ASIC
Australian Securities & Investments Commission

REGULATORY GUIDE 46

Unlisted property schemes: Improving disclosure for retail investors

March 2012

About this guide

This is a guide for responsible entities, compliance committees, compliance plan auditors and others involved with the issue of interests in unlisted property schemes.

It sets out principles for improved disclosure to retail investors to help them compare risks and returns across investments in the unlisted property sector.

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 in March 2012 and is based on legislation and regulations as at the date of issue.

Previous version:

- Superseded Regulatory Guide 46 issued in September 2008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.

Contents

A Overview

Key points

This guide applies to unlisted property schemes in which retail investors have a direct or indirect investment: see RG 46.1–RG 46.4.

ASIC has developed six benchmarks and eight disclosure principles for unlisted property schemes that can help retail investors understand the risks, assess the rewards being offered and decide whether these investments are suitable for them: see RG 46.8–RG 46.10.

Responsible entities of unlisted property schemes offered to retail investors or in which retail investors have invested should:

- disclose against the benchmarks on an 'if not, why not' basis (see Section C); and
- apply the disclosure principles (see Section D).

This information should be included in any Product Disclosure Statements (PDSs) and ongoing disclosure for these schemes issued on or after 1 November 2012. The information should be communicated in the most effective way possible (e.g. by website or regular updates): see Section E.

We have also provided guidance for advertising of all unlisted property schemes to retail investors: see Section F.

Those involved with unlisted property schemes (e.g. compliance committees, compliance plan auditors and valuers) should consider these disclosure and advertising obligations when carrying out their responsibilities: see Section G.

Who this guide applies to

Unlisted property schemes

RG 46.1 For the purposes of this guide, an 'unlisted property scheme' is an unlisted managed investment scheme that has or is likely to have at least 50% of its non-cash assets invested in real property and/or in unlisted property schemes.

> Note: Infrastructure assets are not 'real property' for the purposes of the above definition. Examples of infrastructure assets are roads, railways, ports, airports and other transport facilities, and facilities for telecommunications, electricity generation, transmission and distribution, gas transmission and distribution, water supply and sewerage. Responsible entities of infrastructure schemes should refer to Regulatory Guide 231 *Infrastructure entities: Improving disclosure to retail investors* (RG 231) when considering their disclosure obligations.

RG 46.2 This guide applies to registered unlisted property schemes in which retail investors invest directly or indirectly (e.g. through an investor directed portfolio service).

RG 46.3 This guide does *not* apply to:

(a) listed property schemes;

(b) property securities funds whose only exposure to property is through investments in listed property schemes;

(c) property schemes that do not have any direct or indirect investment by retail investors; or

(d) serviced strata schemes or timeshare schemes.

Hybrid schemes

RG 46.4 This guide may apply to hybrid property schemes (schemes that invest in both property and other non-cash assets), depending on the scheme's proportion of assets in direct real property or unlisted property schemes.

The need for improved disclosure

RG 46.5 Unlisted property schemes often appeal to retail investors, who may believe that the investment offers capital stability and consistent ongoing returns that are not likely to vary significantly. This is not always the case and retail investors need better information on the risks associated with investment in unlisted property schemes: see RG 46.23–RG 46.24.

RG 46.6 Disclosure by unlisted property schemes on key issues affecting the assessment of risk and returns has at times been unclear, making it difficult for retail investors to compare investments. Responsible entities of unlisted property schemes need to improve their disclosure so that retail investors can assess the effect of changing economic conditions on their investment: see RG 46.25–RG 46.27.

RG 46.7 We have analysed the disclosure practices of property schemes in the context of the debt market turbulence that Australia has experienced since mid-2007: see RG 46.26. This analysis led us to develop benchmarks and disclosure principles designed to extract key risk and return information for retail investments in unlisted property schemes.

Benchmarks and disclosure principles for unlisted property schemes

RG 46.8 We have developed six benchmarks and eight disclosure principles covering information that is key to analysing the risks associated with unlisted property schemes: see Table 1. Clear and prominent disclosure of the benchmark and disclosure principle information will allow retail investors to compare the relative risk and return of investments in unlisted property schemes.

Table 1: Benchmarks and disclosure principles for unlisted property schemes in which retail investors invest

Gearing	*Benchmark 1* addresses a scheme's policy on gearing at an individual credit facility level. *Disclosure Principle 1* addresses disclosure of the gearing ratio of the scheme, the calculation of the ratio and its explanation.
Interest cover	*Benchmark 2* addresses a scheme's policy on the level of interest cover at an individual credit facility level. *Disclosure Principle 2* addresses disclosure of the interest cover ratio of the scheme, the calculation of the ratio and its explanation.
Interest capitalisation	*Benchmark 3* addresses whether the interest expense of a scheme is capitalised.
Scheme borrowing	*Disclosure Principle 3* addresses disclosure of the scheme's credit facilities, including the circumstances in which credit facility covenants will be breached.
Portfolio diversification	*Disclosure Principle 4* addresses disclosure of the scheme's assets, including specific information about development assets.
Valuations	*Benchmark 4* addresses the way in which valuations are carried out by a responsible entity in relation to the scheme's assets.
Related party transactions	*Benchmark 5* addresses a responsible entity's policy on related party transactions. *Disclosure Principle 5* addresses disclosure about related party transactions.
Distribution practices	*Benchmark 6* addresses a scheme's practices for paying distributions from cash from operations available for distribution. *Disclosure Principle 6* addresses where distributions are sourced from and whether forecast distributions are sustainable.
Withdrawal arrangements	*Disclosure Principle 7* addresses disclosure of the withdrawal arrangements within the scheme and risk factors that may affect the unit price on withdrawal.
Net tangible assets	*Disclosure Principle 8* addresses disclosure of the net tangible asset (NTA) backing per unit of the scheme.

Disclosure against the benchmarks: 'If not, why not'

RG 46.9 Responsible entities of unlisted property schemes offered to retail investors or in which retail investors have invested should disclose against the benchmarks in Section C on an 'if not, why not' basis: see RG 46.28–RG 46.30.

Applying the disclosure principles

RG 46.10 The purpose of the disclosure principles in Section D is to improve the consistency and quality of disclosure by responsible entities of unlisted property schemes and to enhance consumer confidence. The disclosure principles cover information that retail investors reasonably need to know to make an informed decision about whether to invest and to monitor whether their expectations are being met.

Form and method of disclosure

RG 46.11 We consider that the benchmark and disclosure principle information should be included in any Product Disclosure Statements (PDSs) and ongoing disclosure for unlisted property schemes issued on or after 1 November 2012. After this date, we will review PDSs in use and ongoing disclosure for unlisted property schemes to check that the benchmark and disclosure principle information is adequately disclosed.

RG 46.12 For an explanation about why the benchmark and disclosure principle information should be included in PDSs and ongoing disclosure, how this information should be disclosed, when disclosure principle information can be omitted, how this information can be updated, and for more information on good practice for ongoing disclosure, see Section E.

Transitional arrangements

RG 46.13 Until 1 November 2012, responsible entities should—at a minimum—continue to apply the disclosure principles that were in place under superseded RG 46 issued in September 2008 to any PDS or ongoing disclosure provided to investors in unlisted property schemes.

> Note: We encourage responsible entities to disclose against the benchmarks and apply the disclosure principles to new PDSs and ongoing disclosure before 1 November 2012 if possible.

Advertising

RG 46.14 Advertisements for unlisted property schemes should be consistent with all corresponding disclosures in the PDS. See Section F for further guidance on advertising, including the use of investment ratings.

Compliance plans

RG 46.15 Compliance plans for unlisted property schemes should set out adequate measures to ensure compliance with the law relating to disclosure and advertising obligations: see Section G. Compliance committees should also be aware of the benchmarks and disclosure principles, and monitor the responsible entity's application of them.

RG 46.16 As part of their audit, compliance plan auditors should consider whether the compliance plan contains adequate measures to ensure compliance with the disclosure requirements of the *Corporations Act 2001* (Corporations Act) in light of ASIC's guidance on benchmarks and disclosure principles.

B The unlisted property scheme sector and improved disclosure

Key points

The business models of unlisted property schemes tend to have some common features: see RG 46.17–RG 46.22. Some of these features can create risks for investors: see RG 46.23–RG 46.24.

Clear disclosure can help investors make better informed decisions about these products. Improved disclosure is particularly important when economic volatility increases the risks associated with investments: see RG 46.25–RG 46.27.

Business models of unlisted property schemes

RG 46.17 Understanding an unlisted property scheme's business model can help investors to assess the potential risks and returns associated with the investment. We expect responsible entities to give investors adequate information on the scheme's business model in a PDS: see RG 46.122.

RG 46.18 Some common features of unlisted property schemes include the following:

(a) The responsible entity raises funds by issuing interests in the scheme to investors in exchange for money. This money is pooled and used by the responsible entity on behalf of the scheme to invest a substantial proportion of its assets directly in real property or to invest in other unlisted property schemes.

(b) Investors have beneficial but not legal ownership in the property assets in which the responsible entity chooses to invest.

