



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 133

Agribusiness managed investment schemes: Improving disclosure for retail investors

April 2010

About this paper

This consultation paper seeks your feedback on proposals to improve disclosure for retail investors in the agribusiness managed investment scheme sector.

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 paper was issued on 8 April 2010 and is based on the Corporations Act as at 8 April 2010.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on disclosure for agribusiness managed investment schemes. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator report and/or a Regulation Impact Statement: see Section E, 'Regulatory and financial impact'.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 31 May 2010 to:

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What will happen next?

Stage 1	8 April 2010	ASIC consultation paper released
Stage 2	31 May 2010	Comments due on the consultation paper
	June 2010	Drafting of regulatory guide
Stage 3	July 2010	Regulatory guide released

A Background to the proposals

Key points

We propose to introduce disclosure benchmarks for agribusiness managed investment schemes. The benchmarks are designed to improve disclosure for retail investors to enable more informed decisions about investments into the sector and to make comparisons between schemes more straightforward.

Compliance with the benchmarks is not mandatory, but Product Disclosure Statements (PDSs) and ongoing disclosures must address the benchmarks on an 'if not, why not' basis.

The benchmarks are to apply to all managed investment schemes engaged in agribusiness enterprises.

- 1 The risks of investing in various types of agribusiness managed investment schemes (agribusiness MISs) were highlighted during 2009. Several large and small operators of agribusiness MISs failed, causing significant losses to many investors. A number of issues emerged surrounding the structures of agribusiness MISs and concerns were raised about whether common structures used to promote agribusiness investments were robust enough to adequately protect investors' interests.
- 2 Since 2009, we have been working to ensure that the interests of retail investors in MISs of failed operators are preserved notwithstanding difficult commercial situations. Alongside this work, we have decided to introduce benchmarks to improve disclosure in the agribusiness MIS sector. The benchmarks are designed to assist retail investors and their advisers make informed investment decisions. The benchmark disclosure regime highlights key risks of agribusiness MIS investments and requires prominent and clear disclosure about how a responsible entity proposes to manage those risks. It is intended that the benchmarks will illuminate the positive and negative aspects of commercial structures chosen by agribusiness MIS operators when they offer investments to retail investors. The benchmark requirements will be contained in a regulatory guide.
- 3 'Agribusiness MIS' is a term used to describe various primary production operations that pool investors' money into a common enterprise using the legal structure defined in the *Corporations Act 2001* (Corporations Act) as a 'managed investment scheme'. Traditionally, the industry has distinguished between those agribusiness MISs that conduct forestry plantations and those involved in non-forestry activities. Non-forestry MIS activities are primarily focused on horticultural enterprises, but also include other primary industries, such as beef cattle, aquaculture and poultry.

- 4 We noted in our submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into Aspects of agribusiness MIS in 2009 that 416 agribusiness MISs have been registered by 70 different responsible entities. Taking into account MISs that have been deregistered or wound up, there are 371 agribusiness MISs registered to operate in Australia. Those 371 are divided as follows:
- 198—forestry MISs;
 - 162—horticultural MISs; and
 - 11—other categories of agribusiness MISs.
- 5 We assessed the various horticultural MISs that have been registered, and the majority in number are involved in the production of grapes (45.11%), almonds (16.95%) and olives (14.13%).
- 6 We estimate that since the introduction of the MIS regime in 1998, agribusiness MISs have raised approximately \$8 billion. In the past five years, over \$5 billion has been invested in agribusiness MISs by over 75,000 investors. Of this, forestry MISs represent \$3.7 billion and non-forestry MISs represent \$1.7 billion.

Benchmarks for agribusiness MISs

- 7 We first introduced benchmark disclosure requirements for unlisted, unrated debentures in October 2007: see Regulatory Guide 69 *Debentures: Improving disclosure for retail investors* (RG 69). Since then, we have applied similar requirements for mortgage schemes. In creating benchmarks, we have consulted with stakeholders and designed a number of key principles that should be addressed by the issuer of a financial product as a means of ensuring they comply with their disclosure obligations.
- 8 We have developed 10 benchmarks that apply to agribusiness MISs: see Table 1. As with other examples, we expect agribusiness MIS operators to comply with the requirement to disclose against the benchmarks on an ‘if not, why not basis’. The ‘if not, why not’ approach does not require that a benchmark is complied with; however, it requires the product issuer to explain why the benchmark is not complied with.

