



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 191

Future of Financial Advice: Approval of codes of conduct for exemption from opt-in requirement

October 2012

About this paper

This consultation paper is for:

- financial advisers who enter into ongoing fee arrangements with retail clients and seek an alternative to complying with the opt-in requirement in s962K of the *Corporations Act 2001* (Corporations Act); and
- code owners or applicants who wish to lodge a code of conduct for ASIC's approval that aims to obviate the need for complying with the opt-in requirement.

Prospective code applicants should first read ASIC's Regulatory Guide 183 *Approval of financial services sector codes of conduct* (RG 183).

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 paper was issued on 23 October 2012 and is based on the Corporations Act as at that date.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Contents

The consultation process	4
A Background to the proposals	6
The Future of Financial Advice reforms	6
The opt-in requirement	7
Exemption from opt-in	8
ASIC's code approval power and existing guidance	8
Other FOFA reforms	9
B Scope of a FOFA code	10
Modifying our approach to code content	11
Modifying our approach to code membership	13
C Content that obviates the need for complying with the opt-in requirement	15
D Code administration and enforcement	18
Maintain register of members exempted from the opt-in requirement ..	19
E Independent reviews	21
Frequency of independent reviews	21
Reviews of existing codes	21
F Lodging an application for approval	23
G ASIC relief	25
H Regulatory and financial impact	27
Key terms	28
List of proposals and questions	30

The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our guidance on approval of codes of conduct in the financial advice sector. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section H, 'Regulatory and financial impact'.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 4 December 2012 to:

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What will happen next?

Stage 1	23 October 2012	ASIC consultation paper released
Stage 2	4 December 2012	Comments due on the consultation paper
	December 2012 to February 2013	Drafting of regulatory guide
Stage 3	February 2013	Regulatory guide released

A Background to the proposals

Key points

Under the Government's Future of Financial Advice (FOFA) reform package, financial advisers who enter into ongoing fee arrangements with retail clients must renew their clients' agreement to pay ongoing advice fees every two years. This is referred to as the 'opt-in requirement'.

As an alternative, ASIC may grant relief if we are satisfied that an adviser is bound by an approved code of conduct that obviates the need for complying with the opt-in requirement.

ASIC has an existing power to approve industry codes of conduct under s1101A of the *Corporations Act 2001* (Corporations Act). Regulatory Guide 183, *Approval of financial sector codes of conduct* (RG 183) sets out our guidance on the features of an approved code and how an application for approval should be made. An application for approval of a code under the FOFA reforms must be approved under s1101A.

We will provide updated guidance in RG 183 about how we will tailor our approval power for codes that seek to obviate the need for complying with the opt-in requirement.

The Future of Financial Advice reforms

- 1 In April 2010, the former Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen, announced the Government's Future of Financial Advice (FOFA) reform package, aimed at improving the trust and confidence of retail investors in the financial advice sector.
- 2 The FOFA reforms represent the Government's response to the *Inquiry into financial products and services in Australia* by the Parliamentary Joint Committee on Corporations and Financial Services (PJC) in 2009. The inquiry examined the issues associated with the collapses of financial product and services providers, such as Storm Financial, Opes Prime and other similar collapses.
- 3 In the context of managing conflicts of interest, the PJC stated that:

It should be recognised that the limitations of the current regulatory approach enable poor advice that is mainly incremental in its effect, rather than being catastrophic for investors. Conflicted advice that meets the current legislative requirements is more likely to lead to sub-optimal investment strategies or excessive fee arrangements (paragraph 5.75).
- 4 In its response to the PJC inquiry, the Government announced in April 2010 a prospective ban on conflicted remuneration structures, and the introduction of a requirement for advisers to renew their clients' agreement to pay

ongoing advice fees. Following consultation, the Government announced in April 2011 that it would implement a two-yearly opt-in requirement and that the policy ‘reflects the need to ensure that advisers do not charge ongoing open-ended fees where the client is receiving little or no service’.

- 5 In September 2011, ASIC released Report 251 *Review of financial advice industry practice* (REP 251), based on a review of the 20 largest Australian financial services (AFS) licensees that provide financial product advice to retail clients. These licensees had a combined total of 4.6 millions clients as at 2009, of which only 1.5 million clients—or 32.6%—were identified by licensees as ‘active’ clients.

The opt-in requirement

- 6 Under s962K of the Corporations Act, an AFS licensee, or its representative, who enters into an ongoing fee arrangement with a client must give their client a written renewal notice every two years which requires the client to ‘opt in’ to renew that fee arrangement. The adviser in these circumstances is referred to as the ‘fee recipient’. If the client does not respond to the renewal notice, or opts out, then the fee arrangement terminates.

Note: In this consultation paper:

- references to sections (s), parts (Pts) and divisions (Divs) are to the Corporations Act, unless otherwise specified.
- references to ‘client’ mean ‘retail client’ as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of Ch 7 of the Corporations Regulations 2001; and
- references to ‘advice’ or ‘personal advice’ mean financial product advice given or directed to a person (including by electronic means) in circumstances where the provider of the advice has considered one or more of the client’s objectives, financial situation and needs, or a reasonable person might expect the provider to have considered one or more of these matters (s766B(3)).

