ASIC

Australian Securities & Investments Commission

REPORT 272

Response to CP 134 and CP 154 Infrastructure entities: Improving disclosure for retail investors

January 2012

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 134 *Infrastructure entities: Improving disclosure for retail investors* (CP 134) and Consultation Paper 154 *Infrastructure entities: Improving disclosure for retail investors—Further consultation* (CP 154), and details our responses 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 231 *Infrastructure entities: Improving disclosure for retail investors* (RG 231).

Contents

A Overview/Consultation process 4
Responses to initial consultation—CP 134 5
Responses to further consultation—CP 154 8

B Definition of 'infrastructure entity' 11
Amendments made in CP 154 11
Summary of responses 12

C Benchmarks and disclosure principles 14
Corporate structure and management 14
Funding and sustainability 17
Performance and base-case financial model 20
Valuations 23
Distributions 25
Withdrawal and unit price 27
Portfolio diversification 27

D Form and method of disclosure 29
Amendments made in CP 154 29
Summary of responses 29

E Timing for implementation 31
Summary of responses 31

Appendix 1: Structural differences between CP 134 and CP 154 32

Appendix 2: CP 134—List of non-confidential respondents 33

Appendix 3: CP 154—List of non-confidential respondents 34

A Overview/Consultation process

1 In Consultation Paper 134 *Infrastructure entities: Improving disclosure for retail investors* (CP 134) and Consultation Paper 154 *Infrastructure entities: Improving disclosure for retail investors—Further consultation* (CP 154), we consulted on proposals to improve disclosure to retail investors by infrastructure entities.

2 Investment in infrastructure assets is important for maintaining critical systems and services for our community and has significance for capital flows in Australia. Infrastructure entities typically have complex characteristics and risks that retail investors need to understand to make informed investment decisions. We believe that improving the quality of disclosure by infrastructure entities (by issuing benchmarks and additional disclosure guidance) will enhance investor confidence and enable them to better understand the characteristics of infrastructure entities and the risks associated with them.

3 To improve the quality of disclosure by infrastructure entities, we have developed a set of benchmarks and disclosure principles. We believe that disclosure against the benchmarks and addressing the disclosure principles will help deliver to investors more meaningful and consistent information. The need to provide such information to investors in the infrastructure sector is particularly important because there is an increasing tendency for infrastructure to be funded by capital raised from the public.

4 We conducted two public consultations on our proposed regulatory guidance: CP 134 (initial consultation) and CP 154 (further consultation), issued in April 2010 and March 2011, respectively.

5 In CP 154, we endeavoured to address many of the comments received in response to CP 134, and amended our proposals for improved disclosure accordingly.

6 This report primarily highlights:

(a) the key amendments made in CP 154 to address the comments received on CP 134; and

(b) the key issues that arose out of the submissions received on CP 154, and during subsequent industry consultation, and our responses to those issues.

7 We are grateful to respondents for taking the time to provide us with their comments.

8 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 134 and CP 154. We have limited this report to the key issues.

9 For a list of the non-confidential respondents to CP 134 and CP 154, see Appendices 2 and 3. Copies of these submissions are on the ASIC website at **www.asic.gov.au/cp** under CP 134 and CP 154.

Responses to initial consultation—CP 134

10 In April 2010, we issued Consultation Paper 134 *Infrastructure entities: Improving disclosure for retail investors* (CP 134), which set out our proposals for improving the disclosure requirements for infrastructure entities that raise funding through retail investors. We invited submissions on our proposed benchmark-based disclosure and additional disclosure requirements and asked for feedback on the proposals. The consultation paper also provided background and rationale for the proposed disclosure benchmarks.

11 We received 24 written submissions from a wide variety of sources, including issuers of infrastructure entities, accounting firms, relevant industry bodies and law firms.

12 Most respondents recognised the need for further improvements to disclosure requirements that would enhance the quality of information provided to retail investors and complement the current disclosure regime for infrastructure entities.

13 Some submissions considered the proposed benchmarks to be unnecessary. However, if a benchmark approach were to be adopted, an 'if not, why not' approach was preferred.

14 The main comments received from respondents on the proposed benchmarks and additional disclosure requirements in CP 134 related to:

(a) whether the definition of 'infrastructure entity' was too broad and captured entities not commonly considered to be infrastructure entities;

(b) whether registered managed investment schemes that focus on investment in listed infrastructure entities as part of an investment portfolio should be excluded from the definition of 'infrastructure entity';

(c) whether the benchmarks and additional disclosure guidance should apply to listed infrastructure entities when they do not apply to other listed entities;

(d) whether the benchmark model for disclosure on an 'if not, why not' basis, which assumes a one-size-fits-all approach, was appropriate, given the varying characteristics of infrastructure assets;

(e) the static nature of the financial matrix benchmarks, many of which were based on industry averages at a fixed point in time;

(f) the view in some submissions that changes in the infrastructure sector had resulted in 'self-correction', which meant that the proposed benchmarks and additional disclosure requirements were unnecessary;

(g) the concern that disclosure of commercial in-confidence information for selected benchmarks might place infrastructure entities at a commercial disadvantage;

(h) the added length, complexity and associated costs of the proposed disclosure documentation;

(i) difficulties in obtaining information to disclose against the proposed benchmarks and to address the additional disclosure requirements, especially for multi-asset minority stake entities;

(j) the possible risk of a reduction in opportunities for retail investors to invest in infrastructure entities because of the introduction of the proposed benchmarks and additional disclosure requirements; and

(k) the possible risk that the proposed benchmarks and additional disclosure requirements would decrease the effectiveness of disclosure by infrastructure entities because retail investors might focus only on information relating to the benchmarks and additional disclosure requirements and not read the full disclosure documentation.

15 After assessing the responses, we conducted a further phase of informal consultation. During the additional consultation phase, we met with seven respondents. Before each meeting, we provided a summary of the key comments received in the responses and our proposed changes to address these comments. The feedback on our proposed changes was generally supportive but some reiterated concerns, such as a dislike for the benchmarks or for separating listed infrastructure entities from other listed entities.

