



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 170

Prospective financial information

Chapter 6D — Fundraising

Chapter 7 — Securities

Part 7.9 — Fundraising — Financial products

Issued 6/9/2002

From 5 July 2007, this document may be referred to as Regulatory Guide 170 (RG 170) or Policy Statement 170 (PS 170). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 170.1) or their policy statement number (e.g. PS 170.1).

What this guide is about

RG 170.1 This guide gives guidance on ASIC's approach to the use of prospective financial information (including financial forecasts and projections) in disclosure documents and Product Disclosure Statements (PDS). It also applies to conduct under s1041H of the *Corporations Act 2001* (Act). This guide replaces Practice Note 67 *Financial forecasts in prospectuses* [PN 67].

RG 170.2 This guide discusses:

A when prospective financial information can or should be disclosed

see RG 170.4–RG 170.15

B what are reasonable grounds for stating prospective financial information

see RG 170.16–RG 170.50

C how prospective financial information should be disclosed

see RG 170.51–RG 170.89

D what information should be disclosed by a product issuer in the absence of prospective financial information

see RG 170.90–RG 170.96

RG 170.3 For further guidance on the use of prospective financial information and other material in PDS, see Regulatory Guide 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* (RG 168).

Contents

What this guide is about	1
A When should prospective financial information be disclosed?	3
B What are reasonable grounds for stating prospective financial information?	6
C How should prospective financial information be disclosed?	16
D What to disclose in the absence of prospective financial information	24
Key terms.....	26
Related information	27

A When should prospective financial information be disclosed?

Our policy

Issuer to assess whether information is required

RG 170.4 An issuer must assess on a case-by-case basis if prospective financial information needs to be disclosed in a disclosure document or PDS. In making that assessment, the issuer should consider:

- (a) the nature and extent of the obligation to make disclosure as required under the Act;
- (b) the information value of what is being disclosed; and
- (c) the risk that the disclosure might be misleading.

Information must have reasonable grounds

RG 170.5 A disclosure document or PDS should only include prospective financial information if there are reasonable grounds for its inclusion. This applies even if the information has been used to estimate future performance for internal planning purposes.

RG 170.6 Prospective financial information without reasonable grounds is not material to investors, nor would an investor reasonably require it or reasonably expect to find it in a disclosure document or PDS. The disclosure obligations in the Act do not mandate or allow disclosure of information that is misleading.

Note: For a more detailed discussion of “reasonable grounds”, see Section B of this guide.

Underlying principles

RG 170.7 A decision whether or not to include prospective financial information in a disclosure document or PDS requires balancing the information value of what is disclosed against the likelihood that the information may be misleading. The two elements are interrelated. The less reliable information is, the less relevant it becomes to investors, and the less likely it should be included in the disclosure document or PDS.

RG 170.8 We think that prospective financial information based on hypothetical assumptions (rather than reasonable grounds) is likely to be misleading and provide little information value to investors.

Explanation

Issuer to assess whether information is required

RG 170.9 A number of provisions in the Act require issuers to make disclosure.

RG 170.10 Section 710 of the Act requires a prospectus to contain all information that would enable investors and their professional advisers to make an informed assessment of the issuer's prospects.

RG 170.11 Section 714 (Profile Statements) and s715 (Offer Information Statements) allow the inclusion of information provided it is not misleading or deceptive.

RG 170.12 Section 1013D states in part:

“a Product Disclosure Statement must include the following statements, and such of the following information as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product:

(b) information about any significant benefits to which a holder of the product will or may become entitled, the circumstances in which and times at which those benefits will or may be provided, and the way in which those benefits will or may be provided.”

RG 170.13 We believe the general test of whether prospective financial information must be disclosed is whether it is:

- (a) relevant to its audience; and
- (b) reliable (ie there must be a reasonable basis for it: see *GIO Australia Holdings Ltd v AMP Insurance Investment Holdings Pty Ltd* (1998) 29 ACSR 584).

Information is not material to investors if it is “speculative or based on mere matters of opinion or judgment”: see *AAPT v Cable & Wireless Optus Ltd* (1999) 32 ACSR 63.

RG 170.14 While these cases relate to takeovers, we consider that they state principles that apply equally to disclosure made in a disclosure document or PDS.

