



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 100

Unlisted property schemes— improving disclosure for retail investors

July 2008

About this paper

This consultation paper seeks your feedback on proposals to improve disclosure for retail investors in the unlisted property scheme sector.

It includes a draft regulatory guide with proposed disclosure principles for unlisted property schemes to help retail clients better understand and assess these schemes.

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 8 July 2008 and is based on the Corporations Act as at 8 July 2008.

Disclaimer

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

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The consultation process

The draft guide attached as an Appendix to this paper sets out 8 disclosure principles that we propose responsible entities of unlisted property schemes should apply to their upfront and ongoing disclosures to retail investors. The disclosure principles reflect information we consider is important for retail investors in unlisted property schemes.

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.

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 5 August 2008 to:

Fiona Laidlaw
Strategic Policy
Australian Securities and Investments Commission
GPO Box 9827
Sydney NSW 2001
facsimile: 02 9911 5232
email: policy.submissions@asic.gov.au

What will happen next?

Stage 1	8 July 2008	ASIC consultation paper released
Stage 2	5 August 2008	Comments due on the consultation paper
Stage 3	By 2 September 2008	Regulatory guide released

A Background

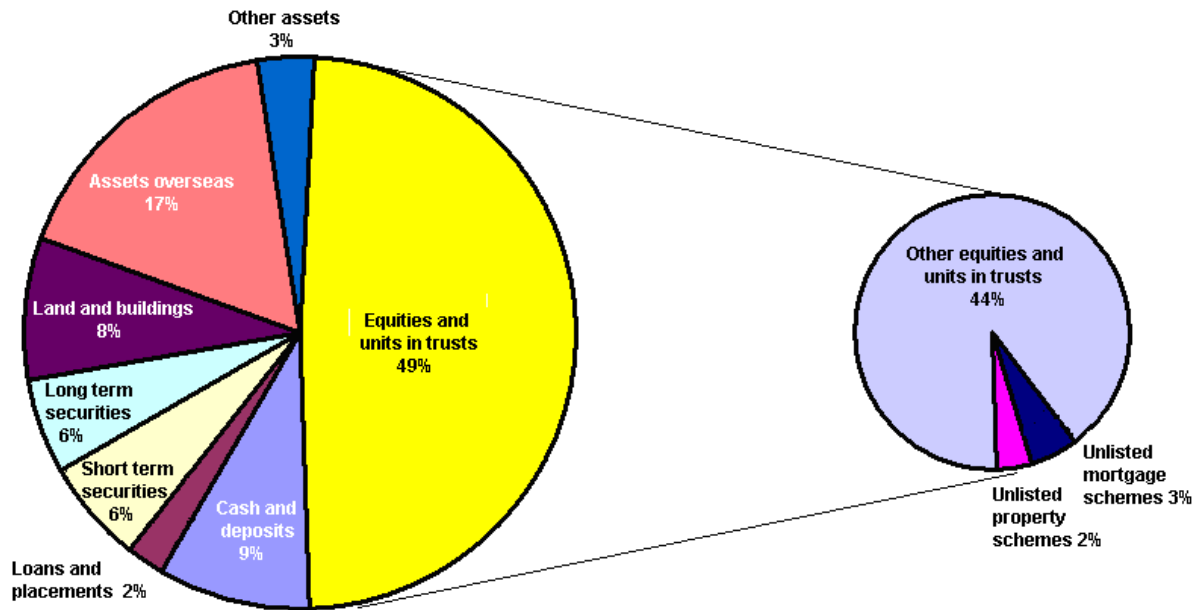
- 1 Recent economic events have had an impact on the property investment sector in Australia. These events include debt market turbulence flowing from the US sub-prime difficulties, rising interest rates and a cyclical softening in the real property market.
- 2 In the 2008 financial year, listed property schemes experienced a significant decrease in market capitalisation. These factors are also likely to affect unlisted property schemes, and are to an extent already evident in that sector.
- 3 Unlisted property schemes may need to renegotiate debt rollovers and extend existing debt facilities. Such refinancing may be difficult to achieve in the current climate without paying higher interest rates or reducing exposure to debt. This may result in an increased supply of properties for sale, reducing the value of the underlying assets of property schemes.
- 4 In light of these significant changes in economic conditions, the Australian Securities and Investments Commission (ASIC) has compared the disclosure practices of a number of Australian listed and unlisted property schemes. Generally, we observed that listed property schemes were more likely than unlisted property schemes to:
 - (a) disclose information that is important to retail investors in these schemes; and
 - (b) update investors on how the global financial turbulence was affecting the scheme's financial circumstances.
- 5 We want to ensure that retail investors are kept fully informed about the risks associated with unlisted property schemes, including the impact of recent debt market turbulence on this sector. We have therefore prepared a draft regulatory guide (the draft guide) which sets out our proposals for improved disclosure: see the Appendix to this paper.
- 6 The draft guide sets out 8 disclosure principles requiring information on the key risks and features of unlisted property schemes. We propose that responsible entities of unlisted property schemes should clearly and prominently include this disclosure principle information in their Product Disclosure Statements (PDSs) for retail investors. We also propose that responsible entities of unlisted property schemes should apply the disclosure principles to their ongoing disclosures to retail investors. This is because we consider the disclosure principles reflect information required by the Corporations Act for upfront and ongoing disclosures to retail investors about unlisted property schemes.

- 7 Our proposals are relevant to:
- (a) responsible entities of unlisted property schemes in which retail investors invest;
 - (b) compliance plans, compliance committees and compliance plan auditors of unlisted property schemes;
 - (c) valuers of properties held by unlisted property schemes; and
 - (d) research houses that provide investment ratings for unlisted property schemes.
- 8 This consultation paper asks questions about specific matters raised by the draft guide. We would also be interested in any other general comments you have on the draft guide.

