



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 85

# Share and unit sale facilities

July 2007

## What this paper is about

**1** This consultation paper sets out our proposals to offer conditional relief from provisions of Chapters 5C and 7 of the *Corporations Act 2001* (Act) for persons who provide certain share and unit sale facilities and related purchase facilities.

Note: For a full description of what we mean by 'sale facilities' and 'related purchase facilities', see Section 1.

## Your feedback is invited

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

**3** 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.

**4** 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:

- (a) the likely compliance costs; and
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

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

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

**7** Your comments will help us develop our policy on sale facilities. 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.

**8** All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential. However, submissions about the costs and benefits of our proposals (see Section 3) will be treated as confidential unless you specifically request that we treat the whole or part of your submission in this area as not confidential.

**9** After the comment period, we aim to publish our final policy by December 2007.

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**Your comments**

Comments are due by 6 August 2007 and should be sent to:

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You can also contact ASIC Infoline on 1300 300 630 for  
information and assistance.

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## Section 1: What are sale facilities?

**1.1** From time to time, some companies and issuers of managed investment products (units) offer sale facilities to their members. These sale facilities are generally an easy and cheap way for their members (especially those with small holdings) to dispose of their shares or units at or about their current market value.

**1.2** Sale facilities are offered in a variety of situations: some are stand-alone facilities and others form a part of an arrangement or reconstruction or some other larger transaction. While the context may differ, most sale facilities share the same basic features.

### Common features of sale facilities

**1.3** Sale facilities usually involve an arrangement between the issuer, a market participant (referred to in this paper as the broker) and, in some cases, the person (registry) who maintains the issuer's members register. They typically work as follows:

- (a) The issuer, or its registry, sends an invitation to all or some of its members that invites them to sell their shares or units through the arrangements with the broker.
- (b) The holders of shares or units must elect whether to participate by a given date. The holder typically makes this election by completing a form that authorises sale of their shares or units.
- (c) The shares or units of participating holders are sold on a licensed market by the broker in batches over a specified period of time. The broker typically has discretion as to the batch size, timing and price of the sale orders.
- (d) The proceeds of the sale are typically pooled and averaged across all shares or units sold through the sale facility. The participating holder receives a volume weighted average price, which may be more or less than the actual sale price of their shares or units.

### In what situations are sale facilities offered?

**1.4** From our experience, sale facilities are mainly offered:

- (a) for small holdings of shares or units;
- (b) as part of an arrangement or reconstruction;
- (c) as part of a takeover bid; and
- (d) to pre-empt unsolicited offers to purchase shares or units.

Variations on these situations may exist (see paragraphs 1.9–1.10) and sale facilities may be offered in different situations. However, we believe

that these four situations cover the majority of sale facilities that have been offered in recent years.

### **Facilities for the sale of small holdings of shares or units**

**1.5** Sale facilities may be used to encourage people holding only a small number of shares or units to sell them. This is a way for issuers to reduce the high administrative costs involved in maintaining a register with many small holdings. Sale facilities encourage the sale of small holdings because:

- (a) the holders do not have to individually appoint a broker to sell their shares or units; and
- (b) brokerage and other transaction costs that may otherwise be disproportionate to the value of the shares or units are generally reduced, or may be entirely borne by the issuer.

### **Facilities offered as part of an arrangement or reconstruction**

**1.6** Where changes are being made to the capital structure of a company or managed investment scheme, a sale facility may be used to:

- (a) facilitate the conversion of existing shares or units to new financial products; or
- (b) enable holders of existing shares or units to cash-out those products, instead of receiving the new financial products.

These types of facilities generally involve the existing or new shares or units being transferred or issued to the broker who then sells those products on-market, whereby the proceeds of the sale are either distributed to the initial holder in cash, or used to acquire a new financial product on behalf of the initial holder.

### **Facilities offered as part of a takeover bid**

**1.7** Companies that issue shares as consideration for the purchase of shares under a takeover bid may use a sale facility to:

- (a) encourage persons who will only hold a small number of shares in the bidder, as a result of accepting a takeover bid, to sell those shares. This is similar to the situation in paragraph 1.5 above.
- (b) sell shares in the bidder that would otherwise be offered to a person that is excluded from receiving shares under the offer, such as foreign shareholders of the target company (under s619(3)) or persons who would hold an unmarketable parcel of shares in the bidder company (under s619(4) as notionally inserted by [CO 00/343]). We do not consider that these types of facilities require relief from section 1019F or the managed investment provisions.

