



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 99

Quotation of securities offered by prospectus (s1031)

Chapter 7 — Securities

Issued 21/8/1995

From 5 July 2007, this document may be referred to as Regulatory Guide 99 (RG 99) or Policy Statement 99 (PS 99). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 99.1) or their policy statement number (e.g. PS 99.1).

Headnotes

s109ZB; s995; s996; s1004; s1005; s1021; s1031; s1084; s1114; s1308; s1309; s1324; s1325; s1(2) Australian Securities Commission Act; prospectus; quotation; listed; securities; securities exchange; issue; rights issue.

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Purpose

RG 99.1 This guide explains the ASC’s views on s1031 of the Corporations Law (Law). When a corporation issues a prospectus offering securities which will be quoted, s1031 ensures that subscribers get either the quoted securities or a return of their application money, within a reasonable time. In particular, the guide contains the following information.

- (a) Part I sets out the ASC’s interpretation of s 1031 (para 3–28).
- (b) Part II explains how the ASC can give relief from s1031(1) to prevent it from invalidating an issue of securities (para 29–43).
- (c) Part III explains the policy the ASC will consider before giving relief (para 44–52).
- (d) Part IV explains the particular circumstances when the ASC will give relief. It also explains the requirements the ASC will impose (para 53–72).
- (e) Finally, Part V contains instructions about how an issuer should prepare and lodge an application for relief from s1031 (para 73 and 74).

RG 99.2 In this guide, references to statutory provisions are to those of the Law. “The Exchange” refers to Australian Stock Exchange Limited. “Issue” refers to an allotment or issue of securities on the basis of a prospectus. “Permission” refers to permission given by the Exchange to list securities for quotation on a stock market of the Exchange (see para 19). “Application” refers to an application for permission to list securities for quotation (unless otherwise specified). “Time limits” refers to those in s1031(1). For example, “three day time limit” refers to the time limit in s1031(1)(a) and the “six or 12 week time limit” refers to the time limit in s1031(1)(b).

Part I: Interpretation of s1031

Summary

RG 99.3 This part sets out the ASC's interpretation of s1031 and addresses the following questions.

- (a) What effect does s1031(1) have when it operates (para 4 and 5)?
- (b) When does s1031(1) apply (para 6 and 7)?
- (c) To what securities does s1031(1) apply (para 8–10)?
- (d) What is the date of issue of a prospectus? For example, is it the prospectus' deemed date of issue (s1021(4)) or the date when it was in fact issued (para 12 and 13)?
- (e) How are the time limits calculated (para 14 and 15)?
- (f) What statements does s1031(9)(b) prohibit (para 16–18)?
- (g) When does the Exchange give "permission" for securities to be listed for quotation for the purpose of s1031(1) (para 19)?
- (h) How does s1031(1) apply when the Exchange gives permission subject to specified conditions (ie, conditional permission)? Is s1031(1)(b) only satisfied if either:
 - (i) the conditions are met in fact; or
 - (ii) the directors give an undertaking under s1031(7) to meet the conditions,

by the end of the six or 12 week time limit (para 20–23)?

- (i) What undertakings can directors give under s1031(7) and what happens if they are not met (para 25–28)?

What effect does s1031(1) have?

RG 99.4 When s1031(1) applies, an issuer needs to make an application to the Exchange for permission to list securities for quotation, within three days after the issue of the prospectus. The application then needs to be approved within six weeks after the issue of the prospectus, or up to 12 weeks if the Exchange allows. Note that the Exchange can only extend time during the initial six weeks.

RG 99.5 Subsection 1031(1) does not expressly require the issuer or its directors to apply for and obtain permission within the specified time limits. However, if that does not occur:

- (a) any issue of securities on the basis of the prospectus is void; and
- (b) the issuer must repay any subscription monies received (see also s1031(2)).

When does s1031(1) apply?

