



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 173

# Disclosure for on-sale of securities and other financial products

May 2010

### **About this guide**

This is a guide for listed companies and listed managed investment schemes.

It outlines the circumstances in which we will provide relief from the disclosure requirements under the *Corporations Act 2001* for the on-sale of securities and other financial products.

### 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 version was issued on 11 May 2010 and is based on legislation and regulations as at 11 May 2010.

Previous versions:

- Superseded Policy Statement 173, issued 3 December 2002, reissued 1 July 2004 and 21 December 2004, rebadged as a regulatory guide 5 July 2007 and reissued on 18 June 2009

### 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

The on-sale provisions are anti-avoidance provisions that are designed to ensure that retail investors receive adequate disclosure regardless of whether securities are issued to them directly or through an intermediary: see RG 173.1–RG 173.2.

In some situations the on-sale provisions can present certain practical difficulties. We consider that relief should be provided if this will facilitate fundraising without compromising the protection that the on-sale provisions provide to retail investors: see RG 173.3–RG 173.9.

### What is the purpose of the on-sale provisions?

- RG 173.1 The on-sale provisions are an anti-avoidance mechanism that is designed to minimise the opportunity for issuers of securities or other financial products to avoid giving disclosure to retail investors by:
- (a) first issuing the financial products to an intermediary for whom disclosure is not required; and
  - (b) the intermediary then on-selling the financial products to retail investors.
- RG 173.2 The on-sale provisions seek to ensure that, regardless of whether financial products are issued directly to retail clients or indirectly:
- (a) retail clients receive adequate disclosure for what is, in substance, an issue of financial products; and
  - (b) the issuer is liable to retail clients for the efficacy of that disclosure.

### Balancing commercial considerations and investor protection

- RG 173.3 The issue of financial products to wholesale investors is an important feature of the Australian capital market. Generally, such issues can be completed more quickly and at a lower cost than issues made to retail clients due to a combination of factors, including economies of scale and fewer regulatory requirements.
- RG 173.4 Many of the products issued in the wholesale market are of the same kind as those issued or traded in the wider markets. In such cases, financial products issued to wholesale investors could be on-sold to retail clients. Such transactions, being secondary in nature, usually do not attract an obligation to issue a disclosure document or Product Disclosure Statement (PDS). This

is because disclosure requirements in the Corporations Act (e.g. prospectus disclosure under Pt 6D.2 and PDS disclosure under Pt 7.9) generally apply to the issue of financial products and not to their on-sale, unless the sale occurs within 12 months of the issue and the on-sale provisions apply.

- RG 173.5 Financial products issued in the wholesale market are likely to be on-sold into the retail market in the ordinary course of wholesale investors carrying on their investment activities. In such transactions, avoiding disclosure to retail clients will usually not be a relevant motive.
- RG 173.6 However, the differences in the regulatory requirements between wholesale and retail markets necessarily raises the potential for:
- (a) financial products issued in the wholesale market to be on-sold to retail investors within 12 months of their issue (this may undermine the requirements for disclosure for retail offers of financial products); and
  - (b) opportunities for abuse of those differences by persons who are inclined to exploit them.
- RG 173.7 Consequently, anti-avoidance provisions have long been a feature of Australian law. By enacting the on-sale provisions, Parliament intended to tighten the operation of their anti-avoidance effect.
- RG 173.8 Nonetheless, we realise that without relief the on-sale provisions can present some practical difficulties. For example,
- (a) in certain circumstances, ordinary placements of equities or other financial products might be unduly impeded; and
  - (b) retail clients who are issued financial products without disclosure under a specific exemption from the disclosure provisions (e.g. for dividend reinvestment plans or as consideration for a takeover offer) might not be able to on-sell those products within 12 months of their issue.
- RG 173.9 In considering relief, it would generally not be appropriate for us to exercise our discretionary powers to make fundamental changes to the settings determined by Parliament. However, we can exercise our powers to enable the legislation to operate more appropriately in particular circumstances that may not have been envisaged, or to ameliorate apparently unintended outcomes.

