



ASIC

Australian Securities & Investments Commission

## REGULATORY GUIDE 162

# Internet discussion sites

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*Amended 4/7/2007*

*From 5 July 2007, this document may be referred to as Regulatory Guide 162 (RG 162) or Interim Policy Statement 162 (IPS 162). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 162.1) or their policy statement number (e.g. IPS 162.1).*

**Editor's note:** The policy in this regulatory guide is based on the Corporations Law (Law) at 2000 before the introduction of the *Corporations Act 2001* (Corporations Act) and *Financial Services Reform Act 2001* (FSR Act). Under the Law at that time, the operator of an internet discussion site (IDS) that conducted an investment advice business was required to have a licence. In ASIC's view, under the Corporations Act as amended by the FSR Act, an IDS may need to operate under an Australian financial services (AFS) licence. We will continue to permit an IDS to operate without an AFS licence if they comply with our IDS guidelines: see Regulatory Guide 167 *Licensing: Discretionary powers* at RG 167.85.

*[Historical note: The editor's note was inserted on 4/7/2007.]*

## What this guide is about

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RG 162.1 This guide explains:

- A** how we approach the regulation of internet discussion sites (IDS)  
*see RG 162.6–RG 162.11*
- B** that this policy applies only to Australian IDS  
*see RG 162.12–RG 162.22*
- C** what type of IDS can operate within our IDS guidelines  
*see RG 162.23–RG 162.38*
- D** our IDS guidelines  
*see RG 162.39–RG 162.65*
- E** further action.  
*see RG 162.66–RG 162.71*

RG 162.1A This policy was developed in 2000 and it is based on the law and market practice at that time. We plan to review it.

[*Historical note:* RG 162.1A was inserted on 4/7/2007.]

RG 162.2 Deleted.

RG 162.3 Deleted.

RG 162.4 Deleted.

RG 162.5 Deleted.

[*Historical note:* RG 162.2–RG 162.5 were deleted on 4/7/2007.]

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## **A ASIC's regulatory approach to IDS**

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### **Our policy**

RG 162.6 Under the Law, a person who conducts an investment advice business must have a licence. What amounts to such a business is widely defined, and catches IDS that allow people to exchange or disseminate information, opinions and advice about securities. On a strict reading of the Law, therefore, IDS may need to operate under a licence.

RG 162.7 However, we will permit a limited type of IDS to operate without a licence if the operator complies with our guidelines. These guidelines require that:

- (a) the IDS is operated to enable people who are not securities market professionals to exchange information that may include opinions and advice about securities;
- (b) postings on the IDS are clearly identified and kept separate from commercial material on the site; and
- (c) people who use the IDS receive adequate disclosures and warnings including that the material posted on the IDS is not professional investment advice.

(See IDS guidelines in Part D.)

### **Underlying principles**

RG 162.8 The definition of investment advice business in the Law is very broad. Some IDS are used as another means of making professional securities advice more accessible to people. These IDS are clearly caught by the licensing provisions and should only be operated under a licence. But some people operate IDS not so much to allow them to give advice as to provide an electronic meeting place for investors who are not securities industry professionals to discuss their experiences as investors. To require activities of this kind to operate under a licence is arguably to burden them unduly, and may mean that the benefits of IDS facilities cannot be fully realised. Our policy allows this type of IDS to operate without a licence provided it does not create risks for consumers or for the integrity of securities markets.

RG 162.9 Our policy is a balance between three public policy concerns:

- (a) the value in people being able to communicate freely with one another;
- (b) the value in permitting an inexpensive and easy way for consumers to better inform themselves about securities and developments in securities markets; and
- (c) the need to promote consumer protection and market integrity by minimising the risk that IDS may be used for market manipulation, insider trading and other abuses, or allow people to take advantage of consumers.

## Explanations

RG 162.10 Section 77(1) of the Corporations Law (Law) defines an investment advice business as a business of advising other people about securities, or a business in the course of which a person publishes securities reports. The term “securities report” is defined in s9 to mean an analysis or report about securities, and the term “publish” is defined in s9 to mean publishing “...by any means, *including* ... by broadcasting or televising or in a cinematograph film...”.

