



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 156

Advertising of debentures and notes to retail investors

February 2012

About this guide

This guide is for issuers of, and publishers of advertisements for, mortgage debentures, debentures, secured notes, and unsecured notes or unsecured deposit notes.

It sets out the standards we expect you to meet when advertising these products to retail investors. It also sets out our expectations of those handling telephone inquiries about these products (including rollover discussions).

Note: See also Regulatory Guide 69 *Debentures and notes: Improving disclosure for retail investors* (RG 69).

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This version was issued in February 2012 and is based on legislation and regulations as at that date.

Previous versions:

- Superseded Regulatory Guide 156, issued December 2007, reissued June 2010

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

This guide applies to issuers of, and publishers of advertisements for, 'mortgage debentures', 'debentures', 'secured notes', and 'unsecured notes' or 'unsecured deposit notes': see RG 156.1.

An issuer of notes can promote investor understanding and minimise the risk of mis-selling by ensuring that advertising for its products meets the advertising standards in this guide: see RG 156.2–RG 156.3.

An issuer who fails to comply with the advertising standards risks making false or misleading statements or engaging in misleading or deceptive conduct: see RG 156.4–RG 156.5.

While the primary responsibility for advertising material rests with the organisation placing the advertisement, under general law the publisher or other media conduit may also have some responsibility for its content: see RG 156.6–RG 156.8.

Who this guide applies to

RG 156.1 This guide applies to issuers of, and publishers of advertisements for, 'mortgage debentures', 'debentures', 'secured notes', and 'unsecured notes' or 'unsecured deposit notes'. These products are interchangeably referred to as 'notes' in this guide.

Note 1: See s283BH of the *Corporations Act 2001* (Corporations Act), Class Order [CO 12/1482] *When debentures can be called secured notes* and Section G of Regulatory Guide 69 *Debentures and notes: Improving disclosure for retail investors* (RG 69) for information on how notes may be described. Where an offer is made in reliance on [CO 12/1482], the relief is subject to issuers including certain statements in advertisements relating to the offer.

Note 2: This guide should be read with RG 69. You should also have regard to Consultation Paper 167 *Advertising financial products and advice services: Good practice guidance* (CP 167). It discusses our proposals across a range of financial products and services to promote good practice guidance to help promoters comply with their legal obligations to not make false or misleading statements or engage in false or misleading conduct. A regulatory guide in response to the consultation paper is due for release shortly. Issuers should consider the general regulatory guide after it is released, in addition to this guidance, specifically concerning advertisements for notes.

Advertising standards for notes

RG 156.2 Experience indicates that retail investors who are thinking about investing in notes place particular emphasis on the information and impressions given in advertisements. These advertisements have not always given a realistic impression of the note, its features and risks. It is particularly problematic when advertisements give messages about a note that are inconsistent with the risks described in a complying prospectus. Because of the way notes have been promoted, retail investors often fail to realise that a note's higher interest rate (compared to a bank deposit) should be balanced against the higher risk of not being paid the interest and losing some or all of their principal investment.

Note: References to 'advertisements' in this guide should be read broadly: see s734 of the Corporations Act. They include comment and promotion of notes in the course of media programs or publications (generally known as 'advertorials') and statements regarding the notes published by an issuer on its website. They do not, however, include statements in a prospectus.

RG 156.3 To promote investor understanding of note products and minimise the risk of mis-selling, we have set standards for issuers when advertising these products. The standards are summarised in Table 1 and explained in detail in Section B. These standards only apply if the notes are offered to retail investors.

