



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 192

Licensing: Wholesale equity venture capital schemes

August 2008

About this guide

This is a guide for trustees and managers of wholesale equity schemes and their advisers. It is particularly relevant to venture capital schemes.

This guide explains the licensing relief ASIC has given in Class Order (CO 07/74) *Wholesale equity schemes: licensing relief for trustees*. The relief is for trustees of wholesale equity schemes that are operated by a manager holding an Australian financial services (AFS) licence under Ch 7 of the *Corporations Act 2001* (Corporations Act).

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 regulatory guide was issued on 8 August 2008 and is based on legislation and regulations as at 8 August 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.

Licensing: Wholesale equity venture capital schemes

Key points

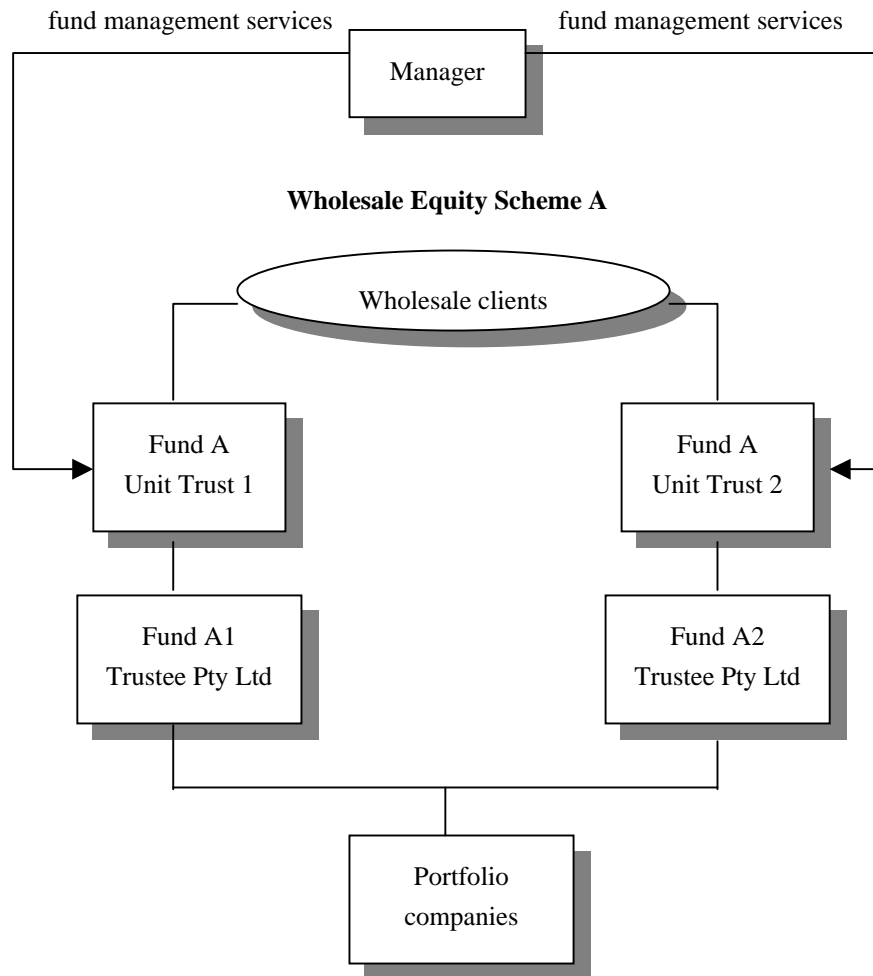
ASIC has given certain trustees of wholesale equity schemes relief from the requirement under Ch 7 to hold an AFS licence to provide custodial or depository services and dealing services in connection with the scheme.

The relief applies when a fund manager that has an AFS licence and is a related body corporate of the trustees accepts responsibility for the conduct of the trustees.

The relief, which is in CO 07/74, is subject to a number of requirements: see Table 1.

What is a wholesale equity scheme?

