



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 107

Electronic prospectuses

Chapter 7 — Securities

Issued 18/9/1996

Updated 10/2/2000

From 5 July 2007, this document may be referred to as Regulatory Guide 107 (RG 107) or Policy Statement 107 (PS 107). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 107.1) or their policy statement number (e.g. PS 107.1).

Editor's note: In June 1999, ASIC executed a new electronic prospectus class order, Class Order [CO 99/790]. Class Order [CO 96/1578] is revoked in relation to prospectuses lodged with ASIC on or after 1 September 1999.

In February 2000, ASIC granted new electronic applications relief. The relief is in Class Order [CO 00/43]. (See also Regulatory Guide 150 *Electronic applications and dealer personalised applications* (RG 150).) Class Order [CO 00/43] is based on Class Order [CO 99/790]. Class Order [CO 00/43] substantially replicates the relief given to allow electronic prospectuses to be distributed but provides more flexible relief for electronic application forms.

If a prospectus is lodged before the *Corporate Law Economic Reform Program Act 1999* commences on 13 March 2000, persons to whom Class Orders [CO 99/790] or [CO 00/43] apply may choose to comply with either of those class orders.

If a prospectus or other disclosure document is lodged after the CLERP Act commences, the distribution of electronic disclosure documents and electronic application forms will be covered by Class Order [CO 00/44]. Class Order [CO 00/44] is based on Class Order [CO 00/43] but is consistent with the CLERP Act.

RG 107 should be read in light of Class Orders [CO 00/43] and [CO 00/44].

Headnotes

Distributing electronic prospectuses; Pt 7.12; securities hawking; s1078; electronic supplementary and replacement prospectuses; electronic notices and notices referring to electronic prospectuses; s1025; electronic offers of foreign securities and to foreign investors; electronic secondary trading of unquoted securities; Div 3A of Pt 7.12.

Contents

Summary	2
Purpose	3
Part I — Background	5
Part II — Broad regulatory approach of ASIC	6
Part III — Prospectus provisions of the Law	8
Basic prohibitions: s1018 and s1020	8
“Copy” question	9
Securities hawking	10
Form requirement	11
Definition of “prospectus” and prospectus liability	11
Supplementary and replacement prospectuses	12
Part IV — ASIC’s electronic prospectuses policy	13
Summary	13
Application form attached to, or accompanied by, electronic prospectus: investor receives prospectus information	14
Complete and unaltered prospectus	16
Accepting applications	16
Third parties passing on electronic prospectus	17
Electronic prospectus contains the same information as the paper prospectus lodged	17
Experts’ consent	19
Paper copy of prospectus to be provided on request	20
Advertising and securities hawking	20
Investor receives updating information	22
Part V — Electronic notices referring to paper prospectuses	25
Part VI — Cross-border offers	26
Foreign securities	26
Offers accessible overseas	27
Part VII — Secondary offers of unquoted securities	29
Applications	29

Summary

The main purpose of this guide is to set out when ASIC will allow the use of electronic prospectuses. An “electronic prospectus” is any prospectus which is distributed in electronic rather than paper form. ASIC’s primary focus in developing this guide was on electronic prospectuses issued by internet or other computer networks, CD-ROM and floppy disk. ASIC considers that

proposals for using electronic prospectuses should be allowed when the policy underlying the prospectus provisions of the Corporations Law (the Law) is satisfied. The fundamental objective of the prospectus provisions is to ensure that investors are able to make informed investment decisions on the basis of a prospectus containing all material information about the securities being offered and the issuer. In summary, ASIC will give relief to allow issuers to distribute electronic prospectuses if:

- (a) the issuer lodges a paper prospectus containing an application form with ASIC. (The issuer may distribute paper copies of the prospectus in the usual manner under the Law);
- (b) the issuer and any other person who passes on an application form takes reasonable steps to ensure that the investor receives an application form attached to, or accompanied by, an electronic prospectus or a print out of it;
- (c) the issuer takes reasonable steps to ensure that the electronic prospectus received by the investor is complete and protected from alteration or tampering;
- (d) the electronic prospectus contains the same information in the same sequence as the paper prospectus lodged with ASIC except for differences allowed by ASIC;
- (e) the issuer provides a free paper copy of the prospectus lodged if requested;
- (f) the electronic prospectus and any promotional material are made available in a way that encourages investors to make decisions on the basis of the prospectus and not on the basis of promotional material or pressure selling; and
- (g) the investor receives any necessary updating information before the investment decision is finalised.

Purpose

RG 107.1 In this guide ASIC sets out what relief it will give from the Law to allow the use of electronic prospectuses. ASIC will give relief by class order (see Class Order [CO 96/1578]). ASIC expects dramatic and continuing advances in electronic commerce and information technology relevant to offers for subscription of securities. ASIC may refine this guide in light of technological and market developments and its regulatory experience.

RG 107.2 This guide considers the regulatory questions associated with issuing electronic prospectuses on the basis that a *paper* prospectus has been lodged with ASIC. It is keen to allow alternative methods of

distribution of the lodged paper prospectus. The guide does not provide any relief from the substantive prospectus content requirement (s1022). While this guide does not consider the question of lodging prospectuses in electronic form, ASIC will consider this question in the future.

RG 107.3 This guide contains the following information and considers the following questions:

- (a) Part I includes background information, including the benefits of electronic prospectuses for the securities market (RG 107.7–RG 107.12);
- (b) Part II sets out ASIC’s broad regulatory approach to electronic prospectuses (RG 107.13–RG 107.16);
- (c) Part III explains the legal questions which arise under the Law for electronic prospectuses (RG 107.17–RG 107.44);
- (d) Part IV explains when and how ASIC allows issuers to distribute electronic prospectuses and allows securities to be issued on the basis of such prospectuses (RG 107.45–RG 107.96);
- (e) Part V explains how electronic advertisements referring to paper prospectuses are regulated (RG 107.97–RG 107.98);
- (f) Part VI briefly explains how ASIC will apply the principles in this guide to offers of foreign securities and what considerations apply to offers of Australian securities overseas (RG 107.99–RG 107.107); and
- (g) Part VII briefly explains how ASIC will apply the principles in this guide to secondary offers of unquoted securities under Div 3A of Pt 7.12 (RG 107.108–RG 107.111).