Table 1: Advertising standards for issuers of notes to retail investors

| Area | Summary of standard |
|--|---|
| Repayment of principal investment | To avoid common misconceptions about the risk profile of notes, all advertisements for notes that are offered to retail investors should include a prominent statement to investors that there is a risk that investors could lose some or all of their money. |
| Comparisons with bank deposits and 'risk free' suggestions | Advertisements for notes should state that the note is not a bank deposit. They should also <i>not</i> suggest that: <ul style="list-style-type: none"> the note is, or compares favourably to, a bank deposit; or there is little or no risk of the investor losing their principal or not being repaid. |
| Warning statements generally | Warning statements in advertisements should be prominent to help ensure investors have a balanced impression of the note offering. |
| Suitability statements | Advertisements for notes should not state or imply that the investment is suitable for a particular class of investor. |
| Consistency with prospectus disclosure | Statements in advertisements for notes should be consistent with the corresponding disclosures on that subject matter in the prospectus. |
| Telephone inquiries | Statements made in response to inquiries are subject to the same regulation regarding misleading and deceptive conduct as the advertisements. |

Compliance with advertising standards

- RG 156.4 Issuers of notes who fail to comply with the advertising standards risk making false or misleading statements or engaging in misleading or deceptive conduct.
- RG 156.5 Section C explains how the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) apply in this case and what action we can take against misleading or deceptive statements or conduct.

The role of publishers and the media

- RG 156.6 Publishers and the media have a role in promoting note products. Some of these products may be directly promoted in the media, through advertising and by media commentators, using terms like ‘guaranteed’.
- RG 156.7 While the primary responsibility for advertising material rests with the organisation placing the advertisement, under general law the publisher or other media conduit may also have some responsibility for its content.
- RG 156.8 We expect publishers to have systems and controls to detect and refuse advertisements for notes that do not comply with the advertising standards in this guide: see Section D.

B Advertising standards for notes

Key points

Advertisements for notes that are offered to retail investors should:

- include a prominent statement to investors that there is a risk that investors could lose some or all of their money (see RG 156.9–RG 156.10);
- state that the note is not a bank deposit, and should also not suggest that the note is, or compares favourably to, a bank deposit, or there is little or no risk of the investor losing their principal or not being repaid (see RG 156.11–RG 156.19);
- include prominent warning statements to help ensure investors have a balanced impression of the note offering (see RG 156.20–RG 156.22);
- not state or imply that the investment is suitable for a particular class of investor (see RG 156.23); and
- be consistent with the corresponding disclosures on that subject matter in the prospectus (see RG 156.24–RG 156.25).

Statements made over the telephone or in correspondence in response to inquiries are subject to the same regulation regarding misleading and deceptive conduct as the advertisements: see RG 156.26–RG 156.28.

Repayment of principal investment

RG 156.9 Retail investors often confuse notes with bank deposits. They often fail to realise that a note is a loan to the note issuer and that there is a higher risk of losing some or all of their money than is the case with a bank deposit.

RG 156.10 For this reason, any advertisement for notes that are offered to retail investors should contain prominent disclosure to investors that there is a risk that investors could lose some or all of their money.

Note: This requirement is also a condition of [CO 12/1482] relating to the use of the term ‘secured notes’.

Comparisons with bank deposits and ‘risk free’ suggestions

RG 156.11 Advertisements for notes should state that the product is *not* a bank deposit. Further, they should not suggest that:

- (a) the note is, or compares favourably to, a bank deposit; or

- (b) there is little or no risk of the investor losing their principal or not being paid interest.

Note: The statement that the product is not a bank deposit is also a condition of [CO 12/1482] relating to the use of the term 'secured notes'.

RG 156.12 This means that the following terms should be avoided in advertisements for notes: 'secure', 'secured', 'guaranteed', 'safe', 'deposit' (other than to describe the note as a 'secured note' in accordance with [CO 12/1482], or an 'unsecured deposit note' under s283BH of the Corporations Act or to include the disclosure required by RG 156.11), 'first ranking' and 'no fees'.

RG 156.13 We note that the test for whether a note may be called a 'secured note' under the Corporations Act, as modified by [CO 12/1482], revolves around whether there is a first ranking security interest in favour of the trustee, and whether the property over which the security interest is granted is sufficient and reasonably likely to be sufficient to repay the money lent under the notes and any liabilities ranking ahead or equally with this liability. This does not mean that such notes are 'safe' or 'low risk'. A risk of loss still exists even if the term is applied in accordance with the modified Corporations Act.

