



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 156

Debenture advertising

December 2007

About this guide

This is a guide for issuers of debentures and publishers of debenture advertising. It sets out the standards we expect you to meet when advertising debentures that are offered to retail investors. It also sets out our expectations of those handling telephone inquiries about debenture products (including rollover discussions).

You should read this guide with Regulatory Guide 69 *Debentures—improving disclosure for retail investors* (RG 69).

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued on 19 December 2007 and is based on legislation and regulations as at 19 December 2007.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

Issuers of debentures can promote investor understanding and minimise the risk of mis-selling by ensuring that advertising for their products meets the advertising standards in this guide: see RG 156.1–RG 156.2.

Issuers who fail to comply with the advertising standards risk making false or misleading statements or engaging in misleading or deceptive conduct: see RG 156.3–RG 156.4.

While the primary responsibility for advertising material rests with the organisation placing the advertisement, under general law the publisher or other media conduit may also have some responsibility for its content: see RG 156.5–RG 156.7.

Advertising standards for debentures

- RG 156.1 Experience indicates that retail investors who are thinking about investing in debentures place particular emphasis on the information and impressions given in advertisements. These advertisements have not always given a realistic impression of the debenture, its features and risks. It is particularly problematic when advertisements give messages about a debenture that are inconsistent with the risks described in a complying prospectus. Because of the way debentures have been promoted, retail investors often fail to realise that a debenture's higher interest rate (compared to a bank deposit) should be balanced against the higher risk of not being paid the interest and losing some or all of their principal investment.

Note: References to 'advertisements' in this guide should be read broadly. They include comment and promotion of debentures in the course of media programs or publications (generally known as 'advertorials') and statements regarding the debentures published by issuers on their websites. They do not, however, include statements in a prospectus.

- RG 156.2 To promote investor understanding of debenture products and minimise the risk of mis-selling, ASIC has set standards for issuers when advertising these products. The standards are summarised in Table 1 and explained in detail in Section B of this guide. These standards only apply if the debentures are offered to retail investors.

Table 1: Advertising standards for issuers of debentures

| Area | Summary of standard |
|--|--|
| Repayment of principal investment | To avoid common misconceptions about the risk profile of debentures, all advertisements for debentures that are offered to retail investors should include a prominent statement to the effect that investors risk losing some or all of their principal investment. |
| Interest rates, credit ratings and investment ratings | <p>Advertisements for debentures should only quote interest rates if the interest rate is accompanied by prominent disclosure of either:</p> <ul style="list-style-type: none"> • a current credit rating of the debenture from a recognised credit rating agency (and what it means or where to find this out); or • a statement that the debenture does not have such a credit rating and what this means. <p>Advertisements for debentures should not refer to:</p> <ul style="list-style-type: none"> • investment ratings of the debenture or the issuer; or • credit ratings issued by an entity other than a recognised credit rating agency. |
| Comparisons with bank deposits and 'risk free' suggestions | <p>Advertisements for debentures should state that the debenture is not a bank deposit. They should <i>also</i> not suggest that:</p> <ul style="list-style-type: none"> • the debenture is, or compares favourably to, a bank deposit; or • there is no or little risk of the investor losing their principal or not being repaid. |
| Suitability statements | Advertisements for debentures should not state or imply that the investment is suitable for a particular class of investor. |
| Consistency with prospectus disclosure | Statements in advertisements for debentures should be consistent with the corresponding disclosures on that subject matter in the prospectus. |
| Telephone inquiries | Statements made in response to inquiries are subject to the same regulation regarding misleading and deceptive conduct as the advertisements. |

How the standards apply

- RG 156.3 Debenture issuers who fail to comply with the advertising standards risk making false or misleading statements or engaging in misleading or deceptive conduct.
- RG 156.4 Section C explains how the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Act 2001* (ASIC Act) apply in this case and what action ASIC can take against misleading or deceptive statements or conduct.

The role of publishers and the media

- RG 156.5 Publishers and the media have a role in promoting debenture products. Some of these products may be directly promoted in the media, through advertising and by media commentators, using terms like ‘secure’ and ‘guaranteed’.
- RG 156.6 While the primary responsibility for advertising material rests with the organisation placing the advertisement, under general law the publisher or other media conduit may also have some responsibility for its content.
- RG 156.7 We expect publishers to have systems and controls to detect and refuse advertisements for debentures that do not comply with the advertising standards in this guide: see Section D.

B Advertising standards for debentures

Key points

Advertisements for debentures should inform investors that they risk losing some or all of their principal investment: see RG 156.8–RG 156.9.

If a debenture advertisement quotes an interest rate, there should be prominent disclosure of whether or not the debenture has a credit rating from a recognised credit rating agency: see RG 156.10–RG 156.16.

