



ASIC

Australian Securities & Investments Commission

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REGULATORY GUIDE 95

Disclosing entity provisions relief

Chapter 1 — Introductory and general topics (Part 1.2A)

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From 5 July 2007, this document may be referred to as Regulatory Guide 95 (RG 95) or Policy Statement 95 (PS 95). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 95.1) or their policy statement number (e.g. PS 95.1).

Headnotes

Corporations Law s50A, s58C, s109ZBA, s111AC, s111AD, s111AS, s111AT, s313, s1022AA; Pt 3.6 and 3.7; disclosing entity provisions; disclosing entity; s111AJ; exempt ED securities; s111AS; relief under the Corporations Regulations; what relief may be given; general and specific factors to be considered; overlap with s313; where relief may be likely; where relief is unlikely; confidentiality; Class Orders; conditions; revocation or suspension of order; application procedure; Australian Securities Commission Act 1989 (Cth) s1(2).

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Purpose

RG 95.1 In this guide, the ASC sets out its policy on applications made under s111AT(1) for exemptions from the disclosing entity provisions, as defined in s111AR of the Corporations Law (Law).

Part I: Interpretation

RG 95.2 References to sections, subsections and paragraphs in this guide are to the Law unless otherwise specified. References to regulations are to the Corporations Regulations unless otherwise specified. References to listing rules (LR) are to those of Australian Stock Exchange Limited (ASX). References to the Explanatory Memorandum (EM) are to the EM to the Corporate Law Reform Bill 1993 (Cth). This Bill was subsequently enacted as the *Corporate Law Reform Act 1994* (Cth) (CLRA).

RG 95.3 The ASC may exempt, either unconditionally or subject to conditions, specified persons from all or some of the “disclosing entity provisions”: s111AT(1).

RG 95.4 In general, “disclosing entity provisions” are the:

- (a) “periodic reporting provisions”, see RG 95.5; and
- (b) “continuous disclosure provisions”, see RG 95.6.

Periodic reporting provisions

RG 95.5 For the purposes of this guide periodic reporting provisions are:

- (a) the accounting and associated requirements for an accounting period (ie, a half-year or financial year) which are, if the entity is:
 - (i) a company — Pt 3.6 (other than Div 10 and 11) and 3.7 as they apply to companies that are disclosing entities;
 - (ii) a body that is not a company — Pt 3.6 and 3.7, and s 287 if relevant because of s 323A; and
 - (iii) an undertaking to which prescribed interests relate (undertaking)— Div 11 of Pt 3.6; and
- (b) the covenants contained in s1069(1)(ea) and s1069(1)(f) as they apply to deeds relating to prescribed interests that are ED securities. (“ED securities” are defined in s111AD; see RG 95.8. These covenants are about the preparation and distribution of accounts and associated reports.

Continuous disclosure provisions

RG 95.6 For the purposes of this guide, the continuous disclosure provisions are:

- (a) s1001A for listed entities; and
- (b) s1001B for unlisted entities.

Disclosing entities

RG 95.7 Section 111AC states that if:

- (a) any of a body's securities (except prescribed interests and units of prescribed interests) are "ED securities", then it is a "disclosing entity"; and
- (b) any prescribed interests or units of prescribed interests are ED securities, then the undertaking to which the interests relate is a "disclosing entity".

ED securities

RG 95.8 In general terms, securities are "ED securities" if they are:

- (a) quoted on the stock market of a securities exchange (s111AE);
- (b) in a class of securities (other than debentures) issued under a prospectus, and since that issue at least 100 persons have held securities in that class at all times (s111AF);
- (c) in a class of securities (other than debentures) issued as consideration for an acquisition under a takeover scheme or a Pt 5.1 compromise or arrangement, and since that issue at least 100 persons have held securities in that class at all times (s111AG); or
- (d) debentures of a borrowing corporation and s1052(1) requires a trustee for debenture holders to be appointed (s111AI).

RG 95.9 The following are not ED securities (s111AJ(1) and reg 1.2.01):

- (a) securities of a body that is an exempt foreign company under the listing rules; and
- (b) securities of a body quoted on Australian Bloodstock Exchange Ltd.

[*Historical note:* RG 95.9(a) amended 3/3/1997 by replacing the words “LR 1B; and” with the words “ the listing rules; and”.]

Exempt ED securities

RG 95.10 The following disclosing entities are exempt from all of the disclosing entity provisions (s111AS(1)):

- (a) foreign companies issuing securities under foreign scrip offers (ie, foreign takeover offers or foreign schemes of arrangement) (reg 1.2A.02); and
- (b) foreign companies issuing securities under employee share schemes subject to certain conditions (reg 1.2A.03).