(c) The return to investors is generally expected to be derived from rental income from property owned by the scheme and from the net proceeds the scheme receives if it sells the real property in which it has invested. Property schemes may also make distributions from capital and/or unrealised revaluation gains on the investment properties, provided that cash is available within the fund or from borrowings.

(d) The value of an investor's investment is subject to change depending on the value of the property assets held by the scheme, which may fluctuate from time to time.

RG 46.19 While unlisted property schemes should be considered as long-term investments, some schemes offer periodic withdrawal facilities whereby investors may withdraw some or all of their investments. Withdrawal facilities are usually subject to restrictions, such as pre-set limits or arrangements if withdrawal demands exceed the cash available.

RG 46.20 Most unlisted property schemes are geared. In these cases, the ability of the scheme to repay debt principal and interest on time and meet all loan covenants is material to the performance and viability of the scheme.

RG 46.21 The underlying assets in unlisted property schemes are predominantly real property. A significant feature of real property is that it is a largely illiquid asset. It is not homogenous, it is not traded on an active market, and it has high transaction costs. This highlights the importance of disclosing and understanding the ability of the unlisted property scheme to service debt and interest from cash flows.

RG 46.22 A relatively small proportion of unlisted property schemes have significant property development assets. Investors in unlisted property schemes with property development assets are exposed to additional construction and development risks. Importantly, while cash outflows are required to fund the construction and development, the cash inflow on those assets does not occur until completion when the asset is available for rental or for sale.

Risks to investors

RG 46.23 Unlisted property schemes are often attractive to retail investors, who may believe that they offer capital stability and consistent ongoing returns. This is not always the case and there are a number of common risks associated with investments in the unlisted property sector. These key risks, many of them relating to the scheme's borrowings, are identified in Table 2.

RG 46.24 These risks do not affect all unlisted property schemes and are not unique to unlisted property schemes. However, disclosure relating to these risks is relevant for investors in unlisted property schemes. The benchmarks in Section C and disclosure principles in Section D address the risks so that investors can make more informed decisions about whether to invest in an unlisted property scheme, including comparing risks and returns across investments in the sector.

Table 2: Key risk features of unlisted property schemes

Risk feature	What this means
Gearing	A higher gearing ratio means a higher reliance on external liabilities (primarily borrowings) to fund assets. This exposes the scheme to increased funding costs if, for example, interest rates rise. A highly geared scheme has a lower asset buffer to rely on in times of financial stress. Disclosure by the responsible entity of its gearing policy, including at an individual credit facility level, helps investors to better understand the risks associated with the responsible entity's approach to gearing.

Risk feature	What this means
Interest cover	A property scheme's interest cover ratio is a key indicator of its financial health. The lower the interest cover, the higher the risk that the scheme will not be able to meet its interest expense. A scheme with a low interest cover ratio only needs a small reduction in earnings (or a small increase in interest rates or other expenses) to be unable to meet its interest expense. Disclosure by the responsible entity of its interest cover policy, including at an individual credit facility level, helps investors to better understand the risks associated with the responsible entity's approach to gearing.
Interest capitalisation	Interest capitalisation means the scheme is not required to make interest payments until an agreed point in time. It generally applies in the context of development because the asset may not generate any income during development to meet any interest obligations under finance facilities. If the property cannot be sold for more than the credit facility, the investor will not receive any return as a result of the sale.
Scheme borrowing	Relatively short-term borrowings and credit facilities with short expiry dates are a risk factor if they are used to fund assets intended to be held long term. If the scheme has a significant proportion of its borrowings that mature within a short timeframe, it will need to refinance. There is a risk that the refinancing will be on less favourable terms or not available at all. If the scheme cannot refinance, it may need to sell assets on a forced sale basis with the risk that it may realise a capital loss. Breach of a loan covenant may result in penalties being applied, or the loan becoming repayable immediately. The scheme may need to refinance on less favourable terms or sell assets. Termination of critical financing could also mean the scheme is no longer viable.
Portfolio diversification	Generally, the more diversified a portfolio is, the lower the risk that an adverse event affecting one property or one lease will put the overall portfolio at risk. A concentration of development assets in a scheme exposes investors to increased risks involved in the development of property assets.
Valuation of real property	Investing in a property scheme exposes investors to movements in the value of the scheme's assets. Investors therefore need information to assess the reliability of valuations. The more reliable a valuation, the more likely the asset will return that amount when it is sold. However, any forced sale is likely to result in a shortfall compared to the valuation unless the valuation has been made on a forced sale basis.
Related party transactions	A conflict of interest may arise when property schemes invest in, or make loans or provide guarantees to, related parties.
Distributions	Some property schemes make distributions partly or wholly from unrealised revaluation gains, capital, borrowings, or support facilities arranged by the responsible entity, rather than solely from cash from operations available for distribution. This may not be commercially sustainable over the longer term, particularly when property values are not increasing.
Withdrawal rights	Unlisted property schemes often have limited or no withdrawal rights. This means they are usually difficult to exit.
Net tangible assets	The net tangible asset (NTA) backing of a scheme gives investors information about the value of the tangible or physical assets of the scheme. The initial and ongoing NTA backing may be affected by various factors, including fees and charges paid up-front for the purchase of properties, costs associated with capital raising, or fees paid to the responsible entity or other parties.

Improving disclosure for investors

RG 46.25 Unlisted property schemes are difficult to exit easily due to the illiquidity of the underlying assets and the limited withdrawal rights (when they are available). It is therefore important that investors have a good understanding of the true nature of unlisted property schemes and their associated risks before they decide to invest.

RG 46.26 We have observed that listed property schemes were more likely than unlisted property schemes to disclose information that is important to retail investors when comparing the risks and rewards of different schemes. Listed property schemes were also more likely to update investors on how global financial turbulence was affecting the scheme's financial circumstances.

RG 46.27 In this context, we have developed six benchmarks and eight disclosure principles that responsible entities of unlisted property schemes should disclose against and apply in their up-front and ongoing disclosures for retail investors: see Sections C and D. Table 3 sets out our approach to improved disclosure for retail investors in these schemes.

Table 3: Our approach to improved disclosure for unlisted property schemes

Our approach	Related information
The benchmark and disclosure principle information will enable retail investors to assess the risks and rewards of unlisted property schemes.	See Sections C and D
Responsible entities of unlisted property schemes should disclose against the benchmarks and apply the disclosure principles to the scheme's PDS and ongoing disclosure for retail investors.	See Section E
Ongoing disclosure should be communicated to investors in the most effective way possible. Responsible entities should be particularly conscious of the need to update investors with information on significant events that may affect their investment.	See Section E
Compliance plans for unlisted property schemes should set out adequate measures to ensure compliance with the law relating to disclosure and advertising obligations. Compliance committees and compliance plan auditors should be aware of the benchmarks and disclosure principles, and of the advertising obligations, and monitor the responsible entity's compliance with the compliance plans and obligations under the Corporations Act.	See Sections F and G
Additional education will help retail investors use the benchmark and disclosure principle information when making investment decisions.	See our investor guide, *Investing in property trusts?* under 'Publications' at www.moneysmart.gov.au

C Benchmarks for unlisted property schemes

Key points

All responsible entities of unlisted property schemes should disclose against the benchmarks on:

- gearing policy (see RG 46.31–RG 46.35);
- interest cover policy (see RG 46.36–RG 46.40);
- interest capitalisation (see RG 46.41–RG 46.44);
- valuation policy (see RG 46.45–RG 46.52);
- related party transactions (see RG 46.53–RG 46.56); and
- distribution practices (see RG 46.57–RG 46.61).

Responsible entities should disclose whether the benchmark is 'met' or 'not met' on an 'if not, why not' basis: see RG 46.28–RG 46.30.

This information should be disclosed clearly and prominently in the responsible entity's PDS and ongoing disclosure: see Section E.

Disclosure against the benchmarks: 'If not, why not'

RG 46.28 Responsible entities of unlisted property schemes offered to retail investors and in which retail investors have invested should disclose against the benchmarks on an 'if not, why not' basis. This means providing a clear statement that the scheme either:

(a) meets the benchmark; or

(b) does not meet the benchmark *and* providing an explanation of how and why the responsible entity deals with the business factor or issues underlying the benchmark in another way.

RG 46.29 'Why not' means explaining how a responsible entity deals with the business factor or issue underlying the benchmark, including the alternative systems and controls the responsible entity has in place to deal with the issue underlying the benchmark.

RG 46.30 If a benchmark contains multiple requirements, all elements of the benchmark and the required disclosure should be addressed (i.e. it is not usually sufficient to explain in general terms why a benchmark has not been met or to address only some aspects of a benchmark). Additionally, disclosure should be made on the basis that a benchmark is either 'met' or 'not met'. If the benchmark is not fully met, the benchmark is regarded as 'not met' (rather than partially met) and there should be an explanation of why it is not met.

Benchmark 1: Gearing policy

RG 46.31 The responsible entity maintains and complies with a written policy that governs the level of gearing at an individual credit facility level.

