



ASIC

Australian Securities & Investments Commission

[Draft PS]

Better prospectus disclosure

Chapter 6D—Fundraising

Issued xx/yy/2006

What this policy statement is about

[PS no.1] This policy statement helps prospectus issuers to comply with their disclosure obligations under the *Corporations Act 2001* (Corporations Act). Better disclosure will help investors make informed decisions about investing in securities.

[PS no.2] It gives guidance on:

A the content requirements for prospectuses

see [PS no.5]–[PS no.19]

B how to word and present a prospectus in a clear, concise and effective manner

see [PS no.20]–[PS no.52]

C some specific disclosure issues

see [PS no.53]–[PS no.84]

[PS no.3] This policy statement applies to prospectuses prepared for securities under Chapter 6D of the Corporations Act only. Some aspects will also help issuers of offer information statements: s709 and 715.

[PS no.4] Primarily, this policy statement deals with the content of a prospectus, rather than relief from the prospectus provisions. Policy Statement 151 *Fundraising: Discretionary Powers* [PS 151] deals with prospectus relief. For our policy on forecasts and projections in

prospectuses, see Policy Statement 170 *Prospective financial information* [PS 170].

Important note: The guidance in this policy statement does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act applies to you. It is your responsibility to determine your obligations under the Corporations Act. Examples in this policy statement are purely illustrative and are not exhaustive. This policy statement is based on the legislation and regulations as at 08/02/05.

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A Prospectus content

Our policy

[PS no.5] If you are an issuer preparing a prospectus, you must:

- (a) include all information that investors and their professional advisers would reasonably require to make an informed assessment of the issuer and the securities being offered (s710);
- (b) make specific disclosures (s711); and
- (c) word and present the prospectus in a clear, concise and effective manner (s715A).

What is ASIC's role?

[PS no.6] We do not prescribe the content of prospectuses. The Corporations Act places responsibility on you as issuer to decide whether the content of your prospectus complies with the disclosure requirements. This is because you are in the best position to assess what information is relevant and material.

[PS no.7] However, to help you comply with your disclosure obligations, this policy statement gives guidance on:

- (a) what investors and professional advisers may expect you to disclose (see [PS no.11]);
- (b) how to prepare a clear, concise and effective prospectus (see Section B); and
- (c) specific topics of disclosure (see Section C).

[PS no.8] You must lodge your prospectus with us. We do not generally pre-vet (review or provide advice on) draft prospectuses or help you to prepare a prospectus before you lodge it.

Underlying principles

[PS no.9] The general prospectus content requirement in s710 is designed to:

- (a) promote efficiency in the capital markets;
- (b) promote disclosure of relevant information;
- (c) reduce the likelihood of omitting important information;
- (d) focus issuers on the information needs of investors; and

- (e) be sufficiently flexible to accommodate changes in investors' information needs.

Note: See Companies and Securities Advisory Committee Prospectus Law Reform Sub-Committee Report March 1992 p29-31.

Explanation

General content requirement: s710

[PS no.10] Under s710, a prospectus must contain all information that investors and their professional advisers would reasonably require to make an informed assessment as to:

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

Note: Section 710(1) contains a separate disclosure requirement for an offer to grant (or transfer) a legal or equitable interest in securities, or grant (or transfer) an option over securities. For example, disclosure is needed about both the rights and liabilities attaching to the option and the underlying securities.

What do investors expect to find?

[PS no.11] The prospectus must contain information only to the extent it is reasonable for investors and their professional advisers to expect to find it in the prospectus: s710.

[PS no.12] Examples of information that, in our experience, investors and their professional advisers expect to find are:

- (a) description of the business and its structure, strategy and plans;
- (b) financial information;
- (c) information about prospects;
- (d) risks (see [PS no.57]);
- (e) description of important contracts (but see [PS no.44] and [PS no.45]);
- (f) use of proceeds (see [PS no.63]);
- (g) background of senior managers and directors and details of their remuneration;
- (h) dividend policy;
- (i) major shareholders and related party transactions;

- (j) taxation; and
- (k) disclosure about material litigation.

