Law Council
OF AUSTRALIA
Business Law Section

Alyssa Frederick
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Corporations
Australian Securities and Investments Commission
Level 29, 120 Collins Street
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Dear Ms Frederick

ASIC Consultation Paper, *Facilitating electronic offers of securities: Update to RG 107*

1. This is a submission by the Corporations Committee of the Business Law Section of the Law Council of Australia (**Committee**), responding to ASIC's Consultation Paper 211 entitled *Facilitating electronic offers of securities: Update to RG 107* (June 2013) (**CP 211**) in relation to Regulatory Guidance 107 (**RG 107**).

Key Points

2. We believe that the use of electronic prospectuses causes few practical difficulties and we support ASIC's proposal to update RG 107 to facilitate the use of the internet and other electronic means to make offers of securities under Chapter 6D of the Corporations Act 2001 (**Corporations Act**).

3. In particular, we support the revocation of [CO 00/44] and the proposed amendments to RG 107 to clarify that the distribution of electronic disclosure documents and electronic application forms is permitted without the need for specific relief.

4. Whilst the Committee supports ASIC's proposed approach in general, we believe that:

   - It would be useful for ASIC to further clarify that the usual industry practice of accepting BPAY® applications to acquire securities without the return of a separate application form is acceptable. It appears implicit at some points in the draft RG 107 that this is acceptable (as various passages refer to the use of an

electronic application form 'and/or' BPAY®) but it would be desirable if this were made explicit.

- It should be made clear that requirements to ensure applications are based on the most up-to-date disclosure in replacement or supplementary prospectus situations only apply where the replacement or supplementary disclosure is 'materially adverse'.

- Certain of the suggestions in Principle 15 regarding promotional or advertising material go too far and should be deleted.

5. We have a number of other more minor suggestions which we have set out below, and have also set out responses to questions B1Q1 to B5Q5 in Annexure 1 and suggested textual amendments to RG107 in Annexure 2.

General submissions

1 BPAY / application form issue

- Whilst it is implicit that the use of electronic application forms and payment by way of BPAY® is acceptable, it would be desirable if this were explicit. Industry practice in the use of BPAY® has developed over several years and BPAY® is today widely used as a payment method. New retail real time gross settlement payment infrastructure proposed to be developed by the Australia Payments Clearing Association is expected to lead to even more widespread use of electronic payments, with payment by cheque becoming the exception over time.

- A valid BPAY® payment can generally only be made by providing a personalised reference number found on an application form accompanying a prospectus. As a consequence, any issue or transfer of securities using BPAY necessarily occurs in response to an application form (notwithstanding that the application form itself is not returned to the offeror). The issue of securities is being made to someone who has received an application form, used it to derive the personalised reference number, and then subsequently made an application for securities by paying via BPAY®.

- RG 107 makes various references to BPAY®. However, it does not explicitly state that, when making a BPAY® payment, subscribers do not also need to return an application form. While several passages (*RG 107.106, RG107.107, RG 107.117*) suggest that an electronic application form 'and/or' (or 'or') BPAY® payment is required, elsewhere (*RG 107.110, RG107.37*) there is reference to securities 'only [being] issued or transferred on receipt of an electronic application form' and to offerors being able to accept electronic application forms 'and' BPAY®) payments for offer securities'. There should be no need to submit an application form 'and' a BPAY® payment, since BPAY® uses personalised numbers extracted from the application form to identify subscribers, so any application via BPAY® payment is necessarily already made in response to the form. We think it important to clarify that the usual industry practice in relation to BPAY® payment is acceptable and that if

subscribing for securities by way of BPAY® payment there is no need to submit a separate application form in hard-copy or otherwise.