Investment in the property scheme sector

- 9 The Australian Bureau of Statistics (ABS) compiles data for the Australian managed funds sector comprising funds held by superannuation funds, public unit trusts, life insurance offices, friendly societies, common funds, and cash management trusts.
- 10 These funds invest in a wide spectrum of asset classes ranging in risk and return profile and liquidity.
- 11 The analysis in Figure 1 below shows that:
- (a) managed funds with investments in equities and unit trusts account for about \$763 billion (or 49%) of total unconsolidated funds;
 - (b) of that \$763 billion, a significant value (\$74 billion) but relatively small percentage (5%) is invested in unlisted securitised property related investments, being unlisted mortgage schemes and unlisted property schemes.
 - (c) ASIC has analysed and profiled the population of registered managed investment schemes and has supplemented the ABS data with this analysis to reflect the following managed funds investments:
 - (i) \$42 billion (or 3%) invested in over 200 unlisted mortgage funds; and
 - (ii) \$32 billion (or 2%) invested in over 300 unlisted property funds.

Figure 1: Managed funds \$1.566 trillion unconsolidated (100%)



Sources: ABS, ASIC

B The disclosure principles

Key points

ASIC proposes that responsible entities of unlisted property schemes in which retail investors invest should apply certain key disclosure principles to their Product Disclosure Statements (PDSs) and ongoing disclosures: see Section C of the draft guide.

What would the disclosure principles apply to?

Proposal

- B1** We propose to define ‘unlisted property scheme’ as an unlisted managed investment scheme that has, or is likely to, have at least 50% of its non-cash assets invested in real property and/or in other unlisted property schemes: see RG 000.1.

Note: Infrastructure assets are not ‘real property’ for the purposes of this definition. Examples of infrastructure assets are roads, railways, ports, airports and other transport facilities; and facilities for telecommunications, electricity generation, transmission and distribution, gas transmission and distribution, water supply and sewerage.

- B2** The guide will apply to registered unlisted property schemes in which retail investors invest directly or indirectly (e.g. through an investor directed portfolio service): see RG 000.2.
- B3** The guide will not apply to property securities funds whose only exposure to property is through investments in listed property schemes or property schemes that do not have any investment by retail investors: see RG 000.3.

Your feedback

- B3Q1** Do you agree with the proposed definition of ‘unlisted property scheme’?
- B3Q2** Are there any other schemes to which the guide should apply?

What are the proposed disclosure principles?

- 12 The 8 disclosure principles in Section C of the draft guide reflect information that we consider is key to analysing the risks associated with unlisted property schemes. The proposed information reflects our experience and consultation with industry experts about appropriate disclosure for retail investors in unlisted property schemes. As mentioned above, the proposals are an indication of the approach we may take and are not our final policy.

Proposal

- B4** Disclosure principles should deal with the following 8 significant areas of potential risk for retail investors in unlisted property schemes:
- (a) **Disclosure principle 1:** Gearing ratio
(see RG 000.36—RG 000.41)
 - (b) **Disclosure principle 2:** Interest cover
(see RG 000.42—RG 000.46)
 - (c) **Disclosure principle 3:** Scheme borrowing (see RG 000.47—RG 000.53)
 - (d) **Disclosure principle 4:** Portfolio diversification
(see RG 000.54—RG 000.58)
 - (e) **Disclosure principle 5:** Valuation policy
(see RG 000.59—RG 000.65)
 - (f) **Disclosure principle 6:** Related party transactions
(see RG 000.66—RG 000.67)
 - (g) **Disclosure principle 7:** Distribution practices
(see RG 000.68—RG 000.69)
 - (h) **Disclosure principle 8:** Withdrawal rights
(see RG 000.70—RG 000.73)

Your feedback

B4Q1 Have we identified the relevant disclosure principles? What is missing and/or is anything not relevant?

B4Q2 Are there any types of unlisted property schemes for which some or all of the disclosure principles are inappropriate?

Gearing ratio

B4Q3 Have you any comments on the formula we propose to adopt for calculating gearing ratio? Is there an alternative formula that would be preferable?

B4Q4 Because of the relatively small proportion of development assets in the unlisted property scheme sector we have not included a separate ratio, such as a loan to cost ratio, that accommodates development assets. . Should we include a ratio that accommodates development assets? Would this result in too much information for retail investors (given that some schemes would need to disclose both a gearing ratio and a loan to cost ratio)?

Interest cover

B4Q5 Have you any comments on the formula we propose to adopt for calculating interest cover? Is there an alternative formula that would be preferable?

B4Q6 Would it be useful for retail investors to have information on a scheme's debt service cover ratio? This ratio measures the amount of cash flow available to meet annual interest and principal payments on debt.

Your feedback (continued)

Scheme borrowing

B4Q7 Do the proposed 12-month increments provide an appropriate level of disclosure? Can you suggest an alternative?

B4Q8 Our disclosure principle on scheme borrowing does not specify that responsible entities should disclose probable or likely breaches of loan covenants. Would information on these prospective breaches be helpful for retail investors? Would providing the information be practical for responsible entities?

Portfolio diversification

B4Q9 Will all of the matters dealt with under this disclosure principle assist retail investors? Are there any other matters that should be covered?

Distribution practices

B4Q10 Is it feasible to disclose whether distributions sourced other than from realised income are sustainable?

C Applying the disclosure principles

Key points

ASIC proposes that responsible entities of unlisted property schemes should apply the disclosure principles to upfront and ongoing disclosures from 31 October 2008. See Section D of the draft guide.

ASIC proposes that responsible entities of existing unlisted property schemes should provide updated disclosure against the disclosure principles for existing investors by 31 October 2008: see Section D of the draft guide.