Information must have reasonable grounds

RG 170.15 We believe that where prospective financial information is misleading (because there are not reasonable grounds to include it in a disclosure document or PDS), it should not be disclosed. Such information will not be:

- (a) information which investors and their professional advisers would reasonably require in order to make an informed assessment of the issuer's prospects;
- (b) information which a person as a retail client would reasonably require for the purpose of making an informed decision about whether to acquire the product to which the information relates;
or
- (c) information reasonably required or expected by an investor to be disclosed in a disclosure document or PDS.

B What are reasonable grounds for stating prospective financial information?

Our policy

The misleading and deceptive prohibition

RG 170.16 The making of a statement that contains prospective financial information (like any forward-looking statement) must have reasonable grounds or it will be misleading under s728(2) or 769C of the Act.

RG 170.17 What are “reasonable grounds” should be determined objectively in light of all of the circumstances at the time of the statement, so that a reasonable person would view as reasonable the grounds for the statement.

Indicative factors that may suggest reasonable grounds

RG 170.18 The following is a non-exhaustive list of factors that may amount to reasonable grounds for stating prospective financial information:

- (a) forward sales contracts, leases or other contracts that lock in future expenses and revenue of a product/service and the quantum of supply;
- (b) reliance upon an independent industry expert’s report which:
 - (i) is included in the document containing the prospective financial information;
 - (ii) sets out the assumptions underlying that information; and
 - (iii) makes a positive statement that both the prospective financial information and its assumptions are reasonable;

- (c) a review of the prospective financial information and underlying assumptions contained in an independent accountant's report prepared in accordance with professional standards and included in the disclosure document or PDS. The independent accountant's report should:
- (i) be based on an investigation of the reasonableness of the assumptions giving rise to the prospective financial information;
 - (ii) state that there is no reason to believe that the assumptions do not provide reasonable grounds for the preparation of the prospective financial information;
 - (iii) in addition to meeting professional standards for reporting requirements, also state that there is no reason to believe that the information itself is unreasonable; and
 - (iv) clearly identify any hypothetical assumptions and state that they have no significant impact upon the projected outcome; or
- (d) short-term estimates (not exceeding 2 years) relating to an existing business and based on events that management reasonably expects to take place or actions management reasonably expects to occur.

RG 170.19 For sales contracts or leases that have a renewal option at the end of the initial term, prospective financial information should only extend to the end of the initial term unless there are reasonable grounds to believe that the option will be exercised.

These factors are not conclusive

RG 170.20 There may be other methods of establishing reasonable grounds and, importantly, the factors listed in RG 170.18 may not be sufficient to establish reasonable grounds in some cases. Each case must be considered in light of its own particular facts and the requirements of the Act.

Matters that of themselves do not indicate reasonable grounds

RG 170.21 The following is a non-exhaustive list of specific factors that do not, by themselves, establish reasonable grounds for prospective financial information in a disclosure document or PDS:

- (a) prospective financial information supported only by hypothetical assumptions (rather than reasonable grounds);

- (b) mere statements by issuers asserting reasonable grounds for the inclusion of information, with no verifiable reasons to support such statements; and
- (c) statements along the lines of “this is the best estimate of the directors”. The test in s728(2) requires that the grounds for prospective financial information be objectively reasonable.

Interim stop orders

RG 170.22 Issuers of a disclosure document or PDS that contains prospective financial information should be prepared to identify all the grounds upon which the prospective financial information is based.

RG 170.23 Where the existence of reasonable grounds for prospective financial information is unclear and delay in resolving our concerns may be seen to be prejudicial to the public interest, ASIC may make an interim stop order affecting the disclosure document or PDS (see s739(3) and 1020E(5) of the Act) without reference to the issuer. However, in these circumstances, we may decide to delay publicising the interim stop order to permit the issuer to demonstrate that there are reasonable grounds for stating that information.

Underlying principles

RG 170.24 Section 728(2) provides:

“A person is taken to make a misleading statement about a future matter (including the doing of, or refusing to do, an act) if they do not have reasonable grounds for making the statement. This subsection does not limit the meaning of a reference to a misleading statement or a statement that is misleading in a material particular.”

PDS are subject to an equivalent provision: see s769C.

RG 170.25 A statement along the lines of “this is the best estimate of the directors” will not be sufficient to demonstrate that the reasonable grounds for stating prospective financial information required by s728(2) exist. The Explanatory Memorandum to the CLERP Bill at paragraph 8.13 explained that s728(2) of the Act was designed to:

“... encourage the inclusion of material of potential use to investors without exposing issuers to liability for legitimate forecasting. [Subsection 728(2)] also ensures that forecasts are made where

there is a reasonable basis for them and not made on the basis of genuine but unreasonable beliefs of issuers.”

