

Guide on Australian Financial Services Licensing and Valuation Services

Date: April 2019



Important Disclaimer

Chartered Accountants Australia and New Zealand (ABN 50 084 642 571) (**CA ANZ**) has prepared this document to assist members in considering whether any of their activities or proposed activities could be characterised as financial product advice.

The examples provided in this document are for illustrative purposes only and your own business situation may differ from those examples. You should also be aware that the examples provided in this document have not been considered by the Australian Securities and Investments Commission (**ASIC**) and CA ANZ cannot provide any comfort or assurance that ASIC's views would be consistent with the content of this document.

This document **does not constitute legal advice** and you should therefore not make any assumptions about the legal characterisation of your business activities when reviewing this document. CA ANZ is unable to provide you with legal advice and highly recommends that you seek independent legal advice if you have any legal questions. This document does not constitute financial or commercial advice, or a recommendation of any services or products. You should consider obtaining independent advice before making any investment, financial or legal decision.

This document has been prepared so that it is current as at the date of writing. You should be aware that such information can rapidly become out of date. You should not act or refrain from acting, or rely on any statement, view or opinion expressed in this document. You should make and rely on your own inquiries in making any decisions or giving any advice.

No warranty is given as to the correctness of the information contained in this document, or of its suitability for use by you. To the fullest extent permitted by law, CA ANZ disclaims any liability whatsoever in connection with, reliance upon or the use of this document. CA ANZ is not liable for any direct, indirect, special or consequential losses or damages of any kind, or loss of profit, loss or corruption of data, business interruption or indirect costs, arising out of or in connection with the use of this publication or the information contained in it, whether such loss or damage arises in contract, negligence, tort, under statute, or otherwise.

© 2018 Chartered Accountants Australia and New Zealand (ABN 50 084 642 571) (**CA ANZ**). Other than for the purposes of and in accordance the *Copyright Act 1968* (Cth), this document may not be reproduced by any process, nor may any other exclusive right to be exercised, without the express written permission of CA ANZ.

Contents

Glossary	4
Introduction	5
What is a financial product?	8
What is financial product advice?	13
When does a person carry on a financial services business?	17
Examples	23

Glossary

“Act” means the *Corporations Act 2001 (Cth)*.

“AFSL” means Australian financial services licence.

“APES 225” means APES 225 Valuation Services, prepared and issued by the Accounting Professional & Ethical Standards Board.

“ASIC” means the Australian Securities and Investments Commission.

“investment-related decision” has the meaning given in paragraph 83.

“member in business” has the meaning given in APES 225 Valuation Services.

“member in public practice” has the meaning given in APES 225 Valuation Services.

Introduction

1. APES 225 Valuation Services (**APES 225**) sets out the professional and ethical obligations of members in relation to the provision of valuation services to clients or an employer.
2. APES 225 defines a valuation service to mean a service provided by a member to a client or employer in performance of a valuation engagement, limited scope valuation engagement, or calculation engagement.¹ It also defines a valuation to mean the act or process of determining an estimate of value of a business, business ownership interest, security, or intangible asset using valuation approaches, methods, and procedures.²
3. The *Corporations Act 2001* (Cth) (the **Act**) provides, among other things, that a person who carries on a financial services business must hold an Australian financial services licence (**AFSL**) or be an authorised representative of a person who carries on a financial services business and holds an AFSL, that covers the provision of the financial service.³
4. The aims of this guide are to help members providing valuation services that fall under APES 225:
 - (a) who do hold an AFSL, to determine if a particular engagement or assignment needs to be conducted under the AFSL; and
 - (b) who do *not* hold an AFSL, to determine if they need to hold one or be an authorised representative.
5. For convenience:
 - (a) hereafter a reference to holding an AFSL also implies, as an alternative, being an authorised representative of a person who carries on a financial services business and holds an AFSL; and
 - (b) unless specified otherwise, a reference in this guide to a section is a reference to a section of the Act.

Scope of this guide

6. This guide is limited to valuation services under APES 225. A member might at the same time as providing a valuation service also provide some other service. This guide does not consider whether a service other than a valuation service requires an AFSL.
7. This guide supplements, and should be read with, the document titled *Financial Advice and Regulations: Guidance for the Accounting Profession* issued by CA ANZ and CPA Australia in July 2016.
8. AFSLs are issued by the Australian Securities and Investments Commission (**ASIC**). Relevant information may be found at: <http://asic.gov.au/regulatory-resources/financial-services>.

¹ In APES 225 defined terms are capitalised (e.g. Valuation Service). In this guide, for ease of reading, the defined terms in APES 225 are not capitalised (e.g. valuation service).

² In this guide, references to APES 225 Valuation Services are to the version dated March 2018: https://www.apesb.org.au/uploads/home/28032018112627_Revised_APES_225_March_2018.pdf.

³ Sections 911A(1) and 766A of the Act.

Overview

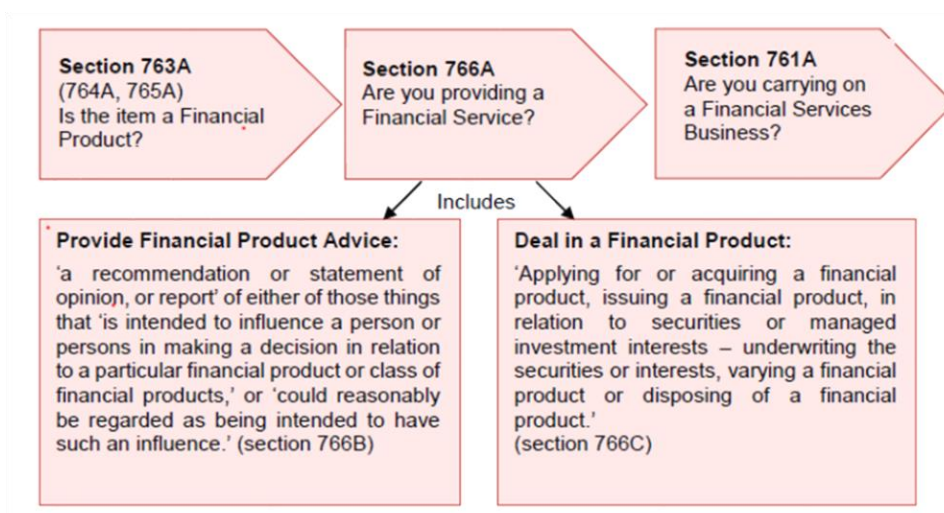
9. Section 911A(1) of the Act provides:

Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

10. In broad terms, and so far as it is relevant to the provision of valuation services under APES 225, a person carries on a financial services business when the person provides financial product advice, which occurs when the person provides a recommendation or statement of opinion or a report of either of those things that is intended to influence, or could reasonably be regarded as being intended to influence, a person in making a decision in relation to a financial product.⁴
11. Understanding s911A(1) requires consideration of a number of other sections, including:
- (a) s761A Definitions;
 - (b) s766A When does a person provide a financial service?;
 - (c) s766B Meaning of financial product advice;
 - (d) s763A General definition of financial product; and
 - (e) s763B When a person makes a financial investment.
12. Section 911A(1) requires a person to hold an AFSL if all of the following sections of the Act apply:
- (a) there is a financial product (s763A);
 - (b) the person is providing a financial service (which, relevantly for valuations, includes providing financial product advice) in relation to that financial product (s766A);⁵ and
 - (c) the person is carrying on a financial services business (s761A).

