



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 135

Managed investments: Transitional issues

Related instruments [CO 98/53], [CO 98/54], [CO 98/55], [CO 98/56], [CO 98/57], [CO 98/59], [CO 99/374], [CO 00/1067], [PF 174], [PF 175]

Chapter 11 Part 11.2 Division 11 — Changes resulting from the Managed Investments Act 1998

Chapter 5C — Managed investment schemes

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From 5 July 2007, this document may be referred to as Regulatory Guide 135 (RG 135) or Policy Statement 135 (PS 135). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 135.1) or their policy statement number (e.g. PS 135.1).

What this guide is about

In order to gain a full understanding of our policy in this area you should read all the parts of this guide, including the Underlying Principles and the Explanations.

RG 135.1 The *Managed Investments Act 1998* commenced on 1 July 1998. The previous law continues to apply to some schemes established before then for a period of up to two years subject to extensions. This guide gives you guidance on:

- A when we will give you an extension of time:
 - (a) for taking steps during the transitional period; and

(b) of the transitional period so that a scheme need not be registered;

see RG 135.2–RG 135.24

B when a meeting of holders of prescribed interests must be convened to ratify modifications to an approved deed;

see RG 135.25–RG 135.31

C when we have given relief that helps you implement the transitional provisions;

see RG 135.32–RG 135.46

D when we have given you relief from the transitional provisions;

see RG 135.47–RG 135.53

E how we interpret some transitional issues; and

see RG 135.54–RG 135.73

F our approach to practical issues of implementing the transitional provisions.

see RG 135.74–RG 135.78

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A Extensions of time

Our policy

Extensions of time during the transitional period

RG 135.2 We will give you relief so that you have more time to comply with the transitional provisions when:

- (a) you cannot comply with the transitional provisions for reasons beyond your control; or
- (b) it is in the interests of the prescribed interest holders for us to give relief.

If relief will mean that transition will not be complete within two years, you must apply under s1454(2).

Extending the transitional period

RG 135.3 We will give you relief so that the transitional period is extended under s1454(2). Relief will be on a case by case basis following Pro Forma 174 [PF 174]. We will give relief when both the following criteria are satisfied:

- (a) the scheme is certain to terminate at a particular time after 30 June 2000 that the approved deed does not allow the parties to the scheme to change; and
- (b) it would be unreasonable for the scheme to be required to be registered.

RG 135.4 It will not be unreasonable for a scheme to be registered unless the scheme is closed. By this we mean that the interests in the scheme could only be issued after the *Managed Investments Act 1998* commenced:

- (a) under a prospectus which was lodged before the Managed Investments Act commenced; and
- (b) by excluded issues.

RG 135.5 If a scheme is closed, it is unreasonable for that scheme to be required to be registered when:

- (a) the scheme operator will have limited active management duties after 30 June 2000; or
- (b) the scheme will be wound up soon after 30 June 2000.

RG 135.6 We believe it is unreasonable to require a pre 1991 exempt trust (as defined in Key Terms) RG 135.79 that is closed, to be registered when all the following criteria apply to the scheme:

- (a) the scheme would not have to be registered if it had less than 20 members;
- (b) the scheme has less than 100 holders when it applies for the extension;
- (c) the scheme's constitution provides that the scheme must be wound up before 1 July 2010;
- (d) all holders of the prescribed interests have been given at least 28 days notice of the intention to apply for the extension and have the right to send a written objection to the operator of the scheme;
- (e) the notices include all the information that holders will reasonably require when deciding whether to accept or object to an extension; and
- (f) less than 5% of the holders have objected to the extension.

RG 135.7 We will initially give extensions for specified periods depending on the type of scheme. Initial extensions will be for up to four additional years after the standard two year transitional period ends.

Extending the time for s1457 meeting

RG 135.7A When we extend the transitional period for a scheme, the relief will also extend the time at which the requirement for a meeting under 1457 will apply for a corresponding period; see [PF 174].

[*Historical note:* RG 135.7A inserted 2/6/1999.]

How to apply for an extension

Lodge your application with an ASIC Regional Office

- include the prescribed fee
- Ensure your application complies with Regulatory Guide 51 *Applications for relief* (RG 51)

You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

Underlying principles

Extensions of time during the transitional period

RG 135.8 So that the transition to the new regime is efficient, we give relief so a responsible entity has more time to comply with steps under the transitional provisions when the responsible entity cannot comply without unreasonable cost.

Extending the transitional period

RG 135.9 New investments in schemes should not be deprived of the protection of the managed investment provisions of the Law for longer than the two year standard transitional period unless this would unreasonably disadvantage a promoter who has incurred significant costs.

RG 135.10 Schemes will only be given extensions of the transitional period when it is clear that the cost of registering is disproportionate to the benefits to prescribed interest holders. When deciding whether or not to give relief, we will also consider the future difficulties of continuing to administer the Law as it existed before 1 July 1998.

Explanations

Extensions of time during the transitional period

RG 135.11 This approach is consistent with Regulatory Guide 44 *Annual general meetings — extensions of time* (RG 44). When an extension would go over two years after the Managed Investments Act commenced, Parliament intends us to use our power under s1454(2).

Extending the transitional period

Closed

RG 135.12 By the time a prospectus is lodged, the promoter of a scheme will have incurred significant costs. Promoters should not be denied an extension that they could otherwise get because they continue to use a prospectus current at the commencement of the Managed Investments Act for its normal life, so long as the scheme is closed to other non excluded applicants.

Fixed term

RG 135.13 If the scheme is to be wound up at a fixed time after 30 June 2000 (“a fixed term scheme”) we can extend the two year transitional period for registering schemes: s1454(2).

RG 135.14 Our power applies only to fixed term schemes because it was not intended that we would have the power to extend the two year period indefinitely. We consider that a fixed term scheme is one which is certain to terminate:

- (a) on a particular calendar date; or
- (b) by reference to some event certain to happen, that can be determined by reference to an existing agreement between the parties.

See *Borambil Pty Ltd v O’Carroll* [1972] 1 NSWLR 302, at 309 and *Potato Producers Co-operative Ltd v Pavone* [1962] VR 231.

