



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 144

Mortgage investment schemes

Chapter 5C — Managed investment schemes

Part 7.12 — Offering securities for subscription or purchase

Issued 2/3/2000

From 5 July 2007, this document may be referred to as Regulatory Guide 144 (RG 144) or Policy Statement 144 (PS 144). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 144.1) or their policy statement number (e.g. PS 144.1).

What this guide is about

RG 144.1] This guide sets out how we will regulate mortgage investment schemes. It describes:

A our general policy on regulating mortgage schemes that are managed investment schemes;

see RG 144.3–RG 144.6

B which mortgage schemes are regulated as managed investment schemes;

see RG 144.7–RG 144.16

C what relief we will give for all regulated schemes;

see RG 144.17–RG 144.32

D what extra relief we will give for small industry supervised schemes;

see RG 144.33–RG 144.46

E when and how we will implement our policy.

see RG 144.47–RG 144.68

RG 144.2 We are publishing this policy as a final guide however we may make some minor adjustments to our policy as a result of the *Corporate Law Economic Reform Program Act 1999* (“CLERP Act”).

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A Our general policy

RG 144.3 Our policy when regulating mortgage investment schemes is that:

- (a) if you operate a mortgage scheme that is a managed investment scheme you must comply with Ch 5C of the Corporations Law;
- (b) in most respects, we apply the policies we have adopted for other managed investment schemes to mortgage scheme operators but in some areas we provide relief specific to mortgage scheme operators;
- (c) we have eliminated one source of legal uncertainty by making the business of providing mortgage investment services the focus of our regulation, not individual mortgages;
- (d) if you are the operator of a small industry supervised scheme we will allow you to comply with an approved industry body's rules rather than all of Ch 5C. We allow this if the industry body can supervise such schemes effectively and if appropriate insurance arrangements are in place;
- (e) although we require prospectuses for all regulated mortgage investment schemes, we allow the use of a two-part prospectus, so that private details about a borrower can be kept off the public register. This relief will continue after the prospectus provisions in Ch 6D introduced by the CLERP Act commence on 13 March 2000.

Explanation

RG 144.4 Our policy is designed to permit appropriate investment choices while ensuring adequate and effective consumer protection.

RG 144.5 On 1 July 1998 a new regime for regulating the managed investments industry was introduced when the *Managed Investments Act* became law. The Act resulted from an extensive inquiry into regulating the managed funds industry which arose out of a number of large scale failures in the industry in the late 1980s. In our view, consumer protection considerations mean that compliance with this regime should be the starting point for regulating mortgage investment schemes.

RG 144.6 In general, mortgage investments that are subject to the provisions of the Law should be regulated in the same way as other managed investment schemes. Our general policies applying to managed investment schemes will apply. We accept, however, that mortgage investment schemes require some specific relief, which we will provide under our exemption and modification powers.

B Which mortgage investments are managed investment schemes

Our interpretation

RG 144.7 Whether the managed investments legislation applies to you depends on how you carry on your mortgage business. If you are in doubt you will need to seek your own legal advice.

RG 144.8 Our approach to how the definition of managed investment scheme applies to mortgage investment services has two elements:

- (a) the nature and extent of your activities as a provider of mortgage investment services is critical to deciding whether you operate a managed investment scheme that needs to be registered under the Law; and
- (b) our policy that the focus of regulation should be on the service provider rather than the individual mortgage.

Explanation and guidance

Focus on activities

RG 144.9 We encourage you to focus on the nature and extent of the *activities* undertaken as a provider of mortgage investment services in deciding whether a mortgage investment scheme needs to be registered under Ch 5C of the Corporations Law. You will need to view these activities as a whole and in their full commercial context. You will need to especially concentrate on the question of who makes, in practice, the important commercial decisions.