[PS no.13] You should view this list of topics as indicative. You will need to consider whether in your case investors would reasonably require all this information or other types of information in making an investment decision.

Specific disclosure requirements: s711

[PS no.14] There are also specific prospectus disclosure requirements. These are:

- (a) The terms and conditions of the offer (s711(1)). This means, for example, that the prospectus must disclose the consideration payable (or a range). See also [PS no.80].
- (b) The nature and extent of interests held by and benefits given to, for example, directors, advisers, promoters and underwriters (s711(2)–(5)). See [PS no.68].
- (c) If the prospectus states or implies the securities will be able to trade on a financial market, information on the quotation of securities (s711(5)). See [PS no.76].
- (d) The expiry date of the offer (s711(6)).
- (e) The fact the prospectus has been lodged with ASIC (s711(7)).
- (f) Any information required by the regulations (s711(8)).

Note: As of February 2006, no regulations have been made under s711(8).

ASIC review of prospectuses

[PS no.15] The *Corporate Law Economic Reform Program Act 1999* entirely removed the requirement on ASIC to register or refuse to register a prospectus. This completed a shift away from the 1980s position that the regulator examined each prospectus before it was registered. The principle that the issuer should be responsible for its prospectus underpins this shift.

[PS no.16] We will conduct selective compliance reviews of disclosure documents following their lodgment. We may start a review either before or after the end of the exposure period (if there is one).

Note: See Policy Statement 152 *Lodgment of disclosure documents* [PS 152.45] on our approach to the scrutiny of disclosure documents lodged with ASIC, including ASIC's stop order power.

Industry guidelines

[PS no.17] Generally, industry guidelines, standards or codes have a useful role to play in fleshing out what needs to be done to comply with the Corporations Act content requirements.

[PS no.18] Guidelines may relate to specific types of issuers or disclosure topics such as hedging arrangements, prudential requirements, accounting treatment or valuations. For example, the JORC and VALMIN Codes concern disclosure about mineral and other resources.

[PS no.19] You should usually use terminology consistent with widely accepted industry guidelines, and use it in the same sense that it is used in the guidelines. (But we discourage unnecessary legal or technical jargon: see [PS no.44]). If a prospectus diverges materially from a widely accepted industry guideline, you should highlight the divergence. You should also clearly explain the reasons for the divergence.

B Clear, concise and effective

Our policy

[PS no.20] The information in a prospectus ‘must be worded and presented in a clear, concise and effective manner’: s715A. We may issue a stop order where we are satisfied that a prospectus is not clear, concise and effective: s739.

[PS no.21] You must comply with both the prospectus content requirements (s710 and 711) and the clear, concise and effective requirement.

How to prepare a clear, concise and effective prospectus

[PS no.22] To help you prepare a clear, concise and effective prospectus, we give the following guidance:

- (a) make the prospectus as short as possible (see [PS no.28]);
- (b) leave out extraneous information (see [PS no.30]);
- (c) highlight key information (see [PS no.32]);
- (d) organise the information in a logical way (see [PS no.36]);
- (e) use navigation aids (see [PS no.37]);
- (f) focus on the needs of different audiences (see [PS no.38]);
- (g) consider incorporating technical and detailed financial information by reference (see [PS no.42]);
- (h) use plain language and avoid jargon (see [PS no.44]);
- (i) pay attention to typeface and layout (see [PS no.46]); and
- (j) use a range of communication tools (see [PS no.47]).

[PS no.23] In developing this guidance, we considered our Good Disclosure Principles. These help you to comply with the Product Disclosure Statement requirements, including the clear, concise and effective requirement under s1013C(3): Policy Statement 168 *Disclosure: Product Disclosure Statements* [PS 168]. See also [IR 04/71] *ASIC issues guidance on PDS disclosure* (21 December 2004).