RG 135.15 We consider that s1069(12) prevents a scheme from being a fixed term scheme. This is because s1069(12) provides that the management company and trustee or representative for a scheme may agree that a scheme should continue. They can agree that it should continue if this appears to be in the best interests of the prescribed interest holders. This can be agreed even if there is something to the contrary in the approved deed. Therefore, if we give a scheme an extension of time we will modify the Law so that s1069(12) does not apply. We have already omitted s1069(12) when giving relief to fixed term property trusts and syndicates under Regulatory Guide 77 *Property trusts and property syndicates* (RG 77).

Property trusts and syndicates

RG 135.16 When a responsible entity would have only a limited role, requiring registration may be unreasonable. We will initially give an extension for up to three years after the standard two year transitional period for property trusts or syndicates relying on fixed term relief given under RG 77. These types of schemes have only limited operating functions because the property is held for the duration of the scheme and the income is rent. If the development of the property is not complete when an extension of time is requested, we will not give relief.

RG 135.17 Under the terms of relief under RG 77, these schemes have a term of 12 years with provision for further 12 year periods if all the prescribed interest holders agree. We will only extend the transitional period for these schemes if the deed is amended so that the

date for winding up of the scheme is fixed at a time that is no later than 12 years after the Managed Investments Act commenced, ie no later than 1 July 2010. We will vary the terms of relief from the buy-back covenant applying to each scheme so that it provides for the scheme to be wound up on the relevant calendar date. This means that none of these schemes have to be wound up earlier than the latest time that the parties could have assumed, that is 12 years. However this does not necessarily mean that these schemes can continue under the Law before 1 July 1998 until wound up. We will only give an initial extension until no later than 30 June 2003 for these schemes. Any further extensions will be as set out at RG 136.23.

Non-mining primary production schemes, film schemes and similar schemes

RG 135.18 We will consider extending the transitional period for non-mining primary production schemes, film schemes and similar schemes. This is because for most of their operation, they are “passively” operated in that the only role of the operator is maintenance and receiving income. We will initially give an extension for up to four years after the standard two year transitional period ends.

RG 135.19 To be eligible for relief such schemes need not be wound up by 30 June 2010 or any other particular date. However:

- (a) the scheme must be a fixed term scheme; and
- (b) the approved deed for the scheme must provide for the scheme to be wound up at a time reflecting the underlying cycle of the business.

If the business venture, when applying for relief, has not entered a phase where only limited management functions are needed, we will not give relief. For example, in the case of a film scheme, the film must be complete and, in the case of a forestry scheme, the trees must have been planted and the plantation set up complete.

Schemes to be wound up shortly after transition

RG 135.20 We will extend the transitional period when a scheme is to be wound up within one year after the standard two year transitional period ends. If we did not give this extension, the cost of registering would be unreasonable due to the short period when the managed investments provisions of the Law would give protection.

Pre 1991 exempt trusts

RG 135.21 We consider that the transitional provisions do apply to pre 1991 exempt trusts under s1452(b). Registering a pre 1991 exempt trust is likely to be especially costly because such schemes have not been previously regulated. We will normally only give relief to a pre 1991 exempt trust when it is not large (using 100 members as set out in the disclosing entity tests as a guide). The costs of registering a scheme of this size are likely to be disproportionate to the benefits of registration. We will initially give exempt pre 1991 trusts extensions for up to four years after the standard two year transitional period ends, ie to no later than 30 June 2004.

Review

RG 135.22 The following table shows the maximum extension we will give now by type of scheme.

<i>Type of closed fixed term scheme</i>	<i>Extension expires no later than</i>
Property trusts and property syndicates	30 June 2003
Non-mining primary production schemes, film schemes and similar schemes	30 June 2004
Schemes being wound up	30 June 2001
Pre 1991 exempt trusts	30 June 2004

RG 135.23 The costs and benefits of registering a particular scheme may change over time and should be reassessed in the future. If the operator of a scheme applies for a further extension before the initial one expires, we will consider whether there is a more appropriate basis for regulating the schemes on an ongoing basis after their extension ends. If there is a no more appropriate basis, we will give a further extension when the first extension ends. The further extension may be until the fixed time when the scheme is wound up or for a shorter time.

Further extensions of time

RG 135.24 We will consider giving a further short extension of time after the fixed time when the scheme was originally due to be wound up. This applies when we have previously given an extension up to that time. We will only consider this if you demonstrate that it is not in the best interests of the prescribed interest holders for the

scheme to be wound up at the original fixed time. For example, the exigencies of the real property market may mean it is not in the best interests of the holders for the scheme property of a property trust or syndicate to be sold at the original fixed time. If we give a further extension then it will be on the basis that:

- (a) a new fixed time will be provided for in the approved deed; and
- (b) the new fixed time is shortly after the original fixed time.

Extending the time for s1457 meeting

RG 135.24A When an extension of time is required, a meeting of holders of prescribed interests will not be required under s1457 as soon as practicable after 30 June 1999, if at that time no requirement notice has been given. Instead the requirement for a meeting will only apply if no retirement notice is given one year before the expiration of the extension. For example if the transitional period is extended to end 30 June 2003, then a meeting will be required under s1457 as soon as practicable after 30 June 2002 if no retirement notice is given by that date. When we decide to give a further extension of the transitional period, we will give a further extension of time when s1457 applies at that time. This relief will allow decisions about who will be the proposed responsible entity to be made at the most appropriate time.