RG 107.4 For the purposes of this guide an “electronic prospectus” is a prospectus distributed in electronic rather than paper form. ASIC’s primary focus in developing the guidewas on electronic prospectuses distributed by the media which ASIC considers are the most likely to be used at this stage. These are the Internet (including the World Wide Web) or other computer networks, CD-ROM and floppy disk. Much of the guide is likely to apply to other media for the distribution of electronic prospectuses. But additional issues may arise.

RG 107.5 ASIC is of the view that text-based information remains the frame of reference for many investors when assessing complex disclosure information. At this stage, ASIC considers that electronic prospectuses should convey information material to the investment decision predominantly in text form. Audio or video presentations of prospectus information may give rise to additional issues.

RG 107.6 Conditions of the class order relief are described in Part IV. RG 107.112 sets out information on how to apply for relief outside the terms of the class order.

Part I — Background

RG 107.7 Application forms for the issue of shares, debentures and prescribed interests distributed by issuers must be attached to (or in the case of debentures, accompanied by) a prospectus. Prospectuses have traditionally been distributed to investors and advisers in paper or “hard copy” form.

RG 107.8 Innovations in information technology and increasing levels of personal computer ownership raise the question whether issuers should be limited to distributing prospectuses in paper form, or whether electronic prospectuses (and electronic applications for securities) should be allowed.

RG 107.9 ASIC is currently considering the impact of information technology and electronic commerce on a variety of securities market transactions. This guide seeks to address those developments as they relate to electronic prospectuses and electronic applications for securities.

RG 107.10 This guide has been developed in light of industry consultation and the approach to electronic commerce of overseas regulators, including the US Securities and Exchange Commission.

RG 107.11 ASIC recognises that there are likely to be significant benefits to the securities market if the distribution of electronic prospectuses is allowed. These potential benefits include:

- (a) improved cost efficiency of informing investors;
- (b) greater speed of information dissemination to investors and advisers;
- (c) greater spread of information throughout the securities market;
- (d) better use of information (for example, the ability to use computer programs to search defined expressions);
- (e) improved access to documents incorporated by reference, updating information and other relevant information; and
- (f) investor access to a wider range of investment products.

There will also be significant benefits for the securities market if ASIC allows electronic applications for securities in certain circumstances.

RG 107.12 This guide does not consider electronic payments for securities. The Law does not prescribe a particular method of payment for securities. The formation of the contract to take securities is a matter for the general law, although the Corporations Law affects the terms of that contract. ASIC does not consider that electronic payments for securities raise risks or questions so particular to the financial services industry or to ASIC’s functions that it should hesitate to give relief for the distribution of electronic prospectuses.

Part II — Broad regulatory approach of ASIC

RG 107.13 ASIC considers that electronic prospectuses should be allowed where the policy of the prospectus provisions of the Law is satisfied.

RG 107.14 The fundamental policy of the prospectus provisions is to ensure that informed investment decisions can be made on the basis of a prospectus containing all material and relevant information about the securities being offered and about the issuer. The key components of the regulatory regime which are relevant in this context are:

(a) *Application form attached to, or accompanied by, prospectus*

The Law requires that application forms are issued only if they are attached to, or accompanied by, a current prospectus. This establishes a mechanism so that the investor receives a current prospectus (which satisfies the information needs of investors and their advisers) before applying for securities (refer to s1020 and s1040 and reg 7.12.15(6)(ba) of the Corporations Regulations);

(b) *Advertising and securities hawking restrictions*

The Law seeks to ensure that investors are encouraged to make investment decisions on the basis of the prospectus rather than on the basis of promotional material or pressure selling (refer to s1025 and s1078);

(c) *Updating requirements*

The Law seeks to ensure that investors receive any necessary updating information before their investment decision is finalised (refer to s1023A–1024E);

(d) *Civil liability provisions*

The Law seeks to ensure that investors have access to appropriate remedies if they invest pursuant to defective prospectus information (refer to Pt 7.11).

RG 107.15 Part III of this guide explains the legal questions which electronic prospectuses raise. In particular, it explores the restrictions which the Law may impose on distributing electronic prospectuses. ASIC acknowledges that in some circumstances an issuer may distribute electronic prospectuses without the need for ASIC relief. However, in many cases there is likely to be doubt. The need for relief arises from the following questions:

- (a) whether the electronic prospectus is a “copy” of the paper prospectus lodged with ASIC (this is referred to in this guide as the “copy” question — refer to RG 107.24–RG 107.30);
- (b) whether the prohibition against securities hawking is contravened (refer to RG 107.31–RG 107.34); and
- (c) whether the electronic prospectus can satisfy the form requirement in the Law, that a prospectus must be printed in a particular font and size (refer to RG 107.35–RG 107.36).

RG 107.16 ASIC relief to allow the distribution of electronic prospectuses will remove legal doubts that are likely to exist in many cases. ASIC considers that this is consistent with its charter to promote market efficiency and commercial certainty.

Part III — Prospectus provisions of the Law

Basic prohibitions: s1018 and s1020

RG 107.17 A person must not offer securities for subscription, or issue invitations to subscribe for securities, unless a prospectus complying with Div 2 of Pt 7.12 has been lodged with (and, if necessary, registered by) ASIC or unless the offer is an excluded offer (s1018).

RG 107.18 Section 1018 applies to offers and invitations made in any form, whether oral or written and whether on paper or electronic. Section 1018 applies to offers made in Australia and invitations issued in Australia (and may also have broader reach where a sufficient territorial nexus exists). An offer is made in Australia if it is received in Australia, regardless of the place in the world from which it is sent. An invitation is issued in Australia if it is circulated, distributed or disseminated in Australia.