RG 99.6 Subsection 1031(1) applies to both listed and unlisted corporations which issue securities by prospectus (eg, a listed company making a rights issue). This is because the expression “listed for quotation” refers to securities being admitted to quotation. It does not refer to the issuer’s admission to the Official List (see the definition of “listing rules” in s761, the former s1018(2)–(7B) and *Re Nanwa Gold Mines Ltd, Ballantyne v Nanwa Gold Mines Ltd* [1955] 3 All ER 219).¹

RG 99.7 Subsection 1031(1) only applies when a prospectus “states that application has been or will be made” for permission to list the *securities* for quotation. These words should be read broadly in light of s1031(9)(b) to include the types of statements mentioned in that paragraph. Subsection 1031(1) therefore applies if the prospectus in any way refers to permission, or an application or intended application for permission (see *Millheim v Barewa Oil & Mining NL* [1971] WAR 65 at 66, and para 60 of the Eggleston Committee’s Fifth Interim Report (October 1970) at page 17).

To what securities does s1031(1) apply?

RG 99.8 The Exchange often quotes rights, as well as the securities subsequently issued on the exercise of those rights. Subsection 1031(1) does not apply to the rights, but does apply to the securities issued on the exercise of the rights. This is because s1031(1) only applies to securities of a corporation, as defined in s92(2). It does not apply to rights because

¹ Section 1031 applies in relation to securities exchanges other than the Exchange. In that situation, an issuer should apply for an extension of the time limits if it expects that they cannot be met. The ASC will give extensions on a case by case basis after considering the policy of s1031 and the mischief it addresses (see para 44-52). The issuer can apply for an extension ahead of time under s1084(6) (para 36-37).

they are not securities (see para 184 of Regulatory Guide 56 *Prospectuses* (RG 56). Rights issues will be the subject of a separate guide.

RG 99.9 Subsection 1031(1) applies to prescribed interests (see *In the matter of Dairy Vale Ltd and Dairy Vale Foods Ltd* (unreported decision of Branson J, Federal Court, 17 March 1995)). In that context, references to the corporation are to the management company rather than the scheme or the trustee. For example, if permission is not applied for and obtained within the specified time limits, the management company has to repay subscribers' application money (s1031(1)). The management company may comply with that obligation by causing the trustee to hold that money (s1031(6)) and repay it if and when necessary (see s52 and s764).

RG 99.10 Options issues will be the subject of a separate guide. In the interim, see para 26 of RG 56.

What is the date of issue of a prospectus?

RG 99.11 The references in s1031(1)(a) and s1031(9)(b) to dates and time periods should be read in light of one another. This has the following results.

RG 99.12 The reference in s1031(1)(a) to "the date of issue of the prospectus" is to the day on which the prospectus was actually issued. This is consistent with s1031(9)(b), which refers to the date "three days after the issue of the prospectus". It is also consistent with s1021(4), which gives primacy to the actual issue date. That subsection provides that the date inserted in the prospectus under s1021(3) is the prospectus' date of issue "unless the contrary is proven".

RG 99.13 A prospectus is issued when copies are first circulated, distributed or disseminated as an offer document to potential investors and their representatives (see the definition of "issue" in s9). A prospectus is not issued when copies are given in confidence for other purposes; eg, copies given to senior staff, underwriters and brokers to the issue. Nor is a prospectus issued merely by being lodged with or registered by the ASC.

How are the time limits calculated?

RG 99.14 The reference in s1031(9)(b) to “three days after the issue of the prospectus” is to the same time limit as s1031(1)(a): “on or before the third day on which that securities exchange is open after the date of issue of the prospectus”. The prospectus’ date of issue is not counted as one of those three days (s105(1), Regulatory Guide 7 (RG 7) and *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421). For example, if a prospectus is issued on Monday, the third day on which the Exchange is open after that day will normally be Thursday. The Exchange is open on a particular day if it is open to receive the application on that day.

RG 99.15 A period of six weeks from the day on which the prospectus is issued, ends at midnight on the corresponding day in the sixth week after issue. For example, if it is issued on a Monday, the six week time period ends at midnight on the sixth Monday following. The same rule applies for the period of 12 weeks (s1031(1)(b)). If the last day for a period is not a business day, s1031(1)(b) allows until the end of the next business day (s105, the definition of “business day” in s9 and RG 7).

What statements does s1031(9)(b) prohibit?

RG 99.16 The concern has been expressed that s1031(9)(b) may prohibit a statement regarding listing if the statement mentions more than the bare fact that permission has been or will be applied for or given. If that was correct, the prospectus could not include further information about the issuer’s application or about the Exchange’s listing requirements. That would be the case even when s1022 or s1022AA required this information to be included, as they often will.