[*Historical note:* RG 95.10(a) amended 17/6/1996 by replacing “1.2.02” with “1.2A.02”.

Para (b) amended 17/6/1996 by replacing “1.2.03” with “1.2A.03”.]

RG 95.11 In addition, certain financial institutions which are disclosing entities are exempt from s297, s298 and s299 as applied by s323A: reg 1.2.04 and s111AS(1).

RG 95.11A Unless a foreign company is admitted under the listing rules as an exempt foreign entity, it is very unlikely that a foreign company will ever be a disclosing entity. This is the case because:

- (a) of the exemption for exempt foreign entities under the listing rules (see paragraph (a) of RG 95.9); and
- (b) securities of a foreign company issued pursuant to a prospectus or a takeover scheme or compromise or arrangement under Pt 5.1 are not counted for the purposes of determining a disclosing entity because they are not included on one of the registers listed under s111AH(1)(a).

As a result the exemptions discussed under para 10 will be of limited application.

[*Historical note:* RG 95.11A inserted 17/6/1996 and amended 3/3/1997 by deleting in the first paragraph, the words “securities of a foreign company are quoted on

ASX under LR 1A,” before the phrase “it is very unlikely that”.

Para (a) amended 3/3/1997 by deleting the words “of the exemption for foreign companies quoted under LR 1B (see para 9(a)); and” after the phrase “of the exemption for exempt foreign entities under the listing rules (see paragraph (a) of RG 95.9); and”.]

Section 111AF

RG 95.12 The ASC has received a number of queries on the interpretation of s111AF. The ASC interprets s111AF to mean that:

- (a) an entity will only be a disclosing entity if at all times since the issue of securities arising from applications under a prospectus relating to those securities, there have been 100 or more persons holding securities in that class;
- (b) each fund established under an umbrella trust deed is a separate disclosing entity because it is a distinct undertaking;
- (c) a security is in the same class of securities as another security if under the entity’s constituent documents the security has the same rights and obligations as the other security (see Regulatory Guide 10);
- (d) a person holding securities in a class does not include a beneficiary of a trust which holds those securities (s111AH(1)); and
- (e) if co-trustees hold securities in a class, they are to be counted as one person holding securities in that class (s111AH(2)).

RG 95.12A The interpretation in RG 95.12(a) above means that where an entity had once over 100 security holders but now has less than 100 security holders in the same class, the entity is no longer a disclosing entity. However, if this same entity has again over 100 security holders in the same class because of applications under a prospectus (the original prospectus or a later prospectus), the entity once again becomes a disclosing entity (see para 101 and 102 of the EM).

[*Historical note:* RG 95.12A inserted 17/6/1996.]

Part II: Granting relief

General approach and relevant factors

RG 95.13 In administering the disclosing entity provisions, the ASC's primary concern is to ensure that the legislative policy behind these provisions is always maintained. The ASC will not use its powers to bring about law reform, although it will recommend amendments to the Law when appropriate.

RG 95.14 The ASC will promote the general policy objectives of the Law and will exercise its powers according to s1(2) of the ASC Law (Cth).

RG 95.15 In addition, when exercising its power under s111AT(1), the ASC will consider the following factors, among others:

- (a) the desirability of efficient and effective disclosure to investors in securities and to securities markets;
- (b) the need to balance the benefits of disclosure against the costs of complying with disclosure requirements; and
- (c) the desirability of facilitating dealings in Australia in securities of foreign companies, subject to appropriate safeguards (para 130 of the EM).

RG 95.16 The CLRA envisages that the ASC and ASX will act in co-operation in ensuring that the market is fully informed and the enhanced disclosure provisions are complied with as they affect listed disclosing entities. Accordingly, the ASC will usually discuss with ASX an application for relief by a disclosing entity listed on the stock market of ASX. The ASC is most unlikely to give relief from the performance of an obligation under the disclosing entity provisions unless ASX would be prepared to grant a waiver of any LR which also require or contemplate performance of that or a similar obligation.

Underlying rationale for enhanced disclosure

RG 95.17 When considering the need for efficient and effective disclosure (see RG 95.15(a)) the ASC considers the rationale for the disclosing entity provisions. In particular, it will only give relief if the

underlying reasons for enhanced disclosure would be not undermined or circumvented by the relief.

RG 95.18 In general, the policy behind the disclosing entity provisions of the Law is to ensure that certain business entities disclose material information periodically and continuously. The ultimate aim is to help investors make better informed investment decisions based on timely information.