Advertisements for debentures should state that the debenture is not a bank deposit: see RG 156.19.

It is misleading to use words like 'secure', 'secured', 'guaranteed' and 'no fees' in debenture advertising: see RG 156.20–RG 156.24.

Suitability statements should also be avoided: see RG 156.25.

Repayment of principal

- RG 156.8 Retail investors often confuse debentures with bank deposits. They often fail to realise that a debenture is a loan to the debenture issuer and that there is a higher risk of losing some or all of their money than is the case with a bank deposit.
- RG 156.9 For this reason, any advertisement for debentures that are offered to retail investors should contain prominent disclosure that investors risk losing some or all of their principal investment.

Interest rates, credit ratings and investment ratings

- RG 156.10 Advertisements for debentures that are offered to retail investors should *only* quote interest rates if the interest rate is accompanied by prominent disclosure of either:

- (a) a current credit rating of the debenture received from a recognised credit rating agency and what the rating means; or

Note: See paragraph RG 156.11 for an explanation of how advertisements can explain what a rating means, including by using a cross-reference to the prospectus.

- (b) a statement that the debenture does not have a current credit rating from a recognised credit rating agency and what this means (i.e. that no independent assessment has been made about the risk of investors losing all or part of their principal investment).

Note: This includes advertisements with generic references to the interest rate or return (e.g. to a 'very high' or 'highly competitive' interest rate) as well as to a specific interest rate.

- RG 156.11 Where a credit rating is quoted for RG 156.10(a), it should be accompanied by:
- (a) the source of the credit rating; and
 - (b) either an explanation of what the credit rating means or a cross-reference to an explanation of what it means located in the prospectus.
- RG 156.12 Advertisements for debentures should not refer to:
- (a) investment ratings of the debenture or the issuer; or
 - (b) credit ratings issued by an entity other than a recognised credit rating agency.

Explanation of warning statements required if interest rate cited

- RG 156.13 References to interest rates in advertising can be very influential to retail investors. These references can be misleading if at the same time the investor is not given information about the likelihood of being paid that interest or getting their principal back.
- RG 156.14 Credit ratings prepared by a recognised credit rating agency are a well-established and widely used method of communicating the credit risk of investment products, including debentures. Institutional investors are familiar with the meaning of various credit ratings. Retail investors should be provided with an explanation of what the rating means in the prospectus.
- RG 156.15 ASIC has already recognised some credit rating agencies for regulatory purposes. These credit rating agencies are obliged to give certain warnings, comply with the *Code of Conduct Fundamentals for Credit Rating Agencies* (issued in December 2004 by the Technical Committee of the International Organisation of Securities Commissions) and provide information to ASIC on request: see Class Order (CO 05/1230) *Credit rating agencies*.
- RG 156.16 For the purposes of this guide, the following are recognised credit rating agencies:
- (a) Moody's Investors Services Pty Ltd;
 - (b) Standard & Poor's (Australia) Pty Ltd; and
 - (c) Fitch Australia Pty Ltd.

Warning statements generally

- RG 156.17 The warning statements required by RG 156.9–RG 156.10 and RG 156.19 should be prominent. For example, this will generally be the case if investors who notice the interest rate statement (if any) will also be reasonably likely

to notice the warning statements and be able to easily understand them. This will help ensure investors have a balanced impression of the debenture offering.

RG 156.18 We are not prescribing ‘boilerplate’ or standardised warning statements. It is the responsibility of the issuer to ensure that their advertisement is not misleading or deceptive and that the warning statements required by RG 156.9–RG 156.10 and RG 156.19 are effective.

Comparisons with bank deposits and ‘risk free’ suggestions

RG 156.19 Advertisements for debentures should state that the product is *not* a bank deposit. Further, they should not suggest that:

- (a) the debenture is, or compares favourably to, a bank deposit; or
- (b) there is no or little risk of the investor losing their principal or not being paid interest.

RG 156.20 This means that the following terms should be avoided in advertisements for debentures: ‘secure’, ‘secured’, ‘guaranteed’, ‘safe’, ‘deposit’ (other than to describe the debenture as an ‘unsecured deposit note’ under s283BH of the Corporations Act or to include the disclosure required by RG 156.19), ‘first ranking’ and ‘no fees’.

RG 156.21 We consider that the use of these terms (or similar terms) creates a misleading impression about the debenture product and the risks involved with investing in it. They contribute to the misconception that investors can achieve higher returns than a bank deposit without the risk of losing their principal investment.

