



ASIC

Australian Securities & Investments Commission

REPORT 261

Response to submissions on CP 155 Prospectus disclosure: Improving disclosure for retail investors

November 2011

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 155 *Prospectus disclosure: Improving disclosure for retail investors* (CP 155) and details our responses in relation to those issues.

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.

Disclaimer

This report 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.

This report does not contain ASIC policy. Please see Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228).

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A Overview/Consultation process

- 1 In Consultation Paper 155 *Prospectus disclosure: Improving disclosure for retail investors* (CP 155), we sought feedback on proposed guidance for issuers and their advisers on how to prepare effective prospectuses for retail investors.
- 2 The proposals in CP 155 were developed after ASIC's earlier consultation on prospectuses in 2006 and more recent discussions with industry bodies and investor representatives in 2010. We asked industry bodies and advisers about the issues they encounter when preparing prospectuses and we asked investors about their experience with reading prospectuses. We also analysed the disclosure concerns that we had identified when reviewing prospectuses and complaints received about prospectuses over the past several years.
- 3 We received 22 submissions on CP 155. This report highlights the key issues that arose out of those submissions and our responses. This report is not a comprehensive summary of all responses received on every question.
- 4 We have published Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228) that incorporates the guidance in the draft regulatory guide attached to CP 155 (draft regulatory guide) as modified through the consultation process. We have adopted most of our proposals in CP 155, with some modification. We have also provided additional guidance as requested.

Our proposed guidance

- 5 The draft regulatory guide attached to CP 155 covered the main disclosure requirements of Ch 6D of the *Corporations Act 2001* (Corporations Act). It gave proposed guidance on:
 - (a) how to word and present a prospectus in a 'clear, concise and effective' manner (s715A), including guidance on communication tools and use of an investment overview to highlight key information;
 - (b) the content required to satisfy the general disclosure test in s710, including guidance on business models, risks, financial information and management; and
 - (c) the specific disclosures required by s711, including details of the offer and interests of persons involved in the offer.
- 6 A number of prospectuses lodged since CP 155 have followed this proposed guidance and we consider there has been a significant improvement in disclosure practices. In particular, these prospectuses have included an effective investment overview and risk disclosure that is more specific and prepared from the investor's perspective.

- 7 Due to feedback obtained during our preliminary consultation with industry, in CP 155 we also asked about other disclosure issues that were outside the scope of our proposed guidance on prospectuses to assess whether ASIC should do further work on these issues.

Responses to consultation

- 8 We received 22 responses to CP 155 from relevant industry associations, accounting firms, law firms, investment banks, and investor representatives.
- 9 For a list of the 18 non-confidential respondents to CP 155, see the Appendix. Copies of the non-confidential submissions are on the ASIC website at www.asic.gov.au/cp under CP 155. We also received four confidential submissions.
- 10 Overall, the responses were very supportive of our proposal to provide guidance on prospectuses. The responses were also mostly supportive of key aspects of the guidance such as the proposal for an investment overview, effective risk disclosure and guidance on business models.
- 11 On some issues there were mixed responses and different views expressed. A number of respondents raised concerns or asked for clarification on:
- (a) the nature of our guidance—there was concern that the guidance was prescriptive and would be used as a checklist;
 - (b) the disclosure of financial information and financial ratios;
 - (c) how to make risk disclosure more specific;
 - (d) the disclosure of directors' track records;
 - (e) the disclosure of confidential information in business models; and
 - (f) the use of photographs (including of celebrities).
- Note: While these were contentious issues for many respondents, other respondents strongly supported guidance on specific risk disclosure, directors' track records and a restriction on the use of photographs in the front section of prospectuses.
- 12 We discussed the more contentious issues further with a number of lawyers, accountants, investment bankers, investor representatives and market commentators. This helped us refine our guidance on these issues.
- 13 We are grateful to all respondents who took the time to send us submissions. We are also grateful to the individuals who discussed specific issues with us and shared their expertise during the extended consultation process both before and after publication of CP 155.

B ‘Clear, concise and effective’

Key points

In CP 155, we proposed guidance on how issuers can word and present prospectuses and other documents in a ‘clear, concise and effective’ manner: s715A.