## When do we provide relief?

- RG 173.10 This guide discusses relief we have provided from the on-sale provisions. There are two types of relief:
- (a) *Disclosure-based relief*: The Corporations Act itself provides exemptions from the on-sale provisions. The on-sale exemptions apply where retail investors have the benefit of information that is comparable to that otherwise available in a prospectus or PDS. If the on-sale exemptions do not apply, but retail investors have the benefit of this type of information and investor protection is not compromised, we may provide additional on-sale relief: see Section B.
  - (b) *Exemption-based relief*: This relief ensures that products issued to persons including retail clients under separate disclosure exemptions may be readily on-sold: see Section C.
- RG 173.11 In considering whether to provide relief and the nature of this relief, we have sought to balance the commercial considerations relevant to wholesale capital markets against the retail client protection provided by disclosure under the on-sale provisions.
- RG 173.12 We believe that any significant relief from the on-sale provisions can only be justified if a comparable level of protection is otherwise available to retail clients who acquire financial products by way of transfer within 12 months of their issue.
- RG 173.13 We have provided relief where we consider it will facilitate fundraising and on-sales without compromising the investor protection that the on-sale provisions provide to retail clients.

## Exclusion power

- RG 173.14 This guide also discusses our power to make a determination to exclude an entity from relying on the statutory on-sale exemptions where the entity has contravened certain provisions of the Corporations Act ('exclusion power'): see RG 173.38–RG 173.43.

## B Disclosure based relief

### Key points

Class orders [CO 04/671] and [CO 04/672] provide relief on terms similar to the statutory on-sale exemptions for issuers of stapled securities and issuers who rely on certain technical accounting relief: see RG 173.20–RG 173.23.

Our case-by-case relief includes increasing the 5-day maximum suspension period for listed entities relying on the on-sale exemptions in s708A(5) and 1012DA(5) where the policy underlying the 5-day requirement is upheld despite the suspension: see RG 173.24–RG 173.31.

We may provide other case-by-case or class order relief in circumstances falling outside the on-sale exemptions: see RG 173.37.

We may exercise our exclusion powers to prevent an entity from relying on the on-sale exemptions where an issuer has contravened certain provisions of the Corporations Act. Before exercising these exclusion powers we will generally offer the body an opportunity to make submissions about whether the determination should be made: see RG 173.38–RG 173.43.

### On-sale exemptions

- RG 173.15 Sections 708A and 1012DA operate as exemptions from the on-sale provisions and set out requirements for the content and method of disclosure needed to qualify for these exemptions.
- RG 173.16 Generally speaking, under these exemptions there are two methods by which information can be made available to investors:
- (a) a notice to the market that the issuing entity has provided a full release of information to the market under s708A(5) or 1012DA(5); or
  - (b) a prospectus or PDS for a retail issue that is more or less contemporaneous with an institutional placement under s708(11) or 1012DA(11).
- RG 173.17 A notice to the market under s708A(5) or 1012DA(5) verifies that the issuer has complied with its continuous disclosure and reporting obligations, and provides the market with information that is excluded from continuous disclosure to ensure investors receive disclosure equivalent to that ordinarily available under a prospectus or PDS.
- RG 173.18 Sections 708A(11) and 1012DA(11) recognise that investors may also receive relevant information through a prospectus or PDS that, while not issued for a placement, contains current information on the same class of financial products as the placement.

- RG 173.19 The on-sale of certain securities or other financial products placed with underwriters (or their nominees) is also exempt from the on-sale provisions under s708A(12) and 1012DA(12).

## ASIC relief from the on-sale provisions

- RG 173.20 The legislative exemptions provided by s708A and 1012DA do not inhibit our ability to provide relief from the on-sale provisions under our existing exemption and modification powers. The following are examples of where we have provided either class order or case-by-case relief.

### Stapled securities

- RG 173.21 The disclosure exemptions provided by s708A apply to ‘quoted securities’, which are defined by s9 as ‘a security that is quoted on a prescribed financial market’. This definition does not include stapled securities and, therefore, s708A does not apply to stapled securities.
- RG 173.22 To facilitate the secondary sale of stapled securities, we have provided disclosure-based relief for the sale of stapled securities on terms similar to s708A: see Class Order [CO 04/671] *On-sale of securities and other financial products*. We can see no reason why the exemptions in s708A should not apply to stapled securities merely because the quoted security offered is stapled to another financial product.