Unlike our approach to debentures and unlisted mortgage schemes, we do not propose to take an ‘if not, why not’ approach to disclosure by unlisted property schemes.

We propose to give some guidance on advertising by unlisted property schemes, including the use of investment ratings: see Section E of the draft guide.

Upfront and ongoing disclosure

- 13 The disclosure principles specify information that is key to analysing the risks associated with unlisted property schemes. We consider that information referred to in the disclosure principles should be:
- (a) clearly and prominently disclosed upfront in the PDS; and
 - (b) updated in ongoing disclosures.

Upfront disclosure

Proposal

- c1 We propose that responsible entities of unlisted property schemes should apply the disclosure principles when preparing a PDS: see RG 000.82–RG 000.87.

Your feedback

- C1Q1 Are there practical problems with expecting this disclosure in PDSs? If so, what alternative would ensure investors are adequately informed?
- C1Q2 Do you agree with our approach to the operation of the disclosure requirements?

Ongoing disclosure

Proposal

- c2 We propose that if there have been any material changes to the matters referred to in the disclosure principles, the responsible entity should explain this in ongoing disclosures. We consider that best practice is for responsible entities to give information directly to members or make it easily accessible (e.g. by updates on the scheme’s website): see RG 000.90–91.

In addition, periodic statements under s1017D should update information required under the disclosure principles (if this has not previously been notified to investors): see RG 000.100–RG 000.103.

Responsible entities should also consider whether it would help investors if they were given more frequent updates of the information required under the disclosure principles. We recommend that responsible entities update investors at least every 6 months.

Your feedback

- C2Q1 Are there practical problems with expecting responsible entities to apply the disclosure principles to their ongoing disclosures? If so, what would ensure that investors are adequately informed about the ongoing performance of the unlisted property scheme?

When you need to apply the disclosure principles

Proposal

- c3 We propose that from 31 October 2008 the disclosure principles should apply to all new PDSs and all ongoing disclosures for new and existing unlisted property schemes: see RG 000.78–RG 000.79.
- c4 We propose that by 31 October 2008 responsible entities of existing unlisted property schemes should provide existing investors with updated disclosure based on the disclosure principles: see RG 000.80.

Your feedback

- C4Q1 Do you agree with the proposed timetable for implementing of the disclosure principles for unlisted property schemes?

Not an ‘if not, why not’ approach

- 14 In August 2007, we published Consultation Paper 89 *Unlisted, unrated debentures—improving disclosure for retail investors* (CP 89), which proposed an ‘if not, why not’ approach of disclosing against key benchmarks

for debentures meaning the issuer was required to state that it and the product either:

- (a) met the benchmark; or
- (b) did not meet the benchmark *and* explain how and why the issuer dealt with the business factors or issues underlying the benchmark in another way.

Note: Final benchmarks and disclosure requirements were published in October 2007 in Regulatory Guide 69 *Debentures—improving disclosure for retail investors* (RG 69).

- 15 In CP 89, we foreshadowed that we would consider whether to apply the ‘if not, why not’ approach of disclosing against key benchmarks to other sectors. While we are proposing to adopt a similar approach for unlisted mortgage schemes (see Consultation Paper 99 *Mortgage schemes—improving disclosure for retail investors* (CP 99)), we do not currently propose to extend the ‘if not, why not’ approach to unlisted property schemes. However, given the risk factors and changing market conditions, we think that it is useful to give guidance about the key risk areas that disclosure for unlisted property schemes should address through our proposed disclosure principles.
- 16 We will be reviewing the unlisted property schemes sector to see whether our guidance has improved investor disclosures. We will also analyse the impact on the sector of any changes in market conditions. Based on these factors, we may consider whether there is a need to establish benchmarks for property schemes to disclose against on an ‘if, not why not’ basis.

Proposal

- c5** We do not currently propose to extend benchmarks and the ‘if not, why not’ approach to unlisted property schemes.

Your feedback

- C5Q1 Do you think an ‘if not, why not’ approach to disclosure against benchmarks would produce a better outcome for retail investors in unlisted property schemes?
- C5Q2 Do you think disclosing the information required in the disclosure principles would be easier for responsible entities if done on an ‘if not, why not’ basis?
- C5Q3 If we required responsible entities of unlisted property schemes to disclose against benchmarks on an ‘if not, why not’ basis, what benchmarks should we develop for the matters covered by the key disclosure principles? In particular, are there numerical benchmarks that would be suitable for gearing and interest cover benchmarks?

Advertising and unlisted property schemes

Proposal

- c6 The draft guide explains that advertising for unlisted property schemes should be consistent with all corresponding disclosures in the PDS. We also propose giving some guidance on the use of investment ratings in advertisements for unlisted property schemes: see Section E of this paper.

Your feedback

- c6Q1 Are there any specific problems with advertising of unlisted property schemes that we should give guidance on?

D Compliance plans, compliance committees and compliance plan auditors

Key points

Compliance plans for unlisted property schemes should contain adequate measures to ensure the responsible entity complies with its disclosure and advertising obligations under the Corporations Act.

ASIC proposes that compliance committees and compliance plan auditors for unlisted property schemes should be aware of and monitor the responsible entity's application of the disclosure principles and compliance with advertising obligations.

See Section F of the draft guide.

- 17 Unlisted property schemes must have compliance plans that set out adequate measures the responsible entity is to apply and follow to ensure compliance with the Corporations Act and the scheme's constitution: Pt 5C.4.
- 18 Where less than half of the responsible entity's directors are external directors, the unlisted property scheme must have a compliance committee: s601JA. The compliance committee must monitor and report on breaches of the law or scheme's constitution and regularly assess the adequacy of compliance plans.
- 19 The compliance plan auditor must report on whether the responsible entity has complied with the compliance plan and whether the plan is adequate.
- 20 The draft guide focuses on improved disclosure for retail investors in unlisted property schemes. We are therefore also focussing on how compliance plans, compliance committees and compliance plan auditors can ensure there is adequate upfront and ongoing disclosure for retail investors. This is consistent with the requirements of Pt 5C.4 and the general approach of our policy in Regulatory Guide 132 *Managed investments: Compliance plans* (RG 132) that compliance plans should ensure that members are told all information that is necessary for them to make decisions about their holdings: RG 132.12(e).