RG 107.19 Section 1018 applies to offers of securities made by email to an Australian investor. Offers of securities on a foreign internet site are accessible in Australia. Section 1018 may apply to such offers. This is particularly so where the overseas issuer accepts (or intends to accept) applications from Australian investors. ASIC relief concerning incidental offers of foreign securities in Australia and procedural relief (refer to RG 107.99–RG 107.104) will reduce doubt about the extra-territorial application of the Law to electronic prospectuses.

RG 107.20 Unless ASIC approves otherwise, any document (including a prospectus) lodged with ASIC must comply with reg 1.07, which requires the document lodged to be a paper document.

RG 107.21 Under s1020 a person must not issue an application form for the issue of securities unless:

- (a) the form is attached to (or in some cases accompanied by) a *copy* of the prospectus;
- (b) a copy of the form and the prospectus have been lodged; and
- (c) the prospectus has been registered, if it is a registrable prospectus.

RG 107.22 The prohibition in s1020 applies to an application form, whether it is distributed in paper or electronic form.

RG 107.23 Section 1020 applies to the issuer and also to any other person who receives a copy of the form. For example, an investor or adviser who receives an application form must not pass on that form to another person unless it remains attached to the prospectus.

“Copy” question

RG 107.24 A key legal question which arises is whether an electronic prospectus issued is a “copy” of the prospectus lodged with ASIC. If the electronic prospectus is not a “copy” of the paper prospectus lodged, then a person:

- (a) will contravene s1020 by distributing an electronic application form with the electronic prospectus; and
- (b) will contravene s1025(3) by publishing the electronic prospectus unless it complies with s1025(2) (assuming that the electronic prospectus is a “notice” as defined in s1025(1)).

RG 107.25 The “copy” question is relevant to s1025(2) not only because the electronic prospectus itself may be a “notice”. Section 1025(3) will be contravened if the issuer publishes a notice (whether in paper or electronic form) inviting applications to be made on the basis of the electronic prospectus. (Refer to s1025(2)(e) which requires the notice to refer investors to a “copy” of the prospectus).

RG 107.26 For prescribed interests, the “copy” question may be relevant to the covenant required by reg 7.12.15(6)(ba). The covenant provides that if the management company receives application moneys that are not accompanied by a completed application form relating to a current prospectus, the management company must return to the investor the moneys. Alternatively, the management company must try to obtain the application form.

RG 107.27 The words “relating to a current prospectus” in reg 7.12.15(6)(ba) mean that the application form must relate to the prospectus in a way that is permitted by the Law. The relationship is determined by the other fundraising provisions, particularly s1020. In the paper environment the words require that the completed application form had been attached to a copy of the prospectus lodged. If ASIC gives relief to allow distribution of electronic prospectuses, the covenant means that the application form must have the relationship to the electronic prospectus that the conditions of relief allow or require (refer to Part IV of this guide).

RG 107.28 Because ASIC relief to allow the distribution of electronic prospectuses removes legal doubts that are likely to exist in many cases, ASIC does not consider it necessary to attempt to give exhaustive guidance about when an electronic version of a prospectus is a “copy” of the prospectus lodged. Nevertheless, a few general observations about the “copy” question may be made.

RG 107.29 The word “copy” does not simply mean “photocopy”. Rather, it means “a reproduction, transcript or imitation which is faithful to the original”. It need not be reproduced from the original, but may be reproduced from the same document as the original. ASIC considers that it is likely (but not certain) that an electronic version of a lodged prospectus is a “copy” of that prospectus if the electronic version contains the same information (and no more information) in the same sequence as the lodged prospectus, with no material differences.

RG 107.30 The effect of additional information and enhancements such as prompts and hypertext links is far less clear. It is possible that an electronic prospectus with additional information or enhancements would not constitute a “copy” of the lodged paper prospectus. Another area of significant doubt is where information contained in the electronic prospectus is not text-based (for example, video presentations).

Securities hawking

RG 107.31 Under s1078, a person must not go “from place to place” offering securities for subscription or purchase (or issuing invitations to subscribe for or buy securities). Two exceptions to this prohibition are when an offer or invitation is made in (or accompanied by) a prospectus sent by post (reg 7.12.17(b)) or an offer is made in a published notice which complies with s1025. The expression “going from place to place” includes communicating with other persons at different places by the use of an eligible communications service (s1077).

RG 107.32 An eligible communications service is defined in s9 of the Law as a postal, telegraphic, telephonic, or other like service, within the meaning of s51(5) of the Constitution. Section 51(5) of the Constitution includes new media for communication, whether personal, narrow or broadcast (for example, the Internet).

RG 107.33 The legal question is whether an issuer who distributes a prospectus in electronic form contravenes s1078. An issuer who sends an electronic prospectus by email to more than one recipient contravenes s1078 because a communication of an offer or invitation to persons at different places by use of an eligible communications service occurs. It is less clear whether making available an electronic prospectus on an internet site for persons to access if they wish to do so contravenes s1078.

RG 107.34 Again, because ASIC relief to allow the distribution of electronic prospectuses removes legal doubts that are likely to exist in many cases, ASIC does not consider it necessary to give exhaustive

guidance about when distributing an electronic prospectus contravenes s1078.

Form requirement

RG 107.35 A prospectus must be printed in at least eight point Times typeface (s1021(2)). It is likely that the reference to “prospectus” in this sub-section is to both the prospectus lodged and the copies distributed. This is because the legislative intention of s1021(2) is that both the prospectus lodged and the copies distributed are readable. If the reference were to the prospectus lodged only, this intention would be defeated as it is not part of the meaning of “copy” that a copy be in the same font or text size as the original lodged.