In general, respondents supported our proposals. However, there were questions about our guidance on photographs and incorporation by reference. Our responses are set out below.

‘Clear, concise and effective’ disclosure

- 14 The draft regulatory guide contained guidance on how issuers can word and present their prospectuses in a ‘clear, concise and effective’ manner to comply with s715A. The draft regulatory guide said that a prospectus will generally be ‘clear, concise and effective’ if it:
- (a) highlights key information (e.g. through an investment overview: see Section C of this report);
 - (b) uses plain language;
 - (c) explains complex information including any technical terms; and
 - (d) is logically organised and easy to navigate.
- 15 We suggested some widely-accepted methods and tools for creating ‘clear, concise and effective’ documents: see Table 3 and Table 4 in the draft regulatory guide. Respondents broadly agreed with these methods and tools, although some noted that these methods and tools should not be prescriptive.
- 16 Respondents also generally supported our proposed guidance that photographs should:
- (a) be meaningfully labelled and only included where relevant to the issuer’s business or the offer; and
 - (b) not be used where they are likely to misrepresent the nature, stage or scale of the business.
- 17 In relation to photographs, the draft regulatory guide also said that photographs should only be included after the investment overview. This was based on our experience reviewing prospectuses and consumer research: see CP 155 at paragraphs 17–19.

- 18 There were mixed responses to this proposed restriction on photographs in the front section of a prospectus. For example:
- (a) Investor representatives agreed with the proposal, commenting that investors need substantive information about the investment rather than glossy photos and marketing slogans.
 - (b) Other respondents (e.g. some advisers) said it would be inappropriate to restrict the use of photographs because they can break up text or help to focus investors' attention.
 - (c) A few individuals we spoke with were ambivalent. They did not consider photographs were problematic for them but nor did they find them helpful.
- 19 In CP 155, we also asked whether there should be a restriction on the use of photographs of celebrities in prospectuses. Most respondents thought that such a restriction was not warranted and that instead our general guidance on photographs should apply to the use of celebrity photographs.

ASIC's response

We have clarified that the tools and methods in Table 3 and Table 4 are not mandatory, but that they may be useful in ensuring the document is not misleading.

We have retained our guidance that photographs should only be included after the investment overview. This is because investor representatives said that too much marketing material in the front of a prospectus undermines the 'clear, concise and effective' objective.

Since CP 155 was published, a number of prospectuses have followed the guidance on photographs and we consider they are more effective than similar documents where the front section was dominated by photographs. In our review of fundraising documents, we have also noticed that broker reports (which do not have photos or marketing slogans) are often easier to read than prospectuses that contain a lot of this promotional material.

We do not object to photographs being included after the investment overview if they are relevant, clearly labelled and not misleading.

We have clarified that if an issuer includes a photograph of a celebrity, they should label the photograph and explain why the celebrity is relevant. This is consistent with our general guidance on photographs.

Prospectuses should be as short as possible

- 20 The draft regulatory guide said that prospectuses should be as short as possible while still satisfying the disclosure requirements. We suggested ways to achieve this, including omitting extraneous information and using incorporation by reference.
- 21 In general, respondents supported our guidance that prospectuses should be as short as possible, especially investor representatives. However, some respondents said that the liability provisions prevented prospectuses from being short. There were also a few submissions that said our guidance on the content of prospectuses may result in them being longer rather than shorter.

ASIC's response

We have retained our guidance that prospectuses should be as short as possible while satisfying the disclosure requirements. As stated in CP 155 and RG 228, the requirement for 'clear, concise and effective' disclosure should be read as a compound phrase and prospectuses should not be 'concise' at the expense of being 'effective'.

Our guidance on the content of prospectuses will not result in longer documents if issuers focus on giving investors relevant information.

