ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 100

Enforceable undertakings

February 2015

About this guide

This guide explains our approach to accepting undertakings under s93A and 93AA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

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.

Document history

This guide was issued in February 2015 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 100, issued February 2008, reissued February 2012
- Superseded Guide 300, issued March 2007, rebadged as a regulatory guide 5 July 2007
- Superseded Practice Note 69, issued 7 April 1999

Disclaimer

This guide 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.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

ASIC uses enforceable undertakings to improve and enforce compliance with the law. This guide explains our approach to these undertakings, including:

- when we will consider accepting an enforceable undertaking;
- what terms are and are not acceptable to us;
- enforceable undertakings involving independent expert review;
- public reporting on compliance with enforceable undertakings; and
- what happens if an enforceable undertaking is not complied with.

RG 100.1 This guide explains our approach to accepting undertakings under s93A and 93AA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Undertakings accepted by us under these provisions are enforceable by the courts.

RG 100.2 Enforceable undertakings are one of our most flexible and effective remedies to improve and enforce compliance with the law. This guide explains:

(a) what an enforceable undertaking is (see Section B);

(b) when we will consider accepting an enforceable undertaking (see Section C);

(c) what terms are and are not acceptable to us (although each case will be considered on its particular facts) (see Section D);

(d) our approach to enforceable undertakings involving independent expert review (see Section E);

(e) the public reporting we will do about compliance with an enforceable undertaking (see Section F); and

(f) what happens if an enforceable undertaking is not complied with (see Section G).

RG 100.3 We will not consider accepting an enforceable undertaking for trivial matters. We may consider accepting an enforceable undertaking in more serious cases where this remedy can achieve a more effective regulatory outcome than civil or other administrative action.

B What is an enforceable undertaking?

Key points

An enforceable undertaking is an administrative settlement we may accept as an alternative to civil court action or certain administrative actions.

We consider that an enforceable undertaking can sometimes offer a more effective regulatory outcome than could otherwise be achieved through other available enforcement remedies (i.e. civil litigation or administrative action).

Our acceptance of an enforceable undertaking in a particular set of circumstances should not be regarded as a binding precedent for future action.

Our role and responsibilities

RG 100.4 Enforceable undertakings are one of a number of remedies available to ASIC for breaches of the legislation ASIC is responsible for enforcing. It is an administrative settlement we may accept as an alternative to civil court action or certain other administrative actions.

Note 1: In general terms, ASIC's functions and powers are conferred on it by the *Corporations Act 2001* (Corporations Act), the ASIC Act and related Acts (through s12A of the ASIC Act).

Note 2: For guidance on our use of administrative remedies in enforcing the financial services provisions of the Corporations Act, see Regulatory Guide 98 *Licensing: Administrative action against financial services providers* (RG 98).

RG 100.5 Under the ASIC Act, we may accept a written enforceable undertaking given by:

(a) a person on a matter over which ASIC has a function or power under the ASIC Act (s93AA); or

(b) a responsible entity of a registered scheme on a matter involving the registered scheme, and over which ASIC has a function or power under the related legislation (s93A).

Note: We may also accept an enforceable undertaking under s322 of the *National Consumer Credit Protection Act 2009* (National Credit Act). This guide relates to accepting enforceable undertakings under s93A and 93AA of the ASIC Act. However, many of the principles set out in this guide are likely to be relevant to the acceptance of an enforceable undertaking under s322 of the National Credit Act: see Regulatory Guide 218 *Licensing: Administrative action against persons engaging in credit activities* (RG 218) at RG 218.48–RG 218.50.

RG 100.6 Our power to accept enforceable undertakings enhances our ability to enforce compliance with the law. We see enforceable undertakings as an important component in our array of enforcement remedies to influence

behaviour and encourage a culture of compliance for the benefit of all participants in the markets we regulate.

RG 100.7 We consider that an enforceable undertaking can sometimes offer a more effective regulatory outcome than could otherwise be achieved through other available enforcement remedies, namely civil or administrative action. We will not enter into an enforceable undertaking that does not offer a more effective regulatory outcome.

Note: For discussion about what constitutes an effective regulatory outcome, see RG 100.24–RG 100.25.

How an enforceable undertaking works

RG 100.8 An enforceable undertaking can be initiated by a company, an individual or a responsible entity, or as a result of a discussion between that party and ASIC. We do not have the power under s93A and 93AA to require a person to enter into an enforceable undertaking. Similarly, a person cannot compel us to accept an enforceable undertaking.

RG 100.9 An enforceable undertaking is different from an undertaking to a court. Table 1 shows the main differences between an undertaking to ASIC and an undertaking to a court.

Table 1: Differences between undertakings to ASIC and to a court

Feature	Undertaking to ASIC	Undertaking to a court
When the undertaking can be accepted	ASIC does not have to start a court action before it can accept an undertaking under the ASIC Act: s93A or 93AA.	An undertaking may only be given when a court action has started.
What happens in the event of non-compliance	ASIC may apply to the court for appropriate orders if the undertaking is not complied with.	A breach of the undertaking may itself be the subject of contempt proceedings (i.e. it may be enforced in the same way as an injunction).

What happens when an enforceable undertaking is offered

RG 100.10 A person wishing to offer us an enforceable undertaking under s93A or 93AA (promisor) should first discuss it with an ASIC case officer assigned to the investigation.

RG 100.11 After the offer has been made and the terms of any enforceable undertaking discussed, the decision to accept or reject the offer will be made by an ASIC senior executive.

