



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 56

# Prospectuses

## Chapter 7 — Securities (Part 7.12)

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*Previous version: Superseded Policy Statement 56 (superseded 20/5/1996)*

*From 5 July 2007, this document may be referred to as Regulatory Guide 56 (RG 56) or Policy Statement 56 (PS 56). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 56.1) or their policy statement number (e.g. PS 56.1).*

**Note:** See RG 136.30–RG 136.66 for information about how this guide applies to managed investment schemes.

## Headnotes

*This guide provides details of relief from the prospectus provisions of the Corporations Law (Law) that will be given by the ASC to facilitate capital raising in Australia. The provision of this relief leads to reduced costs for business and assists in the efficient operation of the Australian capital market. It is an update of the version of Policy Statement 56 which was first issued on 15/6/1993 and last updated on 5/9/1994. It incorporates changes made to Regulatory Guide 56 to date and the paragraphs have been renumbered. The preparation of this update has not involved a review of existing policy. This update refers to other policy contained in the ASC Digest made since Policy Statement 56 was first issued and deletes policy which is now superseded.*

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## Part I: Purpose

RG 56.1 This guide gives:

- (a) an overview of the prospectus provisions (primarily Div 2 of Pt 7.12 of the Corporations Law (Law) and the sharehawking provisions (Div 6 — particularly s 1078 of the Law); and
- (b) a summary of the prospectus policy of the ASC.

RG 56.2 This guide does not consider Divs 4 and 5 of Pt 7.12 of the Law relating to debentures and prescribed interests other than when they are incidental to the prospectus provisions. The provisions of the *Corporate Law Reform Act 1994* (Cth) relating to enhanced and continuous disclosure are not considered in detail in this guide — refer to Superseded Practice Note 53 and Regulatory Guide 95 (see also [MR 94/162]).

RG 56.3 This guide takes into account important applications for relief which have been considered by the ASC and summarises policy issues on which the ASC has made decisions. For a full description of these policy issues, refer to the pages of the *ASC Digest* indicated.

RG 56.4 *Please note that, except as stated, this guide does not override any existing published policy. Readers should refer to existing policy for more detail. In the event that there is an inconsistency between this guide and specific policy or relief which is referred to, the specific policy or relief prevails.*

RG 56.5 Statutory references in this guide are to provisions of the Law or the Corporations Regulations (regs).

## Part II: Administration of the prospectus provisions

RG 56.6 The ASC deals with prospectuses at three stages.

### Stage 1 — applications

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RG 56.7 The ASC considers two types of applications for relief from the prospectus provisions:

- (a) applications for relief from the requirement to prepare and lodge a prospectus; and
- (b) applications for modifications of, or exemptions from, certain of the prospectus provisions. Unless there are exceptional circumstances, these applications must be submitted and finalised before a prospectus is lodged.

### Stage 2 — lodgment and registration

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RG 56.8 The ASC accepts prospectuses for lodgment and considers applications for their registration when applicable.

### Stage 3 — postvetting

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RG 56.9 The ASC selectively postvets prospectuses after lodgment and (when applicable) registration. The aim of postvetting is to provide investor protection and to maintain investor confidence by checking that investors have been given the information which is required by the Law. This information is necessary to make informed investment decisions.

RG 56.10 The ASC's primary concern is to make sure that the legislative policy behind the prospectus provisions is maintained. The ASC will not use its powers to bring about law reform although it will recommend that amendments to the Law be made.

RG 56.11 When the ASC makes a decision to grant an application, that decision is published in the:

- (a) *ASC Digest* (a short summary of the relief is included in the *ASC Instruments* section); and
- (b) *Commonwealth Gazette* (if required by the Law).

When considering applications, the ASC looks at the purpose of the provision or provisions of the Law from which relief is sought. The ASC does not consider individual provisions in a vacuum. Rather, it ensures that the general policy objectives of the Law are promoted and that its powers are exercised according to s1(2) of the ASIC Law (Cth). The ASC also considers the commercial benefit and any net regulatory benefit or detriment which would flow from giving relief on any conditions proposed. The ASC gives relief if it considers that there is a net regulatory benefit or that the regulatory detriment is minimal and is clearly outweighed by the resulting commercial benefit (see RG 51).

RG 56.12 The ASC's primary concern in administering the prospectus provisions of the Law is to ensure that their policy is promoted. In particular, the ASC:

- (a) requires both the primary and secondary markets for securities to be informed;
- (b) seeks to prevent any erosion of the civil liability provisions;
- (c) does not give substantive relief from s1022 or s1022AA, unless relief from the whole Division is given;
- (d) does not reduce the obligations on those who prepare prospectuses to ensure that the prospectus complies with the Law; and
- (e) considers the effect of giving relief from the requirement to lodge a prospectus on the disclosing entity provisions of the Law (see s111AR and s111AF).

RG 56.13 The ASC pays particular attention to promoting the policy behind the following major changes to the regulation of fundraising brought about by the commencement of the Corporations Law on 1 January 1991:

- (a) the requirement for a prospectus no longer depends on whether there is an offer to the public;
- (b) the registration process is less significant;
- (c) the issuer is responsible for the content of its prospectus under general disclosure obligations; and
- (d) the information in a prospectus must be kept up to date during the application period.

## **“Offer to the public” test**

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RG 56.14 Under the Law the requirement for a prospectus does not depend on whether there is an “offer to the public” of securities. Therefore, it is generally inappropriate for the ASC to consider factors relevant to the “offer to the public” test. For example, when the ASC considers an application for relief it is inappropriate for it to consider the relationship between the offerees and the offeror or whether the offerees are professional investors in securities. However, these matters may be relevant to the offeror’s decision about the amount of information needed in a prospectus.

## **Registration**

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RG 56.15 The policy of the Law places primary responsibility on the issuer to prepare a prospectus which complies with the Law. There is now a greater emphasis on civil remedies and the post-issue enforcement powers of the ASC (including the stop order power).

## **General disclosure obligation**

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RG 56.16 Sections 1022 and 1022AA contain the general disclosure obligation under which the issuer must take responsibility for the content of its prospectus.

RG 56.17 The ASC does not have the power to prescribe the content of prospectuses; however, it supports the development by industry bodies of voluntary prospectus content guidelines. The ASC supports guidelines if they make it clear that they:

- (a) must be read subject to the overriding requirement that a prospectus must comply with the Law (particularly s1022 or s1022AA); and
- (b) do not purport to reflect the ASC’s views on what s1022 or s1022AA require.

In addition, the ASC is currently exploring ways to encourage clearer and less expensive prospectuses.

## Up to date information

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RG 56.18 The Law requires an issuer to ensure that information in its prospectus is always current during the application period and to lodge a supplementary or replacement prospectus if it is not (s1023B, s1024, s1024A, s1024B, s1024C and s1024D). Because prospectuses now have a maximum life of 12 months it is more likely that the prospectus will require updating during its life (s1024). Issuers must remain aware of this continuing obligation.

## Public hearings

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RG 56.19 The ASC has held public hearings into the following matters which are relevant to the administration of the prospectus provisions.

- (a) Short-term Money Market Deposits (see [CO 91/366]; [CO 96/651]; RG 56.36–RG 56.37).
- (b) Discretionary Futures Accounts.
- (c) New Zealand Equity Prospectuses (see [CO 94/1282]; RG 56.192).
- (d) Pastoral Companies (see RG 56.78–RG 56.80).
- (e) The Promotion and Sale of Foreign Securities which are not Listed on an Australian Exchange (see Regulatory Guide 72 (RG 72)).
- (g) Underwriting Practices.
- (h) Friendly Societies (see RG 56.99).
- (i) Benevolent Investments (see RG 56.53–RG 56.58).
- (j) Master Funds (see [SPS 94]).

[*Historical note:* Para (f) of RG 56.19 was deleted 9/2/2000.]

## Part III: When is a prospectus required? (s1018(1))

RG 56.20 Section 1018 is the primary provision about preparing a prospectus. It states that a person must not offer for subscription, or issue invitations to subscribe for, securities of a corporation unless a prospectus has been prepared, lodged and, if applicable, registered by the ASC. Section 1018(1) applies to offers and invitations, but not to issues, of securities.

RG 56.21 A prospectus is not required in relation to a primary issue of securities if:

- (a) the offer or invitation is an excluded offer or invitation;
- (b) the offer or invitation relates to an excluded issue (except when the excluded issue requires there to have been a prospectus, eg, s66(2)(f));
- (c) the offer or invitation relates to a takeover scheme or a scheme of arrangement (reg 7.12.02); or
- (d) an exemption has been given by the ASC under s1084 (or if an exemption given by the NCSC under s215C of the Companies Act and Codes (Cth) is still in force).

RG 56.22 The ASC has no power to give relief from the liability provisions of Pt 7.11.

RG 56.23 The definitions of “prescribed interest” and, by implication “security” for the purposes of Pt 7.12, have been amended by reg 7.12.04 to exclude rights or interests in regulated superannuation funds, approved deposit funds and pooled superannuation trusts within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth) (see s9 and reg 7.12.04). Regulation 7.12.04 also excludes a number of other types of rights or issues from the definition of “prescribed interests”.

[15/7/1996]

RG 56.24 Section 1018(1) applies only to primary transactions in securities, that is, offers or invitations to subscribe for or allot the securities. Secondary trading in unquoted securities is now regulated by Div 3A of Pt 7.12. Secondary trading encompasses all offers and invitations in relation to sales of securities other than sales caught by s1030 and excluded offers or invitations.

## Legal issues

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RG 56.25 The ASC has considered the following legal issues which have arisen about s1018(1):

- (a) offers of options;
- (b) offers made to persons outside Australia;
- (c) personal offers to 20 or fewer persons in a 12-month period;
- (d) "each person" to whom a \$500,000 offer or invitation is made; and
- (e) reconstruction meetings.

### Offers of options

RG 56.26 The offer of options to subscribe for unissued shares involves the offer of the underlying shares. Therefore, under s1018, a prospectus must be lodged at the time of the offer of options because the underlying share is a "security of a corporation" within the meaning of s92. The ASC is, however, of the view that an option to subscribe for an unissued share is not, of itself, a security of a corporation. This view was reached because:

- (a) an option to subscribe for an unissued share is not a unit of a share within the meaning of s92(2); and
- (b) the definition in s92(2) is the relevant definition of "security of a corporation" for the purposes of Pt 7.12.

RG 56.27 When a prospectus has been issued for an offer of options to subscribe for unissued shares of a listed corporation, s66(2)(f) provides that the issue of securities pursuant to the exercise of those options is an excluded issue. Therefore, Div 2 of Pt 7.12 and s1040 do not apply in relation to the issue.

### Offers made to persons outside Australia

RG 56.28 Section 1018(1) applies only to offers and invitations made in Australia. The ASC is of the view that s1018(1) has no extra-territorial application (see s110D, s1313A and s1313B; para 30 below). An offer is made in Australia only if it is received in Australia.

## **Personal offers to 20 or fewer persons in a 12-month period**

RG 56.29 A personal offer or invitation of securities (other than prescribed interests) is an excluded offer or invitation, if offers or invitations have been made to 20 or fewer persons in the previous 12 months (s66(3)(d)).

RG 56.30 The ASC is of the view that offers or invitations made anywhere in the world must be included when counting the number of persons to whom offers or invitations have been made. This is because Chapter 1 of the Law (which includes s66) applies to acts and omissions outside Australia (s110D) (see the public hearing report published in 1992 on the “Promotion and sale of foreign securities in Australia”).

## **“Each person” to whom a \$500,000 offer or invitation is made**

RG 56.31 The reference to “each person” in s66(3)(a) and s66(3)(ba) (the \$500,000 exclusions) is a reference to each person to whom an offer or invitation purporting to rely on the \$500,000 exclusion is made.

