



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 198

Unlisted disclosing entities: Continuous disclosure obligations

June 2009

About this guide

This guide is for unlisted disclosing entities and their advisers.

It provides guidance on how unlisted disclosing entities should comply with their continuous disclosure obligations under the *Corporations Act 2001* (Corporations Act).

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Document history

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

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

Contents

A	Overview	4
	Good practice guidance for more effective continuous disclosure	4
	Who does this guide apply to?	4
	What other disclosure obligations apply to unlisted disclosing entities? ..	5
B	Use of issuers' websites for continuous disclosure	7
	Continuous disclosure is important.....	7
	The need for a better means of communication.....	7
	Administering the continuous disclosure provisions to better help investors.....	8
	Notifying investors	8
	Good practice guidance for website disclosure.....	9
	Alternative to website disclosure	9
	ASIC to monitor compliance with continuous disclosure obligations	9
C	Good practice guidance for website disclosure of material information	10
	Purpose of good practice guidance	10
	Disclosure of material information on website	10
	Disclosure as soon as practicable	11
	Records of disclosure	12
	Examples of information to be disclosed	12
D	Operation of the continuous disclosure regime	14
	What continuous disclosure obligations apply to unlisted disclosing entities?.....	14
	Compliance with continuous disclosure obligations	15
	Notifying investors	15
	Key terms	17
	Related information	19

A Overview

Key points

The Corporations Act contains continuous disclosure provisions that apply to unlisted disclosing entities. ASIC will administer these provisions in a way that promotes website based disclosure of material information in accordance with good practice guidance.

Good practice guidance for more effective continuous disclosure

- RG 198.1 ASIC is committed to ensuring that the continuous disclosure provisions in the Corporations Act operate as effectively as possible. It is important to market integrity that material information is disclosed in a timely way and in a form that is accessible to investors.
- RG 198.2 This guide deals with the continuous disclosure obligations of unlisted disclosing entities. We will administer these obligations in a way that facilitates website-based disclosure: see Section B. That is because website disclosure will often be the most effective means for unlisted disclosing entities to disclose new material information to their investors.
- RG 198.3 ASIC has established good practice guidance for website disclosure: see Section C. If an unlisted disclosing entity does not follow our good practice guidance, it will need to comply with its continuous disclosure obligations by lodging all material information with us.
- RG 198.4 Section D explains the operation of various aspects of the continuous disclosure requirements.

Who does this guide apply to?

- RG 198.5 This guide applies to unlisted disclosing entities. For the purposes of this guide, an ‘unlisted disclosing entity’ is a disclosing entity (as defined in the Corporations Act) that is not listed on a prescribed financial market (regardless of whether its securities are quoted or traded on that market).
- RG 198.6 Therefore this guide applies to:
- (a) unlisted bodies (mostly companies) with 100 or more members holding securities as a result of issues under a disclosure document (see 111AF), or as consideration for an acquisition under an off-market takeover bid or Pt 5.1 compromise or arrangement (see s111AG);

- (b) unlisted debenture issuers which need to appoint a trustee under s283AA or which do not need to appoint a trustee because they make recognised offers (see s111AI);
- (c) unlisted managed investment schemes in which 100 or more people hold interests in the scheme as a result of offers that required a Product Disclosure Statement (PDS) (see s111AFA); and
- (d) disclosing entities whose securities are quoted on a prescribed financial market but where the issuer itself is not admitted to that market's official list (see s111AE).

Note: For example, AQUA market products are issued by unlisted disclosing entities that are not included on the official list of the Australian Securities Exchange Limited (ASX).

What other disclosure obligations apply to unlisted disclosing entities?

RG 198.7 The focus of this guide is on the continuous disclosure obligations of unlisted disclosing entities. There are a number of other disclosure obligations that apply to unlisted disclosing entities, but these are not addressed in this guide. Table 1 provides a summary of the some of the key disclosure obligations that apply to unlisted disclosing entities.