RG 100.12 In the course of drafting the enforceable undertaking, we will negotiate the terms of the undertaking with the promisor to arrive at an appropriate regulatory outcome.

RG 100.13 Our acceptance of an enforceable undertaking in a particular set of circumstances should not be regarded as a binding precedent for future action. For instance, the fact that we have accepted an undertaking for misconduct from one person does not necessarily mean we will accept an undertaking for the same misconduct from another person, or that we will accept a further enforceable undertaking from the same person. Whether we accept an undertaking will depend on the factors listed in RG 100.24–RG 100.25.

RG 100.14 An enforceable undertaking will not take effect until it is formally accepted by one of our senior executives with authority to accept the enforceable undertaking. Both ASIC and the promisor keep a signed original of the enforceable undertaking.

RG 100.15 We will then make the enforceable undertaking available for public inspection on our enforceable undertakings register: see RG 100.46. We will also report publicly about compliance with the terms of an enforceable undertaking, including by referring to the content of any expert report required by the terms of an enforceable undertaking: see RG 100.78–RG 100.93.

C When will we consider accepting an enforceable undertaking?

Key points

We will consider accepting an enforceable undertaking if we believe it is the most effective and appropriate regulatory outcome given the significance of the issues to the market and the community, the nature and seriousness of the alleged breach and the compliance history of the party.

We will not accept an enforceable undertaking in some cases, including:

- for trivial matters; or
- in cases of deliberate misconduct, fraud, or conduct involving a high level of recklessness (except where the acceptance of an enforceable undertaking best serves an urgent protective purpose and is not a bar to later court action).

Our general approach

RG 100.16 We may accept an enforceable undertaking instead of:

(a) seeking a civil order from a court (e.g. an award of damages or compensation, or an injunction);

(b) taking administrative action (e.g. cancelling a licence); or

(c) referring a matter to another administrative body.

RG 100.17 This means that we will not consider an enforceable undertaking unless we have reason to believe there has been a contravention of relevant legislation and have commenced an investigation or conducted a surveillance about the conduct we believe gives rise to the suspected breach. We will not contemplate an undertaking to forestall an investigation or surveillance.

RG 100.18 We will use an enforceable undertaking only if we consider it provides a more effective regulatory outcome than non-negotiated, administrative or civil sanctions.

Note: For discussion about what constitutes an effective regulatory outcome, see RG 100.24–RG 100.25.

RG 100.19 An enforceable undertaking has a number of potential advantages. It can, for example:

(a) produce a swift result that compensates persons who have suffered loss or damage as a result of the contravention or alleged contravention of the law;

(b) compel the individual, company or responsible entity to implement improved compliance arrangements, monitored by an independent expert reporting to ASIC;

Note: Examples of improved compliance arrangements include improvements to corporate governance arrangements, disclosure practices, staff training, implementing a whistleblower regime and regular reports to ASIC on progress in implementing a new compliance program.

(c) restrict the activities that may be undertaken by an individual, company or responsible entity; and

(d) be a cost-effective alternative to litigation.

RG 100.20 We will generally only consider accepting an enforceable undertaking if:

(a) we have weighed up the nature of the alleged breach and the effectiveness of the regulatory outcome offered by the enforceable undertaking compared to outcomes offered by other available enforcement remedies; and

(b) we believe an enforceable undertaking is the most effective and appropriate regulatory outcome given the significance of the issues to the market and the community, the nature and seriousness of the alleged breach and the compliance history of the party: see RG 100.24–RG 100.28.

When we will not accept an enforceable undertaking

RG 100.21 We will not accept an enforceable undertaking:

(a) instead of commencing criminal proceedings against a party;

(b) to secure payment of a pecuniary civil penalty (see RG 100.22–RG 100.23);

(c) after a matter has been referred to a specialist body (see RG 100.29);

(d) in cases of deliberate misconduct, fraud, or conduct involving a high level of recklessness (except where the acceptance of an enforceable undertaking best serves an urgent protective purpose and is not a bar to later court action);

(e) for trivial matters; or

(f) as an alternative form of relief if conditional relief has not been complied with.

RG 100.22 Where a pecuniary civil penalty is involved, we consider that the public interest is best served by a court determining whether a pecuniary penalty is available and, if so, its quantum.

RG 100.23 However, we recognise that enforceable undertakings may, in appropriate circumstances, play a role in obtaining payment of compensation for affected third parties that may not otherwise be readily and cost-effectively obtained. In such cases, an enforceable undertaking may be a valid alternative to a compensation order, depending on the circumstances.

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What is an effective regulatory outcome?

RG 100.24 When we assess whether an enforceable undertaking is a more effective regulatory outcome than other possible courses of action, we take into account four critical considerations:

(a) the position of consumers and investors whose interests have been or may be harmed by the suspected conduct;

(b) the effect on the regulated person's future conduct;

(c) the effect on the regulated population as a whole; and

(d) the community benefit in regulatory outcomes being achieved as quickly and cost-effectively as possible.

RG 100.25 We would consider an enforceable undertaking to be an effective regulatory outcome if it:

(a) promotes the integrity of, and public confidence in, our financial markets and corporate governance;

(b) specifically deters the person from future instances of the conduct which gave rise to the undertaking;

(c) promotes general deterrence in making the business community aware of the conduct and the consequences arising from engaging in that conduct; and/or

(d) provides an ongoing benefit by way of improved compliance programs.

When is an enforceable undertaking an appropriate remedy?