RG 162.11 If an IDS posts information, opinions and advice about securities, and is made available to the public (ie published) with system, repetition and continuity to satisfy the test of conduct of an investment advice business, those activities fall within these definitions. As a result, an IDS operator conducting such activities will be required under the Law to operate under a licence (ie have a licence in their own right or operate as a representative of a licensee who will be legally responsible for the operation of the IDS).

## **B This policy applies only to Australian IDS**

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### **Our policy**

RG 162.12 We intend our policy to apply only to Australian IDS. An IDS is an Australian IDS if it:

- (a) targets people in Australia; or
- (b) operates within Australia.

### ***When we regard an IDS as targeting people in Australia***

RG 162.13 We will treat an IDS as targeting people in Australia if the IDS:

- (a) expressly offers the services, or makes invitations, to people in Australia to use the facility; or
- (b) pushes information about the facility to people who have Australian addresses.

RG 162.14 If a site carries postings which mainly discuss securities issued by entities regulated by Australian securities laws, that will tend to indicate that it is an Australian IDS. But if it contains a clear and prominent message that it is not meant for Australian participants, or that it is meant only for participants in another jurisdiction, we will not treat it as an Australian IDS.

RG 162.15 In other contexts there may also be a doubt about whether a facility is intended for people in Australia. An IDS can include express disclaimers that it is not a facility or service intended for people in Australia. We will consider such a disclaimer to be relevant additional evidence tending to indicate that the IDS is not targeting people in Australia.

### ***When will ASIC consider an IDS as operating in Australia***

RG 162.16 We will consider an IDS as operating within Australia if the IDS:

- (a) is operated by a person who provides the IDS facility from an address within Australia; or

- (b) involves material for postings being forwarded to an Australian address; or
- (c) is hosted from an Australian internet address; or
- (d) is offered as, or claims to be, a service/facility offered from Australia.

## **Underlying principles**

RG 162.17 Our primary focus is on:

- (a) protecting people in Australia who use or access IDS; and
- (b) promoting confidence in Australian financial markets by regulating the way IDS can operate in Australia.

RG 162.18 We want to achieve these objectives in a way that is consistent with emerging international thinking on internet-based securities activity and contributes to effective cooperation between regulators in different jurisdictions.

RG 162.19 Since the internet is global, it is easy for people to access material placed on it from anywhere in the world. We have been careful to ensure that our approach is consistent with the principles adopted by IOSCO for dealing with jurisdictional questions arising from cross-border offers of securities or investment services.

RG 162.20 We have taken particular care to ensure that our guidelines for IDS do not apply in an unintended way to IDS that operate outside Australia. This is a concern shared by other regulators, especially as their regulatory regimes may operate differently from the way the Australian securities laws operate.

## **Explanations**

RG 162.21 IOSCO has made recommendations about how regulators should deal with jurisdictional questions in regulating securities activities on the internet. They deal mainly with internet-based offers of securities and do not directly deal with IDS activities. But the tests we have developed to prevent any unintended extra-territorial application of our IDS policy take into account the same considerations that the IOSCO recommendations are based on, and they are therefore consistent with IOSCO's approach.

RG 162.22 Many IOSCO member jurisdictions have applied those principles in deciding how they will apply local securities laws to internet activity. We have applied them in our policy on the offer of securities on the internet (RG 141) and, in that respect, our thinking in this policy is the same as in RG 141.

## **C What type of IDS can operate within the IDS guidelines**

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RG 162.23 The IDS guidelines apply to IDS that:

- (a) provide an internet facility for people who are not securities industry professionals to display information, advice and opinions about securities (that is, to make “postings”), such as on web based bulletin boards; and
- (b) allow other people to “view” these postings.

### ***Interactive sites and membership based sites***

RG 162.24 We will allow IDS facilities that:

- (a) provide for interactive communication and allow people to communicate online when making or altering postings; or
- (b) restrict access by requiring people to become members of the IDS facility,

to operate within the guidelines.