RG 56.32 Offers may be made under these exclusions, although other offers are made at the same time, under other excluded offer categories. Each offer to which the exclusions apply must be an offer to one person to subscribe \$500,000 or more or to several persons to subscribe \$500,000 or more each. The exclusions do not apply to an offer to several persons to subscribe \$500,000 jointly. For example, an invitation to a partnership (which is not incorporated) to subscribe \$500,000 will not fall within the exclusion in s66(3)(a) because it is an invitation to each member of the partnership to jointly subscribe \$500,000. In order for such an offer to fall within the s66(3)(a) exclusion, it must be an offer to the individual partners to each subscribe \$500,000. This is because a partnership (which is not incorporated) is not a “person” in its own right.

## **The effect of other excluded offers on the 20 in 12 months exclusion**

RG 56.33 The exclusion for personal offers to 20 or fewer persons in a 12-month period (s66(3)(d)) depends on the number of persons to whom offers or invitations have been made in the preceding 12 months. Therefore, it is necessary to count all of the persons to whom offers or invitations have been made in the previous 12 months, including excluded offerees (see para 93 below).

## **Reconstruction meetings**

RG 56.34 The ASC is of the view that Divs 2 and 6 of Pt 7.12 of the Law (the prospectus and sharehawking provisions) do not apply to genuine reconstruction meetings where proposals which may result in an issue of securities are considered. Such proposals must be genuinely dependent on the collective decision of the meeting (see [SPN 40]; [MR 93/269]).

## Part IV: Relief from the requirement to lodge a prospectus

### **Class order prospectus relief**

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RG 56.35 When a prospectus is required, it must be lodged with the ASC and comply with the requirements of the prospectus provisions of the Law, unless relief has been given. The ASC has given class relief from the requirement that a prospectus be lodged, and if necessary registered, in the following circumstances.

#### **Short-term money market deposits**

RG 56.36 The ASC has given class relief from the requirement to lodge a prospectus (s1018) to offeror corporations which, in the ordinary course of their business, deal in the short-term money market and provide short-term money market deposit facilities to persons who are substantial and regular depositors. The relief applies only to deposits of \$100,000 or more when the offeror has unsecured short-term debt which is rated A2, A1 or A1+ by Standard & Poor's (Australia) Pty Ltd. Offerors with an equivalent rating by a rating agency approved by the ASC can apply for individual relief (see [CO 96/651]; [CO 91/366]; 1992 *ASC Digest* at page *PH* 42; 1991 *ASC Digest* at page *MED REL* 101,173).

RG 56.37 The ASC has taken the view that the prospectus provisions (as well as the debenture and securities hawking provisions) are inappropriate for offers of highly rated short-term money market facilities. This is because:

- (a) the offers are made to depositors whose ordinary business includes the investment of funds on the short-term money market or the purchase and/or sale of securities; and
- (b) sufficient information is published to allow the rating of the deposit takers.

Therefore these depositors operate in an informed market.

#### **“Small-scale” horse racing syndicates**

RG 56.38 The ASC's policy on regulating “small-scale” horse racing schemes (including both syndicates and partnerships) is given in Superseded Policy Statement 20 [SPS 20] (replaced by RG 91). The ASC has also executed Class Order [CO 92/327] which has been amended (see [CO 93/144], [CO 93/1691] and [CO 94/1824]). Under

this policy, the ASC relies on the surveillance, enforcement and disciplinary measures of horse racing industry regulators. These lead regulators are listed in Class Order [CO 92/327] as amended and in [SPS 20.18] (now RG 91).

RG 56.39 The class order as amended gives relief to licensed promoters of “small-scale” horse racing syndicates from the prospectus provisions (apart from s1022) and from the prescribed interest provisions. The relief applies to syndicates of up to 20 persons who collectively subscribe up to \$250,000 to buy a horse or horses. Although a prospectus does not have to be lodged or registered under s1018, a current full and fair disclosure statement complying with s1022 and approved by a lead regulator is required under the terms of the class order.

### **Horse breeding schemes**

RG 56.40 The ASC has given class order relief from fundraising provisions for private horse breeding schemes: see RG 91; [CO 97/1136] and [CO 97/1138]. Conditional class order relief from the trust deed provisions of the Law, but not the prospectus provisions, has been given for commercial horse breeding schemes: see RG 91; [CO 97/1135] and [CO 97/1137]. This is in addition to the relief given in respect of the Australasian Bloodstock Exchange Ltd: see [CO 91/475]). This policy is under review.

*[Historical note: RG 56.40 replaced 4/2/1998. The paragraph formerly read: “RG 56.40 The ASC has given Class Order relief from the prospectus provisions for personal small-scale horse-breeding schemes (see RG 91; [CO 94/1769]). This is in addition to the relief given in respect of the Australasian Bloodstock Exchange Ltd (see [CO 91/475]). This policy is under review.”]*

### **Film investment schemes**

RG 56.41 The ASC has given class relief exempting promoters of film investment schemes from the prospectus, prescribed interest and share hawking provisions. This relief applies when the issue, offer or invitation of the prescribed interests is made to a government body or to a film distributor or broadcaster (see RG 19; [CO 92/260]; [PF 21]).

RG 56.42 The ASC has exempted offers, invitations and issues made to a government body because they do not require the same level of protection as other investors under the Law. The relief has been extended to distributors and broadcasters if they are participating in the production or development of the film as a distributor or broadcaster because they are experienced in the acquisition of interests in films.

## **Deposit taking by solicitors and others with similar safeguards**

RG 56.43 The ASC has given relief from the prospectus and sharehawking and either managed investment or debenture provisions of the Law for some mortgage investment schemes (see RG 144).

*[Historical note: RG 56.43 was amended 9/2/2000. The paragraph formerly read: “RG 56.43 The ASC has given relief from the prospectus and sharehawking and either prescribed interest or debenture provisions of the Law to the members of various law societies, the Association of Solicitors’ Mortgage Investment Companies Inc and the Finance Brokers Institute of South Australia Inc. This relief applies to the offer of debentures or prescribed interests if the moneys raised are used for limited purposes, for example, making loans which are secured by mortgages. In addition, the relief given to the members of the various law societies allows client money to be invested in specified deposits.”]*

RG 56.44 Relief so that mortgage investment schemes may issue a two part prospectus is discussed in RG 144.26–RG 144.28 and is set out in [CO 99/1638]. In limited instances full relief is given from the prospectus provisions (see [CO 99/1639]).

*[Historical note: RG 56.44 was amended 9/2/2000. The paragraph formerly read: “RG 56.44 Relief was given because of the presence of sufficient prudential controls. This usually means that the following three features are present: (a) there is a self-regulatory body which regulates the conduct of its members and undertakes inspections of a surveillance/audit type; (b) there is a fidelity fund; and (c) there is professional indemnity insurance. It would normally be expected that the self-regulatory organisation also undertakes some vetting of entrants into the industry, for example, by setting entry qualifications: see [CO 92/1523], [CO 94/333], [CO 95/427], [CO 95/640], [CO 96/450].”]*

### **“Small-scale” time-sharing schemes**

RG 56.45 The ASC has given relief from the prospectus provisions for offers or invitations of rights or interests in time-sharing schemes or proposed time-sharing schemes. Relief is available if the scheme involves no more than 15 parties and if no party (including the promoter) will gain a special benefit. In addition, the time-sharing scheme must not be promoted by or on behalf of a person whose ordinary business includes the promotion of similar schemes: see [SPS 66]; [CO 94/1826].

### **“Small-scale” property schemes**

RG 56.46 The ASC has given conditional class relief from the prospectus, secondary trading and prescribed interest provisions of the

Law to property syndicates in which no more than 15 people have interests: see RG 77.96ZA–RG 77.96ZD; [CO 95/821].

### **Issues of foreign exchange quoted securities on the exercise of options**

RG 56.47 The ASC has extended the application of s66(2)(f) to foreign corporations which are listed on an approved foreign exchange. It has done this by giving conditional class relief from the prospectus provisions. This relief means that a foreign corporation can issue securities in a class quoted on an ASC approved foreign exchange pursuant to the exercise of an option without lodging a prospectus at the time the option is exercised. The ASC has designated 14 exchanges as approved foreign exchanges.

RG 56.48 One of the conditions of the relief is that the foreign corporation must give option holders pricing information on request about the securities during the period when the options may be exercised. The ASC will also give case by case relief for an issue of securities, in a class quoted on an approved foreign exchange, on the conversion of convertible notes: see [CO 96/2012]; 1992 *ASC Digest* at page MR 18, 147; PH 58.

*[Historical note: RG 56.48 amended 4/2/1998 by replacing “monthly pricing information” with “pricing information on request” and by replacing “[CO 92/717]” with “[CO 96/2012]”.]*

RG 56.49 This relief is relevant to (but not limited to) a foreign corporation which offers its Australian subsidiary’s employees, options to subscribe for unissued securities in a class quoted on an ASC approved foreign exchange. The relief may be relied on as an alternative to (but not in addition to) the relief described in RG 56.59–RG 56.63.

### **Rights issues of shares quoted on an ASC approved foreign exchange**

RG 56.50 The ASC has given conditional class relief from the prospectus provisions of the Law for a rights issue (whether renounceable or non-renounceable) of shares quoted on an ASC approved foreign exchange. The aggregate offer price of the shares offered to the foreign corporation’s Australian shareholders must not be more than 10% of the aggregate offer price of all shares on offer. The rights issue offer document must also be lodged with the ASC. In the ASC’s view, lodgment of the offer document is necessary so that the ASC is aware of the offer and to attract the stop order power

(s1033): see [CO 93/1548]; 1992 *ASC Digest* at page *PH* 58; and at page *MR* 18, 147.

RG 56.51 The ASC is of the view that unless this relief is given, a foreign corporation may not consider it worthwhile to prepare an Australian prospectus to extend a rights issue to its Australian shareholders.

RG 56.52 The ASC will also give conditional relief when the securities offered are in a different class to those held by the shareholder: see RG 72, particularly RG 72.19–RG 72.21; [PF 83].

### **Charitable investment schemes**

RG 56.53 The ASC has given conditional class relief from the prospectus provisions, s1078 and the debenture or prescribed interest provisions as applicable, for offers of securities by certain charitable bodies. This Class Order applies to a charity if it:

- (a) has a statement identifying and describing its investment scheme registered by the ASC; and
- (b) complies with the conditions of the Class Order, including periodically lodging statements of accounts.

RG 56.54 Class relief which does not require the registration of an identification statement or the lodgment of statements of accounts has been given for school enrolment deposits.

RG 56.55 Alternative relief may be given on a case by case basis when charities which are linked by aims or background have a group sponsor which accepts liability for any losses suffered by investors (see [MR 94/203]; RG 87; [CO 94/1702]; [PF 96], [PF 97]).

RG 56.56 A charity which has been given an exemption from the fundraising, debenture, prescribed interest and sharehawking provisions is also exempt from the disclosing entity provisions (see [CO 94/1703]).

RG 56.57 Exemptions previously given by the ASC or NCSC have been revoked (see [CO 95/406] and [CO 92/1434]).

RG 56.58 This policy was developed following a Public Hearing (see 1994 public hearing report, “Benevolent investments”).

## **Offer of shares and options by a listed corporation under an employee share scheme (when corporation is listed on ASX or an approved foreign exchange)**

RG 56.59 The ASC has given conditional class relief from the prospectus and secondary trading provisions to direct offers of shares and the offer and exercise of options over shares (unissued or issued) under an employee share scheme.

RG 56.60 The shares which are offered must be in a class quoted on the ASX or an approved foreign exchange. The ASC has also imposed a limit on the amount of capital which a corporation may raise by subscription under an employee share scheme. Other conditions are listed in the Class Order (see RG 49; [CO 94/1289]; [MR 93/73]).

RG 56.61 Analogous relief may be given on a case by case basis for an offer to employees of units of shares through a trust structure if certain additional conditions are met (see [PF 45]).

