



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 232

# Agribusiness managed investment schemes: Improving disclosure for retail investors

January 2012

### **About this guide**

This is a guide for responsible entities and others involved with the issue or advertising of interests in agribusiness managed investment schemes (agribusiness schemes).

It sets out ASIC's benchmarks and disclosure principles for improved disclosure to retail investors to help them understand and assess agribusiness schemes, while maintaining the flexibility of the public fundraising process.

### 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 regulatory guide was issued in January 2012 and is based on legislation and regulations as at the date of issue.

### 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

Some features of agribusiness schemes can create risks for retail investors, and require an improved approach to disclosure: see Section B.

ASIC has developed five benchmarks and five disclosure principles for agribusiness schemes that can help retail investors understand the risks, assess the rewards being offered, and decide whether investment in these products is suitable for them: see Sections C and D.

Responsible entities of agribusiness schemes in which retail investors invest should:

- address the benchmarks in their disclosures on an ‘if not, why not’ basis; and
- apply the disclosure principles: see Section E.

We have also set standards for advertising agribusiness schemes to retail investors: see Section F.

### Improved disclosure for agribusiness schemes

- RG 232.1 The risks of investing in various types of agribusiness schemes were highlighted during 2009 and 2010. Several operators of agribusiness schemes failed, causing significant losses. The collapses highlighted particular features of agribusiness schemes and led to concerns about whether structures commonly used in agribusiness schemes are sufficiently robust to protect investors’ interests.
- RG 232.2 In this context, we consider that providing retail investors in agribusiness schemes with the information they need to make an informed investment decision requires, at a minimum, disclosure against key benchmarks and the provision of key information identified in the disclosure principles set out in this regulatory guide.
- RG 232.3 We have developed five benchmarks (see Table 1 and Section C) and five disclosure principles (see Table 2 and Section D) that apply to all agribusiness schemes.
- RG 232.4 We consider that the inherent risks for investors in agribusiness schemes mean that the information in the benchmarks and disclosure principles should be:
- (a) addressed prominently in any Product Disclosure Statement (PDS);
  - (b) updated in ongoing disclosure as material changes occur (e.g. in a supplementary PDS); and
  - (c) supported by any advertising material.

- RG 232.5 We expect the PDS for an agribusiness scheme to explain in a clear, concise and effective way:
- (a) the business model of the agribusiness scheme and what the responsible entity will actually do with the money;
  - (b) the track record and experience of the senior management; and
  - (c) the nature of the investor's interest in the agribusiness scheme.
- RG 232.6 We encourage responsible entities of 'closed schemes', as a matter of best practice, to provide the benchmark and disclosure principle information to investors in these schemes. A closed scheme is one in which no further offers of interests will be made on or after 1 August 2012.
- RG 232.7 Our approach should not result in longer disclosures. Our experience indicates that investors need better quality and more relevant disclosure, presented in a way best suited to investor understanding.

## Benchmarks for agribusiness schemes

- RG 232.8 The benchmarks are summarised in Table 1 and explained further in Section C. We expect responsible entities to disclose in PDSs and ongoing disclosure whether the responsible entity or agribusiness scheme (as applicable) meets the benchmarks and, if not, explain why on an 'if not, why not' basis: see Section E. We also expect any advertising to support the use of these benchmarks: see Section F.

Note: See RG 232.12 for an explanation of how to disclose on an 'if not, why not' basis.

- RG 232.9 Failing to meet one of these benchmarks does not mean that a particular agribusiness scheme is necessarily a poor investment. However, additional disclosure to investors will be needed to address that benchmark on an 'if not, why not' basis so that investors can assess its impact on their investment decision.
- RG 232.10 We first introduced benchmarks for unlisted, unrated debentures in October 2007: see Regulatory Guide 69 *Debentures and unsecured notes: Improving disclosure for retail investors* (RG 69). Since then, we have applied a similar approach to mortgage schemes and over-the-counter contracts for difference: see Regulatory Guide 45 *Mortgage schemes: Improving disclosure for retail investors* (RG 45) and Regulatory Guide 227 *Over-the-counter contracts for difference: Improving disclosure for retail investors* (RG 227). The purpose of the benchmarks in this guide is to improve the consistency and quality of disclosure by the responsible entities of agribusiness schemes and to enhance investor confidence.

RG 232.11 The benchmarks relate to matters that must be disclosed under s1013D–1013E of the *Corporations Act 2001* (Corporations Act). Issues addressed by the benchmarks are all matters that might reasonably be expected to have a material influence on the decision of a reasonable person whether to invest in this type of product, when investing as a retail investor.

Note: The benchmarks do not attempt to specify all the information that is required to be included in a PDS by the Corporations Act.

**Table 1: Benchmarks for agribusiness schemes in which retail investors invest**

<b>1 Fee structures</b>	Benchmark 1 addresses how the responsible entity structures the fees it charges to members of the agribusiness scheme and how the responsible entity ensures that contributions of investors are only available for the agribusiness scheme.
<b>2 Responsible entity or related party ownership of interests in the agribusiness scheme</b>	Benchmark 2 addresses the ownership of interests that the responsible entity and its related parties have in the agribusiness scheme.
<b>3 Annual reporting to members</b>	Benchmark 3 addresses the provision of relevant information about the performance of the agribusiness scheme and its assets to members at least annually.
<b>4 Experts</b>	Benchmark 4 addresses the independence and qualifications of experts engaged by the responsible entity, and the disclosure of opinions.
<b>5 Appointing and monitoring service providers</b>	Benchmark 5 addresses how the responsible entity appoints and monitors parties providing services to the agribusiness scheme.

## Disclosure against the benchmarks: ‘If not, why not’

RG 232.12 Responsible entities of agribusiness schemes in which retail investors invest should address the benchmarks on an ‘if not, why not’ basis within the first few pages of any PDS and in ongoing disclosure: see Section E. This means stating that the responsible entity or agribusiness scheme either:

- (a) meets the benchmark; or
- (b) does not meet the benchmark *and* explaining why not, and how the issuer deals with the concerns underlying the benchmark in another way.

## Disclosure principles for agribusiness schemes

RG 232.13 The disclosure principles are summarised in Table 2 and explained further in Section D.

RG 232.14 We first introduced disclosure principles for unlisted property schemes in September 2008: see Regulatory Guide 46 *Unlisted property schemes: Improving disclosure for retail investors* (RG 46). The purpose of the

disclosure principles in this guide is to improve the consistency and quality of disclosure by the responsible entities of agribusiness schemes and to enhance investor confidence.

RG 232.15 We expect responsible entities to clearly and prominently disclose a summary of the information identified in the disclosure principles in the first few pages of any PDS with cross-references to where further information on the disclosure principles can be found in the PDS. Clear and prominent disclosure will allow retail investors to compare the relative risk and return of investments between agribusiness schemes: see Section E.

RG 232.16 The disclosure principles are intended to increase the clarity and effectiveness of the PDS for retail investors, and should not result in lengthier documents.

**Table 2: Disclosure principles for agribusiness schemes in which retail investors invest**

<b>1 Investor financing arrangements</b>	Disclosure Principle 1 addresses disclosure if the responsible entity or a related party offers or arranges finance for investors.
<b>2 Track record of the responsible entity in operating agribusiness schemes</b>	Disclosure Principle 2 addresses the track record of the responsible entity in operating agribusiness schemes and whether those schemes have produced positive returns for investors.
<b>3 Responsible entity's financial position</b>	Disclosure Principle 3 addresses the financial position and arrangements of the responsible entity.
<b>4 Land, licences and water</b>	Disclosure Principle 4 addresses the arrangements put in place to secure access to the resources and infrastructure to be used by the agribusiness scheme.
<b>5 Replacement of the responsible entity</b>	Disclosure Principle 5 addresses the risk of the structure of the agribusiness scheme frustrating or preventing the appointment of a replacement responsible entity.

## Who this guide applies to

RG 232.17 In this regulatory guide, an 'agribusiness scheme' refers to a managed investment scheme that engages in primary production activities.

Note: This guide does not apply to horse racing and breeding schemes, which are covered by Regulatory Guide 91 *Horse racing and breeding schemes* (RG 91).

RG 232.18 Traditionally, the industry has distinguished between agribusiness schemes that operate forestry plantations and those involved in non-forestry activities, which include horticultural enterprises as well as other primary production industries. This guide applies to all types of agribusiness scheme in which retail investors invest directly or indirectly.