RG 156.14 In addition, there may be instances where an issuer misapplies the term as a result of incorrectly evaluating the sufficiency of the security property. Where the assessment is flawed, the directors risk making misleading statements to investors.

RG 156.15 We consider that it is important to confirm that investors in 'secured notes' risk losing some or all of their money if the issuer cannot meet its obligations and the property over which security has been provided is not sufficient.

RG 156.16 We consider that ultimately, in assessing the risk associated with notes, investors need to consider the disclosure document rather than simply relying on the term used to describe the note. In the case of mortgage debentures, debentures or secured notes, disclosure relating to the security and property over which the security is provided by the issuer or guarantor will be important disclosure. Our relief to allow the use of the term 'secured note' is conditional on regular updates to investors about the security and property underlying the security.

RG 156.17 We have issued an investor guide that will assist investors in their assessment of notes and investors may also seek professional advice: see *Investing in unlisted debentures and unsecured notes?*.

Note: We will shortly update the investor guide to reflect the introduction of the 'secured notes' category in [CO 12/1482].

RG 156.18 The term 'no fees' invites a favourable comparison with bank deposits, which usually have fees, but does not provide a complete comparison. We

consider that ‘no fees’ highlights a positive feature of notes without informing investors of the disadvantages—that is, a higher risk profile.

- RG 156.19 Claiming that a product has ‘no fees’ may also give the misleading impression that the issuer derives no benefit from the investor’s loan. A term can be misleading where it is literally correct but is taken out of context: *Fraser v NRMA* (1995) 127 ALR 543.

Warning statements generally

- RG 156.20 The warning statements required by RG 156.10, RG 156.11 and [CO 12/1482] should be prominent. This will help to ensure investors have a balanced impression of the note offering.

- RG 156.21 A prominent warning statement is important when interest rates are used in advertising because they can be very influential to retail investors. These references can be misleading if, at the same time, the investor is not given information about the risk of not being paid that interest or not getting their principal back.

Note: This includes advertisements with generic references to the interest rate or return (e.g. to a ‘very high’ or ‘highly competitive’ interest rate), as well as to a specific interest rate.

- RG 156.22 It is the responsibility of the issuer to ensure that its advertisement is not misleading or deceptive and that the warning statements are effective.

Suitability statements

- RG 156.23 Advertisements for notes should not state or imply that the investment is suitable for a particular class of investor (e.g. ‘this product is suitable for a conservative investor’ or ‘this product is suitable for a self-managed superannuation fund’). Such statements may be misleading because they may convey the impression that the issuer has actually assessed the suitability of the note for particular investors targeted by the advertisement. Terms such as ‘conservative investor’ may also give a misleading impression about the relative safety of the note.

Consistency with prospectus disclosure

- RG 156.24 Statements in note advertisements should be consistent with all corresponding disclosures on that subject matter in the prospectus. In particular, an issuer should take into account the disclosures against the benchmarks in its prospectus: see RG 69.

- RG 156.25 In ensuring consistency with disclosure in the prospectus, issuers should be aware that a statement in a prospectus may become misleading when it is taken out of context in an advertisement. For example, it may not be misleading to describe a note product as ‘guaranteed’ in the prospectus if sufficient information is given about the guarantee and its likely efficacy, whereas using the term ‘guaranteed’ in an advertisement is likely to be misleading.

Telephone inquiries

- RG 156.26 Statements made over the telephone or in any correspondence in response to inquiries about notes are subject to the same regulation regarding misleading and deceptive conduct as the advertisements. Therefore, the same restrictions apply (e.g. restrictions on using words such as ‘guaranteed’, ‘safe’, ‘first ranking’ and ‘no fees’).
- RG 156.27 An issuer of notes should ensure that all statements made by call centre staff (or other staff or contractors engaged by it) to prospective investors who respond to advertisements for notes are consistent with disclosures on that subject in its prospectus. When discussing rollover options with existing investors, no statements should be made that would have been prohibited in the advertisement to which the inquiry relates.
- RG 156.28 To ensure compliance with this standard, an issuer could develop a script and a list of questions and answers that call centre staff and any other staff fielding these inquiries should adhere to.