RG 100.26 When deciding whether an enforceable undertaking is appropriate in the circumstances of the case, we will consider the following factors (this list is not exhaustive):

(a) Is the person prepared to publicly acknowledge ASIC's views about the conduct and the necessity for protective or corrective action?

(b) Was the conduct that ASIC considers to be a breach inadvertent?

(c) Was the conduct that ASIC considers to be a breach a result of the conduct of one or more individual officers or employees of the company?

(d) What was the seniority and level of experience of the individual(s) involved in the breach?

(e) Has the person cooperated with ASIC, including providing us with complete information about the underlying breaches and any remedial efforts?

(f) Will the undertaking achieve an effective outcome for those who have been adversely affected by the conduct or compliance failure?

(g) Is the person likely to comply with the enforceable undertaking?

(h) Has the person been the subject of complaints or previous ASIC enforcement action?

(i) What are the prospects for a speedy resolution of the matter?

RG 100.27 RG 100.26(f) may be relevant where several remedial actions (including adversarial and negotiated remedies) could rectify the consequences of the misconduct. We will weigh the available alternatives in deciding the most effective approach. In some circumstances, an enforceable undertaking may provide the most effective and flexible resolution because a range of outcomes can be achieved with a single remedy.

RG 100.28 In appropriate cases, we may accept an enforceable undertaking if it would completely settle an existing or potential civil or administrative enforcement action.

What if administrative proceedings have already started?

RG 100.29 We consider an enforceable undertaking to be inappropriate after a matter has been referred to a specialist body for determination or resolution. If we have referred a matter to one of the bodies in Table 2, we have concluded that this will achieve the most effective regulatory outcome in the circumstances.

Table 2: Specialist bodies we may refer matters to

Companies Auditors and Liquidators Disciplinary Board (CALDB)	The CALDB is empowered to determine, upon application by ASIC, whether a registered auditor or liquidator has contravened provisions of the Corporations Act. The CALDB may then make orders cancelling or suspending their registration, or admonish or reprimand them.
Takeovers Panel	The Takeovers Panel has wide powers. Its primary power is to conduct a hearing, upon application by ASIC, a bidder or target, or any other person whose interests are affected, to determine whether to make a declaration of ‘unacceptable circumstances’ about the affairs of a company. Note: The Takeovers Panel may also accept undertakings enforceable by a court under s201A of the ASIC Act.

What if a matter has already been referred to an ASIC delegate and a disqualification order is an available remedy?

RG 100.30 We will generally not accept an enforceable undertaking after a matter has been referred to an ASIC delegate for possible disqualification or suspension.

RG 100.31 At this stage, we will have considered the matter in some detail and, should a delegate decide to make an administrative order, we view this as a more effective regulatory outcome than an enforceable undertaking. This is because:

(a) such a decision would clearly reflect our view of the nature and extent of the misconduct by making findings of fact;

(b) breach of a disqualification order under Pt 2D.6 or s920C is a criminal offence (this is not the case with a breach of an enforceable undertaking); and

Note: This approach is consistent with *Sage v Australian Securities and Investments Commission* [2005] FCA 1043 where an undertaking offered to the court as an alternative to banning action was not considered to be an adequate alternative.

(c) any persons disqualified by a delegate will be listed on one of the public registers of banned or disqualified persons.

Examples of undertakings we may accept

RG 100.32 The examples in Table 3 illustrate in general terms the kinds of undertakings we may accept. The undertakings are not mutually exclusive and an enforceable undertaking may encompass more than one such undertaking.

RG 100.33 These examples are indicative only and are not exhaustive. Every enforceable undertaking is tailored to the particular circumstances of a matter and will contain specific undertakings clearly setting out the promisor's obligations.

Table 3: Examples of enforceable undertakings

Corporate governance	Refrain from taking part in the management of specified corporations for a set period of time. Remedy the deficiencies in the company's compliance systems by taking certain specified action, and having this reviewed by an auditor or expert.
Auditors and liquidators	Refrain from performing a significant role in an audit engagement for a set period of time, completing additional professional education, and be subject to technical supervision on future audit engagements for a set period of time. Refrain from accepting appointments to insolvency administrations for a set period of time, complete additional professional education, and be subject to technical supervision on future insolvency administrations.
Disclosure	Inform the market to correct some previous false or misleading disclosure or any continuing misapprehension for which the promisor is responsible. Set up and implement an internal compliance plan and report periodically to the market.
Takeovers	Remedy the unacceptable circumstances which have occurred, or may have occurred, in a takeover by carrying out certain necessary action (provided that the matter has not been referred to the Takeovers Panel).

Rectification or compensatory action	Pay damages to identified third parties, with a process for bringing this about described in the enforceable undertaking. Perform a community service obligation (e.g. by funding an education program for consumers of particular financial services, or disgorge profits from unlawful conduct by paying money to relevant consumers, a charity or community organisation).
Corrective notices	Write to investors or parties affected by the misconduct, advising them of the fact of the enforceable undertaking, its terms and how a copy of it can be obtained. Issue an advertisement or engage in corrective advertising (on a website or otherwise) to rectify any misleading conduct.

D What are the terms of an enforceable undertaking?

Key points

In the course of drafting an enforceable undertaking, we will negotiate the terms of the undertaking with the promisor to arrive at an appropriate regulatory outcome.

We will not accept an enforceable undertaking that:

- contains a clause denying liability or any clause that sets up defences for possible non-compliance with the enforceable undertaking;
- does not include details of the misconduct that gave rise to the enforceable undertaking and ASIC's views about that misconduct; or
- contains a clause removing ASIC's ability to publicly report on compliance, including by making summaries of any expert report available to the public.