- 7 An ongoing fee arrangement is defined in s962A as an arrangement under which an AFS licensee, or its representative, gives personal advice to a retail client and where fees (however described or structured) are to be paid for more than 12 months. It is a condition of the ongoing fee arrangement that the client may terminate the arrangement at any time. Any condition of the arrangement that seeks to apply an early termination fee is void under s962E(2).
- 8 Section 962D provides that the opt-in requirement applies to an ongoing fee arrangement entered into on or after 1 July 2013 where the client has not been provided with personal advice before that date by the adviser.

Exemption from opt-in

9 Amendments to the Corporations Amendment (Future of Financial Advice) Bill 2012 in March 2012 introduced a new power for ASIC to exempt a person or class of persons from complying with the opt-in requirement if we are satisfied that the person, or class of persons, is bound by a code of conduct approved by us.

10 Section 962CA states that a code of conduct is approved by ASIC if:

- (a) the code of conduct is approved by us under s1101A;
- (b) we are satisfied that the code of conduct obviates the need for persons bound by the code to be bound by the opt-in requirement; and
- (c) we are satisfied of any other matters prescribed by the regulations.

Note: In this consultation paper, we refer to codes of conduct approved by ASIC for the purposes of s962CA as FOFA codes.

11 In his second reading speech to the Corporations Amendment (Future of Financial Advice) Bill 2012, the Minister for Financial Services and Superannuation stated that the amendment:

... offers financial advisers an alternative to the opt-in requirement. This amendment will allow ASIC to provide class order relief from the opt-in requirement to licensees and representatives who are signatories to an ASIC approved professional code of conduct by 1 July 2015. Importantly such an approved code would need to include practices and conduct requirements that obviate the need for the opt-in requirement.

ASIC's code approval power and existing guidance

12 We have a power under s1101A to approve codes of conduct that relate to any aspect of the activities of AFS licensees, authorised representatives of licensees or issuers of financial products.

13 We may only approve a code under s1101A if we are satisfied that:

- (a) the code is not inconsistent with the Corporations Act, or any other law of the Commonwealth under which we have regulatory responsibilities; and
- (b) it is appropriate to approve the code, taking into account:
 - (i) the ability of the applicant to ensure that persons who hold out that they comply with the code will comply with the code as in force from time to time;
 - (ii) the desirability of codes of conduct being harmonised to the greatest extent possible; and
 - (iii) any other matters that we consider are relevant:

14 Our guidance about how we will administer s1101A is contained in RG 183.

- 15 In addition to the statutory approval criteria listed above, RG 183 sets out standards about code development, content, enforceability, administration and review.

Other FOFA reforms

- 16 The opt-in requirement and the power to approve codes of conduct under the FOFA reforms operate alongside other provisions in the Corporations Act which affect how financial product advice is provided to retail clients. These include new requirements about scaled advice and the best interests duty, and also the provisions banning conflicted remuneration and requiring annual fee disclosure.
- 17 Table 1 provides a high-level summary of the conflicted remuneration and annual fee disclosure reforms. The objectives of these two reforms are closely aligned with those of the opt-in requirement.

Table 1: Related FOFA reforms

Conflicted remuneration ban	Annual fee disclosure requirement
This applies when financial product advice is provided to a retail client: see Div 4 of Pt 7.7A.	This applies when an adviser enters into or has an ongoing fee arrangement with a retail client: see Div 3 of Pt 7.7.
<p><i>Advice providers must not accept conflicted remuneration.</i></p> <p>Conflicted remuneration is any benefit given to an AFS licensee or its representative that, because of its nature or the circumstances in which it is given, could reasonably be expected to influence the choice of financial product recommended or the financial product advice given by the licensee or representative.</p> <p>Product issuers and sellers are also banned from giving conflicted remuneration to licensees and other representatives.</p> <p>Employers are also banned from giving their licensee or representative employees conflicted remuneration.</p> <p>There is a presumption that volume-based benefits are conflicted remuneration.</p> <p>Asset-based fees are banned on geared amounts.</p> <p>Benefits given by a retail client in relation to the sale of a financial product or to financial product advice are not conflicted remuneration.</p>	<p><i>Advice providers must provide an annual fee disclosure statement (AFDS) to retail clients who are paying ongoing fees.</i></p> <p>The AFDS must be provided annually on the anniversary of the disclosure day for an ongoing fee arrangement.</p> <p>The AFDS must contain information about:</p> <ul style="list-style-type: none"> • the ongoing fees paid; • the services the client was entitled to; and • the services that the client received. <p>The AFDS will provide this information in relation to the previous 12-month period.</p> <p>The AFDS applies to both new arrangements after 1 July 2013 and existing arrangements at that date.</p> <p>The ongoing fee arrangement will terminate if this disclosure obligation is not complied with in the relevant timeframes.</p>
For further information, see Consultation Paper 189 <i>Future of Financial Advice: Conflicted remuneration</i> (CP 189).	We are preparing guidance for industry on the annual fee disclosure requirement.

B Scope of a FOFA code

Key points

In RG 183, we reserve the term ‘code’ for a self-regulatory model that meets high-level standards relating to content, coverage, consultation and compliance. Industry codes operate across many sectors of the Australian economy and we do not propose to amend our general approach to defining a code, as set out in RG 183.

However, taking into account the specific nature of our exemption power in s962CA and the operation of the opt-in requirement, we are consulting on amending our threshold approach for the approval of FOFA codes.

We are seeking feedback about:

- our proposal to consider ‘opt-in codes’ that are limited in scope; and
- whether it would be appropriate in any circumstance to consider a code sponsored by a single AFS licensee or dealer group, or a small number of licensees or dealer groups, for the purposes of s962CA.