### ***Newsgroups and sites where advice is given***

RG 162.25 IDS that involve:

- (a) newsgroups or newsletters the main purpose of which is to provide advice about securities; or
- (b) other ways of providing online securities advice,

are not within the guidelines and must operate under a licence.

### ***Purely private sites***

RG 162.26 Internet facilities used for private communications between individuals (such as exchange of emails or private real time chat sessions) are not IDS. Facilities of this kind are not dedicated to the exchange of information about securities, and are not provided by a third party as part of a business. Generally, then, they do not involve a securities advice business and should not need a licence or need to operate within the guidelines.

### ***IDS operated by licensees***

RG 162.27 To avoid the risk of investors being misled, licensees must operate IDS only as a licensed activity.

[*Historical note:* RG 162.27 was amended on 4/7/2007 by deleting the last sentence.]

RG 162.28 Deleted.

[*Historical note:* RG 162.28 was deleted on 4/7/2007.]

## **Underlying principles**

RG 162.29 This policy is intended to cover only those IDS that are likely to need a licence, but are so limited in scope and function that we are prepared to allow them to operate without one. Others will either not need a licence at all, or must be operated under a licence.

RG 162.30 Where IDS activities clearly attract the licensing requirements in the Law because they amount to the conduct of a securities advice business or other activity which is required to be licensed (eg dealing in securities), those activities can only be carried out under a licence.

## **Explanations**

### ***Interactive sites and membership based sites***

RG 162.31 We will treat IDS that allow interactive communication between people making postings in the same way as other IDS that do not provide such a facility. They can operate within the guidelines provided the postings do not involve the offer of any securities product or advice, and otherwise comply with the guidelines.

RG 162.32 Some IDS require participants to become “members” before they can view postings. Even if they are restricted in this way, they are still IDS. To avoid the need to be licensed, they must comply with the guidelines. They are still generally accessible to the public and we do not distinguish between them and other kinds of IDS for the purposes of these guidelines.

### ***Newsgroups and sites where advice is given***

RG 162.33 Any IDS that involves the giving of securities advice must operate under a licence. Advice is a key professional service and those who provide it must meet the requirements that other licensees meet. Publishing newsletters or newsgroup information about securities is giving advice about securities.

### ***Purely private sites***

RG 162.34 Internet activities that are purely a vehicle for private communications between individuals and are not meant to be accessed by other internet users are not investment advice businesses. They are mentioned in this policy only to make it clear that we do not have an interest in regulating them.

***IDS operated by licensees***

RG 162.35 If a licensee operates an IDS, users may be prone to regard it as part of the securities business the licensee carries on. They may therefore treat it differently from an IDS operated by someone who is not a licensed adviser or dealer. We do not think that the warnings and disclosures in our guidelines are sufficient to minimise the risk that people using the IDS will regard it as a licensed activity. For example, postings made by a licensee, whether as an original contribution or as a comment on other postings, will tend to have an authority different from that of other postings. This means they should attract the obligations that apply to the holder of a licence.

RG 162.36 In our view, therefore, it is not appropriate to allow licensees to operate IDS except as a licensed activity. Our approach to this issue is consistent with our general approach that unlicensed IDS activity should be confined to situations where there is little risk of IDS users treating an unlicensed IDS as a professional investment advice service.

RG 162.37 Deleted.

*[Historical note: RG 162.37 was deleted on 4/7/2007.]*

RG 162.38 We are mindful of the apparent risk of unfairness in allowing one person to operate a business without a licence, but requiring another to carry on a similar business under a licence. On the other hand, we do not think that there are significant additional costs in licensees providing IDS activities as part of their licensed operations. Operating the business under a licence will also allow licensees to do things that we will not allow unlicensed operators to do, such as provide analysts' reports to IDS customers.

## D Our IDS guidelines

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RG 162.39 If you want to operate an Australian IDS (as described in RG 162.23) without a licence, you must comply with the guidelines in this part.

RG 162.40 The guidelines contain three elements:

- (a) requirements for disclosure and warnings to people who view the information, opinions and advice posted on an IDS (postings);
- (b) requirements for disclosure and warnings to people who make or alter postings; and
- (c) other obligations the IDS operator must satisfy.