RG 99.17 The ASC does not consider that to be a correct reading of s1031(9)(b) because:

- (a) it would clearly be contrary to the general tenor of the prospectus provisions to prohibit that type of information (ie, by implying an “only” into s1031(9)(b) which is not express); and
- (b) s1031(9)(b) appears to be designed only to ensure that the prospectus includes a statement on which s1031(1) can operate (see para 7). The expression “is to the effect that” is an apt description of a statement which *mentions* an application for permission but also gives further information.

RG 99.18 If there is commercially significant doubt on this point, the ASC will give relief by Class Order to remove it. This would exempt an issuer from s1031(9)(b) to the extent that it might be interpreted as prohibiting this type of information from being included in a prospectus. Of course, the statement must not otherwise contravene the Law. For example, it must not be false, misleading or deceptive (see s995, s996, s1308 and s1309).

Permission to list securities for quotation

When does the Exchange give “permission”?

RG 99.19 The Exchange gives “permission” to list securities for quotation, when it notifies the issuer that the securities will be quoted. It is not when the securities are actually admitted to quotation. This is because s1031 contemplates that the Exchange may give “permission” subject to conditions and actual admission to quotation is never conditional (see also para 24 regarding admission on a deferred settlement or conditional trading basis).

Conditional permission

RG 99.20 The Exchange usually advises that securities will be admitted to quotation (and, when relevant, that the issuer will be admitted to the Official List) subject to specified conditions. The Exchange need not begin actual quotation of the securities until those conditions have been met.²

RG 99.21 Before issuing a prospectus, an issuer should ensure that it will be able to meet the Exchange’s usual conditions within the specified time limits. Early consultation with the Exchange will ensure that the application for permission has the appropriate form and content. However, the Exchange will not review the prospectus before registration. The issue of the prospectus itself should be postponed if the issuer knows that the application process will probably take longer than usual.

² The Exchange may refuse to begin quotation until the conditions have been met. The Exchange has the right to do this even if directors have given undertakings to comply with those conditions satisfying s1031(7) (see *Premier Pacific Pharmaceutical Industries Ltd v Australian Stock Exchange Ltd* (1995) 13 ACLC 979 at 938–984 per Davies J (on appeal)).

RG 99.22 It is implicit in s1031(7) that the Exchange can give permission subject to conditions. It is also implicit that s1031(1)(b) is not satisfied unless and until either:

- (a) the conditions are met in fact; or
- (b) the directors give an undertaking under s1031(7) which meets the conditions (see para 25 and 26),

by the end of the time limit in s1031(1)(b). (See *Premier Pacific Pharmaceutical Industries Ltd v Australian Stock Exchange Ltd* (1995) 13 ACLC 744 per Gummow J (“*Premier Pacific v The Exchange*”). The question was not considered on appeal.)

RG 99.23 If none of those things occurs, s1031(1) invalidates:

- (a) any issue which has already been made; and
- (b) any subsequent issue of securities, when and if it ever takes place.

An issue cannot be validated by the Exchange giving permission or the directors giving an undertaking under s1031(7), after that time (see also para 42 and 43).

RG 99.24 The Exchange may admit securities to quotation on a deferred settlement or conditional trading basis. This type of permission satisfies s1031(1) if it is given by the end of the time limit in s 1031(1)(b).

What undertakings can be given under s 1031(7)?

RG 99.25 Subsection 1031(1)(b) is satisfied if:

- (a) the Exchange gives conditional permission to list securities for quotation (para 20–23);
- (b) all of the conditions relate to matters within the directors’ control (para 26); and
- (c) by the end of time limit in s1031(1)(b), all of the directors give a written undertaking under s1031(7) to meet those conditions (para 20).

RG 99.26 A directors’ undertaking is only sufficient for the purpose of s1031(7) if it relates to conditions which the directors can personally meet or cause to be met. This essentially refers to matters within the directors’ control. For example, directors can generally meet a condition requiring them to provide a list of the top 20 shareholders before quotation. However, they can rarely meet a

condition as to shareholder spread. (See *Premier Pacific v The Exchange* (1995) 13 ACLC 744; 13 ACLC 979 (on appeal)).

What happens if the undertakings are not met?

RG 99.27 If the Exchange gives conditional permission to quote securities and the directors give an undertaking under s1031(7) to meet those conditions, s1031(1) will no longer apply to an issue of those securities (para 22 and 23). However, the Exchange need not begin actual quotation of the securities until and unless the conditions have been met in fact (para 20).