Table 1: Benchmarks for agribusiness MISs

	Disclosure benchmark	Summary of disclosure benchmark
1	Fee structures	Benchmark 1 addresses how the responsible entity structures the fees it charges members of the agribusiness MIS
2	Track record of the responsible entity in operating agribusiness MISs	Benchmark 2 addresses how successful agribusiness MISs previously marketed by the responsible entity have been
3	Responsible entity or other group company ownership of interests in scheme	Benchmark 3 addresses the initial ownership interest that the responsible entity and its related entities intend to have in the agribusiness MIS
4	Annual reporting to members	Benchmark 4 requires the responsible entity of the agribusiness MIS to make a commitment to members of each scheme to disclose at least annually relevant information about the performance of the agribusiness MIS and its assets
5	Responsible entity financial position and use of funds raised	Benchmark 5 addresses the financial position of the responsible entity and how the funds raised will be used
6	Qualifications of experts	Benchmark 6 addresses the independence and relevant qualifications of the experts engaged by the responsible entity
7	Related party issues	Benchmark 7 addresses how the responsible entity uses related parties to provide services to the agribusiness MIS and the process by which entities are appointed to provide these services
8	Land, licences and water-related issues	Benchmark 8 addresses ownership of land, licences and water to be used by the agribusiness MIS
9	Third party financing arrangements	Benchmark 9 addresses the use of third party finance to fund the payment of fees payable by members of the agribusiness MIS
10	Replacement of responsible entity	Benchmark 10 addresses the risk of the structure of the scheme frustrating or preventing the appointment of a replacement responsible entity

9 Further details about each particular proposed benchmark are set out in Section C.

The purpose of disclosure benchmarks

10 The purpose of disclosure benchmarks is to improve the consistency and quality of disclosure by the responsible entities of agribusiness MISs and to enhance investor confidence. The disclosure benchmarks will provide

investors with more consistent information to enhance their understanding of the characteristics of agribusiness MISs and the risks associated with them.

- 11 The purpose of the disclosure benchmarks is to target key risk areas for an agribusiness MIS and establish a common standard against which to disclose. The additional disclosure requirements aim to ensure that material information is presented to investors in a form enabling them to make a fully informed investment decision.
- 12 We are interested in industry views on the various disclosure benchmarks, in particular feedback on:
- (a) whether certain disclosure benchmarks are necessary;
 - (b) whether other or additional benchmarks should be considered; and
 - (c) the appropriateness of information required to be disclosed.
- 13 Failing to meet one or more of the disclosure benchmarks does not mean that a particular agribusiness MIS is necessarily a poor investment. However, we believe it is important that investors understand that the investment does not meet the disclosure benchmark so that they can assess its impact on their investment decision.
- 14 Please also note that compliance with the proposed disclosure benchmark does not ensure that the responsible entity's agribusiness MIS disclosure obligations in relation to the scheme have been met. The disclosure benchmarks only assist with disclosure of specific issues within the broader disclosure requirements.

B Disclosure obligations for agribusiness MISs

Key points

The responsible entity of an agribusiness MIS must apply the benchmark disclosure requirements to its PDS, ongoing disclosure and advertising obligations under the Corporations Act: see paragraphs 15–27.

Benchmark disclosure requirements will apply to all types of forestry and non-forestry schemes that are required to be registered under s601ED of the Corporations Act: see paragraphs 28–29.

We anticipate that benchmark disclosure requirements will apply to any PDS dated on or after 30 September 2010, and to the ongoing disclosure requirements of an agribusiness MIS from that time: see paragraphs 30–32.

PDS and ongoing disclosure obligations

Proposal

B1 We propose that the responsible entity of an agribusiness MIS be required to apply the benchmark disclosure requirements to its PDS, ongoing disclosure and advertising obligations under the Corporations Act.

Your feedback

- B1Q1** Are there practical problems with expecting responsible entities to disclose against the benchmarks in the PDS and on an ongoing basis?
- B1Q2** Do you agree with our approach to the operation of the disclosure requirements?

Rationale: Legal framework for PDS disclosure

- 15 The Corporations Act requires disclosure in the form of a PDS for an offer of interests in an agribusiness MIS. The PDS must:
- (a) make specific disclosures, including 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, as a retail client, whether to invest in the scheme (s1013E).
- 16 The proposed benchmarks relate to matters that in any event must be disclosed under s1013D–1013E. We consider that s1013D–1013E require:

- (a) disclosure of the benchmarks and how they have been met (if they have been met);
- (b) a statement that the responsible entity will meet the benchmarks or, if not, why not; and
- (c) in circumstances where the benchmarks are not met, disclosure of the extent of failure to meet the benchmarks and the reason for this, and an explanation of how and why the responsible entity deals with the business factor or issue underlying the benchmark in another way. In some circumstances, failing to meet the benchmarks is a risk that should be disclosed prominently.

17 The PDS should also explain how the responsible entity intends to update investors on material changes to key information about the scheme.

18 We will consider exercising our stop order powers under s1020E if we think there is material non-disclosure or misleading disclosure against the benchmarks. We believe that disclosure against the benchmarks 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 which ASIC and industry experts consider crucial to making an investment decision.

Rationale: Legal framework for ongoing disclosure

19 If there have been any material changes to a responsible entity's performance against the benchmarks, including against the responsible entity's alternative approach to meeting the benchmarks, the responsible entity should explain these in ongoing disclosures. Responsible entities of agribusiness MISs have obligations to provide ongoing disclosure to investors under the Corporations Act, including:

- (a) disclosure of material changes and significant events (s675 or 1017B); and
- (b) periodic statements to members under s1017D.

Continuous disclosure

20 If the responsible entity of a scheme that is subject to continuous disclosure 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 scheme, the responsible entity must lodge a document with ASIC containing the information: s675.