RG 156.22 Terms such as ‘secure’, ‘secured’ and ‘guaranteed’ convey an impression of a safe investment and, in our experience, they have a disproportionate effect on retail investors. Without a detailed explanation of the nature of the security or the guarantee, we consider that investors will be left with a misleading impression as to the risk profile of the debenture.

RG 156.23 The term ‘no fees’ invites a favourable comparison with bank deposits, which usually have fees, but does not provide a complete comparison. We consider that ‘no fees’ highlights a positive feature of debentures without informing investors of the disadvantages, i.e. a higher risk profile.

RG 156.24 Claiming that a product has ‘no fees’ may also give the misleading impression that the issuer derives no benefit from the investor’s loan. A term can be misleading where it is literally correct but taken out of context: *Fraser v NRMA* (1995) 127 ALR 543.

Suitability statements

- RG 156.25 Advertisements for debentures should not state or imply that the investment is suitable for a particular class of investor (e.g. ‘this product is suitable for a conservative investor’ or ‘this product is suitable for a self-managed super fund’). Such a statement may be misleading as it may convey the impression that the issuer has actually assessed the suitability of the debenture for particular investors targeted by the advertisement. Terms such as ‘conservative investor’ may also give a misleading impression about the relative safety of the debenture.

Consistency with prospectus disclosure

- RG 156.26 Statements in debenture advertisements should be consistent with all corresponding disclosures on that subject matter in the prospectus. In particular, issuers should take into account the disclosures in the prospectus about the benchmarks set out in Regulatory Guide 69 *Debentures—improving disclosure for retail investors* (RG 69).
- RG 156.27 In ensuring consistency with disclosure in the prospectus, issuers should be aware that a statement in a prospectus may become misleading when it is taken out of context in an advertisement. For example, it may not be misleading to describe a debenture product as ‘guaranteed’ in the prospectus where sufficient information is given about the guarantee and its likely efficacy, whereas using the term ‘guaranteed’ in an advertisement is likely to be misleading.

Telephone inquiries

- RG 156.28 Statements made over the telephone or in any correspondence in response to inquiries about debentures are subject to the same regulation regarding misleading and deceptive conduct as the advertisements. Therefore, the same restrictions apply (e.g. about using words such as ‘secure’, ‘secured’, ‘guaranteed’, ‘safe’, ‘first ranking’ and ‘no fees’).
- RG 156.29 Issuers of debentures should ensure that all statements made by call centre staff (or other staff or contractors engaged by them) to prospective investors who respond to advertisements for debentures are consistent with disclosures on that subject in the prospectus. In the case of interest rates and credit ratings, no statements should be made that would have been prohibited in the advertisement to which the enquiry related. The same standard applies when discussing rollover options with existing investors.

RG 156.30 To ensure compliance with this standard, issuers could develop a script and list of questions and answers that call centre staff and any other staff fielding these inquiries should adhere to.

C How the standards apply

Key points

Debenture issuers who fail to comply with the advertising standards in Section B risk making false or misleading statements or engaging in misleading or deceptive conduct: see RG 156.31–RG 156.32.

Such statements or conduct could contravene the Corporations Act and the ASIC Act and result in ASIC taking action against the issuer: see RG 156.33 and Table 3.

Determining what is misleading or deceptive

RG 156.31 Debenture issuers who fail to comply with the advertising standards risk making false or misleading statements or engaging in misleading or deceptive conduct in contravention of the Corporations Act or ASIC Act: see Table 2.

Table 2: Sections relating to misleading or deceptive advertising

| Description of conduct | Legislation reference |
|--|--------------------------|
| Making statements that are materially false or materially misleading and are likely to induce persons to apply for financial products. Contravention of this provision is an offence. | s1041E, Corporations Act |
| Engaging in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive. | s1041H, Corporations Act |
| In trade and commerce, engaging in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive. | s12DA, ASIC Act |
| Engaging in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services. This provision is a strict liability offence. | s12DF, ASIC Act |

Note: Section 734 of the Corporations Act also contains restrictions on advertising of debentures.

RG 156.32 In determining whether a contravention has occurred, the following legal principles apply:

- (a) there is no requirement that the issuer intended to mislead investors—the relevant question is whether the advertisement is in fact misleading or likely to mislead;
- (b) it is not necessary to show that investors have actually been misled—the law prohibits conduct that is likely to mislead;
- (c) the relevant test is the reaction of an ordinary and reasonable member of the advertisement’s audience—normally anyone who is not either unusually astute or unusually gullible;
- (d) the audience is not the audience that the issuer would like, but the audience the advertisement actually reaches;
- (e) investors cannot be expected to study or revisit an advertisement—the most important consideration is the overall impression created by the advertisement when viewed for the first time;
- (f) qualifications of a headline claim must be clear and prominent—some headline claims are so strong that any separate qualification will not correct any misleading impression; and
- (g) if an advertisement is misleading, then it cannot be cured—an issuer cannot rely on accurate disclosure documents to undo the effect of a misleading advertisement.