RG 107.36 An issuer who distributes an electronic prospectus may contravene s1021(2) because:

- (a) s1021(2) refers to printed type; and
- (b) the issuer may not comply with the size and font requirements if it does not control size and font when the electronic prospectus is displayed on the investor’s monitor or printed by the investor.

Again, because ASIC relief to allow the distribution of electronic prospectuses will remove legal doubts that are likely to exist in many cases, ASIC does not consider it necessary to offer a concluded view on this question.

Definition of “prospectus” and prospectus liability

RG 107.37 Although issuing electronic prospectuses is restricted by the current Law, an electronic prospectus is a “prospectus” as defined in s9. All provisions in the Law applying to prospectuses generally apply to electronic prospectuses. These provisions include s1040 (which limits the life of a prospectus to 12 months from its date of issue) and the prospectus liability provisions in Pt 7.11.

RG 107.38 Section 996 provides, in effect, that a person must not authorise or cause the issue of a defective prospectus when the prospectus has been, or is required to be, lodged under Pt 7.12. This encompasses electronic prospectuses.

RG 107.39 Prospectus liability under s996 will arise for the electronic prospectus itself. It also arises for any statement taken by virtue of s 994 to be incorporated by reference into the electronic prospectus.

RG 107.40 If a person contravenes s996 (or other provisions of Pt 7.11 or 7.12) they may incur criminal liability. A person (such as a subscriber) who suffers loss as a result of the contravention may recover the loss under s1005. A person engaging in misleading or deceptive conduct (s995) may incur civil, but not criminal, liability.

Supplementary and replacement prospectuses

RG 107.41 An issuer must lodge a supplementary or replacement prospectus as soon as practicable after becoming aware of a material deficiency in a prospectus, a significant change or a new matter (s1023B and s1024). Any supplementary or replacement prospectus lodged with ASIC must be in paper form (reg 1.07).

RG 107.42 The legal interpretation in RG 107.17–RG 107.40 also applies to the electronic distribution of replacement prospectuses (refer to s1024D(2) which deems a replacement prospectus to be a prospectus in its own right).

RG 107.43 Every copy of the original prospectus issued after lodgement of a supplementary prospectus must be attached to, or accompanied by, a copy of that lodged supplementary prospectus (s1024C(3)).

RG 107.44 The “copy” question discussed in RG 107.24–RG 107.30 is further complicated in s1024C(3) because both the original prospectus and the supplementary prospectus must be copies of the relevant paper prospectus lodged. In many cases there is likely to be doubt about whether:

- (a) an electronic version of a lodged paper supplementary prospectus is a “copy”; and
- (b) the sub-section applies to an electronic original prospectus.

If the electronic supplementary prospectus is not a “copy” of the paper document, the issuer will not satisfy s1024C(3) by issuing it with the original electronic prospectus unless ASIC gives relief.

Part IV — ASIC's electronic prospectuses policy

Summary

RG 107.45 ASIC will give class order relief to allow issuers to distribute electronic prospectuses and to allow them to issue securities on the basis of such prospectuses where the policy set out in RG 107.14 is satisfied. To ensure that this policy is satisfied, ASIC relief will be available if:

- (a) a paper prospectus attached to (or, for debentures, accompanied by) an application form is lodged with ASIC (the issuer may continue to distribute paper copies of the prospectus in the usual manner in accordance with the Law);
- (b) the issuer and any other person who passes on an application form takes reasonable steps to ensure that the investor receives an application form attached to, or accompanied by, an electronic prospectus (or a paper print out) before applying for securities (refer to RG 107.48–RG 107.55);
- (c) the issuer takes reasonable steps to ensure that a complete electronic prospectus is received by the investor and that the electronic prospectus is protected from alteration or tampering (refer to RG 107.56–RG 107.59);
- (d) the issuer does not accept an application for securities if it has reason to believe that the investor did not receive an application form attached to, or accompanied by, an electronic prospectus or that the electronic prospectus was incomplete or altered (refer to RG 107.60–RG 107.62);
- (e) the electronic prospectus received by the investor contains the same information in the same sequence as in the paper prospectus lodged with ASIC except for differences allowed or required by ASIC (refer to RG 107.64–RG 107.71A);
- (f) the issuer provides a free paper copy of the prospectus if asked for by a person who has previously received an electronic prospectus (refer to RG 107.73–RG 107.76);
- (g) the electronic prospectus and any promotional material must be made available in a way that encourages investors to make decisions on the basis of the prospectus rather than on the basis of promotional material or pressure selling (refer to RG 107.77–RG 107.87); and

- (h) the investor receives any necessary updating information before the investment decision is finalised (refer to RG 107.88–RG 107.96).

[Historical note: Paragraph (e) of RG 107.45 was amended 10/2/1999 by inserting the words “or required” after the word “allowed”. The cross reference to RG 107.71 was also amended to read RG 107.71A.]

RG 107.46 The relief is contained in Class Order [CO 96/1578]. This class order relief will apply to any person who authorises or causes the issue of the electronic prospectus. The relief will not affect distribution of paper copies of prospectuses in the usual manner under the Law.

RG 107.47 It will be a condition of the relief that the issuer provides to ASIC a print out of the electronic prospectus; any disk or CD-ROM which will be issued; and the address of any internet site on which it will be made available. The electronic prospectus (as opposed to the paper original) will not be lodged (or registered). The purpose of this requirement is not for pre-vetting but to assist ASIC to remain aware of the level and circumstances of the use of electronic prospectuses.

Application form attached to, or accompanied by, electronic prospectus: investor receives prospectus information

RG 107.48 An investor should receive a prospectus before applying for securities.

RG 107.49 The Law seeks to achieve this policy in the paper environment in three ways:

- (a) an application form may be issued only if it is attached to (or in some cases accompanied by) a copy of the prospectus. The prospectus must be a single bound document (s1020);
- (b) a notice of the offer must state, among other things, that applications must be made on an application form attached to (or accompanied by) a copy of the current prospectus (s1025); and
- (c) in the case of prescribed interests, the issuer can accept application moneys only if the moneys are accompanied by a completed application form relating to a current prospectus (reg 7.12.15(6)(ba)).