Explanation

The misleading and deceptive prohibition

Investor reliance on prospective financial information

RG 170.26 Studies and research have shown that:

- (a) the release of prospective financial information by management has a significant effect on share prices (indicating that buy/sell decisions are influenced by prospective financial information);
- (b) perceptions of the likely long-term rate of return are the dominant criteria for investors in selecting a managed investment scheme. For other investment products, the rate of return was seen as a determining factor in making a purchasing decision; and
- (c) longer time horizons reduce the accuracy of prospective financial information.

RG 170.27 Our regulatory experience has identified inherent dangers in disclosing prospective financial information. Some examples include:

- (a) issuers discounting, or not taking into account, the variable nature of matters that may influence, or be influenced by, future events. Our experience suggests that prospective financial information is, at best, only a crude indicator of likely achievable results; and
- (b) the inherent potential to mislead (unintentionally or otherwise) by disclosing prospective financial information based on hypothetical circumstances or unrealistic assumptions.

Indicative factors that may suggest reasonable grounds

RG 170.28 To demonstrate reasonable grounds for stating prospective financial information, an issuer must be able to point to:

- (a) some facts or circumstances;
- (b) existing at the time of publication of the information in the disclosure document or PDS;
- (c) on which the issuer in fact relied;

- (d) which are objectively reasonable; and
- (e) which support the information: see *Sykes v Reserve Bank of Australia* (1999) ATPR 41-699, Heerey J at 42 –902.

RG 170.29 ASIC generally considers that prospective financial information for a period of more than 2 years may require independent or objectively verifiable sources of information to establish that there are reasonable grounds to provide it. However, for an existing business preparing prospective financial information up to 2 years, ASIC will generally not regard as necessary independent verification, if there otherwise appear to be reasonable grounds to make the statement. Directors should satisfy themselves and state why they believe the information is objectively reasonable. ASIC may still take action on prospective financial information up to 2 years if it believes there are no reasonable grounds to provide it.

Forward sales contracts or leases

RG 170.30 A lease or contract may provide reasonable grounds for prospective financial information during the period of that lease or contract. However, the mere existence of an option in a lease or contract does not create reasonable grounds for assuming it will be exercised. Some further basis is needed. An example is where an independent industry expert provides reasonable assurance that even after a lease finishes, the property can be re-leased for the relevant amount given certain assumptions about economic circumstances, local vacancy rates etc, and the expert states that all those assumptions are reasonable.

Independent industry experts' reports

RG 170.31 Reasonable grounds for stating prospective financial information may exist where an independent industry expert states that the information and its underlying assumptions are reasonable and the expert does not disclaim liability for the statement. An expert could even adopt management's assumptions if that expert states that those assumptions are reasonable. However, we will not generally regard an expert's report that accepts management's assumptions without testing whether they are reasonable as meeting the test in s728(2) or 769C. In preparing an expert's report, the independent expert should have regard to Regulatory Guide 12 *Valuation reports and profit forecasts* (RG 12). For the requirements to establish an expert's independence, see Regulatory Guide 42 *Independence of experts' reports* (RG 42).

RG 170.32 An independent industry expert must have the credentials to give an opinion on the issue of whether reasonable grounds exist for the prospective financial information. These credentials might be shown by the expert's specialised training, study or experience. The subject matter of the report must not be outside the scope of the expert's relevant field of expertise: see *Makita v Sprowles* [2001] NSWCA 305.

RG 170.33 An expert's report is unlikely to be of assistance in establishing the existence of reasonable grounds for prospective financial information where the facts that the expert has relied upon are unverified or unverifiable.

RG 170.34 Where experts rely on information provided by third parties, they should indicate if they have any reservations about accepting that information as accurate because they will often be in the best position to decide if the information warrants further enquiry.

Independent accountants' reports

RG 170.35 Reports prepared by an independent accountant in accordance with the relevant audit standards and this policy may establish reasonable grounds for stating prospective financial information.

RG 170.36 We expect accountants who review and report on prospective financial information contained in a disclosure document or PDS to disclose in their report the scope of their engagement and the extent and nature of their enquiries.