ASIC's response to submissions on CP 134—Amendments made in CP 154

As a result of some of the comments received in response to CP 134, we decided to undertake a second round of public consultation on our proposed guidance for improving disclosure by infrastructure entities. In March 2011, we issued CP 154, which set out our amended proposals in (the form of) a draft regulatory guide. We endeavoured to address in CP 154 many of the comments received on CP 134.

Despite the responses to CP 134, we continued to support the introduction of benchmarks and disclosure guidance for infrastructure entities for the reasons we identified in Table 1 in CP 154.

In response to feedback about the breadth of the proposed definition of 'infrastructure entity' in CP 134, we proposed in CP 154 to adopt one of two options for this definition and sought views on which of these was the preferred option: see proposal B1(a) and Table 2 of CP 154 for more detail. Our intention in CP 154 was to exclude from the proposed Option 1 definition those entities whose primary strategy is to invest in listed infrastructure entities.

> Note: The definition of infrastructure entity in the final regulatory guide has been slightly amended to make this intention more clear.

In response to feedback about the static nature of the financial matrix benchmark, we replaced the benchmark with disclosure guidance on financial ratios and provided the flexibility for infrastructure entities to use other financial ratios where those were considered more appropriate.

We acknowledged industry's comments that certain information may be commercially sensitive and may place infrastructure entities at a distinct disadvantage to other competitors. We amended several benchmarks and some of the disclosure guidance in light of this concern. For example, one of the significant changes made in CP 154 was that certain commercially sensitive information on debt facilities, such as material covenants, need not be disclosed. However, we consider there is some basic information, which is critical to an investor's investment decision, that we believe should be made available to investors: see Sections B and C for more detail.

In CP 154, we recognised that, in certain circumstances, it may be difficult for certain infrastructure entities to disclose the information requested because it was not available to them, especially for multi-asset minority stake entities. We noted in the draft regulatory guide that:

> We would expect those infrastructure entities to use reasonable endeavours to obtain and provide such information to meet the obligations of the responsible entity or officers of a company to have sufficient information to make investment decisions. However, if an infrastructure entity does not have that information, it should disclose why it was not able to provide the information.

We amended the benchmarks and additional disclosure requirements proposed in CP 134 to address many of the other comments received in submissions and consultation meetings: see Sections B and C for more detail. We separated the benchmarks and additional disclosure requirements into two sections: one containing nine benchmarks and the other containing 11 disclosure principles.

We also included information on how and when the proposed benchmarks and disclosure principles should be applied in disclosure to retail investors.

Responses to further consultation—CP 154

16 We received 13 responses to CP 154 from a variety of sources, including infrastructure entities themselves, relevant industry bodies, accounting firms, law firms and one retail investor. Most submissions were submitted on a confidential basis.

17 Some comments received from respondents on the amended benchmarks and disclosure principles reiterated their ongoing concerns, as listed in Table 1 in CP 154.

18 The other main comments received from respondents on our amended proposals in CP 154 related to:

(a) a clear preference for the Option 1 definition of 'infrastructure entity' (our preferred option);

(b) the view in some submissions that the existing *Corporations Act 2001* (Corporations Act) and Regulatory Guide 76 *Related party transactions* (RG 76) were sufficient in dealing with any related party disclosure, which meant that the proposed benchmarks and disclosure principles were unnecessary;

(c) whether the benchmark and disclosure principle relating to valuation information were commercially prejudicial. The valuation of assets, and the assumptions underlying these valuations, are sensitive in nature and may vary greatly over time, reducing the effectiveness of disclosure;

(d) whether the benchmark and disclosure principles may impair a listed infrastructure entity's ability to attract unlisted partners for infrastructure investment because often consortium partners may not accept public disclosure of their confidential information;

(e) whether the regulatory guide would necessitate the disclosure of forecasts, and if so, that any disclosure would have to be made in accordance with Regulatory Guide 170 *Disclosure of prospective information* (RG 170);

(f) the concern that selected benchmarks and disclosure principles appeared arbitrary in nature and did not necessarily match those of internationally recognised accounting standards and, in some cases, seemed to contradict other ASIC listing and offer document requirements;

(g) whether a suitably qualified person or firm would be able to provide the relevant opinion and assurances on all assumptions that the cash flow forecast benchmark was seeking; and

(h) the correct interpretation of our disclosure expectations, especially given the lack of examples or precedents when applying the guidance for the first time—for example, determining how the benchmarks and disclosure principles applied to an initial investment versus ongoing financial disclosure.

ASIC's response to submissions on CP 154—Final guidance (RG 231)

We have worked closely with industry to address many of the comments provided in response to CP 154. We have made some changes to the definition of infrastructure entity, and adjusted the benchmarks and disclosure principles in the final Regulatory Guide 231 *Infrastructure entities: Improving disclosure for retail investors* (RG 231) to address these comments: see Sections B and C for more detail.

While we understand the concerns expressed by industry on the benchmark and disclosure principle model, we believe our response to these concerns is appropriate and have retained our general approach in RG 231. In summary, despite the comments received, we continue to believe that the introduction of benchmarks and disclosure principles for infrastructure entities is appropriate and necessary for the following reasons:

- It is anticipated that significant amounts of capital will be raised from the public over the next decade for investment in infrastructure entities and infrastructure assets.
- Significant deterioration in the value of some infrastructure entities has occurred over the past four years, resulting in a loss of retail confidence in the sector.
- Infrastructure entities often have complex characteristics which retail investors should understand and which warrant benchmarks and disclosure principles for the sector. This does not always apply to other sectors. For example:
  - some infrastructure entities rely on long-range forecasting of patronage or usage, and significant capital depletion can occur when forecasting is too optimistic;
  - infrastructure entities typically have complex models that have been internally prepared and are not released to the public, so there is no investor oversight of these models;
  - market valuations are often not done regularly, so the realisable value of an infrastructure asset cannot be determined;
  - infrastructure entities often undertake material related party transactions and it is important for retail investors to know this so they can assess the rigour surrounding decision-making; and
  - infrastructure entities can lack diversity, which can heighten the risk of loss.
- Benchmarks and disclosure principles can lead to a better understanding of the characteristics and risks associated with investments by focusing an investor's attention on the disclosed information in one location in an otherwise lengthy disclosure document, which a retail investor might not read.