RG 99.28 If the undertakings are not met, the Exchange may refuse to admit the securities to quotation. In this case, subscribers will be left with unmarketable securities. The ASC may also:

- (a) prosecute the directors for breach of s1031(8) (this is an offence);
- (b) seek an injunction to compel compliance with the undertaking (s1114 or s1324); or
- (c) seek civil orders for damages, compensation, rescission, restitution or disclosure (s1005, s1325 or s1004).

Part II: How can the ASC give relief from s1031(1)

RG 99.29 This part explains how the ASC can give relief from s1031(1) to prevent the subsection from invalidating an issue of securities.

RG 99.30 The ASC can also give relief from a prohibition or requirement in s1031. For example, it can give relief from a director's obligation to repay subscribers' application money (s1031(2)). That type of relief can be given by modification under s1084(6) or by exemption under s1084(2) (para 33). It *cannot* be given by exemption under s1031(3) (para 35(b)). The ASC will consider the policy of s1031 before giving any relief (see para 44–52).

How can the ASC give relief?

RG 99.31 The ASC can give relief from s1031(1) to prevent it from invalidating an issue of securities. It can give that relief by modification under s1084(6) or by exemption under s1031(3). It *cannot* give it by exemption under s1084(2) (para 30). The ASC will consider the policy of s1031 before giving any relief (see para 44–52).

Why can it not use its power of exemption in s1084(2)?

RG 99.32 Subsection 1084(2) does not empower the ASC to exempt an *allotment or issue*; ie, to prevent it from being invalidated (s1031(1)). This is because s1084(2) only empowers the ASC to exempt *a person* from a prohibition or requirement in Div 2 or 3 of Pt 7.12.

RG 99.33 The ASC can still use s1084(2) to give relief from a prohibition or requirement in s1031; eg, the issuer's obligation to repay application money (s1031(1)). An exemption under s1084(2) can be conditional or unconditional (see s1084(4)). The relief comes into effect when the instrument of relief is executed; ie, before it is published in the *Gazette* (see s1084(8)). This is different from the ASC's power of exemption under s1031(3) (see para 35(d) and (e)).

How does each power work?

Modification under s1084(6)

RG 99.34 Subsection 1084(6) works in the following way.

- (a) It allows the ASC to modify how s1031 applies to a person; eg, by extending the time before s1031(1) operates.
- (b) It does not allow the ASC to give a conditional modification. But the ASC can write an obligation into a modification; eg, a requirement that the issuer offer to return subscribers' application money (see para 65).
- (c) Relief under s1084(6) comes into effect when executed; ie, before it is published in the *Gazette* (see s1084(8)).

Exemption under s1031(3)

RG 99.35 Subsection 1031(3) works in the following way.

- (a) It allows the ASC to exempt an "allotment or issue" of securities from "the operation" of s1031. Subsection 1031(1) is the only provision of s1031 which can operate directly on an allotment or issue; ie, to invalidate it in certain circumstances (see para 5). The only direct effect of the exemption is therefore to prevent s1031(1) from invalidating an allotment or issue.
- (b) It does not empower the ASC to exempt a *person* from a prohibition or requirement; eg, the issuer's obligation to repay subscribers' application money (s1031(1)). However, this obligation will not arise if the exemption is given.
- (c) It does not allow the ASC to modify s1031; eg, by extending time limits.
- (d) It does not allow the ASC to impose conditions on the relief. (This is different from the ASC's power of exemption under s1084(2): see para 33.) However, the ASC may still withhold relief until a specified precondition has been met; eg, the issuer offering to return subscribers' application money (see para 65).
- (e) Relief only comes into effect when published in the *Gazette*. This is different from the ASC's power of exemption under s1084(2) (see para 33).

When can the ASC give the relief?

RG 99.36 Under s1031(3), the ASC can *only* give relief from a time limit *after* it has expired. This is because the subsection only applies when, as a matter of fact, either:

- (a) the issuer did not apply for permission in the required form and within the three day time limit; or
- (b) the Exchange did not give permission by the end of the applicable time limit in s1031(1)(b).