RG 170.37 The Auditing and Assurance Standards Board (AuASB) have provided guidance on the presentation of prospective financial information in AGS 1062 "Reporting in connection with Proposed Fundraisings". In addition to complying with AGS 1062, the independent accountants' report should clearly identify any hypothetical assumptions used in the prospective financial information and state that they have no significant impact upon the projected outcome.

Note: In determining whether or not assumptions will have a significant impact upon the prospective financial information presented the expert may have regard to AUS 306: *Materiality and Audit Adjustments*. However, experts should note that the larger the impact of hypothetical assumptions on a projected outcome, the more likely it is the projection will not be based on reasonable grounds.

Short-term estimates

RG 170.38 Our regulatory experience has shown that the longer the period the prospective financial information relates to, the less likely it is that there are reasonable grounds for stating it, as the grounds for longer term prospective financial information become less verifiable.

These factors are not conclusive

RG 170.39 Forward contracts or leases, independent industry experts' reports or independent accountants' reports *may* indicate that reasonable grounds exist for stating prospective financial information, but they are not necessarily conclusive. What constitutes "reasonable grounds" must be judged according to the facts and circumstances of each case.

RG 170.40 ASIC will monitor experts' reports that seek to provide reasonable grounds for stating prospective financial information, to ensure the reports themselves are reasonable and have not been prepared or presented in a misleading manner. Where such a report does not enable an objective evaluation of the expert's conclusion, it may be given no weight in determining whether there are reasonable grounds for the prospective financial information: see *Makita v Sprowles* [2001] NSWCA 305.

RG 170.41 Where an issuer includes prospective financial information in a disclosure document or PDS, ASIC will closely examine supporting documents to determine whether there are reasonable grounds for including the prospective financial information if:

- (a) the issuer is in the start-up phase;
- (b) the issuer will substantially change its operations following the fund raising;
- (c) the issuer's present activities constitute research and development of products and the development is not significantly advanced to warrant a reasonable expectation that the products will be commercialised; or
- (d) the prospective financial information indicates a return significantly higher than industry competitors or historical performance.

Matters that of themselves do not indicate reasonable grounds

RG 170.42 The reasonable grounds requirement for stating prospective financial information means that there should be a relevant factual foundation for the information and that the information is not contrived: see *George v Rockett* (1990) 170 CLR 104 and *Re Aldred & Dept of the Treasury* (1994) 35 ALD 685.

Other issues

Advertising and other disclosures

RG 170.43 The general principles in this policy also apply to advertising because of the interaction of s769C and 1041H which state that:

“ 769C(1) For the purposes of this Chapter, or of a proceeding under this Chapter, if:

- (a) a person makes a representation with respect to any future matter (including the doing of, or refusing to do, any act); and*
- (b) the person does not have reasonable grounds for making the representation;*

the representation is taken to be misleading.

1041H(1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.”

RG 170.44 It follows that if there is advertising of prospective financial information without reasonable grounds, the advertisement will be misleading. It should be clear from any advertisement that these forward-looking statements are not guaranteed to occur.

Note: For more information on presenting prospective financial information and related assumptions and risks, see Section C of this guide.

RG 170.45 Principles in this guide may assist in other contexts where a person must have reasonable grounds for stating prospective financial information (eg takeovers or scheme documents: see s670A(2) and 1041H). Whether or not there are reasonable grounds for prospective financial information in these contexts will need to be assessed on the particular facts of each case. However, the principles set out in this guide may provide some general guidance.

Forward-looking statements and contingencies

RG 170.46 Section 728(2) and equivalent provisions do not necessarily prevent statements about what may happen as a result of a contingency that is unlikely to occur. The test is whether a reasonable class of consumers would regard the statement as having a predictive faculty: see *ASC v McLeod* (2000) 18 ACLC 424. Because of the marketing role of prospective financial information and its use by investors, it is difficult to argue that prospective financial information in a disclosure document, PDS or advertisement will not have a predictive faculty.

RG 170.47 Deciding whether a reasonable class of consumers would believe that disclosure in a disclosure document or PDS has a predictive character requires consideration of:

- (a) the overall impression created by the disclosure document or PDS; and
- (b) the wider circumstances and context in which the disclosure is made.

A reasonable class of consumers may include the astute and the gullible, the intelligent and the not so intelligent, and the well educated and poorly educated: see *Fraser v NRMA Holdings Ltd* (1995) 13 ACLC 132.