Incorporation by reference

- 22 Section 712 allows certain information in a prospectus to be incorporated by reference. Parliament introduced incorporation by reference to facilitate shorter prospectuses. However, there has been limited use of the provision. We understand this is partly because s712 has different requirements depending on whether the incorporated document is primarily of interest to professional investors or retail investors:
- (a) If the document's primary audience is professional investors, the prospectus can provide very limited information about it (s712(2)(a)).
 - (b) If the document's primary audience is other investors, the prospectus must provide sufficient information about it to allow an investor to decide whether to obtain a copy of the document (s712(2)(b)).
- 23 Some issuers and their advisers have said that information may not be validly incorporated if they make the wrong decision on the document's primary audience and/or fail to meet the sufficient information test in s712(2)(b). They are concerned that the prospectus may then omit relevant information that they intended to incorporate, leading to a risk of liability.

- 24 The draft regulatory guide said that issuers can comply with s712 by giving ‘sufficient information’ about the incorporated document where there is any doubt about the primary audience. This is arguably the more conservative approach and although it may result in more information being included under s712(2), the prospectus as a whole will be shorter than if the whole incorporated document was included. We also gave some examples of providing ‘sufficient information’ to try to alleviate concerns about compliance with s712(2)(b).
- 25 Most respondents who commented on this issue supported our proposal and said the guidance on ‘sufficient information’ was helpful. However, a couple of respondents said that our guidance would not overcome the technical problems with s712. These respondents said that ASIC should modify s712 to address these problems.
- 26 The draft regulatory guide also said that documents which are prepared for the purpose of incorporation by reference should comply with the ‘clear, concise and effective’ requirement in s715A. Most respondents supported this proposed guidance, but there was some concern about the extent to which documents not prepared for the purpose of incorporation needed to comply with s715A.

ASIC’s response

We have retained our guidance that issuers can comply with s712 by giving ‘sufficient information’ about the incorporated document if there is any doubt about the primary audience. We have also retained our guidance on the examples of ‘sufficient information’. We do not consider that relief is necessary.

We have retained our guidance that documents which are prepared for the purpose of incorporation by reference should comply with s715A. However, we acknowledge that documents which have not been prepared for the purpose of incorporation may not satisfy the ‘clear, concise and effective’ requirement. We do not consider that these documents are precluded from being incorporated by reference. In fact, the use of incorporation by reference should help to make the prospectus as a whole more ‘clear, concise and effective’.

C Investment overview

Key points

In CP 155, we proposed guidance that a prospectus should include an investment overview at the front, highlighting information that is key to a retail investor's investment decision. Our proposed guidance set out categories of key information that should generally be covered in the investment overview.

Respondents supported the use of an investment overview and our guidance on the form and content of the overview. However, there were some concerns about a couple of the categories of information we said may need to be included in the overview. We have clarified our guidance on these issues in RG 228.

Effectiveness of an investment overview

- 27 The draft regulatory guide said that issuers should include an investment overview at the front of their prospectus, highlighting information that is key to a retail investor's investment decision.
- 28 Respondents agreed that the proposed form of investment overview would be an effective way to help retail investors and reduce the multiple levels of summaries that were included in many prospectuses. However, there were some concerns that investors might read only the investment overview.
- 29 In CP 155, we asked whether as an alternative to an investment overview, ASIC should encourage a two-part prospectus, with one part aimed at retail investors and the other aimed at sophisticated or professional investors. This was generally opposed by respondents, mostly because of the difficulty with deciding what information should be included in each part.

ASIC's response

We have clarified that an investment overview is an introduction to the issuer and the offer and is not intended to replace the prospectus. We state that investors should read the whole prospectus.

We have not encouraged the use of a two-part prospectus because of the practical issues and the lack of support for this proposal.

Content of the investment overview

- 30 The draft regulatory guide set out some categories of information that should generally be included in the investment overview, including:
- (a) key features of the issuer’s business model;
 - (b) key risks to the issuer’s business model, the security and the offer;
 - (c) key financial information and key financial ratios;
 - (d) if the issuer’s securities have not traded previously, or the issuer is an investment company or has a limited operating history—details about the expertise of directors and key managers;
 - (e) any significant interests and benefits payable to directors and other persons connected with the offer and any significant related party arrangements; and
 - (f) the proposed use of funds and the key terms and conditions of the offer.
- 31 Respondents generally agreed with this guidance on content of the investment overview, although there were comments that benefits payable to directors and other persons connected with the offer would not usually be significant or key to the investment decision.
- 32 There was also feedback that our guidance should not be prescriptive and issuers should retain the flexibility to determine what information will be relevant for the investment overview given the issuer’s individual circumstances. There was also some confusion about what ‘key’ information meant and concern that the investment overviews will end up being lengthy.

