ASIC
Australian Securities & Investments Commission

REPORT 273

Response to submissions on CP 133 Agribusiness schemes: 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 133 *Agribusiness managed investment schemes: Improving disclosure for retail investors* (CP 133) and details our responses to those issues.

About ASIC regulatory documents

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- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
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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 232 *Agribusiness managed investment schemes: Improving disclosure for retail investors* (RG 232).

Contents

A Overview/Consultation process

1 In Consultation Paper 133 *Agribusiness managed investment schemes: Improving disclosure for retail investors* (CP 133), we consulted on proposals to improve disclosure to retail investors by responsible entities of agribusiness managed investment schemes (agribusiness schemes). We want to ensure that retail investors are better informed about the nature of these investments and the risks associated with them.

2 We proposed a benchmark-based disclosure model for agribusiness schemes. The 10 proposed benchmarks focused on key issues such as fee models, the financial position of the responsible entity, arrangements for access to land, water and other licences, and related party arrangements.

3 This report highlights the key issues that arose out of the submissions received on CP 133 and our responses to those issues.

4 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 133. We have limited this report to the key issues.

5 For a list of the non-confidential respondents to CP 133, see the appendix. Copies of these submissions are on the ASIC website at www.asic.gov.au/cp under CP 133.

Responses to consultation

6 We received 17 responses to CP 133 from a wide variety of sources, including responsible entities of agribusiness schemes, relevant industry bodies, law firms and research houses. We also met with interested parties during the consultation period. We are grateful to respondents for taking the time to provide us with their comments.

7 The main issues raised by respondents related to:

(a) our ‘if not, why not’ approach and, in particular, our proposed approach of ‘compliance’ with the benchmarks, as opposed to ‘disclosure against’ the benchmarks;

(b) whether the benchmarks should apply to all agribusiness schemes;

(c) whether annual fees are appropriate for all schemes;

(d) the financial arrangements for responsible entities;

(e) ownership of the land; and

(f) segregation of investors’ money.

8 As a result of the consultation, we have amended our approach so that responsible entities of agribusiness schemes should disclose against five benchmarks on an 'if not, why not' basis, and apply five disclosure principles.

9 Our final guidance is set out in Regulatory Guide 232 *Agribusiness managed investment schemes: Improving disclosure for retail investors* (RG 232), taking into account the feedback from the submissions received. Table 1 lists the 10 benchmarks we proposed in CP 133, compared with our final benchmarks and disclosure principles, as identified in RG 232.

Table 1: Benchmarks and disclosure principles for agribusiness schemes

Proposed benchmarks in CP 133		**Corresponding final benchmarks and disclosure principles in RG 232**	
Benchmark 1	Fee structures	Benchmark 1	Fee structures
Benchmark 2	Track record of the responsible entity in operating agribusiness schemes	Disclosure Principle 2	Track record of the responsible entity in operating agribusiness schemes
Benchmark 3	Responsible entity or other group company ownership of interests in a scheme	Benchmark 2	Responsible entity or related party ownership of interests in the agribusiness scheme
Benchmark 4	Annual reporting to members	Benchmark 3	Annual reporting to members
Benchmark 5	Responsible entity's financial position and use of funds raised	Disclosure Principle 3	Responsible entity's financial position
Benchmark 6	Qualifications of experts	Benchmark 4	Experts
Benchmark 7	Related party issues	Benchmark 5	Appointing and monitoring service providers
Benchmark 8	Land, licences and water-related issues	Disclosure Principle 4	Land, licences and water
Benchmark 9	Third party financing arrangements	Disclosure Principle 1	Investor financing arrangements
Benchmark 10	Replacement of the responsible entity	Disclosure Principle 5	Replacement of the responsible entity

B Proposed benchmarks for agribusiness schemes

Key points

In April 2010, we consulted on improving disclosure for retail investors in agribusiness schemes. This section summarises the feedback we received in response to each of the benchmarks proposed in CP 133.

While there was broad support for improvements in disclosure for retail investors, we have made some changes to the final guidance in response to the submissions received.

Benchmark 1: Fee structures

10 In CP 133 we proposed that members of an agribusiness scheme should pay fees annually (based on the actual costs of operating the scheme) to the responsible entity, and that the responsible entity should use an external custodian to hold the assets of the scheme.

