

# Merely Incidental Investment Advice

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Solicitors and public accountants who provide investment advice to clients without holding either a dealer's licence or an investment adviser's licence are well advised to read the new Policy Statement 119 issued by the Australian securities Commission on 3 March 1997, to know whether they are in breach or fall within the 'merely incidental exemption' in the *Corporations Law*, when they give investment advice.

S77(5) of the *Corporations Law* provides a statutory exemption which excludes the application of all the licensing provisions in the Law to investment advice given by solicitors and public accountants under limited circumstances. Their investment advice would not fall within the definition of an 'investment advice business' in the *Corporations Law* 'if it is merely incidental to the practice of his or her profession'. This is referred to as the 'merely incidental exemption' from licensing requirements.

## What is the scope of the 'merely incidental exemption'?

According to ASC guidelines, neither a solicitor or public accountant needs to have a licence to give investment advice provided all the following conditions are met:

- (1) The investment advice is an integral and merely incidental part of their overall services. It should not be held out in or provided as a discrete service. For example, business cards, letterheads or promotional brochures of a solicitor's practice which specify investment advice as a distinct service, would not bring any such advice given within the 'merely incidental' exemption.
- (2) No discrete fee is charged for such investment advice, either separately or included within overall fees charged for the main service. For example, a solicitor who gives investment advice as a merely incidental part of providing tax advice should charge only for the tax advice. There should not be any fee charged for the investment advice given.

- (3) No arrangements should be held with product issuers eg. fund manager of a public unit trust, to receive fees, commissions or other benefits for recommending their products to clients. Encouraging clients to purchase any particular product of an issuer from whom some benefit is received for such recommendation is tantamount to a dealing activity for which a dealer's licence is required. Such advice would not fall within the 'merely incidental' exemption.

The ASC has also proposed in its Good Advice report that solicitors and accountants claiming the 'merely incidental' exemption must belong to a professional body which has imposed appropriate standards of competence and conduct on solicitors or accountants who give investment advice as a merely incidental part of their main services. This is only an ASC proposal for law reform and not a statutory provision in the *Corporations Law*.

## When does a solicitor need to operate under a licence?

It is important to note that a solicitor or accountant who conducts a business of dealing in securities will not be able to rely on the 'merely incidental' exemption. This is because the exemption operates only in the context of the conduct of an investment advice business.

A solicitor or accountant who receives a fee, commission or any other benefit from a securities issuer eg. a fund manager, for recommending specific securities to a client will be seen by the ASC as being engaged in encouraging clients to transact business with securities issuers. This is tantamount to a dealing activity and consequently their business must operate under a dealer's licence.

Should a solicitor or accountant receive a fee, commission or other benefit from another dealer or investment adviser for giving investment advice, such conduct is tantamount to an act of securities representative (s94(3)). In such

*continued on page 20*



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