RG 56.62 The ASC is of the view that relief from the prospectus provisions is appropriate when:

- (a) the primary aim of the offer is not fundraising;
- (b) the offer is intended to support long-term mutual interdependence between the offeror and the offeree; and
- (c) the issuing corporation has a history of disclosures to a well regulated stock market which are reflected in the market price. This allows the offeree to easily compare the price of the shares with their market value.

RG 56.63 The ASC will also give conditional relief from the prospectus and prescribed interest provisions to an Australian or foreign corporation on a case by case basis for share and option contribution plans offered in conjunction with offers of shares or options over shares. A requirement of this relief is that the corporation has prospectus relief under Class Order [CO 94/1289] (see also RG 49).

## **Offer of options by an unlisted corporation under an employee share scheme**

RG 56.64 The ASC has given relief from the prospectus provisions for offers (but not the exercise) of options over shares (issued or unissued) for free or nominal consideration under an

employee share scheme. This relief applies to an employee share scheme offered by a corporation not listed on the ASX or an approved foreign exchange (see RG 49; [CO 94/1291]; [MR 93/72]).

RG 56.65 The ASC is of the view that a prospectus is required when the options are exercised if the shares are not in a class that is quoted. This means that employees will be able to make informed decisions about whether to exercise their options.

### **Prescribed interests not for money**

RG 56.66 The ASC has given class relief from the prospectus, prescribed interest and sharehawking provisions to various prescribed interest schemes which do not involve the raising of money, but are incidental to other business activities (see RG 80; [CO 93/1070] and [CO 94/378]; [MR 93/236]; [MR 94/39]).

### **Lloyds of London**

RG 56.67 The ASC has given class relief from the prospectus provisions enabling the participation of Australian residents in the insurance business of Lloyds of London. As a condition of the relief, Lloyds must give the ASC any information which may be relevant to the Australian participants and advise the ASC of any changes to its regulatory requirements: see [MR 92/175]; [CO 92/1127].

RG 56.68 In considering this unusual application, the ASC took the view that the regulatory arrangements under which participation in underwriting at Lloyds is offered were comparable with those applicable under the Law. The ASC is currently reviewing this relief in light of changes to regulation and other developments in the Lloyds market.

### **Transfer and settlement of foreign securities through CHES**

RG 56.69 Class relief from the prospectus provisions has been given by the ASC to facilitate the use of CHES Units of Foreign Securities (CUFS) to settle transactions in foreign securities quoted on the ASX. This relief is necessary for foreign securities which cannot be transferred on CHES because of the law of the jurisdiction of the issuer. CUFS are units of shares or prescribed interests because they are equitable interests in those foreign securities. CUFS may be transferred in their own right on CHES because they are securities issued under Australian law.

RG 56.70 The prospectus relief is limited to the offer and issue of units of shares or prescribed interests for the purpose of enabling beneficial ownership of quoted foreign shares or prescribed interests to be transferred and settled on CHESSE. Relief was given on the basis that CUFS are substantially equivalent to the underlying quoted foreign securities and that an offer to convert shares into CUFS does not involve a further investment decision by the offeree: see [CO 96/93].

## Case by case prospectus relief

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### Share purchase plans

RG 56.70A The ASC has given conditional class relief from the prospectus provisions for share purchase plans offered by companies listed on ASX where:

- (a) the right to participate in the scheme is offered only to existing shareholders in the company; and
- (b) the maximum amount which may be raised from each shareholder under the scheme is \$3000 per annum.

[Historical note: RG 56.70A inserted 3/3/1997.]

RG 56.70B Other conditions attached to the relief are described in the class order [CO 97/74]. (See also Regulatory Guide 125 *Small offers of shares to existing shareholders by listed companies — share purchase plans*).

[Historical note: RG 56.70B inserted 3/3/1997.]

RG 56.70C The funds which may be raised under this relief are in addition to funds which may be raised under any other ASC exemption (eg employee share schemes) or under the Law (eg dividend re-investment plans).

[Historical note: RG 56.70C inserted 3/3/1997.]

RG 56.71 The ASC will give case by case relief from the requirement that a prospectus be lodged, and if necessary, registered, in the following circumstances.

### Business introduction services

RG 56.71A The ASC has given conditional class relief from the fundraising provisions of the Law for offers or invitations made through business introduction services that circulate material in

documents, bulletin boards and at meetings convened by the introduction service operator. The relief also extends to those seeking to offer securities via those services: see [MR 97/324]; RG 129; [CO 97/2329].

[*Historical note:* RG 56.71A inserted 4/2/1998.]

## **Extension of the dividend reinvestment plan exemption to convertible notes**

RG 56.72 Regulation 7.12.06(g) provides that an offer or invitation made in connection with a dividend reinvestment plan is an excluded offer or invitation. This means that a prospectus need not be prepared for that offer or invitation.

RG 56.73 The ASC will give relief by analogy with this exemption. Relief will be given when shares are offered to convertible note holders in lieu of interest payments. The ASC considers that the relationship between convertible note holders and a company during the conversion period is similar to that between shareholders and a company. Therefore, relief will be available only during the conversion period. This relief should not be regarded as a precedent supporting similar relief in the case of non-convertible debt securities: see [MR 91/65]).

## **Small-scale fundraising**

RG 56.74 [deleted]

[*Historical note:* RG 56.74 deleted 3/3/1997. The paragraph formerly read: “RG 56.74 The ASC will give relief from the prospectus provisions for small-scale fundraising schemes offered by companies listed on ASX if:

- (a) the right to participate in the scheme is offered only to existing shareholders in the company; and
- (b) the maximum amount which may be raised from each shareholder under the scheme is \$2400 per annum.”]

RG 56.75 [deleted]

[*Historical note:* RG 56.75 deleted 3/3/1997. The paragraph formerly read: “RG 56.75 This relief applies, for example, to share purchase plans. The funds which may be raised under this relief are in addition to funds which may be raised under any other ASC exemption (eg employee share schemes) or under the Law (eg dividend re-investment plans).”]

RG 56.76 [deleted]

[*Historical note:* RG 56.76 deleted 3/3/1997. The paragraph formerly read: “RG 56.76 The ASC considers that small-scale fundraising schemes established by listed companies to raise small amounts of money from existing shareholders on a continuing basis fall within the spirit of the exemption for dividend reinvestment plans under reg 7.12.06(g).”]

RG 56.77 [deleted]

*[Historical note: RG 56.77 deleted 3/3/1997. The paragraph formerly read: “RG 56.77 This policy is under review and therefore subject to change. Until that review is completed, any relief given will have a sunset clause of 30 June 1997 (see [PF 142]).”]*

## **Pastoral companies**

RG 56.78 Policy Statement 48 outlines when the ASC will give pastoral companies relief from the prospectus and deed provisions for an offer of debentures. The ASC will give this relief by exercising its powers under s65. The ASC is of the view that relief from the prospectus provisions should be restricted to existing primary producer clients of the pastoral company for traditional pastoral company activities (see also [SPS 48]; [PF 28]; [MR 93/65]; RG 56.241).

RG 56.79 Since 1 April 1992, pastoral companies have not been given relief to offer deposit-taking services to persons who are merely employees of the pastoral company or to persons introduced to the pastoral company by existing clients: see public hearing report published 1991, “Report from the public hearing on pastoral companies held on 21 June 1991”; [MR 91/133].

RG 56.80 The ASC will, on a case by case basis, give relief from the prospectus and deed provisions to a pastoral company (Coy A) for offers of debentures made to clients of another body corporate (Coy B) if:

- (a) Coy B is a bona fide pastoral company;
- (b) the primary producer clients of Coy B have a pre-existing business relationship with it in relation to traditional pastoral company activities; and
- (c) Coy A is a related company of Coy B.

(See [SPS 48.18] and [SPS 48.19]).

## **Extension of the exemption for offers of debentures to existing debenture holders (s66(3)(g))**

RG 56.81 The ASC has given relief from the requirement to lodge a prospectus to a corporation offering its debentures to existing debenture holders of a previously acquired wholly-owned subsidiary. The ASC’s decision was made on the basis that existing debenture holders of the wholly-owned subsidiary had, since the acquisition, received the same information as investors in the issuing corporation.

## Debenture fundraising by life companies and Australian banks

RG 56.82 The ASC will give life companies interim relief, under s1084 pending a review of policy in this area. This relief is comparable to the relief available if a declaration was made under s65(1)(b)(ii). The ASC will give relief from the prospectus, debenture and securities hawking provisions of the Law (other than s1046, 1047, 1048, 1049, 1050, 1051, 1061, 1062), on a case by case basis until 30 June 1997. This relief will be given for offers or invitations for subscription or purchase of debentures issued out of a statutory fund of a life company: see RG 68; [PF 78].

RG 56.83 The ASC will give similar relief to Australian banks using its declaration power under s65(1)(b)(iii). This relief will only be available for debentures of an Australian bank, if those debentures are expressly stated by the issuing bank to be deposit liabilities of the bank for the purposes of the *Banking Act 1959* (Cth). This relief is available because the Reserve Bank of Australia provides an alternative regime of protection to investors in deposit liabilities (see Superseded Policy Statement [SPS 68]; [PF 79]). The ASC will not give relief from the prospectus provisions to foreign bank branches but will give relief from the debenture provisions in Div 4 of Pt 7.12 (see [PF 80]).

## Extension of the \$500,000 exemption for top-up investments in trusts (s 66(3)(a))

RG 56.84 The ASC will give relief from the prospectus and prescribed interest provisions to permit offers, invitations and issues of prescribed interests in a liquid trust on the following conditions:

- (a) the Deed contains an operative buy-back covenant requiring buy-back in not more than 30 days;
- (b) the offer or invitation is to subscribe for additional prescribed interests in the same trust fund under the deed;
- (c) the minimum that may be subscribed is not less than will result in the offeree's interests in that trust fund exceeding or equalling \$500,000; and
- (d) the offeree has previously subscribed not less than \$500,000 in a single transaction for prescribed interests in that trust fund.

RG 56.85 The two essential elements of this relief are that the investor has made a substantial investment and is able to quickly withdraw that investment from the trust. Together, these factors mean

that the investor is better able to obtain information essential to an investment decision from the manager because the investor can quickly withdraw the entire (and substantial) investment if it is not provided (see [PF 143] for relief for a trust which does not have an approved deed and [PF 144] for relief for a trust with an approved deed).

RG 56.86 Relief is not necessary for offers or invitations of additional cash management trust interests under an approved deed that are made to holders of interests under the same deed: see reg 7.12.06(f).

RG 56.87 The ASC will also give relief which equates to the reinvestment of income exemption (reg 7.12.06(h)) to a trust which does not have an approved deed when the conditions in RG 56.84 paras (b) and (d) are satisfied (see [PF 143]). Relief is not necessary for a trust with an approved deed because of the availability of the exemption in reg 7.12.06(h).

*[Historical note: RG 56.87 amended 3/3/1997 by deleting the word “liquid” before the word “trust” in the first sentence. This sentence was also amended by replacing the reference to “para 92(b)” with “para 84(b)”.]*

### **Extension of the executive officers exemption to a private trust associated with a partnership (s66(3)(e))**

RG 56.88 The ASC will give relief from the prospectus, secondary trading and prescribed interest provisions and s1078 to private trusts if the trust’s activities are restricted to providing goods and services associated with the central activities of a partnership. This relief is limited to offers which are made to persons who equate to the categories listed in s66(2)(e) and s66(3)(e), that is, to partners and persons concerned in the management of the partnership or the equivalent of a related body corporate of the partnership, and their close relatives.

RG 56.89 This relief is conditional on the deed containing covenants:

- (a) restricting the class of persons to whom securities may be offered, issued or transferred to the persons referred to in RG 56.88;
- (b) requiring the unrestricted provision of information about the activities and financial affairs of the trust to partners on request and annually to all holders of prescribed interests in the trust; and
- (c) limiting the activities of the trust to providing goods and services associated with the central activities of the partnership.