11 Submissions on this benchmark were mixed, with industry raising a number of concerns about the proposed approach.

Annual fees

12 Submissions received raised concerns about the following aspects of the proposed approach:

(a) the benchmark, as drafted, suggests that ASIC has a preferred fee structure for an agribusiness scheme and that:

(i) no matter how appropriate an alternative structure may be, non-compliance with our prescribed model would be perceived negatively in the marketplace; and

(ii) the benchmark should be widened to consider other types of fee models, such as a recurrent fee model or an up-front plus deferred fee model, with accompanying safeguards demonstrating the likely viability of the project as a going concern;

(b) annual fees are less effective for some tax-effective forestry schemes due to the long-term nature of the schemes and the interaction of taxation requirements;

(c) the benchmark should only apply to tax-effective agribusiness schemes;

(d) the ability to determine and successfully levy annual fees would be problematic and overcomplicate the business model, adding an administrative burden and creating additional costs; and

(e) there may be difficulties with levying annual costs on a variable basis, and a reasonable rolling average fee structure should be considered that allows for smoothing over two to three years.

13 We received a number of submissions in support of the proposed benchmark. Some of these respondents recommended further disclosure of the mechanism for determining the costs, and that annual fees should be signed off by an external party.

14 Other submissions noted that responsible entities are only able to claim fees after proper performance of their duties.

ASIC's response

As a result of the submissions received, we have amended the benchmark proposed in CP 133 to address the two main fee structures that are currently utilised in the agribusiness scheme sector. The benchmark has been amended as follows:

The scheme is structured so that either:

(a) investors are required to pay annual fees (or contributions) to the responsible entity that are sufficient to fund the operation of the agribusiness scheme for the relevant financial year; or

(b) the up-front fees (or contributions) investors pay when they invest is sufficient to cover the operation of the agribusiness scheme until the proceeds of sale of produce are available and this money is held on trust for the investors in that agribusiness scheme.

We have moved the 'use of fees' component of the proposed Benchmark 5 in CP 133 to Benchmark 1 in our final guidance. Benchmark 1 now also addresses disclosure, on an 'if not, why not' basis, against the following:

Any fees (or contributions) received by the responsible entity from investors in the agribusiness scheme are:

(a) held separately from the other assets of the responsible entity for the benefit of the investors in that agribusiness scheme, are only available for the operation of that agribusiness scheme and are subject to annual audit; and

(b) only used by the responsible entity to meet any expenses that are incurred in the operation of that agribusiness scheme during the period to be covered by the payment, including the portion of the responsible entity's fees that is proportionate to its duties that have been properly performed during that period.

If the responsible entity does not meet these benchmarks, it should explain the following:

(a) the fee structure of the agribusiness scheme;

(b) how the responsible entity expects to fund the operation of the agribusiness scheme until completion;

(c) the risks associated with the fee structure it has adopted and the mechanisms in place to address these risks; and

(d) based on the fee structure in place, the likelihood of a replacement responsible entity being able to continue to operate the agribusiness scheme if this becomes necessary.

We have not specified a preferred fee structure for agribusiness schemes. However, we consider that the inability of responsible entities to have access to sufficient reserves to operate these schemes to completion, or to obtain additional fees from members in times of financial difficulty, is one of the key factors behind a number of collapses of agribusiness schemes.

We consider that schemes that do not meet this benchmark have the opportunity, in disclosure documents, to inform investors about the arrangements in place that give responsible entities access to sufficient financial resources to ensure the ongoing viability of the scheme.

We have clarified the statutory requirement that a responsible entity can claim fees only for the proper performance of its duties.

Further, in keeping with a responsible entity's legal obligation to hold scheme property on trust for members, and its duty to ensure that scheme property is clearly identified as scheme property and held separately from the responsible entity's property or the property of any other scheme, we believe fees should be held in a separate account until expended. We consider that this practice is of value to ensure that money is available for individual projects for which the contribution has been made.

We expect that a responsible entity will put in place accounting methods that permit accurate cost allocation where it is operating more than one agribusiness scheme.

Custodian

15 Several submissions raised concerns that expecting a custodian to hold the responsible entity's fees may be inconsistent with the *Corporations Act 2001* (Corporations Act) and Australian financial services (AFS) licence conditions.

ASIC's response

We have decided to omit a custodial benchmark because a responsible entity is not generally obliged to appoint an external custodian to hold scheme property, or its fees after these have been drawn down upon proper performance of its duties.

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

16 In CP 133 we proposed that, if it operates other similar agribusiness schemes, a responsible entity of an agribusiness scheme should disclose whether these schemes have achieved any of the forecasts or projections that were promoted to investors, and whether these schemes are expected to meet those forecasts in the future.

17 Support for the benchmark was mixed.

18 Submissions raised concerns about the following issues:

(a) since the issue of Regulatory Guide 170 *Prospective financial information* (RG 170) in 2002, forecasts or projections have not been able to be promoted to prospective investors in disclosure documents, and research houses are generally the entities providing forecast information;

(b) it may be difficult to obtain meaningful data to provide to members and investors for a number of reasons, such as in circumstances where the current responsible entity is not the responsible entity that promoted the scheme;

(c) the benchmark should be revised so that the action involves disclosure against, rather than compliance with, the benchmark;

(d) past performance should not be used as an indicator of future performance;

(e) the benchmark should not apply to long-term forestry schemes;

(f) the benchmark should only apply prospectively so that proper costings and mechanisms can be put in place to capture the necessary information;

(g) it would be difficult to assess historical performance; and

(h) where no forecasts have been provided, this benchmark should be considered inapplicable.