B Ratifying modifications to an approved deed

Our policy

RG 135.25 A management company will not be required to convene a meeting of holders of the prescribed interests to ratify modifications to a scheme's approved deed under s1460(6)(b) if all the following requirements are met:

- (a) Unless it proceeds directly to have a postal vote or a meeting, the proposed responsible entity, the management company, trustee or representative ("body") gives a notice to the holders of the prescribed interests that:
 - (i) contains the information about the proposed modifications that would be required under reg 7.12.15(1)(g) of the Corporations Regulations if the notice were a notice of a meeting to consider those modifications;
 - (ii) states prominently that if:
 - (A) holders of the prescribed interests who together hold at least 5% of the total value of the interests held by holders; or
 - (B) 100 holders of the prescribed interests, who would be entitled to vote if the proposal were put to a meeting that was required by us under s1460(6)(b) ask for a vote on the proposed modifications by giving written notice received by the body within 21 days, the body will arrange a postal vote or convene a meeting to vote; and
 - (iii) is accompanied by a form which:
 - (A) can be marked to ask for a vote (eg by a tick); and
 - (B) nominates a reply paid address of the body to which the form can be sent.
- (b) The body must give the holders a reasonable time to request a vote of the holders to ratify any of the proposed modifications. A reasonable period of time would be at least 21 days after they were notified of the proposed modifications and particulars of their right to ask for a postal vote.
- (c) The body must give the holders an opportunity to cast a postal vote or vote at a meeting if a vote was requested by holders in

accordance with the statement in the notice under subparagraph (a)(ii).

- (d) If there is a vote, the voting paper must be accompanied by a notice that would have complied with the covenant required by reg 7.12.15(1)(g) if the proposals had been put as a proposed resolution to a meeting of holders, except for information that has been provided at para (a).
- (e) If there is a postal vote:
 - (i) a voting paper must be sent to each holder of the prescribed interests that nominates a reply paid address of the body to which the voting paper may be sent;
 - (ii) the body must notify the holders of the prescribed interests in the voting paper or in a document accompanying the voting paper that:
 - (A) the proposed modifications will be made if approved by votes received by the body by holders of prescribed interests that would be eligible to vote at a meeting under paragraph 1460(6)(b) holding a majority in value (as determined in accordance with subsection 1069A(5) of the old Law) of all the holders of the prescribed interests that would be eligible to vote at such a meeting and who did vote; and
 - (B) only votes received by the body within 28 days of the issue of the voting paper will be counted.
- (f) If there is a vote, votes must be counted if they were received by the body within 28 days of the issue of the postal vote paper.
- (g) If there is a vote, the modifications are supported by a majority by value of those voting.
- (h) If there is a meeting the meeting must be conducted in accordance with sections 1069A to 1069C except as to the majority needed.

RG 135.25A The terms of RG 135.25 as it was originally published continue to apply in relation to a scheme if notices in accordance RG 135.25 paras (a) and (b) prior to its amendment are sent to holders of the prescribed interests before 22 June 1999.

Common funds

RG 135.25B A trustee of a common fund does not have to convene a meeting of prescribed interests holders to ratify modifications to a

common fund's approved deed under s1460(6)(b) if all of the following requirements are met:

- (a) the trustee is the holder of more than 50% by value of the units in the common fund as trustee for members who are not voluntary investors;
- (b) the trustee forms the belief and certifies to ASIC that:
 - (i) the amendments are not adverse to the best interests of the members; and
 - (ii) in accordance with its duties to each member who is not a voluntary investor, it would vote in favour of the proposal sufficient votes to make at least 50% by value of the interests;
- (c) the trustee gives a notice to the prescribed interests holders that:
 - (i) provides adequate notice of the amendments;
 - (ii) sets out a summary of matters which would be relevant to a member if the member were deciding how to vote on the amendments; and
 - (iii) allows voluntary investors a reasonable period of notice before the amendments will take effect. A reasonable period would be at least 21 days from the date the notice is sent, and must be a period which the trustee reasonably believes allows members sufficient time to request withdrawal from the undertaking if they choose.

[Historical note: RG 135 was amended 11/9/2000 by inserting the subheading "Common funds" and a new paragraph RG 135.25B.]

RG 135.26 We will not require a meeting of holders to ratify modifications if the proposed responsible entity tells us that the conditions in RG 135.25 have been complied with and we have no reason to doubt what we are told.

Of course, if we have reason to believe that holders may have been misled or deceived in the way the proposed responsible entity has satisfied the conditions in RG 135.25, we may nevertheless require a meeting of members to be convened to ratify modifications to the scheme's approved deed under s1460(6)(b).

Underlying principles

RG 135.27 We will not require a meeting of holders to ratify modifications to a deed, when holders are given a reasonable opportunity to prevent modifications that are not in their interests.

Common funds

RG 135.27A We consider that a meeting of interest holders in common funds would be inappropriate where the trustee, by virtue of the units it holds in trust for involuntary investors, can ensure that the resolution is passed. Offering the opportunity to vote in these circumstances would be futile and potentially misleading.

[Historical note: RG 135 was amended 11/9/2000 by inserting the subheading “Common funds” and a new paragraph RG 135.27A.]

Explanations

RG 135.28 Under s1460(3) a proposed responsible entity has the power to modify a scheme’s approved deed. It can remove the covenants that were included to satisfy Div 5 of Pt 7.12 of the Law before the Managed Investments Act commenced. The body’s power to modify the deed under s1460(3) without a meeting only applies if we do not tell the management company to convene a meeting of holders of prescribed interests to ratify any or all of the proposed modifications: s1460(6)(b).

RG 135.29 The intention of s1460(6)(b) is that a meeting be held when it is in the holder’s best interests. A meeting of holders will not be required if the proposed responsible entity complies with the procedures set out in RG 135.25. Otherwise a meeting will have to be held. When we require a meeting we will use Pro Forma 175 [PF 175]. Holders are in a better position than us to decide if a vote should be taken on proposed modifications. The procedure that must be followed involves sending notices to holders and conducting a postal vote if needed. We consider that this is a cost effective mechanism that provides holders with an opportunity to stop modifications that are not in their interests.

RG 135.29A When a registration application is made, and it appears to us that the constitution requires changes to comply, we may not require a meeting to ratify those changes under s1460(6)(b) even though the conditions in RG 135.25 have not been satisfied. This will apply where it is clear to us that the changes are in the best interests of holders of the prescribed interests, are fair to all holders and will not adversely affect holders’ rights.

RG 135.30 In considering how many holders are needed to require a vote, we have reflected the minimum threshold of members holding 5% of the votes or 100 members provided in s252B(1).