How to deal with complex products

[PS no.24] Where the terms of a security or your offer or the structure of your business is complex, you need to explain it to retail investors in a

clear, concise and effective manner. The clear, concise and effective requirement applies even if the product is complex.

[PS no.25] You need to emphasise the implications for investors and practical effect of terms or structure. You should discuss substance over form.

[PS no.26] Ultimately, the length and complexity of a prospectus are within your control because you, the issuer, decide what securities to offer to retail investors and how complex they are.

Underlying principles

[PS no.27] Investors are more likely to read a short prospectus than a long one. Investors should easily be able to find and read the information they need to make an informed investment decision. They should also be able to understand this information.

Explanation

How to prepare a clear, concise and effective prospectus

Make the prospectus as short as possible

[PS no.28] A prospectus should be as short as possible. We may issue a stop order if the prospectus is too long.

[PS no.29] A long and complex prospectus, however comprehensive, is not an effective way to communicate information. An investor will be less likely to read a long prospectus or to find the information that they seek. Issuers should find a way to make prospectuses shorter than many have been in the past. For example, you should avoid repeating information (although a summary of key information at the front of the prospectus may be useful).

Leave out extraneous information

[PS no.30] You should leave out extraneous information from your prospectus. The prospectus should be limited to information that is likely to affect the decision to invest. You should be selective about what you include and avoid using recycled, or ‘boilerplate’, text.

[PS no.31] Including extraneous information increases the risk that investors do not read, understand or place weight on important information. Investors may be misled (s728) or confused.

Highlight key information

[PS no.32] You should highlight key information about the issuer, its business and the security at the front of the prospectus.

[PS no.33] You should give at least as much prominence to the risks as to the benefits of the investment.

[PS no.34] You should draw an investor's attention to any unusual or novel attributes of your business, its structure or the security. For example, if the key assets of your business are subject to unusual pre-emptive rights, this may need highlighting.

Note: You may wish to consult *International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers* (published by IOSCO in September 1998) for discussion on the type of information that should be presented in the forefront of a prospectus – www.iosco.org.

[PS no.35] You should draw an investor's attention to the information they need for example through bold, coloured or large type or by using graphical illustrations: see also [PS no.46] and [PS no.47].

Organise the information in a logical way

[PS no.36] The prospectus should flow from simple (as well as key) information to more detailed, technical information. You should organise information logically and reflect its relationship to other information in the document. You should not fragment related information by inserting it at different points so that its significance is lost.

Use navigation aids

[PS no.37] Investors should be able to easily navigate the document and find the information they need. You should use navigation aids like tables of contents and signposting. If cross-referencing in the prospectus or to another document is necessary, it must be accurate.

Focus on the needs of different audiences

[PS no.38] You should focus on the needs of different audiences for a prospectus:

- (a) retail investors; and
- (b) professional advisers (and institutions).

[PS no.39] Subsection 710(1) itself refers to different audiences: investors and their professional advisers. The scope and detail of disclosure will not be the same for each group. We may issue a stop order

for a prospectus in a retail offer that caters to the needs of professional advisers or institutions only.

[PS no.40] You may consider ‘user testing’ a prospectus to check that it meets the needs of retail investors. We may give relief from the pre-prospectus advertising provisions to allow you to do this with a limited sample of investors: s734(2) and (4).

[PS no.41] You could also review other research or reference material on the communication needs of retail investors.

Incorporate technical information by reference

[PS no.42] You may incorporate by reference into a prospectus a document lodged with ASIC: s712. This may help you prepare a shorter prospectus, limited to information that is useful to all investors, including retail investors. At the same time, you will meet the obligation to provide more technical or detailed financial information that is reasonably required by professional advisers or institutions.

[PS no.43] Incorporated documents should not contain surprises for an investor who only reads the prospectus. The prospectus should identify the incorporated document and inform investors of their right to get a copy: s712(1). If the document is primarily of interest to professional advisers or institutions, the prospectus must state this and describe its contents: s712(2)(a). In any other case, the prospectus must include sufficient information to allow an investor to decide whether to get a copy: s712(2)(b).