RG 144.10 The following key factors are relevant to whether Ch 5C applies to a scheme:

- (a) the extent to which the legal or commercial character of the investment depends on the business or operations of the promoter. For example:
 - (i) if discrete interests in contributory mortgages are pooled and money contributed by different investors is lent under one mortgage. This strongly indicates the characteristics of a managed investment scheme (unless the money is jointly managed or invested for reasons other than investment in the mortgage scheme);

- (ii) if mortgages are taken in the name of a nominee for one investor. This is less clear-cut, but may indicate the characteristics of a managed investment scheme, if it is done to facilitate management or transfer the investor's interest;
 - (iii) if the availability of borrowers, securities or particular terms depends on the scale and continuity of your business. This may also indicate the characteristics of a managed investment scheme;
- (b) the extent to which commercial decisions are taken by the operator or the promoter of the scheme, and not by investors. This must be a matter of fact and degree in each case. But it seems to us that the most important factor is who takes the commercial decisions, and not, for example, who acts as a postbox or draws up documents to implement decisions, once made. For example:
- (i) if you routinely make investment decisions under general authority, or decide whether to extend loans or enforce securities, without referring decisions to investors. This strongly indicates the characteristics of a managed investment scheme (contributory mortgages are generally managed in this way, but not all nominee mortgages are);
 - (ii) if you are responsible for obtaining, or determining valuations and approving lending against those valuations, or administering a repayment system. This suggests a managed investment scheme;
 - (iii) conversely, if a solicitor documents a security and settles an advance under the instructions of a person who makes their own bargain. This does not give the transaction the characteristics of a managed investment scheme;
- (c) whether the scheme attracts s601ED, as discussed at RG 144.11–RG 144.16.

Focus on service provider

RG 144.11 There are different legal views about how the definition of a managed investment scheme applies to mortgage investment schemes:

- (a) On one view, every mortgage in a mortgage investment practice may be a separate scheme.
- (b) On another view, the practice itself may be a scheme instead of, or even as well as, each mortgage.

RG 144.12 In view of this uncertainty, we want to make sure that the law is sensibly and pragmatically applied. We will use our discretion to

achieve an outcome consistent with the intended purpose of the legislation. This means that if your mortgage investment services amount to a managed investment scheme you will not have to register each mortgage arrangement as a separate scheme. We will allow you to register a single scheme covering multiple mortgage services if you can show that you can meet all your obligations as a responsible entity by doing so.

RG 144.13 We will also use this same practical approach to resolve what may otherwise be problems with applying s601ED of the Corporations Law. That section provides that a managed investment scheme must be registered if it:

- (a) has more than 20 members; or
- (b) was promoted by a person...who was, when the scheme was promoted, in the business of promoting managed investment schemes.

RG 144.14 Section 601ED may mean that if you provide mortgage services to 20 or fewer people you will not be regulated by Ch 5C if there is only one mortgage, but may be regulated if there are number of mortgages. This is because each mortgage might be a separate scheme and the you might be regarded as being in the business of promoting managed investment schemes. We will exempt you from the obligation to comply with Ch 5C and the prospectus provisions of the Law unless the total number of all the investors in schemes you manage is more than 20. We will exempt you because we consider:

- (a) the focus of regulating mortgage investment schemes should be on the provision of services; and
- (b) for the purposes of s 601ED, we should not regard a person as being in the business of promoting mortgage investment schemes unless the total number of investors in all schemes is more than 20.

RG 144.15 The number of investors is to be calculated in accordance with s601ED(4). This may be particularly important where a trustee has invested in the scheme.

RG 144.16 This relief is not available if you are an associate (eg an agent) of the operator of a registered mortgage investment scheme (see Class Order [CO 99/1639]).

C General position — a lightly modified regime for registered schemes

Our policy

RG 144.17 We will regulate mortgage investment schemes as far as possible by Ch 5C and the fundraising provisions of the Corporations Law. We will modify (or give conditional exemptions from) the Law to:

- (a) adapt the regime to the particular features of mortgage investment schemes; and
- (b) eliminate legal uncertainties.

Apart from these modifications Ch 5C and the fundraising provisions will apply.

RG 144.18 This means that:

- (a) a scheme operator must be a public company and be licensed as a responsible entity; and
- (b) schemes must be registered, and must comply with the requirements about scheme constitutions, compliance plans and so on.

