

## Regulatory Guide 000 Funds management: Establishing and registering a fund (draft)

While Regulatory Guide 000 *Funds management: Establishing and registering a fund* is a new regulatory guide, there is some material about registering managed investment schemes that has moved from the existing RG 134 — as it now makes better sense for material about registration to be included in one RG.

This RG will assist responsible entities of registered managed investment schemes (MIS), corporate directors of Corporate Collective Investment Vehicles (CCIVs), operators of Australian passport funds and their advisers understand both their obligations and how we apply the requirements, when we assess applications or notifications lodged with us. Our aim has been to give everyone greater transparency about what we do and how we do it.

The RG is arranged across the following main sections:

- Section B — on how we apply the requirements in the Corporations Act in deciding whether to register a managed investment scheme;
- Section C — on how we apply the requirements in the Corporations Act in deciding whether to register a CCIV; and in addition what action we may take when we receive notification of the establishment of a new sub-fund; and
- Section D — on how we apply the requirements in the Corporations Act in deciding whether to register an Australian passport fund.

It is worth pointing out that under the draft core Asia Region Funds Passport (ARFP) Bill, only registered schemes are eligible to be Australian passport funds. This reflects the existing position under the Memorandum of Cooperation and is therefore the position reflected in our RG. However, we will amend our guidance in relation to Australian passport fund eligibility if — or when — this changes to allow CCIVs to passport.

### What has been updated?

For those seeking to register an MIS we have incorporated the information relevant to our decision making process on whether to register a scheme from existing RG 134 into this new RG. We have made minor changes to our existing policy to clarify our guidance, however, broadly speaking, the existing policy for registering a scheme remains largely unchanged.

So in the RG our guidance reflects the process for registration and the s601EA and 601EB criteria for registration, giving:

- The obligation for a responsible entity and when a responsible entity can submit an application;
- When we accept an application for lodgement;
- Who can sign the directors' statement

- What we may ask for during the registration period; and
- When we may refuse to register the managed investment scheme and the rights of the applicant.

Registering an MIS will move on to the ASIC regulatory portal from early 2018. From then, it will be possible to make online applications to register schemes via the Portal. So we have changed our guidance, to reflect this new way of applying to register an MIS.

We have also proposed that an application to register an MIS should identify the asset kinds in which it intends to invest from a more granular asset kind classification. This change is being driven by our need to understand our regulated population. The classifications proposed are based on those adopted by Morningstar, however, in some cases, we have made some amendments to better categorise these assets kinds to help us from a regulatory identification perspective.

However, we are not planning to introduce more granular asset kind authorisations for MIS schemes. The existing AFS licensing kind authorisation types will be retained. Instead, we will map the more granular asset kinds to the existing AFS licensing kind authorisations for MIS.

## **Registration of a CCCIV**

The CCIV regime is a new regime and our proposed guidance about registering CCIVs is driven by the introduction of this new regime.

Where there are proposed legislative requirements that are similar to those that exist for MIS, we have proposed that our guidance should be the same. And for those legislative requirements that are different to those that exist for MIS, we have produced new guidance to reflect these new requirements.

In a departure from the MIS regime, ASIC is not required to form an opinion about whether the CCIV meets extensive legislative requirements. This has allowed us to adopt a different process to register the CCIV — a process that is hopefully more streamlined and less complex.

Submissions for CCIVs will also be made via the ASIC regulatory portal – this will be mandatory. After an application is lodged via the portal, a 'completeness check' will be undertaken to determine whether all relevant fields have been completed and it is acceptable for assessment.

So, where the form seeks information or requires details about particular aspects of the CCIV, sufficient detail should be provided to enable us to understand and assess the answers that have been given.

A corporate director will also need to be mindful of whether its AFS licence authorises it to operate a CCIV with the relevant kind of sub-funds proposed. If not, any application to register a CCIV should only be made once the relevant AFS licence assessment has been undertaken and a green light given by the Licensing team. If this is not done, we may refuse the application to register the CCIV because the requirement for a corporate director (under draft s1138) will not be met.

If an application does not pass this first assessment stage, then it will be rejected. Generally we will inform the applicant of the areas which resulted in the rejection.