## Facilities offered to pre-empt unsolicited offers to purchase shares or units

**1.8** Issuers who are concerned their members may become a target of an unsolicited offer by a third party under Division 5A of Part 7.9 may use a sale facility to pre-empt that unsolicited offer. This situation typically arises where the issuer is concerned the third party may make an unsolicited offer to purchase the shares or units at prices significantly below market value, and gives holders an alternative means to sell at or about their current market value.

## Related purchase facilities

**1.9** As an alternative to the sale facility offered in the ‘small holding’ situation referred to in paragraph 1.5, some issuers also offer a ‘purchase facility’ or ‘top-up facility’ to encourage small holders to acquire more shares or units of the same class. In this paper, we refer to these arrangements as ‘related purchase facilities’.

**1.10** These facilities are typically offered in conjunction with, and as an alternative to, a facility for the sale of small holdings of shares or units. The holder cannot participate in both the sale facility and the related purchase facility. Related purchase facilities typically work in a similar way to the sale facilities, in that shares or units are acquired on-market by a broker, and participating holders receive the benefit of the broker batching purchase orders and averaging the price paid to acquire shares or units through the purchase facility.

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### Your feedback: Section 1

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- Q1.1** Are there any other situations in which sale facilities (and related purchase facilities) are used? If so, please describe the types of facilities and the situations in which they are used.
- Q1.2** Are sale facilities being used for the sale of any financial products other than shares or units?
- O1.3** Do you consider that the ‘excluded person’ facilities referred to in paragraph 1.7(b) require relief? If so, please provide detailed legal analysis in support of that position.

## Section 2: Our proposal

### What do we propose?

**2.1** We propose to grant class order relief from the following provisions of the Act to facilitate the offer and operation of certain sale facilities and related purchase facilities:

- (a) the prohibition on unsolicited offers in s1019F; and
- (b) for the avoidance of doubt, the managed investment provisions in Chapter 5C, the AFS licensing provisions in Part 7.6 and the Product Disclosure Statement (PDS) provisions in Part 7.9 but only to the extent that the operation of the sale facility itself constitutes a managed investment scheme.

### What facilities would be covered by our proposal?

**2.2** We propose that this relief would apply to sale facilities that satisfy all of the following:

- (a) the facility is operated under an arrangement between the issuer of the shares or units that will be sold through the facility and a broker nominated by the issuer; and
- (b) the facility is offered to persons with only a ‘small holding’ of shares or units—see paragraphs 2.4 to 2.5; and
- (c) if a related purchase facility is offered—it is only offered as an alternative to the sale facility (i.e. a holder cannot participate in both the sale facility and the purchase facility); and
- (d) under the facility, the broker:
  - (i) acts on behalf of all of the holders who elect to sell shares or units through the facility; and
  - (ii) must sell the shares or units at a price that is determined in the ordinary course of trading on a licensed market or approved foreign market—see paragraphs 2.6 to 2.7; and
  - (iii) is under an obligation to sell the shares or units at the best price reasonably obtainable at that time; and
- (e) the price paid to participating holders for shares or units sold through the facility is determined using a volume weighted average price (VWAP) of the shares or units sold through the facility less reasonable expenses incurred by the broker; and
- (f) the proceeds of the sale of shares or units (less reasonable expenses) will be paid to the participating holders as soon as is reasonably practicable, and in any case not more than 2 weeks after the sale of



all of the shares or units to be sold through the facility has been completed; and

- (g) the issuer and its associates do not acquire shares or units that are sold through the facility; and
- (h) the facility is not operated during any period where there is a control transaction in relation to the issuer, or its shares or units—e.g. during the offer period of a takeover bid; and
- (i) the facility operates for a period of not more than 3 months.

**2.3** We also propose that the relief in paragraph 2.1(b) would also apply to a related purchase facility that is offered in conjunction with a sale facility that is covered by paragraph 2.2. This relief would only apply where the related purchase facility operates in the same way as the sale facility, except that shares or units are purchased instead of sold (e.g. the broker must purchase the shares or units on a licensed market or approved foreign market and calculate the purchase price on the basis of a VWAP plus reasonable expenses etc).