⁴ This is a simplified and incomplete description of what constitutes carrying on a financial services business.

⁵ Under s766A(1), a person provides a financial service if they provide financial product advice (s766B), or deal in a financial product (s766C), or make a market for a financial product (s766D), or operate a registered scheme, or provide a custodial or depository service (s766E), or engage in conduct of a kind prescribed by regulations made for the purpose of s766A(1). Only providing financial product advice is relevant to a valuation and this guide.



13. The questions of what is a financial product, financial product advice, and a financial services business, and what exemptions might apply, are considered in the following sections of this guide. At the end of the guide, several practical examples are analysed to assist members in considering whether an AFSL is required in those circumstances.

What is a financial product?

14. The question of what is a financial product is important because a member providing a valuation service will not need to hold an AFSL if the valuation service does not relate to a financial product.

Definition of a financial product

15. Section 763A defines a financial product as follows:

For the purposes of this Chapter, a financial product is 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 section 763B);*
- (b) *manages financial risk (see section 763C);*
- (c) *makes non-cash payments (see section 763D).*

This has effect subject to section 763E.

16. Of the three actions set out in s763A(a) to (c), making a financial investment (s763A(a)) is most relevant to APES 225 and is considered further below.

Facility

17. Under s763A, a financial product must be a facility, which is defined by s762C as follows:

Facility includes:

- (a) *intangible property; or*
- (b) *an arrangement or a term of an arrangement (including a term that is implied by law or that is required by law to be included); or*
- (c) *a combination of intangible property and an arrangement or term of an arrangement.*

Making a financial investment

18. Section 763B relates to making a financial investment and provides:

For the purposes of this Chapter, a person (the investor) makes a financial investment if:

- (a) *the investor gives money or money's worth (the contribution) to another person and any of the following apply:*
 - (i) *the other person uses the contribution to generate a financial return, or other benefit, for the investor;*
 - (ii) *the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);*
 - (iii) *the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and*

- (b) *the investor has no day-day control over the use of the contribution to generate the return or benefit.*
19. Note 1 to s763B gives the following examples of actions that constitute making a financial investment under s763B:
- (a) *a person paying money to a company for the issue to the person of shares in the company (the company uses the money to generate dividends for the person and the person, as a shareholder, does not have control over the day-to-day affairs of the company); or*
- (b) *a person contributing money to acquire interests in a registered scheme from the responsible entity of the scheme (the scheme uses the money to generate financial or other benefits for the person and the person, as a member of the scheme, does not have day-to-day control over the operation of the scheme).*
20. Note 2 to s763B gives the following example of an action that does not constitute making a financial investment under s763B:
- (a) *a person purchasing real property or bullion (while the property or bullion may generate a return for the person, it is not a return generated by the use of the purchase money by another person);*
...
21. Section 763B addresses the original making of a financial investment through the acquisition of a facility. Section 763A(3), on the other hand, addresses the secondary market and provides:
- A facility does not cease to be a financial product merely because:*
- (a) *the facility has been acquired by a person other than the person to whom it was originally issued; and*
- (b) *that person, in acquiring the product, was not making a financial investment or managing a financial risk.*
22. Thus, while the intention of the original investor may be relevant to determining if the original acquisition of a facility constitutes the making of a financial investment, the intention of a subsequent acquirer of that facility is not relevant.

Prescribed financial products

23. Section 764A lists specific things that are financial products. Relevantly, each of the following is a financial product:
- (a) a security, which is defined in s761A to include, among other things:
- (i) a share in a body;
- (ii) a debenture of a body;⁶
- (iii) a legal or equitable right or interest in a share or debenture;

⁶ Section 9 defines a debenture of a body to include, among other things, an undertaking by the body to repay as a debt money lent to the body, but excluding money lent by a person in the ordinary course of business carried on by that person. Hence, it would normally exclude a bank loan.

- (iv) an option to acquire by way of issue a share, debenture, or legal or equitable right or interest in a share or debenture;
 - (v) a right (whether existing or future and whether contingent or not) to acquire, by way of issue, any of the above, certain interests or rights in relation to a registered scheme or in relation to certain managed investment schemes that are not registered schemes;
- (b) an interest in a managed investment scheme;⁷
 - (c) a derivative;⁸ and
 - (d) a superannuation interest.
24. Section 765A lists specific things that are not financial products. Relevantly, an undertaking by a body corporate to pay money to a related body corporate is not a financial product.
25. A thing may be a financial product by virtue of s763A even if it is not prescribed to be a financial product by s764A (provided it is not excluded by s765A).
26. APES 225 covers the valuation of a business, business ownership interest, security, or intangible asset.⁹ None of these terms is defined in APES 225. The question of whether each of these, together with certain other financial assets that members may be asked to value, is a financial product is considered below.

	Financial product?	Reasoning
1. Equity		
Share in a company	Yes	A share in a company is a financial product by virtue of s764A(1)(a) because it is a security (as defined in s761A).
Option over unissued shares	Yes	An option over unissued shares is a financial product by virtue of s764A(1)(a) because it is a security (as defined in s761A).
Option over issued shares	Yes	An option over issued shares is a financial product by virtue of s764A(1)(c) because it is a derivative (as defined in s761A and s761D).
Unit in an unlisted property trust	Yes	A unit in an unlisted property trust is a financial product by virtue of s764A(1)(b) if it is a registered managed

⁷ A managed investment scheme is defined in s9 to be a scheme that has the following features: (a) people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not); (b) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders); and (c) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions). The definition also goes on to include a time-sharing scheme and to exclude certain partnerships with more than 20 members.

⁸ Broadly, under s761D, a derivative can be over an asset, an interest rate, an exchange rate, an index, or a commodity.

⁹ See the definition of "valuation" in APES 225.

	Financial product?	Reasoning
		investment scheme (which is usually the case), or s764A(1)(ba) if it is not registered.
Unit in a listed equity trust	Yes	A unit in a listed equity trust is a financial product by virtue of s764A(1)(b) because the trust is a registered managed investment scheme
Interest in a partnership	Unlikely	An interest in a partnership will usually not be a financial product unless the partnership is a managed investment scheme, which is unlikely. ¹⁰
2. Assets		
Business	No	A business is not a financial product because: (a) the creator of the business does not make a financial investment under s763B since no contribution is given to another person; (b) a subsequent acquirer of the business does not make a financial investment under s763B since the purchase price is not a contribution; and (c) a business is not a facility through which a person manages financial risk under s763C or makes non-cash payments under s763D.
Goodwill	No	Goodwill is not a financial product because it cannot be severed from the business to which it relates, and a business is not a financial product.
Identifiable, intangible asset	No	An identifiable, intangible asset (e.g. brands, customer relationships, copyright, software) is not a financial product because: (a) the creator of the asset does not make a financial investment under s763B since no contribution is given to another person; (b) a subsequent acquirer of the asset does not make a financial investment under s763B since the purchase price is not a contribution; and

¹⁰ It is unlikely because the definition of managed investment scheme in s9 excludes a partnership that has more than 20 members but does not need to be incorporated or formed under an Australian law because of regulations made for the purposes of subsection 115(2).