## Odd lots

RG 56.90 The ASC has withdrawn its policy of providing prospectus relief to enable offers to be made to existing holders of less than one marketable parcel (an odd lot) of shares, in a class quoted on the ASX, for the purpose of making up one marketable parcel. This relief was given to allow shareholders to leave the company without having to utilise the services of an odd lot broker. This relief was not intended to facilitate small scale fundraising.

RG 56.91 Relief will no longer be given because ASX has abolished the concept of odd lots and introduced the concept of a tradeable unit of one share, from 1 October 1995 (see [PF 9]).

## Extension of the licensed dealer exemption to a wholly-owned subsidiary (reg 7.12.05(a)(i) and reg 7.12.06(b)(i))

RG 56.92 Regulation 7.12.05(a)(1) and reg 7.12.06(b)(i) provide that an offer, invitation, issue or allotment will be excluded if it is made to the holder of a dealers licence acting as principal. The ASC has extended this exemption by giving relief to a holder of a dealers licence acting as agent for a wholly-owned subsidiary of the dealer. This relief is conditional on:

- (a) all of the directors of the wholly-owned subsidiary also being directors of the holder of the dealers licence; and
- (b) the holder of the dealers licence promptly disclosing the agency after the making of the offer or invitation and before the allotment or issue.

## Extension of the 20 offers in 12 months exemption (s66(3)(d))

RG 56.93 The ASC will give relief to allow all offers made to persons to whom excluded offers may be made (under one of the paragraphs of s66 other than s66(3)(d)) not to be counted for the purposes of s66(3)(d). This relief will be tailored to reflect the particular types of excluded offers which the applicant has made and which are not to be counted. This relief will be reviewed in light of Stage 3 of the Corporations Law Simplification Project: RG 56.29, RG 56.30 and RG 56.33.

## Offers of option contracts (warrants)

RG 56.94 The ASC is of the view that index warrants are not caught by the prospectus provisions because:

- (a) index warrants are not securities of a corporation as defined in s92(2); and
- (b) an offer of index warrants does not involve the offer of an underlying security which is a security of a corporation as defined in s92(2).

Therefore, Class Order [CO 91/761A] is not required and has been revoked.

RG 56.95 ASC policy in relation to deliverable share warrants has been implemented by Class Order [CO 91/779] (in relation to registration and other procedural matters) and by issuing no action letters on a case by case basis (in relation to lodgment of the prospectus). This policy is now under review. A request for comments will be issued shortly.

RG 56.96 In the meantime, exemptions from the prospectus and sharehawking provisions will be given on a case by case basis for offers of warrants to which Class Order [CO 91/779] applies, where the offering circular is governed by and complies with the ASX Business Rules which relate to warrants. The ASC is willing to grant relief from the prospectus and sharehawking provisions because there is an alternative regulatory regime which addresses disclosure issues. Where the issuer will not fully comply with the Business Rules relating to warrants due to having obtained a waiver of certain of those rules from the ASX, the ASC will also consider giving relief on a case by case basis. Such an application should be accompanied by copies of the application to the ASX requesting the waiver and the draft ASX Derivatives Board resolution relating to the waiver.

RG 56.97 Applications for relief should be directed to an ASC Regional Office and will be considered in consultation with the ASC's Regulatory Policy Branch. Due to the nature of this relief it will be necessary for the ASC to consult the ASX when considering such an application. Therefore, it is unlikely that the ASC will grant such relief unless the applicant waives its right to confidentiality to the extent necessary to permit consultation with the ASX (see [CO 91/779]; [MR 91/135]; RG 56.197 and RG 56.239).

## Prospectus relief not given

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RG 56.98 The ASC has refused to give relief from the requirement to lodge a prospectus in the following circumstances.

### Friendly societies

RG 56.99 The ASC will not give relief from the prospectus requirements to friendly societies (see [MR 92/233]).

### Savings plans

RG 56.100 Superseded Policy Statement 27 outlines the ASC's policy on regular savings plans offered in conjunction with prescribed interest schemes (see Superseded Policy Statement 27 [SPS 27]; [PF 1]; [MR 92/121]).

RG 56.101 This guide applies when an investor joins a regular savings plan scheme using the form attached to a current prospectus which has been registered by the ASC. Each participant's agreement to make further regular savings plan investments expires when the initial prospectus expires. However, there is an automatic right to rejoin the regular savings plan when a further prospectus is received.

RG 56.102 The ASC will not give a general exemption from the need to issue further prospectuses to participants in regular savings plan schemes. This is because participants should be given enough information for them to make an informed decision about renewing their participation. However, to take account of the information needs of existing participants in the fund, as distinct from the information needs of prospective investors, the ASC is prepared to allow promoters of regular savings plans to lodge a separate prospectus (known as the savings plan prospectus) (see [PF 1]; RG 56.196).

## Part V: Secondary trading in securities

RG 56.103 Since the commencement of the *Corporate Law Reform Act 1994* (Cth) (4 September 1994) a prospectus is no longer required for secondary sales of securities (other than sales to which s1030 applies). However, a secondary sales notice is generally required by Div 3A of Pt 7.12 for secondary offers of unquoted securities: see Superseded Policy Statement [SPS 105]. Other provisions of the Law, such as s1078, continue to apply to secondary sales.

RG 56.104 In the past, the ASC has issued class orders and exemptions giving relief from the secondary prospectus provisions for secondary offers. The ASC will not give further relief from the secondary prospectus provisions because they have been repealed. However, Div 3A requires a notice for secondary trading in securities which are not quoted on a securities exchange in Australia. If the ASC has given relief from the secondary prospectus provisions, it is likely that this relief applies to the provisions of Div 3A. This is because it is a law corresponding to the previous secondary trading provisions. However, the ASC has amended its Class Orders which relate to secondary trading of securities to ensure that relief is given from Div 3A: see RG 56.107. The ASC will consider applications for relief from Div 3A in other cases: see [SPS 105].

RG 56.105 A prospectus does not have to be lodged with the ASC to enable secondary sales to take place on the ASX. This is because secondary sales are not regulated by the prospectus provisions. In addition, a secondary sale of securities on the ASX does not require a secondary trading notice because Div 3A applies only in respect of unquoted securities: s1043B(4).

RG 56.106 If a company seeking listing on the ASX wants to raise new capital by offering securities for subscription it must lodge (and if necessary register) a prospectus with the ASC. It must also do this if s1030 applies to it. Apart from these cases, the ASC does not have the power under Div 2 of Pt 7.12 to accept for lodgment any offer document or information memorandum. The ASX requirements for admission to the Official List may specify the provision of such documents (see Listing Rule 1.1 Condition 3). Documents which are given to the ASX and subsequently made available to the market must be given to the ASC by the ASX and will be included on the ASC's public database (s776(2B) and s1001A).

[*Historical note:* RG 56.106 amended 3/3/1997 by replacing the Listing Rule reference in the second to last sentence. The reference formerly read: “(see Listing Rule 1(A)(1)(f).)”]

## **Secondary trading relief given**

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RG 56.107 The ASC has given class relief from Div 3A of Pt 7.12 in the following circumstances. Reference should also be made to Policy Statement 105 for details of other relief that the ASC is willing to give from the secondary trading provisions. Policy Statement 105 also gives details about how the ASC interprets the secondary trading and related provisions: see [SPS 105].

### **Secondary trading of foreign securities quoted on an ASC approved foreign exchange**

RG 56.108 The ASC has given conditional class relief from the secondary trading provisions to allow Australian licensed dealers to make offers or invitations to clients, of foreign securities quoted on an approved foreign exchange. The ASC is of the view that the relief is appropriate given the fiduciary duty of dealers to act in the interests of their clients (see [CO 94/1284]; [MR 91/189]; [MR 92/130]; a public hearing report published in 1992, “Report on the public hearing February 1992 on the promotion and sale of foreign securities in Australia”).

RG 56.109 To ensure adequate disclosure, the class order requires the offer or invitation to be accompanied by a securities recommendation (unless it is made in a client-initiated transaction).

### **Secondary trading of shares or options over shares under an employee share scheme**

RG 56.110 Refer to RG 56.59–RG 56.65, [CO 94/1289] and [CO 94/1291].

### **Real estate companies**

RG 56.111 The ASC has given relief from s1043C (but not s1043B) and s1078 for certain secondary offers of shares in real estate companies (see RG 67; [CO 94/1292]; RG 56.245).

### **An offer requiring both a prospectus and a secondary sales notice**

RG 56.112 The ASC has given relief from the secondary trading provisions to an offer for sale or an invitation to purchase made in a prospectus which is lodged and, if necessary, registered by the ASC. The relief was given because the prospectus provisions require the highest level of disclosure. Relief will, however, provide a significant

monetary saving for the issuer and seller who are able to prepare one document and comply with one disclosure regime rather than two. The relief also allows greater administrative efficiency for the offerors by allowing all of the securities which are to be offered for subscription or sale to be pooled in order to satisfy the applications for securities. It is a condition of this relief for the prospectus to be signed by the directors of the issuer in accordance with s1021(13) and by all of the directors of the seller.

### **Business introduction services**

RG 56.112A The ASC recognises that in some cases rather than seeking to raise new capital, introduction services may be used by those who are reorganising existing arrangements and therefore relief is needed by persons selling issued securities. The ASC has issued a class order to exempt such offers on a similar basis to that which is applicable for the primary offer of securities made through an introduction service: see [MR 97/324]; RG 129; [CO 97/2329].

[*Historical note:* RG 56.112A inserted 4/2/1998.]

## Part VI: Types of prospectuses (s9 and s1030)

### Definition of prospectus (s9)

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RG 56.113 The term “prospectus” is defined in s9 in relation to securities of a body corporate, as a written notice or other instrument which makes offers or invitations of securities for subscription. An excluded prospectus is defined as a prospectus where each offer or invitation it makes for any securities is an excluded offer or invitation.

### Deemed prospectuses (s1030)

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RG 56.114 The primary aim of s1030 is to prevent issuers from avoiding the prospectus provisions by issuing securities to an intermediary (especially an exempt offeree) for the purpose of subsequent on-sale. In addition, s1030 provides a means by which issuers can comply with the Law by preparing a prospectus when it is commercially convenient for the securities to be allotted to an intermediary before on-sale to the public.

RG 56.115 Section 1030 makes an issuer liable for any document in which a vendor offers securities for purchase if those securities were originally issued for resale. A specific exemption from s1030(1) is provided by s1030(1A) for sales of securities when the sales are made in the ordinary course of trading on a securities exchange.

RG 56.116 The ASC applies the following principles in relation to s1030.

- (a) When an offer for purchase is made in a document, an exemption from s1030 will not normally be given. This is because relief from s1030 affects the civil rights of purchasers. Therefore, the ASC has refused applications for relief from s1030 when:
  - (i) the allotment of securities was made via a placement to institutions; and
  - (ii) the allotment of those securities did not require a prospectus because it was an excluded issue.
- (b) The ASC will give relief from s1030 to the extent necessary to ensure that an issuer is not liable for a document prepared by a vendor when the issuer has prepared a prospectus which is appropriate for vendors offering securities for sale.

- (c) The ASC has given conditional class relief from s1030 for prospectuses for option contracts (warrants). Relief has been given when the warrants are for on-market trading and have been issued by institutions described under Rule 8.6.1 of the ASX Business Rules (see [CO 91/779]; [MR 91/135]; RG 56.94- RG 56.97 and RG 56.239).

## Part VII: Content and format of a prospectus

RG 56.117 Section 1021, s1022 and s1022AA are the main sections which specify what a prospectus must contain. Other sections that specify matters for inclusion in a prospectus are s204 and s1032 (see also reg 7.12.15(6)(j)). Regulation 1.07 specifies format requirements. Matters which must also be included in a prospectus offering debentures are given in s1023 and s1045, for a prospectus issued by an investment company in s403 and for an offer of prescribed interests in reg 7.12.11 and reg 7.12.12.

