

# **RG 133 Funds management and custodial service: Holding assets, and RG 134 Investment funds: Constitutions**

## **Regulatory Guide 133**

Regulatory Guide 133 is an existing regulatory guide that has been updated to make minor and technical changes to existing guidance, and to provide guidance on how we will apply the requirements for asset holding for CCIVs and Australian passport funds

RG 133 applies to:

- Corporate directors of CCIVs where they are legally responsible for the asset holding function. By this we mean wholesale CCIVs where there is no depositary
- Depositaries of CCIVs where they are legally responsible for the asset holding function;
- Responsible entities of registered MIS;
- Licensed custody providers. This includes those delegated by corporate directors of wholesale CCIVs and depositaries of CCIVs;
- MDA providers that are responsible to clients for assets held under an MDA; and
- i(IDPS providers that are responsible to clients for assets held under an IDPS;
- other asset holders who hold assets under the licence of their client; and
- our proposed guidance applies to registered MIS that are also registered as Australian passport funds. Currently under draft legislation, only registered MIS are eligible to be Australian passport funds. However, if legislation is changed to allow retail CCIVs to be Australian passport funds, we will update this guidance accordingly.

RG 133 contains the following sections:

- Requirements that must be met by asset holders, including corporate directors and depositaries — contained in section B
- Requirements that must be met when engaging a depositary or other asset holder — contained in section C
- Compliance obligations for licensed custody providers — contained in section D;
- Protection rights for land used in registered schemes — contained section E
- Relief from the obligations to separate assets — contained in section F.

## ***Requirements for asset holders and engaging a depositary or other asset holder in sections B and C***

We propose to make minor changes to our guidance to:

- Where appropriate, add in references to the asset holding requirements for CCIVs and Australian passport funds
- Update reference to legislative instruments — as these have changed
- Where necessary, add additional text to clarify existing guidance
- Update the terminology used to be consistent with the terminology used in the other core RGs
- Make some changes to style — to again make this RG look like its parts of the core RGs about funds management
- Remove the transitional information that is no longer needed

## ***Compliance controls in section D***

We propose to move our existing guidance about compliance measures for registered MIS, IDPSs and MDAs to our proposed regulatory guidance on compliance and oversight in RG 132.

## ***Protection rights for land used in registered schemes in section E***

We do not propose to update our guidance under this section to apply to CCIVs nor Australian passport funds, as we do not consider these funds will use the types of structures contemplated under section E.

## ***Relief from the obligation to separate assets in Section F***

We propose to extend our relief in relation to segregation of assets to CCIVs. We have updated our guidance to reflect this policy;

Responsible entities, corporate directors and depositaries would be permitted to use omnibus accounts for:

- Australian or foreign currency
- A deposit-taking facility with a body carrying on a business of accepting money on deposit, including rights under that facility
- Securities
- Derivatives

The use of omnibus accounts also applies to licensed custody providers, MDA providers and IDPS operators.

Relief for responsible entities of registered MIS is provided under [CO 13/1409]. This would be amended to cover corporate directors and depositaries.

Relief for licensed custody providers sits under [CO 13/1410], relief for MDA providers under ASIC Corporations (Managed Discretionary Account Services), and relief for IDPS operators under [CO 13/763].

### ***So what are the new requirements that will apply to depositaries?***

If a wholesale CCIV elects to have a depositary, then investor protection requirements of Chapter 7A regime will apply.

We propose that depositaries of retail and wholesale CCIVs would be subject to:

- Minimum standards for asset holding in section B
- Requirements when engaging a custodian in section C
- Relief from obligation to separate assets in section F.

And for asset holding performed by the corporate director — either because it is a wholesale CCIV without a depositary or because ASIC has granted an exemption from the requirement.

Under our proposed guidance in RG 133, corporate directors of wholesale CCIVs can:

- Hold assets — and section B would apply;
- Appoint a depositary — and section C would apply
- Engage a custodian that is not a depositary — and section C would apply)
- Get relief as set out in section F — that is, relief from the obligation to segregate assets.

## **Regulatory Guide 134 Investment funds: Constitutions**

RG 134 is an existing RG which previously contained guidance about how we apply the constitution content requirements of the Corporations Act when deciding whether to register an MIS. As RG 131 will now provide guidance on the procedural aspects of registration, RG 134 now focusses more strictly on the content requirements for the constitutions of registered schemes, CCIVs, and Australian passport funds.

The key updates to RG 134 are:

- An expansion to cover the draft constitutional content requirements of the Corporations Act for CCIVs and Australian passport funds; and
- Inclusion of guidance on common scheme constitution issues identified during registration, which is guidance that we issued in May in ASIC Information Sheet 220.