RG 170.48 Statements about risks that may occur in the future and the consequences of the risks occurring will not be forward-looking statements unless they have a predictive character. Even if a specific risk has a low probability of occurring, disclosure of it should be made if it would have a material effect on an investment, were it to occur.

Implied assumptions

RG 170.49 Issuers of prospective financial information need to ensure that all material assumptions, including implied assumptions, are reasonable. For example, a disclosure document or PDS might say that “on the basis of today’s price and the yield confirmed by the expert, we expect for every share you hold, you will earn \$100 per year by year 14.” Future market conditions have not been disclosed here, so an implied assumption has been made of no change in market conditions over the period of the prospective financial information. This may have an increasingly material impact on the figures, the further into the future the prediction extends. If there were no reasonable grounds for that assumption the statement would be misleading.

RG 170.50 Other examples of implied assumptions that should have reasonable grounds include material assumptions:

- (a) relating to foreign currency exchange rates; or
- (b) that performance will track or outperform a certain benchmark. Both the performance of the benchmark in future and the fact that the forecast returns will track or outperform that figure require reasonable grounds.

C How should prospective financial information be disclosed?

Our policy

Informed assessment

RG 170.51 Investors should be given enough information to enable them to:

- (a) assess whether the prospective financial information is relevant and reliable (ie to form their own view about how reasonable the grounds are for making the statement); and
- (b) identify with certainty the facts and circumstances that support prospective financial information as well as being able to demonstrate that the information is reasonable.

Note: Disclosure of this information is required under s710 and 1013D of the Act.

RG 170.52 We consider prospective financial information in a disclosure document or PDS should be accompanied by:

- (a) full details of the assumptions (including the quantum of any assumption) used to prepare the prospective financial information;
- (b) the time period covered by the prospective financial information;
- (c) the risks that the prospective financial information will not be achieved; and
- (d) an explanation of how the prospective financial information was calculated and the reasons for any departures from accounting standards or industry standards that investors would reasonably expect to be followed.

Presentation of information

RG 170.53 When prospective financial information is used in a disclosure document or PDS, we consider that:

- (a) its underlying assumptions and limits must be displayed in a prominent way (when compared to the “key” statement); and
- (b) where a range has been given, a more favourable figure or fact in the range should not be given undue prominence.

RG 170.54 The term “forecasts” has a particular accounting meaning. The use of that or other technical terms should not be misleading to investors.

Warning about reliability of prospective financial information

RG 170.55 Even where there are reasonable grounds to state prospective financial information, issuers should consider including a warning so that a reader of the document will understand its predictive character and the risks in placing undue reliance on that information.

Underlying principles

RG 170.56 Additional information must be provided with prospective financial information to enable investors and their advisers to make an informed assessment about the product under s710, 714, 715 or 1013D. Information can be misleading if it is presented in isolation from the assumptions and a description of the methodologies used to develop the information: see *Wesfi Ltd v Blend Investments Pty Ltd* (1999) 31 ACSR 69, *Cultus Petroleum NL v OMV Australia Pty Ltd* (1999) 32 ACSR 1.

RG 170.57 Investors must be able to assess:

- (a) the validity of the assumptions on which the prospective financial information is based;
- (b) the likelihood of the assumptions actually occurring; and
- (c) the effect on the prospective financial information if the assumptions vary.

Explanation

Informed assessment

Assumptions

RG 170.58 A disclosure document or PDS must specifically disclose any assumptions used in compiling prospective financial information that materially affect the forecast outcome. The assumptions should be detailed and specific enough to enable the investor to work through all of the prospective financial information. This may require details about how returns are calculated during each year that the prospective financial information covers. Among other

things, assumptions about expenditures, revenues, inflation rates and other such variables should be clearly disclosed, and highlighted where different assumptions have been used for different parts of the term that the prospective financial information covers.

RG 170.59 We expect a disclosure document or PDS to disclose material assumptions about:

- (a) specific future economic conditions; and
- (b) particular circumstances affecting a company or financial product and the industries relevant to that company or financial product.

RG 170.60 An assessment of the impact of these assumptions on prospective financial information should also be included. However, a disclosure document or PDS does not have to:

- (a) state general assumptions, such as the absence of war or natural disasters, unless the forecast takes these events into account; or
- (b) disclose assumptions that would not materially affect the prospective financial information.

