



Law Council  
OF AUSTRALIA

*Business Law Section*

18 November 2024

Ms Kate Metz  
Senior Executive Leader, Regulatory Reform and Implementation  
Australian Securities and Investments Commission  
GPO Box 9827  
Sydney NSW 2000

By email: [rri.consultation@asic.gov.au](mailto:rri.consultation@asic.gov.au)

Dear Ms Metz

**Consultation Statement 11 *Proposed updates to RG 51 and RG 108 (CS 11)***

1. This submission is made by the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) and relates to CS 11, which the Australian Securities and Investments Commission (**ASIC**) released for consultation on 21 October 2024.
2. The Committee thanks ASIC for the opportunity to provide feedback on CS 11 and for providing a reasonable time in which to respond to the consultation.

***Background***

3. In CS 11 ASIC has provided draft updated versions of the following regulatory guides:
  - (a) Regulatory Guide 51: *Applications for relief (RG 51)*; and
  - (b) Regulatory Guide 108: *No-action letters (RG 108)*.
4. The purpose of the proposed updates is to ensure that RG 51 and RG 108 reflect ASIC's current regulatory approach.
5. ASIC has also provided a summary of the changes it is proposing to make in respect of each of RG 51 and RG 108.

***Submissions***

6. As a general principle, the Committee considers that it is desirable for ASIC's regulatory guidance to reflect its current regulatory approach, and therefore welcomes an update which is in keeping with this objective.
7. The Committee has no significant concerns about the proposed updates to RG 51 and RG 108. However, the Committee wishes to share a small number of observations.

Telephone [REDACTED] • Email [REDACTED]

PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale St, Braddon ACT 2612

Law Council of Australia Limited ABN 85 005 260 622

[www.lawcouncil.au](http://www.lawcouncil.au)

8. As a general observation, the Committee encourages ASIC to avoid unnecessary repetition within these documents so that they are not longer than they need to be.
9. With respect to the draft updated RG 51 (Attachment 1 to CS 11), the Committee considers that:
  - (a) in paragraph RG 51.10(d), for internal consistency, “Transitional Act” should not be italicised;
  - (b) in paragraph RG 51.35, the reference to “legislative instruments” should be “class-based legislative instruments”;
  - (c) in paragraph RG 51.44(b), the reference to an applicant’s “reasonable expectation of loss” should be “reasonable expectation of loss or other commercial detriment”;
  - (d) in paragraphs RG 51.55(b) and RG 51.55(c), the word “seek” would be more appropriate than “involve” (because the application will only “involve” the relevant ASIC policy outcomes described if and when ASIC approves the application);
  - (e) in table 1, under “Information required by any relevant ASIC published policy(ies)”, the content in the right column should be reworded so that it does not suggest that providing other information as an attachment is mandatory (for example, a link to a website address containing the relevant information could be provided instead of providing an attachment—particularly if an attachment containing the information might be too large to be received by ASIC);
  - (f) in table 2, under “The legal and cost-benefit arguments for relief”, the final sentence of the third bullet point (which states that the application “will need to include a cost-benefit analysis of the proposed relief”) should be removed because:
    - (i) it does not appear to add anything to the preceding sentence; and
    - (ii) it could be misconstrued as requiring the applicant to source a formal cost-benefit analysis from an expert (which would be unnecessarily burdensome and, as far as the Committee is aware, is not ASIC’s intention);
  - (g) for the sake of completeness, paragraph RG 51.63 should also mention that the applicant is responsible for paying the application fee (and cross-refer to Section E);
  - (h) Note 2 to paragraph RG 51.78 should mention that instruments governed by the *Legislation Act 2003* (Cth) must have a sunset date and state that they are “subject to a process of potential disallowance” rather than “potentially subject to a process of disallowance” (because the process is always applicable, and disallowance is a potential outcome of the process); and

- (i) it would be helpful for the document to:
  - (i) at the end of paragraph RG 51.4, cross-refer to paragraph RG 51.49 and RG 108 as sources of further information about the use of no-action letters in relation to past conduct;
  - (ii) in paragraphs RG 51.61 and RG 51.78, explain how to access ASIC instruments that are gazetted and/or published on the ASIC website. This is because the Committee considers that it is in the public interest for ASIC to assist applicants to understand where they can access existing relief that is of potential relevance and/or refer back to relief instruments they have previously obtained;
  - (iii) include a definition of “comfort relief” in the “Key terms” section at the end of the document; and
  - (iv) expressly mention the potential for applicants to seek review of ASIC’s decisions in the Administrative Review Tribunal (as this would be consistent with the draft updated RG 108).

10. With respect to the draft updated RG 108 (Attachment 2 to CS 11), the Committee queries:

- (a) whether the statement to the effect that no-action letters do not have precedent value is correct in all cases—for example, ASIC Regulatory Guide 198 *Unlisted disclosing entities: Continuous disclosure obligations* states that ASIC will administer the law as if unlisted disclosing entities that comply with the ASIC “good practice guidance” for website disclosure are not required to lodge continuous disclosure notices with ASIC; and
- (b) why the draft updated RG 108 seeks to omit the content of paragraphs 8 and 9 of the current RG 108, which the Committee considers to be useful background information articulating ASIC’s rationale for providing no-action letters.

### Conclusion and further contact

11. Please contact co-chair of the [REDACTED] ( [REDACTED] ) if ASIC wishes to discuss any aspect of this submission.

Yours sincerely

[REDACTED]

**Professor Pamela Hanrahan**  
**Chair**  
**Business Law Section**