19 Other submissions supported the proposal, noting that:

(a) disclosure of the performance of similar, previously promoted schemes was of value;

(b) such information would assist in meeting the needs of secondary purchasers of agribusiness scheme interests;

(c) it may be beneficial for disclosure to contain an explanation of any variances from forecasts; and

(d) some schemes already disclose similar information on the past performance of projects.

ASIC's response

We consider that it is important for investors to have certain information on the track record of the responsible entity in operating agribusiness schemes.

We have considered the benchmark in light of the responses received and have amended the benchmark (now Disclosure Principle 2 in RG 232) as follows:

> The responsible entity of an agribusiness scheme should disclose the experience and resources it has available to operate the agribusiness scheme and the agribusiness enterprise.
>
> Where the responsible entity has operated other agribusiness schemes, it should disclose:
>
> (a) the number of agribusiness schemes it currently operates;
>
> (b) the types of agribusiness scheme being operated;
>
> (c) the period of time that it has been operating the agribusiness schemes; and
>
> (d) whether any of the agribusiness schemes operated by the responsible entity have produced, or are producing, positive returns net of contributions for the investors in those agribusiness schemes.

We note that, since RG 170 was issued, no forecasts have been permitted in disclosure documents without a reasonable basis.

We have also amended the disclosure we proposed under the annual reporting Benchmark 4 (now Benchmark 3 in RG 232) to include a comparison of the growth, yield, sales price or timing information disclosed in the scheme's Product Disclosure Statement (PDS), periodic disclosure, advertising or promotional disclosure material with what is currently being achieved by the responsible entity: see 'ASIC's response' for Benchmark 4, following paragraph 25 below.

We consider that, where the responsible entity operates a number of agribusiness schemes, the performance of those schemes should be disclosed to investors and, if the schemes have not met the expectations of the responsible entity, this fact should be disclosed.

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

20 In CP 133 we proposed that, immediately following the allocation of interests, a responsible entity or any other group entity should own less than 5% in aggregate of the interests in any single scheme of which it is the responsible entity.

21 There was general support for the proposed benchmark, with a number of respondents referring to the issues faced by several failed agribusiness scheme operators.

22 However, submissions raised the following concerns about the proposal:

(a) the benchmark should be reworded so that the action involves disclosure against, not compliance with, the benchmark;

(b) a responsible entity will generally be unable to comply with this benchmark before interests are issued in the scheme, and there would be limited recourse for investors, in any event, if the responsible entity were to achieve a holding of greater than 5%;

(c) the benchmark should only apply to schemes that are tax effective or require participants to make additional contributions to fund the operation of the scheme;

(d) the benchmark should apply prospectively; and

(e) the benchmark may restrict responsible entity ownership as part of a wholesale funding arrangement.

ASIC's response

We have considered the submissions and have amended the benchmark (now Benchmark 2 in RG 232) proposed in CP 133 as follows:

> The responsible entity and its related parties own less than 5% in aggregate by value of the interests in the agribusiness scheme except for any interests acquired through the default by a member of the agribusiness scheme.

We also consider that the responsible entity should have in place a documented policy concerning the ownership of interests in the agribusiness scheme by the responsible entity and any related party, and that this policy is disclosed to investors.

Benchmark 4: Annual reporting to members

23 In CP 133 we proposed that a responsible entity should (via undertakings in the PDS or some other legally enforceable form) provide members with relevant scheme-specific information at least annually.

24 Submissions mostly supported the benchmark.

25 Submissions identified the following issues:

(a) ASIC should further clarify what we expect for disclosure of the cash position and annual expenses of the scheme;

(b) more information should be provided about the financial position of the responsible entity;

(c) rather than imposing another reporting obligation, we should clarify the information that should be included in the directors' report for a scheme or disclosed to investors under continuous disclosure obligations;

(d) the information provided should first be subjected to external review by the compliance committee or auditor of the scheme;

(e) external independent reviews of agronomic performance should become a standard component of reporting to investors;

(f) the disclosure should differentiate between different types of schemes;

(g) the benchmark should be reworded so that the action involves disclosure against, rather than compliance with, the benchmark; and

(h) a separate benchmark should be drafted for forestry schemes to take into account the longer term nature of these schemes.

ASIC's response

We have amended the benchmark (now Benchmark 3 in RG 232) to omit disclosure about when an undertaking in the PDS or some other legally enforceable form has been entered into. We consider that the statement in the PDS achieves this purpose.

