



ASIC

Australian Securities & Investments Commission

REPORT 113

Report on submissions for CP 94 Debenture advertising

December 2007

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 94 *Debenture advertising* (CP 94) and details our responses in relation to those issues.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 156 *Debenture advertising* (RG 156) and Regulatory Guide 69 *Debentures—improving disclosure for retail investors* (RG 69).

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A Overview/Consultation process

- 1 In Consultation Paper 94 *Debenture advertising* (CP 94) we sought comments on a draft regulatory guide containing standards for debenture advertising. This consultation followed our initial proposals on debenture advertising set out in Consultation Paper 89 *Unlisted, unrated debentures* (CP 89).
- 2 This report highlights the key issues that arose out of the submissions we received on CP 94 and our responses to those issues.
- 3 This report is not meant to be a comprehensive summary of all the responses we received. It is also not meant to be a detailed report on every question from CP 94. We have limited this report to the key issues.
- 4 For a list of the non-confidential respondents to CP 94, see Appendix 1. Copies of their submissions are on the ASIC website at www.asic.gov.au/cp under CP 94.

Responses to consultation

- 5 We received around 20 responses to CP 94 from debenture issuers, publishers, relevant industry bodies and consumer representatives. We appreciate respondents taking the time to comment on the draft guide.
- 6 Most of the submissions made by debenture issuers opposed some of the standards proposed in the draft guide. However, other submissions, including submissions by consumer representatives and industry associations, were very supportive of the proposed standards.
- 7 The main issues raised by respondents related to:
 - the requirements associated with credit rating disclosure when interest rates are part of the advertising;
 - the use of certain words, such as ‘no fees’ and ‘guaranteed’, in debenture advertising; and
 - the responsibility of publishers to screen debenture advertisements to ensure they do not breach the standards.
- 8 We concluded that the regulatory benefit of protecting retail investors from misleading debenture advertisements by raising standards in this area outweighs the regulatory cost to debenture issuers and publishers. We have therefore maintained the overall approach in the draft guide and only altered

our standards on debenture advertising where consistent with consumer protection. Our final guidance is set out in Regulatory Guide 156 *Debenture advertising* (RG 156).

B Interest rates and credit rating disclosure

Key points

Should we require disclosure of a debenture's credit rating status (i.e. whether the debenture has been rated by a recognised credit rating agency) if the advertisement quotes an interest rate?

- 9 References to interest rates in debenture advertising tend to influence retail investors. These references can be misleading if there is no indication of the risk of non-payment.
- 10 We consider that credit ratings prepared by a recognised credit rating agency are a reasonable way of communicating the credit risk of debentures. It is also important for investors to know if a debenture does not have a recognised credit rating and what this means.
- 11 The draft guide therefore proposed that advertisements for debentures should only quote interest rates if there was equally prominent disclosure of either:
- (a) a current credit rating of the debenture received from a recognised credit rating agency and a brief explanation of the rating; or
 - (b) a statement that the debenture does not have a current credit rating from a recognised credit rating agency and that this means that no external assessment has been made about the risk of investors losing all or part of their principal investment.
- (See the draft guide in CP 94 at RG 000.8–RG000.9.)
- 12 Many submissions from issuers and some submissions from publishing representatives argued that the proposed disclosure on credit rating status (i.e. whether the debenture has been rated by a recognised credit rating agency) was impractical, especially for short radio and television advertisements. A number of issuers also said that devising a brief explanation of a credit rating would be difficult.
- 13 Some of these submissions said the proposed warning statements were too long and legalistic and queried their usefulness for retail investors. They also either opposed or sought clarification on the 'equal prominence' requirement.
- 14 There was also concern that the proposed disclosure of a debenture's credit rating status put too much emphasis on credit ratings, especially in comparison to other disclosure benchmarks in RG 69. It was argued that the proposed warning statements might give investors the impression that rated

debentures are less risky than unrated debentures, when this is not necessarily the case.

- 15 Submissions by consumer representatives and industry associations were supportive of credit rating disclosure but said that further warnings were needed on the risk of investors not being repaid their money: see Section C.

ASIC's response

We believe that disclosure of a debenture's credit rating status is important if an advertisement makes claims about the interest rate or likely investment return.

However, the final guide, RG 156, does not prescribe boilerplate, legalistic warning statements. We have given issuers the flexibility to devise their own warning statements. RG 156 also allows issuers to provide an explanation of the debenture's credit rating in the prospectus rather than in the advertisement.

We remain of the view that advertisements for unrated debentures should include a statement that they are not rated and what this means.

To simplify the requirement, RG 156 requires that the disclosure about credit rating status must be prominent rather than 'equally prominent'. This clarifies that it need not be in the same font size as the interest rate statement.