See our general policies in Regulatory Guides 130 to 136.

RG 144.19 This approach will apply to all schemes other than those discussed in Section D and those exempted under our other policies.

Relief from Chapter 5C and section 1022

Chapter 5C

RG 144.20 We will modify the way Ch 5C applies by allowing you to register a single scheme covering any number of mortgages, rather than treating each mortgage as a separate scheme that must be separately registered.

RG 144.21 Normally if you hold scheme property we require you to have net tangible assets (NTA) of at least \$5 million. However, we have given relief to certain mortgage schemes so that you do not have to meet this requirement in some cases. Our policy on NTA for a person holding scheme property is given in Superseded Policy Statement 131 *Managed investments: Financial requirements* [SPS 131]. In a number of cases,

you (or a third party custodian) need only meet the NTA requirement set out in s784(2A).

Our relief applies to scheme assets that are:

- (a) mortgages or documents of title held under a mortgage when certain conditions are met; or
- (b) cash held for up to 3 months in an audited trust account while an application for a mortgage is processed. This cash would include the incidental fees and costs of acquiring a mortgage.

You should refer to Class Order [CO 99/558] and your licence conditions for further details.

RG 144.22 To obtain this relief, operators of mortgage schemes involving general authorities must (unless the investor holds the mortgage and documents of title):

- (a) tell the investor about the property chosen for them and give them an opportunity to approve your choice; or alternatively
- (b) allow the investor a 14 day “cooling off” period when they may withdraw from the mortgage.

RG 144.23 Even if you cannot meet these requirements you may still qualify to hold scheme property. You may qualify if:

- (a) you have a minimum NTA of \$500,000; and
- (b) all assets of the scheme that are not assets described in RG 144.21 are either:
 - (i) mortgages over real property to be held for the duration of those mortgages; or
 - (ii) cash and deposits held in a regulated trust account for up to six months pending its initial investment.

If a mortgage scheme involves other types of assets, our normal policy on NTA will apply, see [SPS 131].

Two stage prospectuses

RG 144.24 We will give relief to allow the use of a two stage prospectus. The first part must contain information about the services provided by the operator of the mortgage investment scheme, and the second part details about the individual mortgage transaction. This relief is contained in Class Order [CO 99/1638].

RG 144.25 Such a prospectus must, as a whole, comply with s 1022 and reg 7.12.12 (and, after, the CLERP Act commences, s710 of the Law). It can be made up of two parts, each of which must be given to an investor:

- (a) a generic part (see RG 144.26); and
- (b) a specific part (see RG 144.27).

RG 144.26 The generic part will not need to be changed for different mortgages, and it must be lodged with us. It should set out:

- (a) the main features of mortgage lending under the operator's scheme;
- (b) the relationship between the operator and investors;
- (c) the rights of a lender;
- (d) the fees and charges that will apply;
- (e) the valuation practices the operator will use;
- (f) the loan to valuation ratio policy the operator will use;
- (g) indicative rates of return;
- (h) procedures in place to address risks associated with speciality loans (including the process used to assess the capacity of the borrower to meet repayments);
- (i) a description of the types of loans that make up the scheme; and
- (j) any other matters listed in Class Order [CO 99/1638].

RG 144.27 The specific part is specific to the mortgage in question. It does not need to be lodged with us, but you must keep a copy of it. This part of the prospectus must say that it is to be read with the generic part. It should contain details about:

- (a) the borrower offering the mortgage, including their creditworthiness;
- (b) the mortgage itself and the rights that go with it;
- (c) the property that is to be mortgaged, how it has been valued and what is its value;
- (d) the loan to valuation ratio;
- (e) any prior securities the property is subject to;
- (f) the interest the borrower will pay;
- (g) how long the loan will last; and
- (h) the arrangements for repaying it.

