



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 94

Debenture advertising

October 2007

About this paper

This consultation paper seeks feedback from issuers of debentures and publishers of debenture advertising on our proposals for standards we expect them to meet regarding debenture advertising.

It seeks comments on a draft regulatory guide prepared following responses to Consultation Paper 89 *Unlisted, unrated debentures—improving disclosure for retail investors* (CP 89).

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 31 October 2007 and is based on the Corporations Act as at 31 October 2007.

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 draft regulatory guide in Appendix 1 of this paper.

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:

- the likely compliance costs;
- the likely effect on competition; and
- 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.

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 30 November 2007 to:

Rhys Bollen, Regulatory Policy
 Australian Securities and Investments Commission
 GPO Box 9827, Sydney NSW 2001
 facsimile: 02 9911 5232
 email: policy.submissions@asic.gov.au

What will happen next?

Stage 1	31 October 2007	ASIC consultation paper released
Stage 2	30 November 2007	Comments due on the consultation paper
Stage 3	20 December 2007	Regulatory guide released

A Draft regulatory guide

- 1 In August 2007, ASIC released *Consultation Paper 89 Unlisted, unrated debentures—improving disclosure for retail investors* (CP 89). Section F of the consultation paper included proposals on advertising of these debentures.
- 2 Following consultation on those proposals, ASIC has prepared a draft regulatory guide on debenture advertising (draft guide): see Appendix 1 of this paper. The draft guide sets out in greater detail our proposals on standards for issuers and publishers of debenture advertisements. This consultation paper seeks your comments on the draft guide.
- 3 Unlike CP 89, the draft guide relates to advertising of debentures generally and is not confined to advertising of unlisted, unrated debentures. We are therefore seeking comments from issuers and advertisers of debentures generally.
- 4 The draft guide is being issued simultaneously with Regulatory Guide 69 *Debentures—improving disclosure for retail investors* (RG 69). We expect issuers of debentures subject to RG 69 to have regard to the advertising standards in the draft guide, when placing any debenture advertising during the consultation period for the draft guide.

Your feedback

- A1Q1 Will the proposals in the draft guide cause any practical difficulties for you or your business? If yes, please provide details.
- A1Q2 How do debenture issuers presently address the risk that investors may confuse advertisements for their products with advertisements for banking products?
- A1Q3 How do issuers ensure consistency between messages in advertisements and prospectus disclosure?
- A1Q4 Do publishers have policies about including interest rates and credit ratings in advertisements? If so, what are they?
- A1Q5 How do publishers presently deal with misleading and deceptive statements in advertisements (particularly those prepared by the publishers, such as advertorials)?
- A1Q6 How do issuers monitor and control what is said to people making telephone enquiries about the debentures (either in response to advertisements or otherwise)?
- A1Q7 Do you have any other comments on the draft guide?

B Regulatory and financial impact

- 5 In developing the proposals in the draft guide, 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) preventing the mis-selling of debentures; and
 - (b) not unduly interfering with the market and flexibility of the public fundraising process.
- 6 As issuers of debentures the subject of RG 69 should have regard to the draft guide during the consultation period, we have complied with the regulatory impact assessment requirements of the Office of Best Practice Regulation (OBPR) in relation to the draft guide and RG 69 at the same time.
- 7 We will reconsider the regulatory and financial impact of our proposals in the draft guide in light of the feedback we receive in response to this consultation paper. We will comply with the requirements of the OBPR before making any changes to the policy in the draft guide.

Appendix 1: Draft regulatory guide



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Australian Securities & Investments Commission

REGULATORY GUIDE 000

Debenture advertising

October 2007

About this guide

This is a guide for issuers of debentures and publishers of debenture advertising. It sets out the standards we expect you to meet when advertising debentures. It also sets out our expectations of those handling telephone inquiries in response to those advertisements and rollover discussions.

You should read this guide with Regulatory Guide 69 *Debentures—improving disclosure for retail investors* (RG 69).

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Document history

This version was issued on 31 October 2007 and is based on legislation and regulations as at 31 October 2007.

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

Issuers of debentures can promote investor understanding and minimise the risk of mis-selling by ensuring that advertising for their products meets the advertising standards in this guide.