Explanation

RG 46.32 Unlisted property schemes tend to use credit facilities to partly finance the purchase of properties. It is important for responsible entities to have policies in place that address the risks associated with these arrangements and to comply with these policies. It is also important for investors in these schemes to understand these policies.

RG 46.33 We consider that responsible entities of unlisted property schemes should disclose a gearing ratio for the scheme: see Disclosure Principle 1 at RG 46.62–RG 46.70. However, we recognise that disclosure of an overall gearing ratio for a scheme may not adequately highlight to investors the risks associated with different credit facilities within the scheme, or how the responsible entity addresses these risks. We consider that it is appropriate that investors understand whether the responsible entity monitors and manages the gearing levels of individual credit facilities within the scheme.

'If not, why not' disclosure

RG 46.34 If a responsible entity meets this benchmark, it should disclose its gearing policy and whether the scheme currently complies with this policy.

RG 46.35 If the benchmark is not met, the responsible entity should explain why not, and disclose the risks associated with the approach it has adopted.

Benchmark 2: Interest cover policy

RG 46.36 The responsible entity maintains and complies with a written policy that governs the level of interest cover at an individual credit facility level.

Explanation

RG 46.37 Another key aspect relating to credit facilities used by unlisted property schemes to finance the purchase of property is interest cover. It is important for responsible entities to have policies in place that address the risks associated with these arrangements and to comply with these policies. It is also important for investors in these schemes to understand these policies.

RG 46.38 We consider that responsible entities of unlisted property schemes should disclose an interest cover ratio for the scheme: see Disclosure Principle 2 at RG 46.71–RG 46.77. However, we recognise that disclosure of an overall

interest cover ratio for a scheme may not adequately highlight to investors the risks associated with the different credit facilities that may exist within the scheme, or how the responsible entity addresses these risks. We consider that it is appropriate that investors understand whether the responsible entity monitors and manages interest cover at an individual credit facility level.

'If not, why not' disclosure

RG 46.39 If a responsible entity meets this benchmark, it should disclose its interest cover policy and whether the scheme currently complies with this policy.

RG 46.40 If the benchmark is not met, the responsible entity should explain why not, and disclose the risks associated with the approach it has adopted.

Benchmark 3: Interest capitalisation

RG 46.41 The interest expense of the scheme is not capitalised.

Explanation

RG 46.42 We consider that when a scheme capitalises interest expense, it is important for investors to understand how the scheme will meet its interest obligations when deciding whether to invest in the scheme.

'If not, why not' disclosure

RG 46.43 If a responsible entity meets this benchmark, it should disclose that the interest expense of the scheme is not capitalised.

RG 46.44 If the benchmark is not met, the responsible entity should explain why not, and disclose the risks associated with the capitalisation of interest. It should also provide details about how it intends to meet its repayment obligations for any borrowing undertaken on behalf of the scheme.

Benchmark 4: Valuation policy

RG 46.45 The responsible entity maintains and complies with a written valuation policy that requires:

(a) a valuer to:

(i) be registered or licensed in the relevant state, territory or overseas jurisdiction in which the property is located (where a registration or licensing regime exists), or otherwise be a member of an appropriate professional body in that jurisdiction; and

(ii) be independent;

(b) procedures to be followed for dealing with any conflicts of interest;

(c) rotation and diversity of valuers;

(d) valuations to be obtained in accordance with a set timetable; and

(e) for each property, an independent valuation to be obtained:

(i) before the property is purchased:

(A) for a development property, on an 'as is' and 'as if complete' basis; and

(B) for all other property, on an 'as is' basis; and

(ii) within two months after the directors form a view that there is a likelihood that there has been a material change in the value of the property.

Explanation

RG 46.46 The value of real property assets can be volatile, particularly when access to credit is constrained and more properties are on the market. A significant fall in valuation will mean an increase in gearing ratio and may trigger a breach of loan covenants.

RG 46.47 Investors should be able to understand and compare how responsible entities value their schemes' real property assets. This will help investors assess the reliability of the valuations.

RG 46.48 It is in the interests of investors that the valuations obtained and used by responsible entities are robust and accurate. Responsible entities are responsible for financial statements and other documents that rely on the accuracy of these valuations. We expect that responsible entities will be careful to ensure that their instructions to valuers are comprehensive and contain reasonable terms of reference.

RG 46.49 We consider that it is important that responsible entities have a valuation policy in place so that valuations are conducted on a timely basis and by suitably qualified experts. Disclosure by responsible entities against the valuation policy benchmark enables investors to better assess the reliability of valuations undertaken for the scheme and to better understand the valuation practices of the responsible entity for the scheme.

'If not, why not' disclosure

RG 46.50 If a responsible entity meets this benchmark, it should disclose a summary of its valuation policy, that the scheme currently complies with this policy, and where an investor can obtain a copy of the full valuation policy.

RG 46.51 If the benchmark is not met, the responsible entity should explain why not, and disclose the risks associated with this approach.

RG 46.52 When the responsible entity discloses the value of a property under development on an 'as if complete' basis, the 'as is' basis of the valuation should also be disclosed. The responsible entity should also disclose the risks associated with 'as if complete' valuations, including the risk that assumptions on which such valuations are based may prove to be inaccurate.

Benchmark 5: Related party transactions

RG 46.53 The responsible entity maintains and complies with a written policy on related party transactions, including the assessment and approval processes for such transactions and arrangements to manage conflicts of interest.

> Note 1: The term 'related party' is defined in s228 (as modified by Pt 5C.7 for registered schemes) and includes the responsible entity. Responsible entities should refer to our guidance in Regulatory Guide 76 *Related party transactions* (RG 76), including, among other things, the content requirements for prospectuses, PDSs and other disclosure documents.
>
> Note 2: Responsible entities are Australian financial services (AFS) licensees and have duties to adequately manage conflicts of interest: s912A(1)(aa). If applicable, responsible entities may need to obtain investor approval for related party transactions under Pt 5C.7. For further guidance on disclosing related party transactions in a PDS, see Section E of RG 76.

Explanation

RG 46.54 We consider that responsible entities of unlisted property schemes that enter into transactions with related parties should disclose information about these related party arrangements that are relevant to a decision to invest in the scheme: see Disclosure Principle 5 at RG 46.98–RG 46.101. It is also important for investors to identify whether responsible entities have adequate arrangements in place to identify, monitor and manage related party transactions.

'If not, why not' disclosure

RG 46.55 If a responsible entity meets this benchmark, it should disclose that it complies with its policy and include a summary of the key elements of the policy and procedures that the responsible entity has in place for entering into related party transactions, including how compliance with these policies and procedures is monitored and that the responsible entity currently complies with its policy and procedures. The responsible entity should also disclose where an investor can obtain more detail on the responsible entity's policy and procedures for related party transactions.

RG 46.56 If the benchmark is not met, the responsible entity should explain why not, the implications of not meeting the benchmark and disclose the arrangements it has in place and the risks associated with the approach it has adopted.

Benchmark 6: Distribution practices

RG 46.57 The scheme will only pay distributions from its cash from operations (excluding borrowings) available for distribution.

Explanation

RG 46.58 We consider that distributions to investors that include capital, borrowings or support facilities may not always be commercially sustainable. In the past some responsible entities have used these sources to support distributions in the short term. Investors may not realise the risks associated with the use of these sources of funding to maintain distributions.

RG 46.59 We consider that this benchmark helps investors to better understand the distribution practices of the scheme.

'If not, why not' disclosure

RG 46.60 If a responsible entity meets this benchmark, it should disclose that the scheme will only pay distributions from its cash from operations (excluding borrowings) available for distribution.

RG 46.61 If the benchmark is not met, the responsible entity should explain why not, provide details of the sources of funds it intends to use to meet distributions, and outline any risks to the scheme of using these funds for this purpose.

D Disclosure principles for unlisted property schemes

Key points

Responsible entities of unlisted property schemes should give retail investors information on the following aspects of the scheme:

- gearing ratio (see RG 46.62–RG 46.70);
- interest cover ratio (see RG 46.71–RG 46.77);
- scheme borrowing (see RG 46.78–RG 46.86);
- portfolio diversification (see RG 46.87–RG 46.97);
- related party transactions (see RG 46.98–RG 46.101);
- distribution practices (see RG 46.102–RG 46.103);
- withdrawal rights (see RG 46.104–RG 46.107); and
- net tangible assets (see: RG 46.108–RG 46.115)

This information should be disclosed clearly and prominently in the responsible entity's PDS and ongoing disclosure: see Section E.

Disclosure Principle 1: Gearing ratio

RG 46.62 Responsible entities should disclose a gearing ratio for the scheme calculated using the following formula:

$$\text{Gearing ratio} = \frac{\text{Total interest-bearing liabilities}}{\text{Total assets}}$$

Note: If the scheme or a stapled group prepares consolidated financial statements, the gearing ratio should be based on the consolidated figures.

RG 46.63 The liabilities and assets used to calculate the gearing ratio should be based on the scheme's latest financial statements. The latest financial statements would usually be the latest audited or reviewed financial statements, except where the responsible entity is aware of material changes since those statements. If the responsible entity does not base the gearing ratio on the latest financial statements, it should disclose the source(s) and date of the information used to calculate the ratio.

