



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 33

Security deposits

Chapter 7 — Securities

Chapter 8 — Futures industry

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From 5 July 2007, this document may be referred to as Regulatory Guide 33 (RG 33) or Policy Statement 33 (PS 33). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 33.1) or their policy statement number (e.g. PS 33.1).

Headnotes

Sections 786(2)(d), 786A, 826(1), 1284(1), 1284A and 1292(2); reg 7.3.03, 7.3.04, 7.3.06 and 9.2.05; approved form; bank guarantee; claims; discharge of security; execution; insurance bond; irrevocable; liability; payment from deposit; period; performance bond; registration; security deposit; transfer of bond.

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Introduction

RG 33.1 In this guide, ASIC sets out its requirements for a security deposit lodged as a condition of the grant of an investment adviser's or dealer's licence, or lodged on the grant of registration as a liquidator. Approved forms of wording for the security deposits are published as Pro Formas 13 and 14 and ASIC sets out other relevant matters to assist applicants and registered or licensed persons.

Background

RG 33.2 Under the previous co-operative scheme of corporate regulation, a security deposit required pursuant to the predecessors to either s786(2)(c) or s1284(1) of the Corporations Law 2001 (Law) (security deposits) was acceptable in a number of forms, including cash deposits, government issued securities, bank guarantees and insurance bonds. ASIC has reviewed the disadvantages, costs and obligations, such as reports to the Australian Transaction Reporting and Analysis Centre (previously CTRA) and provision of tax file numbers to the Taxation Department, associated with accepting different types of security deposit.

RG 33.3 ASIC has resolved that it will only accept as security deposits, performance bonds issued by:

- (a) an Australian bank (as defined by the Law);
- (b) an insurance company registered with the Insurance and Superannuation Commission under the *Insurance Act 1973* (Cth); or
- (c) a state government insurance office ("issuers").

[*Historical note:* RG 33.3 amended 28/10/1996 by replacing reference to "Life Insurance Act 1945" with "Insurance Act 1973 (Cth)".]

RG 33.4 ASIC requires all new security deposits, whether lodged for a new licence or registration or as substitute for an existing deposit, to comply with this guide. For the present ASIC will not require existing security deposits which do not comply with this guide to be withdrawn or replaced but encourages the conversion of existing securities which do not meet the criteria of this guide.

RG 33.5 The maximum security deposit prescribed for investment advisers and dealers is \$20,000 and ASIC has determined that the maximum amount for liquidators is \$250,000.

[*Historical note:* RG 33.5 amended 4/7/1994 by replacing "\$50,000" with "\$250,000".]

Approved performance bonds

RG 33.6 A performance bond acceptable as a security deposit must be:

- (a) unconditional;
- (b) revocable only at the request of ASIC;
- (c) payable, in part or whole, immediately on demand by ASIC;
- (d) payable without any reference to any other person;
- (e) unrelated to any other security or agreement; and
- (f) free of any requirement for ASIC to prove its demand.

RG 33.7 An executed performance bond must be lodged prior to the grant of the licence or registration. The executed bond need not be lodged at the time of application of licence, only at the time of acceptance of ASIC's letter of offer.

RG 33.8 It is the responsibility of the applicant to ensure that the performance bond is properly stamped. A licence or registration will not be granted unless the performance bond appears to be properly stamped.

RG 33.9 A performance bond lodged in the form which ASIC has approved (see [PF 13] and [PF 14]) will normally be accepted without detailed examination. An applicant may use an alternative form of wording for the execution clause, for example to enable the performance bond to be executed as a deed by a person who holds a registered power of attorney for the bank or insurance company, but this may delay granting of a licence or registration while ASIC examines the form of wording used.

Alternative arrangement for liquidators

RG 33.9A ASIC does not intend to take enforcement action for a failure to lodge and maintain security under s1284 where a registered liquidator holds a public practice certificate from either the Institute of Chartered Accountants in Australia (ICAA) or CPA Australia or the National Institute of Accountants (NIA) and the liquidator provides to ASIC, and complies with, an undertaking that the liquidator will maintain professional indemnity insurance in accordance with RG 33.9B] and maintain a public practice certificate.

[*Historical note:* RG 33.9A replaced 17/6/2003. The paragraph (as inserted on 4/7/1994) formerly read:

“RG 33.9A As an alternative to a security deposit, the ASC will accept an undertaking from all registered liquidators who hold practising certificates from either the Institute of Chartered Accountants in Australia (“ICAA”) or the Australian Society of Certified Practising Accountants (“ASCPA”) to maintain professional indemnity insurance in accordance with the requirements of the ICAA or ASCPA.” RG 33.9A amended 22/6/2004 by inserting the words “or the National Institute of Accountants (NIA)” after the words “or CPA Australia”.]

RG 33.9B In addition to undertaking to maintain a current practising certificate, the minimum acceptable terms of the professional indemnity insurance will be:

- (a) a minimum of \$250,000 on each and every claim or the sum insured for the practice must not be less than \$500,000 for any one claim and in the aggregate during the period of insurance;
- (b) cover for any civil legal liability or any act, error or omission, subject to reasonably common exceptions; and
- (c) provision for so-called “run-off” cover, whereby the liquidator maintains the policy for at least seven years (or whatever other period ASIC deems appropriate) after ceasing registration.