RG 135.31 To avoid us requiring a meeting to ratify modifications, the notice of the modifications lodged with us should include a statement that the requirements of RG 135.25 have been complied with. We will not review the modifications, for example, to see if they would cause the deed to comply with s601GA.

C Relief to facilitate transition

Our policy

Removing deed provisions

RG 135.32 We have modified s1460(3) to allow a proposed responsible entity to modify the scheme's approved deed to remove provisions that were included to satisfy:

- (a) guidelines of the National Companies and Securities Commission under the Companies Act and Codes; or
- (b) conditions of any instrument under s1069(3) or 1084 or the corresponding provisions prior to the Law. See [CO 98/2159].

RG 135.33 Class Order [CO 98/2159] also allows modifications of the deed that:

- (a) are incidental to the modifications permitted by RG 135.32 or s1460(3); or
- (b) the proposed responsible entity reasonably believes are in the best interests of holders of the prescribed interests, are fair to all holders and will not adversely affect holders' rights.

Common funds

RG 135.33A We have also given relief from s1460(3) so that deeds of common funds can be amended during the transitional stage to prevent fees from exceeding those provided by the relevant State or Territory legislation at the time of the amendment: see [CO 00/1067].

[Historical note: RG 135 was amended 11/9/2000 by inserting the subheading "Common funds" and a new paragraph RG 135.33A.]

Meetings under s1457

RG 135.34 We have modified s1457 so a meeting can be called within the first year of the transitional period, see [CO 98/54]. Under the relief, either the trustee or representative or the management company can convene a meeting of the holders of prescribed interests to consider the matters required to be considered by a meeting under s1457(1)(a). A meeting can only be convened within the first year of the transitional period if the body convening it has given two months written notice to the other body before convening the meeting.

Investing in schemes during transition

RG 135.35 We have:

- (a) modified s1454(4), see [CO 98/55]. This modification allows assets of a prescribed interest scheme with an approved deed to be invested in a registered scheme during the transitional period despite the covenant required by reg 7.12.15(1)(a) in the deed; and
- (b) given relief from s601FC(4), see [CO 98/55]. This modification means registered schemes can invest or keep an investment in prescribed interest schemes that have been given relief so that they do not have to have an approved deed.

References to prescribed interests

RG 135.36 We have modified s1465 so that the reference to “managed investments” is replaced by reference to “interest in a managed investment scheme”. See [CO 98/56].

External Membership of Board or Compliance Committee

RG 135.36A During the transitional period, we will consider allowing an individual who is or has been:

- (a) a representative; or
- (b) an officer or employee of a trustee or representative,
in relation to a prescribed interest undertaking to act as:
- (c) a director of the entity that is the management company under the relevant approved deed; or
- (d) a member of a compliance committee of a registered scheme in relation to which the management company is the responsible entity.

RG 135.36B We will consider permitting the relief described in RG 135.36A on a case by case basis where the applicant demonstrates that there is not likely to be a conflict of interest: see [PF 185]. If we permit it, we will modify s1464 so that the person is not excluded from being external by having been or continuing to be a representative or officer or employee of a trustee or representative. If we give this relief the person may continue to act as representative or as an officer or employee of a trustee or representative and we will not revoke the representative’s or trustee’s approval for this reason. We will not however permit a representative or an officer or employee of

a trustee or representative to be a director of the management company for more than 6 months.

Appointing a related entity as the proposed responsible entity

RG 135.36C We have modified Div 11 of Part 11.2 to facilitate transition and allow a change of manager in some circumstances. This modification allows a trustee or management company of a prescribed interest scheme (“the body”) that receives a retirement notice from the other body, to nominate a related body corporate as the proposed responsible entity of the scheme: see [CO 99/374]. The nominee can act as the proposed responsible entity if members have an opportunity to vote about the nominee being the proposed responsible entity in accordance with the following requirements:

- (a) the body may, if it wishes, proceed straight to a postal vote or convene a meeting, to approve the nominee. In either case the notice has to include a summary of relevant information as required under reg 7.12.15(1)(g) of the Corporations Regulations;
- (b) otherwise, the body must give holders of the prescribed interests notice of the proposal to appoint the nominee as the proposed responsible entity;
- (c) the notice to the holders of the prescribed interests must:
 - (i) contain a summary of relevant information about the choice of the nominee (as would be required under reg 7.12.15(1)(g) of the Corporations Regulations);
 - (ii) state prominently that if:
 - (A) holders of the prescribed interests who together held at least 5% of the total value of the interests held by holders; or
 - (B) 100 holders of the prescribed interests, who would be entitled to vote if the proposal were put to a meeting under s1456(2)(b) ask for a vote on the choice of the nominee as the proposed responsible entity by giving written notice received by the body within 21 days, the body will arrange a postal vote or convene a meeting to vote; and
 - (iii) be accompanied by a form which can be ticked to ask for a vote;
 - (iv) state prominently a reply paid address of the nominating body to which the form may be sent.

- (d) The nominating body must arrange for a postal vote or, if the nominating body chooses, convene a meeting to vote, if required by the relevant number of holders as soon as practicable.
- (e) If there is a meeting or postal vote the nominee is chosen as the proposed responsible entity if voted for by holders of prescribed interests that would be eligible to vote at a meeting under s1456(2)(b) holding a majority in value (as determined in accordance with s1069A(5) of the old Law) of all the holders of the prescribed interests that would be eligible to vote at such a meeting. In the case of a postal ballot only votes received by the body within 28 days of the issue of the voting paper are to be counted.

Class Order [CO 99/374] sets out some additional requirements.

Common funds

RG 135.36D We have given conditional relief to all common funds from the ratification requirements under s1460(6)(b) for the appointment of a related party responsible entity: see [CO 00/1067] and RG 135.25B.

[Historical note: RG 135 was amended 11/9/2000 by inserting the subheading “Common funds” and a new paragraph RG 135.36D.]

Underlying principles

Removing deed provisions

RG 135.37 Section 1460(3) is intended to assist the conversion of existing approved deeds to managed investment scheme constitutions without unnecessary cost. It should be possible to conveniently amend approved deeds so that they would be similar in nature to a constitution of a new scheme that is to be registered.

