



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 158

Advertising and publicity for offers of securities

Related instruments [CO 00/175], [CO 00/176]

Chapter 6D — Fundraising

Part 6D.3 — Prohibitions, liabilities and remedies

Issued 17/2/2000

From 5 July 2007, this document may be referred to as Regulatory Guide 158 (RG 158) or Policy Statement 158 (PS 158). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 158.1) or their policy statement number (e.g. PS 158.1).

What this guide is about

RG 158.1 This guide deals with advertising and other publicity relating to offers of securities.

RG 158.2 In particular, this policy sets out the relief available for:

A roadshow presentations; and

see RG 158.5–RG 158.7

B market research; and

see RG 158.8–RG 158.11

C independent reports.

see RG 158.12

RG 158.3 The policy also explains how we will enforce the Law on advertising and publicity for offers of securities.

see RG 158.25–RG 158.30

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A When you can get relief

Our policy

RG 158.4 We have granted relief from the prohibitions against advertising and other publicity about offers of securities before the lodgment of a disclosure document for:

- (a) roadshow presentations [CO 00/175]; and
- (b) market research [CO 00/176].

Roadshow presentations

RG 158.5 You may present oral or written material on offers of securities to securities licensees, exempt dealers, exempt investment advisers and securities representatives under the conditions set out in [CO 00/175].

RG 158.6 This relief is only available to you if you are the issuing body. People conducting roadshow presentations must be authorised by the issuing body to conduct the presentation.

RG 158.7 The relief is not available to licensees, exempt dealers or other persons acting on their own behalf.

Market research

RG 158.8 The issuer of the securities or a bona fide market research organisation (engaged by, but not otherwise associated with, the issuing body) may conduct bona fide disclosure document market research under the conditions set out in [CO 00/176].

RG 158.9 The research may determine:

- (a) the number of disclosure documents that should be printed in order to meet anticipated public demand; and
- (b) other information necessary to decide to whom the issue should be marketed and the type and extent of marketing to be done.

RG 158.10 Market research activities may use any number of surveys, but they must not survey more than 5000 people.

RG 158.11 Survey questions may refer to, or call attention to, the proposed offer of securities, proposed advertisements or the proposed disclosure document only to the extent necessary to enable respondents to understand the question asked. Class Order [CO 00/176] prohibits the

research organisation from disclosing information on a particular respondent to any other person.

Independent reports

RG 158.12 You may publish a report which refers to a forthcoming securities issue provided it is a genuinely independent report: see RG 158.20–RG 158.24. If we believe that the report is not genuinely independent, we will bring action to ensure adequate investor protection.

Underlying principles

RG 158.13 In the interests of promoting the efficient operation of capital markets, issuers should be able to carry out the ordinary preparatory work associated with a proposed offer of securities such as roadshow presentations and market research. However, these activities should not be conducted in a way that may encourage retail investors to make investment decisions without the benefit of a prospectus.

RG 158.14 Similarly, the publication of genuinely independent reports contribute to the efficient operation of markets and accordingly should not be impeded by the restrictions on advertising.

Explanations

RG 158.15 The general disclosure requirements for a prospectus are covered in s710 of the Law. Section 710 requires a disclosure document for a body's securities to contain all the information that investors and their professional advisers would reasonably require and reasonably expect to find in the prospectus to make an informed assessment according to the Law.

RG 158.16 Advertising is generally permitted if the securities on offer are in a class already quoted on the ASX. For securities which are not quoted on the ASX, advertising is limited to statements explaining:

- (a) who the offeror is and what the securities are;
- (b) that a disclosure document will be made available when the securities are offered;
- (c) that persons wanting to acquire the securities will have to complete an application form in, or accompanying the disclosure document; and
- (d) how to receive a copy of the disclosure document (this last statement is optional).

RG 158.17 We will give relief for the purposes of market research and roadshow presentations because we recognise that an absolute prohibition on disclosure document advertising could impose unreasonable and uncommercial restraints on issuers. This policy tries to balance the need for investors and potential investors to be protected from issuers attempting to induce them into investing in proposed offers of securities without adequate disclosure being made, and the commercial need for issuers to be able to conduct limited market research and roadshow presentations.

RG 158.18 Limitations have been placed on issuers of securities to:

- (a) prevent drip feeding of selective information to the market;
- (b) discourage inadequate analysis of disclosure documents by individual investors and the market generally; and
- (c) discourage investment decisions being made on the basis of an advertising campaign and other publicity rather than on the basis of the disclosure document.

