



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 196

# Periodic statements for quoted and listed managed investment products and relief for AQUA products

December 2012

## About this paper

The consultation paper sets out ASIC's proposals for relief to allow issuers of interests in registered schemes that are able to be traded on a licensed financial market to report the balances and values required under s1017D of the *Corporations Act 2001* (Corporations Act) on a modified basis. It also covers proposals for relief to facilitate the trading of interests in a registered scheme on the AQUA market of ASX.

We seek the views of issuers, industry bodies, investors, consumer groups and other interested parties on our proposals.

### 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 17 December 2012 and is based on the Corporations Act as at the date of issue.

### 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 periodic statements for quoted and listed managed investment products and relief for AQUA products. 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 Regulation Impact Statement: see Section D, 'Regulatory and financial impact'.

### 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 10 February 2013 to:

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## What will happen next?

<b>Stage 1</b>	17 December 2012	ASIC consultation paper released
<b>Stage 2</b>	10 February 2013	Comments due on the consultation paper
	February–March 2013	Drafting of class order and updating regulatory guidance
<b>Stage 3</b>	July 2013	Class order and updated guidance released

## A Background to the proposals

### Key points

Section 1017D of the *Corporations Act 2001* (Corporations Act) and the relevant regulations of the Corporations Regulations 2001 (Corporations Regulations) require an issuer of managed investment products to provide periodic statements to investors containing information they need to:

- assess the performance of their investment; and
- understand the nature and purpose of transactions in their investment.

This includes the opening and closing balances of their investment, changes to their investment, management costs (including fees charged), the return on their investment, as well as changes in circumstances affecting their investment.

Issuers of some quoted managed investment products may not have access to data that is essential for calculating and reporting on certain information required for a periodic statement.

We are consulting with the industry and other stakeholders to better understand the issues, how the issues affect them and possible solutions.

We are also consulting on the provision of class order relief to facilitate quotation of interests in exchange traded funds (ETFs) on the AQUA market of ASX. This relief is currently provided to each issuer on application for each new scheme on the AQUA market. The class order will provide substantially same relief on a permanent basis.

### Obligations under s1017D of the Corporations Act

- 1 Section 1017D(1) imposes an obligation on issuers of financial products that have an investment component to give retail investors periodic statements when the financial products are either offered or applied for in this jurisdiction. The financial products covered include interests in listed managed investment schemes.
- 2 Section 1017D(4) contains the general content requirement for periodic statements and provides that issuers must give the holder of a relevant financial product all the information the issuer reasonably believes the holder needs in order to understand their investment in the financial product. The specific requirements for the content that must be included in a periodic statement are prescribed under s1017D(5). These are:
  - (a) the opening and closing balances in dollar amounts;
  - (b) the termination value in dollar amounts;

- (c) the details of transactions in relation to the product;
  - (d) any increases in contributions in dollar amounts;
  - (e) the return on investment in dollar amounts;
  - (f) any changes in circumstances affecting the investment; and
  - (g) the fees, charges or expenses paid in dollar amounts.
- 3 Additional requirements about the disclosures are included in the Corporations Regulations 2001 (Corporations Regulations). For example, reg 7.9.60B requires a brief description of transactions in relation to the product and for the amount shown for a transaction to include certain amounts, such as any goods and services tax. Regulation 7.9.75 is another example of a regulation requiring additional disclosures.

## Exchange traded managed investment products

### Certain information not available to issuers of exchange-traded managed investment products

- 4 Exchange traded managed investment products are quoted on ASX's listing and AQUA markets. The AQUA market is the ASX market segment dedicated to the quotation and trading of interests in managed funds, exchange traded funds (ETFs) and structured products. It is operated under the AQUA rules. Retail investors do not typically acquire or dispose of these quoted products by applying to the issuer for an issue or redemption. Rather, retail investors generally engage in transactions in relation to these products by buying or selling on the relevant market.
- 5 Typically, retail investors will receive the following statements—about their transactions in managed investment products on the ASX's financial markets—from sources other than issuers:
- (a) trade confirmation statements from their brokers providing details of their transactions, including price and volume information; and
  - (b) CHESS holding statements confirming the number of units held by investors—that is, the opening and closing unit balances and any change in their holdings.
- 6 Some of the information provided in these statements is the same information that must be included in a periodic statement under s1017D.
- 7 We have engaged in preliminary consultations with a registry services provider and a number of responsible entities of ETF products admitted to trading on the AQUA market on the type of information about trades on the ASX's financial markets that is available to responsible entities. It appears

from our initial inquiries that issuers do not generally have access to the price at which investors trade on ASX, nor the volume of each trade, although the issuer will have information about the net change in an investor's holding at the end of each trading day.

- 8 Generally, in order to accurately report on the information required for a periodic statement, an issuer will need information about the transactions conducted by investors. For example, s1017D(5)(c) requires a periodic statement to include a summary of transactions conducted by investors during the reporting period. This summary may only be constructed with information on the price and volume of each transaction. Also, in order to report accurately on the return on an investor's investment (as required by s1017D(5)(e)), an issuer will need information on the number of interests bought or sold, and the transaction price.

## Our views on the application of s1017D

### Overlap with other statutory reporting and disclosure requirements

- 9 Under the Corporations Act, a listed scheme is a 'disclosing entity'; accordingly, it is subject to the additional reporting and audit requirements of Ch 2M and the continuous disclosure obligations under s674 that apply to disclosing entities. A registered scheme that has interests traded on the AQUA market may be an unlisted disclosing entity that is required to meet the continuous disclosure obligations under s675.
- 10 In addition, we understand that investors will receive or have access to information provided by issuers under other statutory reporting and disclosure requirements, including:
- (a) Product Disclosure Statements (PDSs);
  - (b) annual and half-yearly financial reports in relation to the schemes;
  - (c) distribution statements; and
  - (d) continuous disclosure notifications.
- 11 However, there are important differences to the information that must be given in a periodic statement. While Chs 2M and 6CA effectively require the disclosure of information about the performance of the issuer at the entity level, the periodic statement requirements under s1017D are intended to provide information about investors' holdings at an individual level. In addition, there are requirements for dollar disclosure and the form of the fee disclosure. In particular, reg 7.9.16O provides that details of transactions required under s1017D(5)(c) should be set out in the manner specified in Pt 3 of Sch 10 of the Corporations Regulations.