When we accept an enforceable undertaking, it is our practice to issue a media release.

Acceptable and standard terms

RG 100.34 We will only accept an enforceable undertaking if the promisor makes a commitment to:

(a) stop the particular conduct or alleged breach that concerns us; and

(b) not recommence that conduct.

RG 100.35 Table 4 lists the areas that an enforceable undertaking covers. Enforceable undertaking templates are available on our website at www.asic.gov.au.

Note: We update and add to the enforceable undertaking templates from time to time. Further templates may also be added in the future. The templates are offered as examples only and the terms of any undertaking should be tailored to the individual circumstances of the case.

Table 4: What an enforceable undertaking covers

Background	This section sets out the details of the relevant conduct and the nature of our views about the conduct.
Compliance and monitoring	An enforceable undertaking must specify how the promisor will address the conduct we are concerned about and ensure it does not occur again. We must also be satisfied that the promisor has adequate arrangements for monitoring how the undertaking is implemented and reporting to ASIC. Details might include: • monitoring and reporting mechanisms the promisor will adopt (e.g. internal control and/or compliance programs); • any external assessment of the changes that are put in place; • the name of the contact officer who is responsible for monitoring compliance with the enforceable undertaking (and any external expert); and

	• the ASIC officer who the promisor will report to about compliance with the enforceable undertaking.
Rectification or compensatory action	In resolving any matter, we aim to find ways to rectify the harm caused by the alleged breach. This may involve the promisor compensating, reimbursing or giving other appropriate forms of redress to parties adversely affected by its conduct, or performing a community service obligation by funding an education program or paying money to a charity or community organisation: see Table 3 and RG 100.36.
Corrective notices	In cases of misleading conduct, we will require the promisor to unequivocally correct the misleading impression for which it is responsible.
Other action	The promisor must acknowledge that the enforceable undertaking does not affect the rights of other parties or constitute any restraint on ASIC, except for specific civil or administrative action that ASIC has agreed to compromise. We may accept an enforceable undertaking while continuing with our investigation into specific matters outside the enforceable undertaking.
Compliance attestations	Where appropriate, we will require a promisor to provide us with a statement attesting to compliance with the terms of an enforceable undertaking. If required, the attestation must be from an appropriate senior officer or from the promisor's board or governing body.
Publicity and public access	All enforceable undertakings must contain a waiver of confidentiality clause (excluding certain information where necessary: see RG 100.44). The promisor must also acknowledge in the undertaking that it accepts ASIC's publicity and public access policy. Generally, ASIC will not accept an enforceable undertaking that removes our ability to report on compliance with undertakings given by a promisor, including, where applicable, making summaries of any expert report available to the public: see RG 100.81 and RG 100.93.

Community service obligations

RG 100.36 An enforceable undertaking may require a promisor to perform a community service obligation such as disgorging profits from unlawful conduct by paying money to affected consumers, funding an education program for consumers, or paying money to a charity or community organisation.

RG 100.37 We will generally apply the following principles when considering whether to accept an enforceable undertaking that includes a community service obligation:

(a) priority will be given to payments directed to compensating persons who have suffered loss as a result of the conduct the subject of the enforceable undertaking;

(b) if persons affected by the conduct the subject of the enforceable undertaking cannot be identified, or it is impracticable to compensate them, we may accept an undertaking to fund an education program, or pay money to a charity or community organisation;

(c) we will not take account of an offer to perform a community service obligation in deciding whether to refer a brief to the Commonwealth Director of Public Prosecutions (CDPP) in respect of the promisor;

(d) the community service obligation should be directed to purposes related to the conduct the subject of the enforceable undertaking; and

(e) generally, we will not accept an enforceable undertaking that provides for the payment of money to ASIC or to a third party where ASIC has direct control over how that money is spent. We may depart from this principle in order to ensure the payment relates to the alleged conduct, and/or to ensure proper accountability as to how money is spent. For example, we may accept:

   (i) a community service payment to ASIC to produce specified education materials; or

   (ii) a payment to a third party to produce or fund an education program where ASIC has control over the timeframe, subject matter, target population, medium of communication, or to include reporting obligations.

RG 100.38 The amount of a community service obligation should generally be proportional to the alleged conduct having regard to:

(a) the penalties that could be applied in relation to the alleged conduct; and

(b) the amount of profit made, or loss avoided, as a result of the conduct the subject of the enforceable undertaking.

Unacceptable terms

RG 100.39 Generally, we will not accept an undertaking that:

(a) contains a clause denying liability or omitting any standard clauses (unless otherwise specifically excluded by ASIC);

(b) does not include details of the misconduct which gave rise to the enforceable undertaking and of our views about that conduct;

(c) contains any clause that sets up defences for possible non-compliance with the enforceable undertaking; and

(d) contains a clause removing ASIC's ability to publicly report on compliance, including by making summaries of any expert report available to the public (see RG 100.81 and RG 100.93).

RG 100.40 Further, we will not generally accept an enforceable undertaking in which the promisor does not at least acknowledge that ASIC's views in relation to the misconduct which gave rise to the enforceable undertaking are reasonably held.

Publicity and public access to enforceable undertakings

RG 100.41 If we take enforcement action, our approach to public comment on that action is contained in Information Sheet 152 *Public comment* (INFO 152). As a general principle, we believe there is significant public interest in ensuring that consumers, industry and the broader community are aware of and informed about enforcement action we take. Transparency and disclosure are important factors in market integrity and consumer confidence; they serve to promote deterrence and educate consumers and industry.