Proposal

- D1 Existing compliance plans for unlisted property schemes should contain adequate procedures to ensure that a responsible entity complies with its upfront and ongoing disclosure obligations and its advertising obligations. We do not expect that responsible entities will necessarily need to change their compliance plans to deal expressly with the disclosure principles.

- D2** We expect compliance committees and compliance plan auditors for unlisted property schemes to be aware of the disclosure principles and advertising obligations in the draft guide. We also expect them to consider the disclosure principles and advertising obligations in carrying out their duties (including when assessing whether compliance plans are adequate).

Your feedback

- D2Q1 Will compliance plans need to be modified to specifically address the disclosure principles and advertising obligations, or are existing compliance plans generally satisfactory to address these?
- D2Q2 Are there any practical problems with the proposed role for compliance committees and compliance plan auditors? If so, what would ensure investors are adequately protected?
- D2Q3 What impact would our proposals have on costs for compliance committees and compliance plan auditors, and how might this affect responsible entities and investors? Please give details.

E Investment ratings

Key points

Investment ratings can be useful for retail investors in property schemes. To be effective they need to be properly explained and not create a misleading impression about the scheme: see RG 000.108–RG 000.110.

- 21 Some retail investors and their financial advisers use investment ratings as a source of information when deciding whether to invest in property schemes. Investment ratings can assist retail investors where they are:
- (a) properly explained; and
 - (b) prepared by a person who has the appropriate level of expertise in assessing property schemes.
- 22 However, we have some concerns about the use of investment ratings for property schemes, including:
- (a) how well investment ratings are understood by retail investors and
 - (b) the comparability of investment ratings issued by different research houses.
- 23 Research houses use different methodologies to derive their investment ratings. For example, some research houses and investment ratings focus on publicly available quantitative information (e.g. risk adjusted historical return), while others make use of more qualitative information about the scheme and its management (often including detailed questionnaires, asset level review, and management interviews). There is also a practice of expressing ratings differently. For example, some research houses express their ratings in a number of stars or other symbols, while others describe the rating in words such as ‘recommended’ or a combination of both.
- 24 Interests in a property scheme are an equity product and credit ratings are not available for those interests. In contrast, debentures are a debt product for which a credit rating can be obtained. Advertisements for debentures should not make any reference to investment ratings of the debenture or the issuer: see RG 156.10–RG 156.12. Given the different nature of interests in property schemes and debentures, we are proposing to permit advertisements for property schemes to refer to investment ratings if certain conditions are satisfied: see RG 000.108–RG 000.110.
- 25 We are also considering how investment ratings are used by investors as part of a separate review of the regulation of ratings agencies and research houses

that was initiated by the Minister for Superannuation and Corporate Law in May 2008.

Proposal

- E1 References to investment ratings in property scheme advertising need to be properly explained to retail investors and not create a misleading impression about the scheme: see RG 000.108–RG 000.110.

Your feedback

- E1Q1 Are investment ratings useful to retail investors in property schemes? Are investment ratings being properly explained to retail investors?
- E1Q2 What are the advantages (for issuers, advisers, distribution channels, and retail investors) of the use of investment ratings and research houses for property schemes?
- E1Q3 What difficulties (if any) do retail investors face in interpreting investment ratings for property schemes?
- E1Q4 How comparable are investment ratings for property schemes that are prepared by different research houses?
- E1Q5 Is there a risk that retail investors may place undue weight on an investment rating when making their investment decision?
- E1Q6 Where an unlisted property scheme advertises a rate of return, is there a risk that retail investors may consider an investment rating for the scheme to be a credit rating?
- E1Q7 Are the requirements about the use of investment ratings in advertisements appropriate? Should we impose any other conditions on the use of investment ratings for property schemes (e.g. prohibiting the use of investment ratings in advertisements or requiring warnings to accompany investment ratings)?

F Regulatory and financial impact

- 26 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) preventing mis-selling of interest in unlisted property schemes; and
 - (b) not unduly interfering with the market and flexibility of the public fundraising process.
- 27 Before settling on a final policy, we will comply with the requirements of the Office of Best Practice Regulation (OBPR) by:
- (a) considering all feasible options;
 - (b) if regulatory options are under consideration, undertaking a preliminary assessment of the impacts of the options on business and individuals or the economy;
 - (c) if our proposed option has more than low impact on business and individuals or the economy, consulting with OBPR to determine the appropriate level of regulatory analysis; and
 - (d) conducting the appropriate level of regulatory analysis, that is, complete a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).
- 28 All BCC reports and RISs are submitted to the OBPR for approval before we make any final decision. Without an approved BCC Report and/or RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 29 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 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.



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 000

Unlisted property schemes— improving disclosure for retail investors

July 2008

About this guide

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

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

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- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

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

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

Document history

This version was issued on 8 July 2008 and is based on legislation and regulations as at 8 July 2008.

Disclaimer

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

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

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A Overview

Key points

This guide applies to unlisted property schemes in which retail investors have a direct or indirect investment: see RG 000.1–RG 000.3.

ASIC has developed 8 disclosure principles for unlisted property schemes that can help retail investors understand the risks, assess the rewards being offered and decide whether these investments are suitable for them: see RG 000.7–RG 000.9.