- 12 Despite the obligations under Chs 2M and 6CA, we consider that it is consistent with the intention of Parliament that issuers of managed investment products (including issuers of interests in a listed managed investment scheme) also comply with s1017D. We note that s1017B(2) specifically exempts managed investment schemes that are disclosing entities from the ongoing disclosure requirements. Paragraph 14.134 of the Explanatory Memorandum to the Financial Services Reform Bill 2001 states that:

the continuous disclosure provisions were better able to address ongoing disclosure obligations in relation to listed managed investments and having regard to the fact that the rules of financial markets would impose continuous disclosure obligations for such products in any case.

- 13 This suggests that Parliament had considered the issue of overlap with other statutory reporting or disclosure requirements, but did not envisage an exemption from s1017D for listed managed investment schemes—similar to that in s1017B(2)—should be provided.

### **Information investors may receive from other sources**

- 14 As a result of trading through their brokers on ASX, investors may also receive information from their brokers or the clearing and settlement facility that settles transactions on ASX. This information may include any trade confirmation statements or CHESS holding statements. The receipt of this information by investors does not amount to compliance by the issuers with the requirements of s1017D, as this information does not satisfy the requirements of s1017D (e.g. an investor's opening and closing balances in dollar amounts, details of the investor's transaction in relation to the financial products as required by reg 7.9.60B and the return on investment in dollar amounts).

## **Scope of proposals for relief**

- 15 The practical difficulties faced by issuers in preparing a periodic statement have been identified largely in relation to managed investment products traded on the AQUA market. However, we expect that listed schemes face similar difficulties. Accordingly, the proposals in this paper are intended to cover:
- (a) interests in a scheme that is listed on a licensed financial market; and
  - (b) interests admitted to trading status on the AQUA market under the ASX Operating Rules.
- 16 In September 2012, there were about 175 registered schemes that had interests (inclusive of ETFs) able to be traded on ASX.

- 17 The requirement under s1017D to provide a periodic statement also applies to other types of managed investment products that fall within s764A(1)(b)(ii) and (iii) (such as an interest in an unlisted registered scheme and ASX-traded instalment warrants over managed investment products) and to other financial products that are not managed investment products. However, the proposals in this paper for class order relief will not extend to these products. We will consider relief for these products on a case-by-case basis in accordance with Regulatory Guide 51 *Applications for relief* (RG 51) and Regulatory Guide 136 *Managed investments: Discretionary powers and closely related schemes* (RG 146).

Note: Under Class Order [CO 03/957] *ASX managed investment warrants—disclosure and reporting exemptions*, issuers of ASX traded instalment warrants over managed investment products are exempt from compliance with s1017D.

## Relief related to periodic reporting

- 18 In light of the identified practical difficulties that issuers have in obtaining certain information essential to the statements required by s1017D, under proposals B1–B3 we will provide class order relief so that issuers may report the content in a periodic statement on a modified basis, based on:
- (a) the market price of the interests in the scheme on either the date of trade or date of settlement; or
  - (b) for schemes that offer substantially continuous issue or redemption, the net asset value (NAV) per interest in the scheme on either date of trade or date of settlement.
- 19 The relief under proposal B1 will be provided with a transition period for responsible entities of listed schemes for reports for periods ending on or after 31 December 2013. We will not take enforcement action against a responsible entity of a listed scheme for failing to give periodic statements to investors in these schemes for that period. The transition period is intended to assist issuers prepare for compliance by modifying their systems to prepare periodic statements.
- 20 We clarify our view on the requirements of s1017(5)(b) and (d) in proposals B4–B5.
- 21 This relief will be subject to a requirement that a consistent basis of calculation is used by the issuer for the scheme, a prominent explanation of the reasons for adopting a particular basis of calculation and the resulting implications are included in the periodic statement: see proposal B6.

## Relief to facilitate quotation of ETFs on the AQUA market

- 22 Registered managed investment schemes that are to be admitted to trading status in the AQUA market generally seek and obtain certain relief in order to comply with the Corporations Act. Proposals C1–C7 set out our proposed class order relief, which is designed to facilitate the process of admission.
- 23 Since the commencement of operation of the AQUA market, it has been necessary for responsible entities of registered managed investment schemes to obtain relief from certain provisions of the Corporations Act to facilitate quotation of the managed investment products on the AQUA market and to comply with the Act.
- 24 In Section C, we set out our proposals for the class order relief that would generally cover the case-by-case relief we have already granted. Specifically, we will grant relief so that:
- (a) if interests in the scheme are to be admitted as ETF securities, responsible entities may treat members unequally where redemptions are restricted to authorised participants or persons who are Australian residents for tax purposes, or both (see proposal C1);
  - (b) responsible entities may treat members unequally where current information about the index the scheme aims to track as its investment strategy and the assets in the scheme’s portfolio is provided to authorised participants and market makers before other members (see proposal C2);
  - (c) the ability of members to redeem their interests by way of ‘in specie’ transfer of the underlying securities (transfer of the underlying securities assets in their actual form) that are held by the registered scheme does not in itself give rise to a relevant interest or an obligation to lodge substantial holding notices for the underlying securities (see proposals C3–C5);
  - (d) interests in ETFs may be issued on a continuing basis and treated as quoted automatically upon the issue of the interests (see proposal C6); and
  - (e) responsible entities do not have to send notifications of material changes and significant events to members of the fund (see proposal C7).

## B Relief related to periodic reporting

### Key points

We propose to give class order relief from the periodic statement content requirements under s1017D(5) to issuers of interests in managed investment schemes that are listed or able to be traded on a licensed financial market: see proposal B1.