- We do not consider that disclosing against the benchmarks and applying the disclosure principles will result in any significant loss of opportunity for retail investors to invest in the infrastructure sector. Rather, we consider that the improved disclosure will help restore retail confidence in this sector.
- We do not consider that improved disclosure will reduce an infrastructure entity's ability to attract consortium partners who may not accept public disclosure of certain information. Firstly, RG 231 is applicable to all participants on an industry-wide basis. Secondly, disclosure has been limited to information that is important in helping investors to make informed investment decisions, and this improved transparency should assist entities in attracting funding from all investors.
- We have provided guidance on the form of disclosure (i.e. a summary in table form in the first 15 pages of a disclosure document, with cross-referencing to any additional information). We have also provided guidance on web-based disclosure for continuous disclosure obligations. We consider that this guidance will enhance the efficiency and effectiveness of delivery of the disclosure information.

B Definition of 'infrastructure entity'

Key points

In CP 154, we introduced an alternative definition for 'infrastructure entity', and sought feedback on which of the two options was preferred. We proposed the following new definition of an infrastructure entity as:

> A listed or unlisted registered managed investment scheme, company or stapled structure investment that has been offered to retail investors on the basis that its primary strategy or investment mandate is to invest in any of:
>
> (a) infrastructure assets;
>
> (b) the right to operate infrastructure assets; or
>
> (c) other entities which, either directly or indirectly, primarily invest in infrastructure assets.

Most submissions received preferred this alternative definition.

Amendments made in CP 154

19 In CP 154, we proposed an alternative amended definition of 'infrastructure entity' in response to comments provided in submissions on CP 134.

20 Our alternative option defined an infrastructure entity as:

> A listed or unlisted registered managed investment scheme, company or stapled structure investment that has been offered to retail investors on the basis that its primary strategy or investment mandate is to invest in any of:
>
> (a) infrastructure assets;
>
> (b) the right to operate infrastructure assets; or
>
> (c) other entities which, either directly or indirectly, primarily invest in infrastructure assets.

21 This amended definition focuses on the primary strategy on the basis of which interests in the infrastructure entity were sold to retail investors. It clarifies that infrastructure assets are the physical property, plant or equipment of an infrastructure entity, or the contractual right to operate infrastructure assets, thereby addressing concerns about including entities that provide services only. The alternative definition no longer includes any numerical thresholds.

22 We reassessed the list of assets included in the definition of 'infrastructure assets' and believed these to be appropriate.

Summary of responses

23 The main comments received from respondents on the proposed definition for 'infrastructure entity' and 'infrastructure assets' were as follows:

(a) the majority of submissions indicated a preference for Option 1 as the definition of an infrastructure entity;

(b) some submissions were still concerned about the breadth of the proposed definitions for both infrastructure entities and infrastructure assets, and the one–size-fits-all approach. Respondents suggested the following exclusions from the definitions of an infrastructure entity:

(i) managed investment schemes and/or investment companies, whose assets primarily comprise listed infrastructure entities; and

(ii) infrastructure management businesses that provide services to an infrastructure entity or infrastructure asset, which would typically have a different risk–reward profile compared with an owner of infrastructure assets, and

(c) the following should be excluded from the definition of an infrastructure asset:

(i) 'education', 'public housing', 'recreational assets' and 'other transport facilities'; and

(d) a few submissions noted that some infrastructure entities may have a very limited number of retail investors, and to subject them to this disclosure obligation may be unnecessary. Consequently, it may be more appropriate to apply it only to entities that are classified as disclosing entities under the Corporations Act.

ASIC's response

In response to the submissions received, we have adopted Option 1 as the definition for an infrastructure entity.

We have slightly amended this definition to further clarify the exclusion of entities whose primary strategy is to invest in listed securities or service entities, and to limit it to those entities whose primary strategy or investment mandate is to invest in any of:

- the physical plant, property or equipment of infrastructure assets;
- the right to operate infrastructure assets; or
- other unlisted entities which, either directly or indirectly, primarily invest in the assets described above.

The definition excludes:

- managed investment schemes and investment companies, whose assets primarily comprise listed infrastructure entities; and

- infrastructure management businesses that provide services to an infrastructure entity or infrastructure assets. These entities are not engaged in the operation or ownership of an infrastructure asset, and have a different risk–reward profile compared with, for example, an owner of infrastructure assets.

We have amended the definition of an infrastructure asset by excluding gas generation, although we still include gas and electricity distribution. We have reconsidered the characteristics of education, public housing and recreational assets, and deemed these to be sufficiently different to warrant exclusion from the definition at this time. 'Other transport facilities' have also been excluded because these did not add any additional entities to those covered by the current definition.

We still consider it appropriate for the guidance to apply to entities that have been 'offered to retail investors', rather than limiting it to disclosing entities under the Corporations Act. The target audience of RG 231 continues to be all retail investors.

C Benchmarks and disclosure principles

Key points

This section summarises the feedback we received in response to the nine benchmarks and 11 disclosure principles we proposed in CP 154[1]. Feedback on the proposed benchmarks and disclosure principles was generally positive. The main concerns outstanding related to cash flow forecasts, the base-case financial model and valuations.

We have included details of the changes we have made to the benchmarks and disclosure principles arising from the consultation process.

Corporate structure and management

Amendments made in CP 154

24 In CP 154, we made the following amendments to the benchmarks to address the comments received in response to CP 134:

(a) To conform with ASX Guidance Note 26 *Management agreement*, we removed the benchmark on the term of management agreements because of the typically long-term nature of infrastructure assets. In addition, this benchmark may have lost some relevance because many infrastructure entities have internalised their management over the past three years.