ASIC’s response

We have retained most of the proposed guidance on the content of an investment overview.

We have clarified that ‘key information’ does not mean all information that is required under s710 and we have given some guidance to help issuers produce an investment overview of appropriate length.

We have also confirmed that while there are some categories of information that should usually be explained in the investment overview, issuers need to use their judgment to decide what information will be relevant given their individual circumstances.

On interests and related party transactions, we have clarified that these will not always be significant and require disclosure in the overview. Issuers need to determine if they are significant in their circumstances (e.g. if fees paid to directors make up a large portion of the offer proceeds).

Key financial information in the investment overview

- 33 The draft regulatory guide said that the investment overview should include key information on the issuer's financial performance, financial position and prospects. We said that this should generally include net profit after tax (NPAT), the earnings per share (EPS) ratio, a gearing ratio and where appropriate an interest cover ratio and a working capital ratio. We also proposed guidance on how the gearing, interest cover and working capital ratios should be calculated.
- 34 There was general support for including key financial information and key financial ratios in the investment overview. However, most respondents said our guidance on financial ratios was too prescriptive. They said that issuers needed flexibility to decide which ratios were relevant to an assessment of their business and how the ratio should be calculated.
- 35 Individuals that we spoke with further on this issue said that it would be useful if issuers gave more information about the ratios selected. They said that issuers should explain how the ratio is calculated and why it was chosen. They also said that issuers should give some indication of what the ratio measures or means in general terms.

ASIC's response

We have retained our guidance that the investment overview should include key information about an issuer's financial performance, position and prospects. Our guidance says that examples of key financial information might include earnings before interest and tax (EBIT) and price/earnings (P/E) for financial performance and gearing for financial position.

We recognise that the appropriate financial ratios will depend on the nature of the issuer's business and industry. For this reason, we have not prescribed which ratios must be included in a prospectus. Instead our guidance now explains some factors that may help issuers decide which financial ratios they should choose (acknowledging that ratios are not appropriate for all companies).

We have also refrained from specifying how ratios should be calculated. Our guidance now says that a prospectus should explain how the financial ratios are calculated and any material assumptions. We also encourage companies to briefly explain what the ratio means.

D Specific content guidance

Key points

In CP 155, we proposed detailed guidance on some specific content issues: the issuers' business model, risks, financial information, directors and key managers, interests, benefits and related party transactions, and the offer.

Most respondents supported key aspects of this proposed guidance but raised concerns or queries about some of the detail. We have clarified our guidance on these issues in RG 228.

Business models

- 36 The draft regulatory guide said that a prospectus should explain the issuer's business model to retail investors (i.e. how the issuer proposes to make money and generate income or capital growth for investors). If the issuer does not intend to make money and generate income or capital growth for investors in the short term, the issuer should explain its short-term objectives and how it proposes to meet those objectives.
- 37 The draft regulatory guide said that disclosure on the issuer's business model would involve explaining the key components of the business model, how the components relate to each other and any assumptions underlying the model. Common examples of the components of a business model were provided in Table 6 of the draft regulatory guide. These included significant dependencies, the nature of the issuer's business, financing arrangements, strategy and plans, competition, corporate structure and any dividend policy.
- 38 Respondents supported our proposal that a prospectus should explain the issuer's business model and the proposed guidance on common components of a business model.
- 39 The draft regulatory guide also pointed out that s710 may require disclosure of confidential information relating to an issuer's business model, especially if the information might deter investors from acquiring the securities if that information were generally known.
- 40 A number of respondents were concerned that this guidance on confidential information may result in issuers having to disclose trade secrets or other information that would assist competitors. There were also requests for guidance about the type of confidential information that s710 would require to be disclosed.

ASIC's response

We have retained our guidance on business models and added more guidance on confidential information.