Meetings under s1457

RG 135.38 It is in the interests of prescribed interest holders that the identity of the proposed responsible entity be determined as soon as possible as long as there is a reasonable opportunity for the trustee and management company to consider if they should issue a retirement notice.

Investing in schemes during the transition

RG 135.39 Section 601FC(4) and reg 7.12.15(1)(a) are intended to prevent regulated schemes investing in unregulated schemes. This is to protect investors in the investing scheme. It also prevents avoidance of regulation applying to the operation of the scheme in which members' investments are ultimately managed. An investment in a registered scheme is consistent with these objectives even though the registered scheme does not have an approved deed. Similarly, in those situations when we exempt from having an approved deed, we have accepted that the scheme to which the exemption applies does not need to be regulated in order for investments to be made in it. This includes investments by registered schemes.

External Membership of Board or Compliance Committee

RG 135.39A We consider that individual representatives and officers or employees of representatives and trustees should be permitted on the board or compliance committee of a responsible entity which is also a management company for an existing prescribed interest undertaking to provide flexibility to the responsible entity unless there is a real likelihood of conflict of interest.

Appointing a related entity as the proposed responsible entity

RG 135.39B When a related body corporate to the management company or trustee or representative is nominated by the proposed responsible entity members should be given an opportunity to refuse the nomination in a cost effective manner.

Explanations***Removing deed provisions***

RG 135.40 Any modification of the deed permitted by s1460(3) will still need to be considered by a meeting unless holders are given a reasonable opportunity to prevent any modification that is not in their best interests. See RG 135.25 for our policy on s1460(6)(b).

RG 135.41 Once a scheme is registered its constitution may be modified by the responsible entity. It can do so without a meeting if it reasonably considers the modification will not adversely affect members' rights under s601GC(1)(b). In making a modification, a responsible entity still has to comply with s601FC(1)(c) and

601FC(1)(d). If a modification of the constitution can meet these requirements there is no reason that it should not be effected before registration. The modification only has effect if and when the scheme is registered. Proposed responsible entities will need to be careful that any modifications they lodge are permitted by s1460(3) as modified or they will be guilty of an offence: s1308(4).

Meetings under s1457

RG 135.42 In the case of some schemes neither the management company nor the trustee or representative will give the other body a retirement notice during the first year of the transitional period. If this happens then the management company must convene a meeting of holders of prescribed interests to:

- (a) choose a proposed responsible entity for the scheme; or
- (b) decide that the scheme should be wound up.

The holders may direct at the meeting that the proposed responsible entity include in the compliance plan with the registration application a provision that the scheme property is to be held by a person other than the responsible entity, or a person that is not related to the responsible entity: s1457(1A). We will be considering if we should give guidance about the implications of s1457(1A).

RG 135.43 Both the trustee or representative and the management company may be able to call meetings of prescribed interest holders under the approved deed. However only a meeting under s1457(1)(a) can determine who is the proposed responsible entity if there has been no retirement notice issued. Section 1457(1)(a) requires a meeting as soon as possible after the first year of the transitional period. This is intended to set a minimum rather than maximum rate of progress in the transition.

RG 135.44 Two months notice should be given before a meeting is convened by the body convening to the other body. This will give the other a reasonable time to consider issuing a retirement notice. This is consistent with s1456(1) which gives the body receiving a retirement notice two months to decide if it will lodge a registration application.

Investing in schemes during transition

RG 135.45 Scheme property of a registered scheme may be invested in schemes that are not registered but have approved deeds: s1454(4). In contrast, however, the transitional provisions do not clearly allow the assets of a prescribed interest scheme with an approved deed to be invested in a registered scheme. There may be

doubt about whether this is permitted by reg 7.12.15(1)(a) when read with s1465. Further, a registered scheme cannot invest in a prescribed interest scheme to which an exemption we have given from the requirement to have an approved deed applies. The absence of express provision for these situations does not reflect an intention that such investments are not permitted.

References to prescribed interests

RG 135.46 The modification to s1465 reflects legislative intention by using the appropriate defined term and gives certainty.

External Membership of Board or Compliance Committee

RG 135.46A During the transitional period:

- (a) a management company of a prescribed interest undertaking may become the responsible entity of a scheme while remaining the management company of another undertaking not yet registered; and
- (b) the management company may seek to appoint the representative of the unregistered undertaking as a director or member of the compliance committee of the registered scheme so that it has sufficient external members.

RG 135.46B We consider that independence of the trustee and representative under an approved deed is important for investor protection. Where this loss of independence arises because the representative or an officer or employee of the trustee or representative is to be appointed as an external compliance committee member, the loss of independence is not significantly more than that which arises from a trustee or representative holding office as trustee or representative for a number of undertakings with the same management company. We do not prohibit a trustee or representative from acting for a number of undertakings. Accordingly, where there is not likely to be any actual conflict of interest, we will permit a representative or officer or employee of a representative or trustee to be an external member of a compliance committee. However when the representative or officer or employee of the trustee is to be a director of the management company, the potential for conflicts is more significant because of the wider duties of directors. For this reason if we permit this relief, it will ordinarily be for a period of no more than 6 months.

Appointing a related entity as the proposed responsible entity

RG 135.46C It may be considered commercially desirable for schemes that have been operated by several different management companies or trustees or representatives within a corporate group to have the one responsible entity when they are registered. The transitional provisions currently allow either the existing management company or the trustee or representative of a prescribed interest scheme to become the responsible entity of the scheme on registration. Where neither entity wishes to undertake that role, holders of interests must be given the opportunity to vote: s1456(2).

RG 135.46D If a related body corporate to the existing management company or trustee or representative is nominated as the proposed responsible entity, requiring a vote on the nominee may be unreasonably burdensome. This will apply where a sizeable number of holders of interests do not request a meeting after having been given relevant information. In many cases holders will not be adversely affected by the related body corporate rather than the trustee or representative becoming the responsible entity. However the holders are most appropriately placed to decide if a vote should be taken on the appointment of a nominee as the proposed responsible entity. The amount of holders needed to ask for a vote reflects the numbers required under the Law to request a meeting under s252B(1). The process to be followed for a nomination reflects the process required to amend the deed under RG 135.25. It will therefore not cause any unnecessary additional cost or delay. If a vote is required the degree of possible effect on holders does not warrant a requirement for a quorum of 25% by value of the interests, or that the appointment be approved by a 75% by value majority.