We propose that our existing policy settings for code administration and enforcement would be maintained and apply to all code applications, including those made for the purposes of s962CA.

- 18 A threshold question for ASIC to consider when assessing an application for approval of a code of conduct under RG 183 is, ‘What do we consider to be a code?’
- 19 The Corporations Act does not define a code of conduct for the purposes of s1101A. We believe, however, that the concept of an industry code is generally well understood, and can be broadly characterised as a code regulating the conduct of participants in an industry towards other participants in the industry and/or towards consumers.
- 20 Under s1101A, it is not mandatory for any industry in the financial services sector to develop a code or to have it approved by ASIC. It is up to an industry applicant to decide whether to seek our approval of its code of conduct. Similarly, it is up to an industry applicant, on behalf of subscribing members, to decide to seek approval of a code for the purposes of s962CA. We do not have any power to mandate a code.
- 21 In the following paragraphs, we consider two options for modifying the definition of a code for the purposes of s962CA.
- 22 Regardless of any modification to scope, we will apply the existing requirements in RG 183 about code administration and enforcement when considering an application for approval of any code for the purposes of s962CA. This is appropriate because any approved code will need to have

rigorous systems in place to ensure that members comply on an ongoing basis, and that non-compliance is identified and addressed.

- 23 For example, RG 183 requires that there is an independent body that is empowered to administer and enforce the code. RG 183.75 lists the responsibilities of the code administration body, which include:
- (a) establishing appropriate data reporting and collection procedures;
 - (b) monitoring compliance with the code;
 - (c) publicly reporting annually on code compliance;
 - (d) hearing complaints about breaches of the code and imposing sanctions and remedial measures as appropriate;
 - (e) reporting systemic breaches and instances of serious misconduct to ASIC; and
 - (f) recommending amendments to the code in response to emerging industry or consumer issues, or other issues identified in the monitoring process.
- 24 RG 183.69 also sets out the range of sanctions that code subscribers might be subject to under an approved code. These include public naming, fines and/or suspension or expulsion of membership.

Note: See Section D of this consultation paper for further discussion about our approach to code administration and enforcement.

Modifying our approach to code content

- 25 At RG 183.22 we draw a distinction between industry codes and other self-regulatory instruments, noting that codes should deliver stronger outcomes for consumers because they have the following features:
- (a) they are enforceable;
 - (b) they are developed in a consultative fashion to address a broad range of issues of real concern to consumers;
 - (c) they set standards that elaborate on, exceed or clarify the law;
 - (d) compliance with their standards is required to be monitored; and
 - (e) remedies and sanctions are available for breaches of the code.
- 26 RG 183 also states that, for the purposes of our approval power, we will reserve the term ‘code’ for self-regulatory tools with these features, and that the criteria are designed to exclude single-issue industry guidelines or other self-regulatory arrangements that lack adequate compliance, administration and review features: see RG 183.23.
- 27 We do not intend to amend our general approach to defining an industry code, and any industry association or representative may apply for our

approval of a broad-based code, as set out in RG 183. Broadly based industry codes can deliver significant benefits to both consumers and subscribers by setting a common approach to industry issues or consumer problems not covered by legislation. They can also lift professional standards across the industry and promote a consistent approach to compliance.

- 28 However, we recognise that the opt-in requirement in s962K is intended to achieve specific outcomes (i.e. to ensure that disengaged retail clients do not pay ongoing advice fees and receive little or no service in return for those fees) and that our power to grant relief under s962CA permits consideration of codes for approval that are limited in scope (i.e. limited to conduct or standards that obviate the need for complying with the opt-in requirement).
- 29 We therefore propose to amend RG 183 to clarify that we will, for the purposes of s962CA, consider applications for approval of a code that is limited in scope to provisions that obviate the need for complying with the opt-in requirement. In this consultation paper, we will describe a code limited in this way as an ‘opt-in code’.
- 30 The option of an opt-in code allows ASIC, as well as code applicants, to focus specifically on implementing practical alternatives to the opt-in requirement in s962K.
- 31 We believe that this approach is efficient, and is consistent with the Government’s intention in inserting s962CA. It will also allow ASIC, and any code applicant, to clearly identify the provisions that, together, obviate the need for complying with the opt-in requirement. This is important to enable us to determine the breadth of an exemption granted under s962CA.

Proposal

- B1** We propose to amend RG 183 to refer to an ‘opt-in code’ as a code that is limited in scope to the standards or requirements that we are satisfied will, in combination, obviate the need for complying with the opt-in requirement under s962K. This provides an alternative model in RG 183 for the approval of codes under s962CA.

Your feedback

- B1Q1 Do you agree with our proposal to provide an alternative model of an opt-in code that is limited in scope? Please give your reasons.
- B1Q2 Do you see any practical problems with ASIC considering for approval an opt-in code?
- B1Q3 Do you agree that we should retain our current code approval requirements about consultation, administration and enforcement in assessing an opt-in code?

Modifying our approach to code membership

32 Another limb to the definition of a code is the level of coverage it has across the relevant industry or industries that it covers. Standards that are devised by and limited in application to a single entity do not clearly fit the definition of a code in RG 183, or the broader understanding of a code across the Australian economy in sectors ranging from telecommunications to electronic payments.

33 While individual firms play an important role in setting standards of behaviour and conduct, their own internal standards do not directly improve industry-wide standards or enhance consumer awareness of what is ‘best’ or even ‘good’ practice. This is the work that an industry code is expected to do.