	Financial product?	Reasoning
		(c) the asset is not a facility through with a person manages financial risk under s763C or makes non-cash payments under s763D.

What is financial product advice?

27. The question of what is financial product advice is important because a member providing a valuation service will not need to hold an AFSL if the member does not provide financial product advice.

Definition of financial product advice

28. Financial product advice is defined in s766B(1) as follows:

For the purpose of this Chapter, financial product advice means a recommendation or a statement of opinion, or a report of either of those things, that:

- (a) *is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or*
 - (b) *could reasonably be regarded as being intended to have such an influence.*
29. There are, therefore, two independent tests in s766B(1) of whether advice is financial product advice: one is subjective (s766B(1)(a)) while the other is objective (s766B(1)(b)).
30. However, providing or giving certain exempt documents or statements (including Product Disclosure Statements and Financial Services Guides) does not constitute providing financial advice.¹¹ A valuation report would not normally be an exempt document.
31. The essential elements of financial product advice are considered below. For convenience, references to a “financial product” should be read as being references to a “particular financial product or class of financial products, or an interest in a particular financial product or class of financial products”.

Recommendation or statement of opinion or report

32. First, for there to be financial product advice there must be a recommendation or a statement of opinion, or a report of either of those things.
33. A valuation report under APES 225 is likely to be considered to be a statement of opinion and not merely the provision of factual information for which a person does not need to be licensed. ASIC considers factual information to be objectively ascertainable information, the truth or accuracy of which cannot reasonably be questioned.¹²
34. Whether a valuation opinion could reasonably be regarded as being intended to influence a person in relation to making a decision in relation to, say, the value of a share in a company, or whether to buy or sell or hold a share in a company, will be determined by the circumstances of the case.

¹¹ See s766B(9).

¹² ASIC Regulatory Guide 36.23 and Regulatory Guide 244.24.

Financial product

35. Second, for there to be financial product advice the recommendation, opinion, or report must be in relation to a financial product. The question of what is a financial product is considered above, starting on page 8.

Influence

36. Third, for there to be financial product advice the recommendation, opinion, or report must be intended to influence, or be capable of being reasonably regarded as being intended to influence, a person's decision about a financial product.

Meaning of "influence"

37. The word "influence" is not defined in the Act and its meaning in the context of s766B(1) appears not yet to have been determined by the Courts. The Macquarie Dictionary (7th Edition, 2017), defines "influence" as follows:

n. 1. invisible or insensible action exerted by one thing or person on another, especially by people in power. 2. power of producing effects by invisible or insensible means: spheres of influence. 3. a thing or person that exerts influence by invisible or insensible means: beneficial influences... - v.t. (influenced, influencing) 5. to exercise influence on; modify, affect, or sway: to influence a person by bribery. 6. to move or impel to, or to do, something...

38. In *Thorne v Kennedy* [2017] HCA 49, the High Court had to consider whether certain financial agreements made under the *Family Law Act 1975* (Cth) were voidable for duress, undue influence, or unconscionable conduct. In relation to undue influence, the majority of the Court said:

31. In 1836, ...Story said that a person can be subjected to undue influence where the effect of factors such as pressure is that the person "has no free will, but stands in vinculis [in chains]". He explained that "the constant rule in Equity is, that, where a party is not a free agent, and is not equal to protecting himself, the Court will protect him"...

32. The question whether a person's act is "free" requires consideration of the extent to which the person was constrained in assessing alternatives and deciding between them. Pressure can deprive a person of free choice in this sense where it causes the person substantially to subordinate his or her will to that of the other party. It is not necessary for a conclusion that a person's free will has been substantially subordinated to find that the party seeking relief was reduced entirely to an automaton or that the person became a "mere channel through which the will of the defendant operated"[41]. Questions of degree are involved. But, at the very least, the judgmental capacity of the party seeking relief must be "markedly sub-standard"[42] as a result of the effect upon the person's mind of the will of another.

[Footnotes omitted.]

39. Although the Court was concerned with "undue influence" and did not define "influence" directly, it seems clear that the underlying concept of influence the Court had in mind is consistent with the Macquarie Dictionary definition: that is, one person influences another when that person does something to modify, affect, or sway the actions or beliefs of the other person.

The subjective and objective tests of intention

40. Where a member issues a report valuing a financial product, the subjective test of intention under s766B(1) involves answering the question: "Is the member's report intended to influence a person or persons in making a decision in relation to the financial product?". Evidence of the member's

intention might be found in statements in the report, in the engagement letter, or in other communications.

41. On the other hand, the objective test of intention under s766B(1) involves answering the question: “Could the member’s report reasonably be regarded as being intended to influence a person or persons in making a decision in relation to the financial product?”. Answering this question requires consideration of all the relevant circumstances in which the report was commissioned and issued.
42. If the subjective test is met then the objective test will also be met: that is, where the member’s report is intended to influence a person or persons in making a decision in relation to the financial product, it would also reasonably be regarded as being intended to have such influence. However, if the subjective test is not met, then the member must still consider whether the objective test is otherwise met.
43. In many cases, the member’s report will be commissioned to provide information that will inform a client of the value of a financial product to assist the client in making a decision in relation to that financial product, but not with the intention of influencing the client in making that decision. An opinion on the value of a financial product is not by itself a recommendation to act in any particular way, or to take any action at all, in relation to that product. Influencing is something more than mere informing.

Making a decision

44. The subjective and objective tests under s766B(1) relate to an intention to influence a person or persons in “making a decision” in relation to a financial product. The Act does not define what types of decisions are covered by this provision.
45. Typically, the member and the client will agree in the engagement letter on the purpose or purposes for which the member’s report may be used and, thereby, effectively restrict the range of decisions that the client might legitimately make based on the report.
46. ASIC, expresses the view that the types of decisions covered by s766B(1) include transactional decisions to buy, sell, or hold financial products:¹³

A specific issue that arises is the meaning of s766B(1) of ‘decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products’. This expression includes any decision to buy, sell or hold a particular financial product or class of financial products. Examples include a decision to:

- (a) exercise a right or option to acquire or dispose of a financial product;
- (b) acquire an equitable interest in a financial product; or
- (c) accept or reject a takeover offer.

47. There are, however, many other possible purposes of a valuation that do not involve decisions in relation to a financial product. Some of the more common of these include the purposes of assisting a member’s client or others (where someone other than the client may be relying on the advice) in making one or more decisions regarding:
 - (a) financial reporting;
 - (b) taxation and stamp duty; and

¹³ See paragraph RG 36.27 of Regulatory Guide 36 “Licensing: Financial product advice and dealing”.