D Exemptions from s1457 and the transitional provisions

Our policy

RG 135.47 By [CO 98/57] we have exempted management companies from s1457 in each of the following circumstances.

- (a) The holders of prescribed interests have agreed under s1453 that s1453 does not apply to the scheme. This applies when on 1 July 1999, the scheme would not be required to be registered under s601ED(1) if the transitional provisions did not apply.
- (b) The winding up of the scheme started within one year of the Managed Investments Act commencing, ie before 1 July 1999. In this case the exemption is on condition that the winding up is completed before 1 July 2000.
- (c) All holders of prescribed interests were issued their interests by excluded issue and have agreed that the scheme not be registered and the management company has lodged with us notice of this.

RG 135.47A We will give additional relief when all holders of prescribed interests:

- (a) were issued their interests by excluded issue and are not holding them as a responsible entity or trustee under an approved deed;
- (b) have agreed that the scheme should not be registered; and
- (c) have agreed that Div 5 of Part 7.12 should no longer apply to the scheme.

The relief will exclude the application of the Law before 1 July 1998 while no issues of prescribed interests are made except excluded issues: see [CO 98/1807]. The management company must lodge a notice of the agreement.

Underlying principles

RG 135.48 A meeting should not be required if the scheme is not going to be registered as this would be an unnecessary cost. If no holders are required to be protected by the Law because they have had excluded issues and all the holders agree, they should be able to choose that their scheme no longer be regulated.

Explanations

RG 135.49 A meeting is required during the transitional period if neither body retires. This ensures that decisions are made before the end of the transitional period about what will happen to a scheme that will need to be registered if operated after the end of the transitional period.

RG 135.50 If there was an approved deed before 1 July 1998, s601ED applies in a modified way: s1453. In this case s601ED requires a scheme to be registered even if it has less than 20 members. If all prescribed interest holders under the approved deed agree, they can avoid this modified application of s601ED. This will mean that the scheme will not need to be registered if:

- (a) it has less than 20 members; and
- (b) s601ED(1)(b) or 601ED(1)(c) do not apply.

However, the management company of such a scheme still has to comply with s1457. If such scheme does have less than 20 members and s601ED(1)(b) and (c) do not apply, a meeting under s1457 would be inappropriate. It is inappropriate because when holders of prescribed interests agree that s1453 does not apply they have, in effect, agreed that their scheme will not have to be registered.

RG 135.51 Section 1457(1)(a) applies to a management company of a scheme that is being wound up. If it is clear that the winding up will be completed before 1 July 2000, there is no purpose in making either of the choices available under s1457(1)(a).

RG 135.52 Section 1457(1)(a) also applies to a management company of a scheme that is not required to be registered because all issues of interests in the scheme have been excluded issues. We will exempt from having to convene a meeting when all the holders of prescribed interests:

- (a) agree that the scheme not be registered; and
- (b) were issued their prescribed interests by excluded issue.

Their agreement is needed because holders may have invested on the basis that the scheme would be regulated. The relief applies even if some non excluded issues had been made to former holders.

RG 135.52A Where relief is given from s1457 because all holders had excluded issues and they have agreed the scheme should not be registered, it is appropriate that holders should be able to agree to opt out of regulation immediately. Relief from the application of the Law before 1 July 1998 will be given in this circumstance so that the

approved deed can be amended without complying with the statutory covenants before the end of the transitional period. The relief will not apply if a holder is a responsible entity of a registered scheme or a trustee under an approved deed consistently with the policy of s601FC(4) and reg 7.12.15(1)(a) of the Law before 1 July 1998. If any person becomes a member as a result of a non excluded issue, the scheme may be required to be registered as Chapter 5C will apply.

RG 135.53 We have also modified the transitional provisions for schemes that did not have a separate trustee and management company on 30 June 1998 because we exempted them. See Regulatory Guide 136 *Managed investments: Discretionary powers and closely related schemes* at RG 136.4 and [CO 98/59].

E Our interpretation of some transitional issues

Our interpretation

Transitional provisions apply to exempted schemes

RG 135.54 Before 1 July 1998 we exempted some schemes from Div 5 Pt 7.12 of the Law. We consider that under s1452(a) the transitional provisions apply to such schemes if prescribed interests were issued or offered in reliance on the exemption.

Transitional provisions apply to “wholesale” schemes with an approved deed

RG 135.55 We consider that under s1452(a) the transitional provisions apply to a scheme which had an approved deed for the purposes of Div 5 Pt 7.12 on 30 June 1998. This applies even if, at the time each of the prescribed interests in the scheme was offered for subscription or issued, s1065 did not require an approved deed because they were excluded offers or issues.

Decisions of meetings under s1456(2)(b) or 1457(1)(a)

RG 135.56 We consider that under s1461 a choice or decision of a meeting of holders of prescribed interests under either s1456(2)(b) or 1457(1)(a) is made if the voting requirements of s1069A(2)(c) and 1069A(2)(d) of the Law before 1 July 1998 are satisfied.

Roles and proposed modifications under s1460

RG 135.57 We consider that the covenant in an approved deed required by reg 7.12.15(1)(g) applies to notices of meeting required under s1456(2)(b), 1457(1)(a) or 1460(6)(b).

RG 135.58 We consider that, when the trustee or representative is not the proposed responsible entity of a scheme, it still has a role in relation to notices of meetings under the transitional provisions. It must consider if the management company complies with the covenant required by reg 7.12.15(1)(g) of the Law in relation to any notice convening such a meeting of holders of prescribed interests. The trustee or representative has this role under the covenant required by s1069(1)(e)(i). If the notice does not comply, the trustee or representative must consider what action it should take to protect prescribed interest holders' rights.