(b) We acknowledged the feedback that base fees should be set by the market, and removed the benchmark relating to this fee. In place of this benchmark, we moved the relevant disclosure guidance into 'Disclosure Principle 2: Management and performance fees'.

(c) The benchmark on incentive-based remuneration, being linked to the performance of the infrastructure entity, was moved to 'Benchmark 2: Remuneration of management'. We provided the following note in CP 154 to further explain our intention:

> We believe it is important for investors to understand the extent to which the remuneration of management and board members is derived from the performance of the infrastructure entity. This information will allow investors to form a view about how the incentives and rewards provided to management and the board might influence investment decisions.

[1] In CP 134, we introduced seven benchmarks and additional disclosure guidance. However, in CP 154, we separated the benchmarks and additional disclosure guidance into two sections: one containing nine benchmarks and the other containing 11 disclosure principles: see Appendix 1 for more detail.

We also clarified that the measure of performance would vary depending on the arrangements between the infrastructure entity and its management.

(d) We replaced the benchmark prescribing that performance fees would only be paid from operating cash flows with relevant disclosure guidance in Disclosure Principle 2.

(e) We amended the benchmark on related party transactions—now 'Benchmark 4: Substantial related party transactions'—so that unlisted entities should disclose whether they comply with the requirements of ASX Listing Rule 10.1.

(f) The benchmark on units or shares having the same rights was separated into 'Benchmark 3: Classes of units and shares'. This benchmark is not a prohibition on different classes of units or shares, but simply requires disclosure against the benchmark. Our intention is that the infrastructure entity should disclose the different rights attaching to units or shares that exist at the time the benchmark is introduced. For example, if the units or shares are partly paid, investors should understand what obligations for further payment attach to those units or shares.

25 In CP 154, we made the following amendments to the additional disclosure requirements to address the comments received in response to CP 134:

(a) We moved the relevant additional disclosure requirements on key relationships into 'Disclosure Principle 1: Key relationships', and:

(i) removed the requirement to disclose any material variance between the asset's output and capacity post completion, and the previous assumptions made on output and capacity; and

(ii) removed the requirement to disclose any material inconsistency in the objectives of the key participants in the development.

We noted that key relationships can have an important influence on decisions about infrastructure entities. For example, investment in infrastructure entities that undertake development can be more risky than passive investments.

(b) We removed the benchmarks on management and performance fees and replaced them with relevant disclosure guidance in Disclosure Principle 2. We believe it is important for investors to at least understand the fees payable by an infrastructure entity, the justification for those fees and the funding of those fees.

(c) To address concerns about the inability to pay performance fees where there are no operating cash flows (i.e. for development assets), we included in Disclosure Principle 2 the requirement for separate disclosure in relation to:

(i) mature operating assets; and

(ii) operating assets in the growth phase and development assets.

(d) We moved the additional disclosure requirement on related party transactions into 'Disclosure Principle 3: Related party transactions', and included disclosure of details such as the value of financial benefits payable, the key terms of management agreements, and, if involving a significant infrastructure asset, the steps taken to evaluate the transaction and the availability of an independent expert opinion. This is in line with our policy on related party disclosures (see RG 76).

26 On the basis of the submissions received on CP 134, and in response to some of the queries raised, we confirmed in CP 154 that our preferred approach to enhancing disclosure was the use of benchmarks and disclosure principles, rather than using ASIC's modification powers.

Summary of responses

27 Submissions received on CP 154 were mixed.

28 The main comments received from respondents on the proposed benchmarks and disclosure principles in CP 154 were as follows:

(a) Some respondents queried whether it was appropriate to require unlisted entities to comply with the ASX Listing Rules—specifically, in 'Benchmark 1: Corporate structure and management', and 'Benchmark 4: Substantial related party transactions'. In addition, one submission noted that disclosure of an independent expert opinion might be problematic because it required the expert's consent, which may not be forthcoming.

(b) Some respondents considered the existing Corporations Act and RG 76 to be sufficient in dealing with any related party disclosure.

(c) One submission noted a certain misalignment between the draft regulatory guide and Australian Accounting Standard AASB 123 *Related party disclosure*.

(d) In relation to management remuneration, many submissions sought further clarification on the definition of 'performance' and 'management'. Some also noted that the draft regulatory guide did not recognise the possibility of the infrastructure entity being the parent entity.

ASIC's response

In response to the submissions received, we note the following:

- We have made no material changes in relation to unlisted entities complying with the specified ASX Listing Rules. Given the high proportion of infrastructure entities that are listed, we believe it is appropriate for an unlisted entity to comply with the more stringent requirements under the ASX Listing Rules. For

example, an independent assessment for a proposed related party transaction will help investors understand whether or not the transaction is fair and reasonable.

- We have made a minor amendment to Benchmark 4. The benchmark now requires disclosure against whether the infrastructure entity complies with ASX Listing Rule 10.1 for substantial related party transactions only.
- In relation to related party transactions, no further amendments were made because the benchmark and disclosure principle are in line with our policy on related party disclosure. We note the concern about the inconsistency between current Australian accounting standards and the regulatory guide. The accounting standards have a different purpose and objective from those of the regulatory guide and Corporations Act, and we do not consider it appropriate to set policy based on accounting standards.
- We note that the purpose of Benchmark 2 is to help investors understand the extent to which the remuneration of management is derived from the performance of the infrastructure entity. We are not prescribing any remuneration methods. The entities themselves need to determine the appropriate level of disclosure in this instance. RG 231 has been amended to clarify that:

> Incentive-based remuneration paid to management for the infrastructure entity is derived from the performance of the infrastructure entity and not the performance of other entities within its consolidated group, except where the infrastructure entity is the parent of the consolidated group.