RG 158.19 The restrictions relating to market research are intended to ensure that surveys are not used to induce investment in the securities or to identify individuals with an interest in subscribing to the issue.

RG 158.20 We will ensure that the policy underlying the restrictions relating to disclosure document advertising (particularly preventing drip feeding of information) is not compromised by the publication of independent reports which are not genuinely independent of the issuing body in accordance with s734.

RG 158.21 Reports (other than reports expressly permitted by s734(7)), which are reasonably likely to induce persons to apply for securities, must not be published, whether or not they are in writing.

RG 158.22 There are general exemptions in s734(7)(a)(e) and s734(8) for specific forms of advertisements or publications. For example, s734(7)(e) expressly permits independent reports referring to a proposed securities issue to be published before a prospectus is lodged subject to certain conditions being met, namely:

- (a) the report must not be published by or on behalf of:
 - (i) the issuing body;
 - (ii) a director of the issuing body;
 - (iii) a person who is acting at the instigation of, or by arrangement with, the issuing body or its directors; or

- (iv) a promoter or other person who has an interest in the success of the securities issue; and
- (b) the person publishing the report must not receive or be entitled to receive a benefit from any person interested in the securities issue before or after the report is published.

RG 158.23 The independent report does not have to be based upon publicly available information. However, s734 allows publications by persons associated with the issuer once the prospectus is issued (while the prospectus is still current) only if they are based on information already published.

RG 158.24 Reports (other than reports expressly permitted by s734(7)), which are reasonably likely to induce persons to apply for securities, must not be published whether or not they are in writing.

B How we will enforce the Law

Our policy

RG 158.25 We will not pre-vet advertisements for compliance with the Law. We will however, post-vet advertisements where investor protection considerations demand such scrutiny.

RG 158.26 In considering whether we will take action against an issuing body which publishes an advertisement which may contravene s734 and s995 of the Law, we will review:

- (a) the content, timing, frequency of publication or mode of publication of the advertisement;
- (b) whether you have taken all reasonable steps to ensure that the advertisement has been published in such a way that it would not be likely to be associated with the securities issue by the average person in possession of common knowledge; and
- (c) whether the advertisement, read with the surrounding circumstances (including the advertising campaign, all other publicity and the structure of the securities issue) is likely to materially compromise the policy objectives of the Law.

RG 158.27 We will bring action only if the publication of the advertisement would significantly reduce investor protection and be likely to:

- (a) result in the market being drip-fed with selective information usually contained in the disclosure document (as opposed to information usually conveyed to customers of the issuing body);
- (b) discourage adequate analysis of the disclosure document by individual investors and the market generally (eg if the campaign involves pressure selling. In this case, the issue structure is relevant. An issue which remains open for a reasonable period under which securities are allocated on a pro rata basis in the event of over subscription is far less likely to give rise to pressure selling); or
- (c) result in investment decisions being made on the basis of the advertising campaign and other publicity rather than on the basis of the disclosure document. In this case, the timing of the image advertisement close to the issue of the disclosure document is relevant.

RG 158.28 Third parties may be able to bring civil proceedings against issuing bodies regarding image advertisements, whether or not

we have commenced an action of our own. Accordingly, issuers who publish image advertisements must ensure that they do not contravene the Law, particularly s995 and s734.

Underlying principles

RG 158.29 Where we are of the view that the Law has been contravened, we will take the appropriate action to ensure adequate investor protection.

Explanations

RG 158.30 Advertising is primarily regulated by s995 and s734 of the Law. You must not engage in misleading or deceptive conduct, or conduct which is likely to mislead or deceive, in connection with a prospectus, notice or other dealing in securities (s995). This provision applies to all advertising relating to securities published at any time and to all offers. We do not have power to grant relief from s995.

Related information

RG 158.31

Headnotes

Disclosure document advertising, market research, roadshow presentations, independent reports, enforcement, image advertising

Class orders and pro formas

[CO 00/175], [CO 00/176]

Policy statements

Superseded Policy Statement 54 *Pre-prospectus advertising* [SPS 54]

Superseded Policy Statement 101 *Prospectus advertising provisions* [SPS 101]

Legislation

Chapter 6D, Part 6D.3, s710, 734, 734(7)(e), 995

Media releases

[MR 99/247], [MR 99/303]