



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 103

Review of share purchase plan threshold

December 2008

About this paper

This consultation paper:

- sets out ASIC's proposal to increase the monetary limit for share purchase plans, and
- seeks the views of stakeholders, including companies, industry associations, retail investors and their professional advisers.

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 paper was issued on 18 December 2008 and is based on the Corporations Act as at 18 December 2008.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on share purchase plans. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator Report and/or a Regulation Impact Statement: see Section C, 'Regulatory and financial impact', p. 14.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 13 February 2009 to:

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Lawyer
Strategic Policy
Australian Securities and Investments Commission
GPO Box 9827
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What will happen next?

Stage 1	18 December 2008	ASIC consultation paper released
Stage 2	13 February 2009	Comments due on the consultation paper
Stage 3		If necessary, amendment of class orders and Regulatory Guide 125 <i>Small offers of shares to existing shareholders by listed companies—share purchase plans</i> (RG 125)

A The current approach to share purchase plans

Key points

Existing ASIC relief permits issuers to offer securities to existing investors without a prospectus.

This relief applies to offers under a share purchase plan where the total amount issued in 12 months is up to \$5000.

Share purchase plans

- 1 A share purchase plan is a plan for the offer to existing investors of shares by a corporation listed on the Australian Securities Exchange Limited (ASX).
- 2 Generally, an offer of securities requires a disclosure document under Ch 6D of the *Corporations Act 2001* (Corporations Act). The rationale for this requirement is to ensure that investors have access to all the information required to make an informed investment decision.

ASIC relief for share purchase plans

- 3 Under s741(1) of the Corporations Act, ASIC has the power to modify the disclosure requirements of Ch 6D.
- 4 ASIC Class Order (CO 02/831) *Share purchase plans* grants disclosure relief for offers to existing investors of shares by a company listed on ASX up to a limit of \$5000 in any 12-month period.
- 5 Under CO 02/831, a share purchase plan offering shares in a listed company will not require a disclosure document on certain conditions, including:
 - (a) the company has complied with its continuous disclosure and financial reporting obligations;
 - (b) any registered holder is not issued more than \$5000 worth of shares in any consecutive 12-month period;
 - (c) offers are made only to registered holders of shares in the class;
 - (d) each offer is made on the same terms and conditions and on a non-renounceable basis;
 - (e) the issue price is less than the market price during a specified period in the 30 days prior to either the date of the offer or date of the issue;

- (f) the written offer document discloses the method used to calculate the issue price, the relationship between the issue and market price, and the risk that the market price may change between the date of the offer and the date when the securities are issued.

6 The fundamental rationale for providing this relief is:

- (a) the risk to the shareholder is limited because the amount which may be invested by each investor in a 12-month period under the scheme is restricted; and
- (b) the benefits to investors (such as savings on brokerage) outweigh the disadvantages and risks of not having full prospectus disclosure.

Background to ASIC relief

7 We have granted case-by-case relief for share purchase plans since 1991. In 1997 we released Regulatory Guide 125 *Small offers of shares to existing shareholders by listed companies—share purchase plans* (RG 125) to consolidate our relief in this area. RG 125 introduced class order relief for small offers and an increase in the monetary limit from \$2400 to \$3000 in response to CPI increases since 1991 and ASX minimum investment benchmarks.

8 In 2002, the monetary limit was increased from \$3000 to \$5000 (to reflect CPI increases and changes in market participation) and the relief was extended to apply to listed managed investment schemes.

Rights issues

9 Share purchase plans are not the only mechanism for offering small investors fundraising opportunities without the requirement for a disclosure document.

10 Section 708AA sets out a prospectus exemption for a rights issue that is offered to all registered holders on a pro rata basis. In order to qualify for the exemption, the issuer must, however, lodge a cleansing notice with ASX. A cleansing notice must include information that:

- (a) the issuer has previously withheld from disclosure to investors under its continuous disclosure obligations on the basis of the exceptions to disclosure contained in ASX Listing Rule 3.1A; and
- (b) investors and their professional advisers would reasonably require for the purpose of making an informed assessment of the issuer's assets and liabilities, financial position and performance, profits and losses and prospects.

- 11 The disclosure exemption for rights issues was developed to encourage issuers to offer their own shareholders the opportunity to participate in fundraising activities at a discount rather than opting for other forms of fundraising with less onerous disclosure requirements, such as institutional placements.

B Proposal to increase the monetary limit and require a cleansing notice

Key points

We propose to:

- increase the monetary limit for share purchase plans from the current amount of \$5000 in any consecutive 12-month period to \$15,000, and
- introduce a requirement for cleansing notices.