How ASIC deals with contraventions

RG 156.33 The law provides ASIC with three options for dealing with misleading or deceptive advertisements for debentures or debenture advertising that constitutes misleading or deceptive conduct. These regulatory options are set out in Table 3. We will consider what attempts a debenture issuer has made to comply with the advertising standards when determining the appropriate action to take.

Table 3: Regulatory options available to ASIC

| Options | Legislation reference |
|---|---|
| Issue a stop order on any misleading or deceptive statements in an advertisement for debentures | s739(6), Corporations Act |
| Seek an injunction against a debenture issuer for debenture advertising that constitutes misleading or deceptive conduct | s739(6), Corporations Act |
| Investigate potential criminal action for contraventions of s1041E of the Corporations Act or s12DF of the ASIC Act | s1041E, Corporations Act ; s12DF, ASIC Act |

D The role of publishers and the media

Key points

ASIC expects publishers and the media who deal with advertisements for debentures to:

- be aware of the risks that debenture products pose; and
- adopt systems and controls to detect and refuse debenture advertisements that do not comply with the advertising standards in this guide.

- RG 156.34 While the primary responsibility for advertising material rests with the organisation placing the advertisement, under general law the publisher may also have some responsibility for its content. This depends on whether the publisher received the ‘advertisement for publication in the ordinary course of that business and did not know, and had no reason to believe, that its publication would amount to an offence against that provision’: s1044A, Corporations Act; s12GI(4), ASIC Act.
- RG 156.35 We believe that the advertising standards in Section B of this guide give publishers knowledge of the type of conduct that would contravene the law. This means that publishers should ensure that they are in a position to decline advertisements that:
- (a) do not contain the statements required by RG 156.9 and RG 156.19;
 - (b) have any references to interest rates and credit ratings that do not comply with the standards in RG 156.10–RG 156.17; or
 - (c) use the words ‘secure’, ‘security’, ‘guaranteed’ or ‘no fees’ (or similar terms): see RG 156.19–RG 156.24.
- RG 156.36 We will assist publishers to identify potentially problematic advertisements by making available details of debenture issuers that have previously had a stop order made against either their disclosure document or any of their advertisements. We expect publishers to scrutinise advertisements by these issuers with particular care.
- RG 156.37 We also expect publishers to cease publishing an advertisement if we inform them that it is currently subject to a stop order. We will assist publishers by making this information available.
- RG 156.38 Where a publisher contributes to the content of the advertisement (e.g. in writing advertorials) or otherwise has an active involvement in the promotion of the financial product (e.g. through co-branding or where a

media personality uses their influence to promote a product), we regard the publisher to be in the same position as the issuer in terms of its responsibility to comply with the advertising standards in Section B. We consider that this level of active involvement may mean that the defence in s1044A is unlikely to be applicable.

RG 156.39 Generally, issuers will use the terms ‘debenture’, ‘mortgage debenture’, ‘unsecured note’ or ‘unsecured deposit note’ to describe products subject to this regulatory guide. But we encourage publishers to specifically ask their advertising clients whether the product they are advertising is regulated by this guide.

Key terms

| Term | Meaning in this document |
|-------------------------|--|
| APRA | Australian Prudential Regulation Authority |
| ASIC | Australian Securities and Investments Commission |
| ASIC Act | <i>Australian Securities and Investments Commission Act 2001</i> (Cth) including regulations made for the purposes of that Act |
| bank deposit | A deposit with an APRA regulated bank, building society or credit union |
| CO 02/249 (for example) | An ASIC class order (in this example numbered 02/249) |
| Corporations Act | <i>Corporations Act 2001</i> (Cth) including regulations made for the purposes of that Act |
| RG 69 | An ASIC regulatory guide (in this example, numbered 69) |

Related information

Headnotes

Advertising, misleading, deceptive, interest rates, credit ratings

Regulatory guides

RG 69 *Debentures—improving disclosure for retail investors*

Class orders

CO 05/1230 *Credit rating agencies*

Legislation

Corporations Act s283BH, 739(6), 1041E, 1041H, 1044A, 1324, ASIC Act, s12DA, 12DF, 12GI(4)

Consultation papers and reports

CP 89 *Unlisted, unrated debentures—improving disclosure for retail investors*

CP 94 *Debenture advertising*

REP 113 *Report on submissions for CP 94 Debenture advertising*

Media releases

MR 07-223 *ASIC outlines new and improved disclosure for the unlisted and unrated debentures market (23 August 2007)*