- (c) legal proceedings.
48. While the transactional decisions to buy, sell, or hold a financial product directly affect the financial product, decisions regarding financial reporting, taxation and stamp duty, and legal proceedings are principally in relation to something else other than the financial product and the financial product itself remains unaffected.
49. For example, consider the case of a client who owns securities and is obliged under accounting standards to revalue them, and who commissions a member to produce a report in which the member expresses an opinion on the fair value of the securities. The decision the client must make here is not in relation to the financial product but in relation to accounting for its carrying value: the financial product itself remains completely unaffected by the decision the client makes. This is a quite different type of decision to a transactional decision to buy, sell, or hold a financial product that directly affects the product. Similarly, a valuation for tax purposes is for decisions that affect the client's tax position, not the financial product. And a valuation as an expert witness for a legal proceeding might affect the client or the Court's decisions in relation to that proceeding but not the financial product itself.

General advice and personal advice

50. There are two types of financial product advice: personal advice and general advice.¹⁴
51. Personal advice is financial product advice that is given or directed to a person in circumstances where the provider of the advice has considered one or more of the person's objectives, financial situation and needs, or a reasonable person might expect the provider to have considered one or more of those matters.¹⁵
52. General advice is financial product advice that is not personal advice.¹⁶

Key matters to consider

53. When providing a valuation, in order to determine whether it could be regarded as financial product advice, relevant matters which members should consider include:
- (a) who has engaged the member to give the valuation;
 - (b) the reason or reasons for asking the member to give the valuation;
 - (c) whether the valuation is in relation to a transaction (e.g. the purchase or sale of an asset) that has already occurred;
 - (d) who will have access to the valuation; and
 - (e) any limitations imposed by the member on access to, and use of, the valuation.

¹⁴ See s766B(2).

¹⁵ See s766B(3).

¹⁶ See s766B(4).

When does a person carry on a financial services business?

54. The question of when does a person carry on a financial services business is important because a member providing a valuation service will not need to hold an AFSL if the member does not carry on a financial services business.

Financial services business

55. Section 761A defines a financial services business as follows:

financial services business means a business of providing financial services.

Providing financial services

56. Section 766A(1) defines when a person provides a financial service:

For the purpose of this Chapter, subject to paragraph (2)(b), a person provides a financial service if they:

- (a) provide financial product advice (see section 766B); or*
 - (b) deal in a financial product (see section 766C); or*
 - (c) make a market for a financial product (see section 766D); or*
 - (d) operate a registered scheme; or*
 - (e) provide a custodial or depository service (see section 766E); or*
 - (f) engage in conduct of a kind prescribed by regulations made for the purpose of this paragraph.*
57. Each of these activities is briefly considered below. For the purpose of this guide, only the activity of providing financial product advice is relevant.

Section 766A(1)(a): providing financial product advice

58. A person provides a financial service if they provide financial product advice.¹⁷

Section 766A(1)(b) to (e): various activities outside of APES 225

59. The activities referred to in s766A(1)(b) to (e) do not fall under APES 225 and are not considered in this guide.

Section 766A(1)(f): conduct prescribed by regulations

60. There is no relevant conduct prescribed by regulations made for the purpose of s766A(1)(f).

¹⁷ The question of what is a financial product is considered above, starting on page 8.

Providing a financial service as a secondary service

61. The term *secondary service* has been adopted by ASIC to describe a situation where a person causes or authorises the provision of a financial service by an intermediary to a retail client.¹⁸ This is based on s52 which provides that a reference to doing an act or thing includes a reference to causing or authorising the act or thing to be done. Consider, for example, a person engaged by a company to prepare a valuation report on shares in a subsidiary where the person authorises the company to pass the report to certain potential purchasers of those shares. In such circumstances, the person provides a financial service (as a secondary service) to the potential purchasers.

Exempt services

62. Section 766A(1) is subject to s766A(2)(b), which provides that regulations may set out the circumstances in which a person is taken to provide, or not to provide, a financial service.
63. Significantly, regulation 7.1.29 sets out circumstances in which a person is taken *not* to provide a financial service.
64. Regulation 7.1.29(1) states that:
- For paragraph 766A(2)(b) of the Act, a person who provides an eligible service is taken not to provide a financial service if:*
- (a) the person provides the eligible service in the course of conducting an exempt service; and*
 - (b) it is reasonably necessary to provide the eligible service in order to conduct the exempt service; and*
 - (c) the eligible service is provided as an integral part of the exempt service.*
65. An eligible service is any of the services set out in s766A(1) and, therefore, includes providing financial product advice. An eligible service is a financial service unless it is related to an exempt service in the manner set out in regulation 7.1.29(1). An exempt service is any of the services set out in regulation 7.1.29(3). Not all those exempt services are relevant to a valuation service under APES 225. The exempt services likely to be relevant are considered below.

Regulation 7.1.29(3)(c): certain valuations of entities that carry on a business

66. Regulation 7.1.29(3)(c) provides, among other things, that advice on the valuation of an entity is an exempt service if certain conditions are met. Specifically, the regulation provides that a person who does the following provides an exempt service:¹⁹

provides advice on the acquisition or disposal, administration, due diligence, establishment, structuring or valuation of an incorporated or unincorporated entity, if the advice:

- (i) is given to a person who is, or is likely to become, an interested party in the entity; and*
- (ii) to the extent that it is financial product advice – is confined to advice on a decision about:*

¹⁸ See paragraph RG 175.109 of ASIC's *Regulatory Guide 175: Licensing: Financial product advisers – Conduct and disclosure*.

¹⁹ Square brackets added.

- (A) *securities of a body corporate, or related body corporate, that carries on or may carry on the business of the entity; or*
- (B) *interests in a trust (other than a superannuation fund or a managed investment scheme that is registered or required to be registered), the trustee of which carries on or may carry on the business of the entity in the capacity of trustee; and*
- (iii) *does not relate to other financial products that the body corporate or the trustee of the trust may acquire or dispose of; and*
- (iv) *is not advice for inclusion in an exempt document or statement [e.g. a Product Disclosure Statement or Financial Services Guide].*

Interested party

67. For advice on the valuation of an entity to be an exempt service under r7.1.29(3)(c) it must, among other things, be given to a person who is, or is likely to become, an interested party in the entity.

68. An interested party is:²⁰

- (a) an associate within the meaning of Division 2 of Part 1.2 of the Act which:²¹
 - (i) in relation to a body corporate, includes:²²
 - (1) a director or secretary of the body;
 - (2) a related body corporate (i.e. a holding company, a subsidiary, or a co-subsiary of the same holding company²³); and
 - (3) a director or secretary of a related body corporate;
 - (ii) otherwise includes:
 - (1) in relation to a partner, another partner;²⁴
 - (2) in relation to a beneficiary of a trust, a trustee of the trust;²⁴
 - (3) in relation to a director of a body corporate, another director;²⁴
 - (4) in relation to a person, another person with whom that person is acting or proposes to act in respect of the matter to which the reference to an associate relates;²⁵ and
 - (5) in relation to a person, another person with whom that person is, or proposes to become associated, whether formally or informally, in any other way in respect of the matter to which the reference to an associate relates;²⁶ or
- (b) a manager, which includes:

²⁰ See r7.1.29(6).

²¹ Note s10(3) which provides that nothing in the division limits the generality of anything else in it.

²² See s11.

²³ See s9.

²⁴ See s13.