C Compliance with advertising standards

Key points

Issuers of notes who fail to comply with the advertising standards in Section B risk making false or misleading statements or engaging in misleading or deceptive conduct: see RG 156.29–RG 156.30.

Such statements or conduct could contravene the Corporations Act and the ASIC Act, and result in us taking action against the issuer: see RG 156.31 and Table 3.

Determining what is misleading or deceptive

RG 156.29 Issuers of notes who fail to comply with the advertising standards risk making false or misleading statements or engaging in misleading or deceptive conduct in contravention of the Corporations Act or ASIC Act. Table 2 gives some examples of conduct that contravenes the Corporations Act or ASIC Act.

Table 2: Examples of misleading or deceptive conduct

| Description of conduct | Legislation reference |
|--|--------------------------|
| Making statements that are materially false or materially misleading and are likely to induce persons to apply for financial products. Contravention of this provision is an offence. | s1041E, Corporations Act |
| Engaging in conduct, in relation to a financial product or a financial service, which is misleading or deceptive or is likely to mislead or deceive. | s1041H, Corporations Act |
| In trade and commerce, engaging in conduct, in relation to financial services, which is misleading or deceptive or is likely to mislead or deceive. | s12DA, ASIC Act |
| Engaging in conduct that is liable to mislead the public as to the nature, characteristics, suitability for their purpose or quantity of any financial services. This provision is a strict liability offence. | s12DF, ASIC Act |

Note: Section 734 of the Corporations Act also contains restrictions on advertising of notes.

RG 156.30 In determining whether a contravention has occurred, the following legal principles apply:

- (a) there is no requirement that the issuer intended to mislead investors—the relevant question is whether the advertisement is in fact misleading or likely to mislead;

- (b) it is not necessary to show that investors have actually been misled—the law prohibits conduct that is likely to mislead;
- (c) the relevant test is the reaction of an ordinary and reasonable member of the advertisement’s audience—normally, anyone who is neither unusually astute nor unusually gullible;
- (d) the audience is not the audience that the issuer would like, but the audience the advertisement actually reaches;
- (e) investors cannot be expected to study or revisit an advertisement—the most important consideration is the overall impression created by the advertisement when viewed for the first time;
- (f) the qualifications of a headline claim must be clear and prominent—some headline claims are so strong that any separate qualification will not correct any misleading impression; and
- (g) if an advertisement is misleading, it cannot be cured—an issuer cannot rely on accurate disclosure documents to undo the effect of a misleading advertisement.

How we deal with contraventions

RG 156.31 The law provides us with various options for dealing with misleading or deceptive advertisements for notes, or note advertising that constitutes misleading or deceptive conduct. These regulatory options are set out in Table 3. We will consider the attempts a note issuer has made to comply with the advertising standards in Section B when determining the appropriate action to take.

Table 3: Examples of regulatory options available to ASIC

| Option | Legislation reference |
|--|---|
| Issue a stop order on any misleading or deceptive statements in an advertisement for notes. | s739(6), Corporations Act |
| Seek an injunction against a note issuer for note advertising that constitutes misleading or deceptive conduct. | For example, s739(6), Corporations Act, and s1324, Corporations Act |
| Issue a public warning notice containing a warning about the conduct of an issuer relating to consumer protection provisions in the ASIC Act. | s12GLC, ASIC Act |
| Investigate potential criminal and civil action for contraventions of certain provisions in Div 2 of Pt 7.10 of the Corporations Act or in Div 2 of Pt 2 of the ASIC Act. | For example, s1041E, Corporations Act; and s12DF, ASIC Act |

D The role of publishers and the media

Key points

We expect publishers and the media who deal with advertisements for notes to:

- understand their responsibilities when publishing advertisements;
- refuse to publish, or cease publishing, an advertisement if we tell them the advertisement is the subject of regulatory action; and
- be aware of the risks that note products pose.