RG 95.19 The disclosing entity provisions are designed to:

- (a) overcome the inability of general market forces to guarantee adequate and timely disclosure by disclosing entities;
- (b) encourage greater securities research by investors and advisers. This ensures that securities prices more closely, and quickly, reflect underlying economic values;
- (c) ensure that equity and loan resources in the Australian market are more effectively channelled into appropriate investments, and that funds are withheld or withdrawn from poorly performing disclosing entities (ie, to promote capital market efficiency);
- (d) assist investors in deciding whether to buy, sell, or hold securities, including the prospect of a switch to alternative securities;
- (e) lessen the possible distorting effects of rumour on securities prices;
- (f) minimise the opportunities for insider trading or similar market abuses;
- (g) improve managerial performance and accountability by giving the market more timely indicators of performance;
- (h) encourage the growth of information systems within disclosing entities. This assists directors to make decisions and to comply with their fiduciary duties; and
- (i) reduce the time and costs when preparing prospectuses.

Benefits vs costs

RG 95.20 When considering the need to balance the benefits of disclosure against the costs of disclosure (see RG 95.15(b)), the ASC is conscious of the need to consider the commercial benefit and any net regulatory benefit or detriment which would flow from granting relief. The ASC's policy is that relief and its supporting conditions (if any) should either leave the market:

- (a) as well informed as it would be under the Law, even if in a slightly different way; or
- (b) not materially less well informed as it would be under the Law, while allowing material savings to the disclosing entity.

This objective of balancing benefits and costs of disclosure may be achieved by limiting the scope of relief or by giving it subject to conditions.

Specific factors relevant to giving relief

RG 95.21 In addition to the general statutory rationale and factors for granting relief from the disclosing entity provisions (as described in RG 95.15–RG 95.19) there are specific bases and factors which the ASC has to consider when giving relief from the periodic reporting provisions. These additional statutory bases and relevant factors are discussed in RG 95.27–RG 95.30.

Publishing the decision

RG 95.22 When the ASC makes a decision to give relief, that decision is:

- (a) published in the Commonwealth *Gazette* (s111AT(3)); and
- (b) made public in the *ASC Digest* if it is of significance.

RG 95.23 When the ASC refuses relief, the applicant will be notified by the ASC of the decision and their rights of appeal: see Pro Forma 89.

Class orders

RG 95.24 The ASC is aware of the need to streamline its resource intensive mandatory activities such as exercising case by case discretionary powers. Therefore, the ASC will consider giving relief by a class order under s111AT(1) when appropriate: s109ZBA. However, such a class order must apply to a closed identifiable set of entities and not to an open class of entities. A closed class means a class where all the entities who receive the benefit of relief under the order are specifically identifiable as at the time the order is executed. This means that if an entity does not satisfy the requirements under the order for relief at the time the order is executed, then that entity is not eligible to receive the benefit of the order.

RG 95.25 Therefore, for example, the ASC can not execute a class order under s111AT for the benefit of “all disclosing entities” (ie, present and future disclosing entities). Instead, the ASC may draft a general class order under s111AT by reference to “all disclosing entities as at a certain date” (for instance, as at the date of execution). In this way, the ASC can do by general words what it could clearly do by naming each affected entity.

RG 95.26 The ASC will consider making a class order:

- (a) after holding a public hearing at which interested parties are given the opportunity to make representations;
- (b) after consulting with the class of persons who would be affected by the relief;
- (c) pending the resolution of technical problems with the Law (ie, interim technical relief); or
- (d) after implementing a policy on a case by case basis for a significant period of time, and after a period of public comment.

RG 95.26A Where the ASC is of the view that it is appropriate to grant a class order exemption from the periodic reporting provisions to disclosing entities that are bodies (both companies and bodies to which s323A applies), for reasons of administrative consistency the ASC will issue such relief under s313(6) and not s111AT(1). (For a wider discussion of the overlap of s111AT(1) and s313(6) refer to RG 95.31–RG 95.39.)

[*Historical note:* RG 95.26A inserted 17/6/1996.]

Part III: Relief from the periodic reporting provisions

Statutory rationale

RG 95.27 When giving relief from the periodic reporting provisions, the ASC will keep in mind what it considers to be the specific statutory bases and factors applicable to these provisions. These statutory bases and factors are discussed in RG 95.29–RG 95.39.

RG 95.28 In general, the reporting provisions added by CLRA mean that disclosing entities have to:

- (a) prepare and lodge half-year accounts; and
- (b) prepare and lodge financial year accounts if the disclosing entities are undertakings to which prescribed interests relate or bodies other than companies. These accounts must be consistent with provisions in Pt 3.6 and 3.7.

The half-year accounts are slightly less onerous than financial year accounts under Pt 3.6 and 3.7.

