



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 149

Nominee and custody services

Related instruments [CO 00/2]

Chapter(s) 5C Managed investment schemes

Part 7.12 Offering securities for subscription or purchase

Issued 21/1/2000

From 5 July 2007, this document may be referred to as Regulatory Guide 149 (RG 149) or Policy Statement 149 (PS 149). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 149.1) or their policy statement number (e.g. PS 149.1).

What this guide is about

RG 149.1 This guide explains:

A what is a nominee and custody service (NCS)

see RG 149.2–RG 149.4

B the relief we have given so that:

- (i) a nominee and custody service is exempt from the managed investment and fundraising provisions of the Corporations Law (Law)
- (ii) an issuer of securities through an NCS may do so using an ordinary prospectus

see RG 149.5–RG 149.20

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A What is a nominee and custody service

Our policy

RG 149.2 An NCS is an arrangement which does not have the characteristics of a managed investment scheme for which regulation is intended, with the following features:

- (a) assets in which a client has an economic interest (or expects to derive a benefit) may be acquired or held by a custodian (which may or may not be the operator);
- (b) the client has the sole discretion to decide what (but not necessarily when) assets are acquired or disposed of except where:
 - (i) there are any prior written directions to acquire or dispose of a particular asset in particular circumstances that the client has agreed not to vary (other than on the exercise of any discretion on the part of an operator); and
 - (ii) the client may authorise the operator or another person to give directions on their behalf, for the purpose of the other person receiving or securing payment of moneys owing by the client to the person;
- (c) the client does not expect to derive benefits from participation in the NCS consisting of:
 - (i) cost reductions by using assets contributed by a client or derived directly or indirectly from assets contributed by the client with assets contributed by other clients or derived directly or indirectly from assets contributed by other clients; or
 - (ii) access to investments that the client could not otherwise access directly.

Explanations

RG 149.3 This guide complements Regulatory Guide 148 *Investor directed portfolio services* (IDPS) (RG 148). The services covered by the two policies are different. While the two kinds of services have a number of characteristics in common, nominee and custody services unlike IDPS do not have the characteristics of a managed investment

scheme as they do not provide cost savings or access to securities of the kind specified in RG 149.2.

RG 149.4 Typically NCS are arrangements for the holding of securities and associated maintenance such as the banking of dividends and the receipt of communications. They will usually provide some form of consolidated reporting. NCS will not have a menu of investments opportunities associated with them.

B When we will give relief

Our policy

Operators and custodians

RG 149.5 If you are an operator or custodian of an NCS, you are exempt from the managed investment and fundraising provisions of the Law if you meet the conditions set out in Class Order [CO 00/2].

RG 149.6 Under those conditions you must not make investments in accessible securities on behalf of a client unless you are reasonably satisfied that the client has been given any disclosure document that they would have been required to be given had they invested directly.

RG 149.7 The document must:

- (a) not have expired or to your knowledge been superseded at the time of the acquisition of the accessible securities;
- (b) purport to comply with any requirements of law that would apply.

RG 149.8 If no disclosure document appears to be required, you must have no reason to suspect that one would have been required if all other holdings through an NCS or an IDPS in the securities had been acquired by the relevant clients directly.

RG 149.9 We will give similar relief from the fundraising provisions of the CLERP Act that will take effect when that Act commences on 13 March 2000.

Issuers of securities

RG 149.10 If you are offering or issuing securities that are acquired through a nominee and custody service, you may do so using a disclosure document for offering the securities generally if you meet the conditions set out in Class Order [CO 00/2].

