



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 141

Offers of securities on the internet

Related instruments [CO 99/43], [CO 96/1578], [CO 99/790], [CO 00/97]

Chapter 7, Part 7.12 — Offering securities for subscription or purchase

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From 5 July 2007, this document may be referred to as Regulatory Guide 141 (RG 141) or Policy Statement 141 (PS 141). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 141.1) or their policy statement number (e.g. PS 141.1).

Editor's note: On 13 March 2000, amendments made to the Corporations Law by the *Corporate Law Economic Reform Program Act 1999* come into effect. Class Order [CO 99/43] currently gives relief to issuers of internet offers of securities (see Part A of this guide). Following the commencement of the CLERP Act amendments, it will be replaced (in substantially the same terms) by Class Order [CO 00/97]. (See RG 141.13B for information about the differences between Class Order [CO 99/43] and Class Order [CO 00/97].)

This guide has also been updated to make it consistent with relevant aspects of electronic prospectuses relief given by Class Order [CO 99/790], as foreshadowed in Information Release [IR 99/21]. Class Order [CO 00/97] reflects the changes.

What this guide is about

RG 141.1 This guide sets out when we intend to regulate offers, invitations and advertisements of securities that:

- (a) appear on the internet; and
- (b) can be accessed in Australia.

RG 141.2 This guide relates to both offshore and Australian issuers of securities.

RG 141.3 This guide also sets out our policy on working with regulators in other jurisdictions on internet issues relating to financial products.

RG 141.4 This guide covers:

A when we do not intend to regulate offers, invitations and advertisements of securities that appear on the internet;

see RG 141.5–RG 141.20

B the use of jurisdictional disclaimers in electronic prospectuses by issuers that we regulate;

see RG 141.21–RG 141.28

C our policy on working with international regulators on the use of the internet to make available offers, invitations and advertisements of securities; and

see RG 141.29–RG 141.35

D our enforcement activities.

see RG 141.36–RG 141.40

Contents

What this guide is about	2
A When we do not intend to regulate offers of securities that appear on the internet	4
Our policy	4
Underlying principles	4
Explanations	5
B The use of jurisdictional disclaimers in electronic prospectuses by issuers that we regulate	11
Our policy	11
Underlying principles	11
Explanations	11
C Our work with international regulators on internet offers of securities	13
Our policy	13
Underlying principles	13
Explanations	14
D Our enforcement activities	15
Our policy	15
Underlying principles	15
Explanation	15
Related information	16

A When we do not intend to regulate offers of securities that appear on the internet

Our policy

RG 141.5 We do not intend to regulate offers, invitations and advertisements of securities that are accessible in Australia on the internet if:

- (a) the offer, invitation or advertisement is not targeted at persons in Australia;
- (b) the offer or invitation contains a meaningful jurisdictional disclaimer;
- (c) the offer, invitation or advertisement has little or no impact on investors in Australia; and

there is no misconduct.

RG 141.6 We have issued Class Orders [CO 99/43] and [CO 00/97] which give relief to this effect to issuers of internet offers and advertisements: see RG 141.13–RG 141.17. (Class Order [CO 99/43] applies until the commencement of the *Corporate Law Economic Reform Program Act 1999* (CLERP Act). From that time, Class Order [CO 00/97] applies: see RG 141.13A and RG 141.13B. Applications for relief on a case by case basis for proposals outside the terms of the class orders may be lodged at any Regional Office of ASIC. See Regulatory Guide 51 *Applications for relief* (RG 51) for guidance on how to make an application.

Underlying principles

RG 141.7 We want to improve certainty for people who use the internet for commercial transactions in respect of our application of the Corporations Law (Law) to offers, invitations and advertisements of securities that can be accessed in Australia on the internet.

RG 141.8 We do not generally seek to regulate offers, invitations and advertisements that have no significant effect on consumers or markets in Australia. If every regulator sought to regulate all offers, invitations and advertisements for financial products that were accessible on the internet in their jurisdiction, the use of the internet for transactions in financial products would be severely hampered.