21 However, we have decided to administer the continuous disclosure provisions to facilitate website disclosure of material information where this will meet the needs of investors. If an unlisted disclosing entity complies with our good practice guidance for website disclosure of continuous

disclosure information, we will not insist that the entity also lodges the information with us. To take advantage of this approach, an unlisted disclosing entity must:

- (a) be satisfied that most of its investors are likely to look for information of this kind on its website;
- (b) notify existing and new investors that it makes disclosure available in this way; and
- (c) disclose any material information on its website in a timely fashion in accordance with the good practice guidance in Regulatory Guide 198 *Unlisted disclosing entities: Continuous disclosure obligations* (RG 198).

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

Notifications of material changes and significant events

- 23 If an agribusiness MIS is not subject to continuous disclosure obligations under Ch 6 of the Corporations Act, the responsible entity must give investors notice of any material change to a matter, or a significant event that affects a matter, that would have been required to be specified in a PDS: s1017B.
- 24 In our view, diversions from the benchmarks are material issues that should be covered in notifications to investors under s1017B. If such changes or events are adverse to investors, notifications generally need to be provided as soon as practicable and in any event within 3 months.

Periodic statements

- 25 The responsible entity of an agribusiness MIS must give members a periodic statement at least annually: s1017D. Periodic statements must include details of:
- (a) the information that the responsible entity reasonably believes the investor needs to understand their investment in the agribusiness MIS; and
 - (b) any change in circumstances affecting the investment that has not been notified since the previous periodic statement.
- 26 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 disclosure information in the periodic statement.

Advertising

- 27 There are provisions under the Corporations Act and ASIC Act that apply to disclosure made in advertising material. Advertising by agribusiness MIS operators should support investor understanding of the disclosure against the benchmarks and not convey messages inconsistent with them.

Application of the benchmarks: Who needs to comply?

Proposal

- B2 We propose that benchmark disclosure requirements apply to all types of forestry and non-forestry schemes that are required to be registered under s601ED of the Corporations Act.

Your feedback

- B2Q1 Do you agree with the proposed application of the benchmarks?
- B2Q2 Do you agree with the definition of an agribusiness MIS?

Rationale

- 28 We intend to apply a broad approach to identifying MISs that are required to disclose against the benchmarks contemplated in this consultation paper. We define an agribusiness MIS as all types of forestry and non-forestry schemes that are required to be and/or are registered in accordance with s601ED of the Corporations Act.
- 29 The benchmarks will apply to each of the following kinds of schemes that are included on ASIC's Form 5100 *Application for registration of a managed investment scheme*:
- primary production—forestry;
 - primary production—tea trees;
 - primary production—aquaculture;
 - primary production—cattle breeding;
 - primary production—livestock grown for fleece;
 - primary production—horticulture;
 - primary production—viticulture;
 - primary production—ratites;
 - primary production—horse breeding; and
 - other primary production.

Timing of the benchmarks: When will requirements commence?

Proposal

- B3** We propose that benchmark disclosure requirements apply to any PDS dated on or after 30 September 2010, and to the ongoing disclosure requirements of an agribusiness MIS from that time.

Your feedback

B3Q1 Do you agree with the timing of the implementation of the benchmark requirements?

B3Q2 Are there any practical difficulties with complying with this timetable?

Rationale

- 30 Timing will be subject to the ultimate publication of a regulatory guide. However, we anticipate that responsible entities of agribusiness MISs will be required to disclose against the benchmarks in any PDS dated on or after 30 September 2010. We also expect responsible entities to refer to the benchmarks in their ongoing disclosures from that time.
- 31 By no later than 30 September 2010, responsible entities of existing agribusiness MISs should have addressed the benchmarks on an ‘if not, why not’ basis in an updated disclosure that is brought to the attention of their existing investors. 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).
- 32 If an existing PDS is still in use, responsible entities should, by 30 September 2010, either:
- (a) include the benchmark disclosure information on a website referred to in the PDS (if the omission of benchmark disclosure information from the PDS is not materially adverse); or
 - (b) update the PDS by a new or a supplementary PDS so that it includes the benchmark disclosure information.

Note: PDSs commonly allow information to be updated through a website if the updated information is not materially adverse: see Class Order [CO 03/237] *Updated information in Product Disclosure Statements*. We consider that if the omission of the benchmark disclosure 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.

C Agribusiness MIS benchmarks

Key points

The responsible entity of an agribusiness MIS must either meet each of the disclosure benchmarks outlined in this section, or disclose to investors the extent to which those benchmarks are not met and the reasons they are not: see proposals C1–C10.

Benchmark 1: Fee structures

Proposal

- C1 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the agribusiness MIS meets the disclosure benchmarks in Table 2.

Your feedback

- C1Q1 Are the disclosure benchmarks we propose appropriate?
 C1Q2 Do you think there are any more effective ways of addressing the fee structures of agribusiness MISs?