Use plain language and avoid jargon

[PS no.44] You should use language that is as plain as possible in a prospectus. Expression should not be legalistic or over-complex.

[PS no.45] If you must describe an important contract (e.g. a trust deed, joint venture agreement, licence or supply contract), use plain language. Rather than merely summarising the contract, you should emphasise its implications for investors and practical effect. If you cannot avoid using legal or industry jargon, you should clearly explain the meaning of the terms. But you should avoid lengthy glossaries as a primary means of communicating information.

Pay attention to typeface and layout

[PS no.46] Investors can find and read the information they need more easily if you for example:

- (a) select an appropriate type face and size;

- (b) use white space;
- (c) adjust the space between lines;
- (d) keep lines to a reasonable length; and
- (e) keep paragraph length relatively short.

Use a range of communication tools

[PS no.47] You should consider using a range of communication tools to promote understanding (e.g. text, tables, diagrams, boxes and graphs). Some issues are uniquely suited to being represented in graphical form. You must not use communication tools in a way that might mislead or confuse investors.

How to deal with complex products

[PS no.48] Examples of complex products are:

- (a) *Complex debt products*. These include structured products like collateralised debt obligations (CDOs) and complex hybrid securities. These products contain a range of non-standard features that affect their risk, return and liquidity. They are hard to compare to other products. Issuers have tended to use jargon heavily in disclosure for these products. CDOs give investors exposure to credit risk in portfolios of underlying loans. Retail investors may not understand the implications of a particular loan default for the CDO as a whole. Or they may not understand that a credit rating sometimes applies to part of a CDO only.
- (b) *Stapled securities*. These may have a complex structure, significant tax implications and a defensive effect in a takeover. The issuer should highlight the role of any related parties in the structure, fees, the nature of the investment and risks.

Meaning of ‘clear, concise and effective’

[PS no.49] ‘Clear, concise and effective’ should be read as a compound phrase. Each of these words qualifies the operation of the other words.

Note: See *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661, where the court considered another compound phrase, ‘efficiently, honestly and fairly’ now in s912A(1).

Transaction-specific prospectuses

[PS no.50] Our policy on more concise, transaction-specific prospectuses for offers of continuously quoted securities under s713 is in Practice Note 66 *Transaction-specific disclosure* [PN 66].

[PS no.51] You may prepare a profile statement for an offer in addition to the prospectus, but only if we have approved the making of offers of that kind with a profile statement: s709(3).

[PS no.52] We will approve the use of profile statements only for an industry where we can determine content requirements promoting comparison between products. Previously, we approved the use of profile statements for certain unlisted managed investment schemes, but a PDS is now needed for these products: Superseded Policy Statement 153 *Profile statements* [PS 153].

C Specific content issues

Our policy

[PS no.53] This section gives guidance on some specific prospectus content issues:

- (a) risks (see [PS no.57]);
- (b) high-yield debentures (see [PSno.61]);
- (c) use of proceeds (see [PS no.63]);
- (d) confidential information (see [PS no.66]);
- (e) disclosing interests: s711(2)-(4) (see [PS no.68]);
- (f) indication of listing: s711(5) (see [PSno.76]);
- (g) share allocation (see [PS no.80]);
- (h) waivers from listing requirements (see [PS no.82]);
- (i) pro forma financial information (see [PS no.83]) ; and
- (j) international accounting standards (see [PS no.84]).

[PS no.54] We have discussed most of these issues previously in media or information releases or policies. We might add to this list from time-to-time. The fact we have not identified a specific issue does not mean that you do not need to include it in a prospectus.

Note: See ‘Related Information’ for a list of these media and information releases.

Underlying principles

[PS no.55] While issuers have the responsibility to decide whether the content of their prospectus complies with the law, we ‘act as a “watch dog” on their activities’: Explanatory Memorandum to the Corporations Act 1989 para 3090, discussing proposed lodgment, rather than ASIC registration, of prospectuses.