Such a stance would also conflict with the Federal Government's goals in respect of electronic commerce, that is:

“It is important to ensure that regulatory interventions support and do not hinder the operation of the competitive process. The benefits that electronic commerce offers, and its increasing use across a wide range of markets, make it important that regulation does not impede the evolution of new electronic technologies and products.”(Corporate Law Economic Reform Program Proposals for Reform: Paper No. 5, ‘Electronic Commerce Cutting cybertape — building business’ (December 1997) p6.)

Explanations

Uncertainty about internet regulation

RG 141.9 The internet provides a quick, inexpensive and effective distribution mechanism for offers, invitations and advertisements of securities. However, for those involved in making them available on the internet, there is uncertainty about the application of the laws of the jurisdictions in which the offers, invitations or advertisements can be accessed. This guide has been developed as part of our commitment to recognising the benefits that electronic commerce can offer and removing unnecessary impediments. One of our aims is to improve certainty for those who use the internet for commercial transactions.

Prospectus and advertising requirements of the Law

RG 141.10 A prospectus is required when an offer or invitation is made in Australia.¹ An offer or invitation is made in Australia if it is received in Australia. This means that the Law may apply to an offer or invitation of securities on an internet site accessible from Australia irrespective of where the offeror is located: see Regulatory Guide 56 *Prospectuses* at RG 56.28 and Regulatory Guide 107 *Electronic prospectuses* at RG 107.18–RG 107.19, RG 107.100.

RG 141.11 The implications of this are significant. This is because the word “offer” when used in the fundraising provisions of the Law (Pt 7.12) is not limited to a technical or contractual meaning. It also includes the distribution of material that would encourage a member

¹ See s1018(1) of the Law for offers of securities for subscription (primary offers). Offers of securities for sale (secondary offers) are governed by Part 7.12 Div 3A of the Law and associated regulations. For simplicity, this discussion focuses on primary offers, however, the principles that follow are equally applicable to primary or secondary offers of securities.

of the public to enter into a course of negotiations calculated to result in the issue or sale of securities: see *Attorney-General for New South Wales v Australian Fixed Trusts Limited* [1974] 1 NSWLR 110; *Australian Softwood Forests Pty Ltd & Ors v Attorney-General for New South Wales* (1981) CLC 40-734; Regulatory Guide 129 *Business introduction or matching services* at RG 129.3.

RG 141.12 Similarly, the Law places significant restrictions on publishing advertisements in Australia: s1025, 1026 and 1078. Therefore, the advertising restrictions may also apply to an internet site accessible from Australia.

Class Orders [CO 99/43] and [CO 00/97]

RG 141.13 Class Order [CO 99/43] requires that offering material and advertisements do not target Australian residents (see RG 141.14) and the offering material contains a meaningful jurisdictional disclaimer: see RG 141.15. If these requirements are met, the offer or advertisement should have little or no impact on investors in Australia: see RG 141.16.

RG 141.13A On 13 March 2000, amendments made to the Law by the CLERP Act come into effect. Following the commencement of the CLERP Act amendments, Class Order [CO 99/43] will be replaced by Class Order [CO 00/97].

RG 141.13B Class Order [CO 00/97] is substantially the same as Class Order [CO 99/43]. The key differences are:

- (a) differences reflecting amendments made to the Law by the CLERP Act; and
- (b) replacing the concept of “Australian resident” with a concept of persons in Australia and persons applying from Australia. This change recognises that the Law protects persons who receive offering material in Australia and not just Australian residents. It also conforms with the jurisdictional disclaimer requirement of Class Order [CO 99/790] (see RG 141.28). (Class Order [CO 99/790] gives relief to issuers who intend to make offers to persons in Australia.)