Table 2: Disclosure benchmark: Fee structures

Disclosure benchmark	Benchmark answer	'If not, why not' explanation
Members of the scheme pay annual fees (based on the actual costs of operating the scheme) to the responsible entity	Meets	If not, explain the fee structure proposed and why an annual fee structure is not being used
The responsible entity uses a custodian to hold assets of the scheme	Meets	If not, explain what safeguards exist to ensure that annual fees paid by members are appropriately segregated from the assets of the responsible entity and other schemes operated by the responsible entity and are used for a proper purpose

Rationale

- 33 To meet this benchmark, agribusiness MISs should be structured such that members pay annual fees to the responsible entity to fund the operation of their scheme. Where fees are deferred or made out of harvest proceeds, we consider that the benchmark is not met.
- 34 The amount of the annual fees should be determined at (or before) the beginning of a financial year and should be based on the responsible entity's

estimate of costs for the operation of the scheme during the forthcoming year. The responsible entity should have the ability to vary the quantum of the fees and invoice members for additional amounts, if required from time to time, and equally reduce fees where actual costs were below the prior year's invoiced costs. In other words, fees should not be fixed, but rather adjusted to reflect the anticipated costs of operating the scheme for the year ahead.

- 35 Invoices in respect of annual fees should clearly set out the total amount required to be paid and should have a detailed breakdown of the composition of the total, including (if appropriate):
- (a) management fees;
 - (b) responsible entity fees;
 - (c) water fees and costs;
 - (d) commissions to advisers;
 - (e) licensing fees; and
 - (f) lease (rent) costs.
- 36 Annual fee structures provide protections to members in the event that a responsible entity gets into financial difficulty. Annual fee structures are likely to increase the ongoing viability of a scheme should the responsible entity fail. This is because the agribusiness MIS is able to internally generate funding on an ongoing basis. By way of contrast, an agribusiness MIS that uses an up-front fee model has limited ongoing funding sources, if the up-front fee ends up being too low. The adoption of an annual fee model would mitigate against agribusiness MIS operators becoming dependent on the annual sales cycle to fund the operation of multiple projects.
- 37 The use of annual fee structures may also make it easier to find a replacement responsible entity, as the new responsible entity would not be required to fund scheme expenses from its own resources, but would have the ability to invoice members to cover future scheme costs.
- 38 We acknowledge that the use of annual fees may reduce the up-front tax deductions provided to members under fee structures that are front-ended. Despite this, from an investor protection perspective, the benefits of an annual fee structure outweigh the benefits of up-front tax deductions currently afforded to members of schemes that use an up-front fee structure.
- 39 The use of a custodian to hold annual fees ensures that assets held by the custodian are held separately from the assets of the responsible entity.

Benchmark 2: Track record of the responsible entity in operating agribusiness MISs

Proposal

- c2 We propose the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmark in Table 3.

Your feedback

- C2Q1 Is the disclosure benchmark we propose appropriate?
- C2Q2 Do you think there are any more effective ways of addressing the historical performance of the responsible entity in operating agribusiness MISs?
- C2Q3 Do you agree with the definition of similar scheme?

Table 3: Disclosure benchmark: Track record of the responsible entity

Disclosure benchmark	Benchmark answer	'If not, why not' explanation
Other similar agribusiness MISs operated by the responsible entity met the forecasts/projections disclosed in the scheme's PDS, periodic disclosure, advertising or promotional disclosure material, or still expect to meet those forecasts/projections	Meets	If not, disclose details of the relevant schemes, the nature of the underperformance or over-performance (e.g. lower than expected yields) and the reasons for the variance. This extends to other schemes operated by other responsible entities that are within a corporate group

Rationale

- 40 Where the responsible entity operates other similar agribusiness schemes, the responsible entity should provide information as to whether those schemes currently meet any growth, yield, sales price or timing forecasts promoted to members of the scheme.
- 41 We consider information about the performance of similar schemes important information for investors to be able to make an informed investment decision. This information provides a guide to investors about the responsible entity's ability to operate similar types of agribusiness MISs, as well as how well the responsible entity has forecast the performance of similar schemes at the time of issuing a PDS.
- 42 A similar scheme has the following characteristics:
- (a) product—the types of products being offered are similar (e.g. hardwoods, grape varieties); and
 - (b) location—the proposed location of the scheme has similar climatic conditions.

If more than one responsible entity is controlled by a particular corporate group, we expect that to comply with this benchmark, the responsible entity of a particular agribusiness MIS takes into account the track record of other agribusiness MISs operated by any other responsible entities within that corporate group. This principle extends to the other benchmarks if relevant.

Benchmark 3: Responsible entity or other group company ownership of interests in scheme

Proposal

- c3 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmark in Table 4.

Your feedback

- C3Q1 Is the disclosure benchmark we propose appropriate?
- C3Q2 Do you think there are any more effective ways of addressing the proposed level of ownership in the scheme by the responsible entity?