RG 99.37 Under s1084(6), the ASC can *only* give relief from a time limit *before* it expires. The ASC's powers of exemption and modification do not in general have retrospective effect. The power in s1031(3) is plainly an exception: it can *only* be exercised after the relevant time period has expired. Because s1031(3) gives special power with some retrospective operation, the ASC considers that it cannot give relief under s1084 when the preconditions for the exercise of the power in s1031(3) are satisfied.

Difference between powers

RG 99.38 The differences between the ASC's powers to give relief from s1031(1) are summarised in the following table.

	Modification (s1084(6))	Exemption (s1031(3))
<i>How does the relief work?</i>	Relief changes how s1031(1) applies to a person (para 34(a))	Relief exempts an issue of securities from s1031(1); ie, to prevent it from invalidating the issue (para 35(a))
<i>Does it confer power to extend a time limit?</i>	Yes (para 34(a))	No. Only confers power to waive the time limit altogether (para 35(c))
<i>When can relief be given from a time limit?</i>	Relief can only be given <i>before</i> the time limit has expired (para 37)	Relief can only be given <i>after</i> the time limit has expired (para 36)
<i>When must an issuer apply for relief?</i>	Must apply for relief well before the time limit expires (para 37, 39 and 40)	Must apply for relief before any securities are issued (para 36, 42 and 59)
<i>Conditions</i>	Can only be imposed by writing obligations into the modification (para 34(b))	The ASC can require specified preconditions to be met before giving the exemption (para 35(d))

	Modification (s1084(6))	Exemption (s1031(3))
<i>When does the relief come into effect?</i>	When the ASC executes the instrument of relief; ie, before it is gazetted	When the ASC publishes the instrument of relief in (para 34(c))the <i>Gazette</i> (para 35(e))

Timing

Timing of application for modification (s1084(6))

RG 99.39 As a general guide, an application for a modification should be lodged at least 14 days before the relevant time limit expires. The ASC cannot give a modification after the time limit expires (para 37). Shorter notice may suffice for urgent cases. More time should be allowed for complex matters.

RG 99.40 The ASC will not normally give a modification when the application for relief is made before the prospectus has been issued. This is because an issuer should prepare its application to the Exchange well before the issue of the prospectus. Alternatively, the issuer can delay the start of the time limits by delaying the issue of the prospectus. An exception may be made if the prospectus discloses the likely delay.

Exemption may involve delay (s1031(3))

RG 99.41 If an issuer wants relief from the six or 12 week time limit, it may prefer to apply under s1084(6). An exemption under s1031(3) may delay the issue of securities by weeks because the relief:

- (a) will only be given after the time limit has expired (para 36);
- (b) does not have effect until it has been gazetted (para 35(e)); and
- (c) will only be given after the Exchange gives permission for the quotation of the securities (para 42 and 59).

If the delay is significant, the ASC may also make the issuer offer early subscribers the return of their application money before giving the exemption (para 65).

Can the ASC give relief after an issue of securities is invalidated?

RG 99.42 The ASC cannot give relief after s1031(1) has invalidated an issue of securities. The exception is when the issuer applied for relief under s1031(3) before issuing the securities. However, the ASC will not give relief in this situation. It is clearly inappropriate for the issuer to issue securities when it knows that the issue will be invalidated if relief is not given (see para 59).

RG 99.43 An issuer can apply to the Court to validate an issue of securities (s194 or s1322(4)). See also *In the matter of Dairy Vale Ltd and Dairy Vale Foods Ltd* (unreported decision of Branson J, Federal Court, 17 March 1995).

Part III: Policy in giving relief

RG 99.44 This part explains the policy the ASC will consider before giving relief from s1031(1) to prevent it from invalidating an issue of securities.

RG 99.45 When giving relief from s1031(1), the ASC will aim to promote market efficiency and to ensure that investors are adequately protected (s1(2) of the ASC Law). It will also consider two more specific policy objectives.

- (a) The first policy objective is to ensure that neither s1031 nor relief from the section frustrates a subscriber's intention in applying for securities. When subscribers apply for securities, they expect to get:
 - (i) a marketable investment if and when the issue of securities goes ahead; and
 - (ii) either the securities or a return of their application money, within a reasonable time.
- (b) The second policy objective is to avoid the unduly harsh and unintended effect that s1031(1) may have on both issuers and subscribers when it invalidates an issue of securities.