Table 1: Disclosure obligations for unlisted disclosing entities

Note: This list is not intended to be exhaustive.

Disclosure obligation	Who does the obligation apply to?	Summary of obligation
Continuous disclosure	All unlisted disclosing entities	Must lodge material information with ASIC or follow the good practice guidance for website disclosure set out in this guide
Disclosure for offers of securities	Entities offering securities (e.g. shares or debentures) to retail investors	Must provide retail investors with a prospectus (or other disclosure document). There are obligations to update investors for new material information via a supplementary or replacement prospectus
Disclosure for offers of financial products	Entities offering financial products other than securities (e.g. interests in a managed investment scheme) to retail investors	Must provide retail investors with a product disclosure statement (PDS). There are obligations to update investors for new material information via a supplementary or new PDS

Disclosure obligation	Who does the obligation apply to?	Summary of obligation
Quarterly reports for debenture issuers	Debenture issuers	Must provide ASIC and the debenture trustee with a quarterly report that sets out various matters relating to the debentures. The quarterly reports also cover compliance with the benchmarks contained in RG 69 <i>Debentures—improving disclosure for retail investors</i> : see RG 69.103
Periodic statements under s1017D	Responsible entities of managed investment schemes	Must provide retail investors with prescribed information about their investment, including any information that the responsible entity reasonably believes the investor needs to understand their investment
Financial reports	Unlisted disclosing entities that are incorporated or formed in Australia Note: Unlisted disclosing entities that are not incorporated or formed in Australia may also be subject to financial reporting obligations (e.g. registered foreign companies have reporting obligations under Pt 5B.2).	Must lodge audited annual and half-yearly financial reports with ASIC and, in the case of debenture issuers, the debenture trustee. Must make the annual financial report available to investors in accordance with s314

B Use of issuers' websites for continuous disclosure

Key points

Unlisted disclosing entities are subject to continuous disclosure obligations that require them to make material information available to investors as soon as practicable after becoming aware of it.

For many unlisted disclosing entities, the most effective and efficient way to communicate with their investors is to disclose material information on their website.

We will administer the continuous disclosure provisions so that an unlisted disclosing entity can publish material information on its website in accordance with the good practice guidance set out in this guide, rather than having to lodge the information with us.

We will monitor how unlisted disclosing entities are complying with their continuous disclosure obligations.

Continuous disclosure is important

RG 198.8 Unlisted disclosing entities (see RG 198.5–RG 198.6) are subject to continuous disclosure obligations under s675 of the Corporations Act. Continuous disclosure is intended to help investors make informed investment decisions based on timely information. An effective continuous disclosure regime is important for market integrity and confidence in the unlisted disclosing entity sector.

Note: The continuous disclosure regime is described in more detail in Section D.

RG 198.9 Effective communication of material information is especially important in times of market volatility and financial turmoil when it is likely that:

- (a) more events arise that have a material impact on the price or value of unlisted disclosing entities' securities; and
- (b) the impact of these events on the price or value of those securities will be more significant.

The need for a better means of communication

RG 198.10 The continuous disclosure regime requires unlisted disclosing entities to lodge material information with ASIC. This is increasingly out of step with the widespread use of the internet as a key channel of communication between product issuers and investors. It is also likely to be confusing and unhelpful for

those investors who expect a product issuer's website to contain all the information they need to monitor and make decisions about their investment.

Note: For example, we receive only a small number of requests from investors for information lodged with us under the continuous disclosure obligations. Investors who seek information in this way must also pay a fee prescribed by the Corporations (Fees) Regulations 2001.

- RG 198.11 Publication on a website will often be a more effective means of communicating with investors than lodgement with us. However, publication on a website (or publication in another format) will generally not relieve entities of their legal obligation to also lodge the relevant information with us: see RG 198.37–RG 198.38.