RG 170.61 It is not sufficient to state the general nature of an assumption. The quantum of the assumption must also be set out. For example, it may not be sufficient to state that prospective financial information is based on an anticipated recovery in equity markets, without setting out the amount of the required recovery: see *GIO Australia Holdings Ltd v AMP Insurance Investment Holdings Pty Ltd* (1998) 29 ACSR 584.

RG 170.62 Disclosure of the material assumptions on which the prospective financial information is based allows an investor or adviser to make an informed assessment of an issuer's prospects, or a person as a retail client to make an informed decision whether to acquire the product.

RG 170.63 We consider that because the presence or absence of reasonable assumptions is a factor in any determination of whether an issuer has satisfied the relevant disclosure obligation, the basis for the assumptions underlying the prospective financial information should be stated in the disclosure document or PDS in order that an investor has some means of assessing that information: see *Miba Pty Ltd v Nescor Industries* (1996) 141 ALR 525 and *Wesfi Ltd v Blend Investments Pty Ltd* (1999) 31 ACSR 69.

RG 170.64 Disclosure of the basis for prospective financial information may reduce the capacity of the information to mislead

because such disclosure assists the assessment/decision of an investor or retail client.

Sensitivity analyses

RG 170.65 Including a sensitivity analysis is a useful means of demonstrating the responsiveness of prospective financial information to material changes in key assumptions underlying the information. A sensitivity analysis should show the impact of change on significant assumptions to highlight the importance of those assumptions in calculating the prospective financial information. However, a sensitivity analysis alone is not an adequate substitute for prospective financial information prepared in accordance with s728(2) (where it is required) or explaining all relevant assumptions and risks.

RG 170.66 Sensitivity analyses using positive or optimistic variables should generally be accompanied by a corresponding set of analyses based on negative or pessimistic variables of substantially similar weight. The range of variables covered by a sensitivity analyses should be reasonable.

Disclosing confidential information

RG 170.67 The commercial benefits of keeping certain information confidential are relevant in assessing what is reasonable for investors to require or expect for the purposes of s710 and 1013F(1). However, these commercial benefits do not justify withholding information that may deter investors from acquiring the securities if that information were generally known. Careful disclosure may often satisfy the requirements of the Act without revealing confidential information.

Time period of prospective financial information

RG 170.68 The time period covered by the prospective financial information is an assumption that forms part of the information that must be disclosed.

RG 170.69 It may be appropriate to explain why a particular period was selected. A person setting out prospective financial information covering periods affected by cyclical or seasonal factors or income support guarantees that will expire after the period, must ensure readers are not misled about how representative the period is likely to be. If there are specific considerations that affect a chosen period, those matters should be disclosed.

RG 170.70 Prospective financial information should be based on the financial years of the issuer. This means that:

- (a) investors can compare results with previous year financial results; and
- (b) periods are not selected to create a misleading impression.

RG 170.71 Subject to our comments in RG 170.69, if reliable prospective financial information can only be reasonably stated for part of a financial year, it can be made for that part only.

Risks to prospective financial information

RG 170.72 Any disclosure document or PDS that contains prospective financial information must indicate what factors may lead to a significant difference between the prospective financial information and the actual results. The disclosure of these factors should be in an unambiguous and unequivocal form.

RG 170.73 The following risks relevant to prospective financial information should be disclosed:

- (a) risks associated with a particular asset class for the financial product. For example, the volatility of share prices or the fact taxation deductions may be disallowed for scheme interests subject to a product ruling; and
- (b) risks specific to the proposed investment strategy, for example, the risks associated with particular investment plans or investing in emerging industries.

RG 170.74 In the absence of these warnings, prospective financial information may have a greater capacity to be misleading.

Presentation of information

RG 170.75 Section 728(2) is not an exhaustive statement of when prospective financial information is misleading. The presentation, accompanying disclosures and terminology used in prospective financial information should also be considered. A statement that is literally true may at the same time be misleading and deceptive: see *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228.

RG 170.76 If significant information is presented in a way that investors are likely to overlook, a disclosure document or PDS may be misleading see: *Fraser v NRMA Holdings Ltd* (1995) 13 ACLC 132, *Pancontinental Mining Ltd v Goldfields Ltd* (1995) 16 ACSR 463. Therefore, a disclosure document or PDS must present the information needed to assess the reliability of prospective financial information in

a way that clearly connects both types of information. This normally means that the information about assumptions, and other matters underlying prospective financial information, should be in the same part of the disclosure document or PDS as the prospective financial information itself.