### Specific disclosure requirements (s1021)

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RG 56.118 Section 1021 specifies a number of technical matters including dating, print size and signing.

RG 56.119 Subsection 1021(6) specifies a more substantive information requirement, that is, the prospectus must disclose the interests of directors, proposed directors and experts in the promotion of, and the property to be acquired by, the corporation (s1021(6)). Subsection 1021(6) is modified for prescribed interests by reg 7.12.11. This regulation extends the disclosure requirement to the trustee or representative and the management company in addition to directors, proposed directors and experts. Only interests which arose within two years before lodgment of the prospectus must be disclosed (see RG 55).

RG 56.120 The ASC has made the following decisions about s1021.

#### Date of a prospectus

RG 56.121 The ASC permits an issuer to specify a date of issue up to 14 days after the date of registration of the prospectus. This decision was taken so that the effective life of a prospectus is not reduced to less than the maximum available under the Law which is now 12 months (see [MR 91/111]). This policy is under review.

#### Foreign securities quoted on an ASC approved foreign exchange

RG 56.122 The ASC has given conditional class relief from some of the technical requirements of s 1021 for offers of foreign securities quoted on an ASC approved exchange in the following circumstances.

*(a) Primary offers*

The ASC has given conditional class relief from the type size (s1021(2)) and signing (s1021(13)) requirements (but not the requirements of reg 1.07). This relief has been given for offers to subscribe for securities (including options to subscribe for such securities) of a foreign company which is, or is about to be, listed on an approved foreign exchange. The offer must relate to an issue of securities in a class already quoted, or reasonably expected soon to be quoted, on an approved foreign exchange. In addition, the ASC has modified s1021(5) to permit a prospectus to contain a statement that no securities will be allotted or issued later than 12 months after the date of the issue of the prospectus to a person whose address is a place in Australia.

The ASC has given this relief because of the practical problems which may arise when a prospectus is distributed in more than one country and it must comply with the procedural requirements of more than one jurisdiction.

The ASC may give further procedural relief (but not relief from s1021(6) or s1022) if:

- (i) the application demonstrates that investor protection would not be diminished; and
- (ii) the issuer needs the relief to comply with procedural requirements in the relevant foreign jurisdiction (see [CO 94/1288]; [MR 91/189]; [MR 92/130]; a public hearing report published in 1992, "Report on the public hearing February 1992 on the promotion and sale of foreign securities in Australia").

*(b) Foreign takeovers and schemes of arrangement*

The ASC has given conditional class relief from some of the prospectus provisions of the Law (Divs 2 and 3 of Pt 7.12 apart from s1018(1)(a), s1021(6), s1022 and s1033) to facilitate an offer of foreign securities to be made to Australian investors during a foreign takeover or scheme of arrangement. This relief only applies when the offer is to issue securities that are in a class that is or will soon be quoted on an approved foreign exchange. This relief is not necessary in relation to schemes of arrangement in the circumstances described in Practice Note 40.

Relief has not been given from all of the prospectus provisions because the ASC is of the view that an offer document should comply with the prospectus content provisions of the Law. This is because an Australian investor in a foreign corporation who is

offered securities as consideration for a takeover offer is being asked to make a new investment decision. This should be distinguished from making a further investment in a corporation in which investment has already been made and for which information has already been supplied (see [CO 92/716]; a public hearing report published in 1992, “Report on the public hearing February 1992 on the promotion and sale of foreign securities in Australia”).

### **Subsection 1021(5)**

RG 56.123 The ASC is of the view that the requirement that a prospectus contain a statement that “... [N]o securities will be allotted or issued on the basis of the prospectus later than 12 months after the date of issue of the prospectus” will be satisfied by a statement which differs from that statement in that it specifies a period of less than 12 months. This interpretation is supported by the definition of “application period” which was inserted in s9 by the *Corporate Law Reform Act 1994* (Cth).

RG 56.124 When a listed corporation offers options under a prospectus and s66(2)(f) will apply to the exercise of the options, the ASC will give relief so that a prospectus offering options does not have to contain the statement required by s1021(5). This relief is on condition that a similar but more appropriate statement is included. The ASC is of the view that this is consistent with the intention of the Law as expressed in s1040(2): see RG 56.212.

## **General disclosure requirements (s1022 and s1022AA)**

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RG 56.125 Except when s1022AA applies, a prospectus must contain all information investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of:

- (a) the assets and liabilities, financial position, profits and losses, and prospects of the scheme; and
- (b) the rights attaching to the securities (s1022).

RG 56.126 Under reg 7.12.12 a prescribed interest prospectus must contain comparable information, as well as information on the merits of and risks involved in participating in the scheme.

RG 56.127 If s1022AA applies, the disclosure requirements are less onerous. Section 1022AA requires disclosure of, amongst other things, the “effect of the offer or invitation on the disclosing entity”.

RG 56.128 Section 1022AA applies to a prospectus for ED securities of a disclosing entity if:

- (a) the securities are quoted ED securities;
- (b) the securities are in a class of securities that were quoted ED securities throughout the 12 months before the issue of the prospectus (that is, the securities were not suspended for any period during those 12 months);
- (c) none of the exemptions, modifications or provisions listed in s1022AA(1)(c) applied to the entity at any time in those 12 months; and
- (d) no instrument made under s1022AA(8) is in force excluding the entity from s1022AA.

RG 56.129 [deleted]

[Historical note: RG 56.129 deleted 3/3/1997.]

For further guidance on prospectuses issued under s1022A, refer to Regulatory Guide 28 (RG 28).

## **Relief from s1022 or s1022AA**

RG 56.130 The ASC regards s1022 and s1022AA as of paramount importance. Relief from s1022 or s1022AA will not be given except in the following cases.

RG 56.131 Relief will be granted when it is a necessary result of relief given from the requirement to prepare a prospectus (see Superseded Interim Practice Note 9, withdrawn 1992). “Short-form” prospectuses permitted under NCSC Release 123 will not be facilitated by the ASC — the only “short-form” prospectuses allowed are those under s1022AA.

RG 56.132 The ASC will modify the provisions of s1022 or s1022AA only if it is necessary to ensure that a prospectus contains adequate information. For example, consider debt securities which are issued by a corporation in its capacity as trustee of a unit trust and the liability of the borrowing corporation is generally limited to the assets of the trust. In this example, the ASC would be willing to modify s1022(1) so that the financial position of the trust and the financial position of the borrowing corporation are disclosed (see [CO 92/301]).

RG 56.133 The ASC has given conditional class relief from s1022 to allow a debenture issuer to advertise, for example in a newspaper, the term and interest rate of the debentures to which the prospectus relates. This relief is only to the extent that s1022 requires the rates of interest offered by a borrowing corporation and the term of any debenture offered to be set out in the prospectus or the application form. This relief is available to corporations who offer debentures as part of their ordinary course of business. The ASC has given this relief to reduce the costs of debenture prospectus for issuers who would otherwise have to lodge a supplementary prospectus or an application form whenever the interest rate offered is changed (see Superseded Policy Statement [SPS 97]; [CO 95/887]; [MR 93/07]).

RG 56.134 Issuers who want to include the term and interest rate of the debentures in the application form instead of the prospectus must now rely on s1024G instead of the Class Order (see RG 56.168).

### **Member discretionary master funds**

RG 56.135 Policy Statement 94 discusses the level of disclosure which must be made in a member discretionary master fund (MDMF) prospectus. In a MDMF, individual investors, instead of the manager, make the investment decisions for the fund. Therefore, investing through a MDMF involves not only the decision to invest through that fund, but also a decision to invest in underlying investments. The ASC has executed a number of Class Orders which relate to MDMFs (see Superseded Policy Statement [SPS 94] for full details of the ASC's policy about MDMFs and the available class orders).

### **Revaluation of non-current assets**

RG 56.136 Consistent with the general disclosure obligation under s1022 the ASC has decided not to adopt the policy set out in NCSC Release 135 on prospectus disclosure requirements for the revaluation of non-current assets. However, the ASC will continue post-vetting prospectuses to monitor asset valuations of materially revalued non-current assets.

### **Accounting for the acquisition of net assets**

RG 56.137 The ASC has stated that the reporting of recently acquired assets in prospectuses should be consistent with s191 of the Law, AASB 1015 and AASB 1013 (see [SPN 54]; [MR 94/160]).

## Mining experts' reports

RG 56.138 The ASC has withdrawn NCSC Release 149 as its guide in examining mining experts' reports. The new Code and Guidelines for Assessment and Valuation of Mineral Assets and Mineral Securities which was issued by the Australasian Institute of Mining and Metallurgy (AusIMM) will now be used as a source of reference by the ASC when reviewing mining and exploration prospectuses and takeover documents (see RG 56.17).

## Supplementary and replacement prospectuses (s1023As1024D)

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RG 56.139 The *Corporate Law Reform Act 1994* (Cth) made significant changes to the Law in relation to updating prospectuses.

RG 56.140 Under the Law as amended, after a corporation has lodged a prospectus for its securities, it must lodge a supplementary or replacement prospectus with the ASC as soon as practicable after:

- (a) the corporation becomes aware, during the application period, that:
  - (i) the prospectus contains a material statement that is false or misleading (s1023B(1)(a)); or
  - (ii) there is a material omission from the prospectus (s1023B(1)(b)); or
- (b) the corporation becomes aware, during the application period, that:
  - (i) there has been a significant change affecting a matter included in the prospectus (s1024(1)(a)); or
  - (ii) a significant new matter has arisen, which Pt 7.12 would have required the corporation to include information about, in the prospectus, if the matter had arisen when the prospectus was prepared (s1024(1)(b)).

RG 56.141 However, the use of a supplementary or replacement prospectus is not limited to these matters. Therefore, a supplementary or a replacement prospectus may be used to correct both material and immaterial errors in the original prospectus. They may also be used to add new information, even if it is not material (see RG 23.13).

RG 56.142 A supplementary prospectus gives the corrected or updated information in the form of an insert which accompanies or is

attached to the original prospectus (s1024C(3)). A replacement prospectus is a re-printed prospectus which has the same wording as the original prospectus except for the correction of the deficiency or the addition of new information (s1024B(3)).

RG 56.143 The ASC has issued Regulatory Guide 23 which sets out the following information:

- (a) when a supplementary or replacement prospectus must and can be issued;
- (b) the form and content requirements which apply to a supplementary or replacement prospectus;
- (c) answers to some common questions asked by issuers including how an issuer may limit its liability for a defective prospectus;
- (d) what information can be included in an application form rather than in the prospectus; and
- (e) what happens when an issuer receives an out of date application form.

RG 56.144 The guide also gives details of relief that the ASC will give in relation to these matters (see RG 23).

RG 56.145 Relief to allow changes to be made to a prospectus, for example, to correct errors detected after registration, is discussed in Part III of RG 23. The extent to which the issued prospectus may differ from the lodged (and if necessary registered) prospectus and remain a copy of the prospectus is also discussed (see RG 23.37–RG 23.41).

RG 56.146 The *Corporate Law Reform Act 1994* (Cth) also introduced new provisions dealing with the refund of application moneys if an application for securities is made on an out of date application form (s1024E). Out of date application forms are also considered in RG 23. Class Order relief that the ASC has given is discussed (see RG 23.61).

## **Material contracts (s1029)**

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RG 56.147 Section 1029 requires all material contracts referred to in the prospectus to be made available, irrespective of whether the information is required by s1022 or s1022AA (see Superseded Policy Statement [SPS 79]).

RG 56.148 The ASC has given relief from s1029 in the following circumstances.

### **Confidential information**

RG 56.149 The ASC has given conditional class relief allowing a material contract to be censored if it contains information which would unreasonably prejudice the issuer or would contravene an Australian law. This relief is not available if the information is required by any provision of the Law other than s1029 (such as s1021(6), s1022 or s1022AA) (see [SPS 79]; [CO 94/183]).