Once we have accepted the application, it will be assessed using a risk assessment tool. This will be a flexible and updatable risk assessment tool, which will be capable of providing each application with a rating and it is this rating that can be used to determine how extensive our review of the application will be. It is possible this may result in no review of the constitution and compliance plan being undertaken at registration. Alternatively we may determine to apply a greater level of scrutiny to the application.

Where an assessment is undertaken, while we are not required to do so, we may review whether a constitution for a retail CCIV makes adequate provisions for the required content matters in draft s1155, or whether the compliance plan sets out the adequate measures the corporate director will apply to ensure the CCIV meets the requirements of the Act and its constitution.

Where we do so and consider it necessary, we may request further information about provisions, or that clarifications or amendments be made. Where we make these types of requests, we will generally expect that our request is addressed prior to registration.

### ***Sub-fund notification***

As sub-funds are not separate legal entities, they will not be registered in their own right. However we must be notified when one is established. The required written notification of intent to add one or more sub-funds to an existing CCIV must be provided by the corporate director and must be made via the ASIC regulatory portal a specified period of time prior to the issue of shares. This will ensure that we have the necessary information about the sub-funds of CCIVs registered under the Act

As with an application to establish a new CCIV, the first stage will be satisfying the completeness check, where it is important sufficient detail is provided to enable us to properly understand and assess the answers provided.

And as with a CCIV, you must give consideration to the proposed name of a sub-fund. The proposed name will need to be one that is available – not identical to one that is reserved or registered under the Corporations Act for another sub-fund or body, or one that is not acceptable for registration under s147. If these requirements cannot be met, we will reject the notification.

If the notification is accepted and there are no amendments required following our assessment, the sub-fund will be established in the records of the CCIV (by assigning it a unique name; and identifying the class or classes of shares that are to be referable to the sub-fund.)

## **Registering an Australian passport fund**

The final section in our regulatory guide covers how we apply the requirements under Chapter 8A in deciding whether to register a fund as an Australian passport fund. Our guidance in this chapter is the most extensive of the three topics. This is because of the entry requirements to become an Australian passport fund.

This section covers three areas:

- The requirements for the application;
- The eligibility considerations of the operator; and
- The assessment criteria to determine compliance with relevant legislation.

### ***Application requirements***

As with CCIVs, submission of an application to register an Australian passport fund must be completed via the ASIC regulatory portal.

It is the complexity of a proposed fund that will drive the number and types of questions that will need to be answered. Complexities arising from organisational arrangements – such as if there are various delegation arrangements in place, or in relation to the kinds of assets held.

What this means, as you would expect, is the more complex the arrangements, the greater the likelihood that more questions will need to be answered and generally the longer the assessment period.

Where we can, we have asked yes/no questions and we propose to rely on those representations where it is reasonably appropriate to do so.

Once the application is lodged we then need to form an opinion of whether the eligible entity meets the requirements under the Passport Rules have been met.

We are conscious our guidance about the Passport Rules needs to be consistent with other Participants' views or guidance. We have been in close discussion with our Joint Committee colleagues about our views to make sure that we are not taking different interpretations (of the Passport Rules). And in the future, the Joint Committee may produce collective guidance about some aspects of the Passport Rules.

### ***Eligibility requirements***

The eligible entity requirements are distinct from and additional to any licensing requirements that have enabled an entity to act as a responsible entity.

So an operator will need to be able to demonstrate their ability to meet each requirement. In combination these 7 tests, which include a financial resources test, an organisational arrangements test and a track record test, show whether an operator is well established, competent and adequately resourced to set up and manage new funds.

During our assessment, we may request additional information in respect to one or more of these tests, to assess whether it can be met. Where this information is not provided within a reasonable time, or the evidence is not sufficient, we may consider the eligibility requirements cannot be met and we will refuse to register as an Australian passport fund

A key aspect of the test for us to register the Australian passport fund is that it will, or is likely to, comply with the Corporations Act, Passport Rules and ASIC Act. In order to form that opinion, we propose to take into account an operator's compliance history and the compliance systems and

compliance controls of the operator, to determine whether they are sufficiently effective and responsive.