### **Small holdings**

**2.4** We propose to limit the relief to facilities offered to persons who only hold a ‘small holding’ of shares or units: see paragraph 2.2(b). This is because:

- (a) it is less cost effective for small holders to individually appoint a broker to sell their shares or units; and
- (b) we think it makes sense for us to set consistent limits on the quantity of shares or units that can be sold through the sale facility or, alternatively, purchased through any related purchase facility.

**2.5** We propose to define a ‘small holding’ as a holding where the total value of shares or units in the entity is \$5,000 or less. We have based this figure on the limit applied in Class Orders [CO 02/831] *Share purchase plans* and [CO 02/832] *Interest purchase plans* to the amount of shares or units in listed companies or listed schemes that can be issued to existing members without disclosure under Chapter 6D or Part 7.9 of the Act.

### **Sales through a licensed marked or approved foreign market**

**2.6** We propose that relief would only be available for facilities under which the price at which the shares or units are sold (or purchased) is determined in the ordinary course of trading on a licensed market or approved foreign market: see paragraph 2.2(d)(ii).

**2.7** This is intended to cover facilities that allow the broker to sell or purchase shares or units at a price that is set by the market’s pricing

mechanism. This includes some crossings (e.g. priority crossings). We do not propose that our relief would cover facilities that allow the broker to sell or purchase shares or units at a price that is negotiated or agreed off-market (e.g. overnight crossings and special crossings would not be covered).

## **Who would the proposal cover?**

**2.8** We propose that our relief would apply to:

- (a) the issuer of the shares or units;
- (b) the broker appointed to sell or purchase shares or units on behalf of the participating holders; and
- (c) any other person who, on behalf of the issuer, invites holders to participate in the facility (this could include, for example, the issuer's registry).

## **What would be the conditions of the proposed relief?**

**2.9** We propose that our relief would be subject to conditions requiring the issuer (or other person who invites holders to participate in the facility) to include the following information in the invitation to participate in the sale facility and any related purchase facility:

- (a) information about the number of shares or units the holder may sell or purchase through the facility; and
- (b) the market price of the shares or units on a date not more than 7 days before the date of the invitation; and
- (c) statements that the market price of shares or units is subject to change from time to time, and how to obtain up-to-date information on the price of those products; and
- (d) information about expenses relating to the services provided by the broker to participating holders; and
- (e) information about any other significant characteristics or features of the facility or of the rights, terms, conditions and obligations of holders who elect to participate in the facility; and
- (f) information about any significant risks associated with electing to participate in the facility (e.g. that the price received for the shares or units sold through the facility may be more or less than the actual market price at the time of sale); and
- (g) information about any alternatives that the holder of shares or units may have to participating in the facility.

## Explanation

### Why are we proposing this relief?

**2.10** We are considering class order relief because we think that:

- (a) the prohibition in s1019F, the managed investment and related provisions were not intended to apply to facilities covered by our proposal; and
- (b) strict compliance with these provisions would be impractical or disproportionately burdensome for these sale facilities. Without relief, issuers would probably be unable to offer these facilities to their members. This could disadvantage both the issuers and shareholders; and
- (c) there would be no significant regulatory benefit in requiring compliance with the managed investment and related provisions.

**2.11** In recent years ASIC has granted similar relief on a case-by-case basis to facilitate the offer and operation of a number of sale facilities and related purchase facilities. We think it is likely that these types of facilities will continue to be offered. We think class order relief would remove the need for the entities involved to make individual relief applications and reduce administrative costs for ASIC.

### Addressing risks to consumers

**2.12** Our proposal includes limitations and conditions designed to minimise risks for consumers. This is a summary of the main risks and how we think they are addressed by our proposal.

*Sales for significantly less than market value*      *If holders of shares or units are not aware of their market value, they may sell them at prices that are significantly below current market value.*

The proposed disclosure condition will ensure that the person receiving the invitation has notice of the current market value of the shares or units that they can sell through the sale facility.

*If persons operating the sale facility have discretion to set or influence the sale price for shares or units sold through the facility, participating holders could receive significantly less than market value for their products.*

The proposed limitation to facilities where the sale price is determined in the ordinary course of trading on a licensed market or approved foreign market will ensure that an independent pricing mechanism will apply.

*Significantly deferred payment*      *If persons operating a sale facility have discretion to defer full payment of proceeds of sale to participating holders, and the participating holders are not aware of how the sale facility is operated, its features and the risks associated with it, they could*

*elect to participate in a facility under which the holder will not receive full payment for a substantial period of time.*

The proposed limitations on the circumstances in which relief will apply address this risk by requiring payment within a specified period of time. The proposed disclosure condition will also ensure that the person receiving the invitation has notice of how the facility operates.