- Section 723(1) of the Corporations Act provides that, if an offer of securities needs a prospectus, the securities may only be issued '*in response* to an application form' (emphasis added). The section goes on to provide that, relevantly, the securities may only be issued if the issuer has reasonable grounds to believe that:

    a) the application form which is being responded to was included in, or accompanied by the prospectus when the form was distributed by the issuer; or
    b) the application form was copied, or directly derived, by the applicant from a form referred to above.

- The issuer needs to form the requisite belief, and can do so provided it can be sure that the applicant has received both documents before making an application.

- The use of BPAY® as a payment method is considered by issuers and their advisers to be consistent with statutory and policy considerations on the basis that any issue or transfer of securities using BPAY® is in response to an application form included with a prospectus.

- Issuers have reasonable grounds for the required belief when they receive a completed application form from an applicant, because they have engaged the registry to distribute the prospectus with the application form in a single package. The same belief can be formed by the issuer when an application is made using BPAY® as the applicant is using a personalised reference number (a number associated with their identity) which is contained in the application form which was distributed with the prospectus.

- Therefore regardless of the payment method used – whether that be a cheque accompanied by an application form or a BPAY® payment using the personalised reference number derived from an application form – the issuer has evidence that the application form has been received and referred to by the investor, and will also know that application form was sent with the prospectus. This distribution could be either physical (prospectus and application forms in envelopes) or electronic (a locked pdf which includes both the prospectus and the application form).

- Further, it would not be efficient to require an applicant to complete and return an application form as well as reference the personalised reference number shown on the application form when paying by BPAY® as this would lead to substantial additional reconciliation and other administrative burdens (in terms of linking up the BPAY® payments with separate physical forms). Such a reconciliation process is impracticable in the timeframes for many offers.

- For the above reasons, in addition to the Committee's submissions in Annexure 1, the Committee submits that it would be helpful to clarify in RG 107 (including ASIC's proposed good practice guidance in Principles 11-13) that (1) usual industry practice

in respect of BPAY® payment procedures in connection with personal entitlements to acquire securities is consistent with the policy of section 723 of the Corporations Act, and (2) applicants accepting by way of BPAY® payment to acquire securities are not also required to submit a corresponding application form.

2 New application form issue

- The suggestions at RG107.41 and RG107.42 and in Principle 6 that offerors take steps to ensure applications were based on the most up-to-date disclosure in cases where a replacement or supplementary prospectus has been issued appears to ignore the distinction which the Corporations Act draws between 'materially adverse' replacement or supplementary disclosure and replacement or supplementary disclosure which is not materially adverse from the point of view of the investor.

- While offerors will often take steps to ensure they receive application forms distributed with new disclosure, even if the new disclosure is not materially adverse, they are under no obligation to do so, and we do not believe that RG107 should seek to introduce a 'de facto' requirement to do so.

- What the Corporations Act provides in this area is as follows:

    - An offeror must not offer securities under a disclosure document if the document contains a misleading or deceptive statement or material omission or if a new circumstance has arisen since the document was lodged that would have been required to be included in it had it arisen before lodgement (we refer to this below as the document containing a defect or a new circumstance arising), unless correcting supplementary or replacement disclosure has been lodged (see section 728(1) and Note 1 under it, and Note 1 under section 719(1)).

    - An offeror may lodge a supplementary or replacement disclosure document to correct a defect or a disclose new circumstance, and it may do this whether or not the correcting information is materially adverse to investors (see section 719(1) and Note 1 under it).

    - Once such lodgement occurs, the disclosure document is taken to be the document as replaced or supplemented – this means any offers made after the lodgement must be accompanied by the document as replaced or supplemented, but there is no requirement to circulate the supplementary or replacement material to persons to whom offers have already been made unless the correcting information is materially adverse to investors, in which case (unless the offeror refunds investors' money) the offeror must circulate the supplementary or replacement material to applicants who applied under the original document and give them a month to withdraw their application and be repaid (see sections 719((4) and (5) and Note 1 under each of those subsections, and sections 723(2) and (3)).