- RG 232.19 We expect responsible entities of agribusiness schemes in which retail investors invest to disclose against each of the benchmarks discussed in Section C and apply the disclosure principles discussed in Section D.
- RG 232.20 We expect responsible entities of agribusiness schemes that are offered to retail investors to follow the advertising standards in Section F.
- RG 232.21 We expect other parties involved with the issue of interests in agribusiness schemes to support the principles in this guide. These parties include compliance committees, compliance plan auditors, agribusiness experts and financial advisers.

## Timing for implementing improved disclosure

- RG 232.22 Responsible entities of agribusiness schemes should disclose against the benchmarks and apply the disclosure principles in any PDS dated on or after 1 August 2012. We also expect responsible entities to provide the benchmark and disclosure principle information in their ongoing disclosure from that time: see Section E.
- RG 232.23 By no later than 1 August 2012, if an existing PDS is still in use, responsible entities should:
- (a) include the benchmark and disclosure principle information on a website referred to in the PDS (if the omission of this benchmark and disclosure principle information from the PDS is not materially adverse); or
  - (b) update the PDS by a new or supplementary PDS so that it includes the benchmark and disclosure principle information.

Note 1: By 'in use' we mean that interests in the scheme to which the PDS relates are still being offered, and the scheme is not yet a closed scheme.

Note 2: If the omission of the benchmark and disclosure principle information from a PDS dated before 1 August 2012 is not materially adverse, responsible entities may be able to rely on Class Order [CO 03/237] *Updated information in product disclosure statements* to update the PDS by providing this information on a website referred to in the PDS: see RG 232.128–RG 232.130. Responsible entities should refer to Regulatory Guide 198 *Unlisted disclosing entities: Continuous disclosure obligations* (RG 198) for further guidance on meeting their continuous disclosure obligations.

- RG 232.24 From 1 August 2012, we will review updated investor disclosure for each responsible entity in this industry sector to check that the benchmark information is adequately disclosed to investors on an 'if not, why not' basis and that the responsible entity has applied the disclosure principles.
- RG 232.25 We encourage responsible entities of closed schemes to provide the benchmark and disclosure principle information to investors in these schemes, as a matter of best practice: see Section E.



- RG 232.26 We will also:
- (a) work with responsible entities to ensure that the benchmarks, disclosure principles and our disclosure expectations are understood;
  - (b) discuss with responsible entities any concerns we have with their disclosure and, where necessary, seek additional disclosure from them (e.g. about the practical impact of not disclosing against a particular benchmark or applying the disclosure principles, and the associated risks to investors); and
  - (c) conduct surveillance visits, as needed, to reinforce our expectations.

## Underlying principles

- RG 232.27 The disclosure framework in the Corporations Act requires responsible entities of agribusiness schemes to:
- (a) disclose up-front to retail investors all the information they reasonably need to know to decide whether to acquire the product; and
  - (b) provide ongoing disclosure about material matters to help retail investors monitor whether their expectations are being met.
- RG 232.28 Disclosure is not designed to stop retail investors taking investment risks, but to help them understand the risks involved in any particular investment or type of investment. This enables them to make an informed decision about whether the potential reward (the return on their investment) matches the level of risk involved, and whether they are prepared to take on that risk.
- RG 232.29 We believe that our approach balances:
- (a) the need to improve disclosure to allow investors to make better-informed decisions;
  - (b) the desirability of not unduly interfering with this market as a means for investors to make investments; and
  - (c) the benefit of promoting efficiency in the capital markets.
- Note: The need to strike an appropriate balance between protecting investors' interests and allowing markets to operate freely is part of ASIC's mandate under the *Australian Securities and Investments Commission Act 2001* (ASIC Act).
- RG 232.30 This approach should also lead to comparable disclosure for agribusiness schemes, helping investors to compare investments in this sector. Our approach cannot prevent investments failing, nor ensure that they perform to investors' expectations. However, better disclosure can help investors make better risk–reward decisions.

## B The agribusiness scheme sector

### Key points

Some features of agribusiness schemes can create risks for investors. Clear benchmarks and disclosure principles can help investors to make better-informed decisions about these products.

### Business models of agribusiness schemes

- RG 232.31 Agribusiness schemes pose particular risks because, unlike many other types of managed investment schemes, they do not generally use a traditional unit trust structure. For tax reasons, many agribusiness schemes are structured so that investors are taken to operate their agribusiness investment in their own right. Investors enter into contracts with the responsible entity or other parties to perform all the cultivation and management activities associated with the investor's agribusiness enterprise.
- RG 232.32 An investment in an agribusiness scheme is not a liquid investment. An investor cannot easily exit and therefore remains a member for the term of the scheme. Our experience also shows that the contractual nature of the investment means that the scheme financial reports provided to investors contain less detailed performance and financial information than a traditional unit trust which has assets and liabilities that reflect the contributions of investors.
- RG 232.33 Agribusiness scheme business models have some common features:
- (a) Investors or 'growers' enter into contracts with the responsible entity to cultivate, maintain and harvest the investors' agribusiness enterprise on their behalf. In doing so, investors acquire a right to derive profits from agribusiness produce of the agribusiness enterprise (e.g. timber, wine grapes, olives and almonds), net of management and lease fees paid to the responsible entity, and net of rent and other expenses incurred in operating the agribusiness scheme.
  - (b) Investors may also be entitled to potential tax deductions for the up-front investment and any annual fees paid to the responsible entity and its related parties, provided that they own their scheme interests for at least four years.
  - (c) Fee structures differ among projects:
    - (i) Forestry schemes generally require an up-front fee from investors, and the responsible entity receives a rental and management fee out of the proceeds of the harvest (8–12 years later). Pre-2004, some forestry schemes contained annual fees to cover rent and management.

- (ii) Horticultural schemes generally require an up-front fee from investors and either ongoing rental and management fees on an annual basis or rental and annual fees paid out of the net proceeds from harvests (available after four to five years when the crops reach maturity).
- (d) Investors often use leverage to maximise tax benefits. Finance may be originated by the responsible entity or related party, and either kept as an asset on the balance sheet of this entity or securitised to other financial intermediaries.
- (e) In some circumstances, annual sales of new agribusiness scheme products by the responsible entity provide fresh working capital to fulfil obligations to other agribusiness schemes sold in previous years and to secured creditors.

## Risks to investors

- RG 232.34 Past experience and our analysis of the agribusiness scheme market suggest that features of the operations of some agribusiness schemes can hold particular risks for investors. These key features and risks are identified in Table 3.
- RG 232.35 These features are not present in every agribusiness scheme that is offered to retail investors. The investment risks described will vary from scheme to scheme and from business model to business model. However, disclosure about these features and risks, including to what extent they are present in a given offering, is relevant for a broad range of schemes.
- RG 232.36 Our approach in this guide aims to address these features and risks, so that investors can make better-informed decisions about whether an agribusiness scheme is a suitable investment for them.

**Table 3: Key risk features of agribusiness schemes**

Risk feature	What this means
<b>Fee structures</b>	<p>An up-front fee structure creates uncertainty surrounding the ability of the responsible entity to fulfil its obligations owed to agribusiness scheme investors well after investments are initially made.</p> <p>Liquidity may be at risk because of a mismatch between cash flows from investors and the expenses of the agribusiness scheme. This fact is not highlighted in current disclosure practices. This also creates the risk of the responsible entity becoming dependent on increasing growth in new managed investment schemes to fund operations. Generally, fee structures in unit trusts (as opposed to contract-based agribusiness schemes) enable the responsible entity to draw a fee on a regular basis from the net assets of the scheme.</p> <p>Agribusiness schemes generally have limited assets (as the investor generally owns the assets that produce the return) and therefore the responsible entity is reliant on the investor's up-front fee payment and any ongoing contributions (if any) to the scheme or its own assets to fund the operation of the agribusiness scheme.</p>