- RG 192.1 A wholesale equity scheme is a managed investment scheme (as defined in s9 of the Corporations Act) with the following characteristics:
- (a) the scheme is unregistered;
 - (b) scheme assets are limited to the following investment products (other than incidental holdings of cash or certain highly liquid assets):
 - (i) securities (as defined in s761A);
 - (ii) options to acquire by way of transfer a security covered by paragraphs (a), (b) or (c) of the definition of 'security' in s761A;
 - (iii) interests in a managed investment scheme;
 - (iv) a financial product within the meaning given by s764A(1)(ba); and
 - (v) options to acquire an interest in a managed investment scheme; and
 - (c) the scheme primarily invests in unquoted investment products. At all times, the value of the investment products that are quoted on a financial market must be less than 20% of the total value of the scheme assets. For these purposes the value of the scheme's assets is determined according to the trustee's reasonable estimate of the market value of those assets.
- RG 192.2 Many venture capital schemes are wholesale equity schemes. For tax reasons, wholesale equity schemes are normally established using a multiple unit trust structure with separate corporate trustees: see Figure 1.

Figure 1: Typical wholesale equity scheme structure

What relief have we given to trustees of wholesale equity schemes?

RG 192.3 Class Order (CO 07/74) *Wholesale equity schemes: licensing relief for trustees* gives trustees of wholesale equity schemes relief from the requirement under Ch 7 of the Corporations Act to hold an AFS licence to:

- (a) deal in the financial products they hold on trust for members of the scheme and in interests in the wholesale equity scheme; and
- (b) provide for members a custodial or depository service in relation to the financial products.

In this guide we refer to these two financial services as ‘wholesale equity financial services’.

RG 192.4 The relief under CO 07/74 is available as long as all of the requirements in Table 1 are satisfied. Our relief is structured so that failure to meet the requirements referred to in items 4 or 5 of Table 1 will not necessarily cause

the relief to cease. If a breach of these requirements is reported to us within certain timeframes, we may confirm that the trustee can continue to rely on the relief.

Table 1: Summary of requirements of relief under CO 07/74

Requirement	Explanation
<p>1 The trustee must not 'control' (as defined in s50AA of the Corporations Act) any entity in which it invests.</p>	<p>The relief is intended to facilitate schemes that, for tax reasons, are structured with separate corporate trustees so that the trustee does not control any of the entities in which it invests.</p>
<p>2 The scheme must be operated by a related body corporate of the trustee (the manager).</p>	<p>The relief is intended to apply where the manager is effectively controlling the operations of the trustee so that the manager has the capacity to ensure the trustee's compliance.</p>
<p>3 The manager must have an AFS licence authorising it to provide wholesale equity financial services with the following conditions:</p> <ul style="list-style-type: none"> • the manager must, as far as possible, comply with the Corporations Act as if the trustee were providing the wholesale equity financial services as the manager's representative; • the manager must have in place a deed poll for the benefit of scheme members under which the manager indemnifies them in relation to any liability (except a liability for which the trustee may be indemnified from trust property) that arises from the trustee's provision of the wholesale equity financial services to them; and • the manager must treat the assets, liabilities and cash flows of the trustee as though they were the assets, liabilities and cash flows of the manager for the purposes of the conditions of the manager's licence covering base level financial requirements, the financial requirement for holding client money or property, and licensees transacting with clients and audit reports. 	<p>These conditions are intended to protect scheme members by ensuring as far as practicable that the same regulatory and liability consequences apply as would apply if the manager had provided the wholesale equity financial services itself.</p> <p>While the manager must meet ASIC's financial requirements as if it were providing the financial services, it can rely on the trustees' assets, liabilities and cash flows in demonstrating compliance.</p> <p>One of the financial requirements is that the licensee must have at least \$5 million net tangible assets (NTA) when the licensee has custody of client assets other than incidentally to another financial service being provided by the licensee or a related body corporate: see Regulatory Guide 166 <i>Licensing: Financial requirements</i> (RG 166) at RG 166.63. However, in general, we expect that the manager of a wholesale equity scheme will not need to satisfy the \$5 million NTA requirement because it will usually have custody of scheme assets incidentally to its financial services of issuing interests in the wholesale equity scheme and arranging on behalf of members for the trustee to acquire or dispose of financial products.</p> <p>The manager will usually need to have \$50,000 in surplus liquid funds because, as a result of the proposed licence conditions, it is taken to be holding the assets that the trustee holds on trust for scheme members: see Section E of RG 166.</p>

