



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 189

Disclosure relief for rights issues

June 2009

About this guide

This is a guide for listed companies and managed investment schemes (and their advisers) about rights issues and the disclosure exemption in s708AA and 1012DAA of the *Corporations Act 2001* (Corporations Act).

This guide explains how Class Order [CO 08/35] *Disclosure relief for rights issues* modifies the disclosure exemption so that it extends to certain non-traditional rights issues, such as accelerated rights issues. [CO 08/35] also gives technical relief for foreign holders, stapled securities and rounding of entitlements. It also modifies the on-sale provisions in s708A and 1012DA.

Entities planning to rely on the disclosure exemption for any rights issue should refer to this guide for an explanation of how [CO 08/35] modifies the provisions.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued on 18 June 2009 and is based on legislation and regulations as at 18 June 2009.

Previous versions:

- Superseded Regulatory Guide 189, issued 15 May 2008

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

A rights issue (as defined in s9A) can be made without a prospectus or PDS if it complies with the disclosure exemption in s708AA and 1012DAA of the Corporations Act: see RG 189.3–RG 189.7.

We have given class order relief in [CO 08/35] to:

- extend the disclosure exemption to non-traditional rights issues including accelerated offers to institutional investors, disposal of shortfall and offers to convertible security holders; and
- streamline the cleansing notice requirements (see Section C).

[CO 08/35] also modifies the on-sale provisions in s708A, 1012DA and gives technical relief in relation to foreign holders, stapled securities and rounding of entitlements: see Section D.

Table 1 in Appendix 1 summarises how the modified disclosure exemption and on-sale provisions apply to all rights issues relying on those provisions: see RG 189.83.

Appendix 2 sets out consolidated versions of s9A, 708AA and 1012DAA as modified by [CO 08/35]: see RG 189.84.

Overview of rights issue structure

- RG 189.1 A traditional rights issue is made on a pro rata basis—that is, an entity offers existing holders the opportunity to subscribe for new securities or interests in proportion to their holding of securities or interests in that class. The terms of the offer are the same for each holder, including the timing of the offers.
- RG 189.2 The traditional rights issue structure has been adapted in various ways to meet different fundraising needs. The primary example of a non-traditional rights issue is an accelerated rights issue where offers to institutional holders are accelerated to enable the issuer to raise funds more quickly.

Disclosure exemption for rights issues

- RG 189.3 Listed entities are permitted to offer:
- a rights issue of quoted securities without a prospectus under s708AA;
- or

- (b) a rights issues of quoted interests in a managed investment scheme without a Product Disclosure Statement (PDS) under s1012DAA.

- RG 189.4 To come within the disclosure exemption for rights issues, the offer must meet the definition of a rights issue in s9A and comply with the requirements in s708AA or 1012DAA.
- RG 189.5 The requirements in s708AA and 1012DAA ensure that investors are able to make an informed decision about the offer. For example, the securities or interests offered must be in a class that is quoted and the issuer must lodge a cleansing notice before the offer is made: see RG 189.18–RG 189.26.
- RG 189.6 The disclosure exemption reflects the structure of a traditional rights issue. This means that the offer must be made on the same terms to all existing holders in the offer class of securities or interests, pro rata to their existing holdings. Section B explains how the disclosure exemption applies to traditional rights issues.
- RG 189.7 A rights issue that does not comply with all of the requirements in s9A and 708AA or 1012DAA does not come within the disclosure exemption. Without ASIC relief it would need to be made under a prospectus or PDS.

Purpose of the disclosure exemption

- RG 189.8 The purpose of the disclosure exemption is to encourage listed entities to make greater use of rights issues because they give existing members an equal opportunity to acquire new securities or interests at the same offer price and in proportion to their holdings (the ‘equal opportunity principle’).
- RG 189.9 Rights issues are also one of the few forms of fundraising that allow retail investors to acquire securities or interests at a discount to the market price. The disclosure exemption is intended to facilitate retail investors’ access to a discounted form of fundraising, while ensuring they have adequate information about the securities or interests being offered.

Class order relief for non-traditional rights issues

- RG 189.10 We have issued Class Order [CO 08/35] *Disclosure relief for rights issues*, which allows certain non-traditional rights issues to qualify for the disclosure exemption even though they do not comply with all of the technical requirements in s9A and 708AA or 1012DAA. We consider that this relief promotes the purpose of the disclosure exemption.
- RG 189.11 The relief we have given in [CO 08/35]:
- (a) permits accelerated rights issues to rely on the exemption (see RG 189.30–RG 189.36);

- (b) streamlines the cleansing notice requirements and makes them consistent with any applicable requirements of the relevant market operator (see RG 189.37–RG 189.46);
- (c) facilitates the disposal of any shortfall (see RG 189.47–RG 189.54);
- (d) allows a rights issue to be extended to convertible security holders where the terms of the convertible security require (see RG 189.55–RG 189.60); and
- (e) addresses some technical issues relating to the disclosure exemption (see Section D).

Why the disclosure exemption needs modification

RG 189.12 The disclosure exemption only permits traditional rights issues to be made without a prospectus or PDS. However, this basic form of rights issue does not always meet an entity’s fundraising needs. For example, the traditional rights issue structure does not allow an issuer to make an accelerated offer to institutions in order to receive funds quickly.

RG 189.13 If entities are unable to rely on the disclosure exemption for non-traditional rights issues, it is likely that they will raise funds by institutional placements and the purpose of the exemption will be undermined. Retail investors are generally not able to participate in placements.

Our approach to disclosure relief for rights issues

RG 189.14 We consider that the most important features of the disclosure exemption are those relating to the equal opportunity principle—that is, the requirements that ensure members have a pro rata entitlement to invest at the same offer price.

RG 189.15 We consider that listed entities should be permitted to offer a non-traditional rights issue without a prospectus or PDS where the rights issue:

- (a) complies with the equal opportunity principle, even though it does not meet all the technical requirements of the disclosure exemption; and
- (b) does not compromise the investor protection features of the disclosure exemption.

B Disclosure exemption for traditional rights issues

Key points

This section discusses the requirements that must be met in order to satisfy the disclosure exemption in s708AA and 1012DAA. The disclosure exemption only applies to a traditional rights issue as defined in s9A: see RG 189.16.

For the disclosure exemption to apply, the rights issue must also comply with a number of other conditions in s708AA or 1012DAA. These conditions ensure that offerees are able to make an informed decision about the offer: see RG 189.17–RG 189.26.

Details of how our relief extends the disclosure exemption are set out in Sections C and D.

Definition of a rights issue for the purposes of the disclosure exemption

- RG 189.16 The disclosure exemption in s708AA and 1012DAA only applies to a rights issue that comes within the definition in s9A. The main elements of s9A are:
- (a) the offer is made to all existing holders in the offer class (apart from certain non-residents);
 - (b) the offer is pro rata (i.e. in proportion to the offeree's holding at the time of the offer); and
 - (c) the terms of each offer are the same.