Administering the continuous disclosure provisions to better help investors

- RG 198.12 We have decided to administer the continuous disclosure provisions to facilitate website disclosure of material information where this will meet the needs of investors. We also intend to raise aspects of the operation of the continuous disclosure regime with government.

- RG 198.13 If an unlisted disclosing entity complies with our good practice guidance for website disclosure of continuous disclosure information, we will not insist that the entity also lodges the information with us. To take advantage of this approach, an unlisted disclosing entity must:

- (a) be satisfied that most of its investors are likely to look for information of this kind on its website;

Note: So, for example, if an entity routinely sends written information by post to most of its investors (e.g. because they are elderly and do not use internet communications), the entity cannot take advantage of the approach described in this guide.

- (b) notify existing and new investors that it makes disclosure available in this way; and
- (c) disclose any material information on its website in a timely fashion in accordance with the good practice guidance in Section C.

Notifying investors

- RG 198.14 Unlisted disclosing entities should notify their existing and new investors how they intend to comply with the continuous disclosure regime (i.e. whether they will follow our good practice guidance or whether they will simply lodge continuous disclosure notices with us): see RG 198.42–RG 198.44.

- RG 198.15 A prospectus or PDS issued by an unlisted disclosing entity that is dated after 30 September 2009 should describe how the entity will comply with its continuous disclosure obligations: see RG 198.44.

Good practice guidance for website disclosure

- RG 198.16 ASIC's good practice guidance for website disclosure in Section C is intended to facilitate effective communication of information that is important to investors on an issuer's website. The guidance provides for issuers to publish all material information in a timely fashion on their website, regardless of whether they have also disclosed the information in some other public document (e.g. in a supplementary PDS or a supplementary prospectus).
- RG 198.17 We encourage unlisted disclosing entities to adopt our good practice guidance where that meets the needs of their investors. Providing investors with easy access to material information will assist them to make better informed investment decisions.

Alternative to website disclosure

- RG 198.18 Unlisted disclosing entities that do not adopt the approach described in this guide will need to comply with their continuous disclosure obligations by lodging continuous disclosure notices with ASIC.
- RG 198.19 Some entities may decide not to adopt our good practice guidance because their investors are unlikely to make use of website disclosure. We encourage these entities to contact us so that we can discuss whether there is an alternative to lodging information with ASIC that may be more effective for their investors.

ASIC to monitor compliance with continuous disclosure obligations

- RG 198.20 ASIC will monitor how unlisted disclosing entities are complying with their continuous disclosure obligations. Entities will need to disclose material information by following our good practice guidance or by lodging continuous disclosure notices with us. It will not be satisfactory for entities to rely on disclosure in some other form (e.g. publication in a PDS, a prospectus or an investor newsletter): see RG 198.41.

C Good practice guidance for website disclosure of material information

Key points

This section sets out our good practice guidance for website disclosure of material information by unlisted disclosing entities.

We also provide examples of the kind of information that these entities would disclose under our guidance.

Purpose of good practice guidance

- RG 198.21 Our good practice guidance for website disclosure of material information is intended to promote website disclosure that has the following features:
- (a) all material information is included on the website;
 - (b) investors are able to find material information easily and determine its significance for them;
 - (c) any new material information is included on the website as soon as practicable; and
 - (d) information is kept on the website for as long as it is relevant and appropriate records are kept.

Disclosure of material information on website

- RG 198.22 It is good practice for an unlisted disclosing entity to place all material information on its website. This is because website disclosure allows an entity to provide material information to investors in a timely and efficient way.
- RG 198.23 Material information should be located in a single place on the website. The homepage should contain a prominent link to this location so that investors can easily access it. If investors have to look for information in a number of places, there is a greater likelihood that they will not find all information necessary to make an informed decision about their investment.
- RG 198.24 This section of the website should contain all material information, regardless of whether it has also been disclosed in some other public document prepared by the entity, such as:
- (a) a continuous disclosure notice lodged with ASIC;
 - (b) a new prospectus or new PDS;

- (c) a supplementary prospectus or supplementary PDS; or
- (d) statutory reports and accounts lodged with ASIC.