Funding and sustainability

Amendments made in CP 154

29 In CP 154, we made the following amendments to the benchmarks to address the comments received in response to CP 134:

(a) We moved the proposed requirement for infrastructure entities to disclose certain numerical financial ratios into ‘Disclosure Principle 4: Financial ratios’, which provides for an infrastructure entity to disclose whether its actual financial ratios conform to any publicly disclosed target financial ratios. We provided guidance on the financial ratios infrastructure entities might use, but also provided entities with the flexibility to use other financial ratios where those were considered more appropriate. We provided a definition for ‘financial ratios’ in the ‘Key terms’ section of the draft regulatory guide.

(b) We removed the benchmark on an infrastructure entity’s exposure to foreign exchange and interest rate movements and introduced ‘Disclosure Principle 6: Foreign exchange and hedging’, which

provides for an infrastructure entity to disclose whether or not its foreign exchange and interest rate hedging positions are consistent with its disclosed policy on these issues.

(c) We acknowledged the comments about the benchmark on asset values and operating cash flows and removed this benchmark.

(d) We added the new 'Benchmark 5: Cash flow forecast' for disclosure about whether the directors of the infrastructure entity have approved:

(i) a 12-month cash flow forecast for the entity, and engaged a suitably qualified person or firm to check the forecast; and

(ii) an unaudited cash flow forecast for the remaining life of each new significant infrastructure asset.

This benchmark replaces the additional disclosure guidance for infrastructure entities to disclose a cash flow forecast for the next five years.

30 Based on the feedback received, we made revisions to the additional disclosure guidance and introduced separate disclosure principles in CP 154.

(a) The key amendments provided for:

(i) the disclosure of actual financial ratios for the entity, where target financial ratios have been publicly disclosed, and the method of calculating these ratios;

(ii) disclosure of the entity's anticipated capital expenditure during the next 12 months; and

(iii) a breakdown of the entity's debt maturities on a consolidated contractual basis, with the significant change from CP 134 being that certain commercially sensitive information on debt facilities, such as material covenants, need not be disclosed.

(b) We removed the proposed guidance for infrastructure entities to disclose an operating cash flow forecast for the next five years, and replaced it with Benchmark 5, which requires an infrastructure entity to disclose against whether:

(i) a suitably qualified person or firm has checked the 12-month cash flow forecast for the entity; and

(ii) the entity has prepared an unaudited cash flow forecast for the remaining life of each new significant infrastructure asset.

(c) We removed the proposed guidance on the potential impact on the infrastructure entity's ability to refinance when credit markets are disrupted.

Summary of responses

31 Submissions received on CP 154 were varied. The main comments received from respondents on the proposed benchmarks and disclosure principles in CP 154 were as follows:

(a) The target financial ratios were too narrow and may be potentially misleading. Submissions stated that it should be left to the entities to decide on the relevance of any financial ratios. In addition, some respondents suggested that financial ratios depended on the accounting approach taken, which may result in significant differences in the basis on which these financial ratios were calculated, and may make a direct comparison difficult.

(b) Some respondents were concerned about the cash flow forecast benchmark for the following reasons:

(i) Accounting firms noted that auditors would not be able to provide the relevant assurances on all assumptions that the benchmark was seeking, due to their specialised nature and also their inconsistency with some of the proposed updates to the Australian accounting standards issued by the Auditing and Assurance Standards Board (AUASB). Auditors noted that they would be unlikely to allow their opinions (if such opinions were given) to be disclosed in the Product Disclosure Statement (PDS);

(ii) The regulatory guide should not necessitate the disclosure of cash flow forecasts because any disclosure has to be made in accordance with RG 170.

(iii) Entities without an operating history may find it difficult to comply with this benchmark.

(iv) Some entities may only prepare one to five years of cash flow forecast, except for acquisitions.

(v) It may be difficult for an entity with minority interests in infrastructure assets to comply with this benchmark.

ASIC's response

In response to the submissions received on CP 154, we have made the following amendments.

Benchmark 5

It is important to note that RG 231 does not require disclosure of actual cash flow forecasts and/or detailed opinions on these forecasts to be given by independent, suitably qualified persons or independent advisory firms. All disclosure should continue to be made in accordance with RG 170. There do not appear to be inconsistencies with any of the current assurance standards.

In relation to Benchmark 5 applying to entities without an operating history, we have noted in RG 231 that, for the purposes of disclosing against this benchmark, a new infrastructure asset in its first year of operation may be excluded from the forecast—that is, if an infrastructure entity would otherwise meet the benchmark except for the fact that an independent, suitably qualified person or firm would not provide negative assurance on the reasonableness of the assumptions used in the forecast because there is no operating history for the new infrastructure asset, the infrastructure entity may still disclose that it meets the benchmark.

We have amended the benchmark to limit the requirement for approval of an internal unaudited cash flow forecast for 'the remaining life of each significant infrastructure asset' to 'the remaining life, or the right to operate (if less), for each *new* significant infrastructure asset acquired by the infrastructure entity'.

We note the difficulties for entities with multi-asset minority stakes to disclose against this benchmark: see RG 231.24 for our consideration of this issue.

Disclosure Principle 4

No material amendments were made to Disclosure Principle 4.

In the 'Key terms' section, we have made the following minor amendments to the formulas of the proposed financial ratios:

- gearing ratio = net debt / total assets; and
- look-through gearing ratio = net debt / (total assets + proportionate share of assets of equity accounted investments).

We have retained our guidance on financial ratios under Disclosure Principle 4, which requires an infrastructure entity to disclose whether its actual financial ratios conform to any publicly disclosed target financial ratios. We have provided guidance on (rather than prescribing) the financial ratios infrastructure entities might use, but have also provided entities with the flexibility to use other financial ratios where those are considered more appropriate.

Performance and base-case financial model

Amendments made in CP 154

32 In CP 154, we made the following amendments to the benchmarks to address the comments received in response to CP 134:

(a) We revised the benchmark—now 'Benchmark 6: Base-case financial model'—so that the infrastructure entity discloses whether or not, for any new material transaction, and at least once every three years, an auditor or an independent advisory firm has performed certain agreed-

upon procedures to check the infrastructure entity's base-case financial model and whether all material issues identified have been rectified.