### Accounting relief

- RG 173.23 Sections 708A(5)(d) and 1012DA(5)(d) prevent an entity from relying on the on-sale exemptions where relief has been granted under certain provisions of the Corporations Act including those relating to accounts. We have given class order relief to enable a body to rely on the on-sale exemptions even where it also relies on certain technical accounting relief: see Class Order [CO 04/672] *On-sale of securities and other financial products—accounting relief*. We consider that the technical accounting relief does not detract from the level of information available to the market, and so relief from the on-sale provision should be extended.

### Relief to increase the maximum 5-day suspension period

- RG 173.24 A listed issuer can rely on the on-sale exemptions in s708A(5) and 1012DA(5) only where trading of the relevant securities or financial products has not been suspended for more than 5 days during the shorter of:
- (a) the period during which the class of securities or financial products are quoted; and

- (b) the period of 12 months before the date on which the relevant securities or financial products under the offer were issued.

RG 173.25 In calculating whether securities or financial products have been suspended for more than 5 days, we take the view that:

- (a) '5 days' should be read as '5 trading days'; and
- (b) securities or financial products are not suspended during a trading halt.

ASIC relief is not required for these purposes.

RG 173.26 The underlying policy of the 5-day requirement is to ensure that securities and other financial products are adequately priced by the market and that the market is fully informed.

RG 173.27 We will consider granting case-by-case relief to permit an issuer to rely on s708A(5) or 1012DA(5)—even where the relevant securities or other financial products have been suspended for more than 5 days—where it appears that the securities are adequately priced and the market is fully informed.

RG 173.28 Whether the securities or other financial products appear to be adequately priced and the market is fully informed despite the suspension will need to be considered having regard to all the circumstances of the case. However, in undertaking this assessment, we will have regard to circumstances such as:

- (a) the length of the suspension—generally, the longer the period, the greater the level of scrutiny we will apply in granting relief;
- (b) the reason for the suspension—we will consider whether the suspension is voluntary or whether it was being imposed as a result of failing to comply with the ASX Listing Rules or suspected market misconduct;
- (c) the period of time that has elapsed since the suspension—generally, the less time that has elapsed since the suspension, the greater the level of scrutiny we will apply in granting relief. We will be unlikely to grant relief if the on-sale could occur while the issuer is suspended;
- (d) the announcements made to the market since the suspension—we will be more likely to grant relief where disclosure to the market since the time of the suspension, either in the form of continuous disclosure announcements or unqualified financial reporting disclosure, has been timely and otherwise in accordance with the entity's legal obligations. We expect that disclosure after the suspension would address the reasons for the suspension and, where appropriate, detail steps taken to avoid similar suspensions in the future;
- (e) recent history of disclosure—an entity that has contravened disclosure requirements in the previous 12 months will need to explain why the

securities are adequately priced and the market fully informed notwithstanding this non-compliance; and

- (f) any other relevant circumstances that support the underlying policy.

RG 173.29 An application for case-by-case relief should address generally whether the securities or other financial products are adequately priced by the market and the market is fully informed, and address specifically each of the factors listed in RG 173.28. As the 5-day suspension period is effectively refreshed every 12 months, the application should concentrate on events that have taken place during that period.

Note: Similar individual relief will be considered for issuers whose securities are suspended for more than 5 days but who wish to rely on the disclosure exception under s708AA and s1012DAA in a rights issue: see Regulatory Guide 189 *Disclosure relief for rights issues* (RG 189).

### **Rationale for relief to increase the maximum 5-day suspension period**

RG 173.30 If relief were not granted, a listed entity that has been suspended for more than 5 days would need to prepare and lodge a prospectus in order to raise equity capital. We consider that case-by-case relief to increase the maximum 5-day suspension period is appropriate as it will enable listed entities to raise capital in a quicker and less costly way without undermining investor protection.

RG 173.31 Parliament has considered that an entity must not have been suspended for more than a 5-day period in order for an investor to make a secondary sale without a prospectus. We will not take an approach that simply adopts a longer period than 5 days without critical consideration of why the period set out in the legislation should be changed and whether the relevant securities are adequately priced by the market and the market is fully informed.