RG 100.42 Given that the usual alternative to offering an enforceable undertaking involves potential publication of an adverse finding by a court, the Takeovers Panel or the CALDB, we regard it as appropriate that the subject and terms of an enforceable undertaking be made public. It is therefore our practice to issue a media release in a form determined by us when we accept an enforceable undertaking.

Public access

RG 100.43 We will not accept enforceable undertakings in confidence. We will not enter into an enforceable undertaking on the basis that the terms of the undertaking or parties will be confidential.

RG 100.44 We will make the whole enforceable undertaking available for public inspection unless the promisor asks for certain information not to be released and we are satisfied that the information:

(a) is commercial in confidence;

(b) consists of personal details of an individual; or

(c) should not be disclosed because its release would be against the public interest.

Note: Other information about an undertaking will also be made available for public inspection: see RG 100.78 and RG 100.90.

RG 100.45 If information is deleted, the copy of the enforceable undertaking made available under s93A(6) will include a note stating that certain information has been deleted. While there is no equivalent obligation in s93AA, we consider that it is appropriate regulatory practice to adopt the same approach as for undertakings under s93A.

RG 100.46 A copy of the enforceable undertaking is available on our enforceable undertakings register at www.asic.gov.au/euregister.

Disclosure to the market operator

RG 100.47 If an enforceable undertaking is given by a company listed on a prescribed financial market, the company may be required under the listing rules of that

market and s674 of the Corporations Act to release a copy of the undertaking to the market operator.

Note: For example, if a company is listed on the exchange market operated by ASX Limited (ASX), this obligation may arise under ASX Listing Rule 3.1.

Varying or withdrawing enforceable undertakings

RG 100.48 A promisor may withdraw or vary an enforceable undertaking only with our consent in writing: s93A(2) and 93AA(2).

RG 100.49 Variations of an enforceable undertaking do not replace the original enforceable undertaking; they merely modify it.

RG 100.50 We will only consider a request to vary an enforceable undertaking if:

(a) the variation will not alter the spirit of the original undertaking;

(b) compliance with the original undertaking is subsequently found to be impractical; or

(c) there has been a material change in the circumstances which led to the original undertaking being given.

RG 100.51 If a variation involves anything other than an extension of time, it is executed through a variation of enforceable undertaking document. This is offered by the promisor and accepted by us in the same manner as the original enforceable undertaking. The original enforceable undertaking should be annexed to the variation document. Both the original undertaking and the variation document remain on our enforceable undertakings register at www.asic.gov.au/euregister.

RG 100.52 If a promisor asks for an extension of time and we consider it has genuine reasons for being unable to comply with the specified time limits, we may informally grant an extension of time while reserving our rights to pursue an action for breach of the enforceable undertaking.

RG 100.53 In exceptional circumstances, we may allow a promisor to withdraw an enforceable undertaking after we have accepted it. If we consent to the withdrawal, this means that the promisor is no longer bound by the terms of the undertaking. An example of an exceptional circumstance is where a licensee has asked us to revoke its licence and is no longer able to comply with the undertaking (nor is it necessary that it do so).

RG 100.54 Withdrawals of enforceable undertakings are recorded on our enforceable undertakings register.

Removal from public register

RG 100.55 From time to time, companies have approached us after they have fulfilled all the obligations of an enforceable undertaking, seeking to have the undertaking removed from the public register. It is not our policy to remove an enforceable undertaking from the register.

RG 100.56 The fact that an enforceable undertaking was accepted should remain on the public record and the register should remain a complete record of our use of this remedy.

E Enforceable undertakings involving independent experts

Key points

Some enforceable undertakings will contain terms requiring an independent expert to review and report on specified matters.

In most cases the promisor may appoint an expert, subject to ASIC consent. In some cases, we will appoint the expert.

Regardless of who appoints the expert, we will require the expert to demonstrate:

- competence to undertake the engagement;
- independence from the promisor; and
- the existence of adequate arrangements to manage conflicts of interest arising during the engagement.

This will ensure the expert is capable of exercising objective and impartial judgement during an engagement.

Where an enforceable undertaking requires an expert to report to ASIC on specific matters, we will make public a summary of the final report or a statement that refers to the content of the final report.

Reports by independent experts

RG 100.57 Some enforceable undertakings may require the promisor to remedy deficiencies in compliance systems or take some other specified actions, and have those actions reviewed by an independent expert. Similarly, for auditors and liquidators, an enforceable undertaking may require the promisor to be subject to technical supervision on future appointments: see Table 3. The policy in this guide applies whenever an enforceable undertaking requires independent reporting on undertakings given by, or the conduct of, a promisor.

RG 100.58 In most cases the promisor may appoint the expert, subject to ASIC consent. However, in some cases, we will appoint the independent expert and require the promisor to undertake to bear the cost of the expert's work under the enforceable undertaking: see RG 100.62–RG 100.63.

RG 100.59 Regardless of who appoints the independent expert, we will assess the competence of the expert (see RG 100.60), the independence of the expert (see RG 100.67–RG 100.73) and the expert's arrangements to manage conflicts of interest arising during the engagement: see RG 100.74–RG 100.77. Assessment of these factors will assist to ensure the expert is capable of exercising objective and impartial judgement during an engagement.

RG 100.60 The competence of the independent expert will be assessed against the following non-exhaustive factors:

(a) whether the expert has adequate resources (which may include access to appropriate third party specialists) to perform the necessary work;

(b) the qualifications of the expert and whether the expert has the requisite level of technical expertise (including whether the expert meets the requirements of any relevant industry codes);

(c) the experience of the expert (e.g. whether the expert has undertaken comparable work); and

(d) whether the expert can meet relevant reporting timeframes.