*Nature of an invitation* Holders of shares or units could mistakenly believe that participation in a sale facility is compulsory, and not be aware of the other options available to them.

The proposed disclosure condition will ensure that the person receiving the invitation has notice of how the facility operates, how to elect to participate in the facility and any courses of action that the holder may choose to take instead of participating in the facility.

*Improper conduct in the sale or purchase of financial products* All dealings and conduct in the course of sale facilities or related purchase facilities must be carried out by a broker that holds an Australian financial services licence under the Act. We consider that this provides adequate regulatory protections in relation to the dealing conduct.

## What alternatives have we considered?

**2.13** We have considered continuing our current approach of providing relief on a case-by-case basis. However, we consider that the majority of sale facilities for which individual relief has been granted are to facilitate the sale of small holdings of shares or units. We think there is little benefit in us continuing to receive individual applications for these types of facilities and that the costs involved in preparing and considering individual applications are disproportionately high.

**2.14** We have considered proposing relief that is not limited to facilities that can be accessed by small holders of shares or units. However, we are concerned that broader relief might increase the risk of inadvertently giving relief to invitations that are intended to be prohibited under s1019F or a type of scheme that is intended to be regulated under the Act, and that there is some regulatory benefit in continuing to consider individual applications for facilities that do not fit within this situation.

## How do the markets licence provisions apply to sale facilities?

**2.15** We have occasionally received requests for ‘no action’ letters under Policy Statement 108 *No-action letters* [PS 108] in relation to whether the operators of sale facilities need to hold an Australian markets licence under Part 7.2 of the Act. In the past, we have often issued these types of ‘no action’ letters for the avoidance of doubt. We have recently reviewed this practice and have decided that, where a person operates a sale facility of the kind covered by our proposal, the operator generally

does not operate a financial market for the purposes of Part 7.2 of the Act. We therefore think there is generally no need for the operators of these sale facilities to continue to apply to us for 'no action' letters.

### **What will happen to sale facilities not covered by the proposed relief?**

**2.16** We acknowledge that the proposed relief will not cover all types of share and unit sale facilities that have been offered to date. ASIC will continue to consider granting relief on a case-by-case basis for share and unit sale facilities that are not covered by the proposed class order relief.

#### **Your feedback: Section 2**

- Q2.1** Do you agree with our proposal? If not, why not?
- Q2.2** Do you agree that we should only grant class order relief for sale facilities and related purchase facilities offered to people with 'small holdings' of shares or units (see paragraphs 2.4 to 2.5)? Alternatively, do you consider that ASIC should grant relief to a broader range of sale facilities? If so, please explain what types of facilities should be covered and why.
- Q2.3** Do you agree with our definition of a 'small holding' (see paragraph 2.5)? If not, why not?.
- Q2.4** Do you think the limitation that shares or units must be sold or purchased at a price that is determined in the ordinary course of trading on a licensed market or approved foreign market (see paragraphs 2.6 to 2.7) will cause any practical difficulties? If so, please explain the difficulties that will arise and how you suggest they be addressed.
- Q2.5** Do you agree with the other limitations and conditions of our proposed relief? Alternatively, do you think any of these limitations and conditions will cause practical difficulties? If so, please explain why and how you suggest we address these difficulties.
- Q2.6** Are there any alternative or additional conditions that should you think we should impose on any relief? If so, please describe the conditions and explain why you think they should be imposed?
- Q2.7** Do you think our proposed relief should apply to any additional entities (see paragraph 2.8)? If so, please explain who it should extend to and why

## Section 3: Regulatory and financial impact

**3.1** 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) allowing issuers to offer sale facilities and related purchase facilities to their members; and
- (b) protecting members who use these facilities.

**3.2** 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 being considered, 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, completing a Business Cost Calculator report (BCC report) and /or a Regulation Impact Statement (RIS).

**3.3** All BCC reports and RISs are submitted to the OBPR for approval before we make a final decision. Without an approved BCC report and/or RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a class order that contains regulation.

**3.4** 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.

**3.5** Any information that you provide to us about the costs and benefits of our proposal will be treated as confidential unless you make a specific request to the contrary.

