



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 80

# Managed investment schemes — interests not for money

**Related instruments [CO 02/210], [CO 02/211]**

**Chapter 5C—Managed investment schemes**

**Chapter 7—financial services and markets**

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*From 5 July 2007, this document may be referred to as Regulatory Guide 80 (RG 80) or Policy Statement 80 (PS 80). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 80.1) or their policy statement number (e.g. PS 80.1).*

## What this guide is about

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RG 80.1 This guide discusses:

- (a) our policy on regulating interests in managed investment schemes not offered or issued for money; and
- (b) the relief we will give to certain schemes.

RG 80.2 Some commercial transactions where persons negotiate to receive a benefit that does not involve money may fall within the definition of a managed investment scheme in s9 of the *Corporations Act 2001* (Act).

RG 80.3 Without our relief, the following requirements in the Act would apply to those transactions even though they may be inappropriate given the nature of those transactions:

- (a) the managed investment provisions in Ch 5C of the Act;
- (b) the Australian financial services (AFS) licensing provisions in Pt 7.6 of the Act;
- (c) the anti-hawking provisions in Pt 7.8 of the Act; and
- (d) the product disclosure provisions in Pt 7.9 of the Act.

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## A Our general approach

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### Our policy

RG 80.4 We have provided class order relief for certain types of transactions that involve the offer or issue of interests in a managed investment scheme not for money. The types of transactions for which we have granted class order relief are:

- (a) transactions that involve personal services, goods or produce, intellectual property, interests in land, other property or a business: see RG 80.9–RG 80.11 and Class Order [CO 02/211] *Managed investment schemes—interests not for money*; and
- (b) transactions that involve film, writing or entertainment: see RG 80.12 and Class Order [CO 02/210] *Interests in film and theatrical ventures*.

RG 80.5 Our class order relief is subject to a number of conditions designed to ensure the real purpose of the transaction is not to raise money: see RG 80.13–RG 80.14.

RG 80.6 We may amend these conditions or revoke the class order for particular persons if they try to use this relief to avoid the managed investment provisions or other provisions where the real purpose of the transaction is to raise money.

RG 80.7 We will also consider individual applications for relief that fall outside the terms of our class order but fit within the underlying rationale for our relief in [CO 02/211] and [CO 02/210]: see RG 80.16–RG 80.18 for an example of relief we have granted for intermediaries.

### Underlying principles

RG 80.8 We seek to provide certainty that the managed investment provisions, AFS licensing provisions, anti-hawking provisions and product disclosure provisions do not apply to certain managed investment schemes that:

- (a) arise from arrangements negotiated with a person because of the particular nature of their business, profession or calling; and
- (b) do not involve raising money.

## Explanation

### ***Services, goods, property or business***

RG 80.9 We have granted relief under [CO 02/211] from the managed investment provisions, AFS licensing provisions, anti-hawking provisions and product disclosure provisions where an interest in the scheme is offered as consideration, or part of consideration, to acquire:

- (a) personal or professional services provided by the offeree, or where the offeree is not a natural person, by an officer or employee of the offeree in the ordinary course of the offeree's business;
- (b) the intellectual property or know-how of the offeree resulting from the labour or efforts of the offeree. If the offeree is not a natural person, the intellectual property or know-how must be acquired in the ordinary course of the offeree's business;
- (c) goods imported, manufactured or produced by the offeree in the ordinary course of the offeree's business;
- (d) an interest in land where the interest has been owned for at least 6 months by the offeree or a former member of the scheme (other than the offeror or its associates) before the offer was made; or
- (e) an interest in any business owned by the offeree where the interest has been owned for at least 6 months before any negotiations between the offeree and offeror.

Note: An example of the type of transaction that may fall within [CO 02/211] may include where parties are engaged in share farming.

RG 80.10 In the case of paragraphs (a) and (b) of RG 80.9, the following additional requirements apply if the offeree is not a natural person:

- (a) the business of the offeree must not regularly involve dealing in securities or other financial products;
- (b) the acquisition of securities or other financial products must be merely incidental to the principal trade, business or calling in which the offeree holds itself out to be engaged; and
- (c) the consideration that is offered for the interests must be part of the offeree's ordinary business.

In the case of paragraph (c) of RG 80.9 all of these additional requirements apply whether or not the offeree is a natural person.

RG 80.11 The requirements for relief in paragraphs (d) and (e) of RG 80.9 ensure that the property or business is not used as part of an overall fundraising scheme. For example, our relief does not apply to a scheme using sale and immediate lease-back arrangements.

