



ASIC

Australian Securities & Investments Commission

## REGULATORY GUIDE 70

# Prospectuses for cash box and investment companies

Chapter 7 Pt 7.12 Div 2 s1022 — Securities

Issued 2/6/1999

*From 5 July 2007, this document may be referred to as Regulatory Guide 70 (RG 70) or Practice Note 70 (PN 70). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 70.1) or their practice note number (e.g. PN 70.1).*

## What this guide is about

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RG 70.1 This guide explains how ASIC will apply s1022 of the Corporations Law where the issuer of a prospectus has not formulated or has only partially formulated an investment plan.

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## Disclosure requirements

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### Our policy

RG 70.2 We believe that s1022 of the Corporations Law (Law) is not intended to prevent offers of certain types of investments. Nor do we consider it a requirement of the Law that all matters relating to the proposed investment plan of the company be settled prior to the lodgment of the prospectus. We believe the purpose of s1022 is to ensure that all relevant matters known to persons associated with the issue of the prospectus, are fully disclosed.

RG 70.3 An investment in an enterprise that has no investment plan or only a partially developed investment plan is an investment in the skill and expertise of its directors and management. In these circumstances we consider the only means by which an investor can make an informed assessment about the prospects of the company or scheme is if they are provided with factual information about the expertise of those persons who will make the investment decisions.

RG 70.4 We expect, as a minimum, that any disclosure about the expertise of directors and management should include:

- (a) their qualifications and employment history;
- (b) their anticipated availability;
- (c) the particular expertise that they bring to the enterprise and how this expertise will be deployed in making investment decisions.

RG 70.5 There should be an explicit statement detailing how the background and experience of the individuals will be deployed in the making of investment decisions.

RG 70.6 In the absence of any factual information about where or how the proceeds of the offer will be invested, we expect a very high standard of disclosure about the skill and expertise of those persons who will be making the investment decisions.

RG 70.7 If an issuer has not determined an investment strategy then it is incumbent on the issuer to explicitly state and discuss this fact in the prospectus.

RG 70.8 Those matters associated with the investment strategy which remain unresolved at the time of lodgment of the prospectus can be characterised as risks associated with the proposal. We expect such risks to be explicitly identified and discussed in the prospectus.

### ***Partially developed investment plan***

RG 70.9 Where the directors or promoters have an investment plan and have resolved some issues about where and how the proceeds of the offer will be invested, all material details about their plans must be included in the prospectus. For example, where a company or responsible entity plans to establish a portfolio of securities but has not identified any specific securities, we expect the prospectus to contain as much information as possible about the probable portfolio to be established. This may include a hypothetical example of the type of portfolio that management would be likely to acquire as at the date of the prospectus. Other information which should be included relate to risk profile, geographic location, industry classifications of the portfolio and any other selection parameters associated with specific assets or securities in which management are likely to invest.

### **Underlying principles**

RG 70.10 Some prospectuses lodged with us for registration have relied extensively on s1022(2) to provide limited factual information about where, when or how the proceeds of the offer will be invested. In some cases these prospectuses have also failed to provide sufficient factual information on the qualifications, experience and expertise of those who will be involved in the management of the company.

RG 70.11 In such instances we have formed the view that an investor would not be able to make an informed assessment of the prospects of the company and has refused to register these prospectuses.

### ***Cash box prospectuses — no investment plan***

RG 70.12 On a number of occasions prospectuses have been lodged with us by parties seeking to set up investment vehicles prior to the formulation of an investment plan. The prospectuses usually say something like “an investment will be made when the appropriate opportunity arises”. This can be said with varying degrees of sophistication but generally the directors will say that they retain a wide discretion to determine what, how and when to invest.

### ***AAT decision***

RG 70.13 Since the introduction of the Corporations Law very few judicial decisions have been made on the adequacy or otherwise of the disclosure content of prospectuses. One instance was a determination on 25 May 1998 by the Administrative Appeals Tribunal (AAT). In

that determination the AAT affirmed a decision of the ASC to refuse to register a prospectus on the grounds that it contained insufficient information to enable an intending investor to make a rational assessment of the prospects of the company: (*Exeter Group Limited v ASC*) unreported, 25 May 1998, AAT proceeding N97/1063).

RG 70.14 In the AAT proceeding of *Exeter Group Limited v ASC*, Mr BJ McMahon (Deputy President) said:

“It is not sufficient for the company to say we know nothing about our future investments and so we are obliged to disclose nothing beyond the fact that we know nothing about our future investment. This is no basis upon which any intending investor could make a rational assessment of the prospects of the company.”

RG 70.15 The judicial authorities on the interpretation of cl 20 of Pt A of s750 should assist prospectus issuers when considering disclosure questions for a cash box which does not have a specific asset acquisition in mind at the time of issue.

### ***Reliance on s1022(2)***

RG 70.16 We consider s1022(2)(b) imposes an active obligation upon the issuer and its advisers to make all reasonable enquiries in their efforts to comply with the requirements of s1022(1). In the context of a cash box company seeking to raise funds for the first time we consider this obligation extends to the directors and management of the issuer. We expect those persons to have asked themselves the rhetorical question of how they would be likely to invest the proceeds of the offer.

## **Explanations**

### ***Section 1022 — general disclosure test***

RG 70.17 Section 1022 of the Law contains the general disclosure test that is applicable to all prospectuses.

RG 70.18 Subsection 1022(1) states that in addition to the information required by s1021, a prospectus must contain all such information as investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of:

- (a) the assets and liabilities, financial position, profits and losses, and prospects of the corporation;

- (b) in the case of a managed investment scheme, the merits and risks of participation in the scheme;
- (c) in the case of managed investment schemes, how scheme property is to be held; and,
- (d) the rights attaching to the securities.

RG 70.19 The information required by s1022(1) is limited by s1022(2) to that information which is known to the issuer at the time of the issue of the prospectus, and such information as reasonable enquiries would reveal.

RG 70.20 Subsection 1022(3) says that when considering what information is required by s1022(1), regard shall be had to the nature of the securities, the responsible entity, the corporation or scheme and to the kinds of persons likely to consider investing in the offer.

RG 70.21 It also says that consideration can be given to the fact that certain matters may be reasonably expected to be known to professional advisers who potential investors may reasonably be expected to consult. Consideration can also be given as to whether or not the offer is being made to existing holders of securities in the corporation or scheme.

## Related information

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RG 70.22

### **Headnotes**

Prospectus, disclosure, cash box, investment company

### **Regulatory guides**

RG 56 *Prospectuses*

### **Legislation**

Chapter 7 Pt 7.12 Div 2 s1022, 1022(1), 1022(3) and cl 20 of Pt A of s750

### **Cases**

*Exeter Group Limited v ASC* (unreported, 25 May 1998, AAT proceeding N97/1063)

### **Media and information releases**

[MR 98/143]