Application of the transitional provisions

RG 135.59 We consider that under s1452(a) the transitional provisions apply to a scheme if on 30 June 1998:

- (a) a deed that had been approved under s1067(2) of the Law before the Managed Investments Act was in force for the scheme; and
- (b) at least one prescribed interest had been issued under the deed. This may, for example, be merely an excluded issue to the management company on settlement of a trust. The prescribed interest must relate to a scheme that actually exists rather than a mere “shelf trust”.

Prospectus disclosure

RG 135.60 We consider that s1024(1) will ordinarily require that a current prospectus in relation to a scheme must be updated by a supplementary prospectus or replacement prospectus when the scheme is registered under s601EB(1).

Licensing and registration applications

RG 135.61 We consider that the Law as amended by the Managed Investments Act applies in relation to applications for authorisation to operate managed investment schemes, to our exemptions and modifications under s601QA in relation to registration and to any extension of time to establish a compliance committee under s601JA(4).

Officers of representatives as external members

RG 135.61A We consider that s1464 applies so that officers and employees of a representative are not taken to have been substantially involved in business dealings, or in a professional capacity, with the responsible entity that was formerly the management company, merely because of things they did in that role before the scheme’s registration.

Underlying principles

RG 135.62 The transitional provisions are intended to provide a mechanism so that existing regulated schemes and pre 1991 exempt trusts can be registered (or wound up if they are not registered) within a reasonable time.

Explanations

Transitional provisions apply to exempted schemes

RG 135.63 When due to an exemption by us, certain persons were not required to comply with Div 5 of Pt 7.12 in relation to prescribed interests issued before 1 July 1998, Div 5 still applied to the prescribed interests. Therefore, under s1452(a) the transitional provisions apply to exempted schemes.

Transitional provisions apply to “wholesale” schemes with an approved deed

RG 135.64 When a deed has been approved in relation to the prescribed interests, Div 5 and, in particular, the covenants required by s 1069(1), apply in relation to the interests. This applies even though an approved deed was not required. This view is consistent with our view stated in Superseded Policy Statement 55 *Covenants in deeds* at [SPS 55.80]. Therefore, under s1452(a) the transitional provisions apply to “wholesale” schemes with an approved deed.

Decisions of meetings under s1456(2)(b) or 1457(1)(a)

RG 135.65 Other than being required by us under s1460(6)(b), meetings of holders of prescribed interests can be convened under the transitional period in two circumstances, ie when:

- (a) both the trustee or representative or management company decide not to be the responsible entity of the scheme after receiving a retirement notice from the other body under s1456(2)(b); and
- (b) neither the trustee or representative or management company gives a retirement notice to the other body during the first year of the transitional period under s1457(1)(a).

RG 135.66 Section 1461 provides, among other things, that the voting rules in s1069A of the Law before the Managed Investments Act apply to such meetings of holders of prescribed interests. The voting rules in s1069A are those rules which apply to the modification of approved deeds under the Law as it applied before 1 July 1998.

Roles and proposed modifications under s1460

RG 135.67 A notice convening a meeting of holders of prescribed interests must be adequate and include a summary of relevant information: reg 7.12.15(1)(g). The obligation under the covenant is not expressed to be limited to meetings convened under the deed. It is

not impliedly limited to such meetings because the covenant is clearly intended to apply to statutory meetings such as any conducted under s1069A.

RG 135.68 It has been argued that when the trustee or representative is not the proposed responsible entity, it is not appropriate for them to review notices of meetings under the transitional provisions. The basis of this argument is that the appointment of the responsible entity or amendments to the deed will only take effect when the scheme is registered. The trustee or representative ceases to hold office (at least as trustee or representative) on registration.

RG 135.69 However we consider that the trustee or representative should review notices of meetings under the transitional provisions. This is because they are still the trustee or representative of a scheme at the time the notice is given and until the scheme is registered. Therefore, the trustee or representative must perform its normal duties in relation to compliance by the management company with the covenant required by reg 7.12.15(1)(g). These duties are discussed in Superseded Policy Statement 89 *Trustees and representatives — approvals for prescribed interests schemes* at [SPS 89.18] onwards.

Application of the transitional provisions

RG 135.70 We consider that the transitional provisions will apply to a scheme even if, on 30 June 1998, there is no approved trustee for the purposes of s1067(4) in relation to the scheme. This is despite there not being an approved deed for the purposes of s1066(1). In those cases the transitional provisions will apply to the scheme even if the trustee is approved after 30 June 1998.

Prospectus disclosure

RG 135.71 We consider that under s1024(2) a prospectus must be updated to include information about changes to the scheme because of the Managed Investments Act. This is because some of the changes will be significant and will affect matters included in the prospectus. For example the prospectus will have to include information about:

- (a) the role and obligations of the responsible entity; and
- (b) arrangements for holding scheme property (see s1022(1)(a) as modified by reg 7.12.12).

Any prospectus or other document lodged in relation to a scheme is required by the Law to include the ARSN of the scheme. Once a

scheme is registered, any prospectus for the scheme will need to include the statement required by s1043(1A).

RG 135.72 If there is a current prospectus, the management company must consider if there are prospectus disclosure obligations (including updating obligations) for information about:

- (a) the implications of enactment of the Managed Investments Act for a particular scheme before registration;
- (b) the issue of any retirement notices and the identity of the proposed responsible entity for the scheme; and
- (c) applications for the scheme to become registered and steps such as the making of any modifications to the approved deed.

Licensing and registration applications

RG 135.73 The Law before 1 July 1998 generally applies to a scheme referred to in s1452 until the scheme is registered. However, it is necessarily implied that the Law from 1 July 1998 applies to the steps needed before registration or to determine if registration is required. Our powers under s601QA clearly apply to schemes to which the transitional provisions apply because we can exempt from or modify Div 11 of Pt 11.2.