- By way of example, it is not uncommon for prospectuses to indicate that some uncontentious matter, for example the exact size of a back-end bookbuild (where a

range for the size has been specified in the original prospectus) will be announced and included in a supplementary prospectus during the offer period. The filing of such a 'non-materially adverse' supplementary prospectus should obviously not require receipt of new application forms, and we submit that this is the case for all 'non-materially adverse' replacement or supplementary disclosure, and that this principle should not be undercut by wording in RG107.

3 Promotional and advertising issues

- We query the appropriateness of para (b) of RG107.126 requiring separation of any promotional or advertising material from a notification containing a disclosure document or a link to one. Any email which contains or refers to a disclosure document is itself arguably an advertisement to which section 734 applies and will generally contain legending directing the reader to the disclosure document – it is therefore confusing to say that such a cover email should not include advertising material. More substantively, we also do not see any policy reason why such an email should not contain additional information, so long as required legends are included and the information is balanced and non-misleading. This is consistent with the requirements of section 734(6), which was specifically amended in 1991 to allow advertising of securities offers beyond simple 'tombstone' information once a prospectus had been lodged, so long as the prospectus was referenced in appropriate legends (and the more recent general permission to advertise PDS offers so long as appropriate legends are included). We do not see why less latitude should be allowed in notices which actually direct or link the reader to the prospectus.

- We also think that it RG107.126(c) (suggesting inclusion of statements in advertising material that it does not form part of the prospectus) is unnecessary and should be deleted. If it retained, it would be useful to clarify that depending on the context it may be satisfied by including the section 734(6) wording directing the reader to the prospectus.

- We believe that para (e) of RG107.126 should also be deleted. Pre-offer promotional material will only be permitted at all if it complies with section 734(5) or with 1018A (in particular section 1018A(2)). If material does not so comply it will be illegal, but if it does so comply (and is otherwise balanced and non-misleading) it should be permitted – there is no basis in the electronic context for seeking to limit the advertising permitted under those sections to advertising on a generic website.

4 Other issues

- We have a small number of other more minor suggestions:

    - While we recognise that paper based documents currently remain the primary means of dissemination of prospectuses (particularly for entitlement offers as companies may not have email addresses for all securityholders), that is likely to change over time. We think that as a separate project ASIC should consider what changes if any are required to the legislative framework to enable fully

electronic disclosure documents without the need to provide a paper copy to investors (including what electronic safeguards would be required). If those safeguards can be adequately addressed it may be that that removing the requirement for paper-based copies may lead to some significant enhancements in terms of readability, functionality and efficiency.

- We query whether a hyperlink to the application form should only be permitted at the end of an electronic prospectus. RG107 (we believe sensibly) acknowledges more generally that hyperlinks should be permitted from the contents page, and we believe that a hyperlink from the contents page to the application form should be permitted for investor convenience (although we acknowledge and agree with ASIC's policy concerns about other hyperlinks to the application form within early sections of the prospectus). We do not think there should be requirement for investors to only access the application form after they have viewed the prospectus in its entirety (or have confirmed they have read it), as this is not required in relation to paper prospectuses – we note in this regard that RG107.104(b) goes further than RG107.37 and we have suggested an amendment to bring them into line (using the RG107.37 wording).

- The statement in Principle 1 at RG107.71 to the effect that a website address or hypertext link referencing the prospectus should take investors directly to the webpage containing the document or to the document itself needs to be qualified to allow the address or link to take the investor first to a jurisdictional filter of the kind advocated elsewhere in RG107 (where the investor may need to certify he or she is in Australia before being taken to the prospectus). We are not experts in link/website design, but we query whether this may affect the 'three click' guidance at RG107.70.

