



A Guide to Promoting Your
Digital Investing Solution
Regulatory Considerations

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Background

The financial services industry is heavily regulated in Australia; primarily under the *Corporations Act 2001*, its associated Regulations and through the oversight of the Australian Securities and Investments Commission (ASIC). A central pillar of this regulatory landscape is the categorisation of Financial Product Advice (itself sub-categorised into Personal Advice and General Advice) and Factual Information.

The purpose of this document is to provide guidance to our partner firms, on how they can promote their online investing solution - without inadvertently straying into providing Personal Advice. If you have any concerns or queries regarding anything in this document or the promotion of your solution generally, please feel free to reach out at any time.

This guide has been developed through drawing on the relevant legislation, Court decisions, information published by ASIC in its regulatory guidance documents, as well as through our experience working with OpenInvest partners as they engage with various audiences.

This document has been reviewed by our lawyers at Holley Nethercote Lawyers as at December 2022, and they have confirmed that the “document is an accurate statement of the law and its implications”.



Financial Product Advice

Financial product advice broadly involves making a statement or qualitative judgement about a financial product, which is conveyed to another person. If a communication contains a recommendation or statement of opinion about a financial product that is intended to influence a person (or can reasonably be regarded as being intended to influence a person) into making a decision about a particular financial product or class of financial product, that communication will be regarded as **financial product advice**.

The regulation of financial product advice in the Australian financial services industry involves the separation of communication into three categories: Factual Information, General Advice and Personal Advice.

Factual Information

Factual information is objectively ascertainable information whose truth or accuracy cannot be reasonably questioned, rather than the expression of a subjective opinion as to future outcomes. Factual information is actually not financial product advice at all, but merely a statement of present or historical fact.

However, the manner and context within which factual information is provided is also important. ASIC has stated that:

“Where factual information is presented in a manner that may reasonably be regarded as suggesting or implying a recommendation to buy, sell or hold a particular financial product or class of financial products, the communication may constitute financial product advice.”

Because of this uncertainty it is good practice to include a general advice warning with any material that might be intended to present only factual information.

ASIC has made clear that firms are able to provide factual information to a client, even though the firm may hold personal information about that client and their circumstances.

One does not need an AFS licence or authorisation to provide factual information to clients or prospects.

General Advice

Broadly speaking, general advice is financial product advice that has been given without considering a person's relevant personal circumstances (i.e. their objectives, financial situation or needs). Unlike factual information, general advice carries an overt or implied recommendation or statement of opinion regarding making a decision about a particular financial product or class of financial product.

By promoting your digital solution, whatever the form of marketing involved, each partner firm is implicitly recommending its solution, and thus will be engaging in the provision of general advice.

As with factual information, ASIC has made clear that holding or referring to personal information about a person does not necessarily render all communications/advice to that person to be personal advice.

In fact, ASIC acknowledges that licensed firms are permitted to use the information they hold in order to identify people/clients to communicate with in the form of general advice, and even to inform the content and nature of that communication.

This opportunity is best highlighted by showing the example scenario below which is taken from ASIC's *Regulatory Guide 244*.

Example C1: Using personal information to ensure that the general advice provided is relevant to the client

Scenario

A superannuation fund would like to provide a brochure containing general advice about retirement planning issues to some of its members via a mailout. The general advice would be most relevant to members aged 55 and over.

Commentary

The fund can use personal information that they have about their members' age to send the brochure to members who are 55 and over. Using the personal information about fund members in this way does not mean that the fund is providing personal advice. Instead, the fund is using personal information to provide general advice to a particular audience.

An AFS licence or authorisation covering the relevant financial product is required to provide general advice to clients or prospects. A General Advice Warning is also required to be provided to retail clients.

Personal Advice

Personal advice takes the foundation of general advice (being a recommendation or statement of opinion about a financial product) and refines it through the consideration of an individual's relevant personal circumstances, or by giving the impression that you have considered a person's personal circumstances – to produce a tailored professional opinion that a particular financial product is appropriate *for that person*.