Table 4: Disclosure benchmark: Responsible entity or other group company ownership of interests in scheme

Disclosure benchmark	Benchmark answer	'If not, why not' explanation
Immediately following the allocation of interests, the responsible entity, or any other group company, should own less than 5% in aggregate of the interests of the agribusiness MIS	Meets	If not, disclose the anticipated level of ownership the responsible entity or other group companies intend on holding in the agribusiness MIS and the implications of that ownership

Rationale

- 43 The initial level of ownership that the responsible entity or any other group company has in any particular agribusiness MIS should not exceed 5% immediately after interests are issued. This measure tries to minimise the impact on the scheme in the event that the responsible entity is unable to meet its share of any fees charged to members of the agribusiness MIS. As a member of an agribusiness MIS, the responsible entity would be obliged to pay its proportion of fees levied on members. The costs of a scheme are unlikely to change in the event of the responsible entity (or any investor) not being able to meet its share of scheme costs. As a result, this shortfall would need to be shared among other scheme members or the interests sold to new investors (which is currently difficult as there is no active secondary market for agribusiness MIS interests).

- 44 In recent examples, some failed responsible entities of agribusiness MISs held interests of up to 20% in some of the agribusiness MISs they operated. This was one of the factors that made finding replacement responsible entities for these schemes difficult. This benchmark may help to minimise the level of liabilities that a replacement responsible entity will need to assume, should it be appointed.
- 45 We acknowledge that this benchmark limits the level by which, through direct ownership, a responsible entity may align its interest with those of the other members of the agribusiness MIS. However, the possible implications of the responsible entity developing cash flow issues in its capacity as a member in the scheme outweigh the benefits of aligning the interests between the responsible entity and the investor.
- 46 We also acknowledge that a responsible entity may gradually increase its ownership in an agribusiness MIS if members default on their obligations (subject to each scheme's constitution). The benchmark addresses this issue by only focusing on the initial interest of the responsible entity in the agribusiness MIS.
- 47 A responsible entity should also disclose its policy in respect of ownership of interests in the scheme by the responsible entity or other group companies.

Benchmark 4: Annual reporting to members

Proposal

- c4** We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmark in Table 5.

Your feedback

- C4Q1 Is the disclosure benchmark we propose appropriate?
- C4Q2 Do you think there are any more effective ways of providing relevant information to scheme members in a timely manner?
- C4Q3 Are there any further examples of information that should be provided to members on an annual basis?

Table 5: Disclosure benchmark: Annual reporting to members

Disclosure benchmark	Benchmark answer	'If not, why not' explanation
The responsible entity will (via undertakings in the PDS or some other legally enforceable form) provide members with relevant scheme-specific information at least annually	Meets	If this information will not be provided, explain why not, or what information will be made available to members

Rationale

- 48 We are not mandating the information that should be provided to agribusiness MIS members; however, we are requiring the responsible entity to undertake that it will provide relevant information to members. Examples of information that we would expect to be disclosed to members include:
- (a) the cash position of the scheme;
 - (b) the annual expenses incurred by the scheme (compared against expected expenses (e.g. the amount invoiced));
 - (c) how the scheme is performing relative to expectations (including any revisions to expected project length);
 - (d) current prices and conditions in the underlying markets for finished product and changes from the last report provided to members;
 - (e) update on the financial position of the responsible entity (including any risks with the responsible entity's financial position);
 - (f) impacts of any regulatory changes on the scheme (e.g. impacts of any carbon reduction initiatives);
 - (g) where relevant, access to and usage rates of water compared to water allocation;
 - (h) where relevant, status of any leases or licences required to operate the scheme;
 - (i) levels of defaults and arrears in respect of annual fees, current impact on the scheme and responsible entity (if any) and strategies to deal with the impact of these;
 - (j) number of interests held by the responsible entity or any other group company, any changes from the last report provided to members and the ability of the responsible entity or any other group company to meet obligations associated with these interests; and
 - (k) 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.

Benchmark 5: Responsible entity financial position and use of funds raised

Proposal

- c5 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme and responsible entity meet the disclosure benchmarks in Table 6.

Your feedback

- C5Q1 Are the disclosure benchmarks we propose appropriate?
 C5Q2 Is it reasonable to expect a separate bank account to be operated for each scheme?

Table 6: Disclosure benchmark: Responsible entity financial position and use of funds raised

Disclosure benchmark	Benchmark answer	'If not, why not' explanation
The responsible entity draws down on amounts invested or paid by members only to meet fees due and payable and expenses incurred in the operation of the scheme during the financial period	Meets	If this is not the case, explain how the responsible entity manages the scheme's cash position
Fee income generated by the scheme is restricted and can only be used for the operation of the particular scheme. This does not preclude the responsible entity from claiming expenses (or charging fees) for the particular scheme		
The responsible entity is not reliant on funding from external or related parties to perform the functions and obligations required to be provided under the terms of the agribusiness MIS constituent documents	Meets	If the responsible entity is dependent on funding from external or related parties, the nature and level of this dependency should be disclosed, as should the risks of an interruption to the funding needs of the responsible entity

Rationale

- 49 It is important that the assets of each scheme are separately identifiable from those of the responsible entity and the other agribusiness MISs operated by the responsible entity.
- 50 The responsible entity should be a going concern in its own right. Consequently, the responsible entity of an agribusiness MIS should not have to rely upon its ultimate parent or any related or external party to meet its

financial obligations and should not enter into any cross-guarantees or other financial support arrangements for its ultimate parent or other group company.