We have clarified in RG 232 that the 'cash position' of the scheme means the money held separately by the responsible entity for the operation of the scheme, and that the 'annual expenses' of the scheme mean those expenses incurred by the responsible entity on behalf of members.

We have also included a reference to the responsible entity's continuing disclosure obligations under Ch 6CA and Pt 7.9 of the Corporations Act and the manner in which disclosure can be made.

In response to submissions on the proposed Benchmark 2 in CP 133 relating to the track record of the responsible entity in operating agribusiness schemes, we have amended the suggested examples of information that we would expect to be disclosed to members to include a comparison of the growth, yield, sales price or timing information disclosed in the scheme's PDS, periodic disclosure, advertising or promotional disclosure material with what is currently being achieved by the responsible entity.

We have also clarified in RG 232 that the information disclosed by responsible entities about their agribusiness schemes may differ from year to year and from scheme to scheme, depending on the information available and the status of the scheme.

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

26 In CP 133 we proposed that:

(a) a responsible entity should draw down on amounts invested or paid by members only to meet fees due and payable and expenses incurred in the operation of that particular scheme during the financial period;

(b) the fee income generated by a scheme should be restricted and only used for the operation of that particular scheme. This does not preclude a responsible entity from claiming expenses (or charging fees) for the particular scheme; and

(c) a responsible entity should not rely on funding from external or related parties to perform its functions and obligations under the terms of the scheme's constituent documents.

27 Feedback received on this benchmark was varied, with some respondents believing the benchmark could go further, while others considered that certain aspects of the benchmark were unrealistic.

28 Submissions received raised a number of issues, including the following:

(a) there have been numerous examples, in the broader financial service sector, of funds being contained in an entity's consolidated revenue account or in 'pools', rather than in separately quarantined accounts, which has allowed the entity to use funds at its discretion with disastrous consequences;

(b) there may be practical difficulties in allocating costs between different schemes operating on the same plot of land;

(c) the benchmark should be reworded so that the action involves disclosure against, as opposed to compliance with, a particular model or structure;

(d) the benchmark restricts a responsible entity's ability to enter into cross-guarantee arrangements; and

(e) the benchmark appears to be imposing additional conditions on responsible entities, similar to AFS licence conditions, which is inappropriate.

ASIC's response

Responsible entity's financial position

In response to the submissions, and to address concerns about the perceived prohibition on borrowing and reliance on related parties, we have amended our approach (now Disclosure Principle 3 in RG 232). The amended disclosure principle states the following:

> The responsible entity should disclose a summary of its financial position in any PDS, including details of any known unfunded obligations in respect of the schemes it operates.
>
> The responsible entity should disclose if it:
>
> (a) is reliant on funding from external or related parties to perform the functions and obligations to members in relation to the agribusiness scheme;
>
> (b) has entered into guarantees or indemnities with external or related parties; or
>
> (c) is a member of a tax consolidation group.
>
> It should also disclose the measures it has in place to address the risks arising out of these arrangements to its financial position and its ability to meet its obligations in relation to the agribusiness scheme.
>
> If the responsible entity is reliant on funding from external or related parties to perform its functions and fulfil its obligations in relation to the agribusiness scheme, it should disclose the extent of the reliance.
>
> If the responsible entity has entered into any guarantee or indemnity with external or related parties, it should explain:
>
> (a) what each guarantee or indemnity is, including the names of the parties to the guarantee; and
>
> (b) the potential implications of entering into these arrangements on the financial position of the responsible entity if the other parties are unable to meet their obligations.
>
> If the responsible entity is a member of a tax consolidation group, it should disclose details of:
>
> (a) whether a tax-sharing agreement is in place and the parties to the tax-sharing agreement; and
>
> (b) if no tax-sharing agreement is in place, the potential implications of not having this.

Use of fees

We have moved the 'use of fees' component from this benchmark to Benchmark 1. This seems to be a more relevant location for this information: see 'ASIC's response' for Benchmark 1, following paragraph 14 above.

Benchmark 6: Qualifications of experts

29 In CP 133 we proposed that experts engaged by a responsible entity to provide professional or expert opinions about an agribusiness scheme should hold and maintain relevant qualifications, and be independent. These qualifications should be disclosed to investors. If an expert is not suitably qualified or independent, the responsible entity should explain why the opinion can be relied on.

30 In addition, we proposed that, where an independent expert opinion is not obtained, responsible entities should explain why not.

31 There was general support for our proposal.

32 Submissions recommended additional obligations, such as:

(a) responsible entities maintain a panel of independent experts;

(b) letters of instruction to experts are disclosed;

(c) experts are suitably experienced in the geographic region and the commodity involved;

(d) a minimum of two independent reports are obtained;

(e) the proportion of an expert's work with the responsible entity is disclosed; and

(f) an expert should have an appropriate level of professional indemnity insurance.

