

New ASIC disclosure guidelines for infrastructure entities from 1 July 2012

The Australian Securities and Investments Commission (ASIC) has released new disclosure benchmarks and principles for disclosure documents prepared by infrastructure entities.

The nine benchmarks and 11 disclosure principles are designed to provide retail investors with consistent information to allow them to understand the characteristics and risks of infrastructure entities and allow investors to compare infrastructure investments against a common standard.

Infrastructure entities will need to review existing disclosure documents before the 1 July 2012 implementation of these changes, and those planning new investment documents should adopt these principles now.

Background

On 24 January 2012, Regulatory Guide 231: “*Infrastructure entities: Improving disclosure for retail investors*” (RG 231) was released by Australian Securities and Investments Commission (ASIC).

The guide was developed by ASIC in recognition of the anticipated need for increased private sector investment in Australian infrastructure projects (demand for which is expected to reach A\$360 billion in the period to 2018ⁱ) and against the background of experience arising from the global financial crisis.

Although the offer of interests by infrastructure entities is already subject to regulation under the Corporation Act 2001 (Cth)

(Corporations Act), ASIC has stated that the different characteristics of and risks associated with infrastructure entities means that their offerings are distinguishable from other financial products offered to retail investors.ⁱⁱ

As a result, the new benchmarks and disclosure principles contained in RG 231 (the Benchmarks and Disclosure Principles respectively) have been introduced by ASIC to address these concerns and provide investors with consistent information with its aim to allow them to understand the characteristics and risks of infrastructure entities and to compare infrastructure investments against a common standard.

Key issues

- Regulatory Guide 231: “*Infrastructure entities: Improving disclosure for retail investors*” (RG 231) was issued on 24 January 2012.
- Its requirements apply to infrastructure entities from 1 July 2012, requiring them to:
 - apply the disclosure principles when disclosing to investors
 - disclose against the benchmarks standards on an ‘if not, why not’ basis - if a particular benchmark requirement is not met, the infrastructure entity must explain to the investor why it does not meet the benchmark and how it deals with the issues underlying the benchmark.

The benchmarks and disclosure principles are intended to:

- operate alongside existing disclosure obligations in the Corporations Act;
- inform infrastructure entities regarding the content and standards of disclosure required; and
- improve the consistency and quality of disclosure by infrastructure entities to enhance investor confidence.

What is an infrastructure entity?

The benchmark and disclosure principles apply to “infrastructure entities”. RG 231 defines an infrastructure entity as a listed or unlisted registered managed investment scheme, company or stapled structure investment that has been offered to retail investors on the basis that its primary strategy or investment mandate is to invest in any of:

- the physical plant, property or equipment of infrastructure assets;
- the right to operate infrastructure assets; or
- other unlisted entities which, either directly or indirectly, primarily invest in the assets referred to in either of the categories above.

Infrastructure assets include roads, railways, ports, airports, telecommunications facilities, electricity generation, gas or electricity transmission or distribution, water supply or sewerage, and hospitals.ⁱⁱⁱ

The benchmarks

The nine benchmarks require infrastructure entities to disclose against a number of specific criteria, including:

- whether their corporate structure and governance policies comply with ASX guidelines
- the basis for remuneration of management
- whether cash flow forecasts and base-case financial models have been prepared, approved and reviewed
- whether performance of operating assets meets previously disclosed forecasts
- compliance with ASX rules relating to related party transactions.

Infrastructure entities which are unit trusts must also confirm whether they pay distributions from scheme borrowings as well as update their unit prices following valuations of infrastructure assets before issuing new units or redeeming existing units.

The disclosure principles

As part of their existing disclosure obligations under the Corporations Act, RG 231 indicates that infrastructure entities should, in addition to disclosure against the specific Benchmarks, also make disclosure in the areas described in the 11 disclosure principles. These include:

- key relationships
- payment and justification of management and performance fees

- matters which ASIC expects to be disclosed in connection with related party arrangements
- information in connection with the entity’s financial ratios, hedging arrangements, capital expenditure, debt maturities and base-case modelling
- valuations of significant assets
- investment diversification policies.

RG 231 indicates that infrastructure entities which are unit trusts should also provide disclosure in connection with the source of distributions and their distribution and withdrawal policies.

‘If not, why not’ disclosure

It is important to understand that the benchmarks are designed as a disclosure framework only.

While disclosure against the benchmarks is required, actually meeting those benchmarks is not mandatory^{iv}. An infrastructure entity is required to disclose against the benchmark standards on an ‘if not, why not’ basis. This means that if a particular benchmark requirement is not met, the infrastructure entity must explain to the investor why it does not meet the benchmark and how it deals with the issues underlying the benchmark.

Although the intention behind the reforms is intended to make investments in infrastructure entities more comparable for investors, there is a concern that ASIC’s ‘one size fits all’ benchmark approach fails to recognise the diversity between infrastructure entities.

The new requirements for disclosure may also tend to lead some investors toward an approach which focuses simply on those benchmarks that are not met by the entity, as opposed to a more holistic approach to the investment and its risks.

When to disclose?

RG 231 requires infrastructure entities to disclose against the benchmarks (on an 'if not, why not' basis) and the provide disclosure on the matters set out in the disclosure principles:

- in a product disclosure statement (PDS) or prospectus;
- as material changes occur – including in a supplementary PDS or prospectus or as part of continuous disclosure and reporting.^v

Implementation

ASIC has indicated that infrastructure entities will need to start complying with the disclosure requirements of RG 231 by **1 July 2012**, in particular:

- By 1 July 2012, where a product under a PDS or prospectus has ceased to be available to new investors but there are existing retail holders of that product, infrastructure entities should

address the disclosures required by the benchmarks and disclosure principles in updated disclosure to those existing investors (this may take place via the issuer's normal communication channels).

- If an existing PDS or prospectus is in use as at 1 July 2012, infrastructure entities should update the PDS or prospectus by issuing a new or supplementary PDS or prospectus.^{vi}
- New PDSs and prospectuses dated on or after 1 July 2012 should address the benchmarks and disclosure principles.^{vii}

Further information

The full text of RG231 and supporting information are available on the ASIC website at www.asic.gov.au.

If you require further information, please contact your usual Clifford Chance adviser or any of the contacts listed on this briefing.

ⁱ ASIC Regulation Impact Statement 231: Infrastructure entities: Improving disclosure for retail investors (RIS 231), RIS 231.18.

ⁱⁱ RIS 231.37.

ⁱⁱⁱ RG 231.15 – RG 231.16.

^{iv} RG 231.14.

^v RG 231.20 and 231.70.

^{vi} Some additional concessions to the way in which information is updated are available to infrastructure entities which are managed investment schemes by virtue of ASIC Class Order 03/237.

^{vii} RG231.31-34.

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