34 Our statutory criterion for harmonisation of approved codes under s1101A(3)(b)(ii) is also inconsistent with the consideration of codes with limited industry coverage. RG 183.33 states:

We will therefore encourage those industry representatives responsible for codes to allow all relevant industry participants and service providers to sign up to the code. We also expect the code applicant to be able to demonstrate that its membership covers a majority of participants in the relevant sector.

35 Membership of financial services sector codes tends to be characterised by fewer, larger members.

36 The opt-in requirement in the Corporations Act applies to an adviser who is the fee recipient under an ongoing fee arrangement. This could be an AFS licensee, but will in many cases be an authorised representative or employee representative of a licensee who gives personal advice to a retail client after 1 July 2013: see s962C.

37 There are currently more than 25,000 representatives in Australia authorised to provide personal financial product advice. Given:

- (a) the potentially high number of advisers that might seek to join an approved code;
- (b) the concentration of representatives across the largest AFS licensees and dealer groups in Australia; and
- (c) the challenges facing licensees with representatives potentially belonging to different codes and therefore being subject to different requirements,

we are considering whether our high-level approach to code membership should be modified in the context of considering an application for approval under s962CA—that is, whether it would be appropriate in any circumstance to consider an application for approval of a code that is sponsored by a single licensee or dealer group, or a small number of licensees or dealer groups, specifically for the purposes of s962CA.

38 This would be a significant departure from RG 183. It raises serious concerns about whether such a code with limited industry coverage can ever be credibly and independently administered, and have the confidence of consumers and other stakeholders as an acceptable alternative to complying with the law.

Proposal

B2 We are seeking feedback on whether there are any circumstances in which we should modify our general approach to defining a code in RG 183 to permit consideration of a code sponsored by a single AFS licensee or dealer group, or a small number of licensees or dealer groups, for the purposes of s962CA.

Your feedback

- B2Q1 Should RG 183 permit consideration of a code with limited industry coverage for the purposes of s962CA?
- B2Q2 Would the following types of conditions overcome the concerns about a code with limited industry coverage:
- (a) that the code covers a materially significant number of advisers (relative to the population of advisers authorised to give personal advice);
 - (b) that the applicant can demonstrate to our satisfaction how advisers would be effectively bound by the code;
 - (c) that the applicant makes arrangements for its code to be independently administered, as set out in RG 183 (see RG 183.73–RG 183.77); and
 - (d) that clients are made aware of the code and their adviser's obligations under the code?
- B2Q3 If you think we should approve a code with limited industry coverage subject to the condition that it covers a significant number of advisers, what is the minimum number or proportion of advisers that you think such a code should cover?
- B2Q4 What other conditions, if any, should we consider?
- B2Q5 What, if any, are the advantages of a code with limited industry coverage?
- B2Q6 Do you see any practical problems in ASIC approving codes with limited industry coverage in addition to those set out above?
- B2Q7 Alternatively, should RG 183 be clarified to explicitly exclude consideration of a code with limited industry coverage?
- B2Q8 What, if any, are the disadvantages of a code with limited industry coverage?

C Content that obviates the need for complying with the opt-in requirement

Key points

The policy objectives underlying the opt-in requirement are to promote client engagement and to ensure that disengaged clients do not pay ongoing advice fees for little or no service.

Our approach to approving a code that obviates the need for complying with the opt-in requirement will be principally guided by these policy objectives.

A code applicant must establish to our satisfaction that its code meets the requirements of s962CA. We will not prescribe the content of a code—however, we have provided some high-level examples for the purposes of this consultation. Feedback on these examples will help us in harmonising our approach to FOFA codes.

- 39 The Revised Explanatory Memorandum to the Corporations Amendment (Future of Financial Advice) Bill 2012 describes s962K as being designed to:
- ... protect disengaged clients from paying ongoing financial advice fees where they are receiving little or no service. For those clients that are not disengaged, the renewal requirement will provide them with an opportunity to consider whether the service they are receiving equates to value for money.
- 40 To approve a code of conduct under s962CA, we must be satisfied that the code obviates the need for persons bound by the code to be bound by the opt-in requirement.
- 41 We will be satisfied that code content obviates the need for complying with the opt-in requirement only if it will achieve substantially the same policy outcomes that the opt-in requirement was originally intended to achieve. It is up to a code applicant to demonstrate to our satisfaction that the proposed code content addresses the key policy issues of engagement, service delivery and value for money. We intend to update RG 183 to reflect our policy approach.
- 42 We believe that there are a number of ways that a code might obviate the need for complying with the opt-in requirement.
- 43 Table 2 sets out some examples of possible code content for the purposes of this consultation. This is not intended to be an exhaustive list, and an approved code might need to include a combination of these and other requirements. We strongly encourage feedback from industry and consumer representatives about additional or alternative code content measures that might satisfy the legislative requirements of s962CA, and about the efficacy of the examples in Table 2.