### **Market expectations**

RG 173.32 When conducting placements and other capital raisings, we think that issuers of securities must take steps to ensure that:

- (a) robust due diligence is conducted regarding compliance with the continuous disclosure rules and identification of all excluded information to be contained in the 'cleansing notice';
- (b) there has been a timely issue of the cleansing notice;
- (c) the cleansing notice clearly sets out the excluded information;
- (d) there has otherwise been timely disclosure of information by the issuer under its continuous disclosure obligations (e.g. material information is disclosed immediately an entity becomes aware of it, unless there is a relevant carve out);

- (e) prospective investors are fully informed before they take up any offer; and
- (f) the pricing and availability of any capital raising offer is fair for all shareholders and in the best interests of the company.

RG 173.33 Communicating information regarding equity capital raisings to potential investors before it is provided to the market generally can raise concerns about breaches of continuous disclosure or insider trading laws. In this regard, it is important that the listed entity maintains confidentiality when sounding out equity capital raising proposals. Potential investors must give confidentiality and 'no-trade' undertakings (e.g. establish information barriers within their organisation).

RG 173.34 We may monitor the effectiveness of these information barriers around price-sensitive information, both in relation to listed entities that are conducting equity capital raisings and their advisers and prospective investors. There should be a complete list of all parties (within and outside the entity) provided with confidential information about the listed entity and records setting out what they were told.

RG 173.35 Announcements on a particular topic can give rise to a market expectation that they will be updated. If an announcement is made updating an earlier market announcement, the fact that it is an update should be highlighted. Material information in the announcement should be given appropriate prominence and be clear as to its possible implications.

RG 173.36 If market practices indicate ongoing risks in this area, we will need to consider whether further regulatory guidance or changes regarding non-prospectus and non-PDS equity capital raising are needed.

### **Other relief**

RG 173.37 In considering other relief, we will not exercise our discretionary powers to make fundamental changes to the settings determined by Parliament. However, we may grant relief where the policy rationale for the on-sale exemptions is satisfied and where granting relief would ameliorate apparently unintended outcomes.

## **Exclusion power**

RG 173.38 We have the power to make a determination removing the benefit of s708A and 1012DA if an issuer has contravened relevant provisions of the Corporations Act in the previous 12 months: s708A(2) and 1012DA(2).

- RG 173.39 The on-sale exemptions are not available to those entities that, at the time when the relevant securities are issued, are the subject of a determination made by ASIC: s708A(1)(c) and 1012DA(1)(d).
- RG 173.40 We may make a determination if we are satisfied that in the previous 12 months the body has not complied with any of the provisions set out in:
- (a) s708A(2) if the product offered is a security; or
  - (b) s1012DA(2) if the product offered is a financial product other than a security.
- RG 173.41 Before exercising our exclusion powers, we will generally offer the body an opportunity to make submissions about whether the determination should be made. We will not usually regard it as a sufficient argument against making a determination that the breach of the relevant obligation has since been rectified in some way. We will use our exclusion powers in a way that provides an incentive to ensure that full, accurate and timely disclosure is provided to the market and to investors.
- RG 173.42 A determination must be in writing, and is required to be published in the *Gazette*: s708A(3) and 1012DA(3). We will also send the determination to the operator of the market on which the entity is listed to ensure that the operator is aware of the determination for its supervision of listed entities and for market transparency.

Note: A disclosing entity should consider, at the time it becomes aware of its failure to comply with the provisions and after a determination is made, whether it has an obligation to disclose any information to comply with its continuous disclosure obligations.

### **Period of exclusion**

- RG 173.43 A determination made by us under either s708A(2) or 1012DA(2) will generally exclude an entity from accessing disclosure relief for a period of 12 months from the date of the instrument of exclusion.

## C Exemption based relief

### Key points

[CO 04/671] provides exemption-based relief from the on-sale provisions for:

- Category 1: Employee share schemes
- Category 2: Share purchase plans
- Category 3: Options, convertible securities or products
- Category 4: Dividend reinvestment or bonus share plans
- Category 5: Compromises and arrangements
- Category 6: Takeovers
- Category 7: Securities of exempt public authorities

We will also give relief for the on-sale of securities if we have provided disclosure relief for the issue or transfer of securities under a capital reduction or reconstruction in accordance with our policy in RG 188: see RG 173.78–RG 173.79.

