASIC class order (in this example numbered 00/241)

“consumer” includes an existing, potential or prospective client

“Corporations Act” means the *Corporations Act 2001* (as amended by the FSR Act and the FSR Amendment Act) and includes regulations made for the purposes of the Corporations Act

“financial product” means generally a facility through which, or through the acquisition of which, a person does one or more of the following:

- (a) makes a financial investment (see s763B);
- (b) manages financial risk (see s763C);
- (c) makes non-cash payments (see s763D)

Note: See Div 3 of Part 7.1 of the Corporations Act for the exact definition.

“FSR Act” means the *Financial Services Reform Act 2001*

“FSR Amendment Act” means the *Financial Services Reform Amendment Act 2003*

“meeting” means a gathering of two or more people. According to the *Macquarie Dictionary*, “meeting” means “a coming together ... an assembling, as of persons for some purpose ... an assembly or gathering held”. This includes situations involving just two or three people and those involving larger groups

“offer” means offering a financial product for sale or issue and includes inviting an application for the sale or issue of a financial product

“offeror” means a person who offers financial products for issue or sale

“PDS” means a Product Disclosure Statement

Note: Product Disclosure Statement is defined in s761A.

“regulations” means the *Corporations Regulations 2001*

“representative” of a licensee means:

- (a) an authorised representative of the licensee;
- (b) an employee or director of the licensee;
- (c) an employee or director of a related body corporate of the licensee; or
- (d) any other person acting on behalf of the licensee

Note: This is a definition contained in s910A.

“representative” of any other person means:

- (a) an employee or director of the person;
- (b) an employee or director of a related body corporate of the person; or
- (c) any other person acting on behalf of the first person

Note: This is a definition contained in s910A.

“s912A” (for example) means a provision of the Corporations Act (in this example numbered 912A), unless a contrary intention appears

“Statement of Advice” means a document that must be given to a retail client for the provision of personal advice under Subdivisions C and D of Div 3 of Part 7.7 of the Corporations Act

Note: See s761A for the exact definition.

Related papers

This guide is one of a number of publications on the implementation of the *Financial Services Reform Act 2001*.

The related policy statements are:

- Policy Statement 49 *Employee share schemes* [PS 49]
- Policy Statement 146 *Licensing: Training of financial product advisers* [PS 146]
- Policy Statement 164 *Licensing: Organisational capacities* [PS 164]
- Policy Statement 165 *Licensing: Internal and external dispute resolution* [PS 165]
- Policy Statement 166 *Licensing: Financial requirements* [PS 166]
- Policy Statement 167 *Licensing: Discretionary powers* [PS 167]
- Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* [PS 168]
- Policy Statement 169 *Disclosure: Discretionary powers* [PS 169]
- Policy Statement 175 *Licensing: Financial product advisers — Conduct and disclosure* [PS 175]
- Policy Statement 181 *Managing conflicts of interest* [PS 181]
- Policy Statement 182 *Dollar disclosure* [PS 182]
- Policy Statement 183 *Approval of financial services sector codes of conduct* [PS 183]

The related class orders are:

- Class Order [CO 02/641] *Hawking — securities and managed investments*
- Class Order [CO 03/184] *Employee share schemes*
- Class Order [CO 03/1094] *Law societies — professional indemnity scheme and fidelity funds*
- Class Order [CO 04/150] *Wholly owned subsidiaries of professional investors to be treated as wholesale clients*
- Class Order [CO 04/239] *Factoring arrangements — licensing, hawking and disclosure relief*

The related information releases are:

Information Release [IR 03/14] *Policy Statement 49: Employee share schemes*

Information Release [IR 04/10] *ASIC grants temporary relief to additional law societies during period of consultation*

Information Release [IR 04/12] *ASIC clarifies category of wholesale clients*

Other relevant related documents are:

Licensing: The scope of the licensing regime: Financial product advice and dealing — An ASIC guide

Australian Financial Services (AFS) Licensing Kit

Small Business and your AFS licence: Compliance with Policy Statement 164

Meeting the financial requirements of your AFS licence: Compliance with PS 166

Breach reporting for AFS licensees — An ASIC guide

Managing conflicts of interest — An ASIC guide for research report providers

You can download copies of these documents from the Financial Services home page on www.asic.gov.au/fs. You can also register for our free email update service, which alerts you to the latest developments, at www.asic.gov.au/joinfsrupdate. You can also get copies of these documents from ASIC Infoline on 1300 300 630.

ASIC has published a list of frequently asked questions (FAQs) about specific FSR Act issues. For further information, visit the Financial Services home page at www.asic.gov.au/fs.