Explanations

Chapter 5C

RG 144.28 The relief from Ch 5C described in RG 144.20 gives effect to our general approach to regulating mortgage schemes. The relief permitting you to register a single scheme makes providing mortgage services the focus of regulation, rather than individual mortgages: see Section B at RG 144.11 onwards.

RG 144.29 Our approach to the NTA requirements for those who hold the assets most commonly involved in mortgage schemes is an extension of our general policy. This is that the NTA requirements that normally apply can be relaxed. They can be relaxed when this is justified by the nature of the property normally involved in a type of scheme.

Two stage prospectuses

RG 144.30 We are conscious that investors benefit from shorter, comprehensible, disclosure documents, and we are encouraging the use of simple, concise prospectuses in other areas. Our policy of requiring mortgage scheme prospectuses to comply with the disclosure standard in s1022 (and after the CLERP Act commences, s710) is not intended to result in long or complicated documents. We anticipate that for most mortgage investment schemes operators will be able to comply with their disclosure obligations in a way that is helpful to investors and cost effective for them. This is because most schemes are relatively standard and straightforward.

RG 144.31 In our view, the fundraising provisions of the Corporations Law should apply to offers of interests in mortgage investment schemes. However, we accept that there is a sound public policy argument for keeping private details of the borrower, the property and the terms of the transaction off the public register. We will give relief to allow this, but at the same time we will maintain the protections available to investors through a novel use of the supplementary prospectuses provisions. This is achieved by relief to allow only the generic part of the prospectus to be lodged, mentioned in RG 144.26.

RG 144.32 Not all schemes will need this two-part prospectus. For example, a mortgage scheme in which you make all the decisions about which mortgages are to be acquired may be structured so that the specific part of the prospectus is not necessary. In such a case, it is likely that you can meet all your obligations by issuing a single prospectus that complies with s1022 of the Corporations Law (or s710 of the Law after the CLERP Act commences).

D Small industry supervised, schemes

Our policy

RG 144.33 We are prepared to give more substantial relief from Ch 5C of the Corporations Law for some small scale schemes. We will give this relief if we are satisfied that:

- (a) the schemes are adequately supervised by an industry body (for example some professional associations of lawyers); and
- (b) the regime administered by the industry body provides an adequate alternative way of delivering the protections provided by direct compliance with Ch 5C.

RG 144.34 Before we grant relief of this kind, we must be satisfied that the rules and supervisory arrangements of an industry body are adequate. We will work with interested industry bodies to develop criteria for approving arrangements of this kind.

RG 144.35 We will not grant this kind of relief to public offer schemes, schemes susceptible to known regulatory risks, and larger scale schemes. Schemes are not eligible for relief based on participation in an industry based compliance regime if they have any one of the following characteristics:

- (a) development loans;
- (b) loans where the sum secured by the mortgage (at the time of entry into the mortgage) is more than 80% of the unencumbered present day value of the mortgaged property;
- (c) interests in the scheme are offered interstate (except for local offers in border areas);
- (d) public advertising;
- (e) investors do not choose the mortgage(s) in which their funds are invested; or
- (f) an operator who manages, or whose associates manage, schemes involving loans the total amount of which in aggregate is more than 7.5 million dollars.

What relief will be provided

Full relief from Chapter 5C

RG 144.36 If you operate a small scheme described in RG 144.33, you do not have to comply with the managed investment and licensing requirements of the Law. This is because we have issued a class order which exempts you from those provisions of the Law and Ch 5C will not require you to:

- (a) be a public company;
- (b) hold a responsible entity licence; or
- (c) register your mortgage scheme.

RG 144.37 Prior to the CLERP Act, the prospectus and sharehawking provisions of the Law will still apply to operators of small schemes. The prospectus provisions have important consequences if you conduct your mortgage practice through a proprietary company. We cannot grant relief from s 113(3) of the Law under which a proprietary company cannot do anything that would mean it has to lodge a prospectus.

You will be able to lodge a prospectus in your individual name under s92(4) of the Law before the CLERP Act commences.