[CO 08/35] provides on-sale relief for the sale of securities or interests that have been issued pursuant to the rights issue exemption in s708AA or s1012DAA: see RG 173.80.

### Why is relief needed?

RG 173.44 We have provided relief for the circumstances listed in Categories 1 to 7 of [CO 04/671] because:

- (a) the basis for exemption from disclosure for the issue of these financial products extends to the on-sale of the products; and
- (b) any relief would not erode the anti-avoidance effect of the on-sale provisions.

Note: Category 8 of [CO 04/671] also provides limited relief of a transitional nature for certain executive offers made on or before 29 November 2002 under a previous class order. We have not provided ongoing relief for this category as it may lead to possible abuses.

RG 173.45 The on-sale provisions are an anti-avoidance mechanism to prevent indirect issues of financial products to retail clients. However, they may apply to all financial products that are issued directly to retail clients without disclosure. Examples are financial products that are issued under:

- (a) ASIC relief for employee share plans and share purchase plans; and
- (b) the statutory exemptions available for dividend reinvestment or bonus plans.

- RG 173.46 Retail clients who acquire financial products under these exemptions may have a purpose of on-selling. In this case, the on-sale provisions may apply to any on-sale by these clients within 12 months after the issue. Unless they sell under a disclosure exemption, these clients will not be able to on-sell their investments within 12 months of the issue without disclosure.
- RG 173.47 For example, some of the statutory disclosure exemptions available for offers of financial products for issue in schemes of arrangement and takeover bids can attract the on-sale provisions. These offers are subject to specific alternative disclosure requirements and accordingly do not seem to give rise to the avoidance issues contemplated by the on-sale provisions.
- RG 173.48 In our relief, we have not included all categories of exemptions. For example, we have excluded the exemption available for small-scale offers under s708(1) because that exemption is expressly excluded from application to on-sales.

## Category 1: Employee share schemes

- RG 173.49 We have provided relief from the on-sale provisions for the on-sale of securities issued:
- (a) under class order relief for employee share schemes (i.e. Class Order [CO 03/184] *Employee share schemes*), or any other case-specific relief similar to this class order; and
  - (b) on the exercise of any options issued under that relief.
- RG 173.50 We have provided this relief:
- (a) in recognition of the need to foster better productivity by increasing opportunities for employees to invest in their employer; and
  - (b) on the basis of:
    - information available to employees as a result of their special relationship with the issuer;
    - information available to the market through the continuous obligations of the issuer; and
    - tailored transaction-specific information made available to the employee.
- RG 173.51 We consider that relief from the on-sale provisions for the on-sale of these securities is warranted because:
- (a) the cost of disclosure under the on-sale provisions is likely to act as a disincentive for employers to establish, and employees to participate in, employee share schemes;

- (b) the anti-avoidance effect of the on-sale provisions is not significantly eroded by any relief, because the primary purpose of employee share schemes is not fundraising, but fostering better relations between employers and employees to increase productivity; and
- (c) the exemptions that we provide for an issue under an employee share scheme are conditional on the issuer implementing various specific measures for better investor protection.

RG 173.52 For similar reasons, we consider that relief from the on-sale provisions is warranted in the case of the on-sale of securities on the exercise of options that are issued to employees without disclosure because of our relief for employee share schemes.

RG 173.53 Relief for securities issued under employee share schemes will also be available for employees who receive the securities offshore, if the securities were issued in accordance with one of our employee share scheme class orders.

## Category 2: Share purchase plans

RG 173.54 We have provided relief from the on-sale provisions for the on-sale of securities and other financial products issued under class order relief for share purchase plans and interest purchase plans (i.e. Class Order [CO 02/831] *Share purchase plans* and Class Order [CO 02/832] *Interest purchase plans*), or any other case-specific relief similar to these class orders, or any similar relief provided for managed investment product plans.

RG 173.55 We have provided class order relief to enable listed issuers to make offers of shares and interests in managed investment schemes to existing members without prospectus disclosure under a share purchase plan. This relief is provided on the basis that the relatively small scale of the offers involved does not justify the cost of prospectus disclosure.