### ***Film, writing and entertainment***

RG 80.12 If the offeree is involved in the film, writing and entertainment industries, we have granted relief under [CO 02/210] from the managed investment provisions, AFS licensing provisions, anti-hawking provisions and product disclosure provisions where an interest in the scheme is to be offered as consideration, or part of consideration, to acquire:

- (a) personal or professional services to be provided by the offeree or an officer or employee of the offeree; or
- (b) intellectual property or know-how based on the labour or efforts of the offeree or an officer or employee of the offeree.

Note: An example of the type of transaction that may fall within [CO 02/210] may include a scriptwriter agreeing to take royalties as consideration for the providing a script.

### ***Conditions of relief***

RG 80.13 The relief in [CO 02/210] and [CO 02/211] is conditional. Conditions that generally apply include:

- (a) the offeree must not pay money, or provide any consideration to the offeror or any associate of the offeror other than:
  - (i) the forms of consideration mentioned in RG 80.9 and RG 80.12; or
  - (ii) fees and incidental expenses as mentioned in RG 80.14;
- (b) any right of an offeree to terminate the agreement or take action for default must not depend on the consent or other action of others who have entered into similar agreements;
- (c) the interest must not relate to any other managed investment scheme; and
- (d) other than issues to offerees meeting the other requirements of this policy, the interests in the managed investment scheme that have been issued must not require a Product Disclosure Statement or, before the commencement of the product disclosure provisions in Pt 7.9 of the Act, another form of regulated disclosure.

Note: This is not an exhaustive list of all conditions that apply.

RG 80.14 Paragraph (a) of RG 80.13 ensures that relief does not apply to a transaction with an investment purpose where investors are invited, for example, to contribute financially to funding a film or acquiring a tree plantation. However, fees and incidental expenses that were disclosed to the offeree may be recovered.

RG 80.15 Paragraph (b) of RG 80.13 recognises that, while many people may enter into similar agreements, each agreement must be independent of all others. We think this is consistent with the underlying principles behind our relief.

### ***Relief for intermediaries***

RG 80.16 We have previously granted relief for a small number of intermediaries involved in a commodity pool in circumstances where they could not otherwise rely on [CO 02/211].

RG 80.17 We considered that [CO 02/211] did not apply to these intermediaries because they did not produce the goods involved in the transaction.

RG 80.18 We granted this relief because:

- (a) compliance with the managed investment provisions, AFS licensing provisions, anti-hawking provisions and product disclosure provisions was disproportionately burdensome taking into account:
  - (i) other persons involved in the transaction having the benefit of relief in [CO 02/211]; and
  - (ii) the short duration of the transaction; and
- (b) the likelihood and extent of potential consumer detriment was minimal.

## Key terms

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RG 80.19 In this guide, these terms have the following meanings:

**Act** The *Corporations Act 2001* including regulations made for the purposes of the Act

**anti-hawking provisions** The provisions set out in Division 8 of Part 7.8 and related regulations

**AFS licensing provisions** The provisions set out in Pt 7.6 and related regulations

**ASIC** Australian Securities and Investments Commission

**Ch 5C** (for example) A chapter of the Act (in this example numbered 5C)

**[CO 02/210]** (for example) An ASIC class order (in this example numbered 02/210)

**financial product** A financial product defined under s763A

**managed investment provisions** The provisions set out in Chapter 5C and related regulations

**offeree** The person accepting the offer to receive a benefit that does not involve money and acquiring an interest in a managed investment scheme.

**offeror** The person making an offer for the interest in the managed investment scheme

**product disclosure provisions** The provisions set out in Part 7.9 and related regulations

**Product Disclosure Statement** A product disclosure statement defined under s761A

**Pt 7.6** (for example) A part of the Act (in this example 7.6)

**s761A** (for example) A provision of the Act (in the example numbered 761A)

## Related information

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RG 80.20

### Headnotes

Managed investment scheme, managed investment, licensing, anti-hawking and product disclosure relief, interests not for money, film and theatrical ventures, intermediaries.

### Class orders

[CO 02/210] *Interests in film and theatrical ventures*

[CO 02/211] *Managed investment schemes—interests not for money*

### Regulatory guides

RG 51 *Applications for relief*

RG 136 *Managed investments discretionary powers and closely related schemes*

RG 167 *Licensing: Discretionary powers*

RG 169 *Disclosure: Discretionary powers*

### Legislation

*Corporations Act 2001*, Ch 5C and 7, Pt 7.6–7.9, s9, 601ED, 601QA, 761A, 763A, 911A, 992A, 992B, 1012A, 1012B, 1012C, 1020F