When the CLERP Act commences on 13 March 2000, interests in unregistered managed investment schemes will no longer be securities for the purposes of the prospectus provisions (see s92(3)(c) of the post CLERP Law). Therefore, neither the prospectus provisions nor s113 will apply to offers of interests in schemes we exempt from registration under Ch 5C.

Limited disclosure relief

RG 144.38 We will provide the same, limited relief to small schemes as we provide to other mortgage investment schemes (see Section B). As a result of the change introduced by the CLERP Act (referred to in RG 144.37) we will impose a condition that schemes we exempt from registration provide disclosure to the same standard as schemes under modified Ch 5C regulation. This will be a condition of relief from Ch 5C and not from the prospectus provisions. Therefore the schemes will not attract s113.

What conditions will apply

RG 144.39 The conditions of our relief will require you to:

- (a) comply continuously with the relevant rules of the body of which the scheme operator is a member;
- (b) have a contract with your auditor that requires the auditor to notify ASIC of any breach of the rules on the conduct of mortgage schemes;
- (c) notify individual mortgages to the supervising body immediately after the mortgage agreement is made;
- (d) hold scheme cash in a separate and designated trust account that is regularly audited; and
- (e) have in place insurance arrangements that will give investors the same level of protection as if the scheme was regulated under Ch 5C.

RG 144.40 When necessary we will use our powers under s 601ED(3) of the Law to ensure that a number of schemes effectively operated by one person or by a group of associates are not treated as separate small scale schemes (see Regulatory Guide 136 Managed Investments: Discretionary powers and closely related schemes at RG 136.82).

Explanations

RG 144.41 Before 17 December 1999 regulation of mortgage investment schemes in most states relied primarily on state-based supervision, often involving the law societies. We no longer consider these arrangements appropriate for most mortgage investment schemes. However, we have decided that that the option of industry body supervision should continue to be available in limited circumstances.

RG 144.42 We believe that this approach is appropriate for these small scale schemes because:

- (a) the cost of fully complying with the Ch 5C requirements for operators of small schemes is likely to be disproportionately large, if the risks faced by investors in these schemes are relatively small;
- (b) the supervisory framework provided by an industry body can result in a form of alternative compliance regime to the managed investment provisions in Ch 5C of the Law when:
 - (i) the body's rules can be an adequate substitute for the constitutional components required by Ch 5C; and
 - (ii) the supervisory framework provided by the body and the firm's auditors can be adequate substitutes for the compliance arrangements required by Ch 5C.

What industry based bodies might apply for registration?

RG 144.43 Industry supervision might include regimes administered by:

- (a) existing state-based bodies. However, their capabilities, rules and supervisory regimes will need reviewing and adapting;
- (b) other bodies not at present involved in supervising mortgage practices. These could include bodies set up by promoters of mortgage schemes to supervise the industry on a cooperative basis.

Criteria for approving industry bodies' supervisory role

RG 144.44 Traditionally, professional bodies, such as law societies, have supervised mortgage practices. Law societies' supervisory powers and relationships with their members are generally supported by state legislation, as well as detailed rules of practice and conduct. We do not intend to limit our approval of industry based compliance regimes to law bodies, but the lack of statutory backing for alternate regimes raises a number of issues for us to consider.

RG 144.45 We will set criteria that recognised industry supervisory bodies (ISB) must meet. We will consult with bodies that want to be considered as ISBs when we are formulating these criteria. The types of matters that we need to address include:

- (a) details about the ISB itself, including:
 - (i) the number of members and its coverage of the industry whether regionally, at state level or nationally;
 - (ii) the number, qualifications and experience of the staff who would supervise;
 - (iii) its financial and administrative resources to adequately and appropriately supervise;
 - (iv) what previous experience, if any, it has in supervising its members;
 - (v) how the ISB proposes to monitor and assess its own performance as a supervisor;
- (b) rules covering:
 - (i) the minimum standards of competence a member of the ISB must have before it can provide mortgage investment services;
 - (ii) financial requirements for members who operate schemes;