RG 173.56 In the same way, we consider that relief from the on-sale provisions for the on-sale of such securities issued without disclosure under a share purchase plan is warranted. If the on-sale provisions apply, then the cost savings for issuers and retail clients (which is the underlying reason for the relief from the disclosure provisions for a share purchase plan) will be lost. Further, the purpose of such offers is to allow existing shareholders to make further investments in the issuer, rather than to avoid disclosure through indirect offers to retail clients. Therefore, we believe that relief for the on-sale of securities issued under a share purchase plan will not undermine the anti-avoidance purpose of the on-sale provisions.

### Category 3: Options, convertible securities or products

- RG 173.57 We have provided relief from the on-sale provisions for the on-sale of underlying securities or other financial products issued on the exercise of options or the conversion of convertible securities or other convertible financial products where:
- (a) the option or convertible security or other convertible financial product was issued with disclosure; and
  - (b) the exercise of the option, or the conversion, did not involve any further offer.
- RG 173.58 An offer of an option for the issue of a financial product requires disclosure under Pts 6D.2 or 7.9, unless it is subject to a specific exclusion. If no further offer is involved in exercising the option, then further disclosure is not required at the time of exercise. A new financial product is issued as a result of the exercise of the option.
- RG 173.59 Even where a prospectus or PDS is provided for the offer of an option, the issue of the underlying product on the exercise of the option arguably involves an issue without disclosure for the purposes of s707(3) or 1012C(6) (as the case may be). This is because the prospectus or PDS relates to the offer of the option rather than to the underlying product, even though it is difficult to envisage that the document would not include information that is relevant to the underlying security: see s702 and 1011C. In these circumstances, a product issued on the exercise of an option may be affected by s707(3) if the issuer or acquirer had the requisite on-sale purpose.
- RG 173.60 We consider that the legislative policy requires disclosure at the point where the option is issued, rather than at the time of exercise. It is consistent with that policy to provide relief from the on-sale provisions for the on-sale of products issued on the exercise of the options, where there had been disclosure under Pt 6D.2 or 7.9 at the time of the issue of the options. Such an outcome appears to be broadly consistent with Note 1 to s702 of the Corporations Act, which states:
- If a disclosure document is needed for the option and there is no further offer involved in exercising the option, the issue or sale of the underlying securities on the exercise of the option does not need a disclosure document.
- RG 173.61 Similarly, a person who wishes to come within our class order relief for the on-sale of products issued on the conversion of convertible securities should provide a disclosure document or PDS at the time of issue of the convertible securities. We will generally not provide on-sale relief in relation to the conversion of convertible securities if the issuer has not made such disclosure.

Note: Class Order [CO 10/322] *On-sale of convertible notes issued to wholesale investors* provides prospectus and PDS relief in relation to the on-sale to retail investors

of products issued on the conversion of convertible notes where the convertible notes were originally issued to wholesale or institutional investors pursuant to a cleansing notice containing prospectus-like disclosure.

## Category 4: Dividend reinvestment or bonus share plans

- RG 173.62 We have provided relief from the on-sale provisions for the on-sale of:
- (a) securities issued without disclosure to existing members under a dividend reinvestment plan or a bonus plan (i.e. under the statutory exemption in s708(13)); and
  - (b) financial products issued to clients holding a financial product of the same kind under a distribution reinvestment plan (i.e. under the statutory exemption in s1012D(3)).
- RG 173.63 Issuers can issue shares to existing shareholders under dividend reinvestment or bonus plans without prospectus disclosure under the exemption in s708(13). The underlying reasons for this statutory exemption appear to be that the need for and the cost of prospectus disclosure is not warranted because of:
- (a) the information available to existing members; and
  - (b) the limited or small-scale nature of the capital raising involved.
- RG 173.64 Although on-sales are not limited to existing members, we consider that the cost considerations that underpin the statutory exemption should extend to any on-sale by shareholders within 12 months of the issue. Therefore, we consider that relief from the on-sale provisions is warranted.
- RG 173.65 Similar considerations apply to other financial products issued under distribution reinvestment plans under s1012D(3).