Issuers who fail to comply with the advertising standards risk making false or misleading statements or engaging in misleading or deceptive conduct.

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

Advertising standards for debentures

- RG 000.1 Experience indicates that retail investors who are thinking about investing in debentures place particular emphasis on the information and impressions given in advertisements. These advertisements have not always given a realistic impression of the debenture, its features and risks. It is particularly problematic when advertisements give messages about a debenture that are inconsistent with the risks described in a complying prospectus.

Note: References to ‘advertisements’ in this guide should be read broadly. They include comment and promotion of debentures in the course of media programs or publications (generally known as ‘advertorials’) and statements regarding the debentures published by issuers on their websites.

- RG 000.2 To promote investor understanding of debenture products and minimise the risk of mis-selling, ASIC has set standards for issuers when advertising these products. The standards are summarised in Table 1 and explained in detail in Section B of this guide.

Table 1: Advertising standards for issuers of debentures

Area	Summary of standard
Interest rates, credit ratings and investment ratings	<p>Advertisements for debentures should only quote interest rates if the interest rate is accompanied by equally prominent disclosure of either:</p> <ul style="list-style-type: none"> • a current credit rating of the debenture from a recognised credit rating agency (and an explanation of the rating); or • a statement that the debenture does not have such a credit rating (and what this means). <p>Advertisements for debentures should not refer to:</p> <ul style="list-style-type: none"> • investment ratings of the debenture or the issuer; • credit ratings issued by an entity other than a recognised credit rating agency.

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Area	Summary of standard
Comparisons with bank deposits and 'risk free' suggestions	Advertisements for debentures should not suggest that: <ul style="list-style-type: none"> • the debenture is, or is comparable to, a bank product; or • there is no or little risk of the investor losing their principal or being repaid.
Suitability statements	Advertisements for debentures should not state or imply that the investment is suitable for a particular class of investor.
Consistency with prospectus disclosure	Advertisements for debentures should be consistent with all disclosures in the corresponding prospectus.
Telephone inquiries	Statements made in response to inquiries are subject to the same regulation regarding misleading and deceptive conduct as the advertisements.

How the standards apply

- RG 000.3 Debenture issuers who fail to comply with the advertising standards risk making false or misleading statements or engaging in misleading or deceptive conduct.
- RG 000.4 Section C explains how the *Corporations Act 2001* (Corporations Act) and *Australian Securities and Investments Act 2001* (ASIC Act) apply in this case and what action ASIC can take against misleading or deceptive statements or conduct.

The role of publishers and the media

- RG 000.5 Publishers and the media have a role in promoting debenture products. Some of these products may be directly promoted in the media, through advertising and by media commentators, using terms like 'secure' and 'guaranteed'.
- RG 000.6 While the primary responsibility for advertising material rests with the organisation placing the advertisement, under general law, the publisher or other media conduit may also have some responsibility for its content.
- RG 000.7 Section D sets out our expectations of publishers and the media with respect to advertising placed with them. It sets out some specific screening methods these agencies can adopt to detect and refuse advertisements for debentures where they do not comply with the advertising standards in this guide.

B Advertising standards for debentures

Key points

Issuers of debentures should comply with the standards in this section.

Interest rates, credit ratings and investment ratings

- RG 000.8 Advertisements for debentures should *only* quote interest rates if the interest rate is accompanied by equally prominent disclosure of either:
- (a) a current credit rating of the debenture received from a recognised credit rating agency; or
 - (b) a statement that the debenture does not have a current credit rating from a recognised credit rating agency and that this means that no external assessment has been made about the risk of investors getting all or part of their principal investment back.

- RG 000.9 Where a credit rating is quoted for RG 000.8(a), it should be accompanied by:
- (a) the source of the credit rating; and
 - (b) a brief explanation of what the credit rating means.

Note: For a comparative table of the ratings produced by recognised credit rating agencies, see http://www.asx.com.au/investor/irs/news/credit_ratings.htm.

These disclosures should be as prominent as the credit rating.