²⁵ See s15(1)(a).

²⁶ See s15(1)(c).

- (i) a receiver and manager;²⁷ and
 - (ii) in relation to a corporation, partnership, trust, and joint venture, a senior manager, which is a person who is a *de facto director*;²⁸ or
- (c) an officer, which in relation to:
- (i) a corporation means:²⁹
 - (1) a director (including a *de facto director*²⁸) or secretary;
 - (2) certain external administrators such a liquidator, receiver and manager, or administrator;
 - (ii) an entity that is neither an individual or corporation means:²⁹
 - (1) if the entity is a partnership, a partner in a partnership;
 - (2) if the entity is an unincorporated association, an office holder of that association; and
 - (3) a person who is a *de facto director*²⁸ in relation to a corporation; or
- (d) a trustee or director of a trustee.

69. Note that the definition of interested party does not include current or potential shareholders or unitholders as such.

Requirement relating to carrying on a business

70. For advice on the valuation of an entity to be an exempt service under r7.1.29(3)(c) it must, among other things, be confined to advice on a decision about securities in a body corporate, or interests in a trust, where the relevant entity carries on, or may carry on, the business of the entity. Regulation 7.1.29(3)(d) addresses entities that do not carry on a business.

Requirement to not relate to other financial products

71. For advice on the valuation of an entity to be an exempt service under r7.1.29(3)(c) it must, among other things, be confined to advice that does not relate to other financial products that the relevant entity may acquire or dispose of. Members should consider this in setting the scope of their services.

Regulation 7.1.29(3)(d): certain valuations of entities that do not carry on a business

72. Regulation 7.1.29(3)(d) provides that a person who does the following provides an exempt service:³⁰

provides advice on financial products that are:

- (i) *securities in a company (other than securities that are to be offered under a disclosure document under Chapter 6D of the Act); or*

²⁷ See the definition of manager in s9.

²⁸ See the definition of senior manager in s9. The definition refers to a person who (a) makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the relevant entity, or (b) has the capacity to affect significantly the relevant entity's financial standing. Similar wording is used in the definition of an officer in s9. Similarly, the definition of director in s9 includes a person who is not validly appointed as a director if they act in the position of a director or the directors are accustomed to act in accordance with that person's instructions or wishes. In this guide, such persons are, for convenience, referred to as *de facto directors*.

²⁹ See s9.

³⁰ Square brackets added.

- (ii) *interests in a trust (other than a superannuation fund or a managed investment scheme that is registered or required to be registered);*

if the company or trust is not carrying on a business and has not, at any time, carried on a business.

73. A valuation of securities in a company, for example, would be an exempt service under this regulation only if the company is not carrying on, and has never carried, on a business. Determining if this condition is met would require an investigation of the company's history. However, even when that history is known it might be difficult to determine if a business was carried on. For example, if the company does nothing other than act as a holding company it might, nevertheless, be carrying on the business of a holding company.³¹

Regulation 7.1.29(3)(e): transfer between associates

74. Regulation 7.1.29(3)(e) provides that a person who does the following provides an exempt service:

provides advice in relation to the transfer of financial products between associates

75. This appears to cover the valuation of a financial product that is to be transferred between associates such as, for example, the valuation of shares in a company that are to be transferred between subsidiaries of a group.³²

Carrying on a business

76. The Act does not define "carrying on a business" and the common-law meaning is, therefore, applicable.³³

77. The Explanatory Memorandum for the Act states:³⁴

The common law meaning of 'carrying on a business' encompassing elements of system, repetition and continuity suggests that one-off transactions relating to the provision of financial services and financial products are unlikely to be caught by this regime...

78. In *Spriggs v Commissioner of Taxation, Riddell v Commissioner of Taxation*, the High Court unanimously held that:³⁵

The existence of a business is a matter of fact and degree. It will depend on a number of indicia, which must be considered in combination and as a whole. No one factor is necessarily determinative. Relevant factors include, but are not limited to, the existence of a profit-making purpose, the scale of activities, the

³¹ See *Spassked Pty Ltd v. Commissioner of Taxation* [2003] FCAFC 282 at [84] where Hill J and Lander J (Gyles J in agreement) stated "It can be accepted that a holding company can itself carry on a business, which may be referred to as the business of a holding company... The cases sometimes distinguish between a holding company which is a passive investor, that is to say it does no more than acquire and hold shares in a subsidiary or subsidiary companies and a company the activities of which are properly characterised as a business... Generally, a company which may be referred to as carrying on business as a holding company will be seen to be actively involved in the management of the affairs of its subsidiaries. Active management is not, however, a necessary factual circumstance to permit there to be a finding of business."

³² See paragraph 68(a) of this guide regarding the meaning of *associate*.

³³ See paragraph RG 121.46 of ASIC's Regulatory Guide 121 "Doing financial services business in Australia".

³⁴ See paragraph 6.108 of the Explanatory Memorandum for the Financial Services Reform Bill 2001.

³⁵ [2009] HCA 22 at [59]. Footnotes omitted.

commercial character of the transactions, and whether the activities are systematic and organised, often described as whether the activities are carried out in a business-like manner.

79. The meaning of carrying on a business for the purpose of s761A is, however, subject to certain matters in sections 18 to 20 of the Act, which provide that:
- (a) a person may carry on a business even if they are not carrying on that business for profit;³⁶
 - (b) a reference to a business of a particular kind includes a reference to a business of that kind that is part of, or is carried on in conjunction with, any other business;³⁷ and
 - (c) a reference to a person carrying on a business, or a business of a particular kind, is a reference to a person carrying on a business, or a business of that kind, whether alone or together with other persons.³⁸

³⁶ See s18.

³⁷ See s19.

³⁸ See s20.

Examples

80. Examples are presented in this section and are intended to help you, as a member, in assessing whether an AFSL is required in various circumstances. Any commentary accompanying these examples does **not** constitute legal advice. You will need to consider whether, having regard to your own particular circumstances, it is appropriate for you to seek independent legal advice (which is likely to depend, at least in part, on the level of risk involved).
81. As noted earlier, s911A(1) requires a person to hold an AFSL if all of the following sections of the Act apply:
- there is a financial product (s763A);
 - the person is providing a financial service – which, relevantly for valuations, includes providing financial product advice – in relation to that financial product (s766A); and
 - the person is carrying on a financial services business (s761A).
82. Each example is based on a set of facts that are relevant to determining whether there is a financial product and there is financial product advice. At the end of each example there is a risk rating, an explanation of the assessment that forms the basis of the risk rating, and some guidance. The risk rating refers to the risk that an AFSL is required and is based on the relevant characteristics of the example. The guidance varies according to the risk rating and whether or not there is a financial product involved. Where the explanation of the assessment and/or the guidance is the same as a previous example, it is not repeated and instead there is a cross-reference to the relevant previous example. The risk ratings and guidance associated with each respective risk rating are shown in the table below.