RG 46.64 If members' contributions (other than borrowings from members) are classified as liabilities in the financial statements, they should be excluded from liabilities in calculating the gearing ratio. If the scheme has material off-balance-sheet financing, the responsible entity should disclose the following gearing ratios:

(a) a 'look through' gearing ratio that takes into account such financing; and

(b) a gearing ratio based on liabilities disclosed in the scheme's financial statements.

Note: Examples of off-balance-sheet financing include borrowings of equity-accounted investments and loans taken out by investors to invest in the scheme where those loans are secured over the scheme's assets on a limited recourse basis.

RG 46.65 Responsible entities should also explain to investors what these ratios mean in practical terms and how investors can use the ratios to determine the scheme's level of risk.

Note: We do not think it is adequate to simply state what the gearing ratio is. We expect that an explanation of the gearing ratio should address the risks that may arise as a result of the gearing within the scheme.

RG 46.66 If the responsible entity is unable to calculate the gearing ratio and/or the 'look through' gearing ratio, this should be disclosed with the reasons why the ratio(s) cannot be calculated, an explanation of the risks and impact of being unable to calculate the ratio(s), and the steps being taken by the responsible entity to address these risks.

Explanation

RG 46.67 The gearing ratio in RG 46.62 indicates the extent to which a scheme's assets are funded by interest-bearing liabilities. It gives an indication of the potential risks the scheme faces in terms of its level of borrowings due to, for example, an increase in interest rates or a reduction in property values.

RG 46.68 Retail investors may not have the skills or information to calculate a scheme's gearing ratio (especially the 'look through' gearing ratio) from the scheme's financial statements. In contrast, responsible entities should be able to calculate the scheme's gearing ratio and explain its relevance to investors.

RG 46.69 We consider that a scheme's gearing ratio is a risk factor that retail investors should weigh up against the scheme's rate of return. Consistent disclosure of gearing ratios across this sector will enable investors to compare relative risks and returns for unlisted property schemes.

RG 46.70 We consider that responsible entities should explain to investors the risks associated with the level of gearing of the scheme and the implications of the gearing. For example, if there are assets within the scheme that have a gearing ratio that is significantly different from the overall gearing ratio of the scheme, this type of risk should be highlighted to investors.

Disclosure Principle 2: Interest cover ratio

RG 46.71 The interest cover ratio gives an indication of an unlisted property scheme's ability to meet the interest payments from earnings. Responsible entities should disclose the scheme's interest cover ratio calculated using the following formula and based on the latest financial statements:

$$\text{Interest cover ratio} = \frac{\text{EBITDA} - \text{unrealised gains} + \text{unrealised losses}}{\text{Interest expense}}$$

> Note: If the scheme or stapled group prepares consolidated financial statements, the interest cover ratio should be calculated based on the consolidated figures. Interest expense calculations should take into account any related hedging arrangements. Unrealised losses and gains include losses and gains relating to revaluations of properties, hedging arrangements and straight-lining of rental income.

RG 46.72 The EBITDA (earnings before interest, tax, depreciation and amortisation) and interest expense figures used to calculate the interest cover ratio should be consistent with those disclosed in the scheme's latest financial statements. The latest financial statements would usually be the latest audited or reviewed financial statements, except when the responsible entity is aware of material changes since those statements. If the responsible entity does not base the interest cover ratio on the latest financial statements, it should disclose the source(s) and date of the information used to calculate the ratio.

RG 46.73 If the responsible entity is unable to calculate the interest cover ratio (e.g. in a property development or when the interest is capitalised), it should disclose the reasons why it is unable to calculate the ratio and provide an explanation of the arrangements it has entered into to meet the payment obligations related to the borrowed funds and the risks associated with these arrangements.

RG 46.74 Many retail investors may not understand what interest cover means. Responsible entities should explain how investors can use the interest cover ratio to assess the scheme's ability to meet its interest payments.

> Note: We do not think it is adequate to simply state what the interest cover ratio is. We expect that any explanation of the interest cover ratio should address the relationship between the income received by the scheme and interest expense under the terms of any relevant finance facility, and any other financial obligations the scheme has.

Explanation

RG 46.75 The interest cover ratio measures the ability of the scheme to service interest on debt from earnings. It is therefore a critical indication of a scheme's financial health and key to analysing the sustainability and risks associated with the scheme's level of borrowing. It is information that many retail investors would be unable to calculate. As with the gearing ratio, the interest cover ratio is information that responsible entities should be able to provide. Consistent disclosure will allow investors to compare relative risks and returns across investments in unlisted property schemes.

RG 46.76 If the responsible entity is unable to calculate the interest cover ratio, this should be disclosed with the reasons why the ratio cannot be calculated, an explanation of the risks and impact of the responsible entity not being able to calculate the ratio, and the steps being taken by the responsible entity to address the risks of not knowing the interest cover ratio.

RG 46.77 We consider that responsible entities should help investors to interpret the interest cover ratio by providing information that will enable investors to understand the ability of the scheme to continue to pay distributions and expenses of the scheme after the payment of interest, and whether the income of the scheme is sufficient to cover these costs.

Disclosure Principle 3: Scheme borrowing

RG 46.78 If a scheme has borrowed funds (whether on or off balance sheet), responsible entities should clearly and prominently disclose:

(a) for each borrowing that will mature in five years or less—the aggregate amount owing and the maturity profile in increments of not more than 12 months;

Note: For borrowings that will mature within 12 months, the responsible entity should exercise judgement to determine whether it would be appropriate to disclose aggregate amounts for time bands within 12 months.

(b) for borrowings that will mature in more than five years—the aggregate amount owing;

(c) the amount (expressed as a percentage) by which either the operating cash flow or the value of the asset(s) used as security for the facility must fall before the scheme will breach any covenants in any credit facility;

(d) for each credit facility:

(i) the aggregate undrawn amount;

(ii) the assets to which the facility relates;

(iii) the loan-to-valuation and interest cover covenants under the terms of the facility;

(iv) the interest rate of the facility; and

(v) whether the facility is hedged;

(e) details of any terms within the facility that may be invoked as a result of scheme members exercising their rights under the constitution of the scheme; and

(f) the fact that amounts owing to lenders and other creditors of the scheme rank before an investor's interests in the scheme.

RG 46.79 If borrowings and credit facilities will mature within 12 months, the responsible entity should make appropriate disclosure about the prospects of refinancing or possible alternative actions (e.g. sales of assets or further fundraising). If the responsible entity has no reasonable grounds for commenting on the prospect of refinancing or possible alternative actions, it should state this and explain why to investors: see Regulatory Guide 170 *Prospective financial information* (RG 170) at RG 170.91–RG 170.94.

> Note: Any forward-looking statements should comply with s769C of the Corporations Act and RG 170.

RG 46.80 Responsible entities should explain any risks associated with their borrowing maturity profile, including whether borrowings have been hedged and, if so, to what extent.

RG 46.81 Responsible entities should also disclose any information about scheme borrowing and breaches of loan covenants that is reasonably required by investors. Responsible entities should update investors about the status of scheme borrowings and any breaches of covenants through ongoing disclosure.

> Note: Responsible entities should be aware that, in certain cases, investors would reasonably require information on likely breaches of loan covenants (e.g. if the responsible entity has approached the lender about a likely breach and has been informed that the loan is likely to be terminated if the breach occurs).

Explanation

Borrowing maturity and credit facility expiry profile

RG 46.82 Borrowing maturity and credit facility expiry profiles are important information if an unlisted property scheme borrows to invest. Credit facilities that are due to expire within a relatively short timeframe can be a significant risk factor, especially in periods when credit is more difficult and expensive to obtain. A failure to renew borrowing or credit facilities can adversely affect a scheme's viability.

RG 46.83 It is important that disclosure on the expiry of credit facilities is clear and prominent enough for retail investors to easily locate and understand the information.

Breach of loan covenants

RG 46.84 Information about breaches of loan covenants that is reasonably required by investors is key risk information in up-front and ongoing disclosure. Breach of a loan covenant may result in the lender being able to require immediate repayment of the loan or impose a freeze on further draw-downs on the credit facility.

RG 46.85 If the lender exercises such rights, the scheme may be forced to arrange alternative financing or asset sales within a short timeframe. This can be problematic, particularly in periods when access to credit is more constrained, when the scheme has a poor history of meeting loan covenants, or when there is a softening of the property market.

Ranking of investors

RG 46.86 Retail investors should be made aware that they will rank behind the creditors of a scheme.

Disclosure Principle 4: Portfolio diversification

RG 46.87 A responsible entity should disclose the current composition of the property scheme's direct property investment portfolio, including:

(a) properties by geographic location by number and value;

(b) non-development properties by sector (e.g. industrial, commercial, retail, residential) and development projects by number and value;

(c) for each significant property, the most recent valuation, the date of the valuation, whether the valuation was performed by an independent valuer and, where applicable, the capitalisation rate adopted in the valuation;

(d) the portfolio lease expiry profile in yearly periods calculated on the basis of lettable area or income and, where applicable, the weighted average lease expiry;

(e) the occupancy rate(s) of the property portfolio;

(f) for the top five tenants that each individually constitute 5% or more by income across the investment portfolio, the name of the tenant and percentage of lettable area or income; and

(g) the current value of the development and/or construction assets of the scheme as a percentage of the current value of the total assets of the scheme.