Note: For the purposes of our good practice guidance, in addition to information covered by s675(2), material information also includes information that:

- is contained in a public document prepared by the entity (e.g. a prospectus or a PDS); and
- a reasonable person would expect to have a material effect on the price or value of the entity's securities.

- RG 198.25 However, we would discourage unlisted disclosing entities from disclosing material information by publishing lengthy documents on their website in which the material information is 'buried' among information that is not material.
- RG 198.26 If an unlisted disclosing entity considers that an investor may have difficulty readily identifying material information, it should consider separately highlighting that information to investors.
- RG 198.27 In addition to making material information available on their website, unlisted disclosing entities should also consider whether direct disclosure of the information to investors is appropriate. This may be so where, for example, the entity is aware that a significant number of investors might not have ready access to the internet.
- RG 198.28 Unlisted disclosing entities that disclose material information on their website should consider giving their investors the option of receiving an email alert when material information is updated. We strongly encourage this type of facility as it would help investors to become aware of relevant information as soon as possible after it is published.

Disclosure as soon as practicable

- RG 198.29 The continuous disclosure provisions require unlisted disclosing entities to lodge material information with us as soon as practicable. The Corporations Act has imposed this requirement because an effective continuous disclosure regime requires urgent communication of material information to investors.
- RG 198.30 In the same way, unlisted disclosing entities should publish material information on their website as soon as practicable after first becoming aware of the information, not just at the time that monthly updates are published, or when quarterly or half-yearly reports are issued.
- RG 198.31 The timeframe imposed by the 'as soon as practicable' requirement will vary according to all the relevant circumstances. However, publishing information on a website is a relatively straightforward process. We expect that entities will normally be able to publish material information within only a short period after becoming aware of it.

Records of disclosure

- RG 198.32 Material information should be kept on the website for as long as it is material to a reasonable person's determination of the price or value of the relevant securities. An unlisted disclosing entity should clearly indicate on its website when it first published each item of material information.
- RG 198.33 In addition to maintaining information on its website, an unlisted disclosing entities should retain records of its website disclosures in accordance with its normal record keeping practices. The information could be kept in a hard copy or electronic form (e.g. on a CD-ROM). This record keeping will assist entities to demonstrate compliance with their legal obligations, our good practice guidance and their internal procedures and processes.

Examples of information to be disclosed

- RG 198.34 Table 2 sets out examples of the type of material information that we consider unlisted disclosing entities should disclose on their website.

Table 2: Examples of good practice disclosure by unlisted disclosing entities

Note: This list is not intended to be exhaustive.

Area	Examples of information to be disclosed
Financial forecasts/ valuations/ ratings	<ul style="list-style-type: none"> • A material change in previously released financial forecasts or expectations for an unlisted disclosing entity • A material change in the value of the underlying assets an unlisted disclosing entity holds • Any rating applied to an unlisted disclosing entity or its securities, or any change to such a rating
Debt funding	<ul style="list-style-type: none"> • Information about any material change to the status or terms of the disclosing entity's debt funding • Information about any material breaches by the entity of loan covenants
External administration	<ul style="list-style-type: none"> • The appointment of any external administrator to the disclosing entity or registered scheme
Management changes	<ul style="list-style-type: none"> • If an unlisted disclosing entity is a managed investment scheme, a change in the control of the responsible entity
Access to funds	<ul style="list-style-type: none"> • If withdrawal requests are to be suspended or limited at any time, that fact and brief reasons why • If a registered scheme is no longer liquid for the purposes of Pt 5C.6 of the Corporations Act, that fact and brief reasons why