(See the Cohen Committee's Report on Company Law Amendment (June 1945, London) at para 23–28, and the Explanatory Memorandum to the Corporations Bill 1988 regarding clause 1031 (para 3084). See also *Brolga Minerals NL v The Stock Exchange of Perth Ltd* (1971–1973) CLC 40-057 and *Premier Pacific v The Exchange* (1995) 13 ACLC 744; 13 ACLC 979 (on appeal).

First policy objective

RG 99.46 The ASC's first policy objective when giving relief from s 1031(1), is to ensure that neither s1031 nor relief from the section frustrates a subscriber's intention in applying for the securities. When an issuer offers securities to the public representing that they will be quoted on the Exchange, subscribers for the securities presumably expect to get two things.

Marketable investment

RG 99.47 First, they expect to get a marketable investment if and when the issue of securities goes ahead. The subscribers are presumably attracted by:

- (a) the greater marketability and liquidity of quoted securities;
- (b) the issue being subject to the scrutiny of the Exchange and its financial, spread and other conditions (although the Exchange does not vouch for the merits of an issue); and
- (c) the fact that the listing requirements will apply once the issuer is listed. These include the continuous disclosure obligations.

Part of the purpose of s1031(1) is therefore to ensure that, when subscribers apply for securities on the basis that they will be quoted, the securities are not issued unless they are in fact quoted. That purpose would be defeated if relief from s1031(1) allowed subscribers to be issued with securities which were never quoted.

Securities or return of application money within reasonable time

RG 99.48 Secondly, the subscribers expect to get either the securities or a return of their application money, within a reasonable time. Section 1031(1) and 1031(2) attempt to ensure that this expectation is met. However, they also attempt to allow a reasonable time for:

- (a) the issuer to apply for permission to have the securities listed for quotation; and
- (b) the Exchange to assess and process that application.

RG 99.49 In this way, s1031(1) prevents subscription money from being tied up for an unreasonably long time due to delays in the listing process. It also enables subscribers to predict confidently when they will be able to realise their investments. The time limits in s1031 must therefore remain relatively fixed.

Second policy objective

RG 99.50 The ASC will consider a second and competing policy objective when giving relief from s1031(1). That is to avoid the unduly harsh and unintended effect which s1031(1) may have on both issuers and subscribers.

RG 99.51 When s1031(1) invalidates a subscription contract:

- (a) the issuer loses its promotion costs; and
- (b) subscribers lose their subscription contracts (ie, their bargains), whether or not they want to.

By that time, subscribers have already incurred opportunity costs. They may have lost the use of their subscription money for weeks or months, having exchanged it for the prospect of obtaining securities if and when the issue proceeded. If the issue is aborted shortly before the securities would otherwise have been issued and then admitted to quotation, those opportunity costs are thrown away. This effect may be disproportionate when the delay is trivial, particularly because the time limits in s1031(1) are arbitrary and not suitable in all cases.

Balance of competing policy objectives

RG 99.52 When giving relief from s1031(1), the ASC will therefore balance these two competing policy objectives. On the one hand, it will attempt to prevent s1031(1) from having a harsh and unintended effect on issuers and subscribers. On the other hand, it will attempt to ensure that subscribers obtain either marketable securities or a return of their application money, within a reasonable time.

Part IV: When will the ASC give relief?

Summary

RG 99.53 This part explains the particular circumstances when the ASC will give relief from a time limit in s1031(1) to prevent it from invalidating an issue of securities. It also explains the requirements the ASC will impose when granting that relief. That explanation can be summarised as follows.

- (a) The ASC will generally only give relief if the issuer applied to the Exchange for permission and met the Exchange's requirements, in a timely way. The application for permission must also have a prospect of success (para 55).
- (b) The ASC will only give relief from the six or 12 week time limit under s 1031(3) after the Exchange has already given permission. It will not give the relief if the issuer has already issued securities (para 59).
- (c) The ASC will give relief from the three day time limit without affecting the rest of s1031; eg, the six or 12 week time limit (para 58).
- (d) The ASC will not give relief if the Exchange refuses permission before the end of the six or 12 week time limit (para 60).
- (e) The ASC will only give relief under s1031(3) to extend the six week time limit to 12 weeks if the time limit was not previously extended because of a mistake or inadvertence (para 61 and 62).
- (f) The ASC will only give long extensions of the time limit in s1031(1)(b) (ie, more than 14 days) if the issuer offers to return early subscribers' application money. The issuer must also pay interest on that money. The ASC will give shorter extensions without imposing these requirements (para 63–71).