RG 46.88 Disclosure should cover the responsible entity's investment strategy on these matters, including its strategy on investing in other unlisted property schemes, whether the scheme's current assets conform to the investment strategy and an explanation of any significant variance from this strategy. A responsible entity should also provide a clear description of any significant non-direct property assets of the scheme, including the value of such assets.

RG 46.89 Responsible entities of unlisted property schemes involved in property development should also disclose for each significant development asset:

(a) the development timetable with key milestones;

(b) a description of the status of the development against the key milestones identified;

(c) a description of the nature of the funding arrangements for the development (including the sources of funding and repayment strategies if borrowing is used to fund the development);

(d) the total amounts of pre-sale and lease pre-commitments, where applicable;

(e) whether the loan-to-valuation ratio for the asset under development exceeds 70% of the 'as is' valuation of the asset; and

(f) the risks associated with the property development activities being undertaken.

RG 46.90 The responsible entity for any scheme that has over 20% of its property assets in development based on an 'as if complete' basis should ensure that the scheme is clearly identified as a development and/or construction scheme.

Explanation

RG 46.91 The quality of the properties held by an unlisted property scheme, including the quality of leases entered into over those properties, is a key element in the financial position and performance of the scheme. Generally, the more diversified a portfolio, the lower the risk that an adverse event affecting one property or one lease will put the overall portfolio at risk.

RG 46.92 It is important that responsible entities disclose their approach to portfolio diversification in their PDSs and ongoing disclosure. Most responsible entities will have a firm policy on the types of properties in which the scheme will invest. This should be disclosed as clearly and prominently as possible to help investors monitor the financial position and performance of the scheme over time.

Development

RG 46.93 We consider development to be the construction of a new building, significant increases to the lettable area of a building, or significant changes to the nature or use of the property. Refurbishment of existing assets need not be considered as development for the purposes of this regulatory guide.

RG 46.94 When determining whether over 20% of the property assets of the scheme are development assets, we consider that portions of existing assets that are not in development should not be included in this calculation.

RG 46.95 It is important that investors who invest in schemes that undertake property development have a good understanding of the nature of the developments and the risks associated with specific developments. Further, responsible entities should ensure that investors are kept informed of the progress of the development on an ongoing basis against the development timetable and key milestones.

RG 46.96 Responsible entities should consider whether it is appropriate to disclose development timetables using common key milestones—for example:

(a) land settlement;

(b) planning approval;

(c) construction commencement;

(d) construction completion;

(e) sales settlement; and

(f) project finalisation.

RG 46.97 Any material delays (e.g. to development works, including the underlying reason) or changes to financing circumstances are important indicators that a development may be experiencing difficulties (or may fail) and should trigger disclosure about these material matters.

Disclosure Principle 5: Related party transactions

RG 46.98 Responsible entities that enter into transactions with related parties should describe related party arrangements relevant to the investment decision. The description should address:

(a) the value of the financial benefit;

(b) the nature of the relationship (i.e. the identity of the related party and the nature of the arrangements between the parties, in addition to how the parties are related for the purposes of the Corporations Act or ASX Listing Rules—for group structures, the nature of these relationships should be disclosed for all group entities);

(c) whether the arrangement is on 'arm's length' terms, is reasonable remuneration, some other exception applies, or we have granted relief;

(d) whether scheme member approval for the transaction has been sought and, if so, when (e.g. if member approval was obtained before the issue of interests in the scheme);

(e) the risks associated with the related party arrangement; and

(f) whether the responsible entity is in compliance with its policies and procedures for entering into related party transactions for the particular related party arrangement, and how this is monitored.

Note: The term 'related party' is defined in s228 (as modified by Pt 5C.7 for registered schemes) and includes the responsible entity. Responsible entities should refer to our guidance in Regulatory Guide 76 *Related party transactions* (RG 76), including, among other things, the content requirements for prospectuses, PDSs and other disclosure documents.

Explanation

RG 46.99 Related party transactions carry a risk that they could be assessed and monitored less rigorously than arm's length third party transactions. Investors should therefore be able to assess whether responsible entities take an appropriate approach to related party transactions. A significant number and value of such transactions may mean that investors should consider the financial position of the related group as a whole and the risk of potential conflicts of interest.

RG 46.100 Related party transactions may include commercial contracts for the supply of goods or services with persons that are related parties. They may also comprise larger transactions, such as asset acquisitions or disposals.

RG 46.101 Responsible entities should disclose information about existing related party transactions in disclosure documents, except to the extent that:

(a) such disclosure may confuse investors by dealing with inconsequential matters; or

(b) investors already have adequate information about the related party transactions as a result of past disclosures, so it is not reasonable for the information to be repeated in full.

Note: Responsible entities are Australian financial services (AFS) licensees and have duties to adequately manage conflicts of interest: s912A(1)(aa). If applicable, responsible entities may need to obtain investor approval for related party transactions under Pt 5C.7. For further guidance on disclosing related party transactions in a PDS, see Section E of RG 76.

Disclosure Principle 6: Distribution practices

RG 46.102 If a scheme is making or forecasts making distributions to members, the responsible entity should disclose:

(a) the source of the current distribution (e.g. from cash from operations available for distribution, capital, unrealised revaluation gains);

(b) the source of any forecast distribution;

(c) whether the current or forecast distributions are sustainable over the next 12 months;

(d) if the current or forecast distribution is not solely sourced from cash from operations (excluding borrowings) available for distribution, the sources of funding and the reasons for making the distribution from these other sources;

(e) if the current or forecast distribution is sourced other than from cash from operations (excluding borrowings) available for distribution, whether this is sustainable over the next 12 months; and

(f) the impact of, and any risks associated with, the payment of distributions from the scheme from sources other than cash from operations (excluding borrowings) available for distribution.

Note: Any forward-looking statements should comply with s769C and RG 170. If a responsible entity does not have reasonable grounds for disclosing whether current or forecast distributions sourced other than from cash from operations (excluding borrowings) available for distribution are sustainable, it should explain this to investors: see RG 170.91.

Explanation

RG 46.103 Some unlisted property schemes make distributions to members from capital and/or unrealised gains where cash is available from either within the fund or from borrowings. If this is the case, the responsible entity should clearly and prominently disclose the risks associated with this and whether these distributions are sustainable.

Disclosure Principle 7: Withdrawal arrangements

RG 46.104 If investors are given the right to withdraw from a scheme, the responsible entity should clearly disclose:

(a) whether the constitution of the scheme allows investors to withdraw from the scheme, with a description of the circumstances in which investors can withdraw;

(b) the maximum withdrawal period allowed under the constitution for the scheme (this disclosure should be at least as prominent as any shorter withdrawal period promoted to investors);

(c) any significant risk factors or limitations that may affect the ability of investors to withdraw from the scheme, or the unit price at which any withdrawal will be made (including risk factors that may affect the ability of the responsible entity to meet a promoted withdrawal period);

(d) a clear explanation of how investors can exercise their withdrawal rights, including any conditions on exercise (e.g. specified withdrawal periods and scheme liquidity requirements); and

(e) if withdrawals from the scheme are to be funded from an external liquidity facility, the material terms of this facility, including any rights the provider has to suspend or cancel the facility.

RG 46.105 The responsible entity should ensure that investors are updated on any material changes to withdrawal rights through ongoing disclosure. For example, investors should be informed if the responsible entity knows that withdrawal requests will be suspended during an upcoming withdrawal period for whatever reason.

RG 46.106 Responsible entities should also clearly disclose if investors have no withdrawal rights.

Explanation

RG 46.107 It is important for responsible entities to make investors aware of withdrawal arrangements so that investors form realistic expectations about their ability to withdraw from the scheme.

> Note 1: Members will only have a limited ability to withdraw if a scheme is not 'liquid' for the purposes of Pt 5C.6.
>
> Note 2: If a responsible entity makes representations about likely future withdrawal periods, it must have reasonable grounds for those representations: s769C.

Disclosure Principle 8: Net tangible assets

RG 46.108 The responsible entity of a closed-end scheme should clearly disclose the value of the net tangible assets (NTA) of the scheme on a per unit basis in pre-tax dollars.

RG 46.109 We consider that responsible entities should calculate the NTA of the scheme using the following formula:

$$\text{NTA} = \frac{\text{Net assets – intangible assets +/– any other adjustments}}{\text{Number of units in the scheme on issue}}$$

> Note: When making this NTA calculation, we expect responsible entities to comply with all relevant accounting standards. All NTA calculations should consider the joint unit pricing guide from ASIC and the Australian Prudential Regulation Authority (APRA): see Regulatory Guide 94 *Unit pricing: Guide to good practice* (RG 94).