RG 107.50 For electronic prospectuses, ASIC’s policy is to give class order relief to the issuer and any other person who passes on an application form if they take reasonable steps to ensure that the investor receives (opens, prints or downloads) an application form attached to, or accompanied by, an electronic prospectus or a print out of it.

RG 107.51 ASIC does not wish exhaustively to prescribe the ways in which electronic prospectuses may be made available to investors. But in taking reasonable steps to ensure that the investor receives an application form attached to, or accompanied by, an electronic prospectus the issuer may:

- (a) issue the application form and the electronic prospectus in the same electronic document file; and/or
- (b) use another electronic mechanism by which:
 - (i) investors can gain access to the application form only if they have access to the electronic prospectus; or
 - (ii) the issuer can otherwise verify that the investor received the prospectus before completing the application form.

RG 107.52 For example, the issuer may provide for a “certify” message confirming that the electronic prospectus (contained in a single electronic document file) has actually been received by an investor before the application for securities was made. This method should be used only where the investor has previously asked for electronic delivery of the prospectus. (Note that receipt of the prospectus may not be deduced from receipt of related promotional material. That is, the prospectus itself must be received by the investor.)

RG 107.53 ASIC’s view is that there is a greater risk in the electronic than the paper environment that the investor will receive the application form without a prospectus. Because of this, ASIC will require that the issuer provides in the application form for a declaration by investors that they have received the electronic prospectus or a print out of it. That investors should make this declaration does not necessarily require the use of paper application forms. (It is important to note that a declaration of the investor will not be sufficient to demonstrate that the prospectus seen by the investor was complete or that no person had tampered with it. The issuer must take reasonable steps to ensure the completeness of the electronic prospectus and protect it from tampering: refer to RG 107.56–RG 107.59.)

RG 107.54 The investor may receive a print out of the electronic prospectus. They may receive it by printing it out directly from the electronic prospectus or indirectly, for example by receiving a paper print out of the electronic prospectus made by a dealer or investment adviser. The Law requires that a dealer or adviser may provide an application form only if it is attached to, or accompanied by, a complete and untampered electronic version of the prospectus lodged or a print out of it (refer to RG 107.63).

RG 107.55 Where a prospectus relies on s1024F to incorporate a document by reference and an investor requests that the incorporated document be sent to them, the document must be provided to the investor in paper form unless they have consented to receiving incorporated documents by the electronic medium used. It is not sufficient that the document is accessible on the Internet unless the issuer gives to the investor notice of this and the address of the relevant internet site.

Complete and unaltered prospectus

RG 107.56 It is important not only that the investor receives an electronic prospectus (or a print out of it) but that the electronic prospectus is complete and unaltered.

RG 107.57 ASIC's class order relief will include conditions that the issuer takes reasonable steps to:

- (a) ensure that the investor receives a complete electronic prospectus; and
- (b) protect the electronic prospectus from alteration or tampering.

RG 107.58 There are a variety of reasonable steps that an issuer can take to protect the information in an electronic prospectus from alteration or tampering. It would assist investors if such protection did not prevent the electronic prospectus being copied by the investor into a personal electronic file for the investor's own records (alternatively the investor may wish to print out a paper version for this purpose).

RG 107.59 So that investors may check that they have received the complete prospectus, it may be desirable that an indication of the length of the complete prospectus is provided to investors.

Accepting applications

RG 107.60 ASIC will require that the issuer takes reasonable steps when *issuing* prospectuses to meet the policy of the Law (refer to RG 107.48–RG 107.59). ASIC will also set conditions for the issuer on *accepting* completed application forms. This is consistent with the policy of reg 7.12.15(6)(ba) (receipt of application moneys for prescribed interests).

RG 107.61 ASIC's class order will include conditions to the effect of the following:

- (a) the issuer must not accept applications for securities if it has reason to believe that:
 - (i) the application form was not attached to, or accompanied by, an electronic prospectus (or a paper print out) when received by the investor; or
 - (ii) the issuer received an incomplete, altered or tampered electronic prospectus (or paper print out);
- (b) if the issuer does not accept the application as valid under paragraph (a) it must ensure that some form of notice of rejection is sent to the investor. This is a separate matter from the issuer accepting or rejecting the offer to take securities contained in the application which, in the case of shares, may not occur until the offer period is over; and
- (c) the issuer must keep adequate records which demonstrate that securities have been issued only in circumstances allowed under ASIC relief or under the Law.

RG 107.62 The issuer may accept electronically completed application forms or application forms which were printed out from an electronic prospectus.

Third parties passing on electronic prospectus

RG 107.63 Persons other than the issuer may wish to pass on the electronic prospectus. The application form must draw attention to the fact that the Law prohibits any person from passing on to another person the application form unless it is attached to, or accompanied by, a complete and untampered electronic version of the prospectus lodged or a print out of it.

Electronic prospectus contains the same information as the paper prospectus lodged

RG 107.64 The prospectus received by the investor should contain the same information in the same sequence as the prospectus lodged with ASIC (and, where relevant, registered by ASIC). The Law seeks to achieve this policy in the paper environment by requiring that the prospectus distributed to investors is a “copy” of the prospectus lodged with ASIC (s1020).

RG 107.65 As stated in RG 107.24–RG 107.30, there may be doubt in many cases about whether an electronic version of a lodged paper prospectus and application form are copies of those paper documents.

RG 107.66 ASIC’s class order will allow the issuer to distribute an electronic prospectus where the electronic prospectus contains the same information in the same sequence as in the paper prospectus lodged with ASIC, except for differences allowed or required by ASIC.

[Historical note: RG 107.66 was amended 10/2/1999 by inserting the words “or required” after the word “allowed” at the end of the paragraph.]