Table 2: Possible approaches to code content that obviate the need for complying with the opt-in requirement

Possible code provisions	Further detail
Allow a longer period for clients to opt in, combined with other specific code obligations	<p>Examples of other provisions include:</p> <ul style="list-style-type: none"> • effective and documented initial negotiation with the client about the ongoing fee arrangement; • rules about how the actual authority to charge fees is given to the client (e.g. that a separate authority document should be signed, and clients should be given a copy of this to keep); • commitment to the ongoing provision of specific advice ‘services’ to clients that are commensurate in value with the fees charged (i.e. a generic service such as a newsletter would not, in itself, meet the underlying policy objectives); • client engagement strategies, such as providing ongoing advice or annual meetings to review financial objectives and any changes to ensure the strategy set out in the Statement of Advice (SOA) continues to be relevant; and/or • details about when and how an ongoing fee arrangement must be renegotiated.
Ban ongoing asset-based fees or volume-based fees for personal advice given to retail clients, combined with other specific code provisions	<p>This type of provision addresses the potential conflicts of interest where remuneration is based on the amount of client funds under management. It does not in itself address issues of client engagement or passivity, and so would need to be included with other code obligations that address these.</p>
Regularly advise the client of their ability to opt out, in combination with other specific code provisions	<p>Parliament specifically imposed an opt-in requirement for the continuation of ongoing fee arrangements, and it is also a condition of such an arrangement that the client may terminate it at any time: s962E. An alternative code provision may include requiring an adviser to remind their client of the client’s ability to opt out, at the same time as requiring the client to actively pay the adviser’s fees, for example, by credit card or cheque.</p>

44

A code that is submitted for approval by ASIC under s962CA must have content that exceeds or is differentiated from current legal obligations—including, for example, the new FOFA requirements relating to best interests duty and conflicted remuneration. A code that is lodged for our approval, therefore, should not merely restate existing legal obligations.

Proposal

c1 We propose that it is up to a code applicant to establish that its code contains provisions that obviate the need for complying with the opt-in requirement, taking into account the underlying policy intent of s962K. Table 2 provides examples of possible code provisions that might form part of an approved code under s962CA.

Your feedback

- C1Q1 What do you consider are the essential elements of a code to obviate the need for the opt-in requirement?
- C1Q2 Should we require each code applicant to identify the specific measures in their proposed code that obviate the need for the opt-in requirement? Why or why not?
- C1Q3 What are the services that you consider warrant the payment of ongoing fees by your retail clients?
- C1Q4 What services do you currently provide to retail clients in connection with ongoing fees?
- C1Q5 What services do you plan to provide to retail clients in connection with ongoing fees after 1 July 2013?
- C1Q6 What are your strategies for client engagement?
- C1Q7 Do you consider that the examples in Table 2 are appropriate? Why or why not?
- C1Q8 Please give examples of alternative or additional code provisions that might also meet the policy objective.
- C1Q9 What is an appropriate maximum timeframe for extending opt-in where a code includes specific additional measures to obviate the need for the opt-in requirement?

D Code administration and enforcement

Key points

ASIC must be satisfied that a code approved under s1101A has appropriate compliance features in place.

RG 183 anticipates that there will be a code administration body which has responsibility for, among other things, ensuring compliance with the code. RG 183 also states that the code administration body should be structurally and effectively independent of subscribing industry members: see RG183.73–183.76.

We propose to apply the existing standards in RG 183 relating to administration and compliance to all codes that are lodged for approval under s962CA.

We also propose to insert an additional requirement that the administrator of a code approved under s962CA must maintain a public register of subscribing members who are exempt from the opt-in requirement.

- 45 One of the three statutory criteria for code approval under s1101A is the ability of the applicant to ensure that persons who claim to comply with the code will comply with the code: see s1101A(3)(b).
- 46 In RG 183, compliance is broadly dealt with under the headings of:
- (a) *enforceability*—which includes requirements about dispute resolution, remedies and sanctions (see RG 183.62–RG 183.72); and
 - (b) *administration*—which includes the requirement that a code administration body oversees the operation of the code (see RG 183.73–183.77).
- 47 The code administration body is responsible for monitoring and reporting on compliance with the code and must:
- (a) be independent of the industry or industries that subscribe to and fund the code; and
 - (b) have adequate resources to fulfil its functions.
- 48 A code applicant seeking approval under s962CA will therefore need to clearly identify the constituency of the code administration body and what resources it has to administer the code. This will in turn require the code applicant to identify the likely number of code subscribers.
- 49 There is additional guidance in RG 183 about the proper responsibilities of a code administration body: see RG 183.75. These include monitoring compliance, reporting annually on code compliance, reporting systemic code breaches and instances of serious misconduct to ASIC, and ensuring that

there is a regular, independent review of the content and effectiveness of the code.

- 50 We intend to apply the existing guidelines about code administration and enforcement in considering an application for approval under s962CA. In particular, we believe it is important that code compliance and reporting is conducted independently of industry subscribers. This will apply to either a limited or broadly based code.
- 51 We do, however, propose to amend the independent review requirements: see Section E of this consultation paper for further discussion. We note that this will apply to all code applications under s1101A.

Maintain register of members exempted from the opt-in requirement

- 52 In the interests of transparency, and to monitor compliance effectively, the administrator of a code approved under s962CA should also maintain a public, up-to-date register (available online and easily searchable) of all members that are subscribing as an alternative to complying with the opt-in requirement.
- 53 Where the opt-in requirement applies to an individual adviser, the register will need to include information with that level of detail. This will also assist AFS licensees, who may have adviser representatives who are members of different codes, to monitor their representatives' compliance with the law.

Proposal

- D1 We propose to apply the existing requirements in RG 183 about administration and enforcement to all codes, including those lodged under s962CA.

Your feedback

- D1Q1 Do you agree with our proposal to maintain our existing policy guidelines about code administration and enforcement?
- D1Q2 If not, please tell us which of the current policy guidelines should not be applied or, alternatively, if there are different criteria that should be applied?