## Category 5: Compromises and arrangements

- RG 173.66 We have provided relief from the on-sale provisions for the on-sale of:
- (a) securities or interests issued as part of a compromise or arrangement under Pt 5.1; and
  - (b) securities or interests issued as part of certain foreign compromises or arrangements whose regulation is substantially similar to a Pt 5.1 compromise or arrangement.
- RG 173.67 Securities issued as part of a compromise or arrangement under Pt 5.1 of the Corporations Act do not require prospectus disclosure if the compromise or arrangement was approved at a meeting held as a result of an order under s411(1) or (1A); see s708(17). A court-approved explanatory statement is

required for such meetings. That statement must include, among other things, information that is material to the making of a decision by a creditor or member about whether or not to agree to the compromise or arrangement.

- RG 173.68 Class Order [CO 07/9] *Prospectus relief for foreign schemes of arrangement and PDS relief for Pt 5.1 schemes and foreign schemes of arrangement* provides disclosure relief for offers of interests under a Pt 5.1 compromise or arrangement since there is no reason to distinguish between an offer of securities under a Pt 5.1 compromise or arrangement (which is exempt under s708(17)) and an offer of interests under a Pt 5.1 compromise or arrangement: see Regulatory Guide 188 *Disclosure in reconstructions* (RG 188) at RG 188.52. [CO 07/9] also provides disclosure relief for offers of securities or interests under certain foreign compromises or arrangements whose regulation is substantially similar to a Pt 5.1 compromise or arrangement: see RG 188.50.
- RG 173.69 Where the exemption in s708(17) or the disclosure relief in [CO 07/9] applies, we consider it is also appropriate to provide on-sale relief.

## Category 6: Takeovers

- RG 173.70 We have provided relief from the on-sale provisions for the on-sale of securities issued as consideration for a takeover bid under Ch 6 that is accompanied by a bidder's statement (i.e. under the statutory exemptions in s708(18) or 1012D(7)).
- Note: We have provided other technical class order relief from the on-sale provisions for offers by a nominee appointed by the bidder to sell scrip consideration on behalf of foreign holders under s619(3): see Class Order [CO 04/653] *On sale disclosure relief for scrip bids and schemes of arrangement*.
- RG 173.71 Where securities are issued as consideration for a takeover bid under a bidder's statement, the issue does not require disclosure because of s708(18) (if securities) or s1012D(7) (if managed investment products). In those circumstances, the bidder's statement itself must include the information that would be required to be included in a prospectus or a PDS for the offer of the securities or products: see s636(1)(g) and 636(1)(ga).
- RG 173.72 Given that equivalent disclosure is required, as with compromises and arrangements, we consider that avoidance of the disclosure obligations is not an issue. However, the on-sale provisions are technically capable of applying to securities or products issued as consideration for a takeover, and again we consider that relief from the on-sale provisions is warranted.
- RG 173.73 In Class Order [CO 09/68] *Prospectus and PDS relief for foreign scrip takeovers*, we have given conditional prospectus and PDS relief for securities and interests offered as consideration under a foreign regulated

takeover where Australian residents hold no more than 10% of the bid class securities: see RG 72.13–RG 72.17. We consider that avoidance of Australian disclosure obligations is not an issue for these foreign takeovers and that it is therefore appropriate to provide on-sale relief.

## Category 7: Securities of exempt public authorities

- RG 173.74 We have provided relief from the on-sale provisions for the on-sale of securities of an exempt public authority (i.e. securities issued under the statutory exemption in s708(21)).
- RG 173.75 An offer for issue of securities of an exempt public authority of a state or territory does not require disclosure under Pt 6D.2: see s708(21). These authorities are generally statutory bodies or other agencies of government. Some of them engage in fundraising from time to time—for example, debt securities may be issued by a government agency to fund government programs. Those persons acquiring the securities may have an on-sale purpose.
- RG 173.76 Because the offer of these securities for issue to any person does not require disclosure, it would not seem appropriate to require disclosure for their on-sale.
- RG 173.77 Similarly, disclosure is not required for offers of debentures by authorised deposit-taking institutions and registered life insurance companies, and offers of securities of exempt bodies: see s708(19) and (20). However, it is unnecessary for us to provide relief for the on-sale of these securities, because the statutory exemptions in s708(19) and (20) already provide relief for both issue and on-sale.