- 51 Recommendation 7 of the report by the Parliamentary Joint Committee on Corporations and Financial Services (PJC) following its inquiry into Financial Products and Services in Australia suggested that responsible entities of agribusiness MISs demonstrate they have sufficient working capital to meet their current obligations. The PJC recommended this requirement should be embedded into an Australian financial services licence condition.
- 52 We have attempted to address (in part) Recommendation 7 of the PJC with this particular benchmark. Unless a responsible entity is sufficiently capitalised to adequately and independently discharge its obligations to an agribusiness MIS and its members, then clear and prominent disclosure about the responsible entity’s funding is required. This disclosure should also set out the key risks associated with the responsible entity’s reliance on external funding and the factors that are likely to affect the continued availability of financial support.

Benchmark 6: Qualifications of experts

Proposal

- c6 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmark in Table 7.

Your feedback

- C6Q1 Is the disclosure benchmark we propose appropriate?

Table 7: Disclosure benchmark: Qualifications of experts

Disclosure benchmark	Benchmark answer	'If not, why not' explanation
Experts engaged by the responsible entity to provide professional or expert opinion in respect of the scheme, hold and maintain relevant qualifications and are independent. These qualifications and accreditations must be disclosed to investors	Meets	If the expert is not suitably qualified or independent, explain why the opinion can be relied upon In addition, where an independent expert opinion is not obtained, explain why such an opinion was not obtained

Rationale

- 53 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 such opinions. Consequently, if the responsible entity procures an expert to provide a professional opinion in the PDS or on an ongoing basis, that expert must have a suitably recognised, rigorous and continuing accreditation, and be independent of the responsible entity and its related parties.
- 54 This benchmark includes and builds on a recommendation made in the PJC's report following its inquiry into Aspects of Agribusiness Managed Investment Schemes. The PJC recommended that ASIC require agribusiness MISs to disclose the qualifications and accreditation of third parties who provide expert opinion on likely scheme performance.
- 55 These qualifications and an express statement from the expert regarding their independence should be included in the PDS and other relevant documents if the opinion of an expert is expressed.
- Note: We have published guidance on the independence of experts; responsible entities should be aware of the requirements of Regulatory Guide 112 *Independence of experts* (RG 112).
- 56 If the responsible entity obtains a number of experts' opinions, a summary of all opinions should be included in the PDS. We believe this information is important to retail investors because it highlights any differing opinions provided by experts to the responsible entity.

Benchmark 7: Related party issues

Proposal

- c7 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmark in Table 8.

Your feedback

- C7Q1 Is the disclosure benchmark we propose appropriate?
- C7Q2 Are there any further related party issues that warrant further disclosure?

Table 8: Disclosure benchmark: Related party issues

Disclosure benchmark	Benchmark answer	'If not, why not' explanation
Any service agreements entered into by the responsible entity in respect of the scheme are disclosed to investors, subject to a competitive process and annual review against set performance requirements and approved by the board of the responsible entity	Meets	If service agreements are entered into without a competitive process, provide a justification of why the related party (or non-related party) is the best party to provide these services

Rationale

- 57 We consider it is important for investors to understand the process used by the responsible entity to appoint service providers to the scheme. We consider it imperative that the processes used to appoint service providers ensure that the best interests of members are preserved. To this end, we believe that all service agreements (whether by value or nature of the services provided) entered into by the responsible entity on behalf of the scheme should be subject to a competitive tender process and reviewed by the board of the responsible entity or the scheme's compliance committee (if one exists). The PDS should disclose the name of the party, the service being provided, the relationship to the responsible entity, the fees being paid to the service provider and any other material terms included in each agreement.

Benchmark 8: Land, licences and water-related issues

Proposal

- c8 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the relevant disclosure benchmark(s) in Table 9.

Your feedback

- C8Q1 Are the disclosure benchmarks we propose appropriate?
- C8Q2 Are there any further water licence or land issues that require disclosure?
- C8Q3 Are the benchmark disclosures we propose realistic?

Table 9: Disclosure benchmark: Land, licences and water-related issues

Disclosure benchmarks	Benchmark answer	'If not, why not' explanation
Land and licences		
<p>The land on which the scheme is operated forms part of the property of the scheme or is owned by members of the agribusiness MIS</p> <p>Licences required to secure access to areas to conduct the business of the scheme (e.g. aquaculture licences) are property of the scheme</p> <p>Land and licence assets are not used as security for borrowings by the responsible entity</p>	Meets	If land or licences granting the right to conduct the business of the agribusiness MIS on the land are not scheme property, disclose the risks associated with land tenure, including the risks and effects of termination of any rights to use the land
Water		
<p>The water, and any related rights and infrastructure, to be used in relation to the scheme are owned by the scheme or the members of the scheme</p>	Meets	If the water, and any related rights and infrastructure, used by the scheme are not owned by members or the scheme, disclose who owns these assets, terms of use and details of any loans used to finance these assets (including details of any security for borrowings and covenants attached to these loans)
<p>The directors make an express statement in the scheme's PDS and annually that they believe the scheme has access to sufficient water to meet the needs of the scheme</p>	Meets	<p>If this statement is not made, explain why</p> <p>If the directors do not believe at the time of making the statement that the scheme will have access to sufficient water to operate the scheme, explain how this shortfall will be met</p>

Rationale

- 58 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 scheme. This information will enable investors to understand and assess the risks associated with these not being available for use when required by the scheme. We consider it important that investors understand how these assets are financed and the ability of third parties to prevent the scheme from having the benefit of these assets/rights should the responsible entity, manager or any other party not meet any loan payments associated with these assets.
- 59 We also consider it important that disclosure be made, where relevant, in the PDS relating to the ability of a third party to prevent the responsible entity,

agribusiness MIS (and its members) or manager from using the full entitlement of water rights acquired for the 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.