The provision of personal advice to retail clients is highly regulated. An AFS licence or authorisation covering the relevant financial product is required to provide personal advice to clients or prospects. Advisers providing personal advice to retail clients must also hold relevant qualifications, meet the best interests duty and the advice must be given in the form of a Statement of Advice ('SOA').

Quality of Advice Review

One issue we have discussed in recent conversations with advice firms concerns how the digital solution would work if the *Quality of Advice Review* recommendations become law. We'll have to wait to see the details, but indications are that the General Advice category will be removed from the regulations.

The Review's initial recommendations suggest that promotion of the digital solution would fall under a new "good advice" version of Personal Advice. This would allow firms to talk to prospects in a transparent and relaxed manner about the digital solution and which portfolio would be logical for them; without the present obligations of conducting a detailed fact find, producing an SOA and justifying that this is the "best" outcome for them.

In other words, it actually stands to become much easier and simpler to offer a digital solution alongside a more robust (expensive) traditional Personal Advice service.



How to Promote your Solution - Scenarios

In this section, we explore the specifics of how firms can communicate with clients and prospects in promoting their digital investing solution, and provide sample wording for various scenarios.

Scenario 1: Can I describe our digital investing solution on our website alongside a description of our traditional ongoing personal advice service?

Yes, this is the simplest and most obvious way of showcasing and promoting your digital investing solution: essentially, telling the general public you have (at least) two distinct services, allowing people to immediately self-select based on their circumstances and needs. All OpenInvest partner firms do this.

Scenario 2: Can I send an email to a marketing database of contacts about our digital solution?

Yes. For example, you may have collected names and email addresses on your marketing database for the purposes of sending newsletters. Notifying that audience about your digital investing solution is only a form of general advice, not personal advice.

Here is an example of wording you might use:



Example email

To: John and Jane Citizen

Subject: Digital Investing Solution

Dear John and Jane,

I wanted to take this opportunity to make you aware of a new digital investing solution we have recently launched: **[solution name]**.

Our digital investing solution empowers investors to self-select from a unique range of Model Portfolios; each actively managed to pursue a defined investment objective. Our investing solution has been designed to provide access to our professional investing expertise in a lower-cost way than our traditional personal advice service. The minimum amount needed to open an account is only **[\$XX]**.

You can find detailed information about **[solution name]** including a means to directly open an investment account, here. **[link to solution web content]**

Suggested disclaimer (refer to page 12)

This communication and material provide factual information about our investing solution, and any general advice within does not take into account your objectives, financial situation or needs. If you wish to proceed to make any investment decision, you would need to consider if the solution is appropriate for you, given your personal circumstances, and consider the PDS and Target Market Determination (available at **[web address]**).

Our digital investing service is provided via the OpenInvest Portfolio Service, ARSN 628 156 052, an IDPS-like managed investment scheme registered with ASIC under the Corporations Act and issued by Responsible Entity and Administrator, OpenInvest Limited (ACN 614 587 183, AFSL 504 155).

How to Promote your Solution - Scenarios

Scenario 3: Can I send an email to my existing client base, suggesting that the digital solution may be appropriate for family members or friends?

Yes, As you are not directly promoting your solution to a person with any form of express or implied recommendation that it would be suitable for them given their personal circumstances, then there is clearly no question of personal advice being provided.

Here is an example of wording you might use:



Example email

To: John and Jane Citizen

Subject: Digital Investing Solution

Dear John and Jane,

I wanted to take this opportunity to make you aware of a new digital investing solution we have recently launched: **[solution name]**.

Our digital investing solution empowers investors to self-select from a unique range of Model Portfolios; each actively managed to pursue a defined investment objective. Our investing solution has been designed to provide access to our professional investing expertise in a lower-cost way than our traditional personal advice service. The minimum amount needed to open an account is only **[\$XX]**.

Please feel free to share this communication with any family and friends who might be interested in accessing our investing expertise via a lower-cost, online solution.

Detailed information about **[solution name]** including a means to directly open an investment account, is provided, here **[link to solution web content]**.