RG 107.67 ASIC will allow the following enhancements or differences between the lodged paper prospectus and the electronic prospectus:

- (a) a facility for searching defined expressions;
- (b) immaterial changes to the sequence in which the information is presented;
- (c) prompts to assist investors to use and find information in the electronic prospectus. ASIC considers that prompts which encourage investors to read the prospectus before they complete the application form are desirable. Prompts should not contain substantive prospectus information which does not appear in the paper prospectus lodged;
- (d) hypertext links:
 - (i) within the prospectus (for example, links between a contents page and each section of the prospectus; between the sections; or between defined expressions and the places where the expressions are used); and
 - (ii) to documents incorporated by reference under s1024F.

ASIC will allow hypertext links to documents incorporated by reference only if no reasonable person would be likely to confuse the linked documents with the electronic prospectus. Hypertext links should allow the investor to return to the point in the electronic prospectus at which the investor entered the link so that the continuity of the electronic prospectus is preserved. Issuers will be restricted from providing hypertext links from the electronic prospectus directly to promotional material (refer to RG 107.86(a));

- (e) a zoom facility so that investors may enlarge or reduce the information displayed; and

- (f) absence of graphics of a promotional or decorative nature (as opposed to those containing substantive information such as headings, tables or graphs).

RG 107.68 Prompts and hypertext links should not reduce the likelihood of the investor reading any part of the electronic prospectus.

RG 107.69 No separate relief is required from s1020 and s1025 concerning the “copy” question for differences due to the display of information in the electronic prospectus on the investor’s monitor or in a print out. This is providing that these differences do not change the information or its sequence.

RG 107.70 ASIC will not allow the issuer to modify or enhance the electronic prospectus so that different information is available to different investors depending on the characteristics of the individual investor.

RG 107.71 ASIC will consider allowing other differences or enhancements upon application, provided they do not alter the substantive information available to investors.

RG 107.71A Following the release of Regulatory Guide 141 *Offers of securities on the internet* (RG 141), Class Order [CO 96/1578] has been amended to require electronic prospectuses provided to ASIC after 1/3/1999 to specify the jurisdictions in which the offer of securities is available. If the paper prospectus is lodged with ASIC after 1/3/1999, the electronic prospectus must contain a statement that the offer or invitation to which it relates is available to Australian residents. This may be explicit, or it may be conveyed by a statement that the offer or invitation is available only to residents of certain countries, naming them. The statement must be prominently displayed with the electronic prospectus. (Refer to RG 107.107 and RG 141.21–RG 141.28 for more discussion about the amendment.)

[*Historical note:* RG 107.71A was inserted 10/2/1999.]

Experts’ consent

RG 107.72 It is important for experts whose statements appear in the prospectus, that investors receive a complete and untampered electronic prospectus containing the same information in the same sequence as the paper prospectus lodged. Under s1032, a prospectus containing an expert’s statement may not be issued unless the expert has consented to the issue of the prospectus with the statement included in the form and context in which it is included. Where the issuer wishes to distribute a prospectus in paper and electronic form, the consent should specifically relate to both forms.

Paper copy of prospectus to be provided on request

RG 107.73 It is important that investors have genuine access to the information in the prospectus which they receive. Investors should be able effectively to use the prospectus information and have the option of retaining a copy of the prospectus for their own records.

RG 107.74 ASIC considers that, at this stage, investors wishing to read a prospectus may not be able to use an electronic prospectus as effectively as a paper prospectus.

RG 107.75 A particular concern is that some investors may not be able to access all the information contained in the electronic prospectus. For example, an investor with a monitor which displays information in black and white only will not be able to distinguish colour information. An investor with a black and white printer will not be able to print out information in colour.

RG 107.76 Accordingly, at this stage ASIC requires that the issuer gives to the investor a free paper copy of the prospectus lodged if asked during the application period by an investor who has already received an electronic prospectus. The electronic prospectus must contain a prominent statement referring to the right to obtain a paper copy of the prospectus during the life of the prospectus. In future, once the market and investors are familiar with the concept and practical operation of electronic prospectuses, ASIC is likely to remove this requirement.

Advertising and securities hawking

RG 107.77 It is important that the electronic prospectus and any promotional material are issued in such a way as to encourage investors to make decisions based on the prospectus rather than on the promotional material or pressure selling.

RG 107.78 Three things must be considered in the context of electronic prospectuses:

- (a) the mode of distributing the prospectus;
- (b) advertisements referring investors to the electronic prospectus; and
- (c) pre-prospectus advertising.

Mode of distributing the prospectus

RG 107.79 The Law expressly allows prospectuses to be sent to investors by post, but does not expressly permit other modes of distribution, such as distribution via internet. Section 1078 may prohibit such distribution in some cases (refer to RG 107.31–RG 107.34).

RG 107.80 The policy of s1078 is to prevent investment decisions being made on the basis of pressure selling rather than prospectus information.

RG 107.81 An investor may receive an electronic prospectus directly (for example, via internet) or indirectly (for example, by receiving a paper print out made by an investment adviser). ASIC will give relief from s1078 necessary to allow the direct or indirect electronic distribution of the prospectus, where there is no attendant pressure selling. The relief will not allow the issuer or adviser to make other statements or representations which would contravene s1078.

Advertising referring investors to the electronic prospectus

RG 107.82 An issuer will not comply with s1025(2) if the issuer publishes a notice (whether in electronic or paper form) inviting applications to be made on the basis of an electronic prospectus that is not a “copy” of the prospectus lodged with ASIC (s1025(2)(e) requires the notice to refer investors to a “copy” of the prospectus).

RG 107.83 It would be overly restrictive to prohibit advertising absolutely. An issuer may wish to publish a notice giving brief details of the securities offer and then send the electronic prospectus to those persons expressing interest in the offer.