We propose that under this relief the issuers may report the balances and values based on the NAV per interest or the market price for the interests on either the trade or settlement date: see proposals B2–B3.

We propose that periodic statements will not be required to report the termination value if the fees or expenses related to redemption from the scheme are not applicable to retail investors, and we take the view that s1017D(5)(d) content requirement is not relevant to any increase in holding through on-market acquisition by the members: see proposal B4–B5.

We propose that relief will be subject to the conditions that the issuers:

- use a consistent basis of calculation for all the periodic statements (unless there is a material change in circumstances that makes it appropriate to change the basis going forward); and
- include in the periodic statements a clear and prominent explanation of the basis on which the balances and the values have been calculated and the implications of applying that basis (see proposal B6).

## Relief for responsible entities from s1017D(5)

### Proposal

**B1** We propose:

- (a) to give class order relief from the periodic statement content requirements under s1017D(5) to responsible entities of registered schemes that are listed or quoted schemes to allow use of a substitute price for transactional values;
- (b) that the content of periodic statements should include a report, on an annual and a five-yearly basis, on the performance of the scheme relative to the investment strategy set out in the fund's PDS; and
- (c) that the relief under proposal B1(a) be provided with a transition period of six months for responsible entities of listed schemes for reports for periods ending on or after 31 December 2013.

*Your feedback*

- B1Q1 Do you consider that periodic statements containing transactional information based on price proxies, rather than the actual prices at which the relevant transactions have been conducted, will provide useful information to investors in listed or quoted schemes?
- B1Q2 Instead of the relief in proposal B1(a), would it be preferable for relief to be given that would permit the responsible entity to omit any information that it could only include if it had knowledge of the prices at which investors had actually conducted transactions?
- B1Q3 What would be the impact of the relief in proposal B1 on retail clients affected by the relief?
- B1Q4 Would it create difficulties for an investor to understand the periodic statements of their investment in the financial product if the relief suggested in question B1Q1 were provided?
- B1Q5 Should relief be extended beyond responsible entities of listed schemes or quoted schemes? If so, why?
- B1Q6 Do you agree that information referred to under proposal B1Q1 is information required under s1017D(4) for investors to adequately understand their investments? If not, why? What information, other than what is required under s1017D(5), should investors receive?
- B1Q7 Should full compliance with s1017D be required? If yes, why is this important?
- B1Q8 Can the practical difficulties to compliance identified in this paper be overcome? Are the costs of overcoming the practical difficulties significantly different to those associated with compliance in the proposed modified manner?
- B1Q9 Is any of the information that must be included in a periodic statement under s1017D(5) not applicable to investors in quoted schemes or listed schemes solely because their interests can only be bought or sold on a secondary market?
- B1Q10 Should 'exit statements', the periodic statements provided to members that exit a managed fund, contain any different information to the 'annual statement', the periodic statement typically provided to members in respect of the financial year for the fund?
- B1Q11 How would the proposed relief affect the compliance costs?

**Rationale**

- 25 Based on the discussions we have had with issuers, we do not consider the relevant issuers are complying with s1017D, even after taking into consideration s1017D(7). This is because the information given under the existing practices of the issuers does not meet the requirements of s1017D(5) and is insufficient for investors to adequately understand their investment as required under s1017D(4).

- 26 We understand that issuers of interests in managed investment schemes that are listed or able to be traded on a licensed financial market face practical difficulties when preparing periodic statements that comply with s1017D(5). These difficulties arise mainly due to the fact that these issuers and their service providers do not know the transaction price that an investor bought or sold their interest in the scheme on market.
- 27 The proposed relief will overcome the practical difficulties identified and will help issuers comply with s1017D. This relief will mean that investors will be given periodic statements that will help them understand their investment and its performance during the reporting period.
- 28 Investors may require information other than the information prescribed in s1017D(5) to help them understand their investment (e.g. information on how the fund has performed compared to the investment strategy or the performance benchmark set out in the PDS for the scheme). For index or asset-tracking quoted schemes (such as ETFs), we consider that it may be appropriate to provide investors with information on how closely the scheme tracked the index or asset that its investment objective is based on, or how an index-tracking fund performed relative to the index that the fund aimed to track. Accordingly, we consider this information should be regarded as information required under s1017D(4).
- 29 The transition period of six months during which compliance with s1017D will not be required is intended to help issuers of listed schemes prepare for compliance by modifying their systems to prepare periodic statements.

## Statements may be based on NAV or market price

### Proposal

**B2** We propose that under the relief, instead of reporting on the basis of the actual value of the investment of an investor (e.g. on the basis of the price at which the investor has purchased or sold the interests), issuers may report on a modified basis, based on:

- (a) the market price of the interests in the scheme on either the date of trade or the date of settlement; or
- (b) the NAV per interest in the scheme on either the date of trade or the date of settlement.

We expect that, except in exceptional circumstances, listed schemes will generally use the market price and quoted schemes will use the NAV-based price.

#### *Your feedback*

**B2Q1** Do you think our proposed relief will help produce useful information to investors, particularly in relation to s1017D(5)(c)?

B2Q2 Do you agree that listed schemes should use market price, other than in exceptional circumstances? What are these exceptional circumstances?

B2Q3 Do you agree that quoted schemes should use the NAV-based price, other than in exceptional circumstances? What are these exceptional circumstances?

**B3** We propose that, under proposal B2, issuers may report in a periodic statement:

- (a) for opening balances and closing balances or termination values on the commencement date and closing date of the reporting period, based on:
  - (i) the NAV per interest of the scheme; or
  - (ii) the end-of-day or weighted average daily market price for an interest of the scheme; and
- (b) for details of transactions, any increase in contributions, return on investment and amount payable by investors for their investments, based on:
  - (i) the NAV per interest of the scheme on the respective dates of transaction or when this can be assumed to have occurred (i.e. three days before the settlement day);
  - (ii) the NAV per interest of the scheme on the settlement date for the respective dates of transaction (i.e. usually three days after the transaction date (T+3)); or
  - (iii) the end-of-day market price for an interest of the scheme on the respective dates of transaction or when this can be assumed to have occurred (i.e. three days before the settlement day).

