



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 41

Limited partnerships fundraising

Chapter 7 — Securities

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Editor's note: This guide was updated in April 2008 to remove obsolete references to NCSC regulatory documents.

From 5 July 2007, this document may be referred to as Regulatory Guide 41 (RG 41) or Policy Statement 41 (PS 41). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 41.1) or their policy statement number (e.g. PS 41.1).

Headnotes

Division 2, 3, 3A, 5, 5A and 6 of Pt 7.12; prescribed interests and participation interests; offers or issues of prescribed interests restricted to public corporation by s1064; approved deed requirements under s1065; appointment of trustee or representative requirement under s1067; mandatory covenants required by s1069(1); prospectus requirements under s1018 and 1022; limited partnerships; promoter; "taking part in management"; ownership of scheme property; reg 1.13A.

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Purpose

RG 41.1 In this guide the ASC sets out its policy on the regulation of fundraising activities for limited partnerships regulated by the Corporations Law (Law) and the exercise of its discretionary powers with respect to those activities.

Background

RG 41.2 Since state legislation was passed in New South Wales and Victoria, limited partnerships can now be formed in New South Wales, Queensland, Tasmania, Victoria and Western Australia.

RG 41.3 Certain fundraising activities of limited partnerships formed and registered under state legislation will be governed by the Law.

RG 41.4 The ASC has received requests for exemption from provisions of the Law with respect to the promotion of various investment schemes where an investor is invited to become a limited partner in a limited partnership.

The Law

RG 41.5 Some limited partnership interests are prescribed interests under subparagraph (g)(i) of the definition of “participation interests” (s9). This will be the case where the partnership agreement relates to an undertaking, scheme or enterprise promoted by or on behalf of a person whose ordinary business is to promote similar undertakings, schemes or enterprises. Under reg 1.13A, which was gazetted on 16 December 1992, a limited partnership will also be included in the definition of “participation interest” where:

- (a) the limited partnership relates to a scheme where the partnership or the scheme is promoted by:
 - (i) an associate of a person whose ordinary business is to promote, or includes the promotion of, similar schemes; or
 - (ii) a person who is not, or is not to be, a partner in the partnership; and
- (b) the limited partnership has, or is intended to have, more than 15 partners of any kind.

RG 41.6 A person who offers for subscription or purchase or issues invitations to subscribe for or purchase prescribed interests is required to comply with the Law, and in particular with the provisions of Div 2, 3, 3A, 5 and 6 of Pt 7.12 of the Law (the fundraising provisions) except where the offer or invitation is an excluded offer or invitation as defined in s66 of the Law.

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RG 41.7 These fundraising provisions require, among other things, the person making an offer or invitation:

- (a) to be a public corporation (s1064);
- (b) to enter into an approved deed (s1065);
- (c) to appoint an approved trustee or representative for the purposes of the deed (s1067(3)); and
- (d) to lodge and, where appropriate, obtain registration of a prospectus which complies with the requirements of Div 2 of Pt 7.12 of the Law (s1018).

RG 41.8 In addition to the requirements referred to in the preceding paragraph, the Law imposes many other obligations on persons dealing in prescribed interests. Some of those obligations are:

- (a) to comply with the provisions of Pt 7.3 of the Law so that the promoter of a scheme offering a limited partnership may be required to hold a dealer's licence;
- (b) the prohibitions and limitations on advertising of, and security hawking in relation to, prescribed interests which result from the operation of s1025 and 1078 of the Law; *and*
- (c) the restrictions on secondary sales of interests in a prescribed interest scheme unless there is compliance with the obligation to prepare, and lodge a secondary trading notice under Div 3A of Pt 7.12 of the Law; and ~~lodge and, if appropriate, have registered a secondary prospectus and to be a public corporation; and~~
- (d) the prohibition of misleading or deceptive conduct and other matters under Pt 7.11 of the Law, the breach of which entitles persons affected to claim damages from a wide range of persons involved in the preparation of the prospectus or marketing of the securities.