RG 95.28A The obligation to prepare and lodge accounts as described in RG 95.28 above arises if the entity is a disclosing entity at the end of the relevant half-year or financial year accounting period: see s317A(1).

[Historical note: RG 95.28A inserted 17/6/1996.]

RG 95.29 The preparation and lodgment of half-year accounts:

- (a) acts as a partial summary of, and a checking mechanism on compliance with, the continuous disclosure provisions;
- (b) assists in assessing the longer-term implications of prior disclosure statements;
- (c) promotes a more informed assessment of the likely future financial performance of disclosing entities;
- (d) requires disclosing entities to disclose various facts which in combination, though not necessarily individually, may be material in assessing the value of their securities;
- (e) helps investors to more accurately compare the performance of various disclosing entities through standardised reporting requirements;

- (f) allows the accounting impact of an adverse change in performance to be made public in some cases many months earlier than otherwise would be the case; and
- (g) supplies information about the trend of business operations over a period of time short enough to allow the analysis of business turning points and seasonal patterns.

RG 95.30 The obligation for disclosing entities which are undertakings or bodies other than companies to prepare and lodge financial accounts in compliance with Pt 3.6 and 3.7 is appropriate as it:

- (a) ensures that such accounts are of a generally acceptable quality; and
- (b) enables the financial position of one undertaking or body other than a company to be compared with another and with companies.

Granting relief — overlap with s313

RG 95.31 Under s313(2), the ASC may give relief from compliance with the provisions of the Law relating to, or to the audit of, accounts or consolidated accounts or directors' reports. This relief may be given to a company, the directors of that company or the auditor of that company. It may also be given to a specified class of companies: s313(6).

RG 95.32 Under s313(11), this power may only be exercised if:

- (a) compliance would make the accounts misleading;
- (b) compliance would be inappropriate;
- (c) compliance would impose an unreasonable burden; or
- (d) the company:
 - (i) is not carried on for profit;
 - (ii) does not make distributions to members; and
 - (iii) is required to prepare an annual income and expenditure statement under some other Australian law.

RG 95.33 Section 313 also applies to bodies (other than companies) incorporated or formed in a state or an internal territory: s323A(2). It does not, however, apply to disclosing entities which are undertakings to which prescribed interests relate.

RG 95.34 Therefore, relief given by the ASC under s111AT from any of the periodic reporting provisions to a disclosing entity or disclosing entities (other than an undertaking) *may also* be given under s313(2) or 313(6): see also s111AX.

RG 95.35 On this basis, when deciding whether to give relief to a disclosing entity under s111AT from a periodic reporting provision, the ASC will consider if the applicant has satisfied any of the preconditions for relief in s313(11). When deciding, the ASC will take into account:

- (a) the general factors outlined in RG 95.15; and
- (b) the general and specific bases for periodic reporting discussed in RG 95.17–RG 95.19 and RG 95.29–RG 95.30 respectively.

RG 95.36 The ASC will also take this approach when a disclosing entity is an undertaking. This is despite the fact that the ASC cannot relieve managers and trustees of these entities from all of their accounting obligations under s313. The ASC considers that the preconditions for relief in s 313(11) to a grant of relief under s313(2) or 313(6), should be taken into account when considering applications for relief involving disclosing entities. This includes relief under s111AT from any of the periodic reporting provisions in Pt 3.6 and 3.7.

RG 95.37 Therefore, unless exceptional circumstances exist, it is likely that the ASC will refuse an application under s111AT(1) for relief from some or all of the periodic reporting requirements if it does not satisfy one of the alternative preconditions set out in s313(11), as discussed in RG 95.32.

RG 95.38 The ASC will adopt the same approach described in RG 95.35 above when considering an exemption from any or all of the periodic reporting provisions under s313(2) for a company or body other than a company.

RG 95.39 For detailed consideration of the preconditions set out in s313(11) refer to Regulatory Guide 43 on accounts and audit relief.

RG 95.39A Consistent with the approach taken with execution of class orders (see RG 95.26A), where the ASC is of the view that it is appropriate to grant an exemption from the periodic reporting provisions to disclosing entities that are bodies (both companies and bodies to which s323A applies), the ASC will issue such relief under s313(6) and not s111AT(1). The ASC will do so even if the entity originally made such an application under s111AT(1).

[*Historical note:* RG 95.39A inserted 17/6/1996.]