Proposal

- D2 We propose to amend RG 183 to require that a code administrator seeking approval under s962CA maintains a public register of subscribing members who are exempted from the opt-in requirement. This register should be searchable by name and (where relevant) by AFS licensee or authorised representative number. It should also include the date a member joined the code.

Your feedback

- D2Q1 Do you agree with our proposal that the code applicant should maintain a register of members?
- D2Q2 Do you see any practical problems with code owners maintaining a register?
- D2Q3 What other information, if any, do you think the register should contain?
- D2Q4 Is there any particular information that should be captured in a register to assist licensees in monitoring their representatives?

E Independent reviews

Key points

RG 183 contains a requirement that any ASIC-approved code be independently reviewed every three years after an approval is granted: see RG 183.79. We propose to amend the frequency of ongoing independent reviews.

Given the implementation timetable for FOFA, we also propose to modify the requirement in RG 183 that an existing code that has not been independently reviewed must be reviewed before an application will be considered: see RG 183.82.

Any code owner that intends to make an application under s962CA should speak to ASIC first about its proposed consultation strategy.

Frequency of independent reviews

- 54 RG 183.79 states that, as a condition of approval, a code must be independently reviewed at intervals of no more than three years.
- 55 We propose to amend this requirement so that all codes approved under s1101A must be subject to an independent review within three years of first obtaining approval and, thereafter, within every five years.
- 56 This amendment will align our guidance about the frequency of independent reviews of approved codes with that of independent reviews of approved external dispute resolution (EDR) schemes: see Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139) at RG 139.158.
- 57 This, in turn, reflects our experience in overseeing independent reviews of ASIC-approved EDR schemes. It acknowledges the significant resource and time impacts associated with conducting independent reviews and then amending constituent documents in consultation with members and other public stakeholders.

Reviews of existing codes

- 58 RG 183.82 states that, if an existing code has been operating for more than three years without an independent review, we will require it to be independently reviewed before we will consider an application for approval.
- 59 Given these timelines, and to facilitate the development of effective FOFA codes, we propose to remove this requirement for the purposes of approval

under s962CA. We will, however, expect that any code applicant will undertake appropriate stakeholder consultation in developing a FOFA code, taking into account the guidance in RG 183.50–183.55.

Proposal

E1 We propose to amend RG 183 to generally modify the frequency of independent reviews for any approved code, and to remove the upfront independent review requirement in RG 183.82 for a prospective FOFA code applicant under s962CA.

Your feedback

E1Q1 Do you agree it is appropriate to amend the frequency of independent reviews for all codes? Please give your reasons.

E1Q2 Do you agree with our proposal to remove the upfront independent review requirement in RG 183.82 for a prospective FOFA code applicant? Please give your reasons.

E1Q3 Do you think we should provide any other guidance about consultation when seeking approval under s962CA, or more broadly?

F Lodging an application for approval

Key points

RG 183 contains a list of the documents and information that an application for approval should contain. We propose to update this part of RG 183 and provide more guidance about our expectations of what should be in a code application. This will assist code applicants in preparing an application for our approval.

- 60 An application for ASIC approval of a code under s962CA must be made by the relevant code ‘owner’. The applicant must consider Section D of RG 183, ‘How to obtain and retain approval’. We propose to amend RG 183.93 to explicitly require an applicant to:
- (a) clearly state whether approval is sought under s962CA and, further, whether approval is sought for an opt-in code;
 - (b) estimate the number of likely code members;
 - (c) describe how members are effectively bound by the code (including providing copies of membership forms and any other relevant documents);
 - (d) describe what sanctions apply to members and in what circumstances such sanctions will be imposed, including when a member will be expelled from a code;
 - (e) provide copies of any contractual arrangements relating to outsourcing or sharing of code administration functions;
 - (f) provide details of the proposed compliance strategy for ensuring that members comply with the provisions that obviate the need for complying with the opt-in requirement; and
 - (g) provide details of the register of code members to be published, and how this is going to be maintained.
- 61 The application must be provided to us electronically as well as in hard copy.
- 62 RG 183.94 also states that we ‘will reject a code submitted for approval that is not written in plain language. We will not redraft or rewrite a code. This is the job of the applicant’.
- 63 Industry codes and standards currently operating in the financial advice sector tend to be written as professional standards documents, where the primary audience is the subscribing adviser or firm. RG 183 is drafted anticipating more traditional consumer-focused codes and therefore has, as an essential element, the requirement that codes are in plain English and

written for a consumer or client audience. For example, they should be largely free of industry jargon or technical terms.

- 64 Because the purpose underlying the opt-in requirement is essentially to ensure that disengaged clients become engaged clients, we think it is essential that the alternative compliance option of code membership must similarly be client focused. That is, a client should be able to easily understand the specific commitments that their adviser has made about engagement and service delivery under s962CA.
- 65 Applicants will, therefore, need to ensure that any code submitted for approval is easily accessible and can be clearly understood by a public audience.

Proposal

- F1 We propose to amend the application requirements in RG 183, as set out in paragraph 60.

Your feedback

- F1Q1 Do you agree with our proposals about the documents and information we require from code applicants?
- F1Q2 Is there additional information we should require? If so, what information?
- F1Q3 Do you see any practical problems for code applicants in providing this information?
- F1Q4 For code applicants, please provide details about the cost of code development and administration for the alternative code models? Please provide any further details about how you propose to meet those costs?
- F1Q5 Please give us much detail as possible about establishment costs, membership fees and any other related and ongoing costs?
- F1Q6 For AFS licensees, please give your estimates of the costs of code membership and compliance for both code models, as set out in Section B?
- F1Q7 How do these costs compare to compliance with s962K? Please provide as much detail as possible.