#### *Your feedback*

B3Q1 Are the bases of calculation proposed under the relief appropriate? If not, why?

B3Q2 Do you think our proposed relief will assist in producing useful information to investors, particularly in relation to s1017D(5)(c)?

B3Q3 Are there other suitable bases of calculation? If yes, what are they and why are they appropriate? Please provide information on the impact on investors and on compliance costs.

## **Rationale**

- 30 We consider that preparing a periodic statement based on the NAV-based price or last market price may overcome the practical difficulties identified in preparing a periodic statement that would comply with s1017D in its current form.

- 31 We recognise that the appropriate price to use for preparing the periodic statement will depend on the nature of the scheme. However, we consider that market price is likely to be appropriate for listed schemes, as the market price is what affects the value of an investor's investment. Therefore, we expect that market price will be used by listed schemes, except in exceptional circumstances. We also consider that the NAV-based price is only relevant when the scheme substantially issues and redeems continuously.
- 32 The responsible entity for the scheme will determine the most appropriate price to use in complying with modified s1017D. We envisage that, when making that decision, the responsible entity will need to take into consideration factors including:
- (a) whether the scheme substantially issues and redeems continuously;
  - (b) the volatility of the market price during the day;
  - (c) how closely the market price tracks the NAV per interest;
  - (d) the volume and frequency of trading in the scheme; and
  - (e) whether the scheme has been suspended from quotation for an extensive period.
- 33 Therefore, we consider it appropriate for the responsible entity to determine whether the NAV-based price or the last market price is the appropriate price to use for its scheme.
- 34 A periodic statement prepared using the NAV-based price or the last market price will help investors better understand their investment and its performance during the period.

## Termination value and any increase in contributions

### Proposal

- B4** We propose that issuers of schemes where fees and expenses related to redemption from the scheme are not applicable to retail investors are not required to include the termination value in the periodic statement, as the termination value is the same as the closing balance.

#### *Your feedback*

B4Q1 Do you agree with our proposal? If not, why?

- B5** We propose to take the view that the s1017D(5)(d) content requirement is not relevant to any increase in holding through on-market acquisition by the members.

#### *Your feedback*

B5Q1 Do you agree with our proposed view? If not, why?



## Rationale

- 35 Section 1017D(5)(b) requires a periodic statement to include the termination value of the investment at the end of the reporting period.
- 36 The termination value reports the closing balance, excluding any fees payable to redeem the interests from the scheme or expenses associated with redeeming. In some schemes, retail investors are never charged these fees (e.g. when retail investors are not allowed to redeem from the scheme). In this instance, the termination value would be the same as the closing balance, which would have been reported in a periodic statement under s1017D(5)(a) and therefore may not need to be reported again under s1017D(5)(b).
- 37 Section 1017D(5)(d) requires disclosure in a periodic statement of any increase in contributions for the financial product by the holder or another person during the reporting period.
- 38 Some schemes do not facilitate issuing of new interests to retail investors (e.g. ETFs and schemes that are not open ended). As part of the business model of ETFs, new interests are not generally issued directly to retail investors. Similarly, closed schemes generally do not issue new interests to investors after an initial public offer. In situations where investors are not able to apply for new interests in the scheme, investors may increase their holding in the scheme through acquiring interests of the scheme on market. These transactions will be reported in a periodic statement under s1017D(5)(c). We do not expect any increase in holding in the scheme through on-market acquisition to be reported under s1017D(5)(c).

## Conditions of relief

### Proposal

- B6** We propose to make our relief subject to the following conditions:
- (a) issuers must use a consistent basis of calculation throughout and between the periodic statements they prepare; and
  - (b) issuers must include in the periodic statements a clear and prominent explanation of the basis on which the balances and the values have been calculated and the implications of applying that basis. This explanation must state that the price used for the transaction is based on an estimated price and is not likely to be the exact price transacted at by the investor.

#### *Your feedback*

B6Q1 Do you agree with the proposed relief conditions?

B6Q2 Are there other conditions that should be included? If yes, what are they and why should they be included?

## Rationale

- 39 A periodic statement that is prepared in a consistent manner will be most useful to investors. Preparing periodic statements for different periods using the same basis will help investors better understand and compare their periodic statements for those periods. Disclosure of the basis on which the periodic statement has been prepared will also help investors understand this issue.
- 40 However, there may be compelling reasons to change the basis for preparing the statements from one period to the next. In which case, we expect that the change and the reasons for the change will be clearly disclosed in the periodic statement.
- 41 It will be important that it is made clear to investors in the periodic statement which price is used for its preparation, and that:
- (a) this price will most likely differ from the price that the investor transacted at; and
  - (b) the statement values do not take into account any brokerage fees paid in acquiring the interest or the brokerage fees that will be paid if they sell their interest on a secondary market.

## C Relief to facilitate quotation of ETFs on the AQUA market

### Key points

We propose to give class order relief to facilitate the quotation of managed investment products on the AQUA market.

The class order would provide equal treatment relief, to allow:

- redemptions from an ETF by authorised participants and market makers for ETF schemes, and/or only if the member is an Australian resident for tax purposes (see proposal C1); and
- disclosure of portfolio or assets required for 'in specie' issue or redemption and provided to members who are not authorised participants to be delayed up to a time before the commencement of the next trading day after the day on which disclosure is made (see proposal C2).

The class order would provide:

- relevant interest and substantial holding relief, so that the ability to lodge a redemption request does not by itself give authorised participants a relevant interest in the underlying securities of the scheme for the purposes of Ch 6 (see proposal C3); and
- certain modifications regarding substantial holder notices (see proposal C4).

The class order would not provide relief from s1013H, s1016D and 1016E(1)(b) because we consider relief is unnecessary: see proposal C6.

The class order would also provide material change and significant event disclosure relief, so that a responsible entity is not required to comply with the material change and significant event disclosure obligations regarding the issue of interests in the registered scheme to retail investors: see proposal C7.