- (iii) the capacity of members to operate mortgage scheme businesses;
 - (iv) due diligence in appointing and supervising agents;
 - (v) how books and records for mortgage schemes must be kept;
 - (vi) how often, and how, mortgage scheme books and records are to be audited;
 - (vii) how, and how often, scheme assets and the properties that are, or may be, the subject of mortgages are to be valued; competency standards for eligibility; specific prudential requirements and desired standards of conduct: appropriate financial accountability and audit practices; and rules on valuations;
 - (viii) how disputes between members and their mortgage scheme clients will be resolved; and
 - (ix) insurance requirements, see RG 144.39 para (e);
- (c) particularly if the ISB does not operate under a statutory regime, what powers the ISB will have to compel members to adhere to certain standards, financial accountability and other matters, and to discipline for breaches of its rules;
- (d) how the ISB plans to carry out its supervisory role, including:
- (i) how often its staff will make routine supervisory visits;
 - (ii) what staff will examine and assess on those visits;
 - (iii) how the ISB will identify and deal with emerging problems either with individual operators or more generally;
 - (iv) how the ISB will deal with complaints about its members; and
 - (v) what processes the ISB will have for disciplining members who breach its rules or the Law;
- (e) how the ISB will tell ASIC about compliance and enforcement issues; and
- (f) whether there may be barriers that would prevent the ISB passing information about compliance and disciplinary matters to ASIC (such as other legislation or contractual arrangements between the ISB and its members), and if so the details of those barriers.

RG 144.46 At 1 January 2000 the Law Institute of Victoria and the Law Society of New South Wales have asked to be considered as ISBs.

E Implementing our policy

Our policy

RG 144.47 We recognise that there are a number of complex issues we must work through before all parts of our policy can be fully implemented. These issues include:

- (a) the interrelationship between the Corporations Law regime we administer and relevant state legislation, especially that applying to the legal profession;
- (b) the need for further detailed consultation with industry bodies who may want to be approved as industry supervisory bodies; and
- (c) what approach should we take to existing schemes.

The implementation regime set out below is designed to ensure that these issues are dealt with in a structured and commercially realistic way, but at the same time allow early implementation of the main elements of our policy.

Implementation — different approach for different types of schemes

RG 144.48 Our timetable for implementing our policy depends on the type of scheme involved. For this purpose, there are three main types of schemes:

- (a) Schemes that are not eligible for relief as small industry supervised schemes (see Section D) and are not “run out schemes” (see RG 144.51).

See RG 144.49

- (b) Schemes that are eligible for relief as small industry supervised schemes as described in Section D.

See RG 144.50

- (c) “Run out” schemes

See RG 144.51–RG 144.57

Schemes that are not eligible for relief as small industry supervised schemes (see Section D) and are not “run out schemes” (see RG 144.51)

RG 144.49 Schemes of this type must comply with the new regime by 17 December 1999. At that time existing class orders will cease to apply to these schemes.

Schemes that are eligible for relief as smaller industry supervised schemes (see Section D)

RG 144.50 Relief from the managed investment provisions will continue to apply for each scheme of this type until 1 November 2001, if:

- (a) the scheme is supervised by a body named in an existing class order;
- and
- (b) before 1 November 1999, that body has asked us to approve it as an industry based supervisor as described in Section C;
- and
- (c) before 1 March 2000 the operator of the scheme gives us an audit certificate (see Class Order [CO 99/1639]). This audit timetable may be adjusted by agreement with us.

“Run out” schemes

RG 144.51 You may decide not comply with the Managed Investments Act or participate in an industry supervision arrangement. If you decide to do this then you must make satisfactory arrangements for bringing your scheme to an end and you must ensure appropriate supervision until it ends. In the meantime, you must not create new interests nor extend the duration of existing interests. We will apply our general policy to such schemes (see Regulatory Guid 135 *Managed investments: transitional issues* RG 135 about schemes under approved deeds).

RG 144.52 We will extend run out relief if you “split your practice” between schemes comprising:

- (a) mortgages all made before 17 December 1999 which are in run out;
- and
- (b) new mortgages made, or existing mortgages extended after 17 December 1999, which must be regulated by Ch 5C (unless otherwise allowed by the terms of paragraph 5(c) of Class Order [CO 99/1639]).