We have clarified that although s710 does not contain an express exception for confidential information, issuers will not automatically need to disclose commercially-sensitive information or trade secrets. For example, often confidential information may not be relevant to the investor's investment decision. In some cases, it may also be unreasonable for investors to expect an issuer to disclose commercially-sensitive information that could be used by competitors to harm its business.

Risks

Content of risk disclosure

- 41 The draft regulatory guide said that a prospectus should explain the risks associated with the issuer's business model, the security and the offer. It also said that a prospectus should help retail investors work out which of the relevant risks are the key risks and that greater prominence should be given to the key risks. Table 7 of the draft regulatory guide gave some common examples of risks.
- 42 Most respondents supported our guidance on disclosure of key risks. During our consultation, it was clear that both retail and sophisticated investors expect a prospectus to focus on key risks rather than giving vague, general information on a long list of risks.
- 43 Responses to our examples of risks in Table 7 were mixed. Some submissions urged ASIC to be more prescriptive, while others were concerned that Table 7 would be used as a checklist (despite the draft regulatory guide's statement that it should not be used in this way).

How to disclose risks

- 44 Our proposed guidance said that risk disclosure should be more specific and tailored to the issuer's circumstances rather than generic. We said that risk disclosure could be made more specific by:
- (a) explaining how a risk might affect the issuer's business model, the security or the offer; and
 - (b) giving some indication about the likelihood of the risk occurring.
- 45 The proposed guidance also suggested how to make risk disclosure 'clear, concise and effective'.
- 46 Most respondents broadly supported our guidance on how to disclose risks. However, some respondents said it would often be difficult to estimate the

likelihood of a risk occurring. They were also concerned that it may be difficult to predict the consequences if a risk did occur. It was pointed out that disclosure on likelihood and consequences must have 'reasonable grounds' or it will be misleading: s728(2).

ASIC's response

We have retained our guidance on disclosure of key risks and examples of common risks in Table 7. We consider it is clear from the guidance that Table 7 should not be used as a checklist.

We have retained our guidance that risk disclosure can be made specific by explaining the likelihood and consequences of the risk occurring. We consider that often there will be reasonable grounds for explaining the consequences, at least at a high level. We have acknowledged that disclosure on the likelihood of a risk occurring will often be high level and general.

In response to suggestions during the consultation process, we have given a couple of examples of specific versus general risk disclosure.

Financial information

Historical financial information

- 47 The draft regulatory guide said that issuers with an operating history should consider including, for the three most recent financial years, a summary of the historical audited annual financial statements and most recently audited or reviewed half-year statement, if applicable. This summary would include a consolidated statement of financial information, income statement and cash flow statement.
- 48 There were mixed responses on this issue. A number of submissions said that issuers should have the flexibility to depart from three years of historical financial information where appropriate (e.g. where there had been a significant change to the business). It was also pointed out that issuers should only have to provide the most recent balance sheet (now called 'statement of financial position').
- 49 Other feedback we received (via submissions and further discussions) said that three years of historical financial information is standard market practice and should be a minimum requirement for companies with an operating history. It was pointed out that three years of historical information may still be important even if the business has changed significantly because significant change can involve risk and the historical information may allow investors to understand relevant trends.

Pro forma and forecast financial information

- 50 Some submissions said that pro forma financial information should be given more prominence than statutory financial information if it is more relevant. We have also consulted on pro forma financial information in Consultation Paper 150 *Disclosing information other than in accordance with accounting standards* (CP 150). Some submissions to CP 155 said that guidance on pro forma financial information should be included in any guidance developed in response to CP 150.
- 51 There was also feedback that our proposed guidance gave too much emphasis to historical financial information rather than forecast information.

ASIC's response

We have clarified that issuers with an operating history only need to provide a consolidated audited statement of financial position for the most recent financial year (or audited or reviewed half year depending on the date of the prospectus).

We have retained our guidance that issuers with an operating history should generally give the following audited financial information for at least the three most recent years (or two and a half years depending on the date of the prospectus):

- (a) an audited consolidated income statement;
- (b) other information that is material from the notes to the financial statements; and
- (c) any modified opinion by the auditor.