Conditions of the disclosure exemption

- RG 189.17 Apart from meeting the requirements of s9A, an exempt rights issue must also satisfy the conditions in s708AA (for offers of securities) or 1012DAA (for offers of interests in managed investment schemes). These conditions are intended to ensure that members have sufficient information about the terms of the offer and the relevant securities or interests being offered, as explained below.

Quotation requirements

- RG 189.18 The relevant class of securities or interests must be quoted at the time of the offer and trading must not have been suspended for more than 5 days during the shorter of the period during which the relevant class of securities or financial products are quoted and the period of 12 months before the date on which the relevant securities or financial products under the offer were issued: s708AA(2)(b)–(c), 1012DAA(2)(b)–(c). We consider that 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.

Note: We will consider granting case-by-case relief to increase the maximum 5-day suspension period: see Section D.

Cleansing notice

- RG 189.19 The entity must also give the relevant market operator a ‘cleansing notice’ containing specified information within the 24-hour period before the offer is made: s708AA(2)(f), 1012DAA(2)(f).

Note: [CO 08/35] modifies s708AA(2)(f) and 1012DAA(2)(f) so that the cleansing notice must be given within 24 hours before the first offer is made or such earlier time as required by the relevant market operator: see RG 189.39–RG 189.42. There is also an obligation to update notices until the last issue of securities or interests under the rights issue: see RG 189.43–RG 189.44.

Content of the cleansing notice

- RG 189.20 The cleansing notice must disclose the potential effect that the issue of the relevant securities or interests will have on control of the entity and the consequences of that effect: s708AA(7)(e), 1012DAA(7)(e).
- RG 189.21 The cleansing notice must also disclose information that has been excluded from the entity’s continuous disclosure in accordance with the listing rules and which investors and their professional advisers would reasonably require for making an informed assessment of:
- (a) the assets and liabilities, financial position and performance, profits and losses and prospects of the issuer; or
 - (b) the rights and liabilities attaching to the securities or interests being offered: s708AA(7)(d), 1012DAA(7)(d).
- RG 189.22 In the cleansing notice, the entity must confirm compliance with Ch 2M (Financial reports and audit) and the statutory continuous disclosure obligations in s674 as at the date of the cleansing notice: s708AA(7)(c), 1012DAA(7)(c). This requirement means that only entities that have complied with these financial reporting and continuous disclosure obligations can rely on the disclosure exemption.

- RG 189.23 The notice must also include a statement about the securities or interests being offered without a prospectus or PDS: see s708AA(7)(a) or 1012DAA(7)(a) for the applicable wording.

Correcting a defective notice

- RG 189.24 The entity must correct any defective notice within a reasonable time after becoming aware of the defect up to 12 months after the relevant securities are issued: s708AA(10), 1012DAA(10).

Note: [CO 08/35] modifies s708AA(10) and 1012DAA(10) so that the obligation to correct defective notices begins after the first notice is given.

Exemptions from enhanced disclosure and financial reporting

- RG 189.25 During the previous 12 months (or quotation period if less than 12 months), the issuer (or any person as director or auditor of the issuer) must not be covered by certain exemptions from the enhanced disclosure or financial reporting provisions: s708AA(2)(d)–(e), 1012DAA(2)(d)–(e).

Note: Reliance on certain technical exemptions is disregarded for the purposes of the disclosure exemption: see Class Order [CO 07/571] *Disclosure exemption for rights issues*.

Determinations by ASIC

- RG 189.26 There must be no determinations in force under s708AA(3) or 1012DAA(3) at the time of the offer: s708AA(1)(b), 1012DAA(1)(b). These determinations made by ASIC relate to contraventions by the entity in the previous 12 months of key disclosure provisions of the Corporations Act (including the financial reporting provisions, the statutory continuous disclosure obligations and provisions relating to defective disclosure documents).

C Disclosure relief for non-traditional rights issues

Key points

The class order relief in [CO 08/35] modifies the disclosure exemption so that it applies to accelerated rights issues, disposal of any shortfall and offers extended to convertible security holders: see RG 189.30–RG 189.36 and RG 189.47–RG 189.60.

[CO 08/35] also streamlines the cleansing notice requirements so that generally only one cleansing notice will be required: see RG 189.37–RG 189.46.

The class order relief does not cover offers of unquoted options: see RG 189.61–RG 189.63.

Overview of class order relief

- RG 189.27 The traditional rights issue structure has been adapted to meet different fundraising needs. [CO 08/35] allows non-traditional rights issues to be made without a prospectus or PDS, even though they do not meet all of the technical requirements of the disclosure exemption.
- RG 189.28 The disclosure exemption as modified by [CO 08/35]:
- (a) extends to accelerated rights issues because relatively minor differences in the timing of the offer and allotment to institutional investors (and certain other ‘exempt investors’ as defined in the class order) are permitted: see RG 189.30–RG 189.36;
 - (b) does not require multiple cleansing notices, unless the first notice needs updating or is defective: see RG 189.37–RG 189.46;
 - (c) allows any shortfall to be offered to the original offerees: see RG 189.47–RG 189.54; and
 - (d) allows a rights issue to be extended to convertible security holders where the terms of the convertible securities require: see RG 189.55–RG 189.60.
- RG 189.29 Table 1 in Appendix 1 summarises how the modified disclosure exemption and on-sale provisions apply for all rights issues relying on these provisions: see RG 189.83. Appendix 2 sets out consolidated versions of s9A, 708AA and 1012DAA as modified by [CO 07/571] and [CO 08/35]: see RG 189.84.

Accelerated rights issues

- RG 189.30 In an accelerated rights issue, institutional holders are required to deal with their rights before other holders and are generally allotted their securities first. The offer proceeds in two tranches: institutional and retail. This allows issuers to receive a significant proportion of the offer proceeds from their institutional holders in a very short timeframe.

Relief for different offer periods and dates of allotment

- RG 189.31 Without the relief in [CO 08/35], an accelerated rights issue would not comply with the disclosure exemption because the different offer periods and dates of allotment mean the offers are not made on the same terms to each relevant holder.
- RG 189.32 [CO 08/35] gives relief to permit different offer periods and dates of allotment for retail and institutional investors.

Note 1: Class Order [CO 05/26] *Constitutional provisions about the consideration to acquire interests* facilitates accelerated rights issues by managed investment schemes. This class order relief does not allow the responsible entity to issue interests to institutional holders before any of the retail holders at least have the opportunity to be issued their interests. This condition is imposed in [CO 05/26] to reflect the requirement in s601FC(1)(d) that all members in a class be treated equally, which is a stricter requirement than for rights issues of securities that offers be made on the same terms.