	Relevant characteristics	Guidance	Examples which have been assigned this risk rating
High risk	Ordinarily it could be expected that the relevant activity would be regarded as financial product advice.	We suggest that you obtain your own independent legal advice before engaging in this activity to ensure you comply with the Act.	E1 E2 E3
Medium risk	The asset to be valued may be a financial product but the valuation may not be financial product advice because the valuation is not intended, or could not reasonably be regarded as being intended, to influence a person in making an investment-related decision	We suggest that you consider obtaining your own independent legal advice before engaging in this activity to ensure you comply with the Act. You may wish to include a suitable disclaimer to reduce the risk that the valuation might reasonably be regarded as being	E5 E6 E8 E10 E11 E12 E13

	Relevant characteristics	Guidance	Examples which have been assigned this risk rating
	in relation to the financial product.	intended to influence an investment-related decision in relation to the financial product. Please refer to the “Disclaimer” heading below.	E14
Low risk	The asset to be valued is not a financial product or an exemption applies.	<p>Valuing an asset that is not a financial product will not ordinarily be considered a financial service. You may wish to seek independent legal advice if there is something you are uncertain about.</p> <p>*Where there are financial products involved, but an exemption is available, you may wish to include a suitable disclaimer to reduce the risk that the valuation might reasonably be regarded as being intended to influence an investment-related decision in relation to the financial product.</p> <p>Please refer to the “Disclaimer” heading below.</p>	<p>E4</p> <p>E7*</p> <p>E9</p> <p>E15*</p> <p>E16*</p> <p>E17</p> <p>E18</p> <p>E19*</p> <p>E20</p> <p>E21</p>

83. For convenience, in this section and in the examples, the term “investment-related decision” means a decision of the type contemplated in s766B(1) in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products.³⁹ Such decisions include decisions to buy, sell, or hold a financial product.⁴⁰

³⁹ See the section “What is financial product advice?”, which starts on page 11.

⁴⁰ See paragraph 46 of this guide.

Disclaimer

84. Where you do not hold an AFSL and neither you nor your client intends the valuation to be used for any investment decision, you may wish to reduce the risk of it being reasonably regarded as intended to influence an investment-related decision by including in your valuation a disclaimer which clearly:
- identifies who instructed you to provide the valuation;
 - states the purpose for which you have been told they will use the valuation (“intended purpose”);
 - names the person/s who is/are entitled to see and rely upon the valuation;
 - states that:
 - nobody other than the person/s you have named may access the valuation;
 - the valuation may not be used for any purpose other than the intended purpose;
 - you do not hold an AFSL;
 - the valuation is not intended to be financial product advice;
 - the valuation should not be relied upon to make any investment-related decision; and
 - before any investment-related decision is made, financial product advice should be sought from a licensed financial adviser.

Index to examples

E1	Independent expert report for a takeover	27
E2	Independent expert report for scheme of arrangement	28
E3	Independent expert report for the compulsory acquisition of securities	29
E4	Valuation for financial reporting purposes (1)	29
E5	Valuation for financial reporting purposes (2)	30
E6	Valuation for financial reporting purposes (3)	30
E7	Valuation for tax purposes (1)	31
E8	Valuation for tax purposes (2)	31
E9	Valuation as an expert witness (1)	32
E10	Valuation as an expert witness (2)	32
E11	Valuation as an expert witness (3)	33
E12	Valuation as an expert witness (4)	33
E13	Family law valuation – jointly for husband and wife	34
E14	Family law valuation – solely for wife	34
E15	Valuation for the trustees of a superannuation fund	35
E16	Valuation by a member in business for the member’s employer	35
E17	Valuation of employer’s intangible assets for tax purposes	36
E18	Advice re sale of the business of a company	36
E19	Advice re sale of shares in a company	37
E20	Limited-scope valuation of employer’s business for potential sale	37
E21	Limited-scope valuation for estate planning advice	38

E1 Independent expert report for a takeover

85. You are a member in public practice and you are engaged by a company that is the target of a takeover.
86. Under the Act, the target must send a target's statement to relevant security-holders that must contain all the information that they and their professional advisers would reasonably require in making an informed assessment whether to accept the offer.⁴¹
87. The target's statement must contain a statement by each director of the target recommending that the offer be accepted or rejected, together with reasons for the recommendation.⁴² Further, the target's statement will be accompanied by an expert's report on whether, in the expert's opinion, the takeover offer is fair and reasonable.⁴³
88. You are engaged by the target to provide the independent expert report in which you will:
- state that it has been prepared in accordance with ASIC's relevant regulatory guides, including Regulatory Guide 111 "Content of expert reports";
 - express your opinion on the value of the securities (and possibly also of the consideration) for the purpose of assessing whether the offer is fair;⁴⁴ and
 - express your opinion on whether the offer is reasonable.
89. In your report, however, you do not express any opinion on whether the offer should be accepted or rejected.

Risk: High

Assessment for risk rating:

Financial product? – Yes, the securities are financial products.

Financial product advice? – ASIC expresses the opinion (in paragraph RG 111.121 of RG 111 "Content of expert reports"), that independent expert reports typically constitute the giving of financial product advice.

Carrying on a financial services business? – Yes, this is assumed for the example.

Guidance:

We suggest that you obtain your own independent legal advice before engaging in this activity to ensure that you comply with the Act.

⁴¹ See sections 633(1) and 638.

⁴² See s638(3).

⁴³ See s640. Under s638(5), the target must obtain your consent to having your report accompany the target's statement. Hence, under s52, by granting that consent you are taken to provide your report to security-holders.

⁴⁴ As noted in paragraph RG 111.10 of ASIC's Regulatory Guide 111 "Content of Expert Reports", an offer is "fair" if "the value of the offer price or consideration is equal to or greater than the value of the securities the subject of the offer".

E2 Independent expert report for scheme of arrangement

90. You are a member in public practice and you are engaged by a company that is the target of a friendly takeover to be achieved by way of a scheme of arrangement.
91. Under the Act, an application is made to Court to convene a meeting of members of the target to consider a resolution on whether the proposed scheme should be approved. The notice of meeting must be accompanied by an explanatory statement that, in turn, will be accompanied by an expert's report in which the expert must state whether or not, in the expert's opinion, the proposed scheme is in the "best interest of the members" of the target and in which the expert must set out his reasons for that opinion.⁴⁵ If satisfied, the Court will order the meeting. If the members vote in favour of the proposed scheme, then an application is made to Court to approve it.
92. ASIC states that in determining if the proposed scheme is in the best interest of the members the expert must express an opinion on whether the proposal is fair and reasonable.⁴⁶ ASIC's view appears to be that the determination of the best interest of members is to be made solely based on whether the proposed scheme is fair and reasonable.⁴⁷
93. You are engaged by the target to provide the independent expert report in which you will:
- state that it has been prepared in accordance with ASIC's relevant regulatory guides, including Regulatory Guide 111 "Content of expert reports";
 - express your opinion on the value of the securities (and possibly also of the consideration) in the proposed scheme for the purpose of assessing if the proposed scheme is "fair";⁴⁸
 - express your opinion on whether the proposed scheme is reasonable; and
 - express your opinion on whether the proposed scheme is in the best interest of the members of the target and set out your reasons for that opinion.
94. In your report, however, you do not express any opinion on whether the proposed scheme should be approved.

Risk: High

Assessment for risk rating: See E1

Guidance: See E1.