G ASIC relief

Key points

The exemption power in s962CA applies to fee recipients. It is fee recipients who will need to be effectively bound by an approved code in order to have the benefit of an exemption from compliance with the opt-in requirement.

We do not intend to prescribe how a fee recipient should be bound by an approved code. This is a matter for the code applicant to determine. We will, however, need to be satisfied that there are sanctions available for the code administrator to terminate membership in appropriate circumstances and to notify us if this happens.

66 The person or class of persons who may seek an exemption from the opt-in requirement are the fee recipients—that is, an adviser who gives personal advice to a retail client and who enters into an ongoing fee arrangement with that client. This could be an AFS licensee or an authorised or employee representative of a licensee.

67 To grant relief, we must be satisfied that the fee recipient is ‘bound’ by the relevant code. The current RG 183 does not prescribe the way in which subscribing members should be bound by a code—however, RG 183.25 states:

In most cases, members will incorporate their agreement to abide by a code by contracting directly with the independent body that has the power to administer and enforce that code. In some cases, code subscribers will also incorporate their agreement to abide by a code in individual contracts with consumers (e.g. written directly into the terms and conditions of a particular product). We strongly encourage code sponsors to consider this approach.

68 There are a variety of membership models that currently exist across financial services sector codes. We do not propose to prescribe a particular membership model for the purposes of s962CA—however, we reiterate that a code applicant must satisfy ASIC that:

- (a) arrangements are in place to bind members to a code; and
- (b) the code clearly sets out when membership may be terminated, and that termination of membership will be reported immediately to ASIC and (where relevant) the AFS licensee.

Proposal

- G1** We propose that code applicants must demonstrate to our satisfaction how relevant fee recipients are bound by the code. We do not intend to prescribe a particular model.

Your feedback

G1Q1 Do you agree that our guidance should allow flexibility for the code applicant to determine an appropriate method by which to bind members?

G1Q2 Do you think that any one model of code membership is preferable?

H Regulatory and financial impact

69 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

- (a) promoting client engagement and value for service in the delivery of financial advice; and
- (b) providing a practical alternative to compliance with the opt-in requirement for affected industry participants.

70 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

71 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

72 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Key terms

Term	Meaning in this document
advice	Financial product advice
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
ASIC	Australian Securities and Investments Commission
authorised representative	A person authorised by an AFS licensee, in accordance with s916A or 916B of the Corporations Act, to provide a financial service or services on behalf of the licensee Note: This is a definition contained in s761A of the Corporations Act.
client	A retail client as defined in s761G of the Corporations Act and Div 2 of Pt. 7.1 of Ch 7 of the Corporations Regulations 2001
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
disclosure day	For annual fee disclosure, the disclosure day is the anniversary of the day on which the relevant ongoing fee arrangement was entered into Note: This is a definition contained in s962J of the Corporations Act.
fee recipient	An AFS licensee, or representative of a licensee, who enters into an ongoing fee arrangement under s962C of the Corporations Act
financial product advice	Has the meaning given in s766B of the Corporations Act
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
financial services provider	A person who provides a financial service
FOFA	Future of Financial Advice
FOFA Act No. 1	<i>Corporations Amendment (Future of Financial Advice) Act 2012</i>

Term	Meaning in this document
FOFA code licensee	<p>A code of conduct approved by ASIC for the purposes of s962CA of the Corporations Act</p> <p>An AFS licensee</p>
ongoing fee arrangement	<p>Where an AFS licensee, or representative of a licensee, gives personal advice to a retail client and enters into an arrangement under which the client is to pay a fee (however described or structured) for a period of more than 12 months</p> <p>Note: This is a definition contained in s962A of the Corporations Act.</p>
opt-in code	<p>A code that is limited in scope to content that ASIC is satisfied obviates the need for complying with the opt-in requirement</p>
opt-in requirement	<p>The requirement in s962K of the Corporations Act for fee recipients to give their clients a written renewal notice every two years which requires the client to 'opt in' to renew their ongoing fee arrangement</p>
personal advice	<p>Financial product advice given or directed to a person (including by electronic means) in circumstances where:</p> <ul style="list-style-type: none"> • the provider of the advice has considered one or more of the client's objectives, financial situation and needs; or • a reasonable person might expect the provider to have considered one or more of these matters <p>Note: This is a definition contained in s766B(3) of the Corporations Act.</p>