Note 2: Class Order [CO 09/459] *Takeovers relief for accelerated rights issues* provides class order relief from the takeovers provisions for accelerated rights issues subject to certain conditions. Please see Regulatory Guide 199 *Broadening the rights issue and dividend reinvestment plan exceptions for takeovers* (RG 199).

- RG 189.33 The retail allotment must occur within two months after the allotment to institutional investors: s9A(4)(a)–(b), as modified by [CO 08/35]. We also expect that entities will not schedule a general meeting during this period if the early allotment to institutional investors would distort voting.

Relief for separate bookbuilds

- RG 189.34 Some accelerated rights issues conduct separate bookbuilds for the shortfall arising under the institutional offer and the shortfall under the retail offer. [CO 08/35] modifies s9A to permit this difference between the institutional and retail offers: see RG 189.47–RG 189.54.

Rationale for accelerated rights issues relief

- RG 189.35 Although an accelerated rights issue is made on different terms to institutional investors and retail holders, the differences are minimal and do not contravene the equal opportunity principle.

- RG 189.36 We also consider that our relief is likely to result in more retail investors having the opportunity to participate in rights issues than would be the case if accelerated rights issues had to be made under a prospectus or PDS.

Relief to remove multiple cleansing notices

Cleansing notice requirements without our relief

- RG 189.37 Without our relief, the disclosure exemption would require a cleansing notice to be given within the 24-hour period before an offer is made and the on-sale provisions would require a cleansing notice to be given after the issue of the securities or interests. This is in addition to any requirements imposed by the relevant market operator. For example, the ASX requires a cleansing notice to be given before the start of trading on the day that is at least 6 business days before the offer is made.
- RG 189.38 The effect of these requirements is that, without our relief, an issuer would be required to give a number of very similar cleansing notices to the relevant market operator within a short period of time, particularly in an accelerated rights issue.

Modification of the cleansing notice requirements

Streamlining cleansing notice requirements

- RG 189.39 [CO 08/35] modifies the disclosure exemption and the on-sale provisions so that an issuer will generally only need to give one cleansing notice, unless new information emerges or a defect in the notice is discovered.
- RG 189.40 The class order also removes the obligation to give a cleansing notice after the issue of the securities in order to obtain on-sale relief: s708A(12A), 1012DA(12A), as added by [CO 08/35]. See RG 189.75–RG 189.81 for other modifications to the on-sale provisions.

When cleansing notice must be given

- RG 189.41 [CO 08/35] modifies the disclosure exemption so that the cleansing notice must be given within the 24-hour period before the first offer is made or any earlier time required by the market operator: s708AA(2)(f), 1012DAA(2)(f).
- RG 189.42 The effect of [CO 08/35] and the ASX requirements is that issuers listed on ASX will be required to give the cleansing notice before the start of trading on the day that is at least 6 business days before the offer is made (Day 0 under the ASX timetable in Appendix 7A of the ASX Listing Rules). In the case of a renounceable rights issue, requiring the cleansing notice on Day 0

ensures that investors have the benefit of the cleansing notice disclosure before rights trading starts on Day 2.

Obligation to update and correct cleansing notices

- RG 189.43 The modified disclosure exemption requires an issuer to give a further cleansing notice if the issuer becomes aware of new or additional information that would have required disclosure in the initial notice: s708AA(12), 1012DAA(12) as added by [CO 08/35]. This obligation continues up until the last issue of securities or interests under the rights issue (or any related shortfall issue).
- RG 189.44 [CO 08/35] also modifies s708AA(10)(b) and 1012DAA(10)(b) so that it is clear that the obligation to correct defective notices commences from the time the first notice is given. Cleansing notices with new or corrective information must be given as soon as practicable.

Rationale for cleansing notice relief

- RG 189.45 We have streamlined the cleansing notice requirements because we consider that giving multiple cleansing notices where there is no new information may be confusing to the market.
- RG 189.46 Our relief also ensures that the cleansing notice requirements under the Corporations Act are consistent with relevant listing rules (provided market operators do not require a cleansing notice to be given after the first offer is made).

Disposing of shortfall

- RG 189.47 Some rights issues are under-subscribed by holders, resulting in a shortfall. In these circumstances, issuers often want to dispose of the shortfall to raise the full amount sought under the rights issue.
- RG 189.48 Without our relief, disposal of the shortfall would not usually come within the disclosure exemption because the subsequent offers are unlikely to be pro rata. This means that the issuer would either need to rely on another disclosure exemption (such as s708 or 1012D) or offer the shortfall under a prospectus or PDS.
- RG 189.49 Under [CO 08/35], shortfall offers to existing holders will come within the disclosure exemption provided that:
- (a) the securities or interests have been offered, but not accepted, under the rights issue;

- (b) the offer is made to persons to whom offers were made under the rights issue (although see RG 189.50); and
- (c) the shortfall offer is made no later than two months after the first offer under the rights issue: s708AA(13)(a), 1012DAA(13)(a), as modified by [CO 08/35].

RG 189.50 [CO 08/35] does not prevent an entity from relying on another disclosure exemption for disposal of the shortfall. For example, the entity may wish to offer the shortfall to investors under s708 or 1012D.

RG 189.51 Before the offer period for the shortfall starts, entities should consider whether their cleansing notice disclosure needs updating. For example, the effect on control is likely to be different from originally contemplated if the first offer was significantly under-subscribed by smaller holders and large holders have indicated they will take up the shortfall.

RG 189.52 The takeover exemption for rights issues does not extend to shortfall offers, which are unlikely to comply with the requirements of s611, item 10. This means that issuers will need to ensure that any shortfall offer that complies with [CO 08/35] does not result in a person contravening s606.

Note: We will grant case-by-case relief in certain circumstances to broaden the takeover exception for rights issues to extend to acquisitions under a shortfall facility: see RG 199.

Rationale for shortfall relief

RG 189.53 We consider that our relief for disposal of any shortfall facilitates rights issues in a way that is consistent with the purpose of the disclosure exemption. In particular, the relief ensures that existing holders have an equal opportunity to participate in the initial pro rata offer.

RG 189.54 The relief is relatively broad so that issuers have flexibility to deal with the shortfall in a way that meets their funding needs.

Offers to convertible security holders

RG 189.55 A company offering ordinary shares under a rights issue may often be required to extend the offer to convertible security holders (i.e. holders of securities that convert into ordinary shares) due to the terms of the convertible securities. This type of term is intended to protect convertible security holders from having their holdings diluted.

RG 189.56 Without our relief, a rights issue of ordinary shares that is extended to convertible security holders would not comply with the disclosure exemption and would have to be made under a prospectus. This is because, under the disclosure exemption, an offer of ordinary shares can only be made to

existing ordinary shareholders. In addition, the offer must be to issue ordinary shareholders with the same proportion of shares that they held before the offer: s9A.