RG 170.77 ASIC considers that prospective financial information and associated material should be disclosed:

- (a) with its assumptions and limits prominently displayed immediately after the information, or in a way that ensures that a reader is made aware of the existence, nature and quantum of the assumptions and limits at the time they read it;
- (b) with the assumptions and limits displayed in a way which is not less prominent than the information; and
- (c) so that prominence is not given to a more favourable figure or fact in the forecast range if a range is cited.

RG 170.78 The use of terms like “forecasts” may imply that their contents are calculated in accordance with auditing standards. Issuers should ensure that the use of any technical terms are adequately explained in a PDS or disclosure document and are not misleading. In particular, care should be taken to ensure that the use of terminology is consistent throughout a disclosure document or PDS to avoid investor confusion.

Use of ranges

RG 170.79 Presenting prospective financial information as a range may reduce the risk that investors will place undue weight on it, as may occur with a single point estimate. However, giving a range is only appropriate for significant totals, such as net profits or net assets. Ranges may be confusing or misleading if they are used for every item that appears in a statement of financial position.

RG 170.80 Where prospective financial information is expressed as a range, the range must be small enough to give meaningful information about an issuer’s prospects. A disclosure document or PDS should state which variables will have a significant effect on the outcome within the range. It may be misleading to include a range when the maker expects the results to be at the lower end of the range. If a range is given, the link between the assumptions and the upper and lower ends of the range should be clear. It may be appropriate to express prospective financial information as a statement that a result of at least a specific amount is likely.

RG 170.81 When quoting a range, undue prominence should not be given to the more favourable figure or fact in the range.

Methodology, accounting and industry standards

RG 170.82 Investors must be able to assess the reliability of prospective financial information. To do this, they should be able to assess whether the key assumptions are likely to occur. Therefore, a disclosure document or PDS must disclose material details about the enquiries and research undertaken and the process followed in preparing the information.

RG 170.83 A disclosure document or PDS may show prospective financial information in the format of financial statements required by the Act, such as a statement of financial position. Therefore, some investors may expect that information is prepared in accordance with accounting or industry standards. As a general principle, the following should be disclosed in a disclosure document or PDS:

- (a) the reasons for any departure from current accounting or industry standards that apply;
- (b) the reason a particular accounting or industry standard is applied in a particular way when there is some discretion involved; and
- (c) the reason a particular accounting or disclosure treatment is adopted when current practices differ among relevant professionals.

RG 170.84 The issuer should also disclose the effects of any chosen accounting treatment on the prospective financial information. The effects should be disclosed in enough detail for investors to properly assess the information. Reasons for preparing prospective financial information in a particular way will not need to be given if they would not be material to investors. We are not concerned with trivial or unimportant differences in accounting treatment in a prospectus: see also Practice Note 64 *Accounting and disclosure issues for property trust prospectuses* [PN 64].

RG 170.85 Similarly, if an expert adopts a particular methodology in preference to others when preparing prospective financial information, it should be explained. Experts should see [RG 12 for more detailed guidance.

RG 170.86 The methodology itself should not be misleading. For example, calculation of prospective financial information in a manner that does not take into account the time value of money may be misleading if investors do not understand that fact.

Warning about reliability of prospective financial information

RG 170.87 Any cautionary language should be displayed together with the prospective information or otherwise in a manner sufficiently prominent to ensure that a reader of the disclosure document or PDS will be no less likely to view it than the prospective financial information itself.

RG 170.88 We do not intend to prescribe the nature or content of what may constitute meaningful cautionary language and risk disclosure. However, we suggest that disclosure should include unambiguous statements clarifying that the prospective financial information:

- (a) is predictive in character;
- (b) may be affected by inaccurate assumptions or by known or unknown risks and uncertainties; and
- (c) may differ materially from results ultimately achieved.

RG 170.89 The use of warnings and other cautionary language will not always be sufficient to prevent particular information being misleading and importantly will not, of itself, affect the requirement for there to be reasonable grounds to state the information.

D What to disclose in the absence of prospective financial information

Our policy

Issuer to determine whether information is required

RG 170.90 Whether or not prospective financial information is included in a disclosure document or PDS, there must still be adequate disclosure about the benefits and risks of investing in the scheme or company.