### **Registered office**

RG 56.150 The ASC has given conditional class relief allowing a foreign company that is not registered in Australia to specify in the prospectus where experts' consents and material contracts will be kept. In the case of a foreign employee share scheme such documents must be kept at the registered office of a nominated related Australian employer. Otherwise, such documents must be deposited at a nominated office within five kms of the GPO of an Australian capital city (see [SPS 79]; [CO 94/183]).

### **Offers to subscribe for foreign securities**

RG 56.151 The ASC has given conditional class relief from s1029 for offers to subscribe for securities quoted on an ASC approved foreign exchange. When the issuer lodges the prospectus it must give the ASC a copy of each consent, material contract and memorandum of the kind referred to in s1029 and which is publicly available in the jurisdiction where the exchange is located. Any other documents given to the responsible regulatory authority in the jurisdiction where the prospectus is lodged must also be given to the ASC. The documents which are given to the ASC are used in the post-vetting of the prospectus and will not be placed on the public register (see [CO 94/1288]; the public hearing February 1992 on the promotion and sale of foreign securities in Australia).

### **Foreign collective investment schemes**

RG 56.152 The ASC will exempt, on an individual basis, foreign collective investment schemes from the requirement to give access to material contracts if it considers that the regulatory regime under which the scheme operates gives a comparable level of investor protection to Australian law (see Superseded Policy Statement 65 [SPS 65]; [PF 72]; [MR 93/205]).

## **Experts' consents (s1032)**

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RG 56.153 A prospectus must not include a statement purporting to have been made by an expert or to be based on a statement made by an expert, unless:

- (a) the expert has given written consent to the issue of the prospectus with that statement included in the form and context in which it appears; and
- (b) the prospectus states that the expert has given, and not withdrawn, consent.

RG 56.154 The ASC has given conditional class relief from obtaining an expert's consent for statements made by an official person, made in an official document, or published in a book or journal. Further circumstances in which the ASC will consider giving case by case relief are also discussed in Regulatory Guide 55 (particularly from RG 55.3450; [CO 94/1989]).

## **Applications for listing (s1031)**

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RG 56.155 Section 1031 deals with the allotment or issue of securities when the prospectus states that an application has been, or will be made to have the securities listed for quotation on a stock exchange. If the application for listing is not made within three days of the date of issue of the prospectus, or the listing is not granted within six weeks of that date (or 12 weeks if the period is extended by the ASX), the corporation must repay any money received. Regulatory Guide 99 describes the relief that the ASC will give from the operation of s1031.

RG 56.156 The ASC will also modify s1031(1) using s1084(6) for a prospectus which offers options. The modification will require an application to list the underlying securities to be made within three days after the date of issue or allotment of those securities pursuant to the exercise of those options. The ASC has given comparable relief for convertible notes. This policy is currently under review.

## **Content of debenture prospectuses — s1023**

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RG 56.157 A prospectus for debentures must contain an undertaking that the issuing corporation will, within a specified period

of time, issue an acknowledgment of indebtedness of the corporation for each deposit made with it or loan taken by it (s1023(1)).

RG 56.158 The ASC has given relief from s1023 in the following circumstances.

### **Debentures issued by a unit trust**

RG 56.159 The ASC has considered an application where debt securities were to be issued by a corporation in its capacity as trustee of a unit trust and the recourse available for investors was to be generally limited to the assets of the unit trust and not the assets of the trustee. In this case the ASC decided to modify s1023 to permit the prospectus to contain an undertaking that the manager (on behalf of the trustee) will issue a document acknowledging indebtedness of the trustee to each person accepting the offer. The trustee retained an overriding legal obligation to ensure that the document was issued (see [CO 92/301]; ASC Memo, “Withdrawal of NCSC Practice Notes 323”; RG 56.132).

### **Global bonds**

RG 56.160 The ASC has given relief from s1023 to allow a “paperless” issue or sale of debentures when the debentures are created under a “global” debenture or bond (paperless issue) (see RG 30; [PF 2]).

## **How debentures may be described (s1045)**

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RG 56.161 Section 1045 requires a debenture prospectus to describe the debentures in accordance with that section. The ASC will not refuse lodgment or registration of a prospectus which, in addition to using the description prescribed in s1045, also describes the debenture in another way if:

- (a) the description used is not false or misleading, for example, the description of an unsecured note or an unsecured deposit note must not include the terms set out in s1045(1)(b) or s1045(1)(c);
- (b) the description does not result in an omission from the prospectus, for example, by being a half-truth; and
- (c) the prospectus clearly and prominently characterises the debentures using the description prescribed by s1045, for example, as an unsecured note or an unsecured deposit note, as the case may be.

RG 56.162 Alternatively, additional appropriate descriptive words may be added to the characterisation required by s1045, for example, “convertible unsecured notes”, “converting unsecured notes” or “convertible letter of credit unsecured notes”. If additional descriptive words are used, it is not necessary to also characterise the debentures using no more than the description prescribed by s1045. Again, the additional words must not result in the description being false or misleading or result in an omission from the prospectus.

## **Content of fixed term property trust prospectuses**

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RG 56.163 Pro Forma 134 describes relief from the buy-back covenant that the ASC will give for a fixed term property trust. One of the conditions of this relief is that the trust deed must include a requirement for the prospectus to include a prominent statement that:

- (a) investments in the trust should be viewed as long-term;
- (b) interests in the trust are likely to be illiquid because there is unlikely to be a secondary market; and
- (c) investors have no right to require their interests to be bought by the management company or any other person, or to have their interests redeemed (see RG 77.66–RG 77.83, particularly RG 77.80; [PF 134]).

## **Incorporation by reference (s1024F)**

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RG 56.164 The *Corporate Law Reform Act 1994* (Cth) introduced s1024F which permits the incorporation by reference into a prospectus of documents lodged with the ASC under the Law (or under a corresponding previous law). Therefore, the ASC has replaced Superseded Policy Statement 6. Superseded Practice Note 63 sets out how the ASC will administer s1024F.

## **Application forms (s1020 and 1024G)**

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RG 56.165 An application form must not be issued unless it is attached to (or if it relates to debentures is accompanied by) the prospectus (s1020). Regulatory Guide 23 discusses applications for securities which are made on out of date application forms, and information which may be included in an application form rather than in a prospectus.

RG 56.166 The Law makes the following distinctions between a prospectus and an application form:

- (a) a prospectus is a written notice or instrument offering, or inviting offers to subscribe for, securities; and
- (b) an application form is the vehicle by which an investor makes an offer to a corporation to subscribe for its securities.

### **Statements of entitlement**

RG 56.167 A statement of entitlement is a document stating the number of securities for which the investor is entitled to apply. The Law does not prohibit the issue of statements of entitlement to shareholders after the dispatch of a prospectus which has been lodged (and if necessary registered) with the ASC. This is because such a statement need not be an application form to which s1020 would apply. However, the statement of entitlement must comply with s1025(2) of the Law.

### **Information included in the application form**

RG 56.168 Before the *Corporate Law Reform Act 1994* (Cth) commenced, the prospectus itself had to contain all the information which s1022 requires. This meant that information, such as interest rates payable on debentures, had to be included in the prospectus rather than in the application form. This led to practical problems if the interest rates changed during the life of the prospectus. The ASC gave Class Order relief allowing this information to be included in an application form or published in a newspaper. Relief to allow information to be included in an application form is no longer necessary because issuers may now rely on s1024G. As a result, Class Order [CO 93/15] has been revoked. A new conditional Class Order continues the relief by allowing the interest rate and term of a debenture to be published in a newspaper instead of being included in the prospectus or application form (see [CO 95/887]; [SPS 97]).

### **Personalised application forms**

RG 56.169 The ASC has given relief allowing personalised application forms which accompany a prospectus to be used. The ASC has done this by giving relief from the following requirements of the Law:

- (a) that the application form is attached to the prospectus (s1020); and
- (b) that the application form which is circulated is a copy of the form which was lodged (s1020, s1024G(1) and s1025(2)(e)).

RG 56.170 This relief requires the personalised application form to include the following information:

- (a) the name and address of the offeree;
- (b) a statement that the accompanying prospectus should be read carefully; and
- (c) a statement that an application made using the form will not be valid if another name is substituted for the name printed on the form.

RG 56.171 The relief also permits a personalised application form to differ from the copy of the form which is lodged in the following respects:

- (a) it may contain broker details; and
- (b) it may include the entitlement of the offeree to acquire a specified number of securities of the corporation.

RG 56.172 Finally, the application form must be securely wrapped with the prospectus.

RG 56.173 In addition, the ASC has given class relief for renounceable and non-renounceable (*pari passu*) rights issues permitting personalised application forms to accompany, rather than be attached to, a copy of the prospectus. The relief is only available if the personalised application forms inform the members of the corporation of their individual entitlement to acquire a specified number of securities in the corporation (see [CO 91/170] and [CO 91/171]). The ASC's policy in relation to the use of personalised application forms will be reviewed.

RG 56.174 The ASC has discontinued the discrete application form policy (formerly NCSC Release 161; see [MR 92/10]).

## **Prospectuses consisting of several documents**

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RG 56.175 The Law does not prohibit issuers from attaching two or more documents together and lodging the combined document as the prospectus. The ASC believes that the Law allows this if the document as a whole complies with the Law, particularly s1020, s1021 and s1022 (or s1022AA, if applicable). However, the Law requires the prospectus to be bound as one document.

RG 56.176 The ASC will give conditional relief from s1020 permitting a prospectus to consist of several documents which may

accompany, or be attached to, the application form if the multi-document prospectus is unlikely to be passed on by the original recipient to another person. This condition avoids the risk that incomplete copies of the prospectus will be circulated.

RG 56.177 Such relief is generally appropriate only if:

- (a) a separate non-transferable offer is made to each person who receives a copy of the prospectus; or
- (b) either the prospectus or the application form that accompanies it is personalised.

RG 56.178 The ASC has given relief from s1020 to allow a prospectus to consist of several discrete documents that are not attached to each other in the following circumstances.

### **Employee share schemes**

RG 56.179 The ASC has given conditional class relief allowing a prospectus offering shares or options over shares under an employee share scheme to consist of up to four discrete documents plus the application form, which collectively satisfy the prospectus content provisions of the Law. If the prospectus consists of more than one document, the document which includes the disclosures required by s1021 must list and describe all accompanying documents and must state that these documents are part of the prospectus (see RG 49; [CO 94/1823], first exemption).

RG 56.180 The ASC has also given conditional class relief allowing a corporation (Australian or foreign) which offers shares or options over shares under an employee share scheme to send to each eligible employee either a personalised application form or a personalised prospectus (see RG 49; [CO 94/1823], third exemption).

### **Foreign securities quoted on an ASC approved foreign exchange**

RG 56.181 The ASC has given conditional class relief from the single document prospectus requirements for an offer to subscribe for securities quoted on an ASC approved foreign exchange. The relief means that a prospectus can consist of more than one, but no more than four, documents plus the application form (see [CO 94/1288]; para (a) of RG 56.122). The relief was given on the basis that:

- (a) investor protection would not be diminished; and
- (b) it would reduce the practical problems arising from procedural requirements when a prospectus is distributed in more than one jurisdiction.

## Part VIII: Registration (s1017A, s1018(1)(c) and s1020A)

RG 56.182 A prospectus must be registered under s1020A if it is a “registrable” prospectus. All prospectuses are registrable unless they are exempt from registration under s1017A or unless an exemption has been given by the ASC.

RG 56.183 Superseded PN 66 [SPN 66] on transaction specific prospectuses discusses the effect of a suspension on the quotation of securities. This is also of relevance to whether a prospectus is exempt from registration (but not lodgment) under s1017A(3): see para 22–25 of [SPN 66]).

RG 56.184 As a matter of law, a prospectus for a rights issue of shares need only be lodged, but not registered, if the shares to which the rights relate are in a class of shares that are listed for quotation on a stock market of a stock exchange (s1017A(3)(a)). This is because a right is not a “security” as defined in s92(2), therefore, the Law applies only to the offer of the shares to which the rights relate (see [MR 91/26]).