33 Other submissions proposed limiting this benchmark to schemes that include a report by an expert. If an expert opinion is *not* included, it was argued that entities should be able to state that the benchmark is not applicable, or preferably not include the benchmark, to minimise any unnecessary disclosure in the PDS.

ASIC's response

We have amended the proposed benchmark (now Benchmark 4 in RG 232) as follows:

> Where the responsible entity engages an expert to provide a professional or expert opinion on the agribusiness scheme, and the expert opinion is disclosed to retail investors in a way that may lead them to place reliance on the expert's expertise, the responsible entity only engages an expert that is independent.

In addition to disclosing against this benchmark, responsible entities should also disclose the following:

(a) a summary of the instructions to the expert;

(b) the qualifications held by the expert and the relevance of these to the opinion;

(c) whether the expert has experience in the commodity in the geographical location being considered or proposed or in any other subject matter of the opinion;

(d) the proportion of the expert's work with the responsible entity; and

(e) whether the responsible entity requires the expert to maintain professional indemnity insurance.

We have also clarified that this information should be disclosed in the relevant PDS and other material provided to a scheme's members that includes opinions from experts (e.g. annual reports).

Benchmark 7: Related party issues

34 In CP 133 we proposed that any service agreements entered into by a responsible entity for an agribusiness scheme should be disclosed to investors, be subject to a competitive tender process and annual review against set performance requirements, and be approved by the board of the responsible entity.

35 Generally, there was support for disclosure of the service arrangements entered into by the responsible entity with other parties for the operation of the scheme, and of the assessment processes used by the responsible entity.

36 Submissions received highlighted the following issues:

(a) The benchmark should be reworded so that the action involves disclosure against, rather than compliance with, a particular model or structure.

(b) Contracts entered into by the responsible entity should be made publicly available.

(c) Where the responsible entity provides the services, there is no need to seek competitive pricing. A competitive process may also not be appropriate if a related party is the only suitable provider of the services. The submission proposed that, in these cases, it may be more appropriate for the responsible entity to disclose why the arrangements are in the best interests of members, rather than why the related party is the best party to provide the services.

(d) The blanket approach proposed may mean that all agreements will need to be subject to tender when this may be of limited commercial benefit. Also, considerations other than price may mean that the party best positioned to provide the required services is not the cheapest. This submission agreed, however, that it would be appropriate for responsible entities to explain the process for selecting and appointing material service providers.

(e) Overturning current arrangements to try and meet this benchmark is 'nonsensical' and, if the fee paid to the service provider is 'cost plus' based, then commercial rates, competitive process or performance-based contracts should be demonstrated by the responsible entity.

(f) While the title of the benchmark indicates it applies to related parties, the benchmark actually applies to all service agreements, whether with a related party or with an external service provider. These submissions asked us to clarify this position.

(g) We should consider defining the term 'related party' as in other regulatory guidance.

ASIC's response

In response to the submissions received, we have amended the benchmark (now Benchmark 5 in RG 232) as follows:

> The responsible entity only engages key service providers (whether directly or indirectly on behalf of the agribusiness scheme investors) necessary for the operation of the agribusiness scheme where:
>
> (a) the engagement is subject to a written agreement approved by the board of the responsible entity in accordance with a documented policy;
>
> (b) the agreement is subject to annual review against set performance criteria or measures; and
>
> (c) the agreement is subject to certification by the board, at the time each agreement is entered into, that the agreement is on an arm's length basis.

We have amended the title of the benchmark to 'Appointing and monitoring service providers'. This is because the benchmark applies to all service agreements, rather than just those with related parties.

We consider that any PDS should disclose the details of the parties to any agreements that have been entered into for the scheme at the time of the PDS's publication, the key terms of these agreements and the amounts paid to the parties under these agreements.

We have defined the term 'related party' in RG 232.

We note that there are many factors that need to be considered as part of the process of appointing an external service provider, including the fundamental ability of parties to provide the services required. We do not expect responsible entities to necessarily engage the parties that will impose the least cost on the scheme or responsible entity. Rather, the responsible entity should assess the ability of any proposed service providers to ensure they are able to provide the services required.

In addition, responsible entities need not enter into an annual tendering process. However, when contracts are up for renewal, they should undertake a due diligence process to ensure that any service provider is appointed on terms that are in the best interests of the members of the scheme.

We consider that, when the responsible entity is providing the services to the scheme, it should disclose the fees it will receive. This will give investors enough information to determine whether it is charging fees that are comparable with other responsible entities.

We consider there is also merit in the responsible entity disclosing a summary of its policy on appointing and monitoring service providers, including the board assessment and approval process.