⁴⁵ See s412(1) of the Act and clause 8303 of Schedule 8 of the *Corporations Regulations 2001* (Cth).

⁴⁶ See paragraph RG 111.19 of ASIC's Regulatory Guide 111 "Content of Expert Reports".

⁴⁷ See paragraphs RG 111.18 to RG 111.23 of ASIC's Regulatory Guide 111 "Content of Expert Reports".

⁴⁸ As noted in paragraph RG 111.19 of ASIC's Regulatory Guide 111 "Content of Expert Reports", where the proposed scheme involves a change in control the expert is expected to express an opinion on whether the proposed scheme is fair and reasonable. And as noted in paragraph RG 111.1, an offer is "fair" if "the value of the offer price or consideration is equal to or greater than the value of the securities the subject of the offer".

E3 Independent expert report for the compulsory acquisition of securities

95. You are a member in public practice and you are engaged by a company that has acquired 90% of the securities of a particular class of a company and wishes to issue a notice to acquire compulsorily the balance of the securities. You are engaged to provide an expert's report under s667A of the Act on whether "the terms proposed in the notice give a fair value for the securities concerned". In accordance with s664C, a copy of the expert's report will be sent to each holder of securities.

Risk: High

Assessment for risk rating: See E1

Guidance: See E1.

E4 Valuation for financial reporting purposes (1)

96. You are a member in public practice and you are engaged by a company that has acquired a business to provide your opinion on the fair value of certain of the business's assets (being trade debtors, trading stock, intellectual property, and goodwill), for the purposes of acquisition accounting under AASB 3 Business Combinations.

Risk: Low

Assessment for risk rating:

Financial product? – No, the assets being valued do not include financial products.

Financial product advice? – No, (a) there is no financial product and (b) the valuation is for accounting purposes and, ordinarily, would not be intended, or could not reasonably be regarded as being intended, to influence a person in making an investment-related decision.

Carrying on a financial services business? – Valuing assets that are not a financial product will not ordinarily be considered a financial service, and if no financial services are being provided then no financial services business is being carried on.

Guidance:

No additional action is suggested for this fact scenario.

E5 Valuation for financial reporting purposes (2)

97. The facts are the same as for Example E4 except that the relevant assets also include shares in several proprietary companies.

Risk: Medium

Assessment for risk rating:

Financial product? – Yes, the shares are financial products. None of the other assets is a financial product.

Financial product advice? – No, the valuation is for accounting purposes and would not ordinarily be intended, or reasonably be regarded as being intended, to influence a person in making an investment-related decision.

Carrying on a financial services business? – If the activities involved are not a financial service, then no financial services business is being carried on.

Guidance:

We suggest that you consider obtaining your own independent legal advice before engaging in this activity to ensure you comply with the Act. You may wish to include a suitable disclaimer to reduce the risk that the valuation might reasonably be regarded as being intended to influence an investment-related decision.

E6 Valuation for financial reporting purposes (3)

98. You are a member in public practice and you are engaged by a company that has acquired a company to provide your opinion on the fair value of certain of the acquired company's assets (being trade debtors, trading stock, intellectual property, and goodwill), for the purposes of acquisition accounting under AASB 3 Business Combinations. You are asked to provide your opinion on the value of the shares in the acquired company and whether that value is equal to the consideration transferred to the vendor.

Risk: Medium

Assessment for risk rating: See E5.

Guidance: See E5.

E7 Valuation for tax purposes (1)

99. You are a member in public practice and you are engaged by an individual to provide your opinion on the value of shares held by that person in a trading company for the purposes of the “maximum net asset value test” relating to small business CGT concessions. The person is a director of the company.

Risk: Low

Assessment for risk rating

Financial product? – Yes, the shares are a financial product.

Financial product advice? – No, (a) the valuation is for tax purposes and would not ordinarily be intended, or reasonably be regarded as being intended, to influence a person in making an investment-related decision, and (b) in any event, the exemption in regulation 7.1.29(c) applies because the person to whom you give advice, being a director, is an “interested party” for the purposes of that exemption.

Carrying on a financial services business? This activity may not be a financial service because of regulation 7.1.29 of the Corporations Regulations. If no financial service is being provided, then there will be no financial services business carried on.

Guidance:

You may wish to include a suitable disclaimer to reduce the risk that the valuation might reasonably be regarded as being intended to influence an investment-related decision in relation to the financial product.

E8 Valuation for tax purposes (2)

100. The facts are the same as Example E7, except that the individual engaging you is not a director of the company and is unlikely to become one.

Risk: Medium

Assessment for risk rating:

Financial product? – Yes, the shares are a financial product.

Financial product advice? – No, the valuation is for tax purposes and would not ordinarily be intended, reasonably be regarded as being intended, to influence a person in making an investment-related decision. Note that the person to whom you give advice is not an “interested party” for the purposes of the exemption in regulation 7.1.29(3)(c).

Carrying on a financial services business? – If no financial service is being provided, then there will be no financial services business carried on.

Guidance: See E5.

E9 Valuation as an expert witness (1)

101. You are a member in public practice and you are engaged as an expert witness by the solicitors for a party seeking compensation from an individual in relation to alleged misleading and deceptive conduct and other statutory breaches relating to the purchase of shares in a trading company at over-value. You are asked to provide your opinion on the value of the shares acquired on the basis of certain assumptions relating to the financial position of the business carried on by the company at the time of acquisition. Your client is a director of the company.

Risk: Low

Assessment for risk rating:

Financial product? – Yes, the shares are a financial product.

Financial product advice? – No, (a) the valuation is for the purpose of giving expert evidence and would not ordinarily be intended, or reasonably be regarded as being intended, to influence a person in making an investment-related decision, and (b) in any event, the exemption in regulation 7.1.29(c) applies because the person to whom you give advice, being a director, is an “interested party” for the purposes of that exemption,

Carrying on a financial services business? If no financial service is being provided, then there will be no financial services business carried on.

Guidance: See E4.

E10 Valuation as an expert witness (2)

102. The facts are the same as Example E9, except that you are engaged by the solicitors for the defendant who was a director of the company at the time of the sale of the shares, but is no longer a director.

Risk: Medium

Assessment for risk rating:

Financial product? – Yes, the shares are a financial product.

Financial product advice? – No, the valuation is for the purpose of giving expert evidence and, ordinarily, would not be intended, or could not reasonably be regarded as being intended, to influence a person in making an investment-related decision. Note that the person to whom you give advice is not an “interested party” for the purposes of the exemption in regulation 7.1.29(c).

Carrying on a financial services business? If no financial service is being provided then no financial services business is carried on.

Guidance: See E5.

E11 Valuation as an expert witness (3)

103. You are a member in public practice and you are engaged as an expert witness by the solicitors for an individual (Party A) seeking certain orders in relation to a trading company in respect of which Party A holds a minority interest. Notwithstanding that Party A holds a minority-owned interest, you are asked to provide your opinion on the value of all of the company's equity on the basis that it is asserted that Party A is being oppressed and should be compensated based on Party A's proportionate interest in the value of the company as a whole. Party A is not a director of the company.

Risk: Medium

Assessment for risk rating: See E10.