<b>Adequacy of capital</b>	<p>A lack of cash flow from investors for working capital purposes due to the up-front fee structure or the failure by investors to meet ongoing fee obligations increases the risk that the responsible entity will not be able to fulfil its obligations owed to agribusiness scheme investors because the scheme does not have sufficient assets from which the responsible entity can draw to operate the scheme. This risk is related to the 'fee structures' risk and the difference between agribusiness scheme and unit trust structures is detailed above.</p>
<b>Lack of information</b>	<p>Some agribusiness schemes involve a significant time lag between the commencement of the scheme and the time that revenue is produced. Investors therefore need updated information on the status of the agribusiness scheme and its assets so they can assess whether performance is in line with expectations.</p> <p>Most unitised managed investment schemes will produce revenue on a more regular basis and generally report to members of the scheme while making revenue distributions. As agribusiness schemes—in particular, forestry schemes—may not realise any revenue until many years after the scheme has commenced, this risk is particularly apparent for these schemes.</p> <p>Further, financial reports for agribusiness schemes generally provide little information because there may be no assets, or negligible assets, on the balance sheet of the scheme, and investors are reliant on information outside of these reports for information on the status of their investment.</p>
<b>Reliance on experts</b>	<p>The success of an agribusiness scheme is dependent on a wide range of factors that the responsible entity may not have expertise in, such as soil suitability, horticultural or forestry practices, and the suitability of different varieties of produce to particular regions or for particular purposes.</p> <p>Opinions from experts with experience and knowledge of the underlying commodity, its geographical location, product yields and markets, and agricultural factors affecting the agribusiness scheme are generally provided by the responsible entity in promoting the agribusiness scheme and are relied on by investors.</p> <p>Due to the specialist nature of the underlying product, opinions of the types provided in relation to agribusiness schemes are generally not provided for other types of managed investment schemes.</p> <p>If opinions are not prepared by suitably qualified and independent experts, it is difficult to assess the level of reliance that can be placed on such opinions.</p>
<b>Service providers and related parties</b>	<p>Agribusiness schemes tend to rely on a range of service providers to carry out the agribusiness enterprise. Some agribusiness schemes transact with associated companies or businesses to provide these services. There is an increased risk that agreements entered into with an associated company by the responsible entity on behalf of the agribusiness scheme are not properly approved, nor adequately reviewed and monitored.</p> <p>Frequently, related party service providers lack accountability and are not independently assessed on a regular basis to ascertain financial strength or ability to provide the service. In some circumstances, responsible entities of these schemes have entered into transactions that appear not to be commercial or not to be on an arm's length basis.</p>

<b>Financing arrangements</b>	<p>Some responsible entities promote investors' ability to borrow funds to invest in order to attract investors, without adequately disclosing the terms and conditions. In some circumstances, responsible entities themselves provide the finance to investors to invest in a scheme.</p> <p>The finance is generally in the form of a full recourse financing arrangement, allowing the financier access to the assets of the investor. If a scheme were to collapse, an investor would generally continue to be liable under the financing arrangement. Some collapses of agribusiness schemes in recent years have resulted in no return, or only a small return, to investors.</p>
<b>Land, licences and water</b>	<p>Agribusiness schemes require access to a range of physical infrastructure and natural resources such as land, water and farming equipment. These assets are generally owned by either the responsible entity or entities other than investors. Investors or the responsible entity enter into arrangements to secure access to these resources.</p> <p>If rights to the land and water are not scheme property, there is a risk that they may not be available for use when required by the agribusiness scheme.</p> <p>Generally, other types of managed investment schemes will not be reliant on these types of contractual and legal obligations, which are specific to agribusiness schemes.</p>
<b>Counterparty risk</b>	<p>The ability of the responsible entity to fulfil its obligations to investors under the management agreement and various other contractual arrangements, and to meet its share of fees charged (if it owns interests in the agribusiness scheme), is dependent on the responsible entity's financial position. This may in turn depend on the financial position of the group to which the responsible entity belongs.</p> <p>In addition, investors are exposed to the ability of the responsible entity to continue to operate where, in some circumstances, there is limited cash flow to support its operation. In some cases, this results in the responsible entity borrowing to fund its operations or becoming reliant on other parties for financial support. In circumstances where there is insufficient cash flow from the agribusiness scheme, the responsible entity may be unable to meet its obligations under these arrangements, resulting in defaults under the various arrangements.</p>
<b>Replacement of the responsible entity</b>	<p>Investors face the risk that they may lose part or all of their investment when the agribusiness scheme's documents and contractual arrangements do not adequately provide for the responsible entity to be replaced (e.g. if the responsible entity has become insolvent or there are insufficient assets to meet the ongoing obligations of the agribusiness scheme).</p> <p>Due to the contractual obligations owed to investors in the agribusiness scheme, replacement of the responsible entity becomes a prominent risk, which is not present in a unitised managed investment scheme.</p>
<b>Liquidity</b>	<p>Investors are unable to exit the scheme until the scheme has concluded. There is no established secondary market or withdrawal procedures offered for these types of schemes and therefore the investor is liable for their interest for the term of the scheme, which could extend over a long period of 10 years or more. The uncertainty can affect investors whose personal circumstances can change substantially over the duration of the scheme.</p>
<b>Nature of the product</b>	<p>Agribusiness schemes by their nature carry an inherent risk because they are prone to environmental factors generally beyond the control of even the best endeavours of the responsible entity. Predicting returns for growing new products can be very uncertain, both as to the crop return and the potential market for the product.</p>

## C Benchmarks for agribusiness schemes

### Key points

Responsible entities of agribusiness schemes should address general benchmarks on:

- fee structures (see RG 232.37–RG 232.51);
- responsible entity or related party ownership of interests in the agribusiness scheme (see RG 232.52–RG 232.57);
- annual reporting to members (see RG 232.58–RG 232.65);
- experts (see RG 232.66–RG 232.75); and
- appointing and monitoring service providers (see RG 232.76–RG 232.80).

This information should be disclosed clearly and prominently in the responsible entity's PDS and ongoing disclosure: see Section E.

### Benchmark 1: Fee structures

- RG 232.37 The scheme is structured so that either:
- (a) investors are required to pay annual fees (or contributions) to the responsible entity that are sufficient to fund the operation of the agribusiness scheme for the relevant financial year; or
  - (b) the up-front fees (or contributions) investors pay when they invest is sufficient to cover the operation of the agribusiness scheme until the proceeds of sale of produce are available and this money is held on trust for the investors in that agribusiness scheme.
- RG 232.38 Any fees (or contributions) received by the responsible entity from investors in the agribusiness scheme are:
- (a) held separately from the other assets of the responsible entity for the benefit of the investors in that agribusiness scheme, are only available for the operation of that agribusiness scheme and are subject to annual audit; and
  - (b) only used by the responsible entity to meet any expenses that are incurred in the operation of that agribusiness scheme during the period to be covered by the payment, including the portion of the responsible entity's fees that is proportionate to its duties that have been properly performed during that period.

## Explanation

- RG 232.39 In reporting against this benchmark, the responsible entity should disclose the fee structure that applies to the agribusiness scheme.
- RG 232.40 For this benchmark, if ongoing annual fees (or contributions) are or may be deferred or paid out of harvest proceeds, the benchmark is not met.
- RG 232.41 If the responsible entity does not meet the benchmark in RG 232.37–RG 232.38, it should explain:
- (a) the fee structure of the agribusiness scheme;
  - (b) how the responsible entity expects to fund the operation of the agribusiness scheme until completion;
  - (c) the risks associated with the fee structure it has adopted and the mechanisms in place to address these risks; and
  - (d) based on the fee structure in place, the likelihood of a replacement responsible entity being able to continue to operate the agribusiness scheme if this becomes necessary.
- RG 232.42 We consider that contributions of investors include any up-front establishment fees or annual fees paid to obtain and hold an interest in the scheme.
- RG 232.43 An annual fee structure may provide protection to investors if a responsible entity gets into financial difficulty. An annual fee structure is likely to increase the ongoing viability of an agribusiness scheme should the responsible entity fail. This is because the agribusiness scheme is able to internally generate funding on an ongoing basis.
- RG 232.44 Where there is an annual fee, the responsible entity should ensure that the annual fee each year is sufficient to pay the reasonably estimated expenses that have been or will be incurred in the operation of the agribusiness scheme during the year, including the portion of the responsible entity's fees that is proportionate to its duties during that year.
- RG 232.45 When a responsible entity uses an up-front fee model, there may be limited ongoing funding sources if the up-front fee ends up being too low or the costs associated with the agribusiness scheme are higher than expected. We consider that using a trust account to hold this money may result in funds remaining available for the specific scheme to meet ongoing requirements as a result of the responsible entity acting as trustee for this money.
- RG 232.46 Where there is an up-front fee, the responsible entity should ensure that the up-front fee provides sufficient money to cover, for each year of the agribusiness scheme, the reasonably estimated expenses that have been or will be incurred in the operation of the agribusiness scheme, including the responsible entity's fees.