We propose that the above relief be subject to certain conditions and identify these conditions in the proposals.

## Equal treatment relief

### Proposal

- c1 We propose to give relief from s601FC(1)(d) to responsible entities of ETFs, to allow for redemptions from an ETF by:
- (a) authorised participants and market makers for such schemes; and/or

- (b) only if the member is an Australian resident for tax purposes.

This relief would be subject to the following conditions:

- (c) interests in the scheme must remain admitted to trading status on the AQUA market;
- (d) the PDS for the scheme lodged with ASIC must prominently disclose full particulars of how the responsible entity may treat members of the same class differently as permitted by the relief; and
- (e) all members must be given a right to redeem interests in the scheme if quotation of interests in the scheme is suspended from trading for more than five trading days, unless:
- (i) the scheme has been terminated;
  - (ii) is not a liquid scheme; or
  - (iii) the responsible entity suspends redemption when it would be reasonable to do so and in doing so the responsible entity would be acting in the best interest of members. If a fee is applicable to the members, the fee must not be disproportionate to the relevant costs to the responsible entity.

*Your feedback*

C1Q1 Do you agree with the proposed relief?

C1Q2 Do you agree with the proposed relief conditions?

C1Q3 Are there other conditions that should be included? If yes, what are they and why should they be included.

- C2** We propose that disclosure of portfolio or assets required for in specie issue or redemption and provided to members who are not authorised participants to be delayed up to a time before the commencement of the next trading day after the day on which disclosure is made.

This relief would be subject to the condition that an indicative NAV per interest for the scheme is published on the responsible entity's website so that it is up-to-date within 15 minutes during the day.

*Your feedback*

C2Q1 Do you agree with the proposed relief?

C2Q2 Do you agree with the proposed relief conditions?

C2Q3 Are there other conditions that should be included? If yes, what are they and why should they be included.

## Rationale

- 42 Section 601FC(1)(d) requires a responsible entity for a registered scheme, in exercising its powers and carrying out its duties, to treat the members who hold interests of the same class equally and members who hold interests of different classes fairly.

- 43 ETF operators generally seek to allow ongoing application for and redemption of interests in the ETF at a price based on the NAV of the ETF by authorised participants who have entered an arrangement with the operator. As in other jurisdictions, this process seeks to ensure that the market price will generally reflect the current NAV of the fund through arbitrage. In these circumstances, retail investors are not permitted to be issued or redeem units directly (except in exceptional circumstances), but can trade their interests in the ETF within the secondary market.
- 44 Where the AQUA market should provide an effective means of retail investors disposing of their managed investment products at a price close to NAV, responsible entities of registered schemes that are ETFs have applied to ASIC for this type of relief. Responsible entities have argued that relief to allow exclusion is appropriate to promote market liquidity and, in some cases, to avoid the possible adverse technical implications arising out of satisfying redemptions through an in specie transfer of the securities held by the ETF. In relation to redemptions by non-Australian tax residents, the adverse implications that may arise relate to the inability to appropriately apply and effect imposition of tax liability on the redeeming member.
- 45 The relief would facilitate the pricing of interests in the ETF on the secondary market and restrict the possible adverse technical implications for the ETF.
- 46 In relation to disclosure of index or portfolio information to members who are not authorised participants on a delayed basis, the relief has been sought to reduce the risk of ‘front running’. Front running may occur if the responsible entity of an ETF is required to disclose information that would enable particular trading to be predicted or enable real time calculation by the public of an index that may be sold under subscription. We do, however, expect a high level of transparency about how indexes underlying ETFs are constituted.
- 47 Given retail investors are not allowed to apply to the responsible entity of an ETF for new interests, knowledge of the composition and weightings of the index the ETF seeks to track is not as imperative as to an authorised participant. Authorised participants are generally able to apply directly to the responsible entity for new interests in an ETF by transferring to the responsible entity a basket of securities consisting of the same composition and weightings of securities comprised in the index that the ETF seeks to track.
- 48 We note also that retail investors will be informed about the holding of the ETF and the value of such holding through indicative NAV disclosure. Indicative NAV disclosure requires responsible entities to disclose the NAV of the ETF continuously during the day and update such disclosure every 15 minutes.

## Relevant interest and substantial holding relief

### Proposal

- c3** We propose to give relief from s606 to members who have a right to request an in specie redemption from an ETF that tracks a broad-based index in which no security is more than 10%. This relief is designed to ensure that the ability to lodge a redemption request under the redemption facility offered by a scheme, in the circumstances where redemption will be satisfied by an in specie transfer of the securities held by the ETF, does not by itself give the members a relevant interest in any securities held by the ETF.

#### *Your feedback*

- C3Q1 Do you agree with the proposed relief?

- c4** We propose to give relief to members of ETFs who have a right to request an in specie redemption, to allow them to assume that the composition and weightings of the securities comprised of the index (that the ETF seeks to track) is the same as the creation basket disclosed on that day by the issuer when assessing their obligations (under s671B) to give a substantial holding notice for the securities held by the ETF.

#### *Your feedback*

- C4Q1 Do you agree with the proposed relief?
- C4Q2 Do you think the proposed relief is necessary or useful? If not, why?
- C4Q3 Should relief be given to allow relevant interests disregarded for Ch 6 under our relief to also be disregarded for the purpose of the substantial holder provisions? If so why?
- C4Q4 Do you think the s671B obligations are triggered by any other aspects related to the operation of ETFs (e.g. when an authorised participant puts together a creation basket)? Other than our proposed relief, is there anything the issuers may do to help the relevant members manage their obligations under s671B?

- c5** We propose that relief only apply:
- to the facility offered by the responsible entity to redeem interests in the ETF;
  - where the member has no power to control the voting or disposal of the security arising from holdings in the ETF except if the interest in the ETF is redeemed; and
  - until a redemption request in relation to the members' interests in the scheme is made.

#### *Your feedback*

- C5Q1 Do you agree with the proposed relief conditions?

c5Q2 Are there other requirements or conditions that should be included? If yes, what are they and why should they be included.