- RG 189.57 [CO 08/35] modifies the disclosure exemption so that holders of convertible securities may participate in a rights issue of ordinary shares (or other quoted securities or interests) if the terms of the convertible securities require rights issues to be extended in this way: s708AA(13)(b), 1012DAA(13)(b), as added by [CO 08/35].
- RG 189.58 It is a condition of our relief that the entity must make an offer to all holders with convertible securities that entitle them to participate in the rights issue (although the entity can elect not to make offers to holders with a registered address outside Australia or New Zealand). It is also a condition that convertible holders are only able to participate in the rights issue to the extent necessary to prevent their holdings being diluted.
- RG 189.59 The relief is confined to disclosure requirements and does not affect the takeovers exemption in item 10 of s611. Issuers need to ensure that any offer extended to convertible security holders under [CO 08/35] does not result in a person contravening s606.

Rationale for convertible security holder relief

- RG 189.60 We consider that companies should not be deterred from undertaking a rights issue merely because convertible security holders are entitled to participate. Convertible security holders will have adequate information about the underlying securities because of continuous disclosure, the market price and the cleansing notice.

Offers of unquoted options not covered by [CO 08/35]

- RG 189.61 Some rights issues for ordinary shares include an offer of unquoted options. These offers fall outside the disclosure exemption because they are not an offer of quoted securities and they are not a pro rata offer of securities in a class (i.e. shares) to existing holders in that class.
- RG 189.62 The transaction-specific prospectus provisions for continuously quoted securities in s713(2) require prospectus disclosure of the rights and liabilities attaching to the options themselves as well as the underlying securities.
- RG 189.63 [CO 08/35] does not enable an issuer to offer unquoted options under the disclosure exemption because there would be no previous prospectus, continuous disclosure or market price for the options.

D Other relief for rights issues

Key points

We will consider granting case-by-case relief to permit an issuer to rely on s708AA or 1012DAA, even where the relevant securities or other financial products have been suspended for more than 5 days.

[CO 08/35] also provides technical relief that:

- gives issuers and underwriters flexibility when dealing with foreign holders' entitlements under rights issues (see RG 189.71–RG 189.74);
- streamlines the application of the on-sale provisions to securities or interests issued under the disclosure exemption (see RG 189.75–RG 189.81); and
- addresses other technical issues in the application of the disclosure exemption (see RG 189.82).

Relief to increase the maximum 5-day suspension period

RG 189.64 We will consider granting case-by-case relief to permit an issuer to rely on s708AA or 1012DAA—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 189.65 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 189.66 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 189.67 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. 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 rights issue 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 189.68 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 189.67. 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 s708A(5) and s1012DA(5) in a secondary sale situation: see Regulatory Guide 173 *Disclosure for on-sale of securities and other financial products* (RG 173).

Rationale for increasing the 5-day suspension period

RG 189.69 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 189.70 Parliament has considered that an entity must not have been suspended for more than a 5-day period in order for the entity to conduct a rights issue 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.

Treatment of foreign holders

RG 189.71 Section 9A requires offers to be made to every person who holds securities or interests in the relevant class. However, entities may restrict their rights issue to holders with a registered address in Australia or New Zealand if they determine that it is unreasonable to offer securities or interests to other holders ('non-residents') and advise the non-residents that they will not be included: s9A(3). If the rights issue is renounceable, s9A(3) requires the entity to appoint a nominee to sell the non-residents' rights and remit the net proceeds to them: s9A(3)(c).

Note: A renounceable rights issue is one where the invitation to apply for, or the right to be issued with, the securities (or interests) is able to be assigned.

RG 189.72 [CO 08/35] modifies s9A(3)(c) so that entities have more flexibility when dealing with non-residents' entitlements under a renounceable rights issue, including using a bookbuild process or a sale in accordance with the procedure in s615. Under s9A(3)(c) as modified, the entity must:

- (a) advise each non-resident that a process will be conducted under which their entitlement will be offered for issue or sale to other persons;
- (b) advise the non-resident of the main features of this process; and
- (c) advise the non-resident that they will be sent any net proceeds.

RG 189.73 Section 9A does not prescribe how an entity should deal with the rights or securities that would have been offered to non-residents under a non-renounceable rights issue (provided the entity complies with s9A(3)(a) and (b)). In the case of a non-renounceable rights issue, the entity may elect to use the kind of process described in s9A(3)(c) but they are not restricted to that process.

RG 189.74 [CO 08/35] does not modify the takeovers exemption for rights issues in s611, item 10, which has its own procedure for dealing with non-residents' entitlements in s615. If reliance on the takeover exemption is required, entities should ensure the process they adopt for non-residents under s9A complies with s615.

Note: We will grant case-by-case relief in certain limited circumstances to broaden the takeover exception for rights issues by giving relief from the process in s615 for non-renounceable rights issues: see RG 199.

Application of the on-sale provisions

RG 189.75 Securities or interests that are issued without a disclosure document cannot be readily on-sold in the 12 months after issue unless one of the on-sale exemptions in s708A or 1012DA applies.

- RG 189.76 Without our relief, most issuers who offer a rights issue without a disclosure document would seek to rely on the on-sale exemption for quoted securities or quoted interests in s708A(5) or 1012DA(5).
- RG 189.77 These on-sale provisions for quoted securities impose very similar conditions to those imposed by the disclosure exemption, although the on-sale provisions also require the securities or interests to be in a class that has been quoted at all times in the 3 months before the relevant securities are issued.
- RG 189.78 Another major difference between the disclosure exemption and the on-sale provisions is that a number of the on-sale conditions must be satisfied up until the time the securities or interests are issued, whereas the analogous disclosure exemption requirements in s708AA and 1012DAA must be satisfied only at the time the offer is made.

Effect of ASIC relief

- RG 189.79 [CO 08/35] modifies s708A and 1012DA so that securities or interests issued under the disclosure exemption will automatically qualify for on-sale relief, provided they are in a class that has been quoted at all times in the 3 months before the day on which the relevant securities or interests were issued: s708A(12A), 1012DA(12A), as added by [CO 08/35].
- RG 189.80 Securities or interests are also covered by the relief if they are issued as a result of:
- (a) shortfall offers, including any shortfall offered to investors under s708 or 1012D;
 - (b) offers made to convertible holders under s708AA(13)(b) or 1012DAA(13)(b); and
 - (c) offers relating to non-residents' entitlements: s708A(12B), 1012DA(12B).
- RG 189.81 Under our class order the issuer is not required to give a cleansing notice under the on-sale provisions because they have already given a cleansing notice under the disclosure exemption. There is also no need to comply with the general on-sale conditions for quoted securities (which the issuer would need to do if relying on s708A(5) or 1012DA(5)).

Note: For modifications to the disclosure exemption cleansing notice requirements, see RG 189.39–RG 189.46.