- RG 232.47 To meet this benchmark, the responsible entity should only take its responsible entity fees payable for the agribusiness scheme in arrears after the proper performance of its duties. For example, the responsible entity may wish to consider taking its fee every six months for the previous six months or on an annual basis at the end of each year.
- RG 232.48 If the assets held under RG 232.38 could be taken by creditors of the responsible entity, including if the responsible entity is wound up or is subject to administration before the responsible entity has met the expenses that relate to the operation of the agribusiness scheme for the relevant period and performed its obligations in relation to the agribusiness scheme, we expect this to be disclosed.
- RG 232.49 If the responsible entity makes statements about its ability to operate the agribusiness scheme with the fees paid by investors, we would expect that this statement is made on reasonable grounds.

Note: Regulatory Guide 170 *Prospective financial information* (RG 170) provides guidance on what we consider to be reasonable grounds.

- RG 232.50 The invoice for annual or other fees that is provided to investors should clearly set out the total amount required to be paid and should also include a detailed breakdown of the composition of the total fee.
- RG 232.51 The responsible entity should also have in place accounting methods that permit accurate allocation of fees where the responsible entity is operating more than one agribusiness scheme.

Note: Class Order [CO 98/51] *Relief from duty to separate assets of a managed investment scheme* may allow a common bank account to be operated by the responsible entity for a number of agribusiness schemes when it involves 'scheme property'.

## Benchmark 2: Responsible entity or related party ownership of interests in the agribusiness scheme

- RG 232.52 The responsible entity and its related parties own less than 5% in aggregate by value of the interests in the agribusiness scheme except for any interests acquired through the default by a member of the agribusiness scheme.

### Explanation

- RG 232.53 In reporting against this benchmark, the responsible entity should also disclose its policy on ownership of interests in the agribusiness scheme by the responsible entity or related parties.
- RG 232.54 This measure is designed to enable investors to understand the potential impact on the agribusiness scheme if the responsible entity is unable to meet its share of any fees charged to members of the agribusiness scheme.



- RG 232.55 As a member of an agribusiness scheme, the responsible entity would be obliged to pay its proportion of fees levied on members. The costs of an agribusiness scheme are unlikely to change if the responsible entity (or any investor) is unable to meet its share of the scheme costs. As a result, this shortfall would need to be shared among other agribusiness scheme investors, or the interests sold to new investors (which is currently difficult because there is no active secondary market for agribusiness scheme interests).
- RG 232.56 Some failed responsible entities of agribusiness schemes held interests of up to 20% in some of the agribusiness schemes they operated. This was a factor that made finding a replacement responsible entity for the agribusiness scheme difficult because there was a risk that the failed responsible entity might not be able to continue to meet its obligations as a member of the scheme.
- RG 232.57 We acknowledge that a responsible entity may gradually increase its ownership in an agribusiness scheme if members default on their obligations (subject to each scheme's constitution). The benchmark addresses this issue by only focusing on the interests acquired by the responsible entity in the agribusiness scheme other than through investor default.

Note: Responsible entities should also refer to our guidance in Regulatory Guide 76 *Related party transactions* (RG 76), including, among other things, the content requirements for prospectuses, PDSs and other disclosure documents.

### Benchmark 3: Annual reporting to members

- RG 232.58 The responsible entity provides members with a report at least annually that contains relevant scheme-specific information.

#### Explanation

- RG 232.59 Responsible entities of agribusiness schemes have obligations to provide ongoing disclosure to investors under the Corporations Act, including:
- (a) disclosure of material changes and significant events (s675 and s1017B); and
  - (b) periodic statements to members under s1017D.
- RG 232.60 In a PDS, a responsible entity makes a number of statements about how the funds raised will be used and how the agribusiness scheme will operate. These statements form part of the basis on which investors invest, and the member should be given the opportunity to monitor the responsible entity's performance against these statements.
- RG 232.61 Investors in agribusiness schemes will generally have ongoing obligations in relation to the agribusiness scheme over a significant period of time, and are generally unable to exit or withdraw. Further, we note that, due to the structure of agribusiness schemes, investors generally receive limited information in the financial reports prepared by the responsible entity under Ch 2M.

- RG 232.62 As a result, we consider that it is important for responsible entities to commit to providing detailed reports to investors so they can effectively monitor their investment.
- RG 232.63 We are not mandating the information that should be provided to investors. However, we do expect the responsible entity to provide relevant information to members annually. Information that we would expect to be disclosed to members may include:
- (a) the cash position of the scheme—this refers to the money held separately by the responsible entity for the purposes of operating the scheme;
  - (b) the annual expenses incurred by the responsible entity in operating the scheme (e.g. the amount invoiced) compared with expected expenses—this refers to those expenses incurred by the responsible entity on behalf of members;
  - (c) how the scheme is performing relative to expectations, as disclosed to investors in the scheme’s PDS, periodic disclosure, advertising or other promotional disclosure material (including a comparison of growth, yield, sales information or any revisions to expected project length);
  - (d) the current prices and conditions in the underlying markets for the finished product and changes from the last report provided to members;
  - (e) an update on the financial position of the responsible entity (including any risks with the responsible entity’s financial position);
  - (f) a summary balance sheet for the responsible entity and cash flow statement;
  - (g) the impact of any regulatory changes on the scheme (e.g. the impact of any carbon reduction initiatives);
  - (h) where relevant, the access to and usage rates of water compared with water allocation;
  - (i) where relevant, the status of any leases or licences required to operate the scheme or secure tenure over land or property;
  - (j) the levels of defaults and arrears for annual fees, the impact of these on the scheme and the responsible entity (if any), and the strategies in place to deal with this impact;
  - (k) the number of interests held by the responsible entity or related party, any changes from the last report provided to members, and the ability of the responsible entity or related party to meet the obligations associated with these interests; and
  - (l) the details of any forward sales agreements executed for the sale of scheme assets, including variances to current market prices and/or any shortfalls in expected production yields/volumes.

RG 232.64 We understand that the information disclosed by the responsible entity about the agribusiness scheme may differ from year to year and from scheme to scheme, depending on the information available and the status of the scheme.

RG 232.65 Responsible entities may provide this information to investors using the most efficient and effective method of communication. For example, this could be through a website used for updating investors.

Note: Responsible entities should also refer to RG 198 for guidance on their continuous disclosure obligations under the Corporations Act, including how responsible entities can provide continuous disclosure information. The provision of a report to members annually may not be sufficient for the responsible entity to rely on to meet its continuous disclosure obligations.

## Benchmark 4: Experts

RG 232.66 Where the responsible entity engages an expert to provide a professional or expert opinion on the agribusiness scheme, and the expert opinion is disclosed to retail investors in a way that may lead them to place reliance on the expert's expertise, the responsible entity only engages an expert that is independent.

### Explanation

RG 232.67 In addition to disclosing against this benchmark, the responsible entity should disclose, with equal prominence to any expert opinion provided on the agribusiness scheme:

- (a) a summary of the instructions to the expert;
- (b) the qualifications held by the expert and the relevance of these to the opinion;
- (c) whether the expert has experience in the commodity in the geographical location being considered or proposed, or in any other subject matter of the opinion;
- (d) the proportion of the expert's work with the responsible entity; and
- (e) whether the responsible entity requires the expert to maintain professional indemnity insurance.

RG 232.68 If the responsible entity obtains a number of expert opinions from persons who hold appropriate qualifications and are independent, the responsible entity should provide a summary of all the opinions with equal prominence when any of the opinions are provided to retail clients.

Note: We consider that disclosure of the information in RG 232.66–RG 232.67 will generally be required, in any event, under Pt 7.9 of the Corporations Act.

- RG 232.69 PDSs for agribusiness schemes generally include opinions provided by experts on matters such as the types of produce and their suitability to the geographical locations, potential yields or quality of produce, and farming practices to be employed by the responsible entity.
- RG 232.70 These opinions are generally specialist in nature and are provided to assist investors to make an informed decision about an investment in the agribusiness scheme.
- RG 232.71 Responsible entities may also rely on expert reports to meet their disclosure obligations under Pt 7.9.
- RG 232.72 Robust and objective expert opinions on the agribusiness scheme are needed to ensure that information about the agribusiness scheme is correctly stated in the PDS and ongoing disclosure. It is important for investor confidence that independent experts provide the opinion and that the process is transparent. Where the expert is not independent, responsible entities should explain why.
- Note: We have published guidance on the independence of experts: see Regulatory Guide 112 *Independence of experts* (RG 112).
- RG 232.73 Retail investors need to understand the qualifications of experts who provide opinions in the PDS and on an ongoing basis to enable them to assess the level of reliance that they can place on the opinion.
- Note: We have published guidance on the need for experts to have sufficient expertise in the relevant field: see Regulatory Guide 111 *Content of expert reports* (RG 111) at RG 111.117–RG 111.122.
- RG 232.74 We expect that responsible entities will be careful to ensure that their instructions to experts are comprehensive.
- RG 232.75 Where a responsible entity obtains a number of expert opinions, we believe this information is important to retail investors because it highlights any differing opinions provided by experts to the responsible entity.