- We also note ASIC's preference in Principle 2 at RG107.73 that website addresses be provided rather than hyperlinks to an electronic disclosure document. While we are not technical experts, and have therefore not suggested any textual amendments, we note that clients have in the past experienced difficulties with ASX's previous policy (now changed) of refusing to accept continuous disclosure announcements containing hyperlinks because many forms of electronic communication automatically turn website addresses into hyperlinks when a communication is typed or sent. More generally, we query the desirability of the preference expressed in RG107.73.

- Finally, we believe the suggestion that offerors should monitor websites and social media (other than their own), and correct any misleading information identified, is disproportionately burdensome and should be deleted. An offeror's offering disclosure is its prospectus or PDS, and any advertising or promotional material it authorises, and it should not be expected to 'supervise' the rest of the electronic world in relation to commentary on the offer.

- We also query the need for some of the other more prescriptive aspects of the guidance, for example the recommendation in Principle 4 at RG107.80 that an indication of page number/length be provided, and various other of the legending suggestions. We recognise (and welcome) that the guidance is in the form of best practice recommendations, and have therefore not suggested textual amendments, but we expect that some issuers will fail through inadvertence to meet some of the requirements (which taken together form an extensive checklist).

Conclusion and further contact

- The Committee would be pleased to discuss any aspect of this submission.

- Please contact the chair of the Committee, Marie McDonald , or Philippa Stone , if you would like to do so.

Yours sincerely,

Frank O'Loughlin

ANNEXURE 1
Responses to ASIC's questions

B1Q1 Do you agree with our proposed revocation of [CO 00/44]? If not, why not?

Yes, we agree.

B1Q2 Do you use personalised or AFS licensee created application forms? If yes, how often do you use this type of application form, for what types of securities offering do you use this type of application form, and why do you use this type of application form?

Yes, personalised application forms are used in all entitlement offers and in some IPOs (for example where investors have pre-registered their interest in the offer) and hybrid offers (for example where the offer is extended to investors with existing hybrid or ordinary share holdings in the offeror). Personalised application forms are used in order to streamline the process of completing and processing application forms and in particular assist in minimising reconciliation errors that might otherwise arise from investors incorrectly calculating their entitlement.

B1Q3 Do you agree that we should continue our class order relief for personalised and AFS licensee created application forms? If not, why not?

We note that arguably class order relief for personalised and AFS licensee created application forms is not required. We think this is reasonably clear (as RG 107 acknowledges at RG107.59) in relation to personalised application forms created by the issuer. However, we agree that the position is open to doubt in relation to personalised application forms created by someone other than the offeror, and therefore consider the class order relief should be continued.

B1Q4 Do you consider any other ASIC relief would be desirable (either similar to [CO 00/44] or otherwise)?

See B1Q3 above.

B2Q1 Do you agree with our proposed good practice guidance in Section D of the draft updated RG 107? If not, which part(s) of the guidance do you disagree with and why?

While we agree with the tenor of the proposed good practice guidance in Section D of the draft updated RG 107, we have a number of specific issues with it as set out in our covering submission - these relate to:

- Clarification in relation to BPAY® applications.
- Clarification that new application forms are not required where non-materially adverse supplementary or replacement disclosure is made.
- Deletion of some of the suggestions regarding promotional or advertising material.
- Other more minor points:
    - Allowing a hyperlink to the application form from the contents page (but not from other pages).
    - Clarification that a hyperlink to a prospectus can first take the investor to a jurisdictional screening page (rather than straight to the first page of the document).

- A query in relation to ASIC's preference for website addresses rather than hyperlinks to an electronic disclosure document.
- Deletion of the suggestion that offerors should monitor websites and social media (other than their own) and correct any misleading information identified.

We also query more generally the need for some of the other more prescriptive aspects of the guidance, for example the recommendation in Principle 4 at RG107.80 that an indication of page number/length be provided, and various other of the legending suggestions. We recognise that the guidance is in the form of best practice recommendations, and have therefore not suggested textual amendments, but we expect that some issuers will fail through inadvertence to meet some of the requirements (which taken together form an extensive checklist). We note in this regard that the recommendations in the guidance are in some respects more extensive than the requirements of [CO 00/44].