Increasing the monetary limit

- 12 The fundamental principle underlying our policy on share purchase plans is to allow share purchase plans where:
- (a) the risk to the shareholder is limited because the amount that may be invested by each investor in a 12-month period under the scheme is restricted; and
 - (b) the benefits to investors (such as savings on brokerage) outweigh the disadvantages and risks of not having full prospectus disclosure.
- 13 This principle has not changed. However, we think there are now good reasons to increase the monetary limit for share purchase plans.
- 14 Share ownership is widespread among small investors with 46% of adult Australians owning shares directly or indirectly.¹ This is a substantially higher proportion than 10 years ago.
- 15 Today's retail shareholders are also prepared to invest more money and in a greater number of companies.² The most recent ASX Share Ownership Study found that the value of an average trade by a retail investor in 2006 was \$14,200.
- 16 Similarly, there has been an increase in the assets of the average self-managed superannuation fund (SMSF). In 2006–2007, the average SMSF held around \$938,000 in assets.³ This compares to an average value of \$474,000 in 2003–2004.⁴ However, unless SMSFs hold over \$10m in assets, they are treated as retail clients: s761G(6). This means that an SMSF cannot

¹ ASX, *2006 Australian Share Ownership Study*, ASX, Sydney, 2007, viewed October 2008, <<http://www.asx.com.au>>.

² *ibid.*

³ Australian Tax Office, *Self-managed super fund statistical report*, ATO, Canberra 2008, viewed October 2008, <<http://www.ato.gov.au>>.

⁴ *ibid.*

take advantage of institutional placements, which might otherwise assist in building retirement savings.

- 17 The current economic conditions also mean that many companies are failing to secure debt finance and require alternative forms of capital. We want to promote efficient capital raising by companies and increase the access that retail investors have to upcoming fundraising opportunities that otherwise would likely occur only via institutional placements. At the same time, we do not want to unduly compromise investor protection.
- 18 Increasing retail access to fundraising opportunities was also a policy objective underpinning amendments to the Corporations Act to allow rights issues to be undertaken without the requirement for a prospectus (subject to certain conditions).
- 19 The Explanatory Memorandum to the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 (Explanatory Memorandum) states:
- One of the consequences of [share] placements is that existing members may be disadvantaged. Members with small holdings, for example, are generally not able to participate in institutional placements and therefore cannot acquire shares or units at the discount typically offered in such placements (p. 84).
- 20 Share purchase plans have some similarities to pro rata rights issues in that existing members are all offered an opportunity to increase their shareholding at an amount that is capped. Increasing the monetary limit for share purchase plans would therefore be broadly consistent with the policy on rights issues.

Recent applications for relief

- 21 We have recently received a number of applications for relief from the current monetary limit.
- 22 In October 2008, we granted relief to a listed, APRA-regulated ADI to offer a share purchase plan to its shareholders without a disclosure document and substantially in accordance with CO 02/831 but to a limit of \$10,000.
- 23 In August 2008, the Securities and Derivatives Industry Association (SDIA) applied to us to increase the monetary limit for share purchase plans to \$20,000. In support of its application, the SDIA argued that:
- (a) the rise in the value of the market since the last increase in 2002 justifies a substantial increase in the monetary limit;
 - (b) the level of share ownership in Australia is high;
 - (c) SMSFs are a growing vehicle to build retirement savings and require substantial investment options; and

(d) share purchase plans offer a low-cost capital raising option for companies.

24 The SDIA argued that these factors all suggest that the current \$5,000 limit is no longer an appropriate measure of the acceptable level of risk to retail investors when balanced against the advantages of being able to participate in a greater level of capital raising.

Proposal

B1 We propose to increase the monetary limit for share purchase plans from the current limit of \$5,000 in any consecutive 12-month period to \$15,000.

Your feedback

B1Q1 Do you agree that we should increase the monetary limit for share purchase plans?

B1Q2 If so, do you agree with the proposed limit of \$15,000? If not, what do you think should be the new limit? Why?

B1Q3 Should the increased monetary limit be restricted to certain types of companies (e.g. Australian ADIs)? If so, why?

B1Q4 We also propose to extend this relief to offers for the issue of interests in a listed managed investment scheme (i.e. interest purchase plans). Is there any reason why the relief should not be extended to interest purchase plans?

Rationale for increasing the monetary limit to \$15,000

25 Section 946AA exempts an Australian financial services (AFS) licensee from the requirement to provide an investor with a Statement of Advice for 'small investment advice'. A 'small investment' is defined as an amount not exceeding \$15,000: reg 7.7.09A. The exemption in s946AA was introduced as a refinement to Financial Services Reform to reduce the burden on advisers and to facilitate low-level advice without imposing regulatory costs.

26 The Explanatory Memorandum, which established the threshold for a 'small investment', states:

... a threshold of \$15,000 is proposed which relates to a level that should make the threshold commercially useful without inappropriately undermining consumer protection (p. 130).

27 In determining an appropriate limit, we have found the small investment advice exemption a useful comparison.

Cleansing notice requirement

- 28 The disclosure relief for share purchase plans is currently restricted to securities listed on ASX. This is because listed entities are subject to the continuous disclosure regime in the Corporations Act, which requires the release of all price-sensitive information to the market on an ongoing basis. This means that even in the absence of a disclosure document, shareholders can still access current information about an entity, which may assist in making an investment decision.
- 29 However, in certain situations, the ASX Listing Rules allow entities to withhold information from the market. This is why entities undertaking a share placement under s708A, or a rights issue under s708AA (both of which do not require disclosure documents) must provide a cleansing notice to ASX. This notice includes information that has not been disclosed to the market via continuous disclosure but is nonetheless relevant to an investor's decision.
- 30 Increasing the monetary limit for share purchase plans suggests that greater investor protection is warranted. Requiring a cleansing notice would achieve this objective.