(b) We replaced the benchmark on consistency between debt and equity models with 'Disclosure Principle 7: Base-case financial model'.

(c) For the benchmark relating to actual performance of an asset against forecasts, we separated the benchmark into 'Benchmark 7: Performance and forecast' and clarified that it only applies to operating assets.

33 Based on the feedback received, we made revisions to the additional disclosure guidance and introduced separate disclosure principles in CP 154:

(a) We added additional disclosure guidance on an entity's base-case financial model in the form of Disclosure Principle 7, requiring disclosure on:

(i) the process the directors undertook to satisfy themselves that the assumptions were reasonable, including whether an expert gave an opinion on the model and, if so, the provision of a summary of that expert opinion;

(ii) the key assumptions and the source of those assumptions;

(iii) the procedures that the auditor or independent advisory firm has relied on to check the base-case financial model; and

(iv) any conflicts of interest that may arise in relation to the agreed-upon procedures check.

(b) Based on the feedback received, we amended the additional disclosure requirement in CP 134 on the 'three to five' key assumptions affecting the entity's performance to 'up to five' key assumptions in the revised disclosure principle in CP 154, which is split between the operating performance for the next 12 months and the performance of a development asset in its first year of operation.

(c) In the new Disclosure Principle 7, we replaced the benchmark on consistency between debt and equity models. We proposed that the infrastructure entity should disclose any material differences between the assumptions contained in the entity's base-case financial model used to raise equity and the model used to raise debt within six months of each other in a financial year. Despite receiving significant resistance to this disclosure requirement in CP 134, we consider that this is material information for retail investors and have retained it.

(d) We removed the guidance for infrastructure entities to disclose that any independent expert report received complies with RG 170. We acknowledged that such a requirement was the responsibility of the independent expert and not of the infrastructure entity.

(e) We acknowledged that there may be difficulties in accurately predicting the operating capacity of an infrastructure asset. We amended our guidance so that only a reasonable estimate should be provided.

Summary of responses

34 Submissions received on this topic were largely unsupportive. There was resistance from the industry on the use of these benchmarks and disclosure principles.

35 The main comments received from respondents on the proposals in CP 154 were:

(a) that financial models were too complex for retail investors and it did not add value to burden investors with complicated and unnecessary information. In addition, some respondents were unclear whether the base-case financial model related to the infrastructure entity or the assets the entity owned or had an interest in;

(b) that existing accounting standards and continuous disclosure requirements were sufficient;

(c) that it would be difficult for an entity with minority interests in infrastructure assets to comply because of the complexity of structures and the lack of timely information;

(d) that the requirements assumed the existence of an originally disclosed forecast, which may not always be the case. Some respondents considered that comparing actual performance with forecasts was not a useful tool to investors because it offered a simplistic and backward-looking assessment;

(e) that the disclosure principle was highly prescriptive and commercially sensitive, and may place the asset at a commercial disadvantage; and

(f) that the financial model audit was a confirmation of mathematical accuracy rather than a granular examination of the assumptions.

36 Some respondents sought a definition of the terms ‘significant infrastructure asset’, ‘agreed-upon procedures’ and ‘base-case financial model’. Others also indicated that there was no guidance on which metric should be used to measure performance.

ASIC’s response

In response to the submissions received, we have made the following amendments to our final guidance in RG 231.

We acknowledge, in general, industry’s concern that certain information may be commercial-in-confidence. We have limited most of the disclosure requirements to publicly disclosed information only. Nevertheless, we consider that there is some

basic information that is critical to an investor's investment decision and should be made available to investors.

Benchmarks 6 and 7

- We have revised Benchmark 6 so that an assurance practitioner will perform an agreed-upon procedures check on the infrastructure entity's base-case financial model and at least check the mathematical accuracy of the model, including that:
  - the calculations and functions in the model are in all material respects arithmetically correct; and
  - the model allows changes in assumptions, for defined sensitivities, to correctly flow through to the results,

  and there are no findings by the assurance practitioner that would, in the infrastructure entity's opinion, be materially relevant to the infrastructure entity's investment decision.
- We have revised Benchmark 7 to clarify that the benchmark only applies to publicly disclosed forecasts. If no forecasts have been publicly disclosed, the benchmark is not applicable.

Disclosure Principle 7

- We note that 'significant infrastructure asset' and 'agreed-upon procedures' are defined in the 'Key terms' section of RG 231.
- We have clarified that disclosure is only expected in relation to an acquisition of a significant infrastructure asset.
- We have clarified that disclosure of up to five key assumptions in the base-case financial model applies to the infrastructure entity.
- We have clarified that the disclosure principle only applies to publicly disclosed forecasts. If no forecasts have been publicly disclosed, this component of the disclosure principle is not applicable.
- We note the difficulties for entities with multi-asset minority stakes to disclose against this benchmark: see RG 231.24 for our consideration of this issue.

Valuations

Amendments made in CP 154

37 In CP 154, we made the following amendments to the benchmark and additional disclosure requirement, and introduced a separate disclosure principle to address the comments received in response to CP 134:

(a) We removed the proposed benchmark for an infrastructure entity to confirm that its valuations are conducted in accordance with its valuation policy, and to disclose whether the value of an asset is likely

to have changed by 5% or more. This also removed the issue of consistency with the Australian accounting standards.

(b) We moved the relevant additional disclosure requirement into 'Disclosure Principle 8: Valuations'. To address concerns about valuations being made available to members and/or shareholders, we amended the disclosure principle to allow an infrastructure entity to provide a summary of the valuations, rather than the valuation itself. The summary should contain the following information:

(i) who prepared the valuation (including whether the valuation was prepared by management or externally);

(ii) the valuation methodology;

(iii) the date of the valuation;

(iv) the scope of the valuation and any limitations on the scope;

(v) the purpose of the valuation;

(vi) the value assessed and the key assumptions used to determine the value;

(vii) the key risks specific to the infrastructure assets being valued;

(viii) the period of any forecast and terminal value;

(ix) the discount rate; and

(x) the income capital expenditure and capital growth rates over the forecast period.