## Benchmark 5: Appointing and monitoring service providers

- RG 232.76 The responsible entity only engages key service providers (whether directly or indirectly on behalf of the agribusiness scheme investors) necessary for the operation of the agribusiness scheme where:
- (a) the engagement is subject to a written agreement approved by the board of the responsible entity in accordance with a documented policy;
  - (b) the agreement is subject to annual review against set performance criteria or measures; and
  - (c) the agreement is subject to certification by the board, at the time each agreement is entered into, that the agreement is on an arm's length basis.

## Explanation

- RG 232.77 In addition to reporting against this benchmark, the responsible entity should disclose:
- (a) details of the parties to any agreement;
  - (b) the key terms of the agreement;
  - (c) the amounts payable under the agreement; and
  - (d) a summary of the responsible entity's policy on appointing and monitoring service providers, including the board assessment and approval process.
- RG 232.78 We consider it is important for investors to understand the process used by the responsible entity to ensure that it complies with its duties in appointing key service providers. Key service providers include those to whom the responsible entity has delegated any of its functions in operating the agribusiness scheme or the agribusiness enterprise.
- RG 232.79 We expect that the responsible entity undertakes a process of assessing the ability of any proposed service provider to ensure they are able to provide the service required, and monitors the performance of the service provider against set performance criteria.
- RG 232.80 We would also expect the responsible entity to undertake a due diligence process when service provider agreements need to be renewed to ensure that any service provider is appointed on terms that are in the best interests of members.

Note: Where a related party is engaged to provide services, responsible entities should consider their obligations in relation to related party transactions. Responsible entities should refer to our guidance in RG 76.

## D Disclosure principles for agribusiness schemes

### Key points

To meet their disclosure obligations under Pt 7.9, responsible entities need to disclose various matters, including information about any significant risks associated with holding scheme interests and information about significant characteristics or features attaching to those interests.

In practice, we consider that, for a responsible entity to meet its PDS disclosure obligations, it will generally need to include information about the matters set out in the disclosure principles below relating to:

- investor financing arrangements (see RG 232.81–RG 232.84);
- track record of the responsible entity in operating agribusiness schemes (see RG 232.85–RG 232.87);
- the responsible entity’s financial position (see RG 232.88–RG 232.95);
- land, licences and water (see RG 232.96–RG 232.103); and
- replacement of the responsible entity (see RG 232.104–RG 232.107).

If there are any changes to the matters covered by these disclosure principles, responsible entities should consider providing ongoing disclosure to investors: see Section E.

### Disclosure Principle 1: Investor financing arrangements

RG 232.81 If the responsible entity or a related party is providing finance, or expects to receive payment for arranging finance, for investors in the agribusiness scheme to fund an investment into the scheme, the responsible entity should clearly and prominently disclose in the PDS:

- (a) the details of the financier;
- (b) any amounts paid to the responsible entity or related party in relation to the finance;
- (c) that the investor should obtain and read the finance agreement before entering into the finance facility; and
- (d) unless the proposed finance facility is non-recourse, that the investor will remain liable to repay the amount lent or made available under the finance agreement should the scheme fail.

RG 232.82 The responsible entity should also ensure that, as far as practicable, investors receive a copy of the finance agreement before entering into the finance facility.

Note: Where a responsible entity is offering finance, it should be aware of its obligations (if any) under the *National Consumer Credit Protection Act 2009*.

### Explanation

- RG 232.83 It is important that investors considering funding an investment in an agribusiness scheme through the use of a loan or other finance are provided with adequate disclosure about the terms and conditions of the agreement, where the finance is provided by the responsible entity or a related party, or where the responsible entity may be paid a fee for the arrangement.
- RG 232.84 Responsible entities should explain any risks associated with the financing arrangement, including the consequences of the loan or amount financed being repayable out of the investor's personal assets.

## Disclosure Principle 2: Track record of the responsible entity in operating agribusiness schemes

- RG 232.85 The responsible entity of an agribusiness scheme should disclose the experience and resources it has available to operate the agribusiness scheme and the agribusiness enterprise.
- RG 232.86 Where the responsible entity has operated other agribusiness schemes, it should disclose:
- (a) the number of agribusiness schemes it currently operates;
  - (b) the types of agribusiness scheme being operated;
  - (c) the period of time that it has been operating the agribusiness schemes; and
  - (d) whether any of the agribusiness schemes operated by the responsible entity have produced, or are producing, positive returns net of contributions for the investors in those agribusiness schemes.

### Explanation

- RG 232.87 Investors need to know about the experience and ability of the responsible entity in operating agribusiness schemes and the results for investors (if any) to date because this information provides a guide to investors about the responsible entity's experience and ability to operate agribusiness schemes. If a responsible entity has no past experience in operating agribusiness schemes, then this should also be disclosed.

Note: Responsible entities should be careful to ensure that statements about past performance are accompanied by a warning that this information should not be relied on as indicative of future performance.

### Disclosure Principle 3: Responsible entity's financial position

- RG 232.88 The responsible entity should disclose a summary of its financial position in any PDS, including details of any known unfunded obligations in respect of the schemes it operates.
- RG 232.89 The responsible entity should disclose if it:
- (a) is reliant on funding from external or related parties to perform the functions and obligations to members in relation to the agribusiness scheme;
  - (b) has entered into guarantees or indemnities with external or related parties; or
  - (c) is a member of a tax consolidation group.
- It should also disclose the measures it has in place to address the risks arising out of these arrangements to its financial position and its ability to meet its obligations in relation to the agribusiness scheme.
- RG 232.90 If the responsible entity is reliant on funding from external or related parties to perform its functions and fulfil its obligations in relation to the agribusiness scheme, it should disclose the extent of the reliance.
- RG 232.91 If the responsible entity has entered into any guarantee or indemnity with external or related parties, it should explain:
- (a) what each guarantee or indemnity is, including the names of the parties to the guarantee; and
  - (b) the potential implications of entering into these arrangements on the financial position of the responsible entity if the other parties are unable to meet their obligations.
- RG 232.92 If the responsible entity is a member of a tax consolidation group, it should disclose details of:
- (a) whether a tax-sharing agreement is in place and the parties to the tax-sharing agreement; and
  - (b) if no tax-sharing agreement is in place, the potential implications of not having this.

#### Explanation

- RG 232.93 Under the Corporations Act, a responsible entity must maintain adequate financial resources to enable it to provide the financial services covered by its Australian financial services (AFS) licence and to carry out supervisory arrangements.

Note: Responsible entities should refer to Regulatory Guide 166 *Licensing: Financial requirements* (RG 166) and to the draft updated version of RG 166 (draft RG 166), which forms Appendix 1 to Report 259 *Response to submissions on CP 140 Responsible entities: Financial requirements* (REP 259). The requirements in draft RG 166 will not apply until November 2012. For the treatment of guarantees, including under a tax-sharing arrangement, see RG 166.162(f) of draft RG 166.



- RG 232.94 Many retail investors may not understand the potential for the financial position and arrangements of the responsible entity to have a significant impact on the agribusiness scheme. Consistent disclosure of this information across this sector will allow investors to compare relative risks and returns across investments in agribusiness schemes.
- RG 232.95 Consequently, where the responsible entity is reliant on or provides support to other entities, investors should be able to assess whether the responsible entity has adequate financial resources to meet its obligations in relation to the agribusiness scheme.