Guidance: See E5.

E12 Valuation as an expert witness (4)

104. You are a member in public practice and you are engaged as an expert witness directly by the court (i.e. as a court appointed expert) to assist the court in connection with matters including the valuation of shares in a trading company.

Risk: Medium

Assessment for risk rating:

Financial product? – Yes, the shares are a financial product.

Financial product advice? – No, the valuation is for the purpose of giving expert evidence and would not ordinarily be intended, or reasonably be regarded as being intended, to influence a person in making an investment-related decision.

Carrying on a financial services business? If no financial service is being provided then no financial services business is carried on.

Guidance: See E5.

E13 Family law valuation – jointly for husband and wife

105. You are a member in public practice and you are engaged as an expert witness jointly by the solicitors for the husband and the solicitors for the wife in connection with a matrimonial property settlement under the *Family Law Act 1975* (Cth). The husband is the sole director and shareholder of a company, which carries on a business. It is expected that the property settlement will result in the husband retaining the shares and the wife having no interest in the company. You are asked to express your opinion on the value to the husband of his interest in the company.

Risk: Medium

Assessment for risk rating:

Financial product? – Yes, the shares are a financial product.

Financial product advice? – No, the valuation is for the purpose of giving expert evidence would not ordinarily be intended, or reasonably be regarded as being intended, to influence a person in making an investment-related decision. Note that the exemption in regulation 7.1.29(3)(c) does not apply because your advice is given to the husband and wife jointly, but the wife is not an “interested person”.

Carrying on a financial services business? If no financial service is being provided, then no financial services business is carried on.

Guidance: See E5.

E14 Family law valuation – solely for wife

106. The facts are the same as for Example E13, except that you are instructed solely by the solicitors for the wife.

Risk: Medium

Assessment for risk rating:

Financial product? – Yes, the shares are a financial product.

Financial product advice? – No, the valuation is for the purpose of giving expert evidence and, ordinarily, would not be intended, or could not reasonably be regarded as being intended, to influence a person in making an investment-related decision. Note that the exemption in regulation 7.1.29(3)(c) does not apply because your advice is given to the wife, who is not an “interested person”.

Carrying on a financial services business? If no financial service is being provided, then no financial services business is carried on.

Guidance: See E5.

E15 Valuation for the trustees of a superannuation fund

107. You are a member in public practice and you are engaged by the trustees of a superannuation fund to provide your opinion on the market value of shares in a company, which has never carried on a business, that are held by a SMSF, for the purpose of the fund's compliance with the "in-house assets rule".

Risk: Low

Assessment for risk rating:

Financial product? – Yes, the shares are a financial product.

Financial product advice? – No, (a) the valuation is for the purpose of compliance with superannuation legislation and would not ordinarily be intended, or reasonably be regarded as being intended, to influence a person in making an investment-related decision; and (b) in any event, the exemption in regulation 7.1.29(3)(d) applies because the company has never carried on a business.

Carrying on a financial services business? – If no financial service is being provided, no financial services business is being carried on.

Guidance: See E7.

E16 Valuation by a member in business for the member's employer

108. You are a member in business and you are asked by your employer to provide your opinion on the value of the shares in a trading company, in respect of which your employer has an interest, for internal management purposes. The directors of your employer are directors of the trading company in respect of which you have been asked to prepare your valuation.

Risk: Low

Assessment for risk rating:

Financial product? – Yes, the shares are a financial product.

Financial product advice? – No, (a) the valuation is for internal management purposes and would not ordinarily be intended, or reasonably be regarded as being intended, to influence a person in making an investment-related decision, and (b) in any event, the exemption in regulation 7.1.29(3)(c) applies because the persons to whom you give advice, being directors, are "interested parties" for the purpose of that exemption.

Carrying on a financial services business? – If no financial service is being provided, no financial services business is being carried on.

Guidance: See E7.

E17 Valuation of employer's intangible assets for tax purposes

109. You are a member in business and are assigned by your employer to perform a valuation of the intangible assets of a company acquired by your employer, for the purpose of tax consolidation, and to provide a written report to your employer.

Risk: Low

Assessment for risk rating:

Financial product? – No, none of the intangible assets is a financial product.

Financial product advice? – No, (a) there is no financial product and (b) the valuation is for the purpose of tax and would not ordinarily be intended, or reasonably be regarded as being intended, to influence a person in making an investment-related decision.

Carrying on a financial services business? – No, because valuing assets that are not a financial product will not ordinarily be considered a financial service, and if no financial service is provided then no financial services business is being carried on.

Guidance: See E4.

E18 Advice re sale of the business of a company

110. You are a member in public practice and you are engaged to provide advice to persons, each of whom is both a shareholder and director of a company, in relation to the sale of the business carried on by the company. As part of the sale process you are asked to provide generic valuation statistics and parameters relevant to the industry in which the business operates.

Risk: Low

Assessment for risk rating:

Financial product? – No, there is no financial product involved.

Financial product advice? – No, (a) there is no financial product and (b) the provision of generic valuation statistics and parameters relevant to the industry is not ordinarily intended, or reasonably regarded as being intended, to influence a person in making an investment-related decision.

Carrying on a financial services business? – If no financial service is being provided, then no financial services business is being carried on.

Guidance: See E4.

E19 Advice re sale of shares in a company

111. The facts are the same as Example E18, except that the sale being contemplated is of the shares in the company rather than its business and you are asked to value those shares.

Risk: Low

Assessment for risk rating:

Financial product? – Yes, the shares are a financial product.

Financial product advice? – No, the exemption in regulation 7.1.29(3)(c) applies since each person to whom you are providing advice is an “interested party” for the purposes of the exemption.

Carrying on a financial services business? – If no financial service is being provided, no financial services business is being carried on.

Guidance: See E7.

E20 Limited-scope valuation of employer’s business for potential sale

112. You are a member in business and you are assigned by your employer to provide advice and assistance with respect to the sale of a company in respect of which your employer has an interest. You are asked to provide a limited-scope report providing your opinion on the value of the business on sale.

Risk: Low

Assessment for risk rating:

Financial product? – No, the business is not a financial product.

Financial product advice? – No, (a) there is no financial product and (b) the valuation is for the purpose of advice and assistance to your employer and would not ordinarily be intended, or reasonably be regarded as being intended, to influence a person in making an investment-related decision.

Carrying on a financial services business? – No, providing advice and assistance to your employer with respect to the sale of a company will not ordinarily be considered a financial service, and if no financial service is provided then no financial services business is being carried on.

Guidance: See E4.

E21 Limited-scope valuation for estate planning advice

113. You are a member in public practice and you are engaged to provide estate planning advice to the directors of a company. As a required input to providing that advice, you perform an indicative valuation of the business carried on by the company and provide an oral report to your client.

Risk: Low

Assessment for risk rating:

Financial product? – No, the business is not a financial product.

Financial product advice? – No, (a) there is no financial product and (b) the valuation is for the purpose of estate planning and would not ordinarily be intended, or reasonably be regarded as being intended, to influence a person in making an investment-related decision.

Carrying on a financial services business? – If there is no financial service being provided, no financial services business is being carried on.

Guidance: See E4.