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### **Your feedback: Section 3**

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- Q3.1** Have you previously offered or operated a sale facility or related purchase facility that would be affected by our proposal? If so, how many times and what type(s) of facilities were offered?
- Q3.2** Do you expect you will offer or operate a 'small holding' sale facility or related purchase facility if the proposed relief is given? If so, how often?
- Q3.3** Do you expect you will offer or operate a sale facility other than a 'small holding' sale facility? If so, how often, and what additional costs do you think you would incur if that facilities is not covered by class order relief?
- Q3.4** What costs do you estimate you would incur if you had to apply for the proposed relief on an individual basis (i.e. if we did not grant class order relief), including costs of preparing the application, legal costs and fees on the application?
- Q3.5** What costs do you estimate you would you incur if you had to provide disclosure in accordance with the proposed disclosure condition?
- Q3.6** Would you incur any other costs in accessing the proposed class order relief? If so, please explain the types of costs and give an estimate of them.

## Section 4: Summary of relevant law

### Section 1019F of the Act

**4.1** Section 1019F provides that a person must not invite another person to make an offer to sell a financial product in circumstances in which, if the invitation were instead an offer to purchase the financial product, that offer would be an offer to which Division 5A of Part 7.9 applies. That is, the invitation must not be made if it is unsolicited and is not made on a licensed market.

**4.2** The legislative purpose of Division 5A of Part 7.9 is to address the threat of unsophisticated investors receiving unsolicited offers to purchase their financial products at prices significantly below market value or on significantly deferred payment terms. This risk is addressed by imposing an obligation to disclose particular information in the offer document.

**4.3** Section 1019F is intended to prevent avoidance of the disclosure requirements in Division 5A of Part 7.9 by providing that an unsolicited offer to purchase financial products that is made otherwise than on a licensed market cannot be structured as an invitation.

**4.4** Sale facilities involve a company that issues shares or units inviting the holders of those products to offer to sell those products to third parties. It is arguable that sale facilities contravene s1019F because:

- (a) the invitation is unsolicited; and
- (b) although the offers to sell shares or units that are made through the sale facility are made on a licensed market, the invitation to participate in the sale facility is not made on a licensed market.

### Chapter 5C of the Act

**4.5** Chapter 5C requires a managed investment scheme to be registered in certain circumstances. A registered managed investment scheme must have a constitution and a compliance plan and the responsible entity of the scheme must be a public company that holds an Australian financial services licence authorising it to manage a registered managed investment scheme.

**4.6** It is arguable that the facilities in paragraphs 1.4–1.10 constitute managed investment schemes because these arrangements involve:

- (a) a scheme, in that there is a program or plan of action and a course of conduct to give effect to that program; and
- (b) holders of shares and interests contributing:
  - (i) in the case of sale facilities—these products, or their right to sell these products; or



- (ii) in the case of related purchase facilities—money;
  - as consideration to acquire benefits of the arrangement, including the ability to sell or purchase small parcels of shares more easily, lower brokerage and transaction costs, and the smoothing effect of the batching process on short-term price fluctuations; and
- (c) the shares and interests, the rights to sell these products or the money that is contributed are pooled or used in a common enterprise in the course of the broker:
  - (i) in the case of sale facilities—batching the products for sale and sale proceeds being pooled and averaged across participating holders; or
  - (ii) in the case of related purchase facilities—batching purchase orders and the purchase price of the products acquired being averaged across participating holders; and
- (d) participating holders have no involvement in, or control over, the carrying out of the scheme.

## **Parts 7.6 and 7.9 of the Act**

**4.7** If the sale facilities and related purchase facilities constitute managed investment schemes, interests in those schemes are financial products. Part 7.6 generally imposes licensing obligations and Part 7.9 imposes product disclosure obligations in relation to these financial products.

## Key terms

In this paper, unless a contrary intention appears, the following terms have the following meanings:

**Act** The *Corporations Act 2001*, including regulations made for the purposes of the Act.

**approved foreign market** A market that is included in the list set out in Policy Statement 72 *Foreign securities prospectus relief* [PS 72].

**ASIC** The Australian Securities and Investments Commission.

**ASX** ASX Limited.

**broker** An entity appointed to sell (or purchase) shares or units on behalf of holders who elect to participate in a sale facility or related purchase facility.

**[CO 00/343]** (for example) An ASIC class order (in this example numbered 00/343)

**registry** An entity that maintains the register of members of a company or managed investment scheme.

**related purchase facility** A facility offered in conjunction with a sale facility that enables holders to purchase more shares or units of the same class.

**unit** A managed investment product.