C Comparison with bank deposits and risk free suggestions

Key points

The draft guide discouraged comparisons with bank deposits and the use of words that suggest a debenture investment is secure.

- 16 Advertising of debentures has often given retail investors the mistaken impression that debentures are like bank deposits but with a higher interest rate. Investors often fail to realise that debentures are a riskier investment than bank deposits.
- 17 The draft guide therefore said that advertisements for debentures should not suggest that debenture is comparable to a bank deposit or that there is little risk of an investor losing their money: see the draft guide at RG 000.16. Most submissions agreed with this guidance.
- 18 The draft guide also stated that words such as ‘secure’, ‘secured’, ‘guaranteed’, ‘safe’, ‘deposit’ ‘first ranking’ and ‘no fees’ should be avoided in any debenture advertising: see the draft guide at RG 000.17. In our view, the words ‘no fees’ suggest a favourable, yet incomplete, comparison with bank deposits. The use of terms such as ‘secured’ and ‘guaranteed’ in advertising may give a misleading impression as to the risks associated with a debenture offering.
- 19 A number of issuers argued that it was not misleading to advertise that a debenture had ‘no fees’ or was ‘secured’ where these statements were factually correct. Some issuers argued that not being able to use these terms in advertising would be depriving investors of important information.
- 20 Consumer representatives and industry associations submitted that it is imperative that investors can distinguish between a debenture and bank deposit and realise that investing in debentures puts their principal at risk. These groups advocated more direct warnings on these issues.

ASIC's response

We do not accept that terms like 'secured' or 'guaranteed' should be used in advertising where they cannot be adequately explained. As a matter of law, a statement that is factually true can be rendered misleading when taken out of context.

Similarly, the claim 'no fees' invites a favourable comparison with bank deposits (which usually have fees) but does not provide a complete comparison by disclosing the greater risks associated with debentures.

We accepted the submissions by consumer representatives arguing for more specific warnings on these issues. RG 156 therefore requires that all debenture advertising contain a warning that the product is not a bank deposit and that investors risk losing some or all of their principal investment.

D The responsibility of publishers and the media

Key points

What role should publishers and the media have in screening debenture advertisements to ensure they are not misleading or deceptive?

- 21 The draft guide said that publishers should be aware of the risks that debentures pose and adopt screening methods to detect and refuse debenture advertisements that do not comply with our advertising standards: see Section D of the draft guide.
- 22 From our consultation, it appears that most publishers screen all advertisements that they publish and ensuring compliance with our standards for debentures would not be too onerous. The publishing representatives said that they were keen to work with ASIC to stop misleading debenture advertisements.
- 23 However, the Australian Publishers' Bureau said that screening all advertisements was not feasible for print publishing, given the time frames and technological processes.¹ A few other submissions argued that issuers should have the sole responsibility for their debenture advertising.
- 24 Other submissions inquired as to how ASIC would enforce such requirements and whether we would consider trying to negotiate changes in the current codes of practice in these industries.

ASIC's response

ASIC appreciates the willingness of publishing representatives to work with us to deal with misleading debenture advertisements.

As set out in RG 156, we will help publishers to detect misleading advertisements by making information available about debenture issuers who are either subject to a stop order or have been subject to a stop order in the past.

However, publishers should also have their own systems to detect debenture advertisements that contravene the advertising standards set out in RG 156.

Some publishers and media personalities have played an active role in promoting high-risk debenture offerings to retail investors. This type of involvement may mean that the defence in s1044A against the misleading conduct provisions is inapplicable. It may also attract liability under the general law, e.g. the law of negligence.

¹ Submission dated 28 November 2007, page 5.

Key terms

Term	Meaning in this document
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> (Cth) including regulations made for the purposes of that Act
bank deposit	A deposit with an APRA regulated bank, building society or credit union
CO 02/249 (for example)	An ASIC class order (in this example numbered 02/249)
Corporations Act	<i>Corporations Act 2001</i> (Cth) including regulations made for the purposes of that Act
RG 69	An ASIC regulatory guide (in this example, numbered 69)

Appendix 1: List of non-confidential respondents

- Abacus Australian Mutuals Pty Ltd
 - Australian Finance Conference
 - Australian Publishers' Bureau
 - Balanced Securities Limited
 - Bidgee Finance Ltd
 - Commercial Radio Australia Ltd
 - Consumer Action Law Centre
 - Financial Planning Association of Australia Ltd
 - Free TV Australia
 - Goldman Sachs JBWere Capital Markets Limited
 - Landmark Operations Ltd
 - McCullough Robertson Lawyers
 - North State Finance Limited
 - Profinance Ltd
 - Trustee Corporations Association of Australia
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