RG 46.110 The responsible entity should disclose the methodology for calculating the NTA and details of the adjustments used in the calculation, including the reasons for the adjustments.

RG 46.111 Responsible entities should also explain to investors what the NTA calculation means in practical terms and how investors can use the NTA calculation to determine the scheme's level of risk.

> Note: We do not think it is adequate to simply state what the NTA calculation is. We expect that an explanation of the NTA calculation should address the risks that may arise as a result of the current NTA for the scheme.

Explanation

RG 46.112 An NTA calculation helps investors understand the value of the assets upon which the value of their unit is determined. Open-end schemes regularly disclose the NTA for the scheme or a similar measure such as net asset backing or net asset value to support the pricing of units in the scheme. These measures are not generally disclosed for closed-end schemes.

RG 46.113 The responsible entity should base the NTA calculation on the scheme's latest financial statements. The latest financial statements would usually be the latest audited or reviewed financial statements, except where the responsible entity is aware of material changes since those statements were issued. Where the responsible entity does not base the NTA on the latest financial statements, it should disclose the source(s) and date of the information used to calculate the NTA.

> Note: Any forward-looking statements should comply with s769C of the Corporations Act and RG 170.

RG 46.114 If the responsible entity does not use the above formula to calculate the NTA, it should disclose the formula used, including the reasons why it has chosen a different method of calculation.

RG 46.115 Responsible entities should consider if disclosing the net asset value per unit of the scheme would help investors to better understand the relationship between NTA and net asset value per unit, and if these measures would help investors to understand the financial position of the scheme.

E Form and method of disclosure

Key points

Responsible entities of unlisted property schemes should disclose against the benchmarks and apply the disclosure principles in their PDSs because these reflect information required for this disclosure under the Corporations Act: see RG 46.116–RG 46.118 and RG 46.121–RG 46.139.

The benchmarks and disclosure principles also reflect information required for ongoing disclosure to investors: see RG 46.140–RG 46.155.

For an overview of when responsible entities will need to disclose against the benchmarks and apply the disclosure principles in PDSs and ongoing disclosures, see Table 4.

Responsible entities should clearly specify the date on any ongoing disclosure to which this guide applies: see RG 46.147.

If applying a disclosure principle would result in misleading or clearly inappropriate information, this should be explained to investors: see RG 46.156–RG 46.159.

The disclosure framework

RG 46.116 The Corporations Act requires responsible entities of unlisted property schemes to:

(a) disclose in a PDS to retail investors all the information they reasonably need to know to make a decision to acquire an interest in the scheme; and

(b) provide ongoing disclosure about material matters to help retail investors monitor whether their expectations are being met.

RG 46.117 The benchmarks in Section C and the disclosure principles in Section D reflect information that retail investors reasonably need to make an investment decision and monitor whether their expectations are being met. This information is therefore required under the Corporations Act for both PDSs and ongoing disclosure.

RG 46.118 Apart from disclosures required by the Corporations Act, it is good practice for responsible entities to update investors on the status of the benchmark and disclosure principle information at least every six months: see RG 46.143–RG 46.145.

Timing for implementing improved disclosure

RG 46.119 Table 4 explains how we expect responsible entities for existing and new unlisted property schemes to implement improved disclosure and our views on good practice for updating investors.

RG 46.120 From 1 November 2012, we will review updated investor disclosures for unlisted property schemes to check that the benchmark and disclosure principle information is being adequately disclosed to investors.

Table 4: Timetable for implementing the benchmarks and disclosure principles

Existing schemes—update existing investors by 1 November 2012	By 1 November 2012, the responsible entity should provide investors with an update of the benchmark and disclosure principle information: see RG 46.135–RG 46.139. This could be by using the responsible entity's normal investor communication channels (e.g. in a regular investor update or by including the information on a website that is used to communicate with investors).
PDSs dated before 1 November 2012 that remain in use—update by 1 November 2012	By 1 November 2012, if an existing PDS is still in use, responsible entities should either: • include the benchmark and disclosure principle information on a website referred to in the PDS (if the omission of the information from the PDS is not materially adverse); or • update the PDS by a new or supplementary PDS so that it includes the benchmark and disclosure principle information. Note: PDSs commonly allow information to be updated through a website if the updated information is not materially adverse: see Class Order [CO 03/237] *Updated information in Product Disclosure Statements*. We consider that if the omission of the benchmark and disclosure principle information from an existing PDS is not materially adverse, the responsible entity will generally be able to rely on [CO 03/237] to update the PDS for this information without the need for a new or supplementary PDS: see RG 46.135–RG 46.139.
New PDSs issued on or after 1 November 2012	PDSs dated on or after 1 November 2012 should clearly and prominently disclose the benchmark and disclosure principle information and contain an investment overview: see RG 46.121–RG 46.134. The PDS should also explain how the responsible entity intends to update investors for ongoing disclosure.
Material changes to information	If there are material changes to the benchmark or disclosure principle information, the responsible entity should update investors on material changes to key information about an unlisted property scheme as soon as practicable (e.g. by updating a website used for this purpose) in its ongoing disclosure: see RG 46.140–RG 46.155.
Updates on status of information	It is good practice for responsible entities to update investors at least every six months on the status of the benchmark and disclosure principle information, including whether the information has been updated for any material changes since the last investor report: see RG 46.143–RG 46.145.

Disclosure in a PDS or supplementary PDS

RG 46.121 The Corporations Act requires disclosure in the form of a PDS for an offer of interests in an unlisted property scheme. The PDS must:

(a) make specific disclosures, including about significant risks associated with holding the product (s1013D); and

(b) include all other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to invest in the scheme (s1013E).

RG 46.122 The PDS for an unlisted property scheme should clearly explain:

(a) the business model of the scheme and what it will do with the money raised by the PDS (e.g. what type of property the scheme will invest in);

(b) the track record and experience of senior management; and

(c) the key features and risks of the scheme.

RG 46.123 The benchmarks and disclosure principles reflect information about the key features and risks of an unlisted property scheme. It is information that might reasonably be expected to have a material influence on the decision of a reasonable person whether to invest (s1013D(1) and 1013E), but which they would not be expected to know without explicit disclosure in a PDS: s1013F(2). The benchmarks and disclosure principles therefore reflect the information required under s1013D–1013E.

> Note: The benchmarks and disclosure principles do not attempt to specify all of the information that is required to be included in a PDS by the Corporations Act. Other information will also be required depending on the nature of the unlisted property scheme and the offer being made in the PDS.

RG 46.124 A PDS for an offer of interests in an unlisted property scheme should include the benchmark and disclosure principle information. The PDS should also explain how the responsible entity intends to update investors on material changes to key information about the scheme.

RG 46.125 The information in a PDS must be up-to-date at the time it is given. We consider that PDSs that do not contain the benchmark and disclosure principle information by 1 November 2012 are unlikely to be up-to-date given the key nature of the benchmark and disclosure principle information, particularly in light of recent economic conditions affecting the property sector and the fact that new PDSs will disclose this information.

Clear, concise and effective disclosure

RG 46.126 PDSs must be worded and presented in a clear, concise and effective manner: s1013C(3). A PDS should therefore contain clear and prominent disclosure of the key features and risks of the investment. For unlisted property schemes, this *includes* the benchmark and disclosure principle information.

RG 46.127 The requirement for 'clear, concise and effective' disclosure should be read as a compound phrase so that each word qualifies the other. This means it is inappropriate to focus on one word in the phrase at the expense of others.

RG 46.128 We consider that a PDS will generally be clear, concise and effective if it:

(a) highlights key information (e.g. through an investment overview as explained below);

(b) uses plain language;

(c) is as short as possible;

(d) explains complex information, including any technical terms; and

(e) is logically ordered and easy to navigate.

RG 46.129 We encourage responsible entities to use consumer-friendly tools as much as possible in disclosing key features and risks, including tables, diagrams and other comparative features. Such effective disclosure will help retail investors compare investments across the unlisted property scheme sector.

> Note: Responsible entities should refer to Regulatory Guide 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* (RG 168) and Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228) when considering ways to ensure that a PDS is worded in a clear, concise and effective manner.

Investment overview

RG 46.130 We consider there is a greater risk that a PDS will not be worded and presented in a clear, concise and effective manner if the PDS does not include an investment overview within the first few pages that highlights information that is key to a retail investor's investment decision.

RG 46.131 An investment overview is an introduction to the responsible entity and offer. It is not intended to replace the PDS and investors should read the whole document. The investment overview should:

(a) be the first substantive section of the PDS;

(b) highlight and provide a meaningful summary of information that is key to a retail investor's investment decision, including at least a summary of the benchmark and disclosure principle information; and

(c) provide balanced disclosure of the benefits and risks.

RG 46.132 If the key information is too lengthy to be included in full, the first few pages of the PDS should provide a summary of the information with a clear reference to more detailed disclosure (e.g. a table that says 'the scheme's gearing ratio is *x*; see page *x* for an explanation of what this gearing ratio means').