RG 56.185 Under s1020A, the ASC must register a prospectus lodged for registration as soon as possible and, in any event, within the prescribed period (ie 14 days — reg 7.12.08.) unless:

- (a) it appears that the prospectus does not comply with Div 2 of Pt 7.12 (which includes s1022); or
- (b) the ASC is of the opinion that the prospectus contains a false or misleading statement or that there is an omission from the prospectus.

RG 56.186 A prospectus lodged for registration must be in registrable form and must be accompanied by a written application for the registration of the prospectus as well as the relevant fee (see s102A and s1020A; reg 1.07); Corporations (Fees) Regulations, Schedule, Item 10(a)).

RG 56.187 If a prospectus lodged for registration contains typographical errors the examining officer will allow amendments to be made prior to registration (which must occur within 14 days, see reg 7.12.08). Alternatively, the issuer may correct indisputably trivial errors in the copy of the prospectus which is circulated, without relief as discussed in RG 23.37. If, on the other hand, the prospectus lodged for registration contains an error or omission which is not minor or technical in nature and which justifies a decision to refuse to register

the prospectus, registration must be refused (see 1992 ASC Memo, “Correction of errors in lodged prospectuses prior to registration”). If the prospectus is resubmitted, a further fee will be required.

RG 56.188 Relief to allow changes to be made to a prospectus, for example, to correct errors detected after registration is discussed in Part III of RG 23 (see RG 23.34–RG 23.53). The extent to which the issued prospectus may differ from the lodged (and if necessary registered) prospectus and remain a copy of the prospectus is also discussed (see RG 23.37–RG 23.38).

## Registration relief

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RG 56.189 Relief from the registration requirement does not affect the obligation to prepare and lodge a prospectus which complies with the Law, particularly s1022 or s1022AA, as applicable.

RG 56.190 The ASC has exempted prospectuses from the registration requirement in the following cases.

### Foreign securities quoted on an ASC approved foreign exchange

RG 56.191 The ASC has given conditional class relief from some prospectus procedural requirements, including registration (s1018(1)(c)), for offers to subscribe for securities (including options to subscribe for such securities):

- (a) in a class quoted or reasonably expected soon to be quoted on an approved foreign exchange; and
- (b) made to Australian investors;

when the prospectus is lodged and distributed both in Australia and the jurisdiction of that approved foreign exchange.

The reasons for this relief are outlined in para 122(a) above (see [CO 94/1288]; [MR 91/189], [MR 92/130]; a public hearing report published in 1992, “Report on the public hearing February 1992 on the promotion and sale of foreign securities in Australia”).

### New Zealand equity prospectuses

RG 56.192 The ASC has given New Zealand prospectuses offering quoted or unquoted securities for subscription conditional class relief from the registration requirement. Relief is given on condition that the prospectus registered in New Zealand complies fully with Australian

prospectus content standards and is lodged with the ASC. However, when a New Zealand equity prospectus which has been registered in New Zealand needs a “wrap-around” or insert to comply with Australian law, the prospectus must be registered by the ASC (see [CO 94/1282]; a public hearing report published in 1991, “Report on the public hearing on New Zealand equity prospectuses held on 27 February 1991”). This policy will be extended to s1043C notices on a case by case basis (see [PF 10]).

## Employee share schemes

RG 56.193 A prospectus is exempt from the requirement to be registered if it relates to offers or invitations made to employees of a listed corporation or an “approved unlisted corporation” or to employees of a body corporate that is related to such a corporation (s1017A(3)(b)(iii)) (see RG 49).

RG 56.194 The ASC has not developed a policy in relation to its power under s1017A(1) to declare an unlisted corporation to be an “approved unlisted corporation”. Such approval does not relieve the issuer from the obligation to prepare and lodge a prospectus which complies fully with the Law (see RG 49).

RG 56.195 The only other registration relief available for an employee share scheme prospectus is that referred to in the public hearing report on the promotion and sale of foreign securities in Australia. The ASC has given conditional class relief from the registration requirement for a prospectus offering securities in a class quoted on an approved foreign exchange, for subscription, to Australian investors. This relief is available if the prospectus is lodged and distributed both in Australia and the jurisdiction of that approved foreign exchange (see [CO 93/1548]; [MR 91/189], [MR 92/130]; a public hearing report published in 1992, “Report on the public hearing February 1992 on the promotion and sale of foreign securities in Australia”; para (a) of RG 56.122; RG 56.192).

## Savings plans

RG 56.196 The ASC will only give registration relief for a savings plan prospectus if there is a current initial (full) prospectus registered for the prescribed interest scheme at the time of lodgment (see RG 56.100–RG 56.102). The ASC is of the view that when there is already a registered prospectus, registering a savings plan prospectus would not give more investor protection (see RG 27; [PF 1]).

## Option contracts (warrants)

RG 56.197 The ASC has given class relief from the registration requirement for prospectuses issued in relation to option contracts (warrants) issued by institutions described in Rule 8.6.1 of the ASX Business Rules (see [CO 91/779]; [MR 91/135]; RG 56.94–RG 56.97 and RG 56.239).

## Cattle breeding schemes

RG 56.198 The ASC will give registration relief for certain cattle breeding schemes monitored by the ARCBA (see [SPS 85]; [PF 94]).

## Foreign collective investment schemes

RG 56.199 The ASC will give relief from s1018(1)(c) to foreign collective investment schemes, on a case by case basis. The ASC will give relief when it is of the view that the regulatory regime under which the scheme operates provides a comparable level of investor protection to that provided by Australian law. Relief will not be given to a scheme which is principally targeted at the domestic market or in which Australian investors are likely to represent the principal source of funds under management (see [SPS 65]; [PF 72]; [MR 93/205]).

## Prescribed interest schemes

RG 56.200 The ASC will give relief from the registration requirement for offers of prescribed interests which equate to the exemptions from registration in s1017A(3)(a) or s1017A(3)(b)(i). The relief is limited to the offer of further interests in the same class.

RG 56.201 Therefore, the ASC will give relief from the registration requirement for a prospectus for:

- (a) a listed prescribed interest scheme offering prescribed interests in a class which is quoted on the ASX; or
- (b) an unlisted prescribed interest scheme which offers additional interests to existing investors (on a non-renounceable basis) when the prescribed interests are in the same class as currently held by those investors (this will be the case for a single fund deed and the principle also has application in the context of a multi-fund or umbrella deed).

RG 56.202 Applicants for this relief should note that it will affect any other relief which includes a requirement that a prospectus is registered by the ASC. For example, Pro Forma 1 which relates to regular savings plans refers to a registered prospectus in a number of places. An issuer applying for relief from the registration requirement should consider its effect on other relief that it is relying on and apply for consequential variations of that other relief as required.

## Part IX: Surveillance

RG 56.203 The ASC has developed a number of surveillance programs, including prospectus post-vetting which involves the examination of prospectuses after lodgment or registration (if applicable). These programs are designed to foster a climate of compliance with the Law. In particular, the prospectus post-vetting program is designed to raise the standards of disclosure so that prospectuses comply with the substantive disclosure provisions of the Law. The Law seeks to ensure that disclosure standards are met in two ways. Firstly, the Law subjects the issuing corporation and others involved in the preparation of the prospectus to potential civil liability if the disclosure in the prospectus is defective. Secondly, the ASC vets prospectuses after lodgment (or when applicable, registration) and has the power to issue a stop order to prevent the issue of securities (see ASC information sheet published in 1995, “Prospectus surveillance program”; speech by Alan Cameron published in 1993, “Prospectuses — who is questioning whose professional judgement?”).

RG 56.204 The primary objectives of the prospectus post-vetting program are ensuring adequate protection for investors and maintaining investor confidence. It does this by requiring prospectuses to include information investors need to make informed investment decisions. Therefore, the ASC checks for contraventions of the Law (particularly s1022 and s1022AA) as well as false or misleading statements or material misrepresentations.

RG 56.205 In post-vetting, the ASC is only concerned with material defects, as defined in s1033(2). The ASC’s post-vetting program does not consider whether the securities offered are desirable investments. The ASC will not take action on minor matters and will not use post-vetting to impose a disclosure standard other than the standard prescribed by the Law.

RG 56.206 If it appears that the prospectus contravenes the prospectus provisions in a substantial respect (for example, containing material that is false, misleading or deceptive or contains a material misrepresentation) the ASC may stop the issue of securities (s1033). The ASC can only issue a final stop order after a hearing at which interested parties have the chance to make oral or written submissions (s1033(3)). However, if the ASC is of the view that the delay would not be in the interest of the public, it can issue a 21 day interim order without first holding a hearing (s1033(4)).

RG 56.207 The ASC will also identify and take appropriate action against promoters who raise funds without lodging a prospectus in contravention of the Law.

## Part X: Life of a prospectus (s1040)

RG 56.208 Securities may not be issued on the basis of a prospectus more than 12 months from the date of issue of that prospectus (s1040). Of course, the life of the prospectus may be shorter if the issuer specifies a shorter period in the prospectus (see s9 definition of “application period”) and it will be interrupted if the ASC issues a stop order under s1033. This period runs from the issue of the prospectus, that is, its publication. It is not a rule that a prospectus is issued on the date included in it under s1021(3), only a rebuttable presumption (see s1021(4)). Because the *Corporate Law Reform Act 1994* increased the life of prospectuses from 6 to 12 months, the ASC will no longer give relief based on NCSC Release 158 or Pro Formas 86 or 87.

RG 56.209 The ASC has given Class Order relief to continuous issuers of debentures and prescribed interests allowing a prospectus to have a life of 13 months in certain circumstances. The ASC will also give relief so that an approved deed can allow prescribed interests to be issued for up to 13 months after the prospectus is issued (reg 7.12.15(1)(b) (see [SPS 96]; [CO 95/823]; [CO 95/822]; [PF 116])).

### Options

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RG 56.210 The ASC is of the view that the issue of securities resulting from the exercise of options may be an issue on the basis of a prospectus issued in relation to those options. Therefore, s1040 applies to an issue of securities more than 12 months after the issue of the prospectus under which the options were issued unless:

- (a) relief from s1040 has been given by the ASC; or
- (b) the issue is an excluded issue, for example, under s66(2)(f) (s1040(2)).

RG 56.211 It is not certain that relief from s1040 is, in fact, necessary when a current prospectus is provided to investors as the basis of issue. Comfort relief is, nevertheless, available on condition that a current prospectus is provided to each investor prior to the exercise of the options (see RG 56.26–RG 56.27). The ASC’s policy on options generally, is presently under consideration.

RG 56.212 The ASC will also give an equivalent modification of s1021(5) in either of the above circumstances. In this context, the ASC is of the view that s1040 applies to the issue of securities under a prospectus which has been issued in Australia, even if they are issued outside Australia by a foreign corporation.

## Part XI: Advertising (s1025, s1026 and s1027)

RG 56.213 Advertising is regulated by s1025–s1027. Section 1025 (concerning “notices”) and s1026 (concerning “reports”) contain restrictions on advertising issues of securities and on publishing reports likely to induce persons to subscribe for securities. Section 1027 contains evidentiary provisions.

### Advertising legal issues

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RG 56.214 After the issue of a prospectus the issuer may advertise the securities to which it relates if each advertisement contains the statements required by s1025(2). An advertisement may contain additional information if it does not infringe any other provision of the Law, such as s995 (misleading or deceptive conduct). For a review of the provisions of the Law which regulate advertising (s995, s1025 and s1026) refer to Superseded Policy Statements 54 and 101.