Not targeted at persons in Australia

RG 141.14 In order not to target persons in Australia, we believe the offeror must use the following safeguards:

- (a) *Take a variety of precautions reasonably designed to exclude subscriptions being accepted from persons ~~resident~~ in Australia and to check that the precautions are effective by monitoring the*

number of applications made (if any) by persons ~~resident in~~ Australia. Examples of precautions are not sending notices to, or not accepting applications from, persons whose telephone numbers, postal or electronic addresses or other particulars indicate that they are applying from ~~resident in~~ Australia.

The offeror must actually check that the precautions are effective. It is not acceptable to only use precautions that place the responsibility on the applicant. For example, it is not enough to simply ask an applicant whether they are applying from Australia ~~an Australian resident~~. This alone would not be sufficient to guard against persons in ~~Australian residents~~ making subscriptions. If it is reasonably apparent to the issuer that the procedures that have been implemented are ineffective, we do not consider that they satisfy the reasonableness test.

- (b) *The offering material or advertisement must not be published, distributed or made available in ways or locations which are calculated to draw it to the attention of persons in Australia ~~Australian residents~~. This includes, for instance, electronic mail to addresses which indicate that the notice will be read in Australia, posting to newsgroups in the aus.* hierarchy and websites maintained in Australia, or with Australian content.*
- (c) *The offering material or advertisement must not contain material which is specifically relevant to persons in Australia ~~Australian residents or investors~~. Factors that would lead to such a conclusion include details of Australian tax treatments or rates, or information presented in Australian dollars.*
- (d) *The offer ~~or invitation~~ to which the offering material or advertisement relates must not be made ~~or issued~~ in Australia by any other means, unless Class Order [CO 94/1285] or a replacement for that Class Order applies to the making of the offer ~~or issue~~. ASIC Class Order [CO 94/1285] provides some limited relief from the advertising provisions of the Law for advertisements in foreign publications that have an incidental circulation in Australia. It is a condition of that relief that the publication is not distributed in Australia by or on behalf of the author whether directly or indirectly at the instigation of, or by arrangement with, the author. The conditions of the relief are stringent in order to prevent abuse.*

[Note: The amendments to RG 141.14 reflect [CO 00/97] which takes effect on the commencement of the *Corporate Law Economic Reform Program Act 1999* on 13/3/2000. Until that time, RG 141.14 should be read as if the amendments had not been made.]

Meaningful jurisdictional disclaimers

RG 141.15 A meaningful jurisdictional disclaimer is a simple way of making it clear to consumers where an offer is made and, therefore, whether it is subject to local regulatory requirements. The requirements of Class Order ~~[CO 99/43]~~ [CO 00/97] for a meaningful jurisdictional disclaimer are:

- (a) *The offering material must contain a statement that the offer ~~or invitation~~ to which it relates is not available to persons in Australia ~~Australian residents~~. This may be explicit, or it may be conveyed by a statement that the offer ~~or invitation~~ is available only to persons in residents ~~of~~ certain other countries, naming them. A statement that “the offer is not being made in any jurisdiction in which the offer could or would be illegal” does not satisfy our requirement. This is because it does not clearly state the jurisdictions in which the securities are available.*
- (b) *The statement must be prominently displayed with the offering material. A disclaimer could not be said to be effective if a potential investor could overlook it or did not see it until after they had decided to invest.*

[*Note: The amendments to RG 141.15 reflect [CO 00/97] which takes effect on the commencement of the Corporate Law Economic Reform Program Act 1999 on 13/3/2000. Until that time, RG 141.15 should be read as if the amendments had not been made.*]

Little or no impact on investors in Australia

RG 141.16 More generally, we are concerned with the effect of an offer, invitation or advertisement of securities in Australia. We will be concerned if an internet offer, invitation or advertisement has a significant effect on consumers or markets in Australia. Whether or not it has a significant effect in any particular case will depend upon the facts of that case. Examples of the types of factors which we would consider in determining whether an internet offer, invitation or advertisement has a significant effect on consumers or markets in Australia include the number of:

- (a) enquiries that an issuer receives from investors in Australia about investing in the securities being offered;
- (b) investors in Australia to whom securities are issued;
- (c) complaints which we receive from investors in Australia.