RG 107.84 The policy of s1025 is to allow promotional material to be published only where it directs investors to the prospectus. This encourages investment decisions to be made on the basis of the prospectus rather than the promotional material. (Superseded Policy Statement 101 *Prospectus advertising* [SPS 101] explains the policy of the advertising provisions.) So that this policy is satisfied, it is important that investors are able to differentiate clearly between the prospectus information and the promotional material.

RG 107.85 In the paper environment, the prospectus is required to be a single bound document, and so be readily distinguishable from any accompanying advertising material. In the electronic environment, there is greater risk that investors will be unsure whether the information they are reading is promotional material or part of the prospectus.

RG 107.86 In light of these factors, ASIC will give relief to allow the issuer to publish promotional material which refers to the electronic prospectus provided that:

- (a) the promotional material is published in such a way that a reasonable person would be unlikely to confuse it with the prospectus.

This may be achieved, for example, by using separate electronic document files for the prospectus and the promotional material and by including clear and prominent statements in both documents indicating whether or not the information constitutes part of the prospectus. Direct hypertext links from the electronic prospectus to promotional material blurs the distinction between prospectus information and promotional material. ASIC will allow links from promotional material to the electronic prospectus but not the other way.

- (b) the promotional material states that securities to which the prospectus relates will be issued only on the basis of a completed application form, that was either attached to a paper copy of the prospectus, or accompanied by an electronic version of the prospectus; and
- (c) the promotional material complies with s1025(2)(a)–(d) and 1025(2)(f).

Pre-prospectus advertising

RG 107.87 ASIC's policy regarding pre-prospectus advertising is explained in Superseded Policy Statement 54 [SPS 154]. The policy considerations outlined in that policy statement apply equally to electronic advertising. ASIC will give relief to allow the electronic publication of pre-prospectus tombstone advertisements on similar conditions as set out in Class Order [CO 93/422].

Investor receives updating information

RG 107.88 The Law requires that an issuer who becomes aware of a material deficiency, significant change or new matter relevant to the investment decision, as soon as practicable lodges a supplementary or replacement prospectus ("updating information"): s1024.

RG 107.89 Following lodgment, any prospectus issued must be a copy of the replacement prospectus or a copy of the original prospectus attached to, or accompanied by, a copy of the supplementary prospectus.

RG 107.90 If the issuer lodges a paper supplementary or replacement prospectus and distributes an electronic version of the prospectus lodged, both the Law and relief given by ASIC (and the conditions of that relief) will apply to the electronic supplementary or replacement prospectus.

RG 107.91 An issuer may lodge both a supplementary and replacement paper prospectus and distribute a paper supplementary prospectus and an electronic replacement prospectus.

Electronic supplementary prospectus

RG 107.92 ASIC will give relief from s1024C(3) to the extent that it prohibits an issuer from distributing an electronic supplementary prospectus. Where the issuer chooses to distribute an electronic supplementary prospectus, the issuer must take reasonable steps to ensure that the investor receives the application form attached to, or accompanied by, an electronic supplementary prospectus with an electronic original prospectus (or a print out of them) before completing the application form. The issuer must not accept applications based on the supplementary prospectus if it has reason to believe that the investor did not receive the application form in these circumstances.

RG 107.93 In addition to the reasonable steps mentioned in RG 107.48–RG 107.55, the issuer should distribute electronic application forms distinguishable from the original electronic application forms.

Electronic replacement prospectus

RG 107.94 Investors would benefit if the issuer of an electronic replacement prospectus draws attention to differences between the replacement and the original prospectus (Regulatory Guide 23 *Updating and correcting prospectuses* at RG 23.22).

Application form not current

RG 107.95 Section 1024E sets out a procedure for an issuer to follow if an application form is not current at the time it is received. An application form is not current if, since it was issued, a supplementary or replacement prospectus has been issued. The procedure requires that the issuer gives a notice to each investor who applied on an application form which is not current. The notice must be accompanied by updating information.

RG 107.96 If s1024E applies, ASIC will give relief to allow the issuer to send to an applicant the notice and updating information in electronic

form only if the applicant has previously agreed to receive updating information by the particular electronic medium used. This consent may be obtained through the application form (even if the application form is not current). The consent should be revocable at any time. It is not sufficient that the notice and the supplementary or replacement electronic prospectus is accessible on the Internet, unless the issuer gives to the investor separate notice of this and the address of the relevant Internet site.

Part V — Electronic notices referring to paper prospectuses

RG 107.97 Nothing in the Law prevents an issuer (or licensee or exempt dealer) publishing a notice in electronic form stating that investors wishing to invest must do so pursuant to a paper copy of the prospectus lodged with ASIC provided the notice does not contravene s1025(3) or s995. Section 1025 requires the notice to state, among other things, that applications for securities will be accepted only on the basis of an application form attached to (or accompanied by) a copy of the current prospectus.

RG 107.98 Note that any other person who may be regarded as a publisher of the notice may avoid liability under s1025 by obtaining from the issuer a certificate under s1027(2). The publisher must obtain this certificate, to the effect that s1025(3) does not apply, before publication.

Part VI — Cross-border offers

RG 107.99 In this Part, ASIC briefly explains its policy in relation to offers of foreign securities and discusses electronic offers of Australian securities overseas.

[Historical note: RG 107.99 was amended 10/2/1999. It formerly read:

“RG 107.99 In this Part, the ASC briefly explains how the principles outlined in this guide will be applied by the ASC to offers of foreign securities and discusses electronic offers of Australian securities overseas.”]

Foreign securities

RG 107.100 As noted in RG 107.18–RG 107.19, s1018 applies to offers made in Australia and invitations issued in Australia. For example, s1018 applies to offers of foreign securities made by email to Australian investors and may apply to offers of foreign securities on an Internet site accessible in Australia. Such offers will contravene the Australian Corporations Law unless the overseas issuer has lodged with ASIC a prospectus complying with the Law and has complied with the requirements set out in Part IV of this guide relating to electronic prospectuses.