- 60 Where land licences or water assets are, or are proposed to be, used as security for borrowings by the responsible entity on behalf of the scheme, the level of actual and proposed gearing and risks associated with this gearing are disclosed in the PDS and annual report to members.

Benchmark 9: Third party financing arrangements

Proposal

- c9 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmark in Table 10.

Your feedback

- C9Q1 Is the disclosure benchmark we propose appropriate?

Table 10: Disclosure benchmark: Third party financing arrangements

Disclosure benchmark	Benchmark answer	'If not, why not' explanation
<p>If the responsible entity or a related party is providing finance or arranging for finance to be provided to members of the scheme to fund an investment into the scheme, then the following details should be disclosed in the PDS:</p> <ul style="list-style-type: none"> • details of the financier; • the term of the loan; • the current interest rate; • whether the loan is recourse; • if the loan is recourse, an explanation of what this means for a member in the event of the scheme needing to be wound up; and • any other material terms of these agreements 	Meets	If this information at a minimum is not disclosed, explain why

Rationale

- 61 It is important that investors considering funding an investment in an agribusiness MIS through the use of a loan, either provided by or arranged by the responsible entity, are provided with adequate disclosure regarding the terms and conditions of the loan. In particular, retail investors should be provided with an explanation of the consequences of the loan being repayable out of their personal assets.

Benchmark 10: Replacement of responsible entity

Proposal

- c10 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmarks in Table 11.

Your feedback

- C10Q1 Are the disclosure benchmarks we propose appropriate?

Table 11: Disclosure benchmark: Replacement of responsible entity

Disclosure benchmark	Benchmark answer	'If not, why not' explanation
Scheme documents and contractual arrangements adequately provide for changes of the responsible entity of the scheme	Meets	If scheme documents do not include arrangements providing for changing the responsible entity, explain why this is the case If the ability to change responsible entity may be frustrated or hindered because of arrangements in scheme documents, the responsible entity should disclose why this is appropriate
The responsible entity or related parties are not eligible for any payment or fee if the responsible entity is replaced	Meets	If scheme documents provide for a fee to be paid to the responsible entity on removal, commonly referred to as a 'poison pill', the PDS should disclose the nature and quantum of any fee, the circumstances in which the fee becomes due and payable, and the method for payment

Rationale

- 62 We consider it important that disclosure be made of any arrangements that may frustrate or hinder the appointment of a replacement responsible entity. This information is important for retail investors to have when making an investment decision, because in our opinion such clauses may make the investment riskier.

- 63 To mitigate against circumstances where contractual arrangements may frustrate or hinder the appointment of a replacement responsible entity and that entity gaining control of the scheme or having access to resources required to operate the scheme, any contracts entered into by the responsible entity in respect of the scheme should contain provisions to ensure continuity.

D The form of benchmark disclosure

Key points

Disclosure documents for an agribusiness MIS should contain a table, within the first 15 pages, that prominently and clearly provides disclosure against the benchmarks, including explanations where answers to the questions differ from the benchmarks: see paragraphs 64–66.

Summary of benchmark compliance

Proposal

D1 We propose that disclosure documents contain a summary in table form within the first 15 pages setting out the agribusiness MIS's disclosure against the benchmarks, including an explanation on an 'if not, why not' basis where an answer provided is inconsistent with the benchmark answer.

Your feedback

D1Q1 Do you foresee any difficulties associated with providing a summary of disclosure benchmark issues near the beginning of the PDS?

D1Q2 Are there any other issues associated with requiring disclosure against the benchmarks for agribusiness MISs?

Rationale

- 64 The purpose of the proposed form of disclosure is to achieve consistent disclosure about particular features of agribusiness MIS investments, in a format that allows investors to compare different funds easily.
- 65 Disclosure, whether in a PDS or ongoing disclosure, should be in the form of a table, with a separate section for each of the disclosure benchmarks.
- 66 For each disclosure benchmark, the table should state the benchmark questions and answers, and provide an explanation if the answer is not the benchmark answer.

E Regulatory and financial impact

67 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us, we think they will strike an appropriate balance between:

- (a) the desirability of ensuring that retail investors have appropriate information to make fully informed investment decisions; and
- (b) ensuring that the efficiency of the market in executing transactions is not inhibited through unnecessary and overly burdensome disclosure requirements.

