

RG 136 Funds management: Discretionary powers

This will be an update of existing Regulatory Guide 136 with new content, as RG 136 is very out of date.

We have taken the opportunity to update it to reflect our practice of considering relief applications and to provide greater transparency of what we will consider.

We have also updated to better clarify the interaction between RG 51 and draft updated RG 136, but RG 51 remains the guide under which we decide all relief applications.

RG 136 explains our policy and approach to exercising our exemption and modification powers to grant relief in relation to requirements under the Corporations Act and the Passport Rules for Australia for registered MIS, CCIVs and Australian passport funds.

It also explains some of the more common situations when we have given, and when we may be likely to give, relief to registered MIS.

However, we propose to update this section when appropriate to include other forms of common relief for CCIVs and Australian passport funds.

Our approach to individual relief

We propose to give guidance about how we may exercise our statutory powers of exemption or modification in relation to Chapter 5C for MIS, Chapter 7A for CCIVs and Chapter 8A for Australian passport funds.

This will include:

- A high level summary of our general approach to individual relief applications under RG 51 and how our guidance in these regulatory guides interacts with that guidance in RG 51. This is new and was not included in RG 136;
- The main considerations we would ordinarily take into account under our approach to applications for relief for registered MIS, CCIVs and Australian passport funds.
 - These considerations include:
 - The costs and benefits of the relief sought;
 - The impact of the sought relief on affected persons;
 - The impact of the sought relief on the regulatory objectives of our investment fund regimes;
 - The relevance of any precedents;
 - The nature, scale and complexity of the operator and investment fund seeking relief; and

- The availability and adequacy of any alternative regulation.
- An explanation of the two statutory preconditions for granting an exemption or modification of the Passport Rules for Australia, namely the agreement of all relevant host regulators of the Australian passport fund, and publication of relevant details on our register of passport funds.

Common forms of relief in relation to investment funds

- We propose to give guidance on common forms of relief we may grant in relation to registered MIS.
- We propose to give guidance about the circumstances when we may grant the relief, the factors we take into account and any conditions we are likely to impose for:
 - Closely-related MIS;
 - When a compliance plan is required;
 - Compliance auditing;
 - Extensions for establishing a compliance committee;
 - Extension of time to appoint a new or replacement compliance plan committee member;
 - Stapled securities;
 - Holding a members' meeting for a change of the responsible entity. This includes where the change is to a related body corporate of the responsible entity, where there are a small number of members and where a significant percentage of interests are held by platform operators with a policy of not voting;
 - Restructuring where foreign members are treated differently from other members and where it is impracticable or unlawful to offer or issue securities to foreign members as part of restructure of the MIS or similar proposal involving the MIS;
 - Withdrawal arrangements. This includes where members of a 'frozen fund' are suffering hardship, 'for rolling' withdrawal offers and marketplace lending schemes withdrawal;
 - Voluntary deregistration.

Questions

A lot of these common forms of relief look appropriate for class order relief by ASIC instrument — has that been considered?

It's a little out of scope for the update of this RG, but it could happen in the future. It would be a great way to reduce costs and red tape. Really the purpose of putting them in this RG is to say 'these

are the kinds of things you need to take into account to determine if you're likely to get the relief in a certain situation'. It's about providing better transparency about how we will decide certain types of relief.

With withdrawal arrangements on peer-to-peer lending or market lending, that seems like it could be more conceptual to all schemes, where you'd want people to be able to get out on a class basis. Has that been considered?

Our guidance in section C of RG 136 is about when we might give certain types of relief is focused on what we have done in the past. This section is not intended to give guidance about when we might give relief in the future. We have taken the common decisions we have made and included them. We have not looked at whether we should include extra factors or circumstances as part of this work.

In the existing RG 136 (para 57) there is guidance about what is the property of a registered scheme, which says assets of a controlled sub-trust of a registered scheme are regarded as property of the parent registered scheme. That is missing in the new version — is that a change in ASIC's view?

We've tried to re-calibrate what's in RG 136, and keep it tightly focused on discretionary powers, and that's not so relevant. It hasn't been deliberately omitted from that RG because there is a change in our position.

A relief for an unregistered scheme will need to be applied for again when it's registered. This seems inefficient, do you have a view?

You should look at whether it's the same legal entity. It's not really possible to say whether the relief can transfer without looking at the relief instrument and the context in which it operates.

Considering generally the group of RGs that are contemplated in this CP, has ASIC formed a view on the necessity and duration of any potential facilitative approach, similarly to RG 259?

We haven't considered it yet, which is not to say that we won't consider it. But there's a range of other things that need to happen with the core legislation and consequential amendments for CCIVs and ARFP before we could consider anything. Given that many aspects are a continuation of existing requirements for registered MIS, we haven't had a strong indication that a facilitative approach is needed at this stage. But we would be interested to hear of any areas of our guidance for registered MIS where people think a facilitative approach might be needed.

Obviously the optionality is a factor as well — it's optional to become a CCIV or an Australian passport fund, so we would expect the rules would apply from day one for those types of funds.