Benchmark 8: Land, licences and water-related issues

37 In CP 133 we proposed that a responsible entity should disclose whether the land, licences, and water, water-related infrastructure and water rights, are scheme property, and whether these assets are used as security for borrowings. We proposed that the directors should expressly state that they believe a scheme has access to sufficient water to meet the needs of the scheme.

38 We received mixed feedback on this benchmark.

39 Submissions raised the following issues:

(a) Adding land to scheme property will increase the investor cost base and potentially reduce tax effectiveness and returns to investors. Land ownership is also not appropriate for all business models. In some circumstances, it is better to lease the land rather than own it.

(b) If a scheme owns the land, the responsible entity may also need to be authorised to invest in real property and engage persons with real property experience. This may increase the costs associated with operating an agribusiness responsible entity.

(c) The proposed benchmark does not take into account schemes that are structured to give investors an interest in the scheme and an interest or share in a separate land-holding entity, or circumstances where the responsible entity owns the land, and any attaching water rights associated with the land form part of the leases entered into between the scheme and the responsible entity.

(d) The benchmark does not take into account the requirement under the licence conditions of agribusiness responsible entities to take steps to protect the underlying land. Existing risk disclosure requirements are adequate to ensure disclosure of the risks if the land and water allocation are not scheme property.

(e) The benchmark involves further disclosure on the risks associated with leasing land. Disclosure should also address ownership of the commodities being farmed, particularly if the scheme should collapse.

(f) It is inappropriate for directors of the responsible entity to declare they have adequate water. Rather, they should disclose if there is insufficient water.

(g) The benchmark should reflect the fact that some schemes rely on precipitation rather than water rights.

(h) Responsible entities should have arrangements in place to cover emergencies or circumstances where members fail to make annual fee payments.

(i) The benchmark should only apply to schemes where produce is grown on the land. This is because schemes involving livestock do not own or need to own real property, or have defined water allocations for the operation of the scheme.

(j) Owning the legal rights to the land for the term of the project via a complying lease (i.e. a lease where rent is paid when due and on commercial terms) is more important than owning the land. This is because commerciality will be important if the responsible entity fails.

ASIC's response

The purpose of this benchmark was to highlight to investors that the land and other infrastructure required to operate the scheme may be owned by other parties and that there are risks associated with such holding arrangements.

Taking into consideration the submissions received, we have amended our approach (now Disclosure Principle 4 in RG 232) as follows:

The responsible entity should disclose the arrangements entered into to secure rights of access or tenure to the resources and infrastructure required to operate the agribusiness scheme, including any land, licences or leases, and water required, and whether these arrangements:

(a) provide for access for the life of the agribusiness scheme; and

(b) are entered into on an arm's length basis.

The responsible entity should disclose:

(a) the risks associated with these arrangements;

(b) the consequences of a failure by the responsible entity to pay amounts due under these arrangements, and any breaches of these arrangements or agreements underlying these arrangements; and

(c) any measures the responsible entity has implemented, or will implement, to address these risks.

The responsible entity should disclose the identity, where known, of the owner of the resources and infrastructure referred to above, the terms of use and whether security has been given over these assets.

The responsible entity should disclose (where applicable) for any leases, licences, rights or infrastructure required for the operation of the agribusiness scheme:

(a) whether the responsible entity treats the leases and licences or rights as scheme property;

(b) the identity of the parties to the leases, licences and/or rights; and

(c) whether any action in relation to a lease, licence or right needed for the operation of the agribusiness scheme, which is not an obligation of the responsible entity, could endanger the relevant lease, licence or right. Disclosure should clarify the risk of this occurring and how it may affect the agribusiness scheme.

If land, licences or water assets are, or are proposed to be, used as security for borrowings by the responsible entity, the responsible entity should disclose the level of actual or proposed gearing, and the risks associated with this gearing, in the PDS and in the report provided to members under Benchmark 3.

Benchmark 9: Third party financing arrangements

40 In CP 133 we proposed that, if a responsible entity or a related party is providing finance or arranging for finance to be provided to members of an agribusiness scheme to fund an investment into the scheme, then specific disclosures about the loans should be included in the PDS.

41 There was strong support for the disclosure introduced by this benchmark.

42 Submissions received raised the following issues:

(a) the benchmark should go further and include details on the level of establishment fees and the impact of the financier incorporating non-standard financial instruments into the loan agreements;

(b) it is inappropriate for the responsible entity to include details of financing arrangements in a PDS if it is not providing the finance facility;

(c) the risks associated with borrowing to invest in these schemes should be clearly disclosed, and consideration should be given to disclosure of the extent to which the responsible entity's investor base in all its operational schemes is leveraged, because responsible entities may be exposed to the risk of investors defaulting on their obligations;

(d) applying this benchmark to agribusiness schemes is inappropriate because any negatively geared managed investment scheme would have similar issues;

(e) the information in the benchmark is already provided; and

(f) Australian Taxation Office product rulings generally already require finance to be on a full recourse basis.