Area	Examples of information to be disclosed
Corporate actions	Information about corporate actions that are likely to affect the value of investors' securities—for example: <ul style="list-style-type: none">• a securities placement; or• a share buy-back of which not all investors have been notified
Benchmark disclosures	Any other disclosures against the ASIC benchmarks in: <ul style="list-style-type: none">• RG 45 <i>Mortgage schemes—improving disclosure for retail investors</i>;• RG 46 <i>Unlisted property schemes—improving disclosure for retail investors</i>; or• RG 69 <i>Debentures—improving disclosure for retail investors</i>

D Operation of the continuous disclosure regime

Key points

This section provides a more detailed explanation of some of the matters dealt with in Section B. In particular, it discusses:

- the legal requirement for unlisted disclosing entities to lodge a continuous disclosure notice with us even if they publish the information in some other form;
- that we will administer the law so that unlisted disclosing entities can publish material information on their website in accordance with our good practice guidance, rather than lodging the information with us; and
- why unlisted disclosing entities should notify their existing and new investors how they will satisfy their continuous disclosure obligations.

What continuous disclosure obligations apply to unlisted disclosing entities?

Overview of continuous disclosure requirements

- RG 198.35 Under the continuous disclosure provisions, subject to certain exceptions, an unlisted disclosing entity must lodge with us any information that:
- (a) is not generally available; and
 - (b) a reasonable person would expect to have a material effect on the price or value of the entity's securities: s675.

- RG 198.36 A reasonable person would expect information to have a material effect on the price or value of an unlisted disclosing entity's securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of them: s677.

Alternative publication generally not relevant to application of continuous disclosure requirements

- RG 198.37 Some unlisted disclosing entities currently make material information available on their website. This promotes the purpose behind the continuous disclosure regime of making such information readily available to investors. However, strictly such disclosure is generally not a substitute for compliance with the continuous disclosure requirements. That is because the obligation under s675(2) to lodge material information with us is triggered once an entity becomes aware of the information (subject to the exceptions in s675(2)(c) and (d)). The fact that the entity may subsequently make the information generally available (e.g. by

publication on a website) does not relieve the entity of the obligation to lodge a continuous disclosure notice with us. The exemption for generally available information will only apply if the information was generally available at the time the entity became aware of it.

- RG 198.38 Similarly, the fact that material information is to be included in other publications (e.g. in an investor newsletter, a prospectus or a PDS) will generally not relieve entities of the obligation to lodge a continuous disclosure notice with us.

Note: There is an exception for information required to be included in a supplementary or replacement disclosure document: s675(2)(c)(i). There is also an exception for information that has been included in a PDS, Supplementary PDS or Replacement PDS, a copy of which has been lodged with ASIC: s675(2)(c)(ii).

- RG 198.39 Unlisted disclosing entities are required to lodge continuous disclosure notices with us as soon as practicable after becoming aware of material information that is not generally available. The timing of this obligation is not affected by the fact that the information also needs to be included in a document required under another section of the Corporations Act. For example, if an entity becomes aware of material information while preparing a prospectus, the entity will need to lodge that information with us as soon as practicable, even if the prospectus is incomplete.

Note: An entity will not need to lodge a continuous disclosure notice if a reasonable person would not expect the information to be disclosed and the other requirements in reg 6CA.1.01 are satisfied.

Compliance with continuous disclosure obligations

- RG 198.40 As mentioned in Section B, we will administer the law so that if an unlisted disclosing entity complies with our good practice guidance for website disclosure, we will not insist that the entity lodges the information with us under s675(2) of the Corporations Act. That is because information that is prominently disclosed on a website in a timely way will be generally be more accessible to investors than information that is lodged with us.
- RG 198.41 If an unlisted disclosing entity does not comply with our good practice guidance, it will need to lodge any material information with us via a continuous disclosure notice. Subject to the exceptions in s675(2)(c) and (d), this lodgement requirement will apply even if the entity intends to publish the information in another form (e.g. in a PDS, a prospectus or an investor newsletter): see RG 198.37–RG 198.39.