## Rationale

- 49 Section 606 prohibits the acquisition of a relevant interest in issued voting shares in a listed company, an unlisted company with more than 50 members or a listed managed investment scheme, unless acquired under one of the exceptions in s611.
- 50 Broadly, s671B requires a person who has a substantial holding in a listed company or listed registered managed investment scheme to give specified information about that holding to the company or responsible entity for the scheme.
- 51 We consider the rights attaching to interests in the ETF in respect of the underlying securities of the ETF to be sufficiently remote or tenuous that they are unlikely to be used as a means of gaining control. Accordingly, similar to our position in relation to warrants—set out in Regulatory Guide 143 *Takeovers provisions: Warrants* (RG 143)—we consider relief from s606 is appropriate.
- 52 We consider disclosure of substantial holdings under s671B important for an efficient, informed and competitive market in quoted securities. We have granted relief to ETF issuers from the substantial holding requirements on a case-by-case basis before.
- 53 The proposed class order relief aims to help the relevant members assess whether an obligation under s671B has arisen by removing the uncertainty that may result from any fluctuations in the composition of the index that occur during the day. Under the proposed relief, a member will assess its obligations under s671B assuming that the composition of the index is the same as the creation basket disclosed by the issuer at the beginning of the day—that is, the composition and the number of each of the underlying securities of the ETF that correspond to each interest in the scheme remains the same as represented in the creation basket.

## PDS obligations relief

### Proposal

- c6 We propose to no longer grant relief in response to applications for relief from s1013H, s1016D and 1016E(1)(b). We consider this relief unnecessary and, accordingly, that it should not be granted.

*Your feedback*

C6Q1 Do you agree with our view that this relief is not necessary? If not, why?

**Rationale**

- 54 Sections 1013H, 1016D and s1016E(1)(b) apply to a PDS for a financial product that states or implies that a financial product will be able to be traded on a financial market. Section 1013H only permits a responsible person to issue or sell the financial product in these circumstances if:
- (a) the product is able to be traded on the relevant financial market;
  - (b) an application has been made to the operator of the relevant market to the taking of such action as is necessary to enable the product to be traded on that market; or
  - (c) an application of the kind referred to in paragraph 54(b) will be made to the operator of that market within seven days from the date of the PDS.
- 55 Sections 1016D(1) and 1016E(1)(b) impose similar obligations to s1013H on a responsible person.
- 56 We do not consider the relevant laws require an application—referred to under, for example, s1016D(b)—to be made every time new interests are issued under the PDS. If the issuers have made the required application when the PDS and the interests are first issued, the issuer may continue to issue new interests under the PDS from time to time without having to make the relevant application again. On this basis, we do not consider this relief necessary.

**Material change and significant event disclosure relief****Proposal**

- c7 We propose to give relief from s1017B to ETF issuers on the following conditions:
- (a) the ETF issuer must comply with the provisions of the Corporations Act that apply to an unlisted disclosing entity as if the ETF were a disclosing entity; and
  - (b) the ETF issuer must state in each PDS that it will do so.

*Your feedback*

C7Q1 Do you agree with the proposed relief?

C7Q2 Do you agree with the proposed relief conditions?

C7Q3 Are there other conditions that should be included? If yes, what are they and why should they be included?



## Rationale

- 57 Section 1017B requires an issuer of a financial product, when the product is acquired by a retail investor, to notify the holder of the product of the following changes:
- (a) any material change to, or significant event that affects, a matter that would have been required to be specified in the financial product's PDS, had the PDS been prepared the day before the change or event occurred; and
  - (b) any other change, event or other matter of a kind specified in regulations made for the purposes of s1017B(1A)(b).
- 58 We consider that there is uncertainty regarding the classification of certain AQUA products as a 'disclosing entity' under s111AFA. Section 111AFA sets out when a managed investment product is an enhanced disclosure (ED) security; in particular, if 100 or more people hold the product as a result of offers that gave rise to an obligation to give a PDS, the managed investment product is an ED security.
- 59 A responsible entity will normally prepare a PDS for the issue of AQUA market traded interests to authorised participants. This is to enable sales of the interests by the authorised participants without triggering the requirement, under s1012C, that a PDS be given to retail investors. A copy of the PDS is normally made available on the responsible entity's website, for review by all investors, as part of the responsible entity's continuous disclosure obligations under the AQUA rules. As managed investment products are able to be traded during trading days, retail investors would expect to receive disclosure about significant changes through immediate disclosure to the market, rather than being given a notification within the timeframes in s1017B. Individual notification to retail investors, about their holdings of managed investment products admitted to trading on the AQUA market, may be burdensome to responsible entities and meeting the disclosure requirements that apply to disclosing entities is more appropriate.
- 60 Compliance with the requirements applying to unlisted disclosing entities would not be an additional burden. The AQUA rules impose continuous disclosure obligations on ETF issuers, which include the disclosure of information that must be disclosed to ASIC under s675. Section 675 applies to unlisted disclosing entities and essentially requires the disclosure of information that:
- (a) is not included in a PDS or publicly available; and
  - (b) if it were available, would have a material effect on the price or value of the ED security.
- 61 The relief would clarify the obligation of the ETF issuer and facilitate the above continuous disclosure obligation under the AQUA rules.