### ***Disclosure and warnings to people who view postings***

RG 162.41 An IDS must display prominent warnings to people before they access postings on the IDS. To meet this requirement, an IDS must allow people to access postings only after viewing, or being clearly asked to look at, the required warnings. There must also be clear warnings to the following effect:

- (a) the IDS operator does not endorse or vouch for the accuracy or authenticity of postings;
- (b) no-one is permitted to make postings as a licensed investment adviser, or as a representative of a licensed adviser;
- (c) postings are at best general information, not professional investment advice prepared by taking into account any individual circumstances and needs of particular investors. Therefore, before acting on the basis of what is said in a posting, you should:
  - (i) consider consulting a licensed adviser (ASIC's website at [www.asic.gov.au](http://www.asic.gov.au) has a list of licensed advisers); and
  - (ii) visit ASIC's consumer website at [www.fido.gov.au](http://www.fido.gov.au) for general guidance about investing;

*[Historical note: RG 162.41(c)(ii) was amended on 4/7/2007 to refer to ASIC's current consumer website.]*

- (d) people making postings are individually responsible for the accuracy and authenticity of their postings;
- (e) because of the nature of the internet, it may be hard to identify or locate the person making a posting. The person may also be in an

overseas jurisdiction, so it may be hard to take any legal action against them;

- (f) you will have no access to ASIC-approved dispute resolution schemes to recover any losses you may suffer by relying on the postings;
- (g) securities cannot be offered to you for sale or issue through postings on the IDS; and
- (h) it is advisable that you alert the IDS operator or ASIC Infoline on 1300 300 630 if you have good reason to suspect that any postings are inaccurate, are based on inside information or are likely to mislead or deceive people who view or use the postings.

### ***Disclosure/warnings to people making the postings***

RG 162.42 An IDS must display prominent warnings to people making postings on the IDS. The warnings should also be accessible to people who view the postings. They must set out clear messages that:

- (a) you are personally responsible for your postings (including any alterations you make to postings). Therefore, you should not include any misleading or deceptive information in your postings and not carry out illegal or unauthorised activities using the IDS. Information in postings may, where appropriate, be made available to ASIC. ASIC and people acting on such information may take action against you;
- (b) if you include hyper-links to other sites, you may be seen as endorsing the material on such sites. It may be advisable for you to warn people accessing other sites that you do not endorse or take responsibility for material in the hyper-linked sites;
- (c) if you own or have some other interest in a security, or you have any connection with a securities issuer that you might benefit from, you must disclose that fact. For example, you may be entitled to receive direct or indirect commissions, fees or other benefits from a financial product or service provider; or you may be associated with a particular securities issuer such as by being an employee or director of a securities issuer. If so, you must disclose that fact in your posting; and
- (d) if the IDS operator finds or reasonably suspects that you are making illegal or unauthorised postings, your right to make postings will be withdrawn.

### ***Obligations of the IDS operator***

RG 162.43 As an IDS operator, you:

- (a) must advise us if you propose to operate within the IDS guidelines before you commence;
- (b) must label postings on the IDS and ensure they are separate from other material that can be viewed on the site, especially advertising or other promotional material relating to any financial products or services. That material should be clearly recognisable as advertising or promotional material;
- (c) can use the IDS to link to financial products or services provided by another party only if links are:
  - (i) contained in advertising by that party on the site; or
  - (ii) included in any postings made by other people within these guidelines;

You must not, however, allow a link of this kind if it would mean you are acting as an agent of the person offering the financial product or service.

- (d) must ensure that the IDS:
  - (i) contains all the disclosure and warnings required by RG 162.41 and RG 162.42; and
  - (ii) provides a link from the IDS to our consumer website containing the IDS guidelines and other relevant information about investing;
- (e) must not permit any of your directors, employees, agents or other associated people to make postings, except to moderate or comment on postings made by others. Where they do so, you must ensure they:
  - (i) do not include misleading or deceptive information in postings or carry out illegal or unauthorised activities using the IDS;
  - (ii) disclose in postings that they are a director, employee, agent or other associate of the IDS operator; and
  - (iii) disclose if you or they have any interest in the security or any connection with the issuer of the security to which the postings relate. For example, this includes receiving any fees or commissions from the issuer of the securities or being an employee or agent of that issuer.