Notifying investors

- RG 198.42 It is important for investors to understand how an unlisted disclosing entity will satisfy its continuous disclosure obligations. Unlisted disclosing entities should notify existing and new investors whether they intend to follow our good

practice guidance or whether they intend to lodge continuous disclosure notices with us.

RG 198.43 We recommend that unlisted disclosing entities notify existing investors by using their normal investor communication channels (e.g. by including the information on a website that is used to communicate with investors or in a regular investor update).

RG 198.44 For new investors, prospectuses and PDSs that are dated after 30 September 2009 should identify how the entity will satisfy its continuous disclosure obligations. We consider that information as to how an unlisted disclosing entity will disclose new material information is likely to be:

- (a) information that investors and their professional advisers reasonably require to make an informed investment decision: s710(1); and
- (b) information that might reasonably be expected to have a material influence on the investment decision of a reasonable person, as a retail client: s1013D and 1013E.

Key terms

Term	Meaning in this document
AQUA market	An ASX rule and market framework comprising two Integrated Trading System (ITS) markets that are platforms tailored for managed funds, exchange-traded funds, exchange-traded commodities and structured products: the AQUA Trading Market and the AQUA Quotation Market
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> , including regulations made for the purposes of the Act
ASX	Australian Securities Exchange Limited
Ch 6CA (for example)	A chapter of the Corporations Act (in this example, numbered 6CA)
continuous disclosure notice	A document lodged under s675
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of the Act
external administrator	An insolvency practitioner appointed as a receiver (including a receiver and manager), liquidator, a provisional liquidator, a voluntary administrator, a deed administrator or a scheme administrator appointed to administer a Pt 5.1 compromise or arrangement under Ch 5
good practice guidance	Our good practice guidance set out in Section C of this guide
material information	In relation to a unlisted disclosing entity, means: <ul style="list-style-type: none"> • information that the entity is required to include in a continuous disclosure notice; and • for the purposes of our good practice guidance, also includes information that does not need to be included in a continuous disclosure notice, but: <ul style="list-style-type: none"> – is contained in a public document prepared by the entity; and – a reasonable person would expect to have a material effect on the price or value of the entity's securities
PDS	Product Disclosure Statement
Pt 7.9 (for example)	A part of the Corporations Act (in this example, numbered 7.9)

Term	Meaning in this document
reg 6CA.1.01 (for example)	A regulation in the Corporations Regulations 2001 (in this example, numbered 6CA.1.01)
RG 152 (for example)	An ASIC regulatory guide (in this example numbered 152)
s719 (for example)	A section of the Corporations Act (in this example, numbered 719)
securities	<p>Has the same meaning as in s92(3)</p> <p>Note: It therefore includes interests in a registered managed investment scheme and Ch 2L debentures issued to retail investors.</p>
unlisted disclosing entity	See RG 198.5–RG 198.6

Related information

Headnotes

Unlisted disclosing entities, continuous disclosure, securities, website disclosure, material information, Product Disclosure Statement, prospectus, continuous disclosure notice

Regulatory guides

RG 45 *Mortgage schemes—improving disclosure for retail investors*

RG 46 *Unlisted property schemes—improving disclosure for retail investors*

RG 69 *Debentures—improving disclosure for retail investors*

Legislation

Corporations Act, Ch 2L, Ch 5, Pt 5.1, Ch 5C, Ch 6CA, 6D, Pt 7.9, s9, 92(3), 111AD, 111AE, 111AF, 111AFA, 111AG, 111AI, 111AL, 111AM, 283AA, 675

Corporations Regulations, reg 6CA.1.01, 7.1.01

ASIC forms

Form 1003 *Disclosure notice for unlisted disclosing entity*

Other publications

ASX Guidance Note 8 *Continuous Disclosure: Listing Rule 3.1*