Examples of relief

RG 95.40 Because of the issues discussed in RG 95.31–RG 95.39, the ASC considers that an exemption from all or some of the periodic reporting provisions is appropriate in the following circumstances (whether this relief is given under s111AT or s313(2)):

(a) *Charitable bodies*

The ASC has given Class Order relief from all of the disclosing entity provisions under s111AT to charitable bodies (see Regulatory Guide 87 and Class Order [CO 94/1703]. The ASC took the view that the disclosing entity provisions were inappropriate to such schemes because these entities have an exemption from all of the fundraising provisions.

(b) *Superannuation entities*

The ASC has given class order relief from the periodic reporting provisions under s 111AT to trustees and managers (if any) of superannuation entities (as defined under the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS)), which are disclosing entities (see [MR 94/266] in the 1995 ASC Digest at page MR 23 and Class Order [CO 94/1859]). The ASC wants to make it very clear that, except for the intermediary licensing provisions in Pt 7.3 to 7.6, these entities are to be regulated under SIS Superannuation Industry (Supervision) Act 1993 only. This includes the accounting provisions of SIS.

(c) *Dormant entities*

The ASC will give case by case relief from the provisions on preparing and lodging half-year accounts to a disclosing entity if that entity had no expenses or income and no change to its balance sheet in the half-year for which relief is sought. Many film investment schemes satisfy these criteria. The ASC may also give this relief if:

- (i) expenses of less than \$2000 were incurred in the half-year for which relief is sought; and
- (ii) those expenses related to accounting and/or audit fees.

The ASC considers that it is inappropriate and an unreasonable burden to expect half-year accounts in these circumstances.

(d) *Entities in the final phases of winding-up*

The ASC will give case by case relief from the provisions on preparing and lodging half-year accounts to a disclosing entity

which is in the process of winding-up. The entity must have sold all its assets so that it only has to distribute the proceeds of the sale (or sales) to the entity's shareholders or unitholders. This type of exemption is conditional on the final distribution being made within six months of the receipt of the proceeds of the last sale of an asset of the entity. The ASC considers that it is inappropriate and an unreasonable burden to expect half-year accounts in these circumstances.

(e) *Disclosing entities which are companies in receivership*

On a similar basis to that discussed in RG 43.35–RG 43.39, the ASC will give case by case relief from the periodic reporting provisions to a disclosing entity which is a company in receivership in circumstances described in RG 43.36. The ASC considers that shareholders will be adequately informed if the Report of Affairs (form 507) and Accounts by a Receiver or Scheme Administrator (form 508) is sent to every shareholder at or about the same time as these documents are lodged with the ASC. These forms would be sent to shareholders instead of any accounts made under Pt 3.6 and 3.7.

(f) *Disclosing entities with a short financial year*

The ASC will give case by case relief from preparing and lodging half-yearly accounts with the ASC if the disclosing entity has a financial year of less than eight months. This may occur, for instance, in an entity's first financial year or when an entity changes its financial year. The ASC will give relief because under s50A(5) a "half year" is defined to be the first six months of a financial year. The ASC considers that it is inappropriate and an unreasonable burden to expect half-year accounts from an entity with a half-year which ends two months or less before the financial year end. See also RG 95.41–RG 95.42.

(g) *Exemption from the six month requirement of the half-year accounting period*

The ASC will give case by case relief from the provisions on preparing half-year accounts to a disclosing entity for the half-year accounting period under s50A(5). It will do this if the entity prepares half-year accounts based on a modified half-year accounting period which finishes on a specified day within a week of the end of its half-year accounting period, as defined under s50A(5). For example, an exemption will be given to an entity when its half-year accounts are to be prepared under a modified half-year accounting period ending on the nearest Sunday to the end of the entity's half-year accounting period as

prescribed under s50A(2). In these circumstances, the ASC considers that it is inappropriate and an unreasonable burden to expect half-year accounts to be prepared for an accounting period as defined in s50A(5). See also RG 95.41–RG 95.42.

(h) *Extension of time to lodge accounts for an accounting period*

The ASC will give case by case relief from a disclosing entity's obligation to prepare and lodge accounts by the "deadline" under s58C(4). The ASC will do this if the disclosing entity cannot lodge accounts on time because of factors beyond its control, for instance, if the entity has suffered the temporary or permanent loss of key financial personnel including the external auditor. Where the ASC is prepared to give relief, normally the extension would not be for a period of more than four weeks.

Applications requesting an extension of time to lodge accounts should be made at least three weeks before the relevant "deadline" under s58C(4), in order to allow the ASC time to process the application. Note, the ASC will not issue a letter of comfort nor can it give retrospective relief after the relevant "deadline" has passed. See also RG 95.41–RG 95.42.