If an issuer believes that the disclosure of less than three years of historical financial information is justified because of their particular circumstances, these circumstances should be disclosed.

We have added guidance that issuers should also consider giving pro forma income statements for this period if there has been a significant change to the business. We have also stated that if pro forma financial information is included, it may be appropriate to give it more prominence than statutory financial information.

Issuers that do not have an operating history should give their most recent statement of financial position and a pro forma statement showing the effect of the offer.

We have removed some of the detailed guidance on pro forma financial information, which will be contained in the guidance developed in response to CP 150.

On forecast financial information, our guidance acknowledges that it is common market practice for companies with an operating history to provide prospective financial information to the end of the current financial year, which is often accompanied by an investigating accountant's report. Regulatory Guide 170 *Prospective financial information* (RG 170) provides more detailed guidance on forecasts.

Directors and key managers, interests, benefits and related party transactions

Information on directors and key management

- 52 The draft regulatory guide said that a prospectus should include the following information about the issuer's directors and key managers:
- (a) details of the role they will perform and their expertise relevant to that role;
 - (b) information about their independence or otherwise;
 - (c) details of any criminal convictions, declarations under s1317E, personal bankruptcies, disqualifications or disciplinary action within Australia or other jurisdictions that are less than 10 years old and are relevant to the role to be undertaken and the investment decision; and
 - (d) whether the person has been an officer of a company that entered into a form of external administration because of insolvency and this occurred either during the time the person was an officer or within a 12-month period afterwards.
- 53 Our proposed guidance on disclosure of previous disciplinary action and management of insolvent companies received mixed responses. Some respondents, particularly investor representatives, agreed that this type of information would be relevant. A number of other respondents said the guidance on these issues was too broad. There was concern that the potential significant unfairness to individual directors would outweigh any minimal benefit to investors.
- 54 In relation to disciplinary action, there were requests for ASIC to clarify what 'disciplinary action' would need disclosure. It was suggested that the type of action requiring disclosure was narrow (e.g. disqualifications imposed by ASIC or the court under Pt 2D.6 of the Corporations Act). There was also a query about whether convictions were relevant if they related to the person's character but not their management of a company. Respondents also questioned whether a 10-year 'look back' period was appropriate as it had no clear basis and instead suggested a seven-year period (consistent with s206D and 206F of the Corporations Act).
- 55 Some respondents argued that our proposed guidance on disclosure of directors' and managers' involvement with companies in external administration was too broad because it would capture situations where the person's conduct may not have contributed to the failure of the company, or may not reflect the person's competence or skill in relation to the proposed investment. Some respondents also questioned whether an open-ended look back period for this disclosure was appropriate and instead suggested a 10-year period.

ASIC's response

We consider that s710 may require a prospectus to contain information about a director or key manager's track record. An important preliminary step is ensuring that directors and key managers give the Board and due diligence committee sufficient candid information so that they can assess the information's relevance in the context of the company's circumstances and the officer's role.

We consider investors' right to know about the people who will be managing the company should take precedence over other considerations, such as potential embarrassment to the director. If the prospectus contains information about the director's track record and any appropriate explanation, investors can decide what weight to put on it. Feedback received from investors confirmed they expect such information

The information requiring disclosure will partly depend on the company's circumstances and the role that the officer will undertake. It is therefore not possible to give prescriptive 'one-size-fits-all' guidance. However, we have provided more detailed guidance and a few examples to assist companies and their advisers determine when information on an officer's background may be relevant.

For example, we consider that disciplinary action that is relatively recent (less than 10 years old) and relates to the person's honesty will generally be relevant for investors to assess, even if the conduct did not involve managing a corporation. Similarly, disciplinary action that concerns the person's professional conduct is likely to be relevant if they perform a similar professional role for the company.

We have acknowledged that previous insolvencies may not be relevant if it is clear that the manner in which the company was managed was not responsible for the company failing.