Note: These factors are adapted from Regulatory Guide 112 *Independence of experts* (RG 112) at RG 112.40.

RG 100.61 A report by an independent expert appointed under an enforceable undertaking is provided to ASIC, and usually to the promisor. A summary of the final report of the expert, or a statement that refers to the content of the final report, is made available publicly: see RG 100.78.

Appointment of an independent expert by ASIC

RG 100.62 We will generally appoint an independent expert where:

(a) an enforceable undertaking requires an expert to assess the development or implementation of a large scale, complex or significant compensation or remediation scheme;

(b) there have previously been significant shortcomings in work undertaken or remediation implemented by the promisor under the oversight of an expert; or

(c) a promisor has a history of failing to adequately address compliance issues.

RG 100.63 Where we appoint an expert, a promisor must bear the cost of the expert's work under the enforceable undertaking.

Appointment of an independent expert by a promisor

RG 100.64 Where ASIC does not appoint an independent expert, a promisor may appoint an independent expert. Where this is the case, we require a standard term in the enforceable undertaking that the promisor obtain ASIC's consent to the appointment, and to the terms of the expert's retainer, before appointment. RG 100.68 and RG 100.75 set out some of the matters we will consider before consenting to an appointment.

RG 100.65 Where a promisor appoints an independent expert, we will also require standard terms that provide:

(a) the promisor's retainer of the expert include a statement to the effect that the work of the expert is being carried out for the promisor and ASIC, and acknowledging that ASIC is relying on the work of the expert; and

(b) ASIC is entitled to be informed of, provided with, or be copied into all communications between a promisor and an expert, including but not limited to negotiations about fees.

RG 100.66 The terms in RG 100.65 will help us ensure an expert retains independence in performing an engagement under an enforceable undertaking.

Independence of the expert

RG 100.67 In deciding whether to appoint an expert or to consent to the appointment of an expert proposed by a promisor, we will consider whether the proposed expert is independent of the promisor. We will not consent to an appointment, or appoint, unless we are satisfied that the proposed expert can exercise objective and impartial judgement.

Note: See also RG 112 and Regulatory Guide 111 *Content of expert reports* (RG 111).

RG 100.68 We will assess the following non-exhaustive factors in our consideration of the independence of a proposed expert:

(a) whether the expert is the auditor of the promisor;

(b) whether fees and remuneration from the promisor in the two years before the proposed appointment are material to the expert's revenue in Australia;

(c) whether the staff undertaking work on the engagement or their immediate family have a financial interest in the promisor, including financial interests held through an intermediary;

(d) whether the staff undertaking work on the engagement or the expert owe an amount to the promisor or a related body corporate of the promisor that has been advanced other than in the ordinary course of business or on terms and conditions other than those that would normally apply to such a loan;

(e) whether there are any existing or previous business or personal relationships between the expert or the expert's staff or their immediate family and the promisor or its officers;

(f) whether the expert or the expert's staff are officers of the promisor, or have been in the previous two years;

(g) whether the expert has participated in strategic planning for the promisor;

(h) whether the expert has previously reviewed the transactions or compliance systems that are to be evaluated, or has designed or implemented those systems;

(i) whether there is actual or potential litigation between the expert and the promisor;

(j) whether the expert has acted on behalf of the promisor in litigation or disputes with third parties;

(k) if the expert has done work related to an enforceable undertaking in the past, whether the expert, in the two years following appointment under the undertaking, has performed work for the promisor of the enforceable undertaking (other than under the undertaking) that generated material fees;

(l) whether the expert has appropriate arrangements to manage conflicts of interest that may arise in the engagement under the enforceable undertaking (see RG 100.74 and RG 100.77); and

(m) any other matters that render, or may reasonably be perceived to render, the expert or the expert's staff incapable of exercising objective and impartial judgement.

RG 100.69 A promisor should obtain information about all of the factors in RG 100.68 from a proposed expert, and provide that information to ASIC when seeking our consent to the appointment of the proposed expert. We may refuse to consent to an appointment where this information is not provided.

RG 100.70 We will assess all of the factors in RG 100.68 on a case-by-case basis to determine the cumulative effect of the factors on a proposed expert's ability to exercise objective and impartial judgement

RG 100.71 We will carefully scrutinise any proposal by a promisor to appoint the promisor's auditor as an independent expert under an enforceable undertaking. We will consider the nature of the engagement, the risk of self-review and the public perception created by any such appointment.

RG 100.72 We will also look carefully at the information provided to us about the following factors from RG 100.68, on the basis they may be strong indicia of risks to an expert's ability to exercise objective and impartial judgement:

(a) whether fees and remuneration from the promisor in the two years before the proposed appointment are material to the expert's revenue in Australia (see RG 100.68(b)); or

(b) whether the expert can demonstrate appropriate arrangements to manage conflicts of interest that may arise in the engagement, taking

into account the nature of the engagement and the size, scope and nature of the expert's business (see RG 100.68(l) and RG 100.74–RG 100.77).

RG 100.73 We will assess all of the factors in RG 100.68 on a case-by-case basis to determine the cumulative effect of the factors on a proposed expert's ability to exercise objective and impartial judgement.

Managing conflicts of interest

RG 100.74 We will assess the independence factors set out at RG 100.68 before we consent to the appointment of an independent expert. However, it is important that an expert is able to manage conflicts of interest that may arise during an engagement under an enforceable undertaking, and which may compromise the expert's ability to exercise objective and impartial judgement during the engagement.