Responsible entities of unlisted property schemes should apply the disclosure principles in their Product Disclosure Statements for retail investors. They should also apply the disclosure principles to their ongoing disclosures and communicate the information in the most effective way possible (e.g. by website or periodic updates). See RG 000.10–RG 000.14.

Who does this guide apply to?

RG 000.1 For the purposes of this regulatory guide, an ‘unlisted property scheme’ is an unlisted managed investment scheme that has or is likely to have at least 50% of its non-cash assets invested in real property and/or in unlisted property schemes.

Note: Infrastructure assets are not ‘real property’ for the purposes of the above definition. Examples of infrastructure assets are roads, railways, ports, airports and other transport facilities; and facilities for telecommunications, electricity generation, transmission and distribution, gas transmission and distribution, water supply and sewerage.

RG 000.2 This guide applies to registered unlisted property schemes in which retail investors invest directly or indirectly (e.g. through an investor directed portfolio service).

RG 000.3 This guide does not apply to:

- (a) listed property schemes;
- (b) property securities funds whose only exposure to property is through investments in listed property schemes; or
- (c) property schemes that do not have any direct or indirect investment by retail investors.

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

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Why is improved disclosure required for unlisted property schemes?

- RG 000.4 Unlisted property schemes often appeal to retail investors, who may believe that the investment offers capital stability and consistent ongoing returns that are not likely to vary significantly. This is not always the case and retail investors need better information on the risks associated with investment in unlisted property schemes: see RG 000.28–RG 000.29.
- RG 000.5 Disclosure by unlisted property schemes on key issues affecting the assessment of risk and returns has at times been unclear, making it difficult for retail investors to compare investments. Responsible entities of unlisted property schemes need to improve their disclosure so that retail investors can assess the effect of changing economic conditions on their investment: see RG 000.30–RG 000.35.
- RG 000.6 We have analysed the disclosure practices of property schemes in the context of the debt market turbulence that Australia has experienced since mid-2007: see RG 000.34. This analysis led us to develop principles designed to extract key risk and return information for retail investments in unlisted property schemes: see RG 000.7–RG 000.9.

Disclosure principles for unlisted property schemes

- RG 000.7 ASIC has developed 8 disclosure principles on information that is key to analysing the risks associated with unlisted property schemes. Clear and prominent disclosure of the information referred to in the disclosure principles will allow retail investors to compare the relative risk and return of investments in unlisted property schemes.
- RG 000.8 Responsible entities should generally find the information easy to disclose. In many cases the disclosure principles simply increase the clarity and effectiveness of existing information for retail investors.
- RG 000.9 The disclosure principles are summarised in Table 1 and explained further in Section C of this guide.

Table 1: Disclosure principles for unlisted property schemes

1. Gearing ratio	A scheme's gearing ratio indicates the extent to which a scheme's assets are funded by external liabilities.
2. Interest cover	Information on a scheme's interest cover indicates the scheme's ability to meet interest payments from earnings.
3. Scheme borrowing	This principle requires information on when the scheme's debts and credit facilities will mature and any associated risks. It is also important that investors are kept informed and updated with information they would reasonably require on breach of loan covenants.

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4. Portfolio diversification	This information addresses the scheme's investment practices and portfolio risk.
5. Valuation policy	Key aspects of the scheme's valuation policy for real property assets should be disclosed so that investors can assess the reliability of the valuations.
6. Related party transactions	Investors need to be able to assess the responsible entity's approach to related party transactions.
7. Distribution practices	Information on the scheme's distribution practices is required so that investors can assess the sources of the distributions and be informed as to the sustainability of distributions from sources other than realised income.
8. Withdrawal rights	If a scheme gives investors withdrawal rights, these rights should be clearly explained.

Applying the disclosure principles

- RG 000.10 Responsible entities should apply the disclosure principles to Product Disclosure Statements (PDSs) and ongoing disclosures to retail investors: see Section D.
- RG 000.11 Information required by the disclosure principles should be clearly and prominently disclosed upfront in the PDS. This is consistent with the requirement that a PDS must be worded in a clear, concise and effective manner: see RG 000.86–RG 000.87
- RG 000.12 Information required by the disclosure principles should also be communicated in the most effective way possible for ongoing disclosure, such as by website or regular investor updates: see RG 000.88–RG 000.103. We recommend responsible entities provide their investors with updates on information referred to in the disclosure principles at least every 6 months: see RG 000.103.
- RG 000.13 When reviewing an unlisted property scheme's PDS or ongoing disclosures ASIC will consider whether the disclosure principles have been applied.
- RG 000.14 We will consider exercising our stop order powers under s1020E if we consider there is material non-disclosure of information referred to in the disclosure principles. Failure to apply the principles may also result in liability to investors under the *Corporations Act 2001* (Corporations Act).

Advertising

- RG 000.15 Advertisements for unlisted property schemes should be consistent with all corresponding disclosures in the PDS. Section E gives further guidance on advertising for unlisted property schemes, including the use of investment ratings.

Compliance plans, compliance committees and compliance plan auditors

- RG 000.16 Compliance plans for unlisted property schemes should set out measures to ensure the responsible entity complies with obligations under the Corporations Act, including those relating to disclosure and advertising: see RG 000.111–RG 000.113.
- RG 000.17 Responsible entities, compliance committees and compliance plan auditors should examine whether their compliance plans are adequate to ensure compliance with the obligations in this guide.
- RG 000.18 Compliance committees and compliance plan auditors should monitor the responsible entity’s compliance with the obligations set out in this guide and report any failures to comply as required: see Section F.

What is the timing?