- RG 156.32 While the primary responsibility for advertising material rests with the organisation placing the advertisement, under general law the publisher may also have some responsibility for its content. This depends on whether the publisher received the ‘advertisement for publication in the ordinary course of that business and did not know, and had no reason to believe, that its publication would amount to an offence against that provision’: s1044A, Corporations Act; s12GI(4), ASIC Act.
- RG 156.33 We believe that the advertising standards in Section B give publishers knowledge of the type of conduct that would contravene the law. This means that publishers should ensure that they are in a position to decline advertisements for notes that:
- (a) do not contain the statements required by RG 156.10 and RG 156.11; or
 - (b) use the words ‘guaranteed’ or ‘no fees’ (or similar terms): see RG 156.12–RG 156.16.
- RG 156.34 We expect publishers to cease publishing an advertisement if we inform them that it is currently subject to a stop order or public warning notice. We will assist publishers by making this information available.
- RG 156.35 Where a publisher contributes to the content of the advertisement (e.g. in writing advertorials), or otherwise has an active involvement in the promotion of the financial product (e.g. through co-branding or where a media personality uses their influence to promote a product), we regard the publisher to be in the same position as the issuer in terms of its responsibility to comply with the advertising standards in Section B. We consider that this level of active involvement may mean that the defence in s1044A of the Corporations Act is unlikely to be applicable.

RG 156.36 Generally, issuers will use the terms ‘debenture’, ‘mortgage debenture’, ‘secured note’ (in accordance with [CO 12/1482]), ‘unsecured note’ or ‘unsecured deposit note’ to describe products subject to the advertising standards in this guide. However, we encourage publishers to specifically ask their advertising clients whether the product they are advertising is regulated by this guide.

Key terms

| Term | Meaning in this document |
|---------------------------|---|
| APRA | Australian Prudential Regulation Authority |
| ASIC | Australian Securities and Investments Commission |
| ASIC Act | <i>Australian Securities and Investments Commission Act 2001</i> |
| bank deposit | A deposit with an APRA-regulated bank, building society or credit union |
| [CO 02/249] (for example) | An ASIC class order (in this example, numbered 02/249) |
| Corporations Act | <i>Corporations Act 2001</i> , including regulations made for the purposes of that Act |
| CP 167 (for example) | An ASIC consultation paper (in this example, numbered 167) |
| disclosure document | For an offer of notes, this includes a prospectus, a profile statement and an offer information statement |
| RG 69 (for example) | An ASIC regulatory guide (in this example, numbered 69) |
| rollover | Where an existing investor keeps their money in the existing note investment for an additional term (whether on the same or slightly different terms) |
| s283BH (for example) | A section of the Corporations Act (in this example, numbered 283BH), unless otherwise specified |

Related information

Headnotes

advertising, debentures, deceptive, interest rates, misleading, mortgage debentures, secured notes, unsecured notes

Regulatory guides

RG 69 *Debentures and notes: Improving disclosure for retail investors*

Legislation

Corporations Act, s283BH, 739(6), 1041E, 1041H, 1044A and 1324

ASIC Act, s12DA, 12DF, 12GLC and 12GI(4)

Cases

Fraser v NRMA (1995) 127 ALR 543

Class orders

Class Order [CO 12/1482] *When debentures can be called secured notes*

Consultation papers

CP 89 *Unlisted, unrated debentures: Improving disclosure for retail investors*

CP 94 *Debenture advertising*

CP 123 *Debentures: Strengthening the disclosure benchmarks*

CP 151 *Debt securities: Modifying the naming provisions and advertising requirements*

CP 167 *Advertising financial products and advice services: Good practice guidance*

Reports

REP 113 *Report on submissions for CP 94 Debenture advertising*

REP 127 *Debentures: Improving disclosure for retail investors*

REP 173 *Debentures: Second review of disclosure to investors*

REP 276 Response to submissions on CP 151 Debt securities: Modifying the naming provisions and advertising requirements

Media and information releases

MR 07-223 ASIC outlines new and improved disclosure for the unlisted and unrated debentures market (23 August 2007)

Investor guide

Investing in unlisted debentures and unsecured notes?