RG 100.75 Accordingly, in deciding whether to appoint an expert or to consent to the appointment of an expert proposed by a promisor, we will also consider whether the proposed expert can demonstrate appropriate arrangements to manage conflicts of interest that may arise during the engagement by assessing the following non-exhaustive factors:

(a) procedures for identifying conflicts of interest;

(b) procedures for assessing and evaluating conflicts of interest;

(c) procedures for dealing with, and responses to, particular conflicts;

(d) whether there is a written conflicts management policy;

(e) the period of time that has elapsed since the arrangements were last reviewed internally or by a third party (e.g. an auditor);

(f) the structural arrangements in place to manage conflicts of interest and how they support management of conflicts of interest;

(g) the information barriers in place to assist in managing conflicts of interest;

(h) how the conflicts management arrangements in place ensure that conflicts do not affect the quality of work undertaken for a promisor, or ASIC, under an enforceable undertaking, and how the effectiveness in achieving this is tested;

(i) how conflicts management arrangements are formulated and approved (e.g. whether they were approved by the board or governing body—or by a delegated body);

(j) how conflicts management arrangements are communicated to staff;

(k) whether nominated persons are responsible for the implementation, review and updating of the conflicts management arrangements, and who the relevant staff report to;

(l) the procedures in place to identify instances of non-compliance with the conflicts management arrangements, how non-compliance is dealt with, and how non-compliance is recorded and reported;

(m) how the arrangements in place ensure remuneration policies and the provision of benefits practices do not significantly compromise the integrity and quality of services provided;

(n) whether the processes in place ensure that more serious conflicts are referred to senior management or a governing body; and

(o) the circumstances where conflicts of interest are avoided (as opposed to dealing with conflicts through disclosure or internal controls) and the procedure for making and recording these decisions.

Note: The factors in RG 100.75 are adapted from Regulatory Guide 181 *Licensing: Managing conflicts of interest* (RG 181): see Table 1 at RG 181.64. RG 112 also contains relevant guidance for managing conflicts of interest under an engagement. Most entities undertaking independent reviews and reports under an enforceable undertaking will be Australian financial services (AFS) licence holders, and accordingly ought to be able to demonstrate the matters in RG 100.75.

RG 100.76 As noted in RG 181 at RG 181.64, we do not suggest that all the issues are relevant to every particular proposed expert, or that they are exhaustive. A promisor should obtain from a proposed expert information about as many of the factors in RG 100.75 as are relevant in the circumstances, and provide that information to ASIC when seeking our consent to the appointment of the proposed expert. As set out in RG 100.72(b), we will carefully consider whether a proposed expert can demonstrate appropriate arrangements to manage conflicts of interest, although we may be satisfied that particular arrangements are not relevant to an engagement or to the size, scope and nature of the proposed expert's business.

RG 100.77 We will require an expert to notify us where a conflict of interest arises during an engagement, and we may require a promisor to terminate an expert's engagement if the conflict compromises, or may reasonably be seen to compromise, the expert's ability to exercise objective and impartial judgement.

Publicity for independent expert reports

RG 100.78 In cases where an enforceable undertaking requires reporting by an independent expert, we will make available publicly a summary of the final report or a statement that refers to the content of the report on our enforceable undertakings register at www.asic.gov.au/euregister.

RG 100.79 We may also issue a media release referring to the content of an expert report, and may from time to time refer publicly to the content of the report.

RG 100.80 Publication of summaries of expert reports will promote the integrity of, and public confidence in, our financial markets and corporate governance.

RG 100.81 Generally, we will not accept an enforceable undertaking that limits our rights to publish a summary of an expert's final report and make reference to the content of that report. Where an enforceable undertaking requires delivery of an interim report, we will normally also make publicly available a summary of the interim report or a statement that refers to the content of the interim report. However, we may agree not to publish a summary of an interim report. We expect those cases to be rare because public confidence in our financial markets and corporate governance is likely to be promoted by publication of summaries relating to all expert reports under an enforceable undertaking.

RG 100.82 In giving effect to our policy to make a summary of an expert report available to the public, we may agree that a summary prepared by the expert be publicised. Experts appointed to do work required by an enforceable undertaking should, accordingly, prepare a summary of their report that is suitable for publication.

RG 100.83 We will retain the ability to supplement the summary provided by the expert, or prepare our own summary of a report, if we consider a summary prepared by an expert is not adequate or accurate.

RG 100.84 Generally, we will not refer to any information from an expert report that:

- (a) consists of personal information of an identified natural person whose acts or omissions are not the subject of, or a concern mentioned in, the enforceable undertaking;
- (b) ASIC is satisfied would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of the promisor or a third party otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking;
- (c) ASIC is satisfied should not be released because it would be against the public interest to do so; or
- (d) the promisor has asked not to be released if we are satisfied:
  - (i) it would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of the promisor otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking; or
  - (ii) it should not be released because it would be against the public interest to do so.

RG 100.85 The standard terms of an enforceable undertaking will reflect our policy, by requiring a promisor to acknowledge that ASIC:

(a) may issue a media release referring to the content of the expert report;

(b) may from time to time publicly refer to the content of the expert report; and

(c) will make available for public inspection a summary of the content of the expert report, or a statement that refers to the content of the expert report.

F Public reporting by ASIC on compliance with enforceable undertakings

Key points

We will publicly report on a promisor's compliance with undertakings given in an enforceable undertaking.