[PS no.56] As part of this role, we have from time-to-time highlighted areas of poor disclosure. For example, we have announced the reasons for issuing stop orders.

Explanation

Risks

[PS no.57] Risk disclosure should be accurate and meaningful. It should not be a mere disclaimer or ‘boilerplate’. Disclosure of risks should specifically address the particular issuer and security as well as general matters impacting the business, such as industry conditions.

[PS no.58] Risk disclosure may include:

- (a) *Market risk*. Risk of loss because of adverse changes in the market for the security or the factors that determine the value of the security.
- (b) *Impact of the business cycle*. Implications of an economic downturn.
- (c) *Credit risk*. Risk of loss as a result of the default of creditors or counterparties.
- (d) *Business risk*. Other business risks like increased levels of competition, product development, barriers to entry or access to finance.
- (e) *Liquidity risk*. The risk that an investor is unable to exit or realise their investment because the market for the securities is illiquid, because of the terms of the security or because the issuer cannot meet its obligations under the security.
- (f) *Operational risk*. The risk of loss from fraud, systems failure or a legal issue (including enforceability of contracts, status of intellectual property rights and breach of regulatory requirements).

[PS no.59] In considering what risk factors to address, you should consider the likelihood of a circumstance arising and the impact if it did arise. You should not normally disclose a remote risk with limited impact.

[PS no.60] You should highlight risk information in the prospectus. You should place it at the front of the prospectus. It should be at least as prominent as information on potential benefits of the offer: see also [PS no.32].

High-yield debentures

[PS no.61] A high-yield debenture issuer should give disclosure about its borrowers, loan products, lending policies, approval process and credit and risk management systems. By ‘high-yield’ we generally mean prospectuses offering a return at least 3% above the bank term deposit rate. Retail investors will usually need very clear disclosure to help them to discern or adequately price the risks involved in a high-yield debenture investment.

Common disclosure issues

[PS no.62] The most common disclosure issues for high-yield debentures are:

- (a) *Type of security.* You should disclose clearly whether you have a first ranking mortgage over real property or not. If you do not have first ranking security, the prospectus should explain the risks associated with ranking behind other lenders. You should consider using a diagram to show investors where their security sits in a typical loan made by the issuer.
- (b) *Related party lending.* You should fully disclose any possible conflicts of interest in lending to related parties and the risks associated with these transactions. For example, the prospectus should:
 - (i) highlight any differences in lending procedures and policies between loans to related parties and others;
 - (ii) give details of existing loans to related parties; and
 - (ii) disclose the risks associated with the lack of diversification that can result from lending mainly to related parties.
- (c) *Property development.* Investors need to understand that in lending to an issuer that on-lends to property developers, they are exposed to some of the property development risk. You should not say you invest in a 'portfolio of mortgages' when you really lend to property developers. You should disclose specific development risks, for example "greenfield" developments where council approval has not been obtained.
- (d) *Lack of diversification.* You should also disclose risks associated with a lack of diversification from lending in a single market segment, like property development.
- (e) *Valuation of property.* A key risk area is the valuation of property against which a loan is secured. You should disclose a current, independent valuation of the property. The valuation should not be 'as complete' (include the value of a proposed development). You should disclose the purchase price of the property. It is best practice to use a panel of valuers, rather than the same valuer to value all properties.
- (f) *Capitalising interest.* Where the nature of the projects to which you propose to lend money makes it likely that interest will be capitalised, you should clearly disclose this. Capitalised interest is where the lender adds an amount representing interest to the amount owing. Generally, the borrower is under no obligation to pay interest until the end of the loan.

- (g) *Bad debts.* You should disclose the existence of and provisions for bad debts. You should be careful not to make misleading or deceptive statements that there are a low level of defaulting loans if there are loans on which interest has been capitalised and you have been agreeing to extensions on the date for repayment.