(i) *Making out a directors' statement or report*

Under s303(2)(b) and 310(2)(b) respectively, directors are required to make out a directors' report or directors' statement no more than 42 days before the deadline of the relevant accounting period. The ASC has given class order relief to allow directors to make out either or both of these documents more than 42 days before the deadline in relation to the accounting period (see Class Order [CO 96/278]). Relief under the class order is conditional on the company preparing and lodging accounts with the ASC for the accounting period on or before the deadline for that period under s58C(4). It will also be a condition of relief (where applicable) that the annual general meeting of the company be held within 15 weeks of the making out of the directors' report and statement (beginning from whichever is made out first).

(j) *Compulsory acquisition*

The ASC will give case by case relief to a company which is a disclosing entity from its obligation to prepare and lodge accounts under s317A. The ASC will do this if the company is the subject of compulsory acquisition and between the balance date and the deadline one of its shareholders becomes entitled and bound under s701(5) to acquire all outstanding shares in the company. See also RG 95.41–RG 95.42.

[Historical note: RG 95.40(j) inserted 17/6/1996.]

Part IV: Granting relief — overlap with the LR of the ASX

RG 95.41 Some of the LR contemplate or require compliance with the periodic reporting provisions. Where the relief sought is from an obligation which both the Law and the LR require or contemplate being performed, a listed disclosing entity should inform the ASC of this fact and advise the ASC of whether or not it has applied or intends to apply for a waiver from the relevant LR: see RG 95.60. It is unlikely that the ASC would grant relief in a case where the ASX has indicated that it would not grant a waiver from the LR.

RG 95.42 The ASX has indicated to the ASC that in relation to the examples of relief set out in RG 95.40 paras (f) to (i), it would be guided by the principle that a listed disclosing entity should begin to participate in the normal regime of half-yearly reports and annual reports as soon as possible.

Examples of no relief

RG 95.43 The ASC has refused or will refuse to grant relief under s111AT(1) or s313(2) from all or some of the periodic reporting provisions in the following circumstances.

(a) *Seasonal businesses*

The ASC will generally not give relief to a disclosing entity from the provisions on preparing and lodging half-yearly accounts on the basis that the entity's business operations are affected by seasons. The ASC does not accept that relief is appropriate because the business is seasonal and the half-year accounts may appear misleading when compared to the financial year accounts of the entity.

The ASC considers that:

- (i) one of the reasons for introducing more frequent accounts is to fully expose investors to the vagaries of the entity's seasonal activities (see subpara 29(g) above);
- (ii) half-yearly accounts can be qualified to indicate that the entity operates a seasonal business (ie, the accounts would not be misleading); and
- (iii) preparing such accounts is not an unreasonable burden.

(b) *Borrowing corporations relying on concessions under repealed subsections of s1058*

Prior to the commencement of the CLRA, borrowing corporations were obliged to lodge audited half-yearly accounts under s1058(5) or s1058(6). However, the trustee could consent to dispense with this audit and lodgment requirement under s1058(13) or s 1058(18). The CLRA repealed s1058(13) and s1058(18).

Therefore, the ASC is likely to refuse an application under s111AT(1) for relief from preparing and lodging half-yearly accounts by a disclosing entity if the entity is a borrowing corporation and the argument for relief is that prior to the CLRA it had relief from preparing and lodging half-yearly accounts under s1058(13) or s1058(18) as they then existed.

The ASC takes this attitude because the legislative intention of the CLRA was to remove this dispensing provision so that the entity could be regulated like all other disclosing entities. This intention is indicated in para 269 of the EM where it states, “whilst a borrowing corporation that is not a chief entity will, for all purposes other than the audit of this half-year financial statements, be unaffected by the amendments ...”

Part V: Relief from the continuous disclosure provisions

Background

RG 95.44 The continuous disclosure provisions are a central part of the enhanced disclosure scheme.

RG 95.45 Listed disclosing entities must comply with the continuous disclosure requirements of the securities exchange on which it is listed under s1001A. (In the case of ASX, see LR 3.1 among others.) In general, an entity must disclose to the ASX information which, if released, would be likely to have a material effect on the price or value of the entity's securities. This is subject to a qualified exception of confidentiality (see the Guidance Note entitled "Continuous Disclosure: rule 3.1" issued 1/7/96.

[Historical note: RG 95.45 amended 3/3/1997 by replacing in its first instance the LR number "3A(1)" with the number "3.1".

At the end of the paragraph the phrase in brackets was also amended. It formerly read "(see the Guidance Note entitled "Listing Rule 3A(1)" issued by the ASX, dated December 1994)".]