Requirement	Explanation
<p>4 The trustee and manager must take reasonable steps to ensure that the scheme only has wholesale clients as members.</p>	<p>This requirement is intended to ensure that our relief will not affect the protections Parliament intended for retail clients, such as the requirement for a Financial Services Guide to be given to them.</p>
<p>5 The trustee must:</p> <ul style="list-style-type: none"> • comply with the base level financial requirements in condition 13 of Pro Forma 209 <i>Australian financial services licence conditions</i> (PF 209) (i.e. to be solvent at all times, have positive net assets and have sufficient cash resources to cover the next 3 months); • comply with those parts of condition 28 of PF 209 (except conditions 28(a) and 28(d)(iii), (iv) and (v)) that relate to an audit report relating to condition 13 (i.e. to obtain an audit report on the licensee's compliance with the financial requirements of the licence); and • lodge the audit opinion on financial requirements under condition 28 of PF 209 within the timeframe specified in paragraph 5(c)(iii) of CO 07/74. 	<p>As a separate legal entity with obligations to scheme members, the trustee must have adequate cash resources and be able to demonstrate this. There is provision in RG 166 to establish compliance by cash flow calculation on a group basis.</p>

Why have we given this relief?

- RG 192.5 Part 7.6 of the Corporations Act requires a person who carries on a financial services business in Australia to hold an AFS licence covering the provision of the financial services.
- RG 192.6 In the absence of relief, the trustee of a wholesale equity scheme may require an AFS licence because it will be carrying on a financial services business by:
- (a) providing a custodial or depository service (under s766E) by holding financial products (e.g. shares in unlisted companies) on trust for, or on behalf of, the members of the wholesale equity scheme;
 - (b) dealing (under s766C(1)(a) and (e)), when acquiring and disposing of financial products (e.g. shares in unlisted companies) on behalf of members of the wholesale equity scheme; and
 - (c) dealing (under s766C(1)(b)), if it is issuing interests in the wholesale equity scheme. The trustee would be issuing a financial product because an interest in an unregistered managed investment scheme may be a financial product under s764A(1)(ba). The trustee is likely to be issuing interests in the wholesale equity scheme if it is responsible for obligations owed to members under the terms of the facility that is the product: s761E(4).

Note: Apart from CO 07/74, certain exemptions from the requirement to hold an AFS licence may apply depending on the circumstances. However, a trustee of a wholesale equity scheme cannot rely on the licensing exemption in s911A(2)(b) in relation to the wholesale equity services it provides other than the service of issuing interests in the scheme where a licensed manager offers to arrange for the issue of interests in the scheme.

- RG 192.7 As illustrated in Figure 1, many wholesale equity schemes are established using a multiple unit trust structure with separate corporate trustees to ensure that the trusts are not treated as public trading trusts for tax purposes. Each of these trustees is likely to require an AFS licence. When a fund manager that is already an AFS licence holder takes responsibility for the operation of the wholesale equity scheme, we consider that the requirement for each trustee to also hold an AFS licence would impose a disproportionate cost burden on the scheme.
- RG 192.8 Although Ch 7 of the Corporations Act accommodates a limited form of ‘group licensing’ to the extent that it allows for bodies corporate (including related bodies corporate) to be authorised representatives of AFS licensees, it is unlikely that a trustee of a wholesale equity scheme would be able to rely on the fund manager’s AFS licence. It is unlikely that a trustee would be considered to be providing wholesale equity financial services as the manager’s representative, as the trustee would undertake and be personally responsible for obligations to clients under the terms of the trusts.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
financial product	Generally a facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) Note: See Div 3 of Part 7.1 for the exact definition
related body corporate	A related body corporate as defined in s9
RG 166 (for example)	An ASIC regulatory guide (in this example, numbered 166)
s761A (for example)	A section of the Corporations Act (in this example, numbered 761A)
wholesale client	A wholesale client as defined in s761G
wholesale equity scheme	See RG 192.1

Related information

Headnotes

AFS licence, control, custodial or depository service, dealing, managed investment scheme, related body corporate, wholesale clients

Class orders and pro formas

CO 07/74 *Wholesale equity schemes: licensing relief for trustees*

PF 209 *Australian financial services licence conditions*

Regulatory guides

RG 166 *Licensing: Financial requirements*

Legislation

Corporations Act s9, 50AA, 761A, 761E(4), 764A(1)(ba), 766C(1)(a), 766C(1)(b), 766C(1)(e), 766E, 911A(2)(b)

Consultation papers

CP 82 *Wholesale equity venture capital schemes: Trustee licensing*

Information releases

IR 07-21 *ASIC consults on policy on licensing relief for trustees of wholesale equity schemes* (31 May 2007)