43 We also note that investment lending has been identified as an item that will be reviewed under Phase 2 of the reform of consumer credit, and that the outcomes of this may affect the benchmark.

ASIC's response

We have amended our approach (now Disclosure Principle 1 in RG 232) as follows:

If the responsible entity or a related party is providing finance, or expects to receive payment for arranging finance, for investors in the agribusiness scheme to fund an investment into the scheme, the responsible entity should clearly and prominently disclose in the PDS:

(a) the details of the financier;

(b) any amounts paid to the responsible entity or related party in relation to the finance;

(c) that the investor should obtain and read the finance agreement before entering into the finance facility; and

(d) unless the proposed finance facility is non-recourse, that the investor will remain liable to repay the amount lent or provided under the facility should the scheme fail.

We have also amended the title of the disclosure principle to 'Investor financing arrangements'.

In addition, we consider that, in these circumstances, it is appropriate for investors to receive a copy of any finance documents, setting out the complete terms and conditions of the agreement, before entering into a finance facility.

Benchmark 10: Replacement of responsible entity

44 In CP 133 we proposed that a responsible entity of an agribusiness scheme should disclose whether scheme and contractual documents adequately provide for a change in responsible entity, and whether the responsible entity or related parties are eligible for any payment or fee if the responsible entity is replaced.

45 Submissions were generally supportive of the proposed benchmark.

46 Submissions received raised the following issues:

(a) the first part of the benchmark is unnecessary because the Corporations Act already governs the arrangements for any change in responsible entity;

(b) the benchmark should be amended to remove the word 'adequately';

(c) it may be helpful if the terms in scheme constitutions for the removal and replacement of responsible entities are clarified and standardised. The PDS should also outline the options available to investors in the event of a responsible entity's insolvency or poor performance;

(d) the second part of the benchmark is unnecessary because the existence of removal or replacement fees should already be disclosed in any PDS; and

(e) removal fees should be allowed where the outgoing responsible entity has performed its duties and the basis of payment is fair and transparent.

47 Another respondent identified concerns about the process and effect of the replacement of a responsible entity. In particular, this submission noted the effect on an investor's right to withdraw from the scheme should the responsible entity become insolvent, and that any such right may be removed by the replacement of the responsible entity. In addition, there may be an adverse effect if a related party of the responsible entity is providing finance to growers. To address these issues, it was submitted that the scheme documents and PDS should address the interaction between insolvency and replacement, and that scheme documents should give investors the right to exit the scheme.

ASIC's response

In response to the submissions received, we have amended our approach (now Disclosure Principle 5 in RG 232) as follows:

> The responsible entity should disclose whether there are any restrictions on the ability of any replacement responsible entity to access the resources required to continue to operate the agribusiness scheme (including but not limited to any leases, licences, land, water and money held for the purposes of operating the scheme).
>
> The responsible entity should also disclose:
>
> (a) whether the responsible entity or related parties are eligible for any payment or fee that is payable if the responsible entity is replaced, or is to be replaced, and, if so, the amount or method for calculation of this fee;
>
> (b) the effect of a change in responsible entity on any agreements entered into between investors and the responsible entity or other parties in relation to the agribusiness scheme;
>
> (c) any obligation to repay fees already paid to the responsible entity to the incoming responsible entity if the responsible entity changes; and
>
> (d) the risk to, and impact on, investors if the responsible entity changes.

C Other proposals

Key points

In CP 133 we proposed that:

- the responsible entity of an agribusiness scheme should disclose against the benchmarks in PDSs and ongoing disclosure, and support this disclosure in any advertising for the scheme;
- the benchmarks should apply to all types of forestry and non-forestry schemes required to be registered under s601ED of the Corporations Act;
- the benchmarks should apply to any PDS dated on or after 30 September 2010 and to ongoing disclosure from that time; and
- disclosure documents should contain an investment overview in the form of a summary table within the first 15 pages setting out disclosure against the benchmarks.

Up-front disclosure in PDSs

48 Submissions supported our proposal that responsible entities should disclose against the benchmarks in PDSs, but raised a number of concerns, including that PDSs would be longer and, therefore, more costly to prepare. The question was also raised about how disclosure against the benchmarks would affect Short-Form PDSs.

ASIC's response

We consider that the benefits to investors of having disclosure against the benchmarks in the PDS outweigh the concerns raised. We have reviewed our position and consider that, given the importance of the disclosures, they should be provided in a table within the first few pages of any PDS.

In the case of a Short-Form PDS, we consider disclosure could be made about whether or not the responsible entity meets the benchmarks, or has disclosed the disclosure principle information, and investors referred to where they can obtain further information.