- (f) must give us free access, as far as relevant laws allow, to your IDS and archived member information and postings whenever we ask for it, together with suitable search facilities (for example, search by key words, user and company names and dates of postings);
- (g) must have reasonably adequate procedures and mechanisms to:
  - (i) identify people making or altering postings on the IDS;
  - (ii) review regularly the content of the IDS;
  - (iii) promptly remove any content you reasonably regard as likely to be misleading or deceptive, or to amount to illegal or unauthorised activities (for example insider trading or unauthorised offerings of securities);
- (h) must withdraw promptly the right of people to make postings if they reasonably appear to have been engaging in any illegal, unauthorised or unconscionable conduct using the IDS;
- (i) must notify us, as soon as practicable, of any complaints you receive about postings that reasonably appear to be misleading or deceptive or amount to illegal or unauthorised activities, unless the law does not allow you to do so. The notification should identify the people who made the postings;
- (j) must archive and maintain:
  - (i) information about the identity of people making postings (eg current email addresses, user names and passwords) for a period of at least six months after their membership changes or ceases; and
  - (ii) records of actual postings, and session information about the source and path of postings for a period of at least six months.

***Additional disclaimers to avoid extra territorial application***

RG 162.44 Because internet sites are globally accessible, you may risk being subject to regulatory requirements in other jurisdictions. It may be advisable to include an additional disclosure that the facility is not intended for people outside Australia.

RG 162.45 In spite of the above disclaimer, if your IDS appears to be targeting people in other jurisdictions, for example, by devoting a substantial part of the postings to discuss securities that are offered or traded in jurisdictions other than Australia, then you may become subject to regulatory controls in those jurisdictions.

***IDS operated by licensees***

RG 162.46 The obligations licensees have under the Law and the ASIC Act apply to their operation of IDS facilities. For example, licensees must be members of an ASIC approved external complaints resolution scheme.

RG 162.47 We also want to make sure that users of IDS facilities operated by a licensee are properly warned about the nature, and limitations, of the information they can view on an IDS, and of their obligations if they post information. We think that there should be warnings and disclosures of the same kind they would get upon entry to an unlicensed site. There will need to be some changes to take account of the fact that a licensee operates the IDS, but in general most of the warnings and disclosures in RG 162.41 and RG 162.42 will be appropriate.

RG 162.48 Deleted.

*[Historical note: RG 162.48 was deleted on 4/7/2007.]*

**Explanations**

RG 162.49 The requirements listed in the guidelines are designed to ensure that:

- (a) people who view information on an IDS are properly informed about the nature of the information on it;
- (b) people who post information on an IDS are aware of their responsibilities; and
- (c) IDS operators make sure their sites operate as this policy requires.

***Disclosure and warnings to people who view postings***

RG 162.50 People who use an IDS to view information about securities need to be fully informed about the limited nature of the information it contains. There is a risk that information posted on an IDS will have more credibility than it merits, and in particular that viewers might treat it as professional investment advice that they can or should rely on to make investment decisions.

RG 162.51 The information required by RG 162.41 is designed to mitigate this risk, without undermining the value viewers might get by participating in IDS.

RG 162.52 We do not allow people to make postings in their capacity as licensees or authorised people. This is because IDS operated within these guidelines are intended solely as a facility for non-professionals to exchange information, advice and opinions about securities. They should not be used or held out as facilities where

users can get professional investment advice. If a licensed person uses an IDS to provide opinions, that may increase the risk that users will be misled about the nature of the service.

### ***Disclosure/warnings to people making the postings***

RG 162.53 People who post information on an IDS should know what their responsibilities are. The information they post might be used by others, and may be subject to regulation through the securities laws. This might give rise to legal or other consequences people making postings should be aware of.

RG 162.54 The information required by RG 162.42 is designed to provide people making postings with information that will help them to participate responsibly in an IDS.

RG 162.55 We do not allow people to make postings as licensees or authorised representatives of licensees because IDS operating under these guidelines are only for the use of non-professional people.