## Disclosure Principle 4: Land, licences and water

- RG 232.96 The responsible entity should disclose the arrangements entered into to secure rights of access or tenure to the resources and infrastructure required to operate the agribusiness scheme, including any land, licences or leases, and water required, and whether these arrangements:
- (a) provide for access for the life of the agribusiness scheme; and
  - (b) are entered into on an arm's length basis.
- RG 232.97 The responsible entity should disclose:
- (a) the risks associated with these arrangements;
  - (b) the consequences of a failure by the responsible entity to pay amounts due under these arrangements, and any breaches of these arrangements or agreements underlying these arrangements; and
  - (c) any measures the responsible entity has implemented, or will implement, to address these risks.
- RG 232.98 The responsible entity should disclose the identity, where known, of the owner of the resources and infrastructure referred to in RG 232.96, the terms of use and whether security has been given over these assets.
- RG 232.99 The responsible entity should disclose (where applicable) for any leases, licences, rights or infrastructure required for the operation of the agribusiness scheme:
- (a) whether the responsible entity treats the leases and licences or rights as scheme property;
  - (b) the identity of the parties to the leases, licences and/or rights; and
  - (c) whether any action in relation to a lease, licence or right needed for the operation of the agribusiness scheme, which is not an obligation of the responsible entity, could endanger the relevant lease, licence or right. Disclosure should clarify the risk of this occurring and how it may affect the agribusiness scheme.

- RG 232.100 If land, licences or water assets are, or are proposed to be, used as security for borrowings by the responsible entity, the responsible entity should disclose the level of actual or proposed gearing, and the risks associated with this gearing, in the PDS and in the report provided to members under Benchmark 3.

### Explanation

- RG 232.101 It is important for retail investors to understand the ownership arrangements relating to land, licences, water, water rights and related infrastructure to be used by the agribusiness scheme. This information will enable investors to understand and assess the risks associated with these not being available for use when required by the agribusiness scheme. We consider it is important that investors understand how these assets are financed and the ability of third parties to prevent the agribusiness scheme from having the benefit of these assets or rights should the responsible entity, manager or any other party not meet any loan, rent, licence fee or other payments associated with these assets.
- RG 232.102 We also consider it is important that disclosure is made, where relevant, in the PDS relating to the ability of a third party to prevent the responsible entity, agribusiness scheme (and its members) or manager from using the full entitlement of water rights acquired for the agribusiness scheme. This disclosure should also include contingency plans for how such a situation would be managed, and an express statement of who would be required to meet the additional costs (if any) associated with sourcing the additional water.
- RG 232.103 It is also important for investors to understand the nature of any related party transactions in relation to the resources required to operate the agribusiness scheme.

Note: Where a related party is engaged to provide services, responsible entities should consider their obligations in relation to related party transactions. Responsible entities should refer to our guidance in RG 76.

## Disclosure Principle 5: Replacement of the responsible entity

- RG 232.104 The responsible entity should disclose whether there are any restrictions on the ability of any replacement responsible entity to access the resources required to continue to operate the agribusiness scheme (including but not limited to any leases, licences, land, water and money held for the purposes of operating the scheme).
- RG 232.105 The responsible entity should disclose:
- (a) whether the responsible entity or related parties are eligible for any payment or fee that is payable if the responsible entity is replaced, or is to be replaced, and, if so, the amount or method for calculation of this fee;

- (b) the effect of a change in responsible entity on any agreements entered into between investors and the responsible entity or other parties in relation to the agribusiness scheme;
- (c) any obligation to repay fees already paid to the responsible entity to the incoming responsible entity if the responsible entity changes; and
- (d) the risk to, and impact on, investors if the responsible entity changes.

### **Explanation**

- RG 232.106 We consider it is important that disclosure is made about any arrangements that may affect the appointment of a replacement responsible entity. This information is important for retail investors to know when making an investment decision. In our view, an agribusiness scheme with these types of arrangements in place may increase the investment risk.
- RG 232.107 Any contracts entered into for the agribusiness scheme should contain provisions to ensure continuity and mitigate against circumstances where contractual arrangements may frustrate or hinder the appointment of a replacement responsible entity, and prevent that entity from gaining control of the agribusiness scheme or having access to the resources required to operate the scheme.

## E Form and method of disclosure

### Key points

Responsible entities of agribusiness schemes should disclose against the benchmarks in Section C on an 'if not, why not' basis and apply the disclosure principles in Section D in meeting their disclosure obligations to investors.

We expect responsible entities of agribusiness schemes to implement the improved disclosure in this guide from 1 August 2012. This applies to new PDSs, existing PDSs that are still in use, and ongoing disclosure.

We encourage responsible entities of closed schemes to provide the benchmark and disclosure principle information to investors as a matter of best practice. We also expect these responsible entities to consider the benchmark and disclosure principle information in reviewing their continuous disclosure obligations.

### How to disclose against the benchmarks and apply the disclosure principles

- RG 232.108 We expect PDSs for offers of interests in agribusiness schemes to provide the benchmark and disclosure information. Table 4 explains how we expect responsible entities of agribusiness schemes to provide this information.
- RG 232.109 Our view is that the inherent risks for investors in agribusiness schemes mean that information about the risks addressed by the benchmarks and disclosure principles should be included both in the PDS and in ongoing disclosure.
- RG 232.110 Disclosing against the benchmarks and applying the disclosure principles is not intended to lead to longer or more complex PDSs. Rather, we expect that this disclosure will help responsible entities produce PDSs that are better focused on the issues that matter to retail investors and are more clear, concise and effective.

### Timing for implementing benchmarks and disclosure principles: New and in-use PDSs

- RG 232.111 From 1 August 2012, we will review updated investor disclosure for agribusiness schemes to check that the benchmark and disclosure principle information is adequately disclosed to investors: see RG 232.24. Table 5 explains our views on good practice for updating investors.

**Table 4: Disclosing against the benchmarks and applying the disclosure principles**

<b>Benchmarks</b>	<p>Responsible entities should disclose against each of the benchmarks. We expect this information to be prominently disclosed in the first few pages of any PDS.</p> <p>If responsible entities meet the benchmarks, they should state this.</p> <p>If responsible entities do not meet a benchmark, they should explain why not, and explain any additional risks that this may pose for the investor. If a responsible entity has alternative systems and controls in place to deal with the issues underlying the benchmark, it should explain this.</p> <p>Note: If a benchmark contains multiple requirements and a responsible entity cannot meet all the requirements under a benchmark, it should state that it does not meet the benchmark and clearly explain why it fails to meet particular aspects of the benchmark.</p>
<b>Disclosure principles</b>	<p>We expect that responsible entities should disclose the information addressed by the disclosure principles in all but exceptional circumstances. If the responsible entity is unable to provide the information—for example, in circumstances where contracts are yet to be entered into—the PDS should disclose the reasons why the information has not been provided and outline how and when investors will be provided with the information.</p> <p>Responsible entities should include a summary of the information identified in the disclosure principles in the first few pages of the PDS, and also provide references to where further information on the disclosure principles can be found in the body of the PDS.</p>

**Table 5: Implementing the benchmarks and disclosure principles**

<b>By 1 August 2012—PDSs that are dated before 1 August 2012</b>	<p>By 1 August 2012, if an existing PDS is still in use, responsible entities should either:</p> <ul style="list-style-type: none"> <li>include the benchmark and disclosure principle information on a website referred to in the PDS (if the omission of the benchmark and disclosure principle information from the PDS is not materially adverse); or</li> <li>update the PDS by a new or supplementary PDS so that it includes the benchmark and disclosure principle information.</li> </ul> <p>Note: PDSs commonly allow information to be updated through a website if the updated information is not materially adverse: see [CO 03/237]. We consider that, if the omission of the benchmark or disclosure principle information from an existing PDS is not materially adverse, the responsible entity will generally be able to rely on [CO 03/237] to update the PDS for this information without the need for a supplementary or new PDS: see RG 198.</p>
<b>From 1 August 2012—new PDSs</b>	<p>PDSs dated on or after 1 August 2012 should clearly and prominently address the benchmarks on an 'if not, why not' basis and apply the disclosure principles.</p> <p>The PDS should also explain how the responsible entity intends to update investors in relation to ongoing disclosure.</p>
<b>Material changes to information</b>	<p>Where there are any material changes to the benchmark or disclosure principle information, the responsible entity should deal with this in ongoing disclosure. It is good practice to update investors on material changes to key information concerning an agribusiness scheme as soon as practicable (e.g. by updating a website used for this purpose).</p>
<b>Updating on status of information</b>	<p>It is good practice for responsible entities to update investors at least annually on the status of the benchmark and disclosure principle information, including whether the information has been updated for any material changes since the last investor report.</p>

## Information for investors in closed schemes

- RG 232.112 We encourage responsible entities of closed schemes to provide the benchmark and disclosure principle information to investors in these schemes, as a matter of best practice. This could be by using the responsible entity's normal investor communication channels (e.g. in a regular investor update or by including the information on a website that is used to communicate with investors).
- RG 232.113 The disclosure should also advise investors how the responsible entity intends to update them on the status of the benchmark and disclosure principle information and on material changes. This is particularly important if the responsible entity intends to use a website to communicate material changes to investors about key information.
- RG 232.114 We consider that responsible entities of closed schemes should consider the benchmarks and disclosure principles in relation to their ongoing disclosure obligations and, where there is a significant change to the benchmark and disclosure principle information, this should be communicated to investors.