RG 144.53 You may use run out relief while waiting to qualify for small industry supervised scheme relief or while reducing the number of scheme members to no more than 20. After the scheme has qualified for this other relief you will no longer need to meet the conditions of run out.

Time period for run out schemes

RG 144.54 Run out schemes must conclude by November 2001. We may however need to vary this in particular cases if a state practice is to write mortgages for more than a two year term.

Supervision of run out schemes

RG 144.55 We will treat a scheme as a run out scheme only if it is subject to an existing supervisory regime and that regime will stay in place for the life of the scheme. To ensure this, we will modify existing class orders so that they continue to apply through the run out period, if a law society or other professional body is prepared to undertake a continuing supervisory role. At 1 January 2000 this has occurred in Tasmania, Queensland, Victoria, New South Wales and South Australia.

RG 144.56 An operator can only get run out relief if they give us an audit certificate before 1 March 2000 (see Class Order [CO 99/1639]).

Substituting investors

RG 144.57 The class order will allow substitution of investors in existing schemes — that is, transferring existing interests to new investors. A new investor must be given the information that they reasonably need when deciding to enter the scheme. Because it would be unduly onerous to require a fresh valuation etc, the information may be given as at the date the mortgage was entered into. However, the information should include a statement about whether the operator has later information which is material to a decision to invest in that mortgage or scheme.

What this means for you

RG 144.58 From 17 December 1999 you cannot operate a mortgage scheme unless:

- (a) you comply with the Law, or the Law as modified in the way described in Section C of this policy (see RG 144.17 onwards); or
- (b) your scheme is a small industry supervised scheme as described in this guide and it is currently supervised by either the Law Institute of Victoria or the Law Society of New South Wales; or
- (c) your scheme meets and qualifies for “run out” or closed scheme relief and the scheme will terminate before 1 November 2001; or
- (d) your scheme has no more than 20 members.

How do I apply for registration

RG 144.59 In general, you must register your scheme, unless it is a one-off promotion with no more than 20 members; all the interests are issued by excluded issue; or you have been given relief by us from the need to register your scheme. To register, you must meet the following three requirements of the Corporations Law:

- (a) the operator must be a public company;
- (b) the operator must be licensed; and
- (c) the scheme must be registered.

In addition, for registered schemes, a prospectus must generally be issued.

Operator

RG 144.60 You must be a public company and licensed to operate the managed investment scheme as a responsible entity (certain minimum capital and insurance requirements apply: see [SPS 131]).

Registered scheme

RG 144.61 The scheme must be registered, which means that there must be:

- (a) a constitution and compliance plan which meet the requirements of the Corporations Law;
- (b) an auditor appointed to review compliance with, and the adequacy of, the scheme's compliance plan;
- (c) either at least half of the operator's board must be composed of external members or the operator must appoint a compliance committee, the majority of which is composed of external members. (The board or compliance committee must monitor compliance with the scheme's compliance plan); and
- (d) at least annual audited financial statements for the scheme lodged with us and provided to members of the scheme.

See our Regulatory Guides 130 to 134 on managed investments, and Form 701 and RG 1-RG 3 Licensing Kit .

Transfer of existing interests

RG 144.62 Any transfer of an existing interest from an existing mortgage scheme into a registered managed investment scheme may

amount to an offer to subscribe for interests in that managed investment scheme. It may therefore require a prospectus. Any prospectus should meet the general disclosure requirements set out in the Law and may need to address issues affecting investors including:

- (a) possible stamp duty liability;
- (b) possible capital gains tax liability; and
- (c) potential loss of access to law society or other fidelity funds.

Licensing of intermediaries

To operate registered schemes

RG 144.63 To register a scheme you must obtain a dealers licence under the Law which authorises you to operate a managed investment scheme.

Dealing in interests in registered schemes

RG 144.64 To be able to deal in interests in registered managed investment schemes, you must hold a securities dealers licence.