Ongoing disclosure

49 In relation to our proposal about ongoing disclosure, submissions raised the issue that responsible entities of existing agribusiness schemes have not been structured to provide this additional level of disclosure. The question was raised about whether disclosure against the benchmarks should apply to existing schemes where there are no new investors and no investors can withdraw.

ASIC's response

We consider that the benchmark and disclosure information is important to both prospective and existing investors. We consider that this information has always been the type of information that should be disclosed in a PDS under s1013D–1013E of the Corporations Act.

We believe providing the benchmark and disclosure information improves the quality of the information available to investors and that investors in existing schemes would benefit from this disclosure, allowing them to be better informed about the status of their investment and their obligations in relation to the investment.

We note that responsible entities of existing agribusiness schemes already have several other ongoing disclosure obligations under Ch 6CA and Pt 7.9 of the Corporations Act. We encourage responsible entities of existing schemes, in which no offers are made on or after 1 August 2012, to provide the benchmark and disclosure principle information to investors in these schemes as a matter of best practice. This could be done using the responsible entity's normal investor communication channels.

We consider that responsible entities of existing schemes should consider the benchmarks and disclosure principles as part of their ongoing disclosure obligations and, where there is a significant change to circumstances covered by the benchmarks and disclosure principles, this should be communicated to investors.

Advertising

50 In relation to our proposal about advertising, submissions raised concerns that it would be impractical to address the benchmark disclosure in advertising, and that this may create additional costs for no additional value.

ASIC's response

We expect responsible entities of agribusiness schemes to ensure that any advertising is consistent with the benchmark and disclosure principle information. We note that it is not necessary for advertising to contain the benchmark or disclosure principle information.

Who the guide applies to

51 In CP 133 we stated that we intended to apply a broad approach to identifying agribusiness schemes that should disclose against the proposed benchmarks. We defined an agribusiness scheme as all types of forestry and non-forestry schemes that are required to be and/or are registered under s601ED of the Corporations Act.

52 Submissions raised the issue of whether disclosure against the benchmarks should apply to agribusiness schemes that are not promoted as tax effective, to wholesale schemes, or to schemes that are listed.

ASIC's response

We consider that the benchmarks and disclosure principles should apply to all agribusiness schemes in which retail investors invest directly or indirectly to ensure comparative disclosure across the entire sector.

Timing for implementing improved disclosure

53 In CP 133 we stated that our expected timing for implementation would be subject to the ultimate publication of a regulatory guide but that we expected the benchmarks would apply to any PDS dated on or after 30 September 2010.

54 Submissions raised concerns with the proposed start date in CP 133 for a number of reasons, including the additional burden on responsible entities that are finalising financial reports. It was also noted that existing members cannot withdraw from schemes. A number of submissions proposed a date of 31 December 2010 for implementation of disclosure against the benchmarks, while others stated that we should allow a three-month implementation period.

ASIC's response

As a result of the submissions received, and the timing of the publication of RG 232, we have allowed a period of six months, until 1 August 2012, after which responsible entities of agribusiness schemes that have a current PDS in use should provide improved disclosure to retail investors in response to the regulatory guide.

Consistent with our approach in Regulatory Guide 45 *Mortgage schemes: Improving disclosure for retail investors* (RG 45) and Regulatory Guide 198 *Unlisted disclosing entities: Continuous disclosure obligations* (RG 198), the initial update to existing investors may be given by online disclosure, as long as the responsible entity currently communicates with members in this way.

Responsible entities may also be able to update disclosure information in current PDSs through online disclosure, provided that omitting the information in the PDS itself would not be materially adverse to investors: see Class Order [CO 03/237] *Updated information in product disclosure statements*.

Investment overview

55 In CP 133 we proposed that disclosure documents should contain a summary in table form within the first 15 pages setting out the agribusiness scheme's disclosure against the benchmarks, including an explanation on an 'if not, why not' basis if the benchmark is not met.

56 Most submissions did not raise an issue with this proposal. However, some respondents noted that disclosure against certain benchmarks may cause difficulties in achieving clear, concise and effective disclosure.

ASIC's response

We have included guidance in RG 232 on how a PDS can be presented clearly, concisely and effectively, including through the use of an investment overview as the first substantive part of the PDS to highlight. This provides a meaningful summary of information that is key to a retail investor's investment decision.

The investment overview should contain at least a summary of the benchmark and disclosure principle information, and provide balanced disclosure of the benefits and risks of the investment.

Appendix: List of non-confidential respondents

- Butcher, Peter
- CPA Australia Ltd
- Forest Products Commission Western Australia
- Institute of Chartered Accountants in Australia
- Macpherson & Kelley Lawyers Pty Ltd
- Macro Funds Ltd
- McCullough Robertson Lawyers
- McMahon Clarke Legal
- Primary Securities Limited
- Smart, Kerin
- Trust Company Ltd
- Zenith Investment Partners Pty Ltd