RG 170.91 If prospective financial information has not been included in a disclosure document or PDS because there are no reasonable grounds for it, issuers may consider inserting a statement to that effect.

Underlying principles

RG 170.92 Even where there are no reasonable grounds to set out prospective financial information, disclosure may still be needed on certain matters to meet the requirements of the Act.

Explanation

Issuer to determine whether information is required

RG 170.93 The Act requires disclosure about:

- (a) the issuer's prospects: s710; and
- (b) the significant benefits of a product and the way in which the benefits will or may be provided: s1013D(1)(b).

RG 170.94 What is sufficient to meet these disclosure requirements must be judged in the context of each case. However, some examples of information may include:

- (a) historical information about the product such as yield or price (making sure that investors will not think it is a guarantee of future performance);
- (b) risks (eg historically what impacts on the key areas of yield and price, experience of the directors);

- (c) anticipated acquisitions;
- (d) product development and market share;
- (e) the kinds of matters discussed in Regulatory Guide 70
Prospectuses for cash box and investment companies (RG 70).

Past performance

RG 170.95 If events have occurred that make historical information unreliable, then those factors should be specifically identified. Past performance disclosure is also discussed in Regulatory Guide 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* (RG 168).

Cash burn

RG 170.96 In the case of start-up ventures and where there are reasonable grounds for establishing future costs, we would also expect some disclosure of:

- (a) the likely rate of expenditure for the venture;
- (b) if and when further funds will be required to continue business operations; and
- (c) how those funds might be raised.

Key terms

RG 170.97

In this guide, a reference to:

“Act” means the *Corporations Act 2001* and includes regulations made for the purpose of the Act;

“ASIC” means the Australian Securities and Investments Commission;

“AGS 1064” (for example) means an Auditing and Assurance Guidance Standard issued by the AuASB (in this example numbered 1064);

“AuASB” means the Auditing and Assurance Standards Board;

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

“disclosure document” has the meaning set out in s9 of the Act;

“forecast” means prospective financial information prepared on the basis of assumptions as to future events which management expects to take place and the actions management expects to take as of the date the information is prepared;

“PDS” means a Product Disclosure Statement that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Part 7.9 Div 2 of the Act;

“projection” means prospective financial information prepared on the basis of:

- (a) hypothetical assumptions about future events and management actions which are not necessarily expected to take place; or
- (b) a mixture of assumptions management expects to take place and hypothetical assumptions;

“prospective financial information” means financial information of a predictive character based on assumptions about events that may occur in the future and on possible actions by an entity;

“RG 136” (for example) means regulatory guide 136; and

“s728” (for example) means a section of the Act (in this example numbered 728).

Related information

RG 170.98

Headnotes

Prospective financial information, forecasts, misleading and deceptive conduct

Regulatory guides

RG 12 *Valuation reports and profit forecasts*

RG 42 *Independence of experts' reports*

RG 70 *Prospectuses for cash box and investment companies*

RG 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

Legislation

s710, 714, 715, 728, 765, 769C ,995, 1013D and 1041H

Cases

AAPT v Cable & Wireless Optus Ltd (1999) 32 ACSR 63

ASC v McLeod (2000) 18 ACLC 424

Cultus Petroleum NL v OMV Australia Pty Ltd (1999) 32 ACSR 1

Fraser v NRMA Holdings Ltd (1995) 13 ACLC 132

George v Rockett (1990) 170 CLR

GIO Australia Holdings Ltd v AMP Insurance Investment Holdings Pty Ltd (1998) 29 ACSR 584

Hornsby Building Information Centre Pty Ltd v Sydney Information Centre Ltd (1978) 140 CLR 216

Makita v Sprowles [2001] NSWCA 205

Miba Pty Ltd v Nescor Industries (1996) 141 ALR 525

Pancontinental Mining Ltd v Goldfields Ltd (1995) 16 ACSR 463

Re Aldred & Depot of the Treasury (1994) 35 ALD 685

Sykes v Reserve Bank of Australia (1999) ATPR 41-699

Wesfi Ltd v Blend Investments Pty Ltd (1999) 31 ACSR 69

Media and information releases

[IR 01/5] ASIC provides guidance for preparers and reviewers of prospective financial information included in disclosure documents, 7 February 2001

[MR 01/112] Further intervention by ASIC on fundraising disclosure, 30 March 2001