Advising on registered schemes

RG 144.65 To be able to give investment advice on interests in registered managed investment schemes, you must hold a securities dealers licence or an investment advisers licence.

An investment advisers licence will apply only in limited circumstances and you should consult Superseded Policy Statement 116 *Investment advisory services: licensing and “independent” advisory services* [SPS 116].

If you advise clients to agree to the transfer of existing mortgages into a registered scheme you may be giving “investment advice”.

After 1 July 2000 if you want to give investment advice under your dealer’s licence you must meet further requirements. You should consult Regulatory Guide 130 *Managed investments: Licensing* at RG 130.6 for further guidance on these matters.

There are also further important obligations below you should be aware of even if you will be participating in a small scale industry supervised regime or run out relief.

Interests in excluded schemes (schemes which do not have to be registered)

RG 144.66 An operator does not have to hold a licence to operate a scheme or deal in interests in a scheme if:

- (a) a mortgage investment scheme is not required to be registered, under an exemption; or
- (b) all issues under the scheme are excluded issues: see reg 7.3.11(1).

In particular, an operator does not have to hold a licence if the scheme operates under:

- (a) our former class order relief; or
- (c) our former class order relief as continued for transitional and run-out purposes; or
- (d) relief given under Section D of this guide: see RG 144.34 onwards.

RG 144.67 If you make recommendations about investments in an excluded mortgage scheme, although you do not have to operate under an appropriate licence, you have obligations under the Law to:

- (a) disclose any interest you have in the recommendation (you must do this under s849 of the Law); and
- (b) have a reasonable basis for the recommendation (under s851).

You have these obligations because under reg 7.3.11(1), s849 and s851 still apply to such activities.

RG 144.68 There are also some other circumstances when you will generally not need to operate under a licence:

- (a) you are merely undertaking administrative activities by distributing a prospectus; or
- (b) you are referring someone to a licensee or their authorised representative. You are merely introducing a potential investor to a licensee and this is incidental to your other business.

For more information see Superseded Policy Statement 121 *Investment advisory services: Mere referrals and other excluded activities* [SPS 121].

Key terms

RG 144.69 In this guide, a reference to:

“audit certificate” means a certificate that:

- (a) is signed by:
 - (i) a registered company auditor;
 - (ii) an “approved auditor” under the *Legal Profession Practice Act 1996* of Victoria;
 - (iii) a “trust account inspector” or an “investigator” under the *Legal Profession Practice Act 1987* of New South Wales; or
 - (iv) an employee of the relevant industry supervisory body who is approved for the purpose by ASIC; and
- (b) states that the person who signs the certificate:
 - (i) has within the last 6 months reviewed the compliance arrangements of schemes conducted by the operator and any related schemes;
 - (ii) has within the last 6 months reviewed the loan books of the schemes. The certificate must state the total value of the loans managed under each of the schemes;
 - (iii) has been informed by the operators of the schemes whether each of the schemes is operating as a registered managed investment scheme or under an exemption. For each of the schemes, the certificate must specify the relevant exemption or state that the scheme is registered; and
 - (iv) in the light of that review, has no reason to believe that the operators of the schemes have not complied, or will not comply with, the conditions of the relevant exemption or exemptions;

“CLERP Act” means to the *Corporate Law Economic Reform Program Act 1999*.

“commencement” of the “CLERP Act” means 13 March 2000.

Related information

RG 144.70

Class orders and pro formas

Class Order [CO 99/558]

Class Order [CO 99/1638]

Class Order [CO 99/1639]

Policy statements

Superseded Policy Statement 116 *Investment advisory services: licencing and “independent” advisory services* [SPS 116]

Superseded Policy Statement 121 *Investment advisory services: Mere referrals and other excluded activities* [SPS 121]

Superseded Policy Statement 131 *Managed Investments: Financial Requirements* [SPS 131]

Regulatory guides

RG 130 *Managed investments: Licensing*

RG 135 *Managed investments: Transitional issues*