RG 141.17 If we believe that an internet offer, invitation or advertisement has had a significant effect on consumers or markets in Australia, we will consider taking regulatory action on the basis that

the offeror may not have complied with the requirements of Class Order [CO 99/43] or Class Order [CO 00/97], as applicable. We will do this even if the offeror used safeguards or disclaimers. For example, it may be that the safeguards and disclaimers were either so poorly designed as to be ineffective, or were used to provide the appearance of satisfying the requirements of Class Order [CO 99/43] or Class Order [CO 00/97], without real compliance.

No misconduct

RG 141.18 If those responsible for an internet offer, invitation or advertisement of securities (or involved in its publication)² appear to have been involved in any misconduct, we will consider the means available to regulate that conduct. We will do this whether the conduct occurred in Australia or overseas. Our options include taking action in respect of all breaches of Australian law and cooperation with foreign regulators and law enforcement agencies. Misconduct may involve significant non-compliance with Australian or overseas laws, such as fraudulent, misleading or deceptive conduct, or failure to abide by other regulatory requirements, such as inadequately disclosing the jurisdictions in which the offer is intended to be made.

RG 141.19 In addition, we will continue to monitor Australian issuers conducting fundraising activities overseas. In particular, we will monitor if their conduct affects the level of confidence in the integrity of the Australian securities market. Our enforcement powers relevant to the conduct of Australian issuers are not limited to the prospectus liability provisions. They include, for example, the power to revoke an issuer's licence (see Regulatory Guide 107 *Electronic prospectuses* at RG 107.106) or obtain an injunction to restrain an unlicensed person from dealing in securities.

² The concept of being involved in a contravention is quite broad under the Law. Firstly, persons who fall into the eight categories specified in s1006(2) of the Law will be deemed to be involved in a contravention involving the issue of a defective prospectus for the purposes of s1005(1). These categories cover the corporation and those closely associated with the corporation (ie directors and promoters) as well as underwriters, experts and advisers. In addition, under s79 of the Law a person is involved in a contravention if they have: (a) aided, abetted, counselled or procured the contravention; (b) induced, whether by threats or promises or otherwise, the contravention; (c) been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or (d) conspired with others to effect the contravention.

Our approach to internet offers of other financial products

RG 141.20 This guide deals with regulation under the Law of internet offers, invitations and advertisements of securities. We are developing our approach to regulating offers of other financial products over the internet for which we have regulatory responsibility under other legislation (such as insurance and savings products). We will consider the principles in this guide when determining our approach.

B The use of jurisdictional disclaimers in electronic prospectuses by issuers that we regulate

Our policy

RG 141.21 Issuers that target persons in Australia when making available offers, invitations or advertisements of securities on the internet must comply with Australian regulatory requirements. We have added a condition to ASIC Class Order [CO 96/1578] (which gives effect to RG 107 that these issuers include a meaningful jurisdictional disclaimer in their electronic prospectuses: see RG 141.28. (Class Order [CO 96/1578] is replaced by ASIC Class Order [CO 99/790] where the paper prospectus was lodged on or after 1 September 1999. Condition 5 of the First Exemption of Class Order [CO 99/790] also requires the inclusion of a meaningful jurisdictional disclaimer.)

RG 141.22 We will also require Australian issuers to include meaningful jurisdictional disclaimers in their electronic prospectuses about the jurisdictions in which the securities are available: see RG 141.28.

Underlying principles

RG 141.23 The Law requires a prospectus when an offer or invitation of securities is made in Australia and places significant restrictions on the publishing of advertisements in Australia: see RG 141.10–RG 141.12.

RG 141.24 We want to assist Australian issuers avoid the potential for regulatory action in jurisdictions where their offers are not targeted. We also want to enhance international coordination of consumer protection.