Officers of representatives as external members

RG 135.73A We consider that s1464 was intended to apply equally to officers and employees of a representative of a prescribed interest undertaking as it does to officers and employees of a trustee. We hold this view on the basis that the use of the word “body” in s1464 refers to the bodies described in s1455, such as the trustee, management company and representative. This interpretation means that officers and employees of a representative may be treated as an “external director” under s601JA(2), or considered for a position as an “external member” of a compliance committee of a responsible entity under s601JB(2) if they are not otherwise disqualified by those subsections. We have given relief so that representatives who are individuals will also be able to qualify as external members of a compliance committee on the same basis: see RG 136.11A and [CO 98/1805].

F Our administrative policy during transition

Our policy

RG 135.74 Information release [IR 98/10] gives guidance on a range of process measures we will apply during the transitional period for managing applications for:

- (a) a licence to operate a scheme;
- (b) scheme registration; and
- (c) relief from the provisions of the Law.

RG 135.75 We will consider facilitating limited extensions of the life of prospectuses of continuous issuers on application case by case, so that prospectus rollovers can coincide with scheme registrations.

Underlying principles

RG 135.76 We will administer the Law during the transitional period so as to minimise costs and the impact of any delays to parties to schemes. At the same time we will ensure we are efficient in using our resources.

Explanations

RG 135.77 We expect a large number of applications during the opening months of the transitional period because:

- (a) some entities, for commercial reasons, want to be operating schemes as responsible entities as soon as practicably possible; and
- (b) continuous offerors of interests may want their scheme to be registered when the scheme's next rollover prospectus is due.

RG 135.78 If we give an extension of time to a current prospectus of a continuous offeror, the offeror will need to consider if a supplementary prospectus is required in the particular circumstances.

Key terms

RG 135.79 In this guide, a reference to the:

“common funds” means common funds where trustee companies are empowered to pool money, notwithstanding that the money may be held on individual trust, by virtue of one or more of the following State or Territory Acts:

- (a) *Trustee Companies Act 1984 (Vic)*
- (b) *Trustee Companies Act 1964 (NSW)*
- (c) *Trustee Companies Act 1988 (SA)*
- (d) *Trustee Companies Act 1968 (Qld)*
- (e) *Trustee Companies Act 1987 (WA)*
- (f) *Trustee Companies Act 1953 (Tas)*
- (g) *Companies (Trustee and Personal Representatives) Act 1981 (NT)*
- (h) *Trustee Companies Act 1947 (ACT)*

“Managed Investments Act” is to the *Managed Investments Act 1998*;

“pre 1991 exempt trust” is to a scheme that has been exempt from the application of Div 5 Pt 7.12 of the Law before 1 July 1998 by operation of the words in reg 7.12.04(c)(ii), “except in the case of a trust that was in existence on 5 July 1991”;

“s782” (for example) is to a section of the Law;

“reg 7.12.15(1)(g)” (for example) is to the Corporations Regulations;

“the Law” is to the Corporations Law;

“transitional period” is to the period for which the old Law applies under s1454 of the transitional provisions; and

“transitional provisions” are the provisions of Div 11 of Pt 11.2 of the Law;

“voluntary investor” means a person:

- (a) who invests, or on whose behalf money is invested, with the trustee under a prospectus or other disclosure document issued for the prescribed interests; or
- (b) if money is already held by the trustee for that person:
 - (i) who directs the trustee to apply the money to the prescribed interests; or

- (ii) whose specific consent is required prior to the trustee applying the money to the prescribed interest,

where the trustee has no authority to invest or deal with that money in any other way.

[*Historical note:* RG 135.79 was amended 11/9/2000 by inserting definitions for terms “common funds” and “voluntary investor”.]

Related information

RG 135.80

Headnotes

Transitional issues, extensions of time, fixed term schemes, property trusts, property syndicates, non-mining primary production schemes, film schemes, meetings of members, meetings of holders of prescribed interests, modifications to approved deeds, ratification of modifications to approved deeds, pre 1991 exempt trusts, wholesale schemes, licensing, registration applications, exemptions, prospectus disclosure, transitional provisions — practical issues.

Class orders and pro formas

[CO 98/54], [CO 98/55], [CO 98/56], [CO 98/57], [CO 98/59], [CO 98/1789], [CO 99/374], [CO 00/1067], [PF 174], [PF 175]

Policy statements

Superseded Policy Statement 55 *Covenants in deeds* [SPS 55]
 Superseded Policy Statement 89 *Trustees and representatives — approvals for prescribed interests schemes* [SPS 89]
 Superseded Policy Statement 131 *Managed investments: Financial requirements* [SPS 131]

Regulatory guides

RG 44 *Annual general meetings — extensions of time*
 RG 77 *Property trusts and property syndicate*
 RG 130 *Managed investments: Licensing*
 RG 132 *Managed investments: Compliance plans*
 RG 133 *Managed investments: Scheme property arrangements*
 RG 134 *Managed investments: Constitutions*
 RG 136 *Managed investments: Discretionary powers and closely related schemes*

Legislation

Div 11 of Pt 11.2, Div 5 Pt 7.12, s252B, 601ED, 601ED(1), 601ED(1)(b), 601ED(1)(c), 601FC(1)(c), 601FC(1)(d), 601FC(4), 601GA, 601GC(1)(b), 601JA(4), 601QA, 1022(1)(a), 1024(1), 1043(1A), 1065, 1066(1), 1067(2), 1067(4), 1069(1), 1069(1)(e)(i), 1069(3), 1069(12), 1069A(2)(c), 1069A(2)(d), 1084, 1308(4), 1452, 1452(a), 1453, 1454(2), 1454(4), 1456(1), 1456(2)(b), 1457, 1457(1)(a), 1457(1A), 1460, 1460(3), 1460(6)(b), 1461, 1462, 1465, reg 7.12.04(c)(ii), 7.12.12, 7.12.15(1)(a), 7.12.15(1)(g)

Cases

Borambil Pty Ltd v O'Carroll [1972] 1 NSWLR 302, at 309
Potato Producers Co-Operative Ltd v Pavone [1962] VR 231

Consultation papers

Licensing a responsible entity
Financial requirements of a responsible entity
Compliance plans for managed investment schemes
Scheme property arrangements
Constitutional issues
Transitional issues
Exemptions and modifications

Information releases

[IR 98/9], [IR 98/10], [IR 99/18]