In this part, "early subscribers" refers to subscribers whose application forms were received by the issuer on or before the day when the delay was first publicly announced (see also para 67).

General circumstances

RG 99.54 The only reason for giving relief from s1031(1) under s1084(6) or s1031(3) is to support the Exchange's discretion in deciding whether or not to list the securities for quotation. However,

by giving relief, the ASC does not indicate that the Exchange should quote the securities.

RG 99.55 The ASC will usually discuss an application for relief with the Exchange. The issuer should therefore consult with the Exchange before applying for relief (see para 73 and 74). In general, the ASC will only give relief if:

- (a) the issuer has applied to the Exchange for permission and met the Exchange's requirements, in a timely way. This is to ensure that the issuer has not prejudiced its prospects of obtaining quotation in a reasonable time; and
- (b) the Exchange advises the ASC that the application for permission has a prospect of success. These prospects may have to be stronger in certain circumstances (see para 71–73).

Relief from three day time limit

RG 99.56 When the ASC gives a modification extending the three day time limit, the modification will not disturb the rest of s1031 (s1084(6)). This means that any issue of the securities will be invalid under the modified s1031(1) if the issuer does not:

- (a) apply for permission within the extended time; and
- (b) obtain permission within the six or 12 week time limit from the date of issue of the prospectus.

RG 99.57 If the three day time limit has expired, the ASC can exempt the issue from s1031(1)(a) without affecting s1031(1)(b) (s109ZB(6) and s1031(3)). When this is done and permission is not obtained within the six or 12 week time limit, any issue of the securities will be invalid. The exemption may be worded as follows:

“the ASC exempts the issue or allotment of the securities from the operation of s1031(1)(a) so that any issue or allotment is not void because of non-compliance with that paragraph. This exemption does not affect the operation of s1031(1)(b) (s109ZB(6)).”

RG 99.58 When applying for relief from the three day time limit under s1031(3) or s1084(6), the issuer should consider whether it should ask for other relief. For example, it may want to ask the ASC to modify the time limit in s1031(1)(b).

Relief from six or 12 week time limit under s1031(3)

RG 99.59 The ASC will only give relief from the six or 12 week time limit under s1031(3) after the Exchange gives permission to quote the securities. It will not give the relief if the issuer has already issued the securities (see para 42).

Exchange refuses to give permission

RG 99.60 The Exchange may advise an issuer before the end of the six or 12 week time limit that it refuses the issuer's application for permission. The ASC will not give relief in that situation because relief would only delay the return of subscription money.

Extensions from six to 12 weeks

RG 99.61 The ASC will not give relief if the Exchange refuses to extend the time limit in s1031(1)(b) from six to 12 weeks. This is because the effect is the same as if the Exchange had actually refused the application for permission (see para 60).

RG 99.62 The ASC may give relief if the time limit is not extended from six to 12 weeks because of a mistake or inadvertence. (Note that the Exchange can only extend time during the initial six weeks.) The issuer must apply for the relief under s1031(3) because the time limit will have already expired (para 36–37). The ASC will not usually make the relief conditional on the issuer offering to return early subscribers' application money (compare para 65). This is because subscribers should usually expect that the issue of securities may take up to 12 weeks (see para 63).

Extension of 12 week time limit

Policy

RG 99.63 Subscribers for securities know that the process of getting the securities quoted may take up to 12 weeks from the issue of the prospectus. Subscribers will also know that there may be longer delays if this is stated in the prospectus or some other public announcement. (Alternatively, they may expect quotation to occur

sooner if this is suggested by the prospectus.) However, when the ASC extends the 12 week time limit:

- (a) the issuer keeps subscribers' application money for the extended period but does not pay interest; and
- (b) subscribers do not get the opportunity of withdrawing their subscriptions. This is despite the fact that they subscribed for the securities expecting that they would get either securities or a return of their application money, within a reasonable time (see para 52).

These effects may be particularly harsh on early subscribers (see para 53). Also, if there is only a remote prospect that the securities will be quoted, the ASC is less justified in extending the time during which the issuer can keep the application money (see para 52).

RG 99.64 For these reasons, the ASC will only extend the 12 week time limit in the following circumstances and subject to the following conditions. Also, it will generally only extend that time limit once for the same issue of securities.