Disclosure about interests and benefits

- 56 The draft regulatory guide said that a prospectus must disclose the interests of, and benefits paid to, persons involved in the offer. We included examples of indirect interests and benefits that should be disclosed. A number of respondents said that some of the examples were irrelevant and others would be difficult to predict.
- 57 In CP 155, we asked whether, if photographs of celebrities are included in a prospectus, the prospectus should also be required to include any interests or benefits paid to those celebrities in connection with the offer or as a consequence of their image being included in the prospectus. Of those who responded to this question, most submissions supported disclosure of fees payable to a celebrity only if the celebrity's involvement amounted to actual endorsement of the offer.

ASIC's response

We have clarified our guidance on what indirect benefits need to be included in a prospectus by removing some examples that may not be possible to quantify. However, the guidance states that the relevant circumstances may still require disclosure. For example, the fact that a director has an interest in a property next to the company's development should be disclosed even if the expected increase in the director's property cannot be estimated.

The issue of celebrities' fees is currently rare in practice so we have not given any guidance. However, if a celebrity is being paid to endorse an offer, then investors may reasonably expect disclosure of these fees to allow them to assess that endorsement.

Disclosure about the offer

- 58 Our proposed guidance covered disclosure about the effect of the offer, including the use of funds. Most respondents supported this guidance.
- 59 The draft regulatory guide also contained guidance on disclosing the terms and conditions of the offer. It said that if the offer price was not final at the time for acceptances, the prospectus should disclose how the final price would be set and include a warning that the final price may not accurately reflect the market value of the securities and may differ significantly from the market price when the securities are quoted (especially where retail investors are involved in the price-setting process).
- 60 We received mixed submissions on whether disclosure about the process to set the final offer price should be included in a prospectus. While the majority of respondents favoured disclosure, some submissions argued that detailed disclosure may be impractical, confusing, or unnecessary. Most submissions agreed that if the offer price would not be finalised until after the deadline for acceptances, a prospectus should warn that the final price may differ significantly from the market price when the securities are quoted.
- 61 Our proposed guidance also required disclosure of any underwriting arrangements and the identity of the underwriters and sub-underwriters. There was some strong feedback that disclosure of the identity of sub-underwriters would cause difficulties in practice. It was also argued that this information is irrelevant unless the sub-underwriter is a related party or may become a substantial shareholder.

ASIC's response

We have broadly retained our guidance about disclosure of the effect of the offer and the terms and conditions of the offer.

We have retained our guidance that a prospectus should disclose details about any process to set the final offer price but have amended the required warning so that it does not refer to the market value of the securities.

We have restricted our guidance on disclosure of sub-underwriting arrangements in accordance with the submissions received. We agree that information about sub-underwriters only needs disclosure if the sub-underwriter is a related party of the issuer or a substantial holder of the issuer.

E Other disclosure issues

Key points

In CP 155, we asked questions to help us determine whether further ASIC work or guidance may be required on transaction specific prospectuses, 'low doc' offers, electronic prospectuses, or any other prospectus or disclosure matters.

Based on the feedback received, we consider that further work may be required on electronic prospectuses but not on the other issues.

Transaction-specific prospectuses

- 62 ASIC's policy on transaction-specific prospectuses that comply with the disclosure requirements in s713 is set out in Regulatory Guide 66 *Transaction-specific disclosure* (RG 66). During our preliminary consultation before publishing CP 155, some industry groups said that further guidance may be required on compliance with s713.
- 63 The draft regulatory guide said that the following guidance would apply to s713 prospectuses: our proposed guidance on 'clear, concise and effective' disclosure, the investment overview, interests and benefits, and the offer. We also said that our proposed content guidance on business models, risks and financial information would be relevant to a s713 prospectus if the aim of the fundraising was to finance a new asset that involved a major change to the issuer's business.
- 64 Most submissions agreed that our proposed guidance should apply to s713 prospectuses in the way described. In CP 155, we also asked whether ASIC should provide further guidance on s713 prospectuses. Most submissions agreed that RG 66 together with the proposed guidance in the draft regulatory guide would give adequate guidance on s713 prospectuses.

ASIC's response

We have retained our guidance on which sections of RG 228 are relevant to s713 prospectuses, but have clarified that Section I (ASIC's role) will be relevant in all cases.

We do not currently propose to give any further guidance on s713 prospectuses.