## Disclosure in a PDS

### Content of a PDS

- RG 232.115 The Corporations Act requires disclosure in the form of a PDS for an issue of interests in an agribusiness scheme to retail investors. The PDS must:
- (a) make specific disclosures, including about significant risks associated with holding the product (s1013D); and
  - (b) include all other information that might reasonably be expected to have a material influence on the decision of a reasonable person whether to invest in the agribusiness scheme, when investing as a retail investor (s1013E).
- RG 232.116 We expect the PDS for an agribusiness scheme to explain in a clear, concise and effective way:
- (a) the business model of the agribusiness scheme and what it will actually do with the money;
  - (b) the track record and experience of the senior management; and
  - (c) the nature of the investor's interest in the agribusiness scheme.

Note: We have issued policy guidance in Regulatory Guide 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* (RG 168) on preparing a PDS that complies with the PDS requirements in the Corporations Act. It sets out good disclosure principles and explains how we will monitor the use of PDSs and enforce the PDS requirements.

RG 232.117 The benchmarks and disclosure principles relate to matters that, in any event, must be disclosed under s1013D–1013E because they are all matters that might reasonably be expected to have a material influence on the decision of a reasonable person whether to invest in a product, when investing as a retail investor.

Note: The benchmarks do not attempt to specify all the information that is required to be included in a PDS by the Corporations Act.

RG 232.118 We will consider exercising our stop order powers under s1020E if we consider there is material non-disclosure or misleading disclosure of these matters. We believe that disclosing against the benchmarks and applying the disclosure principles up-front in a PDS promotes compliance with the requirement that PDSs should be worded in a clear, concise and effective manner by encouraging comparability and uniformity of financial measures and highlighting issues that ASIC and industry experts consider crucial to making an investment decision.

### **Clear, concise and effective disclosure**

RG 232.119 PDSs must be worded and presented in a clear, concise and effective manner: s1013C(3). A PDS should, therefore, include clear and prominent disclosure of the key features and risks of the investment. For agribusiness schemes, this *includes* the benchmark and disclosure principle information.

RG 232.120 The requirement for ‘clear, concise and effective’ disclosure should be read as a compound phrase so that each word qualifies the other. This means it is inappropriate to focus on one word in the phrase at the expense of others.

RG 232.121 We consider that your PDS will generally be ‘clear, concise and effective’ if it:

- (a) highlights key information (e.g. through an investment overview as explained below);
- (b) uses plain language;
- (c) is as short as possible;
- (d) explains complex information, including any technical terms; and
- (e) is logically ordered and easy to navigate.

RG 232.122 We encourage responsible entities to use consumer-friendly tools as much as possible in disclosing key features and risks, including tables, diagrams and other comparative features. Such disclosure will help retail investors compare investments across the agribusiness scheme sector.

Note: Responsible entities should refer to RG 168 and Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228) when considering ways to ensure that a PDS is worded in a ‘clear, concise and effective’ manner.

## Investment overview

- RG 232.123 We consider there is a greater risk that a PDS will not be worded and presented in a ‘clear, concise and effective’ manner if it does not include an investment overview within the first few pages that highlights information that is key to a retail investor’s investment decision.
- RG 232.124 An investment overview is an introduction to the issuer and offer. It is not intended to replace the PDS and investors should read the whole document. The investment overview should:
- (a) be the first substantive part of the PDS;
  - (b) highlight and provide a meaningful summary of information that is key to a retail investor’s investment decision, including at least a summary of the benchmark and disclosure principle information; and
  - (c) provide balanced disclosure of the benefits and risks.
- RG 232.125 Where necessary, the investment overview should contain clear cross-references to more detailed disclosure.

## Supplementary PDSs

- RG 232.126 A PDS must be given to prospective investors in various circumstances: s1012A–1012C and s1012IA. If there are material changes to the benchmark or disclosure principle information provided by a responsible entity, the responsible entity with a current offer open will need to provide a new or supplementary PDS if the new information would be materially adverse to the reasonable investor.
- RG 232.127 We consider that it is good practice to also make the information in a new or supplementary PDS available to existing investors (e.g. in a regular investor update or on the website).

## Updating PDSs

- RG 232.128 Responsible entities may be able to rely on Class Order [CO 03/237] *Updated information in product disclosure statements* to provide updated benchmark and disclosure principle information on a website, subject to various conditions, including:
- (a) the updated information is not materially adverse;
  - (b) the PDS must have included a statement that non-materially adverse information may be updated by a website and that a paper copy of any updated information will be given to a person without charge on request;
  - (c) the updated information is easily accessible to investors; and
  - (d) the PDS was up-to-date at the time it was prepared.

Note: See [CO 03/237] for all applicable conditions that must be fulfilled.



- RG 232.129 Subject to fulfilling the conditions in the class order (including that the updated information is not materially adverse), we consider [CO 03/237] should allow responsible entities to update:
- (a) PDSs dated before 1 August 2012 for the benchmark and disclosure principle information; and
  - (b) PDSs that do not include the benchmark or disclosure principle information for changes to that information.
- RG 232.130 By 1 August 2012, if an existing PDS that does not contain benchmark or disclosure principle information remains in use, we expect responsible entities to:
- (a) disclose the benchmark and disclosure principle information using a website or other means of communication referred to in the PDS (if the omission of this information from the PDS is not materially adverse); or
  - (b) update the PDS by a new or supplementary PDS so that it includes the benchmark and disclosure principle information.
- RG 232.131 The information in a PDS must be up-to-date at the time it is given. We consider that PDSs that do not contain the benchmark and disclosure principle information by 1 August 2012 are unlikely to be up-to-date, given the key nature of this information, particularly in light of recent economic conditions affecting the agribusiness scheme sector and the fact that new PDSs will disclose this information.

## Ongoing disclosure

### Effective ongoing disclosure

- RG 232.132 If there have been any material changes to the benchmark or disclosure principle information, including information about the responsible entity's alternative approach to meeting the benchmarks, the responsible entity should explain these in ongoing disclosure.
- RG 232.133 In a PDS, a responsible entity makes a number of statements about how the funds being raised by the PDS will be used, and how the responsible entity will operate the agribusiness scheme. These statements are part of the basis on which the investor invests their money, and the investor should be given the opportunity to monitor the responsible entity's performance against those statements.
- RG 232.134 Good ongoing disclosure, therefore, plays an important role in helping investors monitor their investment and evaluate its performance. Ongoing disclosure also assists investors in assessing other actions they may wish to take if they believe the agribusiness scheme is not meeting their expectations, including requesting a members' meeting.

RG 232.135 Responsible entities have a number of obligations to provide ongoing disclosure to investors under the Corporations Act: see RG 232.136–RG 232.143. Apart from these legal requirements, we encourage responsible entities to use the most efficient and effective methods to regularly communicate key information to investors.

Note: Responsible entities should refer to RG 198 when considering ways to comply with the continuous disclosure requirements of the Corporations Act.

### **Legal framework for ongoing disclosure**

RG 232.136 Responsible entities of agribusiness schemes have obligations to provide ongoing disclosure to investors under the Corporations Act, including:

- (a) disclosure of material changes and significant events (s675 and 1017B);
- (b) notification of any material change to a matter, that would be required to be specified in a PDS (s1017B); and
- (c) periodic statements to members who acquired their interests as retail clients under s1017D.

### **Continuous disclosure**

RG 232.137 If the responsible entity of an agribusiness scheme that is subject to continuous disclosure under Ch 6A becomes aware of information that is not generally available and that a reasonable person would expect, if it were available, to have a material effect on the price or value of the interests in the agribusiness scheme, the responsible entity must lodge a document with ASIC containing the information: s675.

Note: It is good practice for responsible entities to provide investors with access to continuous disclosure documents lodged with ASIC, either by sending investors a hard copy or posting the information on a website used for updating investors.