RG 149.11 Under those conditions you must:

- (a) have complied with any applicable requirements for lodgement and registration of the disclosure document;
- (b) either:

- (i) stated in the disclosure document that you agree to the use of the disclosure document as disclosure to clients or prospective clients of the NCS; or
 - (ii) have agreed in writing with each operator of the NCS to the use of the disclosure document as disclosure to clients and prospective clients;
- (c) notify operators of an NCS with whom you have an agreement and any person applying for your securities who you have reason to suspect is a custodian of an NCS when:
- (i) a supplementary or replacement prospectus has been lodged;
 - (ii) you would not be permitted by the Law to make offers of securities under the disclosure document; or
 - (iii) the disclosure document is withdrawn before its original expiry.
- (d) have an undertaking in writing from each person who you have reason to suspect is an operator of the NCS that the operator will comply with the conditions of exemption for an NCS under [CO 00/2];
- (e) retain a copy of the undertaking for 7 years from when you last issued any securities to the custodian of the NCS; and
- (f) not be aware of any non compliance by the operator of the NCS with the conditions under [CO 00/2].

RG 149.12 We will also give similar relief from the fundraising provisions of the CLERP Act 1999 that will take effect when that Act commences on 13 March 2000.

Underlying principles

RG 149.13 The operators and custodians of an NCS should have certainty about what obligations apply to them.

RG 149.14 People who invest through an NCS should receive the same disclosure (if any) about the accessible securities as they would be required to receive if they invested directly.

Explanations

RG 149.15 We do not consider that NCS are intended to be regulated as managed investment schemes. However, from time to time concerns have been expressed that they may nonetheless

arguably be such a scheme given the broad definition of the concept. A similar issue arose in relation to the former prescribed interest provisions of the Law which preceded the managed investment provisions.

RG 149.16 The purpose of this policy is to put in place a mechanism for putting the matter beyond doubt. The opportunity is also being taken to remove uncertainty about what is required to be included in a prospectus that is used to offer securities through an NCS. Unlike an IDPS under RG 148 the operator of an NCS is not required by the terms of the relief to hold a dealers licence.

RG 149.17 However they may be required to hold a dealers licence if they carry on a securities business. As such they will be subject to the obligations in Pt.7.5 and 7.6 of the Law that apply to holders of dealers licences.

RG 149.18 Without the relief given by [CO 00/2], the prospectus for offers of securities issued through an NCS may need to contain information about the NCS including any particular rights which result from acquiring the securities in this way. Class Order [CO 00/2] allows the issuer to use an ordinary prospectus when offering securities through an NCS.

RG 149.19 The conditions imposed by this exemption in relation to disclosure concerning the securities that are acquired through an NCS are consistent with those imposed in relation to acquisition of accessible securities through an IDPS. They seek to ensure that people investing through an NCS have similar rights against the issuer of the securities if the disclosure is deficient to those that invest directly.

RG 149.20 This policy does not apply to custody arrangements that form part of an IDPS.

Key terms

RG 149.21 In this guide, a reference to:

“CLERP Act” means the *Corporate Law Economic Reform Program Act 1999*

“custodian” means the person (other than a client) who holds assets to which the NCS relates

“disclosure document” means prospectus, notice required by subsection 1043B(1) of the Law or document required by an instrument under s1084 of the Law setting out information about offers of securities

“fundraising provisions” means Divisions 2, 3, 3A and 6 of Part 7.12

“managed investment provisions” means Chapter 5C and Division 5 of Part 7.12

“operator” means a person who contracts to provide services that comprise in whole or part the nominee and custody service.

Related information

RG 149.22

Headnotes

Nominee and custodial service, nominee, custodian, managed investment scheme, investor directed portfolio service, offer of securities, disclosure document, prospectus, supplementary prospectus, replacement prospectus, investment through intermediate vehicles, indirect offer

Class orders and pro formas

[CO 00/2]

Regulatory guides

RG 148 *Investor directed portfolio services*

Legislation

Chapter 5C, Divisions 2, 3, 3A, 5 and 6 of Part 7.12, section 1043B(1)

Consultation papers and reports

CP 2 *Non discretionary portfolio services* (May 1999)

Regulatory impact statements

RIS *Investor directed portfolio services*

Media releases

[MR 99/163]