RG 95.46 A similar obligation to that under s1001A applies to unlisted disclosing entities under s1001B. However, in the case of the unlisted disclosing entities:

- (a) the disclosures must be made to the ASC; and
- (b) disclosure is not required if the same information is required to be disclosed by way of a supplementary or replacement prospectus (s1001B(a)). Disclosure will be required by supplementary or replacement prospectus where the disclosing entity has a current prospectus in relation to the relevant ED securities. For more detail on supplementary and replacement prospectuses, see Regulatory Guide 127 *Additional investments in managed investment schemes* (RG 127).

RG 95.47 Unlike the case of the periodic reporting provisions, there are no additional statutory bases for the continuous disclosure provisions other than the general bases described in RG 95.17–RG 95.19.

Granting relief

RG 95.48 As at the date of issue of the guide, the ASC is considering levels of disclosure by disclosing entities under the continuous disclosure provisions and the supplementary and replacement prospectus provisions. Among other things, the ASC is deciding whether it is appropriate to grant class order relief from the continuous disclosure provisions for unlisted disclosing entities in terms similar to the exceptions under LR 3A(1) (these exceptions are discussed in RG 95.49(b)). Until this process is complete, the ASC will grant case by case relief from any or all of the continuous disclosure provisions taking into account the factors for granting relief and bases for continuous disclosure as discussed in RG 95.13–RG 95.20.

RG 95.49 The ASC will also consider the following factors which are relevant to applying the continuous disclosure provisions:

(a) *Listed disclosing entities — provisions of Listing Rule 3.1*

The second reading speech to the Corporate Law Reform Bill 1993 in the House of Representatives outlines the legislative intention of the Bill, particularly s1001A. It states that the intention was to build on the existing framework for disclosure by listed disclosing entities to the ASX rather than creating an overlapping system for disclosure of the same or similar information to the ASC.

In addition, as agreed in the Memorandum of Understanding between the ASC and the ASX on Companies Matters dated 23 September 1994 (MOU), the ASX will:

- (i) continue to take primary responsibility for monitoring and enforcing compliance with the disclosure requirements of the LR including, particularly, LR 3.1; and
- (ii) notify the ASC if it believes a person has committed, is committing or is about to commit a serious contravention of the LR (eg, LR 3.1) or the Law (including s1001A) by a statement as required under s776(2A).

See also RG 95.57–RG 95.60.

Consequently, unless unusual circumstances exist, it is unlikely that the ASC will give relief from s1001A to a listed disclosing entity where the ASX has refused to grant a waiver of LR 3.1 or any other relevant LR. This is because the ASC will rely on the primary supervision of the ASX in implementing continuous disclosure by disclosing entities listed on the ASX. Further, the

ASC considers that disclosing entities listed on the ASX have the benefit of clear exceptions to disclosure in LR 3.1 and therefore, should not require relief from s1001A under an exemption granted by the ASC.

(b) *Unlisted disclosing entities — disclosure of information which is confidential and unreasonably prejudicial*

Listing Rule 3.1 of the ASX's Listing Rules (see RG 95.45) gives disclosing entities listed on the ASX with an exemption from continuous disclosure if:

- (i) a reasonable person would not expect the information to be disclosed;
- (ii) the information is confidential; and
- (iii) one of a number of conditions is satisfied. For example, it would be a breach of law to disclose the information; the information is part of an incomplete proposal or negotiation; or the information is a trade secret.

As contemplated in para 235 of the EM, relief may be given to unlisted disclosing entities exempting them from lodging a continuous disclosure notice with the ASC if this disclosure would be unreasonably prejudicial to the entity. For example, that relief may be warranted if disclosure would expose trade secrets, matters still under negotiation and details of disputes.

Given the above context and comments, the ASC will consider giving an unlisted disclosing entity relief from the continuous disclosure provisions (in particular s1001B) if lodging a notice with the ASC would involve disclosing confidential and unreasonably prejudicial information. Relief from s1001B would be on the condition that when the relevant information is no longer confidential, it is immediately disclosed to the ASC.

A disclosing entity may have withheld from disclosing information under its continuous disclosure obligations because of its confidential and prejudicial nature. This information must be disclosed in a prospectus made under s1022AA if investors and their professional advisers would reasonably require, and reasonably expect to find it in the prospectus, for making an informed assessment of:

- (A) the assets and liabilities, financial position and prospects of the disclosing entity; and
- (B) the rights attaching to the securities (s1022AA(6)).

[Historical note: RG 95.49(a) amended 3/3/1997 by replacing in all instances the listing rule number “3A(1)” with “3.1”.

Para (b) amended 3/3/1997 by replacing in the first para the listing rule number “3A(1)” with “3.1”.]