Proposal

- B2** We propose to require issuers to lodge a cleansing notice on ASX as part of a share purchase plan offer.

Your feedback

- B2Q1 Do you agree that issuers should be required to lodge a cleansing notice on ASX as part of a share purchase plan offer? If not, why not? If the cost of preparing a cleansing notice is a factor please provide as much detail as possible.
- B2Q2 More generally, do you think information is lost to investors and the market by relying only on the continuous disclosure regime and a cleansing notice?
- B2Q3 If you agree that issuers should lodge a cleansing notice as part of a share purchase plan offer, do you think cleansing notices should be required for all share purchase plans, whatever the offer amount? If not, why not?
- B2Q4 Do you think we should also require that there be a concurrent share placement with a share purchase plan? Why?
- B2Q5 Should relief also be conditional on the relevant securities not being suspended for more than 5 days in the last 12 months, similar to s708AA(2)? Why?

- B2Q6 If we impose a cleansing notice requirement, should we include provisions in the relevant class orders similar to s708AA(2)(d) and (e)?
- B2Q7 More generally, should there be any other changes to the technical requirements of the relevant class orders?
- B2Q8 Is there any reason why a cleansing notice regime should not be extended to interest purchase plans?

Rationale for requiring a cleansing notice

- 31 Disclosure relief for share purchase plans is designed to facilitate offers while limiting the financial risks that small investors run by making a decision without the benefit of a regulated disclosure document. Increasing the monetary limit means increasing that financial risk, and so some form of additional disclosure is warranted.
- 32 In introducing the disclosure exemption for rights issues, it was recognised that in certain prescribed circumstances, the continuous disclosure regime, together with a cleansing notice, would provide investors with sufficient information with which to make an investment decision.
- 33 The Explanatory Memorandum states:
 The scope of the exemption is limited to quoted securities and interests in managed investment schemes on the grounds that the combination of an original prospectus or Product Disclosure Statement on listing and the continuous disclosure rules ensure the provision of an appropriate flow of information to members which will facilitate informed decision-making (p. 89).
- 34 The advantage of a cleansing notice is that it provides investors with additional information but in a form that is less costly and time-consuming for an issuer to prepare than a prospectus or Product Disclosure Statement.
- 35 We recently granted relief to a listed, APRA-regulated ADI to offer a share purchase plan with an increased monetary limit of \$10,000. A key consideration in granting the relief was that the share purchase plan was to be offered concurrently with a placement of shares to institutional and sophisticated investors. Under s708A(5)(e), a placement requires the lodgement of a cleansing notice with ASX. This means that although shareholders are able to invest an increased amount of money without a disclosure document, they still have access to additional information via the cleansing notice.

C Regulatory and financial impact

- 36 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:
- (a) issuer time and cost in preparing a prospectus when the amount to be raised from each investor is quite small;
 - (b) shareholder convenience in obtaining additional shares, often at a discount to the market and without brokerage fees or stamp duty; and
 - (c) access for retail investors to offers that might otherwise only be made to sophisticated and professional investors.
- 37 Before settling on a final policy, we will comply with the requirements of the Office of Best Practice Regulation (OBPR) by:
- (a) considering all feasible options;
 - (b) if regulatory options are under consideration, undertaking a preliminary assessment of the impacts of the options on business and individuals or the economy;
 - (c) if our proposed option has more than low impact on business and individuals or the economy, consulting with OBPR to determine the appropriate level of regulatory analysis; and
 - (d) conducting the appropriate level of regulatory analysis—that is, by completing a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).
- 38 All BCC reports and RISs are submitted to the OBPR for approval before we make any final decision. Without an approved BCC report and/or RIS, we are unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 39 To ensure that we are in a position to properly complete any required BCC report or RIS, we ask you to provide us with as much information as you can about:
- (a) the likely compliance costs;
 - (b) the likely effect on competition; and
 - (c) other impacts, costs and benefits,
- of our proposals or any alternative approaches: see ‘The consultation process’ p. 4.

Key terms

Term	Meaning in this document
ADI	Authorised deposit-taking institution
AFS licensee	A person who holds an AFS licence under s913B that authorises them to carry on a financial services business
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange Limited
CO 02/831 (for example)	An ASIC class order (in this example, numbered 02/831)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of the Act
CPI	Consumer Price Index
Explanatory Memorandum	Explanatory Memorandum to the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007
Product Disclosure Statement	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 Note: See s761A for the exact definition.
reg 7.7.09A (for example)	A regulation of the Corporations Regulations 2001 (in this example, numbered 7.7.09A)
RG 125 (for example)	An ASIC regulatory guide (in this example, numbered 125)
s741(1) (for example)	A section of the Corporations Act (in this example, numbered 741(1))
SMSF	Self-managed superannuation fund
Statement of Advice	A document that must be given to a retail client for the provision of personal advice under Subdivs C and D of Div 3 of Pt 7.7 Note: See s761A for the exact definition.