## D Regulatory and financial impact

- 62 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) confident and informed investors; and
  - (b) fair and efficient financial markets.
- 63 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:
- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
  - (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
  - (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).
- 64 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 65 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:
- (a) the likely compliance costs;
  - (b) the likely effect on competition; and
  - (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

## Key terms

Term	Meaning in this document
AQUA market	The market created by ASX to specifically manage the admission of ETF securities, managed fund products and structured products (collectively referred to as 'AQUA products') on the ASX market and to provide access for AQUA product issuers to clearing and settlement services provided by the ASX Group
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited (ASN 008 624 691) or the exchange market operated by ASX Limited
authorised participant	An ASX trading participant, as that term is defined in the ASX Operating Rules, that has an authorised participant agreement in place with the issuers of a quoted scheme to make an application to acquire and redeem interest in the scheme
CHESS	Clearing House Electronic Subregister System
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
ED security	Enhanced disclosure security. Has the meaning given in s111AD of the Corporations Act
ETF	Exchange traded fund
in specie	The distribution of an asset in its present or actual form, rather than selling it and distributing the proceeds
listed scheme	A scheme listed under the relevant market rules that gives investors exposure to an underlying asset or set of assets, but where the value of the assets is not under the control of the issuer
market makers	An entity that provides liquidity to a market when it is generally absent or weak, and manages short-term buy and sell imbalances in customer orders by taking the other side of transactions. Market makers often take on this role in return for rebates and/or various information and execution advantages
NAV	Net asset value
NAV per interest	Net asset value per interest of the scheme.
PDS	Product Disclosure Statement

Term	Meaning in this document
Product Disclosure Statement	<p>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</p> <p>Note: See s761A for the exact definition.</p>
quoted scheme	<p>A scheme quoted under the AQUA rules that gives investors exposure to an underlying asset or set of assets, but where the value of the assets is not under the control of the issuer</p>
reg 7.9.60B (for example)	<p>A regulation of the Corporations Regulations (in this example numbered 7.9.60B)</p>
s1017D (for example)	<p>A section of the Corporations Act (in this example numbered 1017D), unless otherwise specified</p>

## List of proposals and questions

Proposal	Your feedback
<p>B1 We propose:</p> <ul style="list-style-type: none"> <li>(a) to give class order relief from the periodic statement content requirements under s1017D(5) to responsible entities of registered schemes that are listed or quoted schemes to allow use of a substitute price for transactional values;</li> <li>(b) that the content of periodic statements should include a report, on an annual and a five-yearly basis, on the performance of the scheme relative to the investment strategy set out in the fund's PDS; and</li> <li>(c) that the relief under proposal B1(a) be provided with a transition period of six months for responsible entities of listed schemes for reports for periods ending on or after 31 December 2013.</li> </ul>	<p>B1Q1 Do you consider that periodic statements containing transactional information based on price proxies, rather than the actual prices at which the relevant transactions have been conducted, will provide useful information to investors in listed or quoted schemes?</p> <p>B1Q2 Instead of the relief in proposal B1(a), would it be preferable for relief to be given that would permit the responsible entity to omit any information that it could only include if it had knowledge of the prices at which investors had actually conducted transactions?</p> <p>B1Q3 What would be the impact of the relief in proposal B1 on retail clients affected by the relief?</p> <p>B1Q4 Would it create difficulties for an investor to understand the periodic statements of their investment in the financial product if the relief suggested in question B1Q1 were provided?</p> <p>B1Q5 Should relief be extended beyond responsible entities of listed schemes or quoted schemes? If so, why?</p> <p>B1Q6 Do you agree that information referred to under proposal B1Q1 is information required under s1017D(4) for investors to adequately understand their investments? If not, why? What information, other than what is required under s1017D(5), should investors receive?</p> <p>B1Q7 Should full compliance with s1017D be required? If yes, why is this important?</p> <p>B1Q8 Can the practical difficulties to compliance identified in this paper be overcome? Are the costs of overcoming the practical difficulties significantly different to those associated with compliance in the proposed modified manner?</p> <p>B1Q9 Is any of the information that must be included in a periodic statement under s1017D(5) not applicable to investors in quoted schemes or listed schemes solely because their interests can only be bought or sold on a secondary market?</p> <p>B1Q10 Should 'exit statements', the periodic statements provided to members that exit a managed fund, contain any different information to the 'annual statement', the periodic statement typically provided to</p>

Proposal	Your feedback
	<p>members in respect of the financial year for the fund?</p> <p>B1Q11 How would the proposed relief affect the compliance costs?</p>
<p>B2 We propose that under the relief, instead of reporting on the basis of the actual value of the investment of an investor (e.g. on the basis of the price at which the investor has purchased or sold the interests), issuers may report on a modified basis, based on:</p> <p>(a) the market price of the interests in the scheme on either the date of trade or the date of settlement; or</p> <p>(b) the NAV per interest in the scheme on either the date of trade or the date of settlement.</p> <p>We expect that, except in exceptional circumstances, listed schemes will generally use the market price and quoted schemes will use the NAV-based price.</p>	<p>B2Q1 Do you think our proposed relief will help produce useful information to investors, particularly in relation to s1017D(5)(c)?</p> <p>B2Q2 Do you agree that listed schemes should use market price, other than in exceptional circumstances? What are these exceptional circumstances?</p> <p>B2Q3 Do you agree that quoted schemes should use the NAV-based price, other than in exceptional circumstances? What are these exceptional circumstances?</p>

Proposal	Your feedback
<p>B3 We propose that, under proposal B2, issuers may report in a periodic statement:</p> <p>(a) for opening balances and closing balances or termination values on the commencement date and closing date of the reporting period, based on:</p> <p>(i) the NAV per interest of the scheme; or</p> <p>(ii) the end-of-day or weighted average daily market price for an interest of the scheme; and</p> <p>(b) for details of transactions, any increase in contributions, return on investment and amount payable by investors for their investments, based on:</p> <p>(i) the NAV per interest of the scheme on the respective dates of transaction or when this can be assumed to have occurred (i.e. three days before the settlement day);</p> <p>(ii) the NAV per interest of the scheme on the settlement date for the respective dates of transaction (i.e. usually three days after the transaction date (T+3)); or</p> <p>(iii) the end-of-day market price for an interest of the scheme on the respective dates of transaction or when this can be assumed to have occurred (i.e. three days before the settlement day).</p>	<p>B3Q1 Are the bases of calculation proposed under the relief appropriate? If not, why?</p> <p>B3Q2 Do you think our proposed relief will assist in producing useful information to investors, particularly in relation to s1017D(5)(c)?</p> <p>B3Q3 Are there other suitable bases of calculation? If yes, what are they and why are they appropriate? Please provide information on the impact on investors and on compliance costs.</p>
<p>B4 We propose that issuers of schemes where fees and expenses related to redemption from the scheme are not applicable to retail investors are not required to include the termination value in the periodic statement, as the termination value is the same as the closing balance.</p>	<p>B4Q1 Do you agree with our proposal? If not, why?</p>
<p>B5 We propose to take the view that the s1017D(5)(d) content requirement is not relevant to any increase in holding through on-market acquisition by the members.</p>	<p>B5Q1 Do you agree with our proposed view? If not, why?</p>