B2Q2 Do you think that the good practice guidance is useful? If not, what other guidance do you think is necessary to help offerors, distributors and publishers comply with the law and to promote confident and informed retail investors?

See B2Q1 above.

B2Q3 Are there any practical problems with our proposed good practice guidance? Please give details.

See B2Q1 above.

B2Q4 Do you think our proposed good practice guidance is too restrictive? If so, please provide details.

See B2Q1 above.

B2Q5 Do you think that our proposed good practice guidance is likely to result in additional compliance costs for offerors? Please give details, including your reasons and the specific costs involved.

See B2Q1 above.

B2Q6 Do you think that our proposed good practice guidance is likely to result in additional risks or costs for investors? Please give details, including any figures and reasons.

See B2Q1 above. We think the proposed good practice guidance is in parts unnecessarily prescriptive and may increase costs for issuers (we do not think it poses any additional risks for investors).

B3Q1 Do you agree with our proposed guidance in Principles 1–8? If not, which part(s) of the guidance do you disagree with and why?

See B2Q1 above.

B3Q2 In Principle 1, we have listed the most likely means by which electronic documents are currently made available to investors. Are there any other means of electronic distribution that are not listed and that are currently being used in the market?

Not that we are aware of.

B3Q3 In relation to Principle 4, do you use, or are you aware of, any other measures that offerors, distributors or publishers take to protect electronic disclosure documents from unauthorised alteration or tampering? Please provide details.

Not that we are aware of.

B3Q4 In relation to Principle 5, do you agree that offerors and distributors should continue to make paper copies of disclosure documents and application forms available free of charge to investors? If not, why not?

Yes, we agree (although it may be that this principle should be reviewed over time).[1]

B3Q5 In your experience, is paper still the primary means of distributing disclosure documents in the market? If so, what are the reasons for not using the internet or other electronic distribution channels?

In our experience, paper remains the primary means of distributing disclosure documents particularly in respect of entitlement offers. We understand that the primary reason for this is that listed companies do not necessarily have email addresses for all of their shareholders. However, electronic distribution is becoming increasingly common.

B3Q6 If you mostly distribute disclosure documents electronically, do you receive many requests for paper copies? If available, please provide us with any figures on the use of paper and electronic disclosure documents.

We do not have this information.

B3Q7 In relation to Principle 7, what do you think is a reasonable period of time for offerors, distributors and publishers to ensure that disclosure documents remain accessible from a link, website or electronic facility?

We agree that 2 years appears reasonable. We note that issuers will typically ensure that the disclosure document remains accessible on its website.

B4Q1 Do you agree with our proposed guidance in Principle 9? If not, why not?

Yes, we agree.

B4Q2 Are there any practical problems with our proposed guidance in Principle 9? Please give details.

Not that we are aware of.

B4Q3 Do you agree with our proposed guidance in Principle 10 on the use of hypertext links in electronic disclosure documents?

We agree generally, but subject to our comments in our covering submission in relation to allowing a hyperlink to the application form from the contents page of a prospectus (but not from other pages).

B4Q4 Are there any other situations where you think hypertext links should be permitted? Please provide details.

[1] See our covering submission. While we recognise that paper based documents currently remain the primary means of dissemination of prospectuses, that is likely to change over time. We think that as a separate project ASIC should consider what changes if any are required to the legislative framework to enable fully electronic disclosure documents without the need to provide a paper copy to investors (including what electronic safeguards would be required).

See B4Q3 above.

B5Q1 Are there any practical difficulties with our recommended reasonable measures in Principle 11 for ensuring that the electronic application form is distributed to investors with the electronic disclosure document? If yes, please provide details.

Not that we are aware of, although the provision of a 'certify' message (*RG 107.107*) seems an unnecessary step if investors cannot actually access an application form without having accessed the disclosure document.