RG 232.138 The benchmarks and disclosure principles reflect information that would reasonably be expected to have a material effect on the price or value of interests in the agribusiness scheme. Material changes to the responsible entity's performance against the benchmarks and disclosure principle information may therefore trigger s675, unless the information is already generally available.

### **Notification of material changes and significant events**

RG 232.139 If an agribusiness scheme is not subject to continuous disclosure obligations under Ch 6CA, the responsible entity must give investors who acquired their interests as retail clients notice of any material change to a matter, or a significant event that affects a matter, that would be required to be specified in a PDS: s1017B.

RG 232.140 In our view, diversions from the benchmarks and changes in the disclosure principle information are material issues that should be covered in notifications to investors under s1017B. Where such changes or events are materially adverse to investors, notifications generally need to be provided before the change or event occurs, or as soon as practicable and, in any event, within three months.

RG 232.141 We consider that responsible entities of closed schemes should consider the benchmarks and disclosure principles in relation to meeting their ongoing disclosure obligations.

### **Periodic statements**

RG 232.142 The responsible entity of an agribusiness scheme must give members a periodic statement at least annually: s1017D. Periodic statements must include details of:

- (a) the information that the responsible entity believes the investor reasonably needs to understand their investment in the agribusiness scheme; and
- (b) details of any change in circumstances affecting the investment that has not been notified since the previous periodic statement.

RG 232.143 Periodic statements are designed to give investors regular updates about their investment. If a responsible entity does not otherwise report to investors in regular updates, they should update investors on the status of the benchmark and disclosure principle information in the periodic statement.

### **Good practice for ongoing disclosure**

RG 232.144 It is good practice for a responsible entity to maintain a document addressing the benchmarks on an 'if not, why not' basis and applying the disclosure principles, which is updated for material changes that the responsible entity becomes aware of in the ordinary course of managing the agribusiness scheme. This updating allows the responsible entity to provide consolidated updated disclosure to investors on request.

RG 232.145 It is also good practice for this consolidated disclosure document to be clearly accessible on the agribusiness scheme's website (if used for updating investors). The consolidated disclosure document should indicate the date it was prepared and last updated.

RG 232.146 Many responsible entities have adopted the practice of updating investors on key information about the agribusiness scheme with a yearly report. We consider that it is good practice for responsible entities to update investors in writing on the status of key information at least annually.

RG 232.147 Although it is not necessary to repeat information in these updates on the benchmark and disclosure principle information if it has not changed, we consider it is good practice to provide investors with:

- (a) an overview of any material changes to the benchmarks and disclosure principle information since the last update (as far as the responsible entity is aware);
- (b) if there have been no material changes, confirmation that this is the case;
- (c) details of how to access the agribusiness scheme's consolidated disclosure document on the website (if it is available there); and
- (d) confirmation that they are entitled to a hard copy of the benchmark and disclosure principle information on request.

Note: An alternative would be for responsible entities to provide investors with details of material changes to the benchmark and disclosure principle information using a procedure similar to that applying to the provision of a financial report under s314.

## F Advertising

### Key points

Responsible entities of all agribusiness schemes can promote investor understanding and minimise the risk of mis-selling by ensuring that advertising for their products meets certain standards.

Responsible entities that fail to comply with these standards risk making false or misleading statements, or engaging in misleading or deceptive conduct.

We expect responsible entities of agribusiness schemes to comply with these standards from the date of publication of this guide.

## Standards for advertisements

### Repayment of principal investment

- RG 232.148 Statements in advertising for agribusiness schemes should be consistent with all corresponding disclosures on that subject matter in the PDS.
- RG 232.149 For this reason, any advertisements for agribusiness scheme investments that are offered to retail investors should contain prominent disclosure that investors risk losing some or all of their principal investment.

### Returns on investments and investment ratings

- RG 232.150 Advertisements for agribusiness schemes that are offered to retail investors should *only* quote returns on the investment if this is accompanied by prominent disclosure that there is a risk that the investment may achieve lower than expected returns.
- Note: This includes advertisements with generic references to the return (e.g. to a 'very high', 'highly competitive', 'regular' or 'consistent' return), as well as to a specific return.
- RG 232.151 References to returns in advertising 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 likelihood of being paid that return.
- RG 232.152 If an investment rating is used in an agribusiness scheme advertisement, it should be properly explained. This explanation should include the meaning of the rating and where an investor can obtain further information about the rating. The advertisement should also state that investment ratings are only one factor to be taken into account when deciding whether to invest.

- RG 232.153 Responsible entities should ensure that:
- (a) the impression the investment rating creates about the agribusiness scheme being advertised is not misleading; and
  - (b) investment ratings used in advertisements for agribusiness schemes are only quoted from research houses that hold an AFS licence.

### **Consistency with PDS disclosure**

- RG 232.154 Statements in advertisements for agribusiness schemes should be consistent with all corresponding disclosures on that subject matter in the PDS. In particular, responsible entities should take into account the disclosure in the PDS that deals with the benchmarks in Section C and disclosure principles in Section D.

Note: Reference to 'advertisements' in this guide should be read broadly. They include comment and promotion of agribusiness schemes in media programs or publications (generally known as 'advertorials'), and statements about the schemes published by responsible entities on their websites that are intended to promote the scheme to retail investors. They do not, however, include statements in the PDS.

- RG 232.155 When considering consistency with the PDS, responsible entities should be aware that an advertisement may be misleading if it quotes a statement from the PDS out of context.
- RG 232.156 Responsible entities of agribusiness schemes that fail to ensure that advertisements are consistent with PDS disclosures risk making false or misleading statements, or engaging in misleading conduct in contravention of the Corporations Act or the ASIC Act.

Note: As at the date of publishing, we have consulted on proposals to issue guidance to help promoters and publishers present advertisements that are accurate, balanced and that help consumers make decisions that are appropriate for them: see Consultation Paper 167 *Advertising financial products and advice services: Good practice guidance* (CP 167). We note that responsible entities should consider any guidance issued in response to CP 167 when preparing advertising.

## Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A.
agribusiness scheme	A managed investment scheme that engages in primary production activities
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
benchmark and/or disclosure principle information	Information covered by the benchmarks in Section C and/or disclosure principles in Section D of this guide
Ch 2M (for example)	A chapter of the Corporations Act (in this example, numbered 2M)
closed scheme	An agribusiness scheme in which no offers of interests will be made on or after 1 August 2012
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
CP 133	An ASIC consultation paper (in this example, numbered 133)
expert	The meaning given to that term in s9 of the Corporations Act
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
Pt 7.9 (for example)	A part of the Corporations Act (in this example, numbered 7.9)
related party	Has the meaning given to that term in s228 of the Corporations Act
retail client	A client as defined in s761G of the Corporations Act and associated Corporations Regulations
retail investor	For the purposes of this guide, a retail client who invests in an agribusiness scheme
RG 69	An ASIC regulatory guide (in this example, numbered 69)
s1017B (for example)	A section of the Corporations Act (in this example, numbered 1017B)

## Related information

### Headnotes

advertising, agribusiness schemes, benchmarks, deceptive, disclosure, disclosure principles, managed investment schemes, misleading, PDS, Product Disclosure Statement, responsible entities

### Class orders

[CO 98/51] *Relief from duty to separate assets of a managed investment scheme*

[CO 03/237] *Updated information in product disclosure statements*

### Regulatory guides

RG 45 *Mortgage schemes: Improving disclosure for retail investors*

RG 46 *Unlisted property schemes: Improving disclosure for retail investors*

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

RG 76 *Related party transactions*

RG 91 *Horse racing and breeding schemes*

RG 111 *Content of expert reports*

RG 112 *Independence of experts*

RG 133 *Managed investments: Scheme property arrangements*

RG 166 *Licensing: Financial requirements*

RG 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

RG 170 *Prospective financial information*

RG 198 *Unlisted disclosing entities: Continuous disclosure obligations*

RG 227 *Over-the-counter contracts for difference: Improving disclosure for retail investors*

RG 228 *Prospectuses: Effective disclosure for retail investors*

### Legislation

ASIC Act

Corporations Act, Chs 2M, 6A and 6CA, Pt 7.9, s314, 675, 1012A–1012C, 1012IA, 1013C, 1013D–1013E, 1017B and 1017D



## **Consultation papers and reports**

*CP 133 Agribusiness managed investment schemes: Improving disclosure for retail investors*

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

*REP 259 Response to submissions on CP 140 Responsible entities: Financial requirements*

*REP 273 Response to submissions on CP 133 Agribusiness schemes: Improving disclosure for retail investors*