- RG 000.19 By 31 October 2008, responsible entities of existing schemes should provide updated disclosure to existing investors that applies the disclosure principles: see RG 000.80.
- RG 000.20 We expect responsible entities of both new and existing schemes to apply the disclosure principles to new PDSs and ongoing disclosures issued on or after 31 October 2008: see RG 000.78–RG 000.79.
- RG 000.21 From 31 October 2008, we will review new PDSs and ongoing disclosures for unlisted property schemes to check that the information referred to in the disclosure principles is adequately disclosed.
- RG 000.22 We will also:
- (a) work with responsible entities to ensure that the disclosure principles and our disclosure expectations are understood;
 - (b) discuss any concerns we have with a responsible entity’s disclosure with them and, where necessary, require additional disclosure;
 - (c) discuss any concerns we have about the financial position and performance of a scheme with the responsible entity; and
 - (d) conduct surveillance visits as needed to test and reinforce our disclosure expectations.

Table 2: Timetable for implementing improved disclosure

By 31 October 2008	Responsible entities of existing unlisted property schemes provide updated disclosure to existing investors that applies the disclosure principles.
From 31 October 2008	<p>Responsible entities of both new and existing unlisted property schemes apply the disclosure principles to new PDSs and ongoing disclosures.</p> <p>ASIC reviews new PDSs and ongoing disclosures for unlisted property schemes for application of the disclosure principles.</p>

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B The unlisted property scheme sector and improved disclosure

Key points

The business models of unlisted property schemes tend to have some common features: see RG 000.23–RG 000.27.

Some of these features can create risks for investors: see RG 000.28–RG 000.29.

Clear disclosure principles can help investors make better-informed decisions about these products.

Improved disclosure is particularly important when economic volatility increases the risks associated with investments: see RG 000.30–RG 000.35.

Business models of unlisted property schemes

- RG 000.23 Understanding an unlisted property scheme’s business model can help investors to assess the potential risks and returns associated with the investment. We expect responsible entities to give investors adequate information on the scheme’s business model in upfront disclosure: see RG 000.83.
- RG 000.24 The following sets out some common features of unlisted property schemes’ business models:
- (a) The responsible entity raises funds by issuing interests in the scheme to investors in exchange for money. This money is pooled and used by the responsible entity on behalf of the scheme to invest a substantial proportion of its non-cash assets directly in real property or to invest in other unlisted property schemes.
 - (b) Investors have beneficial but not legal ownership in the property assets the responsible entity chooses to invest in.
 - (c) The return to investors is generally expected to be derived from rental income from property owned by the scheme and from the net proceeds the scheme receives if it sells the real property it has invested in. Property schemes may also make distributions from capital and/or unrealised revaluation gains on the investment properties provided that cash is available within the fund or from borrowings.
 - (d) While unlisted property schemes should be considered as long-term investments, some schemes offer periodic withdrawal facilities whereby

investors may withdraw some or all their investments. Withdrawal facilities are usually subject to restrictions, such as preset limits or arrangements if withdrawal demands exceed the cash available.

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

- RG 000.25 Most unlisted property schemes are geared. In these cases, the ability of the scheme to repay debt principal and interest on time and meet all loan covenants is material to the performance and viability of the scheme.
- RG 000.26 The underlying assets in unlisted property schemes are real property. A significant feature of real property is that it is a largely illiquid asset—it is not homogenous, it is not traded on an active market, and it has high transaction costs. This highlights the importance of disclosing and understanding the ability of the unlisted property scheme to service debt from cash flows.
- RG 000.27 A relatively small number of unlisted property schemes have significant property development assets. Investors in unlisted property schemes with property development are exposed to additional construction and development risks. Importantly, while cash outflows are required to fund the construction and development, the cash inflow returns on those assets do not occur until completion when the asset is available for rental or for sale.

Risks to investors

- RG 000.28 Unlisted property schemes are often attractive to retail investors, who may believe that they offer capital stability and consistent ongoing returns. This is not always the case and there are a number of common risks associated with investments in the unlisted property sector. These key risks, many of them relating to the scheme's borrowings, are identified in Table 3.
- RG 000.29 These risks do not affect all unlisted property schemes and are not unique to unlisted property schemes. However, disclosure relating to these risks is relevant for unlisted property schemes. The disclosure principles in Section C address the risks so that investors can make more informed decisions about whether to invest in an unlisted property scheme, including comparing risks and returns across investments in the sector.

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Table 3: Key risk features of unlisted property schemes

Risk feature	What this means
Gearing	A higher gearing ratio means a higher reliance on external liabilities (primarily borrowings) to fund assets. This exposes the scheme to increased funding costs if interest rate rises. A highly geared scheme has a lower asset buffer to rely upon in times of financial stress.
Interest cover	A property scheme's interest cover is a key indicator of its financial health. The lower the interest cover, the higher the risk that the scheme will not be able to meet its interest payments. A scheme with a low interest cover only needs a small reduction in earnings (or a small increase in interest rates or other expenses) to be unable to meet its interest payments.
Scheme borrowing	<p>Relatively short term (or shortly maturing) debt and credit facilities are a risk factor if they are used to fund assets intended to be held long term.</p> <p>If the scheme has a significant proportion of its debts that mature within a short time frame, it will need to refinance. There is a risk that the refinancing will be on less favourable terms or not available at all. If the scheme cannot refinance, it may need to sell assets on a forced sale basis with the risk that they may realise a capital loss.</p> <p>Breach of a loan covenant may result in penalties being applied, or the loan becoming repayable immediately. This means that the scheme may need to refinance on less favourable terms or sell assets. Termination of critical financing could also mean the scheme is no longer viable.</p>
Portfolio diversification	The more diversified a portfolio is, the lower the risk that an adverse event affecting one property or one lease will put the overall portfolio at risk.
Valuation of real property	Investing in a property scheme exposes investors to movements in the value of the scheme's assets. Investors therefore need information to assess the reliability of valuations. The more reliable a valuation, the more likely the asset will return that amount when it is sold. However, any forced sale may still result in a shortfall to the valuation.
Related party transactions	A conflict of interest may arise when property schemes invest in, make loans or provide guarantees to related parties.
Distributions	Some property schemes make distributions partly or wholly from unrealised revaluation gains and/or capital rather than solely from realised income. This may not be commercially sustainable over the longer term, particularly where property values are not increasing.
Withdrawal rights	Unlisted property schemes often have limited or no withdrawal rights. This means they are usually difficult to exit.