Supplementary PDSs

RG 46.133 The benchmarks and disclosure principles relate to information required in a PDS under the Corporations Act. A PDS must be given to prospective investors in various circumstances: s1012A–1012C. If there are material changes to the benchmark or disclosure principle information, a responsible entity with a current offer open will need to provide a new or supplementary PDS if the new information would be materially adverse to the reasonable investor.

RG 46.134 We consider that it is good practice to also make the information in new or supplementary PDSs available to any existing investors (e.g. in a regular investor update or on the website).

Updating existing investors

RG 46.135 By no later than 1 November 2012, if an existing PDS that does not contain the benchmark and disclosure principle information remains in use, we expect responsible entities to:

(a) update the PDS by a new or a supplementary PDS so that it includes the benchmark and disclosure principle information; or

(b) disclose the benchmark and disclosure principle information using a website or other means of communication if the responsible entity is able to rely on Class Order [CO 03/237] *Updated information in Product Disclosure Statements*.

RG 46.136 We consider that a responsible entity of an unlisted property scheme may be able to rely on [CO 03/237] to provide updated disclosure of this information on a website, subject to various conditions, including:

(a) the updated information is not materially adverse;

(b) the PDS includes a statement that non-materially adverse information may be updated by a website and that a paper copy of any updated information will be given to a person without charge on request;

(c) the updated information is easily accessible to investors; and

(d) the PDS was up-to-date at the time it was prepared.

Note: See [CO 03/237] for all of the applicable conditions that must be fulfilled.

RG 46.137 Updates for existing investors could be in a regular report (e.g. in the quarterly report) or in a periodic statement under s1017D. An alternative would be to put the initial update on the scheme's website (if this is already used to communicate with investors).

RG 46.138 The updated disclosure should also advise investors how the responsible entity intends to update them on the status of the benchmark and disclosure principle information and material changes. This is particularly important if the responsible entity intends to use a website to communicate material changes to key information.

RG 46.139 Updated disclosure for benchmark and disclosure principle information provided to investors should clearly specify the date it was published to help investors identify when the information was prepared and whether it is current or out-of-date.

Ongoing disclosure

RG 46.140 In a PDS, a responsible entity makes a number of statements about how the funds being raised by the PDS will be used, and how the responsible entity will operate the unlisted property scheme. These 'promises' are part of the basis on which the investor invests their money, and the investor should be given the opportunity to monitor the responsible entity's performance against these promises.

RG 46.141 Good ongoing disclosure therefore plays an important role in helping investors monitor their investment, evaluate its performance and decide if and when to exit their investment (provided exit mechanisms exist), or increase their investment in the scheme.

RG 46.142 Responsible entities have a number of obligations to make ongoing disclosure to investors under the Corporations Act: see RG 46.148–RG 46.155. Apart from these legal requirements, we encourage responsible entities to use the most efficient and effective methods to regularly communicate key information to investors: see RG 46.143–RG 46.147.

> Note: Responsible entities should refer to Regulatory Guide 198 *Unlisted disclosing entities: Continuous disclosure obligations* (RG 198) when considering ways to comply with the continuous disclosure requirements of the Corporations Act.

Good practice for ongoing disclosure

RG 46.143 It is good practice for a responsible entity to maintain a document that covers the benchmark and disclosure principle information and to update this document for material changes that the responsible entity becomes aware of in the ordinary course of managing the unlisted property scheme. This updating allows the responsible entity to provide consolidated updated disclosure to investors on request. It is also good practice for this consolidated disclosure document to be clearly accessible on the scheme's website (if used for updating investors).

RG 46.144 Many responsible entities have a practice of updating investors on key information about the scheme with a quarterly report. We consider that it is good practice for responsible entities to update investors in writing on the status of key information, including the benchmark and disclosure principle information, at least every six months.

RG 46.145 Although it is not necessary to repeat information if it has not changed in these updates to investors, we consider it is good practice to provide investors with:

(a) an overview of any material changes to the benchmark and disclosure principle information since the last update (as far as the responsible entity is aware);

(b) if there have been no material changes, confirmation that this is the case;

(c) details of how to access the scheme's consolidated disclosure document on the website (if available there); and

(d) confirmation that they are entitled to a paper copy of the benchmark and disclosure principle information on request.

Note: An alternative would be for responsible entities to provide investors with details of material changes to the benchmark and disclosure principle information using a procedure similar to that applying to the provision of a financial report under s314.

RG 46.146 In addition to the regular updates discussed in RG 46.144, material changes to key information, including the benchmark or disclosure principle information, should be notified to investors, or be made accessible to them, as soon as practicable using the most efficient and effective method of communication. For example, this could be through a website used for updating investors. The regular investor update would then advise investors directly that the benchmark or disclosure principle information had been updated for a material change: see RG 46.145.

RG 46.147 All ongoing disclosure containing benchmark and disclosure principle information should clearly specify the date it was published to help investors identify when the information was prepared and whether it is current or out-of-date.

The legal framework for ongoing disclosure

RG 46.148 Responsible entities of unlisted property schemes have obligations to provide ongoing disclosure to investors under the Corporations Act, including:

(a) disclosure of material changes and significant events (s675 or 1017B); and

(b) periodic statements to members under s1017D.

RG 46.149 The responsible entity should include the benchmark and disclosure principle information in ongoing disclosure and explain any material changes to this information.

Note: The benchmarks and disclosure principles do not attempt to specify all of the information that the Corporations Act requires for ongoing disclosure.

Continuous disclosure

RG 46.150 If the responsible entity of a scheme that is subject to continuous disclosure becomes aware of information that is not generally available and that a reasonable person would expect, if it were available, to have a material effect on the price or value of the interests in the scheme, the responsible entity must lodge a document with ASIC containing the information: s675.

> Note: It is good practice for responsible entities to provide investors with access to continuous disclosure documents lodged with ASIC, either by sending investors a paper copy or posting the information on a website used for updating investors.

RG 46.151 The benchmarks and disclosure principles reflect information that would reasonably be expected to have a material effect on the price or value of interests in the scheme. Therefore material changes to benchmark or disclosure principle information may trigger s675, unless the information is already generally available.

Notifications of material changes and significant events

RG 46.152 If an unlisted property scheme is not subject to continuous disclosure obligations under Ch 6CA, the responsible entity must give investors notice of any material change to a matter, or a significant event that affects a matter, that would have been required to be specified in a PDS: s1017B.

RG 46.153 In our view, material changes in the benchmark and disclosure principle information are matters that should be covered in notifications to investors under s1017B. If such changes or events are adverse to investors, notifications generally need to be provided as soon as practicable and in any event within three months.

Periodic statements

RG 46.154 Responsible entities of property schemes must give members a periodic statement at least annually: s1017D. Periodic statements must include details of:

(a) the information that the responsible entity reasonably believes the investor needs to understand their investment in the unlisted property scheme; and

(b) details of any change in circumstances affecting the investment that has not been notified since the previous periodic statement.

RG 46.155 Periodic statements are designed to give investors regular updates about their investment. If a responsible entity does not otherwise report to investors in regular updates, in the periodic statement it should update investors on the status of the benchmark and disclosure principle information.

Omitting disclosure principle information when misleading

RG 46.156 If applying a disclosure principle to an unlisted property scheme's particular business model or circumstances would be likely to mislead investors or is clearly inappropriate, then the information should be omitted.

> Note: For example, if a property scheme has no interest-bearing liabilities, ratios would not need to be provided for gearing and interest cover (Disclosure Principles 1 and 2).

RG 46.157 If key information is omitted, the responsible entity should tell investors the information has been omitted and explain why it would be misleading or inappropriate to include the information.

RG 46.158 If the responsible entity is unable to apply a disclosure principle, it should consider whether it can disclose other information that would allow investors to assess the relevant risk factor. For example, if a property scheme is a start-up and cannot disclose a gearing ratio because it has no liabilities, it should consider whether investors need to know its target gearing ratio.

RG 46.159 If a disclosure principle that did not apply to an unlisted property scheme subsequently becomes relevant, then the responsible entity should disclose that information to investors through ongoing disclosure.

ASIC review of PDSs and ongoing disclosure

RG 46.160 From 1 November 2012, we will review PDSs in use and ongoing disclosures for unlisted property schemes to check that the benchmark and disclosure principle information is adequately disclosed.

RG 46.161 We will consider exercising our stop order powers under s1020E if we consider there is material non-disclosure or misleading disclosure of these matters. The benchmarks and disclosure principles relate to matters that must be disclosed under the Corporations Act. Material non-disclosure or misleading disclosure may also result in liability to investors.

RG 46.162 We will also:

(a) work with responsible entities to ensure that the benchmarks and disclosure principles, and our expectations, are understood;

(b) discuss any concerns we have about a responsible entity's disclosure with them and, where necessary, require additional disclosure;

(c) discuss any concerns we have about the financial position and performance of a scheme with the responsible entity; and

(d) conduct surveillance visits as needed to test and reinforce our expectations.

F Advertising

Key points

Advertising for unlisted property schemes should be consistent with all corresponding disclosures in the PDS: see RG 46.163–RG 46.164.

If investment ratings are used in advertising for unlisted property schemes, they should be properly explained and not create a misleading impression about the scheme: see RG 46.166.