The appendix to RG 134, which contained guidance on the constitution of MIS registered before 1 October 2013, will be moved to a new, short-form RG.

Due to the similarities between the content requirements for the constitutions of registered MIS and retail CCIVs, we were able to largely retain the existing structure of RG 134, with some re-ordering of the sections and the addition of 2 new areas of guidance that we considered would be useful.

RG 134 now contains the following substantive sections:

- Section B: Consideration to acquire interests and shares
  - This section applies to responsible entities of registered MIS and corporate directors of retail CCIVs:
  - The draft requirement that the constitution of a retail CCIV make adequate provision for consideration to acquire a share mirrors the existing requirement for registered MIS, so we've made some fairly simple updates to this section in order for it to apply to retail CCIVs, and to refer to our planned extension to CCIVs of the relief we currently give in this area for registered MIS.
- Section C: Sub-funds of retail CCIVs and class rights in registered MIS:
  - This section applies to responsible entities of registered MIS and corporate directors of retail CCIVs.
  - We've added this new section to RG 134 to reflect the requirement in the draft legislation that the constitution of a retail CCIV make adequate provision for the establishment of sub-funds, and classes of shares referable to sub-funds. This is a relatively short section focussing on the process of establishment and the rights of sub-funds, and classes of shares.
  - We've also included in this section a reference to our long-standing relief - recently remade as a result of sunseting — that allows the constitution to protect rights of members of a class by requiring that certain modification can only be made where a specified procedure is followed.
- Section D: Powers and rights of an investment fund operator:
  - This section applies to responsible entities of registered MIS and corporate directors of retail CCIVs.
  - The requirement to provide for the powers and rights of the corporate director of a retail CCIV mirrors the requirement for registered MIS, so we've again made fairly simple updates to this section to reflect that requirement.
  - We've also included guidance on two common fees and expenses issues identified in INFO 220. These are (i) provisions that provided for fees or indemnities out of scheme property for the exercise of powers not subject to the proper performance of duties, and (ii) and the use of uncertain variables in fee provisions.
- Section E: Complaints, disputes and remedies:

- This section applies to responsible entities of registered MIS, corporate directors of retail CCIVs, and operators of Australian passport funds.
- As explained in the draft explanatory memorandum for the CCIV legislation, there won't be any specific requirement for the constitution of a retail CCIV to provide for complaints handling, so no update has been made in that regard for CCIVs.
- We've included some guidance on the requirements for the constitutions of Australian passport funds under the ARFP MoC, which relate to handling of certain disputes between a member and the passport fund.
- We've also included guidance on a common issue we identified in INFO 220 regarding complaints handling — and withdrawal — provisions in scheme constitutions that due to their definition of 'member' or 'unit holder', were narrower than required under the Act.
- Section F: Changing the constitution of an investment fund
  - This section applies to responsible entities of registered MIS and corporate directors of retail CCIVs.
  - This is a new section that we considered would be useful given that the requirements for changing the constitution of both a registered MIS and retail CCIV are essentially the same. We've set out the legal requirement, as well as guidance on relief that we provide from this requirement to allow for changes in certain circumstances.
- Section G: Withdrawal from registered schemes and CCIVs
  - This section applies to responsible entities of registered MIS and corporate directors of CCIVs.
  - The requirements for redemption of shares in a CCIV don't mirror those for a registered MIS, so rather than provide consolidated guidance in this area we've included a separate sub-section relating to CCIVs which steps through the requirements, including our views on what it means for the price to be determined by reference to the net asset value of a sub-fund.
  - We've updated the guidance in this section on registered MIS to reflect the two withdrawal-related issues identified in INFO 220. These are (i) uncertain withdrawal provisions and (ii) the timeframe for payment of withdrawal amounts after a person has ceased to be a member.
- Section H: Winding up a registered scheme
  - This section applies to responsible entities of registered MISs
  - We haven't made any substantial changes to the guidance in this section, except to provide some additional clarity around our guidance on independent audit on winding up, as identified in INFO 220.
- Section I: Legal enforceability

- This section applies to responsible entities of registered MIS.
- We haven't made any substantial changes to the guidance in this section.
- Section J: Incorporation by reference in investment fund constitutions
  - This section applies to responsible entities of registered MIS and corporate directors of retail CCIVs.
  - This section has remained largely the same, with the same principles being applied to both registered MIS and retail CCIVs in light of the requirement that their constitutions make adequate provision, and specify, certain matters.