Improving disclosure for investors in unlisted property schemes

RG 000.30 Unlisted property schemes are difficult to exit easily due to the illiquidity of the underlying assets and the limited withdrawal rights, where they are available. It is therefore important that investors have a good understanding of the true nature of unlisted property schemes and their associated risks before they decide to invest: see RG 000.28–RG 000.29.

- RG 000.31 Investment risks generally increase in more adverse economic conditions. Good disclosure on the risks associated with unlisted property schemes is particularly important due to recent volatility in the financial and property sectors.
- RG 000.32 In the 2008 financial year, listed property schemes experienced a significant decrease in market capitalisation due to debt market turbulence flowing from the US sub-prime difficulties, interest rate rises and a cyclical softening in property markets.
- RG 000.33 These factors are also likely to affect unlisted property schemes. Property schemes may need to renegotiate debt rollovers and extend existing debt facilities. Such refinancing is likely to be difficult to achieve without paying higher interest rates or lowering the amount of debt. Failure to refinance may result in an increased number of properties for sale.
- RG 000.34 In light of the significant changes in economic conditions referred to in RG 000.32, we compared the disclosure practices of a number of Australian listed and unlisted property schemes. Generally, we observed that listed property schemes were more likely than unlisted property schemes to disclose information that is important to retail investors when comparing the risks and rewards of different schemes. Listed property schemes were also more likely to update investors on how global financial turbulence was affecting the scheme's financial circumstances.
- RG 000.35 In this context, ASIC has developed the 8 disclosure principles that responsible entities of unlisted property schemes should apply to their upfront and ongoing disclosures for retail investors: see Section C. The following table sets out our approach to improved disclosure for retail investors in unlisted property schemes.

Table 4: Improved disclosure for unlisted property schemes

Guideline	Related information
1. The information referred to in the disclosure principles will enable retail investors to assess the risk and rewards of unlisted property schemes.	See Section C
2. Responsible entities of unlisted property schemes should apply the disclosure principles to the scheme's upfront and ongoing disclosures for retail investors.	See Section D
3. Ongoing disclosures should be communicated to investors in the most effective means possible. Responsible entities should be particularly conscious of the need to update investors with information on significant events that may affect their investment.	See Section D
4. Compliance plans for unlisted property schemes should set out adequate measures to ensure compliance with the law relating to disclosure and advertising obligations. Compliance committees and compliance plan auditors should be aware of the disclosure principles and advertising obligations in this guide and monitor the responsible entity's application of them.	See Section E and F

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Guideline	Related information
5. Additional education will help retail investors use the information referred to in the disclosure principles when making investment decisions.	Investor guide

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C Disclosure principles for unlisted property schemes

Key points

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

- gearing ratio (see RG 000.36–RG 000.41);
- interest cover (see RG 000.42–RG 000.46);
- scheme borrowing (see RG 000.47–RG 000.53);
- portfolio diversification (see RG 000.54–RG 000.58);
- valuation policy (see RG 000.59–RG 000.65);
- related party transactions (see RG 000.66–RG 000.67);
- distribution practices (see RG 000.68–RG 000.69); and
- withdrawal rights (see RG 000.70–RG 000.73).

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

Disclosure principle 1: Gearing ratio

RG 000.36 Responsible entities should disclose a gearing ratio for the scheme calculated using the following formula:

$$\text{Gearing ratio} = \text{total liabilities} / \text{total assets}$$

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

RG 000.37 The liabilities and assets used to calculate the gearing ratio should be based on the scheme's latest financial statements. Where members' contributions (other than debts) are classified as liabilities in the financial statements, they should be excluded from liabilities in calculating the gearing ratio. If the scheme has off balance sheet financing, the responsible entity should disclose two gearing ratios:

- (a) a 'look through' gearing ratio that takes into account such financing; and
- (b) a gearing ratio based on liabilities disclosed in the scheme's financial statements.

Note: Examples of off balance sheet financing include loans taken out by investors to invest in the scheme where the loans are secured over the scheme's assets on a limited recourse basis, borrowings of equity accounted investments, and subordinated debts not classified as liabilities.

- RG 000.38 Responsible entities should also explain to investors what the ratio means in practical terms and how investors can use the ratio to determine the scheme's level of risk. This includes explaining the relevance of any loan covenants that specify a certain level of gearing. Where the loan covenants specify a formula for a gearing ratio different to that in RG 000.36, this should be disclosed and its implications explained.

Explanation

- RG 000.39 The gearing ratio in RG 000.36 indicates the extent to which a scheme's assets are funded by liabilities. It gives an indication of the potential risks the scheme faces in terms of its level of debt.
- RG 000.40 Retail investors may not have the skills or information to calculate a scheme's gearing ratio (especially the 'look through' gearing ratio) from the scheme's financial statements. In contrast, responsible entities should be able to calculate the scheme's gearing ratio and explain its relevance to investors.
- RG 000.41 We consider that a scheme's gearing ratio is a risk factor that retail investors should weigh up against the scheme's rate of return. Consistent disclosure of gearing ratios across this sector will enable investors to compare relative risks and returns for unlisted property schemes.