## Capital reductions and reconstructions

- RG 173.78 We may give case-by-case disclosure relief for capital reductions involving an issue or transfer of securities to members where there is no significant change to their overall investment so the members are not making a new investment decision: see RG 188.22. We may also give case-by-case disclosure relief for reconstructions involving no change to the underlying assets or business: see RG 188.23–RG 188.24. We consider that where there is no new investment decision for investors, the cost of a prospectus is not justified: see RG 188.18–RG 188.35.
- RG 173.79 If we give disclosure relief for the issue or transfer of securities under a capital reduction or a reconstruction, we will also give on-sale relief so that a

member can on-sell the securities within 12 months without an on-sale prospectus: see RG 188.36.

## Rights issues

RG 173.80 The rights issue disclosure exemptions in s708AA and 1012DAA allow a person to undertake a rights issue of quoted securities or interests without a disclosure document or PDS provided that certain conditions are satisfied. Class Order [CO 08/35] *Disclosure relief for rights issues* provides relief to streamline the application of the on-sale provisions in s708A and 1012DA to sales of securities or interests that have been issued pursuant to the rights issue exemption: see RG 189.75–RG 189.81.

## Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange Limited
[CO 04/671] (for example)	A class order issued by ASIC (in this example, numbered 04/671)
Corporations Act	<i>Corporations Act 2001</i> , and includes regulations made for the purposes of that Act
disclosure document	Has the meaning given in s9 of the Corporations Act
ED securities	Has the meaning given in s111AD of the Corporations Act
exclusion power	The power in s708A(2) and 1012DA(2) to preclude an entity from relying on the on-sale exemptions
on-sale exemptions	The exemptions in s708A and 1012DA of the Corporations Act
on-sale provisions	Sections 707(3)–(4) and s1012C(6)–(7) of the Corporations Act
PDS	A Product Disclosure Statement required under Pt 7.9 of the Corporations Act
quoted ED securities	Has the meaning given in s111AM of the Corporations Act
retail client	Has the meaning given in s761G of the Corporations Act
s707 (for example)	A provision of the Corporations Act (in this example numbered 707)

## Related information

### Headnotes

Placements, prospectus, disclosure, disclosure-based relief, exemption-based relief, on-sale, on-sale provisions, anti-avoidance, employee share schemes, share purchase plans

### Class orders

[CO 02/831] *Share purchase plans—disclosure relief for securities*

[CO 02/832] *Interest purchase plans—disclosure relief for securities*

[CO 02/1180] *Disclosure for on-sale of securities and other financial products—transitional relief*

[CO 03/184] *Employee share schemes*

[CO 04/671] *On-sale of securities and other financial products*

[CO 04/672] *On-sale of securities and other financial products—accounting relief*

[CO 04/681] *Disclosure for on-sale of securities and other financial products—amendment*

[CO 07/9] *Prospectus relief for foreign schemes of arrangement and PDS relief for Pt 5.1 schemes and foreign schemes of arrangement*

[CO 08/35] *Disclosure relief for rights issues*

[CO 09/68] *Prospectus and PDS relief for foreign scrip takeovers*

[CO 10/322] *On sale for convertible notes issued to wholesale investors*

### Regulatory guides

RG 49 *Employee share schemes*

RG 72 *Foreign securities prospectus relief*

RG 125 *Small offers of shares to existing shareholders by listed companies – share purchase plans*

RG 188 *Disclosure in reconstructions*

RG 189 *Disclosure relief for rights issues*

RG 213 *Facilitating debt raising*

## **Legislation**

*Corporations Act 2001*, Chs 2L, 2M and 6CA, Pts 5.1, 6D.2 and 7.9, s411(1), 411(1A), 674(2), 675(2), 707(3), 707(4), 708(12), 708(17), 708(19), 708(20), 708(21), 708A, 710, 1012C(6), 1012C(7), 1012DA, 1016, 1016E, 1021E; *Australian Securities and Investments Commission Act 2001*

## **Consultation papers and reports**

CP 32 *Secondary sales of securities that require disclosure under s707(3) and (4)* (December 2001)

CP 33 *Disclosure for on-sale of securities and other financial products* (June 2002)

CP 48 *CLERP 9 Bill: Product disclosure* (April 2004)

CP 105 *Facilitating equity capital raising* (February 2009)

REP 160 *Response to submissions on CP 105 Facilitating equity capital raising* (June 2009)