Other technical relief

- RG 189.82 [CO 08/35] also provides technical relief to allow rounding of fractional entitlements and to extend the disclosure exemption to stapled securities.

Appendix 1: Overview of modified disclosure exemption and on-sale provisions

RG 189.83 Table 1 summarises how the disclosure exemption (s9A, 708AA, 1012DAA) and the on-sale provisions (s708A, 1012DA) apply, as modified by [CO 08/35].

Table 1: Overview of the modified disclosure exemption and on-sale provisions

Topic	Explanation
Offer to all existing holders in a class	<p>Under s9A, the offer must be made to all existing holders in a particular class (subject to an exception for certain foreign holders).</p> <p>[CO 08/35] allows the offer to be extended to convertible security holders where the terms of the convertible securities requires this: see RG 189.55–RG 189.60.</p>
Pro rata offer	<p>The offer must be to issue securities or interests in proportion to the relevant investor's existing holding, but we allow differences attributable to rounding: s9A(4)(e), as added by [CO 08/35].</p>
Terms of offer	<p>The terms of the offer must be the same, apart from different offer periods and dates of allotment for institutional investors and retail holders: s9A(4)(a)–(b), as modified by [CO 08/35]. See RG 189.31–RG 189.33.</p>
Excluding foreign holders	<p>The issuer is not required to extend the offer to persons with a registered address outside Australia or New Zealand provided the issuer:</p> <ul style="list-style-type: none"> • determines it is unreasonable to extend the offer to non-residents (s9A(3)(a)); • advises non-residents that the offer will not be made to them (s9A(3)(b)) and gives them details of the offer; and • if the rights issue is renounceable, advises the non-residents of how their entitlement will be dealt with and remits the net proceeds to them (s9A(3)(c), as modified by [CO 08/35]).
Quotation requirements	<p>The class of securities or interests must be quoted at the time the offer is made: s708AA(2)(b), 1012DAA(2)(b).</p> <p>To rely on the on-sale provisions, the relevant class must have been quoted for at least 3 months before the issue of the relevant securities or interests: s708A(12A), 1012DA(12A), as added by [CO 08/35].</p>

Topic	Explanation
Cleansing notice	<p>The issuer must give the relevant market operator a cleansing notice containing prescribed information within the 24-hour period before the first offer or any earlier time required by the market operator: s708AA(2)(f), 1012DAA(2)(f), as modified by [CO 08/35]. See RG 189.39–RG 189.42.</p> <p>If new information arises or the initial notice is defective, the issuer must give the market operator a notice that sets out the new or amended information as soon as practicable: s708AA(10)-(12), 1012DAA(10)-(12), as modified by [CO 08/35]. See RG 189.43–RG 189.44.</p>
Restriction on suspension	<p>Trading in the offer class of securities must not have been suspended for more than a total of 5 days in the previous 12 months (or quotation period if less than 12 months): s708AA(2)(c), 1012DAA(2)(c).</p> <p>Note: ASIC will consider granting case-by-case relief to increase the 5-day suspension period where it appears that the securities are adequately priced and the market is fully informed.</p>
No reliance on certain exemptions	<p>During the previous 12 months (or quotation period if less than 12 months), the issuer (or any person as director or auditor of the issuer) must not be covered by an exemption from the enhanced disclosure or financial reporting provisions: s708AA(2)(d)–(e), 1012DAA(2)(d)–(e). Reliance on certain technical exemptions is disregarded for the purposes of the disclosure exemption: [CO 07/571].</p>
ASIC determination	<p>At the time the offer is made, there must be no determination by ASIC in force due to contravention of specified provisions of the Corporations Act: s708AA(1)(b), 1012DAA(1)(b).</p>
Disposal of shortfall	<p>If the rights issue is not fully subscribed, the issuer may dispose of the shortfall without a prospectus or PDS where the offer of the shortfall is:</p> <ul style="list-style-type: none"> • made to an original offeree; and • made no later than 2 months after the first offer under the rights issue (s708AA(13)(a), 1012DAA(13)(a), as added by [CO 08/35]). <p>In the case of an accelerated rights issue, the issuer may conduct separate bookbuilds in respect of the shortfalls arising under the institutional offer and the retail offer: s9A(4)(c), as added by [CO 08/35].</p>

Appendix 2: Consolidated provisions

RG 189.84 In order to assist issuers and their advisers, this Appendix sets out consolidated versions of s9A, 708AA and 1012DAA as modified by [CO 07/571] and [CO 08/35].

Note: [CO 08/35] also makes modifications to s708A and 1012DA so that a cleansing notice is not required after the issue of securities under a rights issue in order to obtain on-sale relief: see RG 189.40.

Consolidated s9A

9A Meaning of *rights issue*

- (1) A *rights issue* is an offer of a body's securities for issue in respect of which the following conditions are met:
- (a) the securities being offered for issue are in a particular class;
 - (b) either:
 - (i) the offer is made to every person who holds securities in that class to issue them, or their assignee, with the percentage of the securities to be issued that is the same as the percentage of the securities in that class that they hold before the offer; or
 - (ii) if the conditions in subsection (3) are met—such an offer is made to:
 - (A) every person with a registered address in Australia or New Zealand; and
 - (B) every other person (if any) with a registered address outside Australia and New Zealand to whom the body decides to make offers,
 who holds securities in that class;
 - (c) the terms of each offer are the same.

Note: Paragraph (b) covers offers made to persons because they hold securities in the relevant class. It does not cover offers made to persons in some other capacity, for example, because they hold securities which are convertible into securities in the relevant class. Accordingly, these other offers do not affect whether the conditions in paragraph (b) or (c) are met.

- (2) A *rights issue* is an offer of interests in a managed investment scheme for issue in respect of which the following conditions are met:
- (a) the interests being offered for issue are in a particular class;
 - (b) either:
 - (i) the offer is made to every person who holds interests in that class to issue them, or their assignee, with the percentage of the interests to be issued that is the same as the percentage of the interests in that class that they hold before the offer; or
 - (ii) if the conditions in subsection (3) are met—such an offer is made to:

- (A) every person with a registered address in Australia or New Zealand; and
- (B) every other person (if any) with a registered address outside Australia and New Zealand to whom the responsible entity decides to make offers,

who holds interests in that class;

- (c) the terms of each offer are the same.

Note: Paragraph (b) covers offers made to persons because they hold interests in the relevant class. It does not cover offers made to persons in some other capacity, for example, because they hold financial products which are convertible into interests in the relevant class. Accordingly, these other offers do not affect whether the conditions in paragraph (b) or (c) are met.