- RG 000.10 For the purposes of this guide, the following are recognised credit rating agencies:
- (a) Moody's Investors Services Pty Ltd;
 - (b) Standard & Poor's (Australia) Pty Ltd; and
 - (c) Fitch Australia Pty Ltd.

- RG 000.11 Advertisements for debentures should not refer to:
- (a) investment ratings of the debenture or the issuer;
 - (b) credit ratings issued by an entity other than a recognised credit rating agency.

- RG 000.12 References to interest rates 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 interest (or getting their principal back).
- RG 000.13 We recognise that it may not be practicable to effectively explain the meaning of a credit rating in radio or television advertisements, due to their short duration. If it is not practicable to include the reference to the credit rating and explanation of its meaning in an advertisement, the advertisement should not refer to interest rates or credit ratings.
- RG 000.14 Credit ratings prepared by a recognised credit rating agency are a well-established and widely used method of communicating the credit risk of debentures. Institutional investors are familiar with the meaning of various credit ratings. Retail investors should be provided with a short explanation of what the rating means. Even where there is no reference to an interest rate in an advertisement, debenture issuers should try to include these ratings and their explanations in their advertisements.
- RG 000.15 ASIC has already recognised some credit rating agencies for regulatory purposes. These credit rating agencies are obliged to give certain warnings, comply with the Code of Conduct Fundamentals for Credit Rating Agencies (issued in December 2004 by the Technical Committee of the International Organisation of Securities Commissions) and provide information to ASIC on request: see Class Order [CO 05/1230] *Credit rating agencies*.

Comparisons with bank deposits and 'risk free' suggestions

- RG 000.16 Advertisements for debentures should not suggest that:
- (a) the debenture is, or is comparable to, a bank deposit; or
 - (b) there is no or little risk of the investor losing their principal or not being paid interest.
- RG 000.17 This means that the following terms should be avoided in advertisements for debentures: 'secure', 'secured', 'guaranteed', 'safe', 'deposit' (other than to describe the debenture as an 'unsecured deposit note' under s283BH of the Corporations Act) 'first ranking' and 'no fees'.
- RG 000.18 We consider that the use of these terms (or similar terms) could create a misleading impression about the debenture product or the risks involved with investing in it. For example, 'no fees' suggests an analogy with banking products, which are typically subject to fees directly payable by the investor.

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Suitability statements

- RG 000.19 Advertisements for debentures should not state or imply that the investment is suitable for a particular class of investor (e.g. ‘this product is suitable for a conservative investor’ or ‘this product is suitable for a self-managed super fund’).

Consistency with prospectus disclosure

- RG 000.20 Advertisements for debentures should be consistent with all disclosures in the corresponding prospectus for those debentures. In particular, issuers should take into account the disclosures in the prospectus about the benchmarks set out in Regulatory Guide 69 *Debentures—improving disclosure for retail investors* (RG 69).

Telephone inquiries

- RG 000.21 Statements made over the telephone or in any correspondence in response to inquiries about debentures are subject to the same regulation regarding misleading and deceptive conduct as the advertisements. Therefore the same restrictions apply about what should or should not be said.
- RG 000.22 Issuers of debentures should ensure that all statements made by call centre staff (or other staff or contractors engaged by them) to prospective investors who respond to advertisements for debentures are consistent with the advertisement. In the case of interest rates and credit ratings, no statements should be made that would have been prohibited in the advertisement to which the enquiry related. The same standard applies when discussing rollover options with existing investors.
- RG 000.23 To ensure compliance with this standard, issuers could develop a script and list of questions and answers that call centre staff and any other staff fielding these inquiries should adhere to.

C How the standards apply

Key points

Debenture issuers who fail to comply with the advertising standards in Section B risk making false or misleading statements or engaging in misleading or deceptive conduct.

Such statements or conduct could contravene the Corporations Act and the ASIC Act and result in ASIC taking action against the issuer.

Determining what is misleading or deceptive

RG 000.24 Debenture issuers who fail to comply with the advertising standards risk making false or misleading statements or engaging in misleading or deceptive conduct in contravention of the Corporations Act or ASIC Act: see Table 2.