Suggested disclaimer (refer to page 12)

This communication and material provides factual information about our investing solution, and any general advice within does not take into account your objectives, financial situation or needs. If you wish to proceed to make any investment decision, you would need to consider if the solution is appropriate for you, given your personal circumstances, and review the PDS and Target Market Determination (available at **[web address]**).

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How to Promote your Solution - Scenarios

Scenario 4: Can I host a webinar introducing our new digital solution?

Yes - this is a great way to introduce your new solution to a broad audience.

Be sure to articulate in the invitation, and at the commencement and closing of the webinar, that the session is a marketing event and provide a general advice warning (see wording below in Page 12). Any questions asked during the session which identify someone's personal circumstances should be approached with caution.

For example: "Given my age, do you think I should be selecting your High Growth portfolio"? It would be very difficult to answer this question in a way that is not providing personal advice.

It is good practice to specifically request attendees not to provide any details about themselves when asking questions.

Scenario 5: Can I prepare and use a brochure describing our online investing solution?

Yes. We have a sample brochure that we share with all partner firms.

You can have copies of your brochure available in the reception area of your office, so that anyone may take one. Making brochures available in this way is a means of promoting your solution via general advice.

However, if one of your staff members was to hand out a brochure to a prospect who walks into your office and tell them something like: "Based on what you've said about yourself, our digital investing solution is ideal for you", then clearly personal advice has been provided.

That is, even though the wording on your website, in a brochure or in your email communications might be carefully crafted and vetted, the circumstances of direct interactions with a person will determine if your firm has acted within the bounds of general advice or else strayed into inadvertently providing personal advice.

We describe various scenarios below to assist you in ensuring all personal interactions are compliant.

How to Promote your Solution - Scenarios

Scenario 6: Can we send out an email to any of our personally-advised clients to tell them about our digital investing solution? This might be particularly relevant if these clients are not ideal clients for the firm.

Yes - you are allowed to use the client information you have to communicate with those existing clients who you believe might be better suited to your general advice digital investing solution.

Here is an example of wording you might use:



Example email

To: John and Jane Citizen

Subject: Digital Investing Solution

Dear John and Jane,

We've been giving you ongoing personal financial advice tailored to your situation, and you know that this takes considerable time and effort from our professional team. As a result, we charge a certain level of fees for this service. Unfortunately, as a result of recent regulatory changes and cost pressures generally we have had to increase our fees for our personal advice service.

This is therefore an opportune time to inform you of a new service we have recently launched, our online investing solution: **[solution name]**. Our new investing solution has been designed to provide access to our professional investing expertise in a lower-cost way than our traditional personal advice service.

You can read about our new digital solution on our website, here **[link to solution web content]**.

Also, even though we have traditionally given you tailored, personal advice, it's important to note I haven't taken into account or had regard to your personal objectives or circumstances or considered whether our digital model portfolio option is right for you, so you would need to consider if the solution is appropriate for you, given your personal circumstances, consider the PDS and Target Market Determination (available at **[web address]**), and make your own decision.

Please feel free to reach out to me at any time if you have any questions.

Kind regards,

Suggested disclaimer (refer to page 12)

This communication and material provides factual information about our investing solution, and any general advice within does not take into account your objectives, financial situation or needs. If you wish to proceed to make any investment decision, you would need to consider if the solution is appropriate for you, given your personal circumstances, and review the PDS and Target Market Determination (available at **[web address]**).

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How to Promote your Solution - Scenarios

Scenario 7: Can we send out an email to any of our general advice clients to tell them about our digital investing solution? This might be particularly relevant for stockbroking firms to advise clients whose portfolio balances are below a certain threshold, and/or who infrequently trade with the firm.

Yes - you are allowed to use the client information you have to communicate with those existing clients who you believe might be well suited to your digital investing solution.

Here is an example of wording you might use:



Example email

To: John and Jane Citizen

Subject: Digital Investing Solution

Dear John and Jane,

We are delighted to introduce to you a new service called **[solution name]** – an online, investing solution that gives clients direct access to a unique range of diversified investment portfolios managed by our investment team.