Note 1: See High-yield debentures ASIC surveillance report (February 2005).

Note 2: Continuous debenture issuers should have regard to Policy Statement 155 *Debenture prospectuses* [PS 155], Class Order [CO 00/173] *Debenture prospectuses: incorporation of information on application forms* and Class Order [CO 00/174] *Debenture prospectuses: updating of interest rate and term information*, which give relief for the disclosure of interest rate and term information.

Note 3: Our policy on high-yield debentures also applies to high-yield products offered under a Product Disclosure Statement such as interests in mortgage schemes.

Use of proceeds

[PS no.63] You should address how a company will use the funds raised. You should give a breakdown if the company has different uses for the funds.

[PS no.64] You should disclose the minimum subscription and the consequences of it not being met: s711(1). Where the minimum subscription is less than the full amount or the fundraising is not fully underwritten, you should disclose the financial position and prospects of the company in the event the offer is not fully subscribed. For example, it might affect your ability to continue as a going concern, or materially alter your debt levels. You should also disclose this information where a bookbuild price below that expected would reduce the amount raised.

[PS no.65] The prospectus should also describe how you will apply the funds if less than the full amount is raised. For example, the prospectus should say:

- (a) Whether some or all of the stated activities might need to be scaled back, and how this will be done. Investors are not assisted if you merely state that the activities will be scaled back, for example, ‘as appropriate’ or ‘as the directors determine’.
- (b) Whether the funds will be allocated to stated activities in any particular priority until each activity is fully funded, or whether they will be allocated pro rata.

Confidential information

[PS no.66] There is no confidentiality exemption from the prospectus requirements. The commercial benefits of keeping certain information

confidential are relevant in assessing what is reasonable for investors to require or expect under s710.

[PS no.67] But these commercial benefits do not justify withholding information that might deter investors from acquiring the securities if that information were generally known.

Disclosing interests: s711(2)-(4)

[PS no.68] You must disclose interests or benefits given to, for example, professional advisers named in the prospectus, directors and underwriters in the formation or promotion of the issuer or offer of securities: s711(2)–(4).

[PS no.69] A purpose of s711(2)–(4) is to ensure that where people involved in preparing a prospectus have an interest in the outcome of the offer, these interests are disclosed. Paragraph 8.99 of the Explanatory Memorandum to the Corporate Law Economic Reform Program Act 1999 says:

‘Requiring the disclosure of all significant interests in the body or in the issue will provide a significant disincentive for persons involved in the offer to act improperly.’

Particulars needed

[PS no.70] It is not sufficient to say that a person has been paid normal, usual or standard fees: s711(3). You should disclose the nature of an interest in enough detail for an investor to evaluate its possible impact on the person’s contribution to the prospectus. You must quantify the interest in terms of a cash amount, number of shares, or other commercial terms. This may involve disentangling and explaining other transactions.

[PS no.71] If disclosure needs to be settled before final bills are rendered, an approximate figure is adequate if it is not misleading.

[PS no.72] The expression ‘interests’ in ‘the formation or promotion of the body’ has a wide meaning. It includes any benefit that a person might derive from the flotation of the company, including indirect benefits and benefits derived passively: *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215. You should disclose legal fees for transactions that are conditional on, occur in the lead-up to or are part of preparing the business for the capital raising. The obligation is to disclose fees for services ‘*in connection with* the formation or promotion of the body or the offer of the securities’: s711(3).

[PS no.73] Examples of indirect interests or benefits that you should disclose are:

- (a) Audited accounts are incorporated by reference in a prospectus. The auditor has not received any additional fee for consenting to the inclusion of the audit report in the prospectus. You should disclose some proportionate amount of the fee received by the auditor for preparing the audit report. If it is not practical to apportion the fee, you should disclose the entire fee with an explanation of what else it includes. In charging for the audit report, the auditor might have factored in an amount to compensate for any subsequent use of the report.
- (b) Directors of the issuer are also directors of the issuer's holding company and only get fees from the holding company. You should disclose some proportion of these fees. If it is not practical to apportion the fees, you should disclose the entire amount with an explanation of what else it includes.
- (c) Directors of the issuer hold shares in the issuer's holding company. You should disclose the amount of any increase in the value of the directors' shares expected as a result of the offer.
- (d) Directors have an interest in property adjacent to the development to be carried out by the company. This property is likely to increase in value as a result of the development. You should disclose this likely increase in value.