‘Low doc’ rights issues

- 65 ASIC’s policy on s708AA rights issues conducted without a prospectus is set out in Regulatory Guide 189 *Disclosure relief for rights issues* (RG 189). During preliminary consultation before publishing CP 155, we were asked about the scope of information required in the offer documents often used for s708AA rights issues.
- 66 In CP 155, we asked whether our proposed guidance on ‘clear, concise and effective’ communication should apply to s708AA offer documents and whether ASIC should provide further guidance on the content of offer documents.
- 67 Of those who responded, most submissions agreed that s708AA offer documents should be ‘clear, concise and effective’. Most submissions said that ASIC should not provide further guidance on the content of offer documents, although a few argued that some guidance would be beneficial to improve consistency.

ASIC’s response

We have retained our guidance that s708AA offer documents should be ‘clear, concise and effective’. This is because even though these documents are not subject to a statutory requirement to be ‘clear, concise and effective’, we consider similar duties arise under the general law (e.g. directors’ duty to inform members and prohibitions on misleading or deceptive conduct).

We do not currently propose to give any further guidance on offer documents. However, we will continue to monitor this important area of fundraising to see if further guidance is needed in the future.

Electronic prospectuses and other technological developments

- 68 In CP 155, we referred to the relief ASIC has given for the preparation and use of electronic prospectuses: see Class Order [CO 00/44] *Electronic disclosure documents, electronic application forms and dealer personalised applications*. ASIC’s guidance on the preparation and use of electronic prospectuses is set out in Regulatory Guide 107 *Electronic prospectuses* (RG 107).
- 69 In CP 155, we asked whether ASIC should give further relief or guidance on electronic prospectuses. If so, we asked what the perceived barriers were and what our guidance should cover.
- 70 Some submissions argued that ASIC’s relief and guidance needed to be updated to reflect current technology (e.g. web-based tools that help investors navigate within the document and to external documents, and ‘pop-ups’ that explain

definitions, in place of standard glossaries). There was also a request for clarification on the application of [CO 00/44]. Other submissions said that hardcopy prospectuses should not be discontinued because some investors do not have adequate access to the internet.

ASIC's response

The issues involved with electronic disclosure are complex. We consider that more extensive consultation will be required to advance any further guidance and relief.

Other prospectus or disclosure issues

- 71 In CP 155, we asked whether ASIC should provide guidance on any other prospectus or disclosure issues.
- 72 We received a few responses to this question. Some responses were outside the scope of the current project (e.g. the use of short offer periods and advertising). In relation to the advertising, ASIC has recently published Consultation Paper 167 *Advertising financial products and advice services: Good practice guidance* (CP 167).
- 73 There were a couple of suggestions that were within the scope of the current project, including requests for more guidance on:
- (a) the nature of our guidance;
 - (b) ongoing continuous disclosure; and
 - (c) replacement prospectuses.

ASIC's response

On the suggested matters that are within the scope of the current project to give guidance on prospectuses, we have clarified that:

- (a) our guidance is general rather than prescriptive and that issuers have the flexibility to determine what information the Corporations Act requires for their prospectus. We have also clarified that we will consider RG 228 when reviewing prospectuses but we will not use it as a checklist;
- (b) our guidance on content may help issuers in complying with the continuous disclosure requirements; and
- (c) replacement prospectuses can be made more 'clear, concise and effective' by giving a short explanation at the front of the replacement prospectus about the key differences between the replacement prospectus and the original one.

Appendix: List of non-confidential respondents

- Adler, Michael J.
 - Allens Arthur Robinson
 - Australian Corporate Lawyers Association
 - Australian Finance & Leasing Limited
 - Australian Financial Markets Association
 - Australian Institute of Company Directors
 - Australian Shareholders' Association
 - Chartered Secretaries Australia Ltd
 - Deloitte Touche Tohmatsu
 - Freehills
 - Grant Thornton Australia Limited
 - KPMG
 - Corporations Committee of the Business Law Section of the Law Council of Australia
 - Law Institute of Victoria
 - McCullough Robertson
 - Pitcher Partners
 - PricewaterhouseCoopers
 - PROVIC Group
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