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to amend RG 183 to refer to an 'opt-in code' as a code that is limited in scope to the standards or requirements that we are satisfied will, in combination, obviate the need for complying with the opt-in requirement under s962K. This provides an alternative model in RG 183 for the approval of codes under s962CA.</p>	<p>B1Q1 Do you agree with our proposal to provide an alternative model of an opt-in code that is limited in scope? Please give your reasons.</p> <p>B1Q2 Do you see any practical problems with ASIC considering for approval an opt-in code?</p> <p>B1Q3 Do you agree that we should retain our current code approval requirements about consultation, administration and enforcement in assessing an opt-in code?</p>
<p>B2 We are seeking feedback on whether there are any circumstances in which we should modify our general approach to defining a code in RG 183 to permit consideration of a code sponsored by a single AFS licensee or dealer group, or a small number of licensees or dealer groups, for the purposes of s962CA.</p>	<p>B2Q1 Should RG 183 permit consideration of a code with limited industry coverage for the purposes of s962CA?</p> <p>B2Q2 Would the following types of conditions overcome the concerns about a code with limited industry coverage:</p> <ul style="list-style-type: none"> (a) that the code covers a materially significant number of advisers (relative to the population of advisers authorised to give personal advice); (b) that the applicant can demonstrate to our satisfaction how advisers would be effectively bound by the code; (c) that the applicant makes arrangements for its code to be independently administered, as set out in RG 183 (see RG 183.73–RG 183.77); and (d) that clients are made aware of the code and their adviser's obligations under the code? <p>B2Q3 If you think we should approve a code with limited industry coverage subject to the condition that it covers a significant number of advisers, what is the minimum number or proportion of advisers that you think such a code should cover?</p> <p>B2Q4 What other conditions, if any, should we consider?</p> <p>B2Q5 What, if any, are the advantages of a code with limited industry coverage?</p> <p>B2Q6 Do you see any practical problems in ASIC approving codes with limited industry coverage in addition to those set out above?</p> <p>B2Q7 Alternatively, should RG 183 be clarified to explicitly exclude consideration of a code with limited industry coverage?</p> <p>B2Q8 What, if any, are the disadvantages of a code with limited industry coverage?</p>

Proposal	Your feedback
<p>C1 We propose that it is up to a code applicant to establish that its code contains provisions that obviate the need for complying with the opt-in requirement, taking into account the underlying policy intent of s962K. Table 2 provides examples of possible code provisions that might form part of an approved code under s962CA.</p>	<p>C1Q1 What do you consider are the essential elements of a code to obviate the need for the opt-in requirement?</p> <p>C1Q2 Should we require each code applicant to identify the specific measures in their proposed code that obviate the need for the opt-in requirement? Why or why not?</p> <p>C1Q3 What are the services that you consider warrant the payment of ongoing fees by your retail clients?</p> <p>C1Q4 What services do you currently provide to retail clients in connection with ongoing fees?</p> <p>C1Q5 What services do you plan to provide to retail clients in connection with ongoing fees after 1 July 2013?</p> <p>C1Q6 What are your strategies for client engagement?</p> <p>C1Q7 Do you consider that the examples in Table 2 are appropriate? Why or why not?</p> <p>C1Q8 Please give examples of alternative or additional code provisions that might also meet the policy objective.</p> <p>C1Q9 What is an appropriate maximum timeframe for extending opt-in where a code includes specific additional measures to obviate the need for the opt-in requirement?</p>
<p>D1 We propose to apply the existing requirements in RG 183 about administration and enforcement to all codes, including those lodged under s962CA.</p>	<p>D1Q1 Do you agree with our proposal to maintain our existing policy guidelines about code administration and enforcement?</p> <p>D1Q2 If not, please tell us which of the current policy guidelines should not be applied or, alternatively, if there are different criteria that should be applied?</p>
<p>D2 We propose to amend RG 183 to require that a code administrator seeking approval under s962CA maintains a public register of subscribing members who are exempted from the opt-in requirement. This register should be searchable by name and (where relevant) by AFS licensee or authorised representative number. It should also include the date a member joined the code.</p>	<p>D2Q1 Do you agree with our proposal that the code applicant should maintain a register of members?</p> <p>D2Q2 Do you see any practical problems with code owners maintaining a register?</p> <p>D2Q3 What other information, if any, do you think the register should contain?</p> <p>D2Q4 Is there any particular information that should be captured in a register to assist licensees in monitoring their representatives?</p>
<p>E1 We propose to amend RG 183 to generally modify the frequency of independent reviews for any approved code, and to remove the upfront independent review requirement in RG 183.82 for a prospective FOFA code applicant under s962CA.</p>	<p>E1Q1 Do you agree it is appropriate to amend the frequency of independent reviews for all codes? Please give your reasons.</p> <p>E1Q2 Do you agree with our proposal to remove the upfront independent review requirement in RG 183.82 for a prospective FOFA code applicant? Please give your reasons.</p> <p>E1Q3 Do you think we should provide any other guidance about consultation when seeking approval under s962CA, or more broadly?</p>

Proposal	Your feedback
<p>F1 We propose to amend the application requirements in RG 183, as set out in paragraph 60.</p>	<p>F1Q1 Do you agree with our proposals about the documents and information we require from code applicants?</p> <p>F1Q2 Is there additional information we should require? If so, what information?</p> <p>F1Q3 Do you see any practical problems for code applicants in providing this information?</p> <p>F1Q4 For code applicants, please provide details about the cost of code development and administration for the alternative code models? Please provide any further details about how you propose to meet those costs?</p> <p>F1Q5 Please give us much detail as possible about establishment costs, membership fees and any other related and ongoing costs?</p> <p>F1Q6 For AFS licensees, please give your estimates of the costs of code membership and compliance for both code models, as set out in Section B?</p> <p>F1Q7 How do these costs compare to compliance with s962K? Please provide as much detail as possible.</p>
<p>G1 We propose that code applicants must demonstrate to our satisfaction how relevant fee recipients are bound by the code. We do not intend to prescribe a particular model.</p>	<p>G1Q1 Do you agree that our guidance should allow flexibility for the code applicant to determine an appropriate method by which to bind members?</p> <p>G1Q2 Do you think that any one model of code membership is preferable?</p>