- (3) The conditions in this subsection are met if:

- (a) the body or responsible entity (as the case requires) decides that it is unreasonable to offer securities or interests (as the case requires) for issue to persons (the **non-residents**) with a registered address in a place outside Australia or New Zealand, after taking into account the following matters:
 - (i) the number of non-residents, in that place, to whom offers would otherwise be made;
 - (ii) the number and value of the securities or interests that would otherwise be offered for issue;
 - (iii) the cost of complying with the laws, and any requirements of any regulatory authority, of the place where the securities or interests would otherwise be offered for issue; and
- (b) the body or responsible entity:
 - (i) sends details of the offer to each non-resident in that place; and
 - (ii) advises each non-resident in that place that the non-resident will not be offered the securities or interests; and
- (c) if the invitation to apply for, or the right to be issued with, the securities or interests is able to be assigned—the body or responsible entity:
 - (i) advises each non-resident in that place that a process will be conducted under which the securities or interests that would otherwise have been offered to the non-resident, or the invitations to apply for or rights to be issued with the securities or interests, will be offered for issue or sale to other persons; and
 - (ii) advises each non-resident of the main features of the process; and
 - (iii) advises each non-resident that they will be sent any net proceeds to which they are entitled from the issue or sale of the securities, interests, invitations or rights under the process.

Note: Paragraph (c) has no application where the invitation to apply for, or the right to be issued with, the securities or interests is not able to be assigned. In such a case, there is no failure to meet the conditions in this subsection merely because the body or responsible entity decides to conduct a process of the kind described in that paragraph, whether in whole or in part.

- (4) For the purpose of determining whether an offer of a body's securities or an offer of interests in a managed investment scheme (as the case requires) satisfies the conditions in subsection (1) or (2), disregard the following matters:

- (a) some or all persons who are offered securities or interests as an exempt investor may:
 - (i) receive the offer before other persons to whom offers are made; or
 - (ii) be given a period of time to accept the offer which is less than the period of time given to other persons to whom offers are made;
 - (b) the securities or interests may be issued to a person as an exempt investor before securities or interests are issued to other persons under the offer, provided that any such issue to an exempt investor occurs no earlier than 2 months before the issue of securities or interests to other persons who are not exempt investors;
 - (c) in relation to any securities or interests offered to but not accepted by some or all of the persons to whom the offers were first made:
 - (i) processes are conducted at different times under which the securities or interests, or the invitations to apply for or rights to be issued with those securities or interests, are offered for issue or sale to exempt investors; and
 - (ii) payments are made at different times of any net proceeds of issues or sales under those processes to the persons to whom the securities, interests, invitations or rights were first offered;
 - (d) an offer made in the circumstance referred to in paragraph 708AA(13)(a) or 1012DAA(13)(a);
 - (e) the rounding up or down of the number of securities or interests offered to a person to a whole number.
- (5) For the purposes of this section:
- (a) ***exempt investor*** means a person:
 - (a) offered securities in circumstances that do not need disclosure under Part 6D.2 because of subsections 708(8) to (12); or
 - (b) offered interests as a wholesale client (as defined in section 761G);***process***, in relation to an offer of securities or interests or invitations to apply for or rights to be issued with the securities or interests, includes:
 - (a) the appointment of a nominee:
 - (i) to whom the securities, interests, invitations or rights are issued;
 - (ii) who sells the securities, interests, invitations or rights; and
 - (b) persons or classes of persons being invited to make offers to acquire:
 - (i) the securities or interests;
 - (ii) the invitations or rights on the condition that an application is made under the invitation or the rights are exercised;

Note: The issue and sale of securities or interests under the terms of an offer referred to in section 615 is a process for the purposes of this section.
 - (b) a reference to an offer of securities or interests includes a reference to an invitation to apply for the issue of securities or interests; and
 - (c) a reference to accepting an offer of securities or interests includes a reference to making an application for the securities or interests.

Consolidated s708AA

708AA Rights issues that do not need disclosure

- (1) This section applies to an offer of a body's securities (the *relevant securities*) for issue if:
 - (a) but for subsection (2), disclosure to investors under this Part would be required by section 706; and
 - (b) a determination under subsection (3) is not in force in relation to the body at the time when the relevant securities are offered.

Conditions required for rights issue

- (2) The offer does not need disclosure to investors under this Part if:
 - (a) the relevant securities are being offered under a rights issue or related issue; and
 - (b) the class of the relevant securities are quoted securities at the time at which the offer is made; and
 - (c) trading in that class of securities on a prescribed financial market on which they are quoted was not suspended for more than a total of 5 days during the shorter of the following periods:
 - (i) the period during which the class of securities is quoted;
 - (ii) the period of 12 months before the day on which the offer is made; and
 - (d) no exemption under section 111AS or 111AT covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (c); and
 - (e) no order under section 340 or 341 (other than ASIC Class Orders [CO 98/100], [CO 98/101], [CO 98/104], [CO 98/1418], [CO 98/2395], [CO 99/90], [CO 00/2449], [CO 05/83], [CO 05/637], [CO 05/642], [CO 05/644], [CO 05/910], or [CO 06/441]) covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (c); and
 - (f) the body gives the relevant market operator for the body a notice that complies with subsection (7) within the 24 hour period before the first offer is made under the rights issue or by any earlier time required by the market operator.

Determination by ASIC

- (3) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the body contravened any of the following provisions:
 - (a) subsection 283AA(1), 283AB(1) or 283AC(1);
 - (b) the provisions of Chapter 2M as they apply to the body;
 - (c) section 674 or 675;
 - (d) section 724 or 728;
 - (e) subsection (10) of this section;
 - (f) section 1308 as that section applies to a notice under subsection (2) of this section.

- (4) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.
- (5) The determination made under subsection (3) is not a legislative instrument.
- (6) A failure to publish a copy of the determination does not affect the validity of the determination.

Requirements for notice

- (7) A notice complies with this subsection if the notice:
 - (a) states that the body will offer the relevant securities for issue without disclosure to investors under this Part; and
 - (b) states that the notice is being given under paragraph (2)(f); and
 - (c) states that, as at the date of the notice, the body has complied with:
 - (i) the provisions of Chapter 2M as they apply to the body; and
 - (ii) section 674; and
 - (d) sets out any information that is excluded information as at the date of the notice (see subsections (8) and (9)); and
 - (e) states:
 - (i) the potential effect the issue of the relevant securities will have on the control of the body; and
 - (ii) the consequences of that effect.

Note 1: A person is taken not to contravene section 727 if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 727(5).

Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The body has an obligation to correct a defective notice: see subsection (10) of this section.

- (8) For the purposes of subsection (7), excluded information is information:
 - (a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and
 - (b) that investors and their professional advisers would reasonably require for the purpose of making an informed assessment of:
 - (i) the assets and liabilities, financial position and performance, profits and losses and prospects of the body; or
 - (ii) the rights and liabilities attaching to the relevant securities.
- (9) The notice given under subsection (2) must contain any excluded information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in a disclosure document.