[*Historical note:* RG 33.9B inserted 4/7/1994. Amended 17/6/2003 by replacing paragraph (a). Paragraph (a) formerly read:

“(a) a minimum of \$250,000 on each and every claim;”]

RG 33.9C In all other respects, liquidators must comply with the requirements for a member in public practice of either the ICAA or CPA Australia or the NIA.

[*Historical note:* RG 33.9C inserted 4/7/1994. Amended 17/6/2003 by replacing reference to “ASCPA” with “CPA Australia”. Amended 22/6/2004 by inserting the words “or the NIA” after the words “or CPA Australia”.]

Payment from security deposit and topping up security deposit

RG 33.10 The Act requires a security deposit to be lodged and *maintained*. The terms of most performance bonds provide for a maximum liability to the issuer of the bond. A client of a licensee, or a person affected by the conduct of a liquidator (collectively “client”), may suffer pecuniary loss due to the failure of the licensee or liquidator to carry out the business properly. If that client makes a claim, ASIC may apply part or all of the security deposit to the claim. In this case, the payment would reduce the sum of the performance bond to less than the amount required to be maintained, placing the licensee or liquidator in breach of its licence or registration conditions.

RG 33.11 If a successful claim is made and ASIC applies part of the bond, a new performance bond will be required, either for the sum paid out or for the whole of the original amount. If the latter, ASIC will then request the issuer to revoke the now depleted, original performance bond.

RG 33.12 Such arrangements will rarely be required because in most cases the licensee or liquidator will pay valid claims by clients who have been damaged without ASIC being required to apply the security deposit.

In many cases, clients and licensees will be able to reach commercial settlement without recourse to official claims. Where a claim is made, ASIC must give the licensee or liquidator an opportunity to be heard before deciding whether a person should be compensated out of a security deposit. After, ASIC will give the licensee or liquidator an opportunity to pay the amount directly to a successful claimant before making an order for application of the security deposit.

RG 33.13 If:

- (a) ASIC has given a licensee or liquidator an opportunity to be heard in relation to a claim;
- (b) ASIC has decided that a client should be compensated; and
- (c) the licensee or liquidator then decides not to, or is unable to, make direct payment to the person concerned of the amount determined by ASIC,

ASIC will consider whether a person's licence should be revoked (under s826(1)(j) or 826(1)(k)) or whether it should make application to the Auditors and Liquidators Disciplinary Board for cancellation of a person's registration (under s1292(2)(d)).

Change of issuer of security deposit

RG 33.14 A licensee or liquidator who wishes to change the issuer of the performance bond must ensure that there is an acceptable security bond in place at all times. ASIC will not consider revoking or discharging a performance bond until a replacement bond is in place.

RG 33.15 It is for the licensee or liquidator to prove to ASIC that the change will be effective and seamless. ASIC will not revoke the existing security unless:

- (a) the new bond is in the form approved by ASIC (see Pro Forma 13 and Pro Forma 14);

- (b) the new bond explicitly states that it can be drawn against for application to claims relating to failure of the licensee or liquidator to perform its business adequately and properly before the issue of the bond; or
- (c) the issuer of the earlier bond issues a further performance bond which is specified to be payable for claims arising from the earlier period.

[*Historical note:* RG 33.15 amended 7/6/1993 by inserting new paragraph (a).]

Termination or discharge

RG 33.16 The issuer's liability may only cease and ASIC will only consent to the discharge of the security deposit, when ASIC is satisfied that it no longer has a purpose, ie when no future claims are likely to be made. This will be well after the licensee or liquidator has ceased to carry on the business of liquidator or licensee. The provisions of (reg 7.3.04(4)(b) and reg 9.2.05(3)(b)) indicate that a period of six months after the licence or registration has ceased is a minimum period.

RG 33.17 A person who has ceased to carry on a business of liquidator, adviser or dealer, or the issuer of a performance bond, should apply to ASIC for consent to the discharge of the security deposit at least six months after the cessation and should supply to ASIC the reasons that it is no longer appropriate for ASIC to hold the security deposit. Any application should be accompanied by evidence that the notification provisions of reg 7.3.06 have been met.

RG 33.18 Once ASIC is satisfied that discharge is appropriate it will write to the issuer of the performance bond releasing it from any further obligations and notify the licensee or liquidator.

RG 33.19 Discharge of a security deposit in no way alters any other civil or criminal liabilities of the licensee or liquidator and in no way affects the rights of any person to institute any action in relation to those civil or criminal liabilities.

Applications

RG 33.20 Applicants should ensure that their applications provide sufficient details of the suitability of the issuer of the performance bond. Applicants should also ensure that the relevant branch or office of the issuer is identified. Applications which do not sufficiently

address these matters will not be considered by ASIC until all relevant information is provided.

RG 33.21 An applicant should lodge the executed performance bond with his or her letter of acceptance of ASIC's letter of offer of a licence or registration, at the ASIC Regional Office at which the application was lodged. (See Pro Forma 13 and Pro Forma 14.) This should normally be in the State or Territory of the applicant's principal place of business.