Consistency with PDS

RG 46.163 Statements in advertisements for unlisted property schemes should be consistent with all corresponding disclosures on that subject matter in the PDS. In particular, responsible entities should take into account the benchmark and disclosure principle information in the PDS.

> Note: References to 'advertisements' in this guide should be read broadly. They include comment and promotion of unlisted property schemes in media programs or publications (generally known as 'advertorials') and statements about these schemes published by responsible entities on their websites that are intended to promote the schemes to retail investors. They do not, however, include statements in a PDS.

RG 46.164 When considering consistency with the PDS, responsible entities should be aware that an advertisement may be misleading if it quotes a statement from the PDS out of context. Responsible entities of unlisted property schemes who fail to ensure that advertisements are consistent with PDS disclosures risk making false or misleading statements or engaging in misleading or deceptive conduct in contravention of the Corporations Act or the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

> Note: Responsible entities should also refer to Regulatory Guide 234 *Advertising financial products and advice services: Good practice guide* (RG 234) when considering advertising.

Use of investment ratings

RG 46.165 If an investment rating is used in an unlisted property scheme advertisement, it should be properly explained. This explanation should include the meaning of the rating and where an investor can obtain further information about the rating. The advertisement should also state that investment ratings are only one factor to be taken into account when deciding whether to invest.

RG 46.166 Responsible entities should ensure that:

(a) the impression the investment rating creates about the unlisted property scheme being advertised is not misleading; and

(b) investment ratings used in advertisements are only quoted from research houses that hold an AFS licence.

G Compliance plans

Key points

Compliance plans must set out measures for the responsible entity to comply with the Corporations Act and scheme constitution. We expect compliance plans for unlisted property schemes to set out adequate measures to ensure compliance with the law relating to disclosure and advertising: see RG 46.167–RG 46.171.

We expect compliance committees and compliance plan auditors to be aware of the benchmarks and disclosure principles and advertising obligations discussed in this guide, and to have regard to them in carrying out their duties: see RG 46.172–RG 46.178.

Responsible entities, compliance committees and compliance plan auditors should consider the benchmarks, disclosure principles and advertising obligations when assessing whether a compliance plan is adequate.

The compliance plan

RG 46.167 Compliance plans play a key role in protecting investors and promoting their interests. The law requires an unlisted property scheme to have a compliance plan: s601EA. The compliance plan must set out adequate measures for the responsible entity to ensure compliance with the Corporations Act and the scheme's constitution: s601HA. The responsible entity has a duty to comply with the compliance plan: s601FC(1)(h).

RG 46.168 Compliance plans should contain adequate procedures to ensure that a responsible entity discloses against the benchmarks and applies the disclosure principles in its up-front and ongoing disclosure to retail investors. Compliance plans should also contain adequate procedures to ensure that responsible entities comply with their advertising obligations.

RG 46.169 We do not expect that responsible entities will necessarily need to change their compliance plans to deal expressly with the benchmarks, disclosure principles and advertising obligations discussed in this guide. Good compliance plans should already contain procedures that ensure that responsible entities comply with all of their disclosure and advertising obligations under the Corporations Act.

RG 46.170 However, we expect responsible entities to critically examine existing compliance plans and consider whether they are adequate to ensure compliance with the obligations discussed in this guide.

RG 46.171 Regardless of whether a scheme has a compliance committee, responsible entities have a duty to ensure that compliance plans establish adequate measures to ensure compliance (including with disclosure and advertising obligations): s601FC(1)(g).

Compliance committees

RG 46.172 Many unlisted property schemes have a compliance committee. A scheme is required to have a compliance committee unless at least half of the responsible entity's directors are external directors: s601JA. If the scheme does not have a compliance committee, the responsible entity's directors should be particularly vigilant about ensuring the responsible entity complies with the compliance plan and that the compliance plan is adequate.

RG 46.173 The functions of a compliance committee are to:

(a) monitor the extent to which a responsible entity complies with the compliance plan and report its findings to the responsible entity;

(b) report any breach of the law or the scheme's constitution to the responsible entity;

(c) report to ASIC if the compliance committee considers that the responsible entity is not taking adequate action to deal with a matter reported under RG 46.173(b); and

(d) assess at regular intervals whether the compliance plan is adequate, to report to the responsible entity on the assessment and to make recommendations to the responsible entity about any changes that it considers should be made to the plan: s601JC(1).

RG 46.174 We expect compliance committees for unlisted property schemes to be aware of the benchmarks, disclosure principles and advertising obligations discussed in this guide. Compliance committees need to regularly assess whether the compliance plan contains adequate measures to ensure compliance by responsible entities with:

(a) their up-front and ongoing disclosure obligations to retail investors, including in relation to the benchmarks and disclosure principles, as discussed in Sections C, D and E; and

(b) their obligation to ensure that any advertising for the scheme is not misleading or deceptive, as discussed in Section F.

RG 46.175 If a compliance committee forms the view that a compliance plan is not adequate, it needs to report this to the responsible entity, together with recommendations about changes that should be made to the plan.

RG 46.176 A compliance committee should also monitor compliance by the responsible entity with the compliance plan. If a compliance committee identifies non-compliance or a possible breach of the Corporations Act (including a breach relating to the responsible entity's disclosure or advertising obligations), the compliance committee will need to make a report to the responsible entity and, if necessary, report the matter to us.

Compliance plan auditors

RG 46.177 Compliance plans are subject to an annual audit. The auditor of a compliance plan must give the responsible entity a report that states the auditor's opinion on whether:

(a) the responsible entity has complied with the compliance plan; and

(b) the plan continues to meet the requirements of the Corporations Act.

RG 46.178 We expect compliance plan auditors of unlisted property schemes to be aware of the benchmarks, disclosure principles and advertising obligations in this guide. In determining whether a plan continues to meet the requirements of the Corporations Act, compliance plan auditors should consider whether the compliance plan is adequate to ensure that the responsible entity discloses against the benchmarks and applies the disclosure principles in its PDSs and ongoing disclosures to retail investors, and meets its obligations to avoid any misleading advertising.

Key terms

Term	Meaning in this document
advertisement	Includes comment and promotion of unlisted property schemes in media programs or publications (generally known as 'advertorials') and statements about a scheme published by a responsible entity on its website that is intended to promote the scheme to retail investors (but does not include statements in a PDS)
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
'as if complete' valuation	An estimate of the market value of a property, assuming certain specified improvements are made
'as is' valuation	An estimate of the market value of a property in its current state (i.e. without any further improvements)
Ch 2M (for example)	A chapter of the Corporations Act (in this example, numbered 2M)
closed-end scheme	A scheme which issues all the interests it will issue at the outset. These interests may be able to be transferred between investors thereafter
[CO 03/237] (for example)	An ASIC class order (in this example, numbered 03/237)
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
CP 100 (for example)	An ASIC consultation paper (in this example, numbered 100)
disclosure principle information	Information covered by the disclosure principles in Section D of this guide
existing scheme	An unlisted property scheme that investors have invested in before 1 November 2012
open-end scheme	A scheme which can issue and redeem units at any time. An investor will generally purchase units in the scheme directly from the scheme itself rather than from the existing investors

Term	Meaning in this document
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
related party	Has the meaning given in s228, or as modified by Pt 5C.7 for registered schemes, as the case may be
RG 76 (for example)	An ASIC regulatory guide (in this example, numbered 76)
s710 (for example)	A section of the Corporations Act (in this example, numbered 710)
unlisted property scheme	An unlisted managed investment scheme that has or is likely to have at least 50% of its non-cash assets invested in real property and/or in unlisted property schemes Note: For the purposes of this definition, 'real property' does not include infrastructure assets.

Related information

Headnotes

advertising, benchmark disclosure, compliance committees, compliance plans, compliance plan auditors, deceptive, disclosure, disclosure principles, listed, misleading, PDS, Product Disclosure Statement, property schemes, responsible entities, retail investors, valuers, unlisted

Class order

[CO 03/237] *Updated information in Product Disclosure Statements*

Regulatory guides

RG 76 *Related party transactions*

RG 120 *Commentary on compliance plans: Property schemes*

RG 132 *Managed investments: Compliance plans*

RG 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

RG 170 *Prospective financial information*

RG 198 *Unlisted disclosing entities: Continuous disclosure obligations*

RG 228 *Prospectuses: Effective disclosure for retail investors*

RG 231 *Infrastructure entities: Improving disclosure to retail investors*

RG 234 *Advertising financial products and services: Good practice guidance*

Legislation

ASIC Act

Corporations Act, Chs 2M and 6CA, Pts 5C.6, 5C.7, 7.9 and 7.10, s228, 314, 601EA, 601FC(1)(g), 601FC(1)(h), 601HA, 601JA, 601JC(1), 675, 769C, 912A(1)(aa), 1012A–1012C, 1013D–1013F, 1017B, 1017D and 1020E

Consultation papers and reports

CP 163 *Unlisted property schemes: Update to RG 46*

REP 280 *Response to submissions on CP 163 Unlisted property schemes: Update to RG 46*