Obligation to correct defective notice

- (10) The body contravenes this subsection if:
 - (a) a notice given under subsection (2) or (12) is defective; and
 - (b) the body becomes aware of the defect in the notice within the period commencing on the date the notice is given under paragraph (2)(f) and ending 12 months after

the last issue of securities that occurs under the rights issue or any related issue;
and

- (c) the body does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.
- (11) For the purposes of subsection (10), a notice under subsection (2) or (12) is *defective* if the notice:
- (a) does not comply with paragraph (2)(f) or subsection (12); or
 - (b) is false or misleading in a material particular; or
 - (c) has omitted from it a matter or thing, the omission of which renders the notice misleading in a material respect.
- (12) If, at any time in the period (*relevant period*) between the date the notice was given under paragraph (2)(f) and the last issue of securities made under the rights issue or a related issue, the body becomes aware of:
- (a) any information that would be excluded information that would need to be included in the notice if the notice had been given at that time and that has not been included in the notice or otherwise provided to the relevant market operator; or
 - (b) a material change to:
 - (i) the potential effect the issue of the relevant securities will have on the control of the body; or
 - (ii) the consequences of that effect,

the body must, as soon as practicable but in any event before the end of the relevant period, give the relevant market operator a notice that sets out details of the information or material change.
- (13) In this section, *related issue* means, in relation to a rights issue, an offer of securities in the same class as the securities offered under the rights issue in any of the following circumstances:
- (a) all of the following are satisfied:
 - (i) either:
 - (A) the securities had first been offered to, but not accepted by, a person under the rights issue; or
 - (B) the offer is made on the condition that the securities to which the offer relates may only be issued to the person where an offer of the securities has first been made to, but not accepted by, another person under the rights issue;
 - (ii) the offer is made to persons to whom offers were made under the rights issue;
 - (iii) the offer is made no later than 2 months after the first offer is made under the rights issue;

Note: Nothing in this paragraph:

- (a) prevents an offer being made to a person other than a person mentioned in subparagraph (ii) and which does not need disclosure under this Part; or
 - (b) implies that a particular process must be carried out in making any such offer.
- (b) an offer made to a holder of securities (*convertible securities*) that are convertible, whether or not at the option of the holder, into securities in the class offered under the rights issue where:
- (i) the terms (the *convertible terms*) of, or the rights (the *convertible terms*) attaching to, the convertible securities require the offer to be made to the holder (other than a holder with a registered address in a place outside Australia or New Zealand to whom the body decides that it is unreasonable to offer securities);
 - (ii) each holder:
 - (A) to whom the body is required to make an offer under the convertible terms; and
 - (B) with a registered address in a place outside Australia or New Zealand and to whom the body decides offers will be made, is made such an offer; and
 - (iii) the number of securities offered to each holder is no greater than the number of securities that would have been required to be offered to the holder if all of those convertible securities had been converted into securities in the class being offered under the rights issue immediately before the date (*record date*) on which a person needs to be recorded on the register of members in order to receive an offer under that issue.
- (14) For the purposes of paragraph (13)(a), a reference to accepting an offer of securities includes a reference to making an application for the securities.
- (15) For the purposes of paragraph (13)(b), if under the convertible terms the price at which the securities are traded on a prescribed financial market is relevant to determining the number of securities that are to be issued on the conversion of the convertible security, then the number is to be determined by reference to the price at which the securities were traded:
- (a) where under the convertible terms the relevant price is to be determined by reference to trading over a period of time—over the period ending on the record date; or
 - (b) where under the convertible terms the relevant price is the price at a particular time—as at that time on the record date.
- (16) For the purposes of this section, if under the terms on which a security (the *component security*) is traded on a prescribed financial market it can only be transferred together with one or more other securities or other financial products (together the *stapled security*) then:
- (a) the component security is taken to be in a class of quoted securities that is different from any other class of quoted securities it is in, or is taken to be in, when at any

other time it is able to be transferred on the market by itself or as part of a different stapled security; and

- (b) trading in the class of quoted securities that the component security is taken to be in on the market is taken to be suspended when trading in the class of stapled securities on the market is suspended.

Consolidated s1012DAA

1012DAA Rights issues for which Product Disclosure Statement is not required

- (1) In a recommendation situation or issue situation, the regulated person does not have to give the client a Product Disclosure Statement if:
 - (a) but for subsection (2), the regulated person would be required by section 1012B to give a Product Disclosure Statement for the transfer or issue of a financial product (the *relevant product*); and
 - (b) a determination under subsection (3) was not in force in relation to the issuer of the relevant product at the time when the relevant product was issued.

Conditions required for rights issue

- (2) The regulated person does not have to give the client a Product Disclosure Statement if:
 - (a) the relevant product is being offered under a rights issue or related issue; and
 - (b) the class of the relevant product are quoted securities at the time at which the offer is made; and
 - (c) trading in that class of the relevant product on a prescribed financial market on which they are quoted was not suspended for more than a total of 5 days during the shorter of the following periods:
 - (i) the period during which the class of the relevant product is quoted;
 - (ii) the period of 12 months before the day on which the offer is made; and
 - (d) no exemption under section 111AS or 111AT covered the issuer of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (c); and
 - (e) no order under section 340 or 341 (other than ASIC Class Orders [CO 98/100], [CO 98/101], [CO 98/104], [CO 98/1418], [CO 98/2395], [CO 99/90], [CO 00/2449], [CO 05/83], [CO 05/637], [CO 05/642], [CO 05/644], [CO 05/910], or [CO 06/441]) covered the issuer of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (c); and
 - (f) the issuer of the relevant product gives the relevant market operator for the issuer a written notice that complies with subsection (7) within the 24 hour period before the relevant conduct first occurs under the rights issue or by any earlier time required by the market operator.

Determination by ASIC

- (3) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the issuer of the relevant product contravened any of the following provisions:
- (a) the provisions of Chapter 2M as they apply to the registered scheme in which the relevant product is an interest;
 - (b) section 674 or 675 as it applies to the registered scheme in which the relevant product is an interest;
 - (c) section 1016E, 1021D, 1021E or 1021J;
 - (d) subsection (10) of this section;
 - (e) section 1308 as it applies to a notice under subsection (2) of this section.
- (4) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.
- (5) The determination made under subsection (3) is not a legislative instrument.
- (6) A failure to publish a copy of the determination does not affect the validity of the determination.

Requirements for notice

- (7) A notice complies with this subsection if the notice:
- (a) states that the relevant product was issued without a Product Disclosure Statement for the relevant product being prepared; and
 - (b) states that the notice is being given under paragraph (2)(f); and
 - (c) states that, as a disclosing entity, the issuer of the relevant product is subject to regular reporting and disclosure obligations; and
 - (d) states that, as at the date of the notice, the issuer of the relevant product has complied with:
 - (i) the provisions of Chapter 2M as they apply to the registered scheme in which the relevant product is an interest; and
 - (ii) section 674 as it applies to that registered scheme; and
 - (e) sets out any information that is excluded information as at the date of the notice (see subsections (8) and (9)); and
 - (f) states:
 - (i) the potential effect the issue of the relevant product will have on the control of the body; and
 - (ii) the consequences of that effect.