Summary of responses

38 The submissions received on CP 154 were mixed.

39 Some submissions noted that they would not be prepared to publish any forecast information.

40 Some failed to see the value added by such disclosure on the basis that:

(a) valuations of the same asset could vary significantly over time;

(b) the valuation of infrastructure assets was complex and it was difficult to compare one infrastructure asset with another because of each asset's unique characteristics; and

(c) the disclosure principle was highly prescriptive and commercially sensitive, and may place the asset at a commercial disadvantage.

ASIC's response

In response to the submissions received, we can clarify that Disclosure Principle 8 does not necessitate disclosure of any valuations.

However, if such disclosure is made:

- it should be made in accordance with RG 170; and
- we would consider it prudent to make the supporting documentation available to investors.

If valuations are not available to investors, a summary of valuations should be provided. It is important for investors to have access to, and understand, basic information about valuations and their key assumptions. Some of the information requested is critical to any valuation, and prudent consideration by investors on the appropriateness of these valuations is important.

We acknowledge industry's concern that certain information about valuations is commercial-in-confidence and may place infrastructure entities at a distinct disadvantage to other competitors. We amended several benchmarks and some of the disclosure guidance in light of this concern in CP 154. For example, one of the significant changes from CP 134 was that certain commercially sensitive information on debt facilities, such as material covenants, need not be disclosed. However, we consider there is some basic information about valuations that is critical to an investor's investment decision and should be made available to investors.

We do not consider that disclosure about valuations will reduce an infrastructure entity's ability to attract investment partners or reduce its competitiveness. Firstly, RG 231 is applicable to all participants on an industry-wide basis. Secondly, disclosure has been limited to information that is important in helping investors to make informed investment decisions, and this improved transparency will enhance entities' ability to attract funding from all investors.

Distributions

Amendments made in CP 154

41 In CP 154, we made the following amendments to the benchmark and additional disclosure requirement, and introduced a separate disclosure principle, to address the comments received in response to CP 134:

(a) We amended the benchmark—now 'Benchmark 8: Distributions'—to state that, if the infrastructure entity is a unit trust, it will not pay distributions from scheme borrowings. The rationale for this benchmark is that, if an infrastructure entity that is a unit trust borrows against the assets of the scheme, investors' interests in these assets will generally

rank behind those of the lender. Investors in infrastructure entities with high borrowings face the risk that distributions may not be sustainable. Investors often rely heavily on distributions from investments. To assess whether current distributions are sustainable, investors should understand whether these distributions are funded from income or debt. Investors also face the risk that they may lose part or all of their investment if the entity defaults on these loans.

(b) We moved the relevant additional disclosure requirement into 'Disclosure Principle 9: Distribution policy'. No other material amendments were made. It is important for investors to understand the infrastructure entity's distribution policy, and the source of funding and its sustainability. We noted in CP 154 that this disclosure principle applies only to unit trusts because of existing requirements in the Corporations Act regulating the payment of dividends from companies, which prohibit the payment of a dividend under certain circumstances.

Summary of responses

42 Submissions received reiterated some of the concerns that were expressed previously in response to CP 134, including:

(a) whether it was appropriate to target unit trusts but not companies;

(b) whether the benchmark was uniformly appropriate, as there were often different and legitimate ways for an entity to allocate its distribution to investors that did not entail greater risk; and

(c) that the board was in a better position to determine the entity's distribution policy.

ASIC's response

We reiterate our previous response that Benchmark 8 and Disclosure Principle 9 apply only to infrastructure entities that are unit trusts because of existing requirements in the Corporations Act, which already regulate the payment of dividends from companies and prohibit the payment of a dividend under certain circumstances.

Our approach is consistent with all other current ASIC regulatory guides. We are not prescribing how distributions should be made to investors. We acknowledge that it is the board that makes the final decision on distributions and the source of funding. The purpose of the benchmark is to bring to investors' attention the investment risks associated with funding distributions from scheme borrowings.

Withdrawal and unit price

Amendments made in CP 154

43 We made the following minor changes in CP 154 to the benchmark and additional disclosure guidance, and introduced a separate disclosure principle:

(a) We made minor drafting edits to the benchmark—now 'Benchmark 9: Updating the unit price'.

(b) We moved the relevant additional disclosure requirement into 'Disclosure Principle 10: Withdrawal policy' and:

(i) split the original additional disclosure requirement in paragraph 47(a) of CP 134 into two new paragraphs for clarity; and

(ii) increased the disclosure threshold on capital withdrawal to 10% in light of concerns about what constitutes a 'material' change.

Summary of responses

44 We did not receive any further material comments on this topic.

> *ASIC's response*
>
> We have retained our guidance on withdrawals and updating the unit price in the final RG 231.

Portfolio diversification

Amendments made in CP 154

45 In CP 154, we made the following amendments to the benchmark and additional disclosure guidance, and introduced a separate disclosure principle, to address the comments received in response to CP 134:

(a) We removed the benchmark in acknowledgement of the fact that some entities may not have a portfolio diversification policy.

(b) We moved the relevant additional disclosure requirement into 'Disclosure Principle 11: Portfolio diversification', and replaced the 5% threshold with guidance proposing an explanation should be provided on any material variance that exists between the infrastructure entity's diversification policy and its actual position.

Summary of responses

46 We received very few comments on this topic. One submission noted that this disclosure principle was unnecessary because it was not an issue specific to the infrastructure sector and was most likely to have already been addressed in the risk section of any PDS.

ASIC's response

Portfolio diversification is one of the key investment considerations. While we note that many infrastructure entities are currently single asset operators, there are also many that hold multiple interests in assets across, for example, different locations.

Given the limited feedback received, we have not made any further changes to Disclosure Principle 11.

D Form and method of disclosure

Key points

In CP 154, we retained our recommendation that a PDS or prospectus should contain a table within the first 15 pages summarising the infrastructure entity's disclosure against the benchmarks.