Long extensions

RG 99.65 The ASC may give long extensions of the 12 week time limit under s1031(3) or s1084(6); ie, more than 14 days. That relief would extend the time limit to more than 14 weeks in total. However, the ASC will only give that relief if the issuer:

- (a) offers to return early subscribers' application money (the offer must state that it will expire on a specified date, as agreed to by the ASC); and
- (b) pays interest on that money at current rates from the time the application was received to the time it is returned.

RG 99.66 The ASC will impose that requirement because, when s1031(1) and 1031(2) apply, they require an issuer to return subscribers' application money. They may also require the issuer or its directors to pay interest on that money. In both cases, the subsections apply regardless of whether subscribers want to continue to support the float (see para 52). The ASC's policy is therefore intended to enable applicants to make this decision for themselves. If the issue falls through, it is because subscribers choose to withdraw their subscriptions.

RG 99.67 Issuers can diminish the effect of this requirement by announcing likely delays in good time. This is because the issuer only

has to make this offer to subscribers who applied for securities before the issuer gave notice that the issue of the securities was likely to be delayed (see para 53).

RG 99.68 If the issuer wants a longer extension *before* the 12 week time limit expires, it should apply for a modification under s1084(6) (para 36). When giving that extension, the ASC will modify s1031 so that the section requires the issuer to make the offers discussed in para 65.

RG 99.69 If the issuer wants a longer extension *after* the 12 week time limit has expired, it must apply under s1031(3) (para 37). The ASC will only give that extension if the issuer made the offers discussed in para 65 as soon as possible after that time expired.

Short extensions

RG 99.70 The ASC will give a shorter extension of the 12 week time limit (ie, up to 14 days) without requiring the issuer to offer to return early subscribers' application money. A shorter extension will extend the maximum time limit in s1031(1)(b) to 14 weeks in total.

RG 99.71 When applying for a short extension, the issuer must establish that the Exchange is likely to grant permission within the extended time (see para 55 and 73(h)).

Statements in prospectus

RG 99.72 A prospectus may say what the issuer will do if permission is not obtained within the 12 week time limit. For example, it may say that subscribers' application money will be refunded within seven days after that time limit expires. This may affect the expectation of subscribers when they apply for the securities (para 63). The ASC will therefore consider this factor when deciding whether to give relief in these circumstances. For example, it may require the issuer to make out a stronger case for relief based on the policy concerns stated in para 44–52 (see para 55 and 73(h)).

Part V: How to prepare application for relief

RG 99.73 An application for relief from s1031(1) should be prepared in the following way, whether the issuer is applying under s1031(3) or s1084(6).

- (a) The application should identify the issuer, the prospectus and the person handling the matter on behalf of the Exchange.
- (b) It should establish the prospectus' date of issue (see para 12 and 13). It should also establish the date on which the issuer applied to the Exchange for permission (if applicable).
- (c) If the application for relief is under s1031(3), it should explain why permission was not applied for or obtained (as the case may be) within the specified time (para 36). It should also state that no securities have been issued, or will be issued before the relief is published in the *Gazette* (para 42 and 59).
- (d) If the application for relief is under s1084(6), it should establish that the relevant time limit has not yet expired and when it will expire (para 37).
- (e) It should be accompanied by copies of the issuer's submissions to the Exchange regarding quotation and any request to the Exchange to extend the six week time limit to 12 weeks. It should also be accompanied by the Exchange's responses (para 55, 61 and 62).
- (f) It should state that the issuer believes permission will ultimately be given and give a firm indication as to when quotation is likely to begin (para 55 and 71).
- (g) If the Exchange has given conditional permission, it should indicate that the issuer and its directors can fulfil the conditions (para 20–23).
- (h) It should address the ASC's policy concerns in para 44–52. The issuer may have to make out a stronger case for relief in some circumstances (eg, see para 55, 71 and 72).

How to lodge an application for relief

RG 99.73 Applications for relief under this guide should be:

- (a) lodged at an ASC Regional Office; and
- (b) accompanied by the appropriate fee and any supporting documentation required by this guide.

Applications will be received on the basis that the ASC is free to discuss the contents of the application with the relevant securities exchange. For this reason, it would be preferable if the issuer provided a copy of the application to the Exchange at the same time.