Note 1: A person is taken not to contravene section 1021C if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 1021C(5).

Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The issuer has an obligation to correct a defective notice: see subsection (10) of this section.

- (8) For the purposes of subsection (7), excluded information is information:

- (a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and
 - (b) that a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the relevant product.
- (9) The notice given under subsection (2) must contain any excluded information only to the extent to which it is reasonable for a person considering, as a retail client, whether to acquire the relevant product to expect to find the information in a Product Disclosure Statement.

Obligation to correct defective notice

- (10) The issuer of the relevant product contravenes this subsection if:
- (a) a notice given under subsection (2) or (12) is defective; and
 - (b) the issuer becomes aware of the defect in the notice within the period commencing on the date the notice is given under paragraph (2)(f) and ending 12 months after the last issue of the relevant product that occurs under the rights issue or any related issue; and
 - (c) the issuer does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.
- (11) For the purposes of subsection (10), a notice under subsection (2) or (12) is **defective** if the notice:
- (a) does not comply with paragraph (2)(f) or subsection (12); or
 - (b) is false or misleading in a material particular; or
 - (c) has omitted from it a matter or thing, the omission of which renders the notice misleading in a material respect.
- (12) If, at any time in the period (**relevant period**) between the date the notice was given under paragraph (2)(f) and the last issue of the relevant product under the rights issue or a related issue, the issuer of the relevant product becomes aware of:
- (a) any information that would be excluded information that would need to be included in the notice if the notice had been given at that time and that has not been included in the notice or otherwise provided to the relevant market operator; or
 - (b) a material change to:
 - (i) the potential effect the issue of the relevant product will have on the control of the registered scheme in which the relevant product is an interest; or
 - (ii) the consequences of that effect,
- the issuer must, as soon as practicable and in any event before the end of the relevant period, give the relevant market operator a notice that sets out details of the information or material change.
- (13) In this section, **related issue** means, in relation to a rights issue, an offer of the relevant product in the same class as the products offered under the rights issue in any of the following circumstances:

- (a) all of the following are satisfied:
 - (i) either:
 - (A) the relevant product had first been offered to, but not accepted by, a person under the rights issue; or
 - (B) the offer is made on the condition that the relevant product to which the offer relates may only be issued to the person where an offer of the product has first been made to, but not accepted by, another person under the rights issue,
 - (ii) the offer is made to persons to whom offers were made under the rights issue;
 - (iii) the offer is made no later than 2 months after the first offer is made under the rights issue;

Note: Nothing in this paragraph:

- (a) prevents an offer being made to a person other than a person mentioned in subparagraph (ii) and which does not require a Product Disclosure Statement to be given to the person; or
 - (b) implies that a particular process must be carried out in making any such offer.
- (b) an offer made to a holder of a financial product (***convertible product***) that is convertible, whether or not at the option of the holder, into the relevant product in the class offered under the rights issue where:
 - (i) the terms (the ***convertible terms***) of, or the rights (the ***convertible terms***) attaching to, the convertible product require the offer to be made to the holder (other than a holder with a registered address in a place outside Australia or New Zealand to whom the issuer decides that it is unreasonable to offer the relevant product);
 - (ii) each holder:
 - (A) to whom the issuer is required to make an offer under the convertible terms; and
 - (B) with a registered address in a place outside Australia or New Zealand and to whom the issuer decides offers will be made,

is made such an offer; and
 - (iii) the number of products offered to each holder is no greater than the number of products that would have been required to be offered to the holder if all of those convertible products had been converted into products in the class being offered under the rights issue immediately before the date (***record date***) on which a person needs to be recorded on the register of members in order to receive an offer under that issue.
- (14) For the purposes of paragraph (13)(a), a reference to accepting an offer of products includes a reference to making an application for the products.
 - (15) For the purposes of paragraph (13)(b), if under the convertible terms the price at which the products are traded on a prescribed financial market is relevant to determining the number of products that are to be issued on the conversion of the convertible product, then the number is to be determined by reference to the price at which the products were traded:

- (a) where under the convertible terms the relevant price is to be determined by reference to trading over a period of time—over the period ending on the record date; or
 - (b) where under the convertible terms the relevant price is the price at a particular time—as at that time on the record date.
- (16) For the purposes of this section, if under the terms on which a financial product (the ***component product***) is traded on a prescribed financial market it can only be transferred together with one or more securities or other financial products (together the ***stapled security***) then:
- (a) the component product is taken to be in a class of quoted securities that is different from any other class of quoted securities it is in, or is taken to be in, when at any other time it is able to be transferred on that market by itself or as part of a different stapled security; and
 - (b) trading in the class of quoted securities that the component product is taken to be in on the market is taken to be suspended when trading in the class of stapled securities on the market is suspended.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange Limited
Corporations Act	The <i>Corporations Act 2001</i> including any regulations made for the purposes of the Act
disclosure exemption	Exemption under s708AA and 1012DAA of the Corporations Act from the requirement to provide a prospectus or PDS for 'rights issues' of quoted securities and quoted interests (as defined in s9A), which was introduced by the SRS Act
on-sale provisions	Sections 708A and 1012DA of the Corporations Act
PDS	Product Disclosure Statement
SRS Act	<i>Corporations Legislation Amendment (Simpler Regulatory System) Act 2007</i>

Related information

Headnotes

rights issue, non-traditional rights issue, equal opportunity principle, fundraising, prospectus, Product Disclosure Statement, listed company, managed investment scheme, disclosure exemption, retail holders, shortfall, accelerated rights issue, cleansing notice, placement, on-sale provisions, 5-day suspension period

Class orders

[CO 04/671] *Disclosure for on-sale of securities and other financial products*

[CO 05/26] *Constitutional provisions about the consideration to acquire interests*

[CO 07/571] *Disclosure exemption for rights issues*

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

[CO 09/459] *Takeovers relief for accelerated rights issues*

Regulatory guides

RG 159 *Takeovers, compulsory acquisitions and substantial holding notices*

RG 173 *Disclosure for on-sale of securities and other financial products*

RG 199 *Broadening the rights issue and dividend reinvestment plan exceptions for takeovers*

Legislation

Corporations Act 2001 Ch 6D, s9A, 606, 611, 615, 708A, 708AA, 713(3), 1012DA, 1012DAA

Consultation papers and reports

CP 91 *Non-traditional rights issues*

CP 105 *Facilitating equity capital raising*

REP 128 *Report on submissions to CP 91 Non-traditional rights issues*

REP 160 *Response to submissions on CP 105 Facilitating equity capital raising*

Information releases

IR 07-42 *ASIC proposes widening prospectus exemption for rights issues*