Proposal	Your feedback
<p>B6 We propose to make our relief subject to the following conditions:</p> <ul style="list-style-type: none"> <li>(a) issuers must use a consistent basis of calculation throughout and between the periodic statements they prepare; and</li> <li>(b) issuers must include in the periodic statements a clear and prominent explanation of the basis on which the balances and the values have been calculated and the implications of applying that basis. This explanation must state that the price used for the transaction is based on an estimated price and is not likely to be the exact price transacted at by the investor.</li> </ul>	<p>B6Q1 Do you agree with the proposed relief conditions?</p> <p>B6Q2 Are there other conditions that should be included? If yes, what are they and why should they be included?</p>
<p>C1 We propose to give relief from s601FC(1)(d) to responsible entities of ETFs, to allow for redemptions from an ETF by:</p> <ul style="list-style-type: none"> <li>(a) authorised participants and market makers for such schemes; and/or</li> <li>(b) only if the member is an Australian resident for tax purposes.</li> </ul> <p>This relief would be subject to the following conditions:</p> <ul style="list-style-type: none"> <li>(c) interests in the scheme must remain admitted to trading status on the AQUA market;</li> <li>(d) the PDS for the scheme lodged with ASIC must prominently disclose full particulars of how the responsible entity may treat members of the same class differently as permitted by the relief; and</li> <li>(e) all members must be given a right to redeem interests in the scheme if quotation of interests in the scheme is suspended from trading for more than five trading days, unless: <ul style="list-style-type: none"> <li>(i) the scheme has been terminated;</li> <li>(ii) is not a liquid scheme; or</li> <li>(iii) the responsible entity suspends redemption when it would be reasonable to do so and in doing so the responsible entity would be acting in the best interest of members. If a fee is applicable to the members, the fee must not be disproportionate to the relevant costs to the responsible entity.</li> </ul> </li> </ul>	<p>C1Q1 Do you agree with the proposed relief?</p> <p>C1Q2 Do you agree with the proposed relief conditions?</p> <p>C1Q3 Are there other conditions that should be included? If yes, what are they and why should they be included.</p>



Proposal	Your feedback
<p>C2 We propose that disclosure of portfolio or assets required for in specie issue or redemption and provided to members who are not authorised participants to be delayed up to a time before the commencement of the next trading day after the day on which disclosure is made.</p> <p>This relief would be subject to the condition that an indicative NAV per interest for the scheme is published on the responsible entity's website so that it is up-to-date within 15 minutes during the day.</p>	<p>C2Q1 Do you agree with the proposed relief?</p> <p>C2Q2 Do you agree with the proposed relief conditions?</p> <p>C2Q3 Are there other conditions that should be included? If yes, what are they and why should they be included.</p>
<p>C3 We propose to give relief from s606 to members who have a right to request an in specie redemption from an ETF that tracks a broad-based index in which no security is more than 10%. This relief is designed to ensure that the ability to lodge a redemption request under the redemption facility offered by a scheme, in the circumstances where redemption will be satisfied by an in specie transfer of the securities held by the ETF, does not by itself give the members a relevant interest in any securities held by the ETF.</p>	<p>C3Q1 Do you agree with the proposed relief?</p>
<p>C4 We propose to give relief to members of ETFs who have a right to request an in specie redemption, to allow them to assume that the composition and weightings of the securities comprised of the index (that the ETF seeks to track) is the same as the creation basket disclosed on that day by the issuer when assessing their obligations (under s671B) to give a substantial holding notice for the securities held by the ETF.</p>	<p>C4Q1 Do you agree with the proposed relief?</p> <p>C4Q2 Do you think the proposed relief is necessary or useful? If not, why?</p> <p>C4Q3 Should relief be given to allow relevant interests disregarded for Ch 6 under our relief to also be disregarded for the purpose of the substantial holder provisions? If so why?</p> <p>C4Q4 Do you think the s671B obligations are triggered by any other aspects related to the operation of ETFs (e.g. when an authorised participant puts together a creation basket)? Other than our proposed relief, is there anything the issuers may do to help the relevant members manage their obligations under s671B?</p>
<p>C5 We propose that relief only apply:</p> <p>(a) to the facility offered by the responsible entity to redeem interests in the ETF;</p> <p>(b) where the member has no power to control the voting or disposal of the security arising from holdings in the ETF except if the interest in the ETF is redeemed; and</p> <p>(c) until a redemption request in relation to the members' interests in the scheme is made.</p>	<p>C5Q1 Do you agree with the proposed relief conditions?</p> <p>C5Q2 Are there other requirements or conditions that should be included? If yes, what are they and why should they be included.</p>

Proposal	Your feedback
<p>C6 We propose to no longer grant relief in response to applications for relief from s1013H, s1016D and 1016E(1)(b). We consider this relief unnecessary and, accordingly, that it should not be granted.</p>	<p>C6Q1 Do you agree with our view that this relief is not necessary? If not, why?</p>
<p>C7 We propose to give relief from s1017B to ETF issuers on the following conditions:</p> <p>(a) the ETF issuer must comply with the provisions of the Corporations Act that apply to an unlisted disclosing entity as if the ETF were a disclosing entity; and</p> <p>(b) the ETF issuer must state in each PDS that it will do so.</p>	<p>C7Q1 Do you agree with the proposed relief?</p> <p>C7Q2 Do you agree with the proposed relief conditions?</p> <p>C7Q3 Are there other conditions that should be included? If yes, what are they and why should they be included?</p>