Explanations

RG 141.25 Including a jurisdictional disclaimer in an electronic prospectus will not significantly increase the regulatory burden on issuers. However, it will assist Australian issuers to avoid regulatory action in jurisdictions where their offers, invitations and advertisements are not targeted. This is because the use of a

meaningful jurisdictional clause is a factor that many regulators consider when deciding whether it is appropriate to take regulatory action. (Actual requirements differ from place to place and many jurisdictions have additional requirements, such as active measures to reject applications from jurisdictions mentioned in the disclaimer).

RG 141.26 This requirement will also assist regulators and consumers, both in Australia and overseas. This is because it will be easier to identify offers, invitations and advertisements that are available in their own jurisdiction.

RG 141.27 We have modified ASIC Class Order [CO 96/1578] and included condition 5 in the First Exemption of Class Order [CO 99/790] to achieve this policy goal rather than simply requesting issuers to comply with best practice. This class order condition ensures that best practice is followed in all cases without imposing significant additional costs on issuers.

RG 141.28 To ensure that costs to issuers are minimised we will only apply this condition to electronic prospectuses provided to ASIC after 1 March 1999, (being after the date on which the amendment to Class Order [CO 96/1578] was issued). Therefore, existing electronic prospectuses will not have to be modified before they expire. An electronic prospectus to which Class Order [CO 96/1578] applies must contain a statement that the offer or invitation to which it relates is available to Australian residents. This may be explicit, or it may be conveyed by a statement that the offer or invitation is available only to residents of certain countries, naming them. The statement must be prominently displayed with the electronic prospectus. (See condition 5 of the First Exemption of Class Order [CO 99/790] if the paper prospectus is lodged with ASIC on or after 1 September 1999. It replaces the concept of “Australian resident” with a concept of persons receiving electronic prospectuses within Australia).

C Our work with international regulators on internet offers of securities

Our policy

RG 141.29 We will continue working with international regulators to seek a consistent approach on issues relating to the use of the internet to make available offers, invitations and advertisements of securities. In particular, we will continue our active participation in the work of the International Organisation of Securities Commissions (IOSCO).

Underlying principles

RG 141.30 Cooperation among international regulators to harmonise the requirements of different jurisdictions should lead to greater certainty for Australian issuers that use the internet to distribute offers, invitations or advertisements, reduce their compliance costs and improve consumer protection.

RG 141.31 Our approach is to minimise compliance costs as much as reasonably possible. (Accordingly, we have prepared this guide with reference to the work that has been done in other jurisdictions on these issues.)

RG 141.32 Our approach is consistent with:

- (a) the recommendation of the Financial System Inquiry Final Report that protection should be provided for cross-border financial transactions and to avoid the potential for fraud³; and
- (b) the Corporate Law Economic Reform Program recommendation that we should continue our participation in the work of IOSCO which is addressing enforcement challenges and opportunities arising from the increasing use of the internet.⁴

³ Financial System Inquiry Final Report (March 1997), Recommendation 29.

⁴ Corporate Law Economic Reform Program Proposals for Reform: Paper No 5, 'Electronic commerce cutting cybertape — building business' (December 1997), Proposal No 1.

Explanations

RG 141.33 We continue to work with other regulators to coordinate regulatory approaches and develop effective enforcement strategies. We cooperate with regulators both bilaterally and through IOSCO. IOSCO is particularly active in the field of electronic commerce including through its internet Task Force of which we are an active member. This guide also forms part of our cooperative international efforts.

RG 141.34 We are working within international forums to encourage regulators in other jurisdictions to issue guidelines about how the requirements of their laws affect transactions in, and communications about, financial products on the internet. The provision of this guidance by regulators around the world (including us) will:

- (a) assist people who are making information about securities available on the internet by making it clear how regulatory requirements apply to such activity;
- (b) provide greater certainty and less regulatory risk for Australian issuers using the internet to make available offers, invitations and advertisements of securities; and
- (c) provide greater certainty and less risk for investors in Australia using the internet to find investment opportunities.