In addition, we updated our guidance on providing updates through ongoing disclosure, the shorter PDS regime, and disclosure via websites.

Some of the submissions received sought further clarification on initial versus ongoing disclosure.

Amendments made in CP 154

47 We provided guidance on how disclosure against the benchmarks and disclosure principles would integrate with the Corporations Amendment Regulations 2010 (No. 5).

48 We consider it important for investors to understand the basic terms of material related party transactions, even if these arrangements are complex.

49 We consider it unlikely that the benchmark and disclosures principles will result in infrastructure entities choosing to operate in other jurisdictions. We think this increased transparency will assist entities to operate more efficiently and effectively.

50 We proposed that disclosure against the benchmarks and disclosure principles should be updated in ongoing disclosures at least annually, and when there are any material changes. In some circumstances, this disclosure may be made through the infrastructure entity's website.

Summary of responses

51 We received few comments on this topic.

52 Some submissions used this section to reiterate their overarching concerns about:

(a) how much value the benchmarks would provide, especially in the format of the example given in CP 154;

(b) whether the disclosure may become lengthy, thereby reducing its relevance; and

(c) how ASIC envisaged that users would locate the cross-referenced benchmarks.

53 Some submissions noted that the nature of the information to be disclosed was not easy to present in the form of a short table without the potential for that information to be misunderstood.

54 Some respondents were unclear whether the benchmarks and disclosure principles applied to initial fundraising and/or ongoing financial disclosure.

55 Some were concerned about failing to correctly interpret the requirements, given the lack of examples or precedents when applying the guidance for the first time.

ASIC's response

We have considered the comments received in response to both CP 134 and CP 154 about the difficulties associated with reducing often complicated matters into just a few pages in a disclosure document. However, we consider the benchmark and disclosure principle information is vital to retail investors. The disclosure difficulties associated with its format have been significantly reduced as we have endeavoured to keep the disclosure information more focused and concise—for example, through the introduction of separate benchmarks and disclosure principles.

We have noted the confusion about whether the benchmarks and disclosure principles apply to initial fundraising and/or ongoing financial disclosure. We have provided further clarification about ongoing disclosure in RG 231.35 and Section E below.

We will assist, as required, with any inquiries that industry may have to resolve any possible issues associated with the interpretation of RG 231.

E Timing for implementation

Key points

In CP 154, we proposed to implement the benchmarks and disclosure principles to cover both new and existing disclosure documents by 1 January 2012.

Some of the submissions received sought further clarification on timing.

Summary of responses

56 Some of the submissions received sought the following clarifications:

(a) whether any PDS dated before 1 January 2012 would have to be replaced or supplemented, or only those PDSs for which the application period was still open; and

(b) the exact timing of when the regulatory guide would come into effect.

ASIC's response

We note RG 231 for our consideration of this issue.

RG 231 will come into effect from 1 July 2012.

We have amended the regulatory guide at RG 231.32 to clarify that existing infrastructure entities, where the product under the prospectus or PDS has ceased to be available to new investors, may address the benchmarks and apply the disclosure principles through ongoing disclosure and bring this to the attention of existing investors. For any existing PDS or prospectus that is still in use as at 1 July 2012, an update to its PDS is warranted. For any PDS dated on or after 1 July 2012, the benchmark and disclosure principle information should be clearly and prominently disclosed.

Appendix 1: Structural differences between CP 134 and CP 154

Table 1 shows the benchmarks and additional disclosure guidance we proposed in CP 134, compared with the corresponding benchmarks and disclosure principles proposed in CP 154 and those used in our final guidance in RG 231.

Table 1: Benchmarks and disclosure principles for infrastructure entities

Proposed benchmarks and additional disclosure in CP 134	Corresponding benchmarks and disclosure principles in CP 154 and final RG 231*
Benchmark 1: Corporate structure and management and additional disclosure guidance	Benchmark 1: Corporate structure and management Benchmark 2: Remuneration of management Benchmark 3: Classes of units and shares Benchmark 4: Substantial related party transactions Disclosure Principle 1: Key relationships Disclosure Principle 2: Management and performance fees Disclosure Principle 3: Related party transactions
Benchmark 2: Funding and additional disclosure guidance	Benchmark 5: Cash flow forecast Disclosure Principle 4: Financial ratios Disclosure Principle 5: Capital expenditure and debt maturities Disclosure Principle 6: Foreign exchange and hedging (CP 154) Foreign exchange and interest rate hedging (RG 231)
Benchmark 3: Assumptions and sensitivity analysis and additional disclosure guidance	Benchmark 6: Base-case financial model Benchmark 7: Performance and forecast Disclosure Principle 7: Base-case financial model
Benchmark 4: Valuation policy and additional disclosure guidance	Disclosure Principle 8: Valuations
Benchmark 5: Distribution policy and additional disclosure guidance	Benchmark 8: Distributions Disclosure Principle 9: Distribution policy
Benchmark 6: Withdrawal policy and additional disclosure guidance	Benchmark 9: Updating the unit price Disclosure Principle 10: Withdrawal policy
Benchmark 7: Portfolio diversification and additional disclosure guidance	Disclosure Principle 11: Portfolio diversification

* These are the same except where noted in Disclosure Principle 6.

Appendix 2: CP 134—List of non-confidential respondents

- Allens Arthur Robinson
- AMP Capital Investors Limited
- ConnectEast Group
- Envestra Limited
- Freehills
- Group of 100 (G100)
- Infrastructure Partnerships Australia
- Investment & Financial Services Association Limited
- KPMG
- Law Council of Australia
- Magellan Asset Management Limited
- Transurban

Appendix 3: CP 154—List of non-confidential respondents

- Agsten, Felicity
- ConnectEast Group
- Freehills
- Group of 100 (G100)
- Infrastructure Partnerships Australia
- KPMG
- Law Council of Australia
- Magellan Asset Management Limited
- PricewaterhouseCoopers
- Transurban