Our new digital investment solution is a quick and low-cost way to access our professional portfolio management expertise – without the cost of obtaining personal financial advice or the need and cost of you placing individual trades. The minimum amount needed to open an account is only **\$(XX)**.

You can read about our new digital solution on our website, here **[link to solution web content]**.

It's important to note we haven't taken into account or had regard to your personal objectives or circumstances or considered whether our digital model portfolio solution is right for you, so you would need to consider if the solution is appropriate for you, given your personal circumstances, consider the PDS and Target Market Determination (available at **[web address]**), and make your own decision.

Suggested disclaimer (refer to page 12)

This communication and material provides factual information about our investing solution, and any general advice within does not take into account your objectives, financial situation or needs. If you wish to proceed to make any investment decision, you would need to consider if the solution is appropriate for you, given your personal circumstances, and review the PDS and Target Market Determination (available at **[web address]**).

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How to Promote your Solution - Scenarios

Scenario 8: How can I speak with a prospect about our online solution without straying into personal advice?

Scenario: A prospect is referred to you seeking help in how they should invest an amount of money that is below an amount that would make them an ideal personally-advised client for your firm.

You might respond as follows:



Example response

“Financial advice tailored to your situation requires significant personal involvement by a professional member of our firm. In addition, it requires production of extensive documentation, given the regulations governing the provision of personal advice.”

“As a result, this service tends to be relatively expensive and hence may not be appropriate for everyone.”

“Our digital model portfolio solution **[solution name]** is a quick and lower-cost way to access our professional portfolio management expertise. Our website contains information and general advice about the solution. I can also send / give you a brochure on this solution.”

“If you want tailored advice that is specific to your circumstances, I can give you more information about that particular separate service.”

Scenario 9: Can I speak with an existing client about our digital solution without straying into personal advice?

Yes, ASIC will not consider a communication to be personal advice if you clarify with the client or prospect that:

- ▶ you are not providing personal advice, and
- ▶ the communication is made without consideration of the client’s relevant personal circumstances (i.e. their objectives, financial situation or needs).

Even where you hold relevant information about a person (including an existing or former client), you are still able to reference your digital investing solution via general advice to that person. Clearly, you would need to be conscious of using wording that does not give the person the impression you have considered their relevant personal circumstances.

Scenario: You have an ongoing personal advice client with a portfolio balance that is below the level that makes them an ideal client, and wish to make them aware of your lower-cost digital investing solution.

You would be able to speak to this client in the following terms:



Example response

“We’ve been giving you ongoing personal financial advice tailored to your situation, and you know that this takes considerable time and effort from our professional team. As a result, we charge a certain level of fees for this service. “

“Our new digital investing solution **[solution name]** has been designed as a quick and lower-cost way to access our professional portfolio management expertise.”

“You can read about our new digital solution on our website, or I can send / give you a brochure that sets out some information and general advice about our digital investing solution. Our digital investing solution is different to the current service where we give you personal advice about investing that has been tailored to your particular situation.”

“Are you comfortable that you understand all this? Do you want me to go ahead and send you the brochure?”

How to Promote your Solution - Scenarios

Scenario 10: Can I recommend our digital solution and thereby provide personal advice to an existing or new personally advised client?

Yes - provided that a new SOA or an ROA (if permitted) is prepared for a retail client.

For example, this might be a narrowly defined recommendation to invest in a particular portfolio within your digital solution, supported by an appropriately “scaled” Statement of Advice to a client.

What General Advice warning do I need to provide?

Firms must provide a warning when general advice is given to a retail client in a communication whether written or orally. The general advice warning must be provided at the same time and by the same means of communication as the advice itself, as it serves to alert individuals to the fact that the advice is general in nature and does not take into account their relevant personal circumstances.

We suggest the use of the following disclaimer as a general advice warning:



Suggested disclaimer

This communication and material provides factual information about our investing solution, and any general advice within does not take into account your objectives, financial situation or needs. If you wish to proceed to make any investment decision, you would need to consider if the solution is appropriate for you, given your personal circumstances, and review the PDS and Target Market Determination (available at **[web address]**).

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