RG 141.35 The Securities and Exchange Commission in the United States⁵ and the Financial Services Authority in the United Kingdom⁶ have already published guidance about the regulatory requirements affecting internet transactions and communications in their jurisdictions. Significant work has also been done in international forums on common principles.⁷

⁵ Securities and Exchange Commission, 'Statement of the Commission Regarding Use of internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore', Release Nos 33-7516, 34-39779, IA-1710, IC-23071, International Series Release No 1125 (March 23, 1998).

⁶ Financial Services Authority, 'Treatment of material on overseas internet World Wide Web sites accessible in the UK but not intended for investors in the UK', Guidance Release 2/98 (May 1998).

⁷ The Technical Committee of the International Organisation of Securities Commissions has published a paper on this topic — 'Securities Activity on the internet' (September 1998), which is available through the IOSCO homepage at www.iosco.org.

D Our enforcement activities

Our policy

RG 141.36 We are continuing to be vigilant in monitoring regulatory issues associated with electronic commerce.

Underlying principles

RG 141.37 We seek to protect consumers and maintain confidence in the integrity of Australia's financial markets through our education and enforcement strategies.

Explanation

RG 141.38 As the opportunities presented by the internet grow, so too do the opportunities for abuse. A key part of any regulatory regime is developing methods to enforce it. We are aware of the enforcement challenges which the internet poses such as promptly identifying and locating non-complying issuers and taking appropriate action.

RG 141.39 Like a number of other regulators in Australia and overseas, we have commenced a surveillance and enforcement program to monitor the internet (including message areas such as news groups and bulletin boards). To enhance our effectiveness we are utilising a range of advanced internet software tools that assist in automating our surveillance and enforcement processes. These include advanced search tools, push technology and intelligent agents.

RG 141.40 These techniques have already proved successful and have resulted in a number of enforcement actions including enforceable undertakings and litigation to remove information that does not comply with the Law. We have also issued a number of warnings to consumers about the dangers of relying on information on the internet without first obtaining a current prospectus.

Related information

RG 141.41

Headnotes

Offers, invitations and advertisements of securities on the internet, regulatory approach, targeting persons in Australia, meaningful jurisdictional disclaimers, misconduct, electronic prospectuses and the inclusion of a jurisdictional disclaimer, work with international regulators, enforcement activities.

Class orders

[CO 94/1285], [CO 96/1578], [CO 99/43], [CO 99/790], [CO 00/97]

Regulatory guides

RG 51 *Applications for relief*

RG 56 *Prospectuses*

RG 107 *Electronic prospectuses*

RG 129 *Business introduction or matching services*

Legislation

Chapter 1, Part 1.2, Div 7, s79

Chapter 7, Part 7.11, Div 4, s1005, 1006

Part 7.12, Div 2, s1018, 1025, 1026, Div 3A, Div 6, s1078

Cases

Attorney-General for New South Wales v Australian Fixed Trusts Limited [1974] 1 NSWLR 110

Australian Softwood Forests Pty Ltd & Ors v Attorney-General for New South Wales (1981) CLC 40-734

Consultation papers and reports

Offers, invitations and advertisements of securities on the internet

Financial System Inquiry, Final Report (March 1997)

Corporate Law Economic Reform Program Proposals for Reform: Paper No 5, 'Electronic commerce cutting cybertape — building business' (December 1997)

Securities and Exchange Commission, 'Statement of the Commission Regarding Use of internet Web Sites to Offer Securities, Solicit

Securities Transactions or Advertise Investment Services Offshore', Release Nos 33-7516, 34-39779, IA-1710, IC-23071, International Series Release No 1125 (March 23, 1998)

Financial Services Authority, 'Treatment of material on overseas internet World Wide Web sites accessible in the UK but not intended for investors in the UK', Guidance Release 2/98 (May 1998)

Technical Committee, the International Organisation of Securities Commissions, 'Securities Activity on the internet' (September 1998)

Media releases

[MR 97/317], [MR 98/168], [MR 98/234], [MR 98/271],
[MR 98/278], [IR 99/21]

Speeches

[SPCH 19], [SPCH 20], [SPCH 22.22]