### Advertising relief

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RG 56.215 Superseded Policy Statement 101 [SPS 101] gives some guidance on how the ASC interprets some of the advertising provisions, their policy and when and how they operate. Specific issues considered include: republishing reports given to the ASX, news reports derived from specified sources and publications relating to a general meeting. [SPS 101] refers to the following Class Order relief from the advertising provisions:

- (a) relief for notices of general meeting;
- (b) relief for discussions relating to a general meeting; and
- (c) relief for republishing certain specified documents (see [CO 95/1259]; [SPS 101]).

RG 56.216 Superseded Policy Statement 54 [SPS 54] contains guidance on image advertising, pre-prospectus tombstone advertising, pre-prospectus roadshow presentations, market research activities and preliminary prospectuses (see [SPS 54]; [MR 93/108]).

### Image advertising

RG 56.217 The ASC will not give relief from the advertising provisions to facilitate “image” advertising (see [SPS 54]).

## **Pre-prospectus “tombstone” advertising**

RG 56.218 The ASC has given class relief from s1025 and s1026 allowing a listed or listing corporation to publish a pre-prospectus tombstone advertisement which contains only those matters specified in Class Order [CO 93/422] (see [SPS 54]; [CO 93/422]; [MR 93/108]).

## **Pre-prospectus “roadshow” presentations**

RG 56.219 The ASC has given relief allowing an issuing corporation, listed or listing on the ASX, to present oral or written material to securities licensees, exempt dealers, exempt investment advisers and securities representatives (see [SPS 54]; [CO 93/421]; [MR 93/108]).

## **Market research**

RG 56.220 The ASC has given conditional class relief from s1025 (but not s1026 or s1078) allowing an issuing corporation, listed or to be listed on the ASX, to conduct genuine pre-prospectus market research if the number of people surveyed does not exceed 5000 (see [SPS 54]; [CO 93/423]; [MR 93/108]).

## **Preliminary prospectuses**

RG 56.221 The ASC has, in the past, given relief to allow a “preliminary prospectus” to be circulated. A preliminary prospectus is a document which may be circulated generally and which gives all the information the Law requires to be contained in a prospectus, except the issue price. The application form is a request to receive the final prospectus and not an offer to subscribe for securities. The ASC has stopped giving this relief because of concerns that people who have made investment decisions on the basis of the information contained in the preliminary prospectus, rather than in the actual prospectus, may not have access to remedies under Pt 7.11 (see [SPS 54]; [MR 93/108]).

RG 56.222 Relief from the advertising provisions has also been given in the following circumstances.

## **Post-prospectus “tombstone” advertising**

RG 56.223 The ASC will give relief from the strict requirement to include all the information referred to in s1025(2) in a “notice” (see Pro Forma 48). This will allow a prospectus issuer to advertise the availability of the prospectus rather than promote the securities offered in the prospectus. The ASC is of the view that, in such cases, strictly “tombstone” advertising which sets out particulars, such as the name of the issuer and the availability of the prospectus but which

included no promotional material, should be allowed (see [MR 91/17] and [MR 91/79]).

## **Pathfinder prospectuses**

RG 56.224 Superseded Policy Statement 8 [SPS 8] gives guidance about when the ASC will modify s1025 to allow the circulation of a pathfinder prospectus. A pathfinder prospectus is a document which does not seek subscriptions, but is designed to facilitate the pricing of shares proposed to be offered, or for settling the contents of the prospectus. This relief is available for any issue of shares or prescribed interests in a class of shares or prescribed interests quoted, or reasonably expected soon to be quoted, on the ASX. The pathfinder prospectus may be circulated only to prospective underwriters, brokers and exempt offerees under reg 7.12.05(a) or reg 7.12.05(e): see [SPS 8]; [PF 11].

## **Relief from s1025(2)(c)**

RG 56.225 Paragraph s1025(2)(c) requires a notice to “specify the date of the prospectus”. The ASC recognises that strict compliance with this requirement is impractical in certain circumstances, for example, when one notice is used to refer to several prospectuses which have different rollover dates. Therefore, the ASC will give relief from this requirement in the circumstances described in Superseded Policy Statement 9: see [SPS 9]; [PF 12].

## **Foreign securities quoted on an ASC approved foreign exchange**

RG 56.226 The ASC has given conditional class relief from the advertising prohibitions (s1025 and s1026) to take account of the incidental circulation in Australia of advertisements which may inadvertently breach the Law. Relief is given for a notice or report, published in a newspaper or periodical printed and substantially circulated outside Australia, which draws attention to an offer to subscribe for foreign securities: see [CO 94/1285] and [CO 94/1286].

RG 56.227 The ASC has also given class relief from the advertising prohibitions (s1025 and s1026) for a notice or report published in Australia, of a body corporate listed on an ASC approved foreign exchange on the analogy of s1026(2)(a), s1026(2)(b) and s1026(2)(c). Relief is available if the notice or report constitutes a publication or republication of information given to the exchange or if it relates to proceedings at a general meeting or is a news report of either of these: see [CO 94/1287].

## **Post-prospectus television and radio advertising**

RG 56.228 The ASC will give conditional relief modifying s1025(2) for television and radio advertising conducted after the relevant prospectus is lodged and, if applicable, registered. The ASC is of the view that this relief makes s1025 better suited to non-print advertising. The relief ensures that investors are adequately informed that a prospectus has been issued and how they may obtain copies: see [PF 48].

## **Employee share schemes**

RG 56.229 The ASC has given class relief from the prospectus provisions of the Law to certain employee share schemes. This relief is referred to in para 59–65 above. The ASC is not prepared to give further relief to permit pre-prospectus advertising in relation to employee share schemes except in accordance with the ASC's general policy (as described above).

## **Business introduction services**

RG 56.229A The ASC recognises that the material contained in introduction service publications may constitute a notice for the purposes of the Corporations Law. Class orders provide relief from the advertising provisions of the Law for offers made through introduction services: see [MR 97/324]; RG 129; [CO 97/2329].

[*Historical note:* RG 56.229A inserted 4/2/1998.]

## Part XII: Securities hawking (s1078)

RG 56.230 The securities hawking provision of the Law (s1078) prohibits a person from going from place to place making an offer or invitation of securities (whether primary or secondary). The reference in s1078(1) to a person “going from place to place” is defined to include a reference to a person communicating with other persons at different places by telephoning or using other eligible communications service: s9 and s1077.

RG 56.231 Exceptions to the prohibition in s1078 include:

- (a) an offer or invitation of securities in a class quoted on the ASX (whether primary or secondary) made by a licensed dealer which is communicated by an eligible communications service (s1078(3));
- (b) an offer or invitation (whether primary or secondary) made by a licensed dealer to a client of that dealer (s1078(3A));
- (c) an offer or invitation made under or accompanied by a prospectus or a secondary sales notice which is sent by post (reg 7.12.17(b) and reg 7.12.17(ba)); and
- (d) the publication of notices which comply with s1025(2) and reports which comply with s1026(2).

RG 56.232 A notice that complies with s1025(2) or a report that complies with s1026(2) is not caught by s1078. This is because s1025(2) and s1026(2) each commence with the statement, “Nothing in this Part prohibits the publishing of ...”, before going on to specify information which must be included in a s1025(2) notice or the types of reports that are not prohibited by s1026(3). Sections 1025, 1026 and 1078 are all found in Pt 7.12.

### **Securities hawking relief**

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RG 56.233 The ASC has adopted the following policies in relation to s1078.

#### **Licensed dealers**

RG 56.234 The ASC has revoked the class order which previously gave conditional class relief from s1078(1) for an offer or invitation (whether primary or secondary and regardless of the means of its communication) by an Australian licensed dealer to a client for securities quoted on an ASC approved foreign exchange (see

[CO 92/713] and [CO 94/1283]). This Class Order was superseded by s1078(3A), which came into force on 4 September 1994. However, licence holders must comply with any licence conditions which apply to dealings in foreign securities.

### **“Small-scale” horse racing syndicates**

RG 56.235 An offer or invitation (whether primary or secondary) to participate in a horse racing scheme is exempt from the securities hawking provisions if it is made in, or accompanied by, a disclosure statement (which complies with s1022) and is sent by post: see SPS 20 (replaced by RG 91); [CO 93/144]; RG 56.38–RG 56.39.

### **Horse breeding schemes**

RG 56.236 An offer to sell an existing interest in a private horse breeding scheme is conditionally exempt from the securities hawking provisions of the Law: see RG 91; [CO 97/1136] and [CO 97/1138].

*[Historical note: RG 56.236 replaced 4/2/1998. The paragraph formerly read: “RG 56.236 An offer to sell an existing interest in a stallion syndicate is conditionally exempt from the securities hawking provisions of the Law (see RG 91; [CO 94/1768]; para 40 above.)”]*

### **Takeovers and schemes of arrangement — share hawking relief**

RG 56.237 Regulation 7.12.17(d) now exempts an offer or invitation in connection with a takeover scheme or scheme of arrangement which is sent by post. Therefore, the ASC has discontinued its previous policy of giving relief to this effect.

### **Debentures**

RG 56.238 The ASC has revoked Class Order [CO 92/79] which gave relief from Div 6 of Pt 7.12 for offers or invitations of debentures (other than convertible notes) which are made or issued to existing holders of debentures of the corporation (other than convertible notes) and sent by post. This relief is no longer necessary because the reference to s66(3)(g) in reg 7.12.17(c) produces the same result.

### **Option contracts (warrants)**

RG 56.239 The ASC has given class relief from s1078 for option contracts (warrants) issued by institutions described under Rule 8.6.1 of the ASX Business Rules: see [CO 91/779]; RG 56.94–RG 56.97 and RG 56.197.

## Exempt stock markets

RG 56.240 The ASC has given relief from s1078 for the secondary trading of securities on the exempt stock markets established and maintained by Queensland Cotton Holdings Ltd and Golden Circle Ltd (see [MR 92/179]). Reference should be made to Superseded Policy Statement 100 on stock markets at [SPS 100.105] and Superseded Policy Statement 105 [SPS 105] on secondary trading.

## Pastoral companies

RG 56.241 The ASC has given relief from s1078 to allow a pastoral company to offer clients deposit-taking services by telephone: see [SPS 48]; [PF 28]; [MR 93/65]; RG 56.78–RG 56.80.

## Charitable bodies

RG 56.242 The ASC has given conditional class relief from s1078 for offers of debentures and prescribed interests by certain charitable bodies: see RG 87; [CO 94/1702]; [CO 94/1703]; [CO 95/464]; [PF 96]; [PF 97]; RG 56.53–RG 56.58.

## Employee share schemes

RG 56.243 The ASC has given class relief from s1078 for employee share schemes which have the benefit of the substantive prospectus class relief referred to in RG 56.59–RG 56.63. If a corporation does not have the benefit of such substantive prospectus relief, relief will be given to allow a prospectus for an employee share scheme to be distributed by personal delivery: see RG 49; [CO 94/1823].

## Secondary sales which comply with s1025

RG 56.244 The ASC will give relief from s1078 as discussed in Superseded Policy Statement 105 [SPS 105]. Conditional relief is available before lodgment of a secondary sales notice for tombstone advertising of the type permitted by Class Order [CO 93/422] and after lodgment (or in the case of a s1043C notice, registration if applicable) for advertisements of the type permitted by s1025(2): see [SPS 105.51].

## Real estate companies

RG 56.245 The ASC has given relief from s1078 for certain secondary offers of shares in real estate companies: see RG 67; [CO 94/1292]; RG 56.46.

## **Time-sharing schemes**

RG 56.246 All secondary sales of interests in time-sharing schemes have the benefit of conditional relief from s1078: see [SPS 66]; [CO 94/1826]; RG 56.45.

## **Business introduction services**

RG 56.246A The ASC has given relief from Div 6 for offers of securities which are advertised through introduction services: see [MR 97/324]; RG 129; [CO 97/2329].

*[Historical note: RG 56.246A inserted 4/2/1998.]*

## **Part XIII: Applications for relief**

RG 56.247 Applications for relief referred to in this guide may be made at any ASC Regional Office. Regulatory Guide 51 gives guidance on making applications.