Part VI: Relief may be conditional

RG 95.50 The ASC may give relief from some or all of the disclosing entity provisions, either unconditionally or subject to conditions (s111AT(1)(b)). Since it is based on a particular set of circumstances and facts which may change, relief is generally for a limited period only.

RG 95.51 A common condition imposed when a disclosing entity has been granted relief from preparing and lodging half-year accounts is that the accounts for the financial year include a statement describing the relief given for the half-year accounts. The statement should give details of the relief and must be included in the:

- (a) directors' report prepared under s304 or s305 for a disclosing entity which is a company (and applied under s323A in the case of a disclosing entity which is a body other than a company); or
- (b) trustee's report under s323J for a disclosing entity which is an undertaking.

RG 95.52 The ASC may also give relief subject to a condition that the applicant provides an annual declaration of compliance with any other conditions imposed. The making of a false or misleading statement to the ASC can have serious consequences: s1308(2).

RG 95.53 The ASC may impose a condition of relief that the applicant must inform it of any changes (which may be specified) immediately if those changes could:

- (a) significantly affect the need for relief; or
- (b) have an adverse effect on the interests of the investors in the particular entity.

RG 95.54 When relief has been granted for a limited period and further relief is required, the applicant must make a fresh application. An application which merely refers to the existence of the present order and the application which gave rise to that order, does not meet the ASC requirements: see RG 95.61–RG 95.64.

Part VII: Power to revoke relief

RG 95.55 The ASC may revoke the operation of an order made under s111AT(1) whether on the basis of an application or otherwise: s109ZB(5).

Part VIII: Effect of relief on the application of s1022AA

RG 95.56 It should be noted that listed disclosing entities which have received the benefit of an exemption from any of the disclosing entity provisions during the previous 12 months will not, unless relief is otherwise given by the ASC, be able to rely on s1022AA to lodge a short form prospectus with the ASC: s1022AA(1)(c).

Part IX: MOU between ASX and ASC

RG 95.57 As mentioned in subpara 49(a) above, the ASC and the ASX signed a Memorandum of Understanding between the ASC and the ASX on Companies Matters dated 23 September 1994 (previously defined as the MOU).

RG 95.58 The MOU sets out the arrangements agreed between the ASC and the ASX to promote co-operation and assistance in monitoring and, when appropriate, enforcing provisions of the LR of ASX and the Law relating to, among other things, the disclosing entity provisions.

RG 95.59 For the purposes of this guide, the salient features of the MOU which should be noted are:

- (a) the ASX will take primary responsibility for monitoring and enforcing compliance with the disclosure and accounting requirements of the Listing Rules;
- (b) the ASC will take primary responsibility for enforcing the disclosure and accounting requirements of the Law;
- (c) the ASX will notify the ASC by a statement as required under s776(2A) if it believes a person has committed, is committing or is about to commit a serious contravention of the Listing Rules (eg, LR 3.1) or the Law (including s1001A); and
- (d) the ASC will notify the ASX, with appropriate details, if it believes a person has committed, is committing or is about to commit a serious or material contravention of the Listing Rules.

[Historical note: RG 95.59(c) amended 3/3/1997 by replacing the listing rule number "3A(1)" with "3.1".]

RG 95.60 The ASC may have to notify the ASX of a possible contravention of the LR if it gives relief from an obligation under any of the disclosing entity provisions which both the Law and the LR require or contemplate being performed in circumstances where no waiver from the LR has been given by the ASX. Similarly, the ASX may have to notify the ASC of a possible contravention of the Law if it gives a waiver which allows non-performance of an obligation which both the Law and the LR require or contemplate being performed in circumstances where no relief has been given by the ASC. An applicant for relief should provide details to the ASC of any relief sought from the ASX.

Part X: Applications

RG 95.61 Applications made under s111AT(1) (or under s313(2) for applications for relief from any or all of the periodic reporting provisions by a company or a body other than a company) should address (but not be limited by):

- (a) in the case of an application for relief from any or all of the periodic reporting provisions — the matters raised in RG 95.35–RG 95.37; and
- (b) in the case of an application for relief from any or all of the continuous disclosure provisions — the matters raised in RG 95.48.

RG 95.62 An applicant should not assume that relief will automatically be given merely because the relevant considerations are in its favour.

RG 95.63 Applications may be lodged at any office of the ASC. They will normally be processed by the Regional Office in the state or territory in which the applicant disclosing entity has its principal business office.

RG 95.64 Applicants should refer to Regulatory Guide 51 for further information regarding the preparation of an application for relief and how such an application will be processed by the ASC.

RG 95.65 Applications for class orders under s111AT(1) (or s313(6) as the case may be) are processed by the Regulatory Policy Branch, Office of the Chairman, Sydney.