RG 100.86 We make enforceable undertakings available for public inspection on our enforceable undertakings register: see RG 100.15 and RG 100.46.

RG 100.87 For enforceable undertakings accepted by us on or after 9 March 2015 we will report publicly on whether undertakings given by a promisor in an enforceable undertaking have been complied with. This may include interim reporting about compliance as well as reporting on final outcomes under an enforceable undertaking.

RG 100.88 Where a promisor undertakes to perform a community service obligation involving the funding of an education program or paying money to a charity or community organisation, we will report on the making of the payment as well as initiatives delivered by third party recipients of the payment.

RG 100.89 Public reporting on compliance with enforceable undertakings improves ASIC's accountability for the regulatory outcomes we seek to achieve by accepting an enforceable undertaking.

RG 100.90 Our statements on compliance with undertakings will be available on our enforceable undertakings register at www.asic.gov.au/euregister.

Note: Where an independent expert is reporting under the terms of an enforceable undertaking, a summary of the expert report will also be made available on our enforceable undertakings register: see RG 100.78.

RG 100.91 An exception to the policy in RG 100.87 is that we will not normally report publicly on compliance with an undertaking to refrain from engaging in particular conduct or activities unless we become aware there has been a failure to comply with the undertaking.

Note: Examples of undertakings we will not report on (unless we become aware there has been a failure to comply) are undertakings to refrain, for a set period of time or permanently, from:

- taking part in the management of corporations;
- providing financial services;
- performing a significant role in an audit; or
- accepting appointments to insolvency administrations.

RG 100.92 The extent, scope and timing of our reports about compliance (including interim reporting) will depend on the nature of the undertakings given and on:

(a) whether public scrutiny may assist in measuring compliance;

(b) whether there are persons with a direct interest in knowing of the outcomes under the enforceable undertaking (e.g. potential beneficiaries of proposed or possible actions under the enforceable undertaking, such as remedial advice, compensation or adjustments to contracts);

(c) whether we think public reporting will improve specific or general deterrence;

(d) the duration of the enforceable undertaking, because public reporting over longer periods of implementation may assist to keep a promisor focused on compliance; and

(e) a need to raise the profile of an enforceable undertaking in a new compliance area or to educate the regulated population or consumers about an area of the law or our approach to its implementation.

RG 100.93 Generally, we will not accept an enforceable undertaking that restricts our ability to report, in the manner outlined in this guide, on compliance with undertakings given by a promisor. All enforceable undertakings accepted on or after 9 March 2015 will contain a standard term of acknowledgement by a promisor that ASIC will publicly report on compliance with undertakings given by a promisor.

G What happens if an enforceable undertaking is not complied with?

Key points

We may apply to the court for appropriate orders if there has been a breach of a term of an enforceable undertaking.

RG 100.94 If we have reason to believe that a promisor has not complied with a term of an enforceable undertaking, we may apply to the court for appropriate orders. Cases for court action include where the breach of the enforceable undertaking:

(a) is a significant breach; or

Note: For guidance on what we mean by a significant breach in the context of providing financial services, see Regulatory Guide 78 *Breach reporting by AFS licensees* (RG 78).

(b) involves a failure of the promisor to perform an obligation by a certain time.

RG 100.95 We will publicise our application to the court and seek legal costs from the promisor when appropriate.

RG 100.96 The court can:

(a) direct the promisor to comply with the particular term;

(b) direct the promisor to transfer money (up to the amount of any financial benefit it obtained directly or indirectly and that is reasonably attributable to the breach) to:

(i) the scheme property, if it is a responsible entity; or

(ii) the Commonwealth, if it is an individual or a company;

(c) direct the promisor to compensate any other person who has suffered loss or damage as a result of the breach; or

(d) make any other order that the court considers appropriate.

Note: See s93A(4) and 93AA(4) of the ASIC Act.

RG 100.97 The aim of the court orders is to compel the promisor to comply with the enforceable undertaking and to put all parties in the position they would have been in had the enforceable undertaking not been breached (e.g. by stripping any benefit and compensating for loss).

RG 100.98 A breach of an enforceable undertaking cannot itself be the subject of contempt proceedings. However, a breach of a court order granted because of a breach of the enforceable undertaking may constitute contempt of court.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
CALDB	Companies Auditors and Liquidators Disciplinary Board
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
National Credit Act	*National Consumer Credit Protection Act 2009*
promisor	The party entering into an enforceable undertaking with ASIC
RG 78 (for example)	An ASIC regulatory guide (in this example numbered 78)
s93A (for example)	A provision of the ASIC Act (in this example numbered 93A), unless otherwise specified

Related information

Headnotes

acceptable and standard terms, appointment of independent experts, compliance with the law, effective regulatory outcome, enforceable undertaking, expert report, promisor, public reporting, unacceptable terms

Regulatory guides

RG 78 *Breach reporting by AFS licensees*

RG 98 *Licensing: Administrative action against financial services providers*

RG 111 *Content of expert reports*

RG 112 *Independence of experts*

RG 181 *Licensing: Managing conflicts of interest*

RG 218 *Licensing: Administrative action against persons engaging in credit activities*

Information sheets

INFO 152 *Public comment*

Legislation

ASIC Act, Pt 2D.6, s12A, 93A, 93A(2), 93A(4), 93A(6), 93AA, 93AA(2), 93AA(4), 201A, 920C

Corporations Act, s674

National Credit Act, s322

Cases

Sage v Australian Securities and Investments Commission [2005] FCA 1043

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