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RG 41.9 Under s1084(2) of the Law, the ASC has a discretion to exempt a person or a class of persons, either conditionally or

unconditionally, from compliance with all or any of the provisions of Div 2, 3, 3A, 4, 5 and 6 of Pt 7.12 of the Law. There is no power to exempt any person from liability under Pt 7.11.

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RG 41.10 In addition, under s1084(6) of the Law, the ASC has discretion to modify or vary any of the provisions of Div 2, 3, 3A, 4, 5 and 6 of Pt 7.12 of the Law in respect of their application to a person or class of persons.

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Partnerships

Who is the promoter?

RG 41.11 It has been suggested that as the definition of “participation interest” includes partnership interests promoted by a person whose business involves such promotion, the application of the Law could be avoided in relation to partnerships simply by having each partnership promoted by a special purpose company. In the ASC’s view this is not so, as it ignores the very wide interpretation of the meaning of the term “promoter” to include a variety of commercial roles involved in the establishment and financing of a new company or investment scheme, whether or not by the person who ultimately “offers” the securities.

RG 41.12 The expression “promoter” can cover more than the persons who take part in the formation and floating; it can cover persons who leave it to others to get up the venture on the understanding that they also will profit from its establishment — see *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215.

RG 41.13 Any doubt on this interpretation is clarified by reg 1.13A which includes any interest in a partnership issued by an associate of the promoter.

Partnership property

RG 41.14 The ASC is of the view that in the case of a limited partnership subject to the Law it is inappropriate for the title to the partnership property to be held by the general partner. Such property must be held by a trustee for the partners or by all the partners in proportion to their partnership share. This ensures that the trustee or representative can comply effectively with s1069(1)(e)(i) of the Law, required to be included in an approved deed, requiring a trustee or

representative to exercise all due diligence and vigilance in protecting the rights and interests of investors.

“Taking part in management”

RG 41.15 A limited partnership is like an ordinary partnership except that it has two categories of partners: general and limited. The principal attraction for passive investors is that a limited partner’s liability for the debts and obligations of the partnership may be limited to his or her agreed contribution to the partnership capital. However, this limitation does not apply to liabilities incurred while he or she is taking part in the management of the partnership.

RG 41.16 It has been put to the ASC that wide exemptions from the statutory covenants should be granted because a limited partner might incur unlimited liability if he or she takes part in the management of the partnership, whether directly or through the actions of a trustee or representative. The ASC will not grant relief on the basis of this proposition to detract from the rights which the trustee or representative and the limited partners have under a complying deed.

RG 41.17 The ASC does not consider it appropriate to take a view as to whether the performance of the rights and obligations imposed by the statutory covenants on the trustee or representative in the discharge of its duties to all the partners constitutes “taking part in management” by the limited partners. This is a matter which relates to the liability of the prescribed interest holders and is a risk which should be fully disclosed in the prospectus under reg 7.12.12(1). It is then up to the prospective prescribed interest holder to choose whether or not to take the risk.

Relief

RG 41.18 The ASC has given further consideration as to whether exemptions from the Law should be given due to the nature of a limited partnership and has affirmed its view that there is no justification for giving promoters of schemes involving a limited partnership a privileged position under the Law. Such schemes must meet the same standards of investor protection as other prescribed interest schemes. However, relief will be available where consistent with ASC policy in relation to the general nature of the investment, as set out in para 19 below.

RG 41.19 Where an applicant is seeking approval of a deed which relates to interests in a limited partnership, he or she should refer to the guide (if any) issued by the ASC relevant to the underlying

investment or purpose of the scheme or in relation to prescribed interest schemes generally. For example:

- (a) Regulatory Guide 77 ~~16~~ — property syndicates;
- (b) Regulatory Guide 19 — film investment schemes;
- (c) Superseded Policy Statement 20 — horse racing schemes;
- (d) Superseded Policy Statement 23 — approval of deeds relating to prescribed interests; and
- (e) Superseded Policy Statement 34 — horse breeding schemes (see 1994 *ASC Digest* at page *PS 7/166*, Superseded Policy Statements guidecard).

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