RG 107.101 ASIC recognises that it can be difficult to enforce the Law fully in relation to offerors located in overseas jurisdictions. To overcome this difficulty, ASIC will work closely with other regulators to ensure that the interests of Australian investors are protected and that confidence in the integrity of the Australian securities market is maintained.

RG 107.102 ASIC has also issued RG 141 which explains ASIC’s policy of not intending to regulate offers, invitations and advertisements of securities that are accessible in Australia on the Internet if:

- (a) the offer, invitation or advertisement is not targeted at persons in Australia;
- (b) the offer or invitation contains a meaningful jurisdictional disclaimer;
- (c) the offer, invitation or advertisement has little or no impact on Australian investors; and

there is no misconduct.

[Historical note: RG 107.102 was amended 10/2/1999 when the first sentence was deleted and the second sentence moved to the end of a new paragraph, RG 107.102A. The paragraph formerly read:

“RG 107.102 The ASC intends to give class order relief so that issuers who place foreign prospectuses on the Internet or other computer systems accessible from

Australia will not breach Australian law where the issuer does not accept applications from Australian residents and this is clearly stated in the offer. This relief is analogous to the relief provided by Class Order [94/1285] for newspaper or periodical publications which circulate incidentally in Australia. The ASC will discuss with overseas regulators appropriate forms of wording for jurisdictional clauses in electronic prospectuses.”]

RG 107.102A ASIC has issued Class Order [CO 99/43] which gives relief to this effect to issuers of Internet offers and advertisements (refer to RG 141.5RG 141.19 for more details about the class order relief). This relief is analogous to the relief provided by Class Order [CO 94/1285] for newspaper or periodical publications which circulate incidentally in Australia.

[*Historical note:* RG 107.102A was inserted 10/2/1999.]

RG 107.103 ASIC will consider giving procedural relief to issuers who wish to distribute electronic prospectuses offering foreign securities to Australian investors. Any relief given will be in accordance with the principles set out in Regulatory Guide 72 *Foreign securities prospectus relief* (see RG 72.40–RG 72.43). The relief will not affect the substantive disclosure requirements under the Law, such as s1022.

RG 107.104 In the case of rights issues of foreign listed securities falling within the terms of Class Order [CO 93/1548], the information which the issuer must make available to investors under paragraph (e) of Schedule B of that class order may be accessible in electronic form. This is provided the shareholder has previously agreed to be sent information in that form. In any event, the shareholder must always be able to obtain a free paper copy of the information if they request it.

Offers accessible overseas

RG 107.105 An electronic prospectus on an Internet site may be accessible throughout the world. The prospectus provisions of the Law apply only to offers and invitations made in Australia. An offer is made in Australia only if it is received in Australia: Regulatory Guide 56 *Prospectuses* (see RG 56.28). In the context of electronic prospectuses, the primary function of ASIC is to improve the performance of the Australian securities market and ensure adequate protection of Australian investors.

RG 107.106 However, ASIC will monitor Australian offers to overseas investors for conduct affecting confidence in the integrity of the Australian securities market. ASIC’s enforcement powers relevant to the conduct of Australian issuers are not limited to the prospectus liability provisions. For example, if the issuer is a licensee, ASIC may, following a hearing, revoke the issuer’s licence if its conduct overseas gives ASIC

reason to believe that the issuer will not perform its duties in Australia as a dealer or investment adviser efficiently, honestly and fairly (s826(1)(k)). Otherwise, the issuer's potential liability under foreign law for an offer on the Internet is primarily a matter for the issuer.

RG 107.107 One way of reducing the risk of contravening foreign securities laws may be to insert into an electronic prospectus a jurisdictional clause stating to whom it is intended that the offer be available. For this reason, and to improve the quality of information available to Australian investors, Class Order [CO 96/1578] has been amended to require electronic prospectuses provided to ASIC after 1/3/1999 to specify the jurisdictions in which the offer of securities is available (refer to RG 141.21–RG 141.28 for more discussion about the amendment).

[Historical note: RG 107.107 was amended 10/2/1999 by inserting the sentence commencing “ “For this reason ...” after the first sentence and deleting the last sentence which previously read: “As mentioned in RG 107.102, the ASC will discuss with overseas regulators an appropriate form of words for such clauses.”]

Part VII — Secondary offers of unquoted securities

RG 107.108 Secondary offers of unquoted securities are regulated principally by Div 3A of Pt 7.12. ASIC has issued a regulatory guide which explains in detail the Law and ASIC policy concerning secondary offers of unquoted securities (refer to Superseded Policy Statement 105 *Secondary trading of unquoted securities* (SPS 105) and Class Order [CO 96/120]).

RG 107.109 In summary, a seller of unquoted securities must lodge with ASIC a secondary sales notice in relation to the securities offered. Due to the effect of s1078 and reg 7.12.17(ba), and in the absence of relief from ASIC, a copy of the notice must actually accompany the offer in most circumstances (in other circumstances, the notice must be made available on request). ASIC has given relief so that offers may be made (for example, in newspaper publications) without being accompanied by the notice provided a copy of the notice is actually sent to the purchaser before the sale is made.

RG 107.110 Some sellers may wish to make secondary offers of securities in electronic form, for example by the Internet. Sellers may require relief from ASIC to make electronic offers or to allow secondary sales notices to be sent in electronic form, for reasons analogous to those outlined in Part III in the case of electronic prospectuses.

RG 107.111 ASIC, in determining what relief it will give to sellers for electronic offers, will apply the principles contained in this guide to the substantive disclosure requirements referred to in SPS 105. Note, however, that ASIC will give this type of relief only for secondary offers not made in connection with a stock market or which fall within the “low volume markets” category described in Superseded Policy Statement 100 *Stock markets* (see [SPS 100.139]–[SPS 100.141]).

Applications

RG 107.112 Applications for relief on a case by case basis for proposals outside the terms of the class order may be lodged at any Regional Office of ASIC. See Regulatory Guide 51 *Applications for relief* (RG 51) for guidance on how to make an application.