68 Before settling on a final policy, we will comply with the requirements of the Office of Best Practice Regulation (OBPR) by:

- (a) considering all feasible options;
- (b) if regulatory options are under consideration, undertaking a preliminary assessment of the impacts of the options on business and individuals or the economy;
- (c) if our proposed option has more than a low impact on business and individuals or the economy, consulting with OBPR to determine the appropriate level of regulatory analysis; and
- (d) conducting the appropriate level of regulatory analysis (i.e. by completing a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS)).

69 All BCC reports and RISs are submitted to the OBPR for approval before we make any final decision. Without an approved BCC report and/or RIS, we are unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

70 To ensure that we are in a position to properly complete any required BCC report or RIS, we ask you to provide us with as much information as you can about:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits,

of our proposals or any alternative approaches: see 'The consultation process' (p. 4).

Key terms

Term	Meaning in this document
agribusiness MISs	All types of forestry and non-forestry schemes that are required to be registered in accordance with s601ED of the Corporations Act
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Corporations Act	<i>Corporations Act 2001</i> including regulations made for the purposes of that Act
CP 99	An ASIC consultation paper (in this example, numbered 99)
PDS	Product Disclosure Statement
related party	The term 'related party' should be interpreted broadly, taking into consideration the definitions of 'related party' in s228 (as applied to a scheme by Part 5C.7) and accounting standard AASB 124 <i>Related party transactions</i> , and includes the responsible entity
RG 69	An ASIC regulatory guide (in this example, numbered 69)

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose that the responsible entity of an agribusiness MIS be required to apply the benchmark disclosure requirements to its PDS, ongoing disclosure and advertising obligations under the Corporations Act.</p>	<p>B1Q1 Are there practical problems with expecting responsible entities to disclose against the benchmarks in the PDS and on an ongoing basis?</p> <p>B1Q2 Do you agree with our approach to the operation of the disclosure requirements?</p>
<p>B2 We propose that benchmark disclosure requirements apply to all types of forestry and non-forestry schemes that are required to be registered under s601ED of the Corporations Act.</p>	<p>B2Q1 Do you agree with the proposed application of the benchmarks?</p> <p>B2Q2 Do you agree with the definition of an agribusiness MIS?</p>
<p>B3 We propose that benchmark disclosure requirements apply to any PDS dated on or after 30 September 2010, and to the ongoing disclosure requirements of an agribusiness MIS from that time.</p>	<p>B3Q1 Do you agree with the timing of the implementation of the benchmark requirements?</p> <p>B3Q2 Are there any practical difficulties with complying with this timetable?</p>
<p>C1 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the agribusiness MIS meets the disclosure benchmarks in Table 2.</p>	<p>C1Q1 Are the disclosure benchmarks we propose appropriate?</p> <p>C1Q2 Do you think there are any more effective ways of addressing the fee structures of agribusiness MISs?</p>
<p>C2 We propose the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmark in Table 3.</p>	<p>C2Q1 Is the disclosure benchmark we propose appropriate?</p> <p>C2Q2 Do you think there are any more effective ways of addressing the historical performance of the responsible entity in operating agribusiness MISs?</p> <p>C2Q3 Do you agree with the definition of similar scheme?</p>
<p>C3 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmark in Table 4.</p>	<p>C3Q1 Is the disclosure benchmark we propose appropriate?</p> <p>C3Q2 Do you think there are any more effective ways of addressing the proposed level of ownership in the scheme by the responsible entity?</p>
<p>C4 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmark in Table 5.</p>	<p>C4Q1 Is the disclosure benchmark we propose appropriate?</p> <p>C4Q2 Do you think there are any more effective ways of providing relevant information to scheme members in a timely manner?</p> <p>C4Q3 Are there any further examples of information that should be provided to members on an annual basis?</p>

Proposal	Your feedback
C5 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme and responsible entity meet the disclosure benchmarks in Table 6.	C5Q1 Are the disclosure benchmarks we propose appropriate? C5Q2 Is it reasonable to expect a separate bank account to be operated for each scheme?
C6 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmark in Table 7.	C6Q1 Is the disclosure benchmark we propose appropriate?
C7 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmark in Table 8.	C7Q1 Is the disclosure benchmark we propose appropriate? C7Q2 Are there any further related party issues that warrant further disclosure?
C8 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the relevant disclosure benchmark(s) in Table 9.	C8Q1 Are the disclosure benchmarks we propose appropriate? C8Q2 Are there any further water licence or land issues that require disclosure? C8Q3 Are the benchmark disclosures we propose realistic?
C9 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmark in Table 10.	C9Q1 Is the disclosure benchmark we propose appropriate?
C10 We propose that the responsible entity (being any entity making disclosure on behalf of an agribusiness MIS) should disclose whether the scheme meets the disclosure benchmarks in Table 11.	C10Q1 Are the disclosure benchmarks we propose appropriate?
D1 We propose that disclosure documents contain a summary in table form within the first 15 pages setting out the agribusiness MIS's disclosure against the benchmarks, including an explanation on an 'if not, why not' basis where an answer provided is inconsistent with the benchmark answer.	D1Q1 Do you foresee any difficulties associated with providing a summary of disclosure benchmark issues near the beginning of the PDS? D1Q2 Are there any other issues associated with requiring disclosure against the benchmarks for agribusiness MISs?