B5Q2 In relation to Principle 11, are there any other measures that offerors, distributors and publishers currently take that are not listed in the proposed good practice guidance? Please provide details.

See our comments in our covering submission regarding BPAY® applications. This is the most important aspect of our submission from a practical perspective.

B5Q3 In relation to Principle 12, do you agree that these warnings should be displayed on all electronic application forms and facilities? If not, why not? If yes, are you currently displaying these warnings on your electronic application forms?

While we agree that appropriate warnings should be displayed on all electronic application forms and facilities, we think it important to clarify that the usual industry practice in relation to BPAY® payment is acceptable and that if subscribing for securities by way of BPAY® payment there is no need to submit a separate application form in electronic form or otherwise.

Accordingly, any statements to be displayed on electronic application forms should reflect this and RG 107.110 should be amended accordingly.

B5Q4 In relation to Principle 13, do you agree that offerors and distributors should take reasonable measures to verify the identity of an applicant using an electronic application form or facility to apply for securities? If not, why not?

The suggestions sound reasonable (although we are not expert in this area) so long as we are correct in understanding that they are able to be satisfied in the normal BPAY® application situation – which we understand to be the case, based on the wording RG 107.117(a).

B5Q5 Do you think that Principles 11–13 of our proposed good practice guidance are too restrictive? If so, please provide details.

Yes in some respects. See above submissions.

ANNEXURE 2

Suggested textual changes

BPAY / application form issue

- Insert the words ‘in response to an application form and’ after ‘securities may only be issued or transferred’ in the first line of RG107.34 (reflecting the wording of section 723).
- Replace the words ‘application forms and payments (i.e. via BPAY) for offer securities’ in the second line of RG107.37 with ‘application forms for offer securities, or electronic payments for offer securities (i.e. via BPAY) made using identifying information or other techniques linking them to a personalised application form (even if the application form is not itself received)’.
- Insert the words ‘or making the BPAY payment’ at the end of RG107.106(c) after the words ‘completing the application form’.
- Add a note under RG107.107 as follows: ‘Note: An application form need not be returned if the offeror has sent a personalised application form to an investor with the disclosure document and the investor makes a BPAY payment for securities quoting an identifying number from that personalised application form (or the BPAY payment otherwise clearly links back to that form) such that there is evidence that the application is made in response to that form.’.
- Insert the words ‘or a BPAY payment made in response to a personalised application form issued together with the electronic disclosure document’ at the end of RG107.110 before the full stop.

New application form issue

- Insert the words ‘(at least where any supplementary or replacement disclosure is materially adverse from the point of view of an investor)’ after ‘to ensure’ in the third line of RG107.42.
- Insert the words ‘(at least where any supplementary or replacement disclosure is materially adverse from the point of view of an investor)’ after ‘they should take reasonable steps’ in the second line of RG107.85.
- Insert the words ‘that contains information that is materially adverse from the point of view of an investor’ after ‘supplementary or replacement disclosure document’ in the second line of RG107.86.

Promotional and advertising issues

- Delete paras (b), (c) and (e) of RG107.126 (or if para (c) is retained at least clarify that it can be satisfied by the normal section 734(6) legends).

Other issues

- Insert the words ‘or in the contents page’ before the close bracket at the end of the note at the end of RG107.36.
- Replace the words ‘(unless the link can only be accessed after the disclosure document has been viewed in its entirety or the investor has positively confirmed that they have read the disclosure document)’ with ‘(unless the link is contained at the end of the disclosure document or in the contents page)’.

- Add a note under RG107.71 as follows: ‘Note: A hypertext link may take investors first to a screen requiring them to certify their location as referred to in RG107.123(a), but after such screening investors should be taken to the first page of the disclosure document.’.
- Delete RG107.129 and RG107.130.

General / typos

- Insert the word ‘available’ before ‘free of charge on request’ in the third line of RG107.4.