Relief from s711(3)

[PS no.74] You need to disclose interests held in the last two years only: s711(2). In contrast, s711(3) is not limited to benefits given in the last two years.

[PS no.75] We may give case-by-case relief from s711(3) where disclosure would be impractical or unreasonable, or the cost of disclosure would not result in a commensurate benefit to investors. We may give relief where records that would support disclosure no longer exist. We will consider whether it is reasonable to obtain the information in view of how long ago it was created. But we will not give relief merely because the information was created more than two years ago. We have provided relief for material benefits given more than five years previously and other benefits given more than two years previously.

Indication of listing: s711(5)

[PS no.76] If the prospectus says or implies that the securities will be able to be traded on a financial market, you must say that:

- (a) the securities have been admitted to quotation; or
- (b) an application has been made for admission; or

(c) an application will be made within seven days after the date of the prospectus: s711(5).

[PS no.77] If you cannot include any of these statements without misleading investors, you cannot give an indication of listing.

[PS no.78] This requirement is broad, so it applies where the issuer says that it may seek admission after some significant period has elapsed.

[PS no.79] The policy of s711(5) is that holding out the prospect of admission to quotation, even indicatively, is likely to influence people to invest. The quotation of securities will generally be fundamental to their future marketability and liquidity. An indication of quotation also suggests to the investor that the issuer will be subject to compliance with the listing rules and to supervision by the financial market.

Share allocation

[PS no.80] The prospectus should disclose the issuer's and underwriters' share allocation policy so that investors understand the terms and conditions of the offer: s711(1). Prospectuses generally create contractual conditions dealing with allocations. If the issuer and underwriters do not observe these conditions, they may be subject to civil action. Nor may the issuer and underwriters engage in misleading or deceptive conduct concerning allocations: s728 and 1041H.

Note: See [MR 98/3] *Share allocation policy*.

[PS no.81] For example, we expect you to highlight:

- (a) whether and under what circumstances the issuer or underwriter will allocate securities to investors in the fundraising transaction at lower prices (under the prospectus offer or not). A lower price includes an effective price taking into account concessionary fees;
- (b) what type of investors may be allocated shares at lower prices;
- (c) how priorities between applicants will be determined where the offer is over-subscribed, and who will make those decisions;
- (d) on what terms an underwriter may on-sell the securities (for example, whether the underwriter may consider allocating securities which it is initially unable to place at a price lower than that paid by other investors in the offer); and
- (e) allocation of shares to underwriters and directors and officers of the issuer and their 'friends and family'.

Waivers from listing rules

[PS no.82] Market operators, such as the ASX, may grant waivers to an issuer from certain listing rules. You will need to assess whether investors would reasonably need disclosure about the waiver.

Pro forma financial information

[PS no.83] It may be useful and at times necessary to include pro forma financial information in prospectuses to meet the disclosure requirement in s710. We have recently published a draft guide *Disclosing pro forma financial information*: see [IR 05-43] (29 July 2005). It proposes guidelines for using pro forma financial information in a prospectus. For example, you should:

- (a) disclose corresponding information in accordance with accounting standards;
- (b) not give greater prominence to pro forma financial information than corresponding information in accordance with accounting standards;
- (c) disclose the amount and nature of all material adjustments made to the statutory financial information to derive the pro forma financial information; and
- (d) disclose whether the pro forma and statutory information has been audited or reviewed.