### ***Obligations of the IDS operator***

RG 162.56 Operators are responsible for making sure their IDS stays within the limits that allow it to operate without a licence. This means they have obligations to make sure it is not used to provide advice in a professional capacity.

RG 162.57 They are also responsible for ensuring that advertising or other promotional material about financial products and services displayed on an IDS is clearly displayed as advertising and promotional material and kept separate from postings. This is designed to make sure people reading the material on the IDS are not likely to be confused about what are postings and what is advertising and other promotional material.

RG 162.58 We do not allow an IDS to include links to securities reports such as analysts reports prepared by other people. This is because, by including these links, the IDS operator might become a person publishing a securities report. That would mean they need to hold a licence. The IDS operator might also become a representative of the person publishing the securities report. If so, they need to be properly authorised by the publisher of the report, who should be licensed.

RG 162.59 We also do not allow IDS operators to include links from their IDS to offer documents issued by other people. This is because by including such links, they might be acting as agents of the person issuing the offer document, which would mean they need to comply with the relevant provisions of the Law that apply to offers of

securities (see also RG 118 for further guidance on the display of prospectuses on internet facilities).

RG 162.60 IDS operators can display on the IDS advertising and promotional material relating to financial products and services provided they comply with the requirements specified. We do not permit IDS operators themselves to offer any information about securities or links to services offered by other licensees. If they did so, they may be publishing securities reports, which is prohibited under the Law unless they operate under a licence. If they provide links to a licensee's services other than as part of paid advertising, that may be an act carried out for or by arrangement with the licensee in connection with that licensee's securities or investment advice business. This is an activity which can be carried out by people holding proper authorities from that licensee.

RG 162.61 IDS operators are also responsible for ensuring that their IDS contains the disclosures and warnings for people reading postings and making postings.

RG 162.62 To assist us to monitor compliance with our policy, and, more broadly, to ensure that IDS do not become vehicles for securities fraud or other abusive practices, we also require IDS operators to keep information about the identity of people who put information on the site, and about the information itself. They must make this information available to us if we ask for it.

RG 162.63 We do not wish to make IDS operators de facto regulators, but we think it is reasonable to ask them to exercise some diligence in checking that the content of their site is not used for misleading or illegal activities. If they find things that might be in this category, they should inform us and we will take appropriate action.

RG 162.64 If we have reason to suspect people who make postings are breaching or may breach securities or other laws, we will take appropriate action. To help us to do this, and ensure consumer protection and maintain market integrity, we will require IDS operators to provide information to us, unless they cannot because of privacy or other laws. We will provide guidance to help IDS operators carry out this obligation.

### ***IDS operated by licensees***

RG 162.65 Deleted.

*[Historical note: RG 162.65 was deleted on 4/7/2007.]*

## **E Further action**

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### **Status of this policy**

[PS 162.65A] This policy was developed in 2000 and it is based on the law and market practice at that time. We plan to review this policy.

*[Historical note: The heading was amended and RG 162.65A was inserted on 4/7/2007.]*

RG 162.66 Deleted.

RG 162.67 Deleted.

*[Historical note: RG 162.66–RG 162.67 were deleted on 4/7/2007.]*

### **We will apply this policy**

RG 162.68 To help those who may want to establish an IDS now, we will apply the principles set out in this policy during the review period. We think we can do this because, while some aspects of the policy may change, we can apply aspects to current IDS activities. We will seek to work with parties seeking to take advantage of the policy in applying it to their circumstances.

*[Historical note: RG 162.68 amended on 4/7/2007 to refer to the review period rather than the consultation period.]*

### **Surveillance and enforcement**

RG 162.69 We will continue to monitor IDS activities carefully. We will focus on IDS operators' compliance with their obligations, and on ensuring that those who make postings are not engaging in any illegal or improper conduct.

RG 162.70 If we find significant non-compliance by Australian IDS operators, or evidence that Australian IDS facilities are being used to breach the Law, we will take appropriate enforcement action.

### **Regulation impact statement**

RG 162.71 Deleted.

*[Historical note: RG 162.71 was deleted on 4/7/2007.]*