Table 2: Sections relating to misleading or deceptive advertising

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

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

RG 000.25 In determining whether a contravention has occurred, the following legal principles apply:

(a) There is no requirement that the issuer *intend* to mislead investors—the relevant question is whether the advertisement is in fact misleading or likely to mislead.

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- (b) It is not necessary to show that investors have *actually* been misled—the law prohibits conduct that is likely to mislead.
- (c) The relevant test is the reaction of an *ordinary and reasonable* member of the advertisement’s audience—normally anyone who is not either unusually astute or unusually gullible.
- (d) The audience is not the audience that the issuer would like, but the audience the advertisement actually reaches.
- (e) Investors cannot be expected to study or revisit an advertisement—the most important consideration is the overall impression created by the advertisement when viewed for the first time.
- (f) Qualifications of a headline claim must be clear and prominent—some headline claims are so strong that any separate qualification will not correct any misleading impression.
- (g) If an advertisement is misleading, then it cannot be cured—an issuer cannot rely on accurate disclosure documents to undo the effect of a misleading advertisement.

How ASIC deals with contraventions

RG 000.26 Table 3 sets out how ASIC can deal with misleading or deceptive advertisements for debentures or debenture advertising that constitutes misleading or deceptive conduct. We will consider what attempts a debenture issuer has made to comply with the advertising standards when determining the appropriate action to take.

Table 3: Options available to ASIC

What ASIC can do

Issue a stop order under s739(6) of the Corporations Act on any misleading or deceptive statements in an advertisement for debentures

Seek an injunction s739(6) of the Corporations Act against a debenture issuer for debenture advertising that constitutes misleading or deceptive conduct

Investigate potential criminal action for contraventions of s1041E of the Corporations Act or s12DF of the ASIC Act

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D The role of publishers and the media

Key points

ASIC expects publishers and the media who deal with advertisements for debentures to:

- be aware of the risks that debenture products pose; and
- adopt specific screening methods to detect and refuse debenture advertisements that do not comply with the advertising standards in this guide.

RG 000.27 While the primary responsibility for advertising material rests with the organisation placing the advertisement, under general law, the publisher may also have some responsibility for its content. This depends on whether the publisher received the ‘advertisement for publication in the ordinary course of that business and did not know, and had no reason to believe, that its publication would amount to an offence against that provision’: s1044A Corporations Act, s12GI(4) ASIC Act.

RG 000.28 We believe that the advertising standards in Section B of this guide give publishers knowledge of the type of conduct that would contravene the law. This means that publishers should screen advertisements to ensure that:

- (a) any references to interest rates and credit ratings comply with the standards in RG 000.8–RG 000.15;
- (b) they do not include any of the terms (or similar terms) referred to in RG 000.16–RG 000.19.

RG 000.29 Where a publisher contributes to the content of the advertisement (e.g. in writing advertorials), we regard the publisher to be in the same position as the issuer in terms of its compliance responsibility with the advertising standards in Section B.

RG 000.30 Generally issuers will use the term ‘debenture’, ‘mortgage debenture’, ‘unsecured note’ or ‘unsecured deposit note’ to describe products subject to this regulatory guide. But we encourage publishers to specifically ask their advertising clients whether the product they are advertising is regulated by this guide.

Key terms

Term	Meaning in this document
advertisements	Includes comment and promotion of debentures in the course of media programs or publications (generally know as 'advertorials') and statements regarding the debentures published by issuers on their websites
ASIC	The Australian Securities and Investments Commission
ASIC Act	The <i>Australian Securities and Investments Commission Act 2001</i> (Cth) including regulations made for the purposes of the Act
CO 02/249 (for example)	An ASIC class order (in this example numbered 02/249)
Corporations Act	The <i>Corporations Act 2001</i> (Cth) including regulations made for the purposes of the Act
RG 69	An ASIC regulatory guide (in this example, numbered 69)

Related information

Headnotes

Advertising, misleading, deceptive, interest rates, credit ratings

Regulatory guides

RG 69 *Debentures—improving disclosure for retail investors*

Class orders

CO 05/1230 *Credit rating agencies*

Legislation

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

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

Consultation papers

CP 89 *Unlisted, unrated debenture—improving disclosure for retail investors*

Media releases

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

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