International Financial Reporting Standards

[PS no.84] We have issued Guide 160 *Disclosing the impact of international accounting standards in prospectuses and other disclosure documents* (22 April 2005) to help you prepare disclosure. This guide resulted from the adoption of the International Financial Reporting Standards as Australian accounting standards for financial years starting on or after 1 January 2005.

Key terms

[PS no.85] In this policy statement, terms have the following meanings:

ASIC The Australian Securities and Investments Commission.

ASX The Australian Stock Exchange Ltd.

[CO 00/173] (for example) An ASIC class order (in this example numbered 173 of 2000).

Corporations Act The *Corporations Act 2001*.

IOSCO The International Organisation of Securities Commissions.

JORC Code The Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves.

[PN55] (for example) An ASIC practice note (in this example numbered 55).

[PS170] (for example) An ASIC policy statement (in this example numbered 170).

s710 (for example) A provision in the Corporations Act, unless a contrary intention appears.

VALMIN Code The Code for the Technical Assessment and Valuation of Mineral and Petroleum Assets and Securities for Independent Expert Reports.

Related information

[PS no.86]

Headnotes

Prospectus disclosure, industry standards or codes, misleading or deceptive conduct, clear, concise and effective, Good Disclosure Principles, lodgment

Class orders

[CO 00/173] *Debenture prospectuses: incorporation of information on application forms*

[CO 00/174] *Debenture prospectuses: updating of interest rate and term information*

[CO 00/176] *Pre-prospectus market research*

Policy statements, practice notes and guides

Policy Statement 56 *Prospectuses* [PS 56]

Policy Statement 151 *Fundraising: Discretionary Powers* [PS 151]

Policy Statement 152 *Lodgment of disclosure documents* [PS 152]

Policy Statement 155 *Debenture Prospectuses* [PS 155]

Policy Statement 158 *Advertising and publicity for offers of securities* [PS 158]

Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* [PS 168]

Policy Statement 170 *Prospective financial information* [PS 170]

Practice Note 55 *Prospectuses—citing experts and statements of interests* [PN 55]

Practice Note 60 *Updating and correcting prospectuses and application forms* [PN 60]

Practice Note 66 *Transaction-specific disclosure* [PN 66]

Practice Note 70 *Prospectuses for cash box and investment companies* [PN 70]

Guide to reading a prospectus [INFO 1420]

Guide 160 Disclosing the impact of international accounting standards in prospectuses and other disclosure documents (issued April 2004)

Legislation

Chapter 2L and s710(1), 710(2), 711(1)-(8), 715A, 718, 728, 739 and 912A

Cases

Story v National Companies and Securities Commission (1988) 13 NSWLR 661

Tracy v Mandalay Pty Ltd (1953) 88 CLR 215

Policy proposal paper

CLERP 9 Bill Product disclosure: discretionary powers (March 2004)

Draft guide *Disclosure of pro forma financial information* (July 2005)

Media and information releases

[MR 98/3] Share allocation policy (8 January 1998)

[MR 00/69] ASIC issues CLERP fundraising policies (17 February 2000)

[MR 04/001] ASIC protects over \$465 million in shareholders' funds (15 January 2004)

[MR 04/002] ASIC focuses on defective debenture prospectuses (6 January 2004)

[MR 04/124] ASIC scrutinises recent debenture prospectuses (29 April 2004)

[MR 04/226] More than \$300 million of shareholders funds protected in last three months (14 July 2004)

[IR 01/05] ASIC provides guidance for preparers and reviewers of prospective financial information included in disclosure documents (7 February 2001)

[IR 03/06] Fundraising documents have common failures (10 March 2003)

[IR 04/28] Stapled securities (29 June 2004)

[IR 05/43] ASIC releases draft guide on using pro forma financial information (29 July 2005)

Other

United States Securities and Exchange Commission *A Plain English Handbook: How to create clear SEC disclosure documents* (August 1998).

United Kingdom Financial Services Authority *Implementation of the Prospectus Directive – Feedback on CP 04/16 and CP 05/7 and near final Prospectus Rules* (June 2005)