### ***Assessment criteria to determine compliance with relevant legislation***

Australian passport fund operators will be asked to identify the compliance controls in place, the frequency with which they are undertaken and the frequency with which compliance with them is monitored. To assist applicants with this identification, some common compliance controls and frequencies have been included within the form. Where these are reflective of the controls that are operated, these may be selected. However it will all be possible to reflect the actual controls and frequencies engaged by the Australian passport fund operator.

In our assessment, particular attention will be paid to the descriptions about the compliance controls, and the procedures to monitor compliance with those compliance controls. We will look for consistency with our guidelines in Section B of draft Regulatory Guide 132 *Funds Management: Compliance and oversight*.

As many of the compliance controls and Australian passport fund operator may implement have a broader application to similar compliance requirements in the Corporations Act, where we have concerns about any of the answers provided, we are generally likely to ask more broadly about them.

We have attempted to provide some guidance about some of the common issues about compliance with the Passport Rules that might arise and how we will approach them. For example, in situations where the constitution of an existing registered MIS may allow a fund to go beyond what is permitted under the Passport Rules, we will look at the compliance controls the operator has in place to prevent breaches.

Another example is how we treat applications where there are breaches of the Passport Rules, such as when a fund holds assets which are not permitted investments (under division 6.2 of the Passport Rules). As a general rule, to be able to lodge an application to become a passport fund, an operator must be able to comply with the Passport Rules, so breaches of rules will most likely result in an inability to submit on the portal, or a refusal. Where an action has been taken in 'exceptional circumstances', we will review these on a case by case basis.

Our guidance also covers breaches of the portfolio allocation limits across the permitted asset types. These limits are there to ensure a fund is well diversified, however, breaching these limits may not result in a breach of the Passport Rules.

So in these circumstances we will look at issues like:

- Why is a limit being exceeded?
- What is being done to bring it into line, and when is that expected to happen during the 3 months permitted under the Passport Rules?
- The Passport Rules provide for an extension of a further month where the operator has satisfied the independent oversight committee the extension is in the best interests of investors — we will

look at whether these have been granted. If they have been granted and granted appropriately, how many extensions have been granted?

And finally, as registration is unlikely while the fund is exceeding one or more portfolio allocation limits, if you have an existing scheme which is exceeding, we would encourage you to speak with us in advance of attempting to make a submission.

## Questions

### ***Do you have any insight on the licensing process for corporate directors?***

We haven't released our licensing RGs yet, that will be in the second tranche of guidance that goes out. We are currently working with Treasury on what the licensing regime might look like.

We will want to align it as much as possible with the existing MIS regime, so some of the aspects for MIS and responsible entities will be relevant, but there are some structural differences in the CCIV model that will have an impact.

We expect that there will be new financial services for 'operating a CIV' and for 'depositories', and potentially a small change to the current financial service of 'depository and custodial service'.

### ***Do you think that existing MIS will be grandfathered, or will they need to apply for a licence?***

Treasury are working on what transitional and grandfathering arrangements might be put in place. We have starting working on what sort of grandfathering arrangements we might be able to put in place make things as efficient as possible for existing responsible entities to become corporate directors.

### ***Under current draft corporate directors must be a public company, will that change for wholesale CIVs?***

That is an issue for Treasury to decide, not ASIC.

### ***Are there any upcoming RGs on registration of existing MIS and CCIVs?***

There will need to be a legislative framework for this. Depending on what the legislation looks like, there might be some guidance on how ASIC will administer an existing MIS registering as a CCIV or as a sub-fund. ASIC's approach to releasing guidance is based around whether there is a need to provide guidance about how we approach or administer an area. We think this is likely to be an area of high interest, so some guidance in this area might be warranted. We may also release some procedural documents to go with an application to convert an existing MIS to a CCIV or sub-fund.

### ***Given the issues the recent RE review raised, is ASIC intending to do another review before progressing with its regulatory guidance?***

When we update our guidance we will look at the guidance we've published, all our info sheets, all the surveillance results, any legal developments that may impact and what's happening globally, to make sure what's in our regulatory guides reflects our position at that point in time.