Disclosure principle 2: Interest cover

- RG 000.42 Interest cover gives an indication of an unlisted property scheme's ability to meet the interest payments from earnings. Responsible entities should disclose the scheme's interest cover calculated using the following formula based on the latest financial statements:

$$\text{Interest cover} = \text{EBIT} / \text{interest expense}$$

Note: If the scheme prepares consolidated financial statements, the interest cover should be calculated based on the consolidated figures.

- RG 000.43 EBIT (earnings before interest and tax) and interest expense (also known as finance cost) used to calculate interest cover should be consistent with those disclosed in the scheme's latest financial statements. If the scheme has off balance sheet financing, the responsible entity should disclose two interest covers:
- (a) a 'look through' interest cover that takes into account interest on such financing; and
 - (b) an interest cover based on actual interest expense disclosed in the scheme's financial statements.

- RG 000.44 Many retail investors may not understand what interest cover means. Responsible entities should explain how investors can use the interest cover to assess the scheme's ability to meet its interest payments.
- RG 000.45 The relevance of interest cover should also be explained in the context of any loan covenant that specifies a certain level of interest cover below which the loan facility may be in default or would otherwise be unacceptable to the lender. Where the loan covenants specify a formula for interest cover different to that in RG 000.42, this should be disclosed and its implications explained.

Explanation

- RG 000.46 Interest cover measures the ability of the scheme to service interest on debt from earnings. It is therefore a critical indication of a scheme's financial health and key to analysing the sustainability and risks associated with the scheme's level of borrowing. It is information that many retail investors would be unable to calculate. As with the gearing ratio, interest cover is information that responsible entities should be able to provide. Consistent disclosure by this sector will allow investors to compare relative risks and returns across investments in unlisted property schemes.

Disclosure principle 3: Scheme borrowing

- RG 000.47 Where a scheme expects to borrow funds or has borrowed funds (whether on or off balance sheet), responsible entities should clearly and prominently disclose:
- (a) for each debt that will mature in 5 years or less—the amount owing and the maturity profile in increments of 12 months;
 - (b) for debts that mature in more than 5 years—the total amount owing;
 - (c) for each credit facility—the undrawn amount and the maturity profile in increments of no more than 12 months; and
 - (d) whether amounts owing to lenders and other creditors of the scheme rank ahead of an investor's interests in the scheme.
- RG 000.48 Where debt and credit facilities are to mature within 12 months, the responsible entity should make appropriate disclosure about the prospects of refinancing or possible alternative actions (e.g. sales of assets). Responsible entities should explain any risks associated with their debt and credit facility maturity profile.
- RG 000.49 Responsible entities will also need to disclose any information about breaches of loan covenants that is reasonably required by investors.

Responsible entities should update investors about the status of any breaches through ongoing disclosure.

Explanation

Debt and credit facility maturity profile

- RG 000.50 Debt and credit facility maturity is important information where an unlisted property scheme borrows to invest. Debt and credit facilities that are due to mature within a relatively short time frame can be a significant risk factor, especially in periods where credit is more difficult and expensive to obtain. A failure to renew debt or credit facilities can adversely impact on a scheme's viability.
- RG 000.51 It is important that disclosure on the maturity of debt and credit facilities is clear and prominent enough for retail investors to easily locate and understand the information.

Breach of loan covenants

- RG 000.52 Information about breaches of loan covenants reasonably required by investors is key risk information in upfront and ongoing disclosures. Breach of a loan covenant may result in the lender being able to require immediate repayment of the loan or impose a freeze on further draw-downs on the credit facility. If the lender exercises such rights, the scheme may be forced to arrange alternative financing or asset sales within a short time frame. This can be problematic particularly in periods when access to credit is more constrained and where the scheme has a poor history of meeting loan covenants or when there is a softening of the property market.

Ranking of investors

- RG 000.53 Investors will generally rank behind creditors of a scheme and responsible entities should disclose whether this is the case.

Disclosure principle 4: Portfolio diversification

- RG 000.54 A responsible entity should disclose the current composition of the property scheme's investment portfolio, including:
- (a) properties by geographic location by number and value;
 - (b) properties by sector (e.g. development projects, industrial, commercial, retail, residential and development projects) by number and value;
 - (c) for each significant property, the most recent valuation and, where applicable, the capitalisation rate, discount rate and the terminal capitalisation rate (or terminal yield) adopted in the valuation;

- (d) the portfolio lease expiry profile in yearly periods calculated on the basis of lettable area and income and where applicable, the weighted average lease expiry;
- (e) the occupancy rate(s) of the property portfolio;
- (f) for each significant tenant, the name of the tenant, the area occupied by the tenant as a percentage of the total lettable area of the property portfolio and the lease expiry of that tenant; and
- (g) a clear description of any assets of the scheme that are not direct property assets, including the value of such assets.

RG 000.55 Disclosure should also cover the responsible entity's investment strategy on the above matters, including its strategy on investing in other unlisted property schemes.

RG 000.56 Responsible entities of unlisted property schemes involved in property development should also disclose:

- (a) the project timetable with significant milestones;
- (b) funding arrangements;
- (c) pre-sale and lease pre-commitments where applicable; and
- (d) development approval status.

Explanation

RG 000.57 The quality of the properties held by an unlisted property scheme, including the quality of leases entered into over those properties, is a key element in the financial position and performance of the scheme. The more diversified a portfolio is, the lower the risk that an adverse event affecting one property or one lease will put the overall portfolio at risk.

RG 000.58 It is important that responsible entities disclose in their PDSs and ongoing disclosures their approach to portfolio diversification. Most responsible entities will have a firm policy on the types of properties in which the scheme will invest. This should be disclosed as clearly and prominently as possible to help investors monitor the financial position and performance of the scheme over time.

Disclosure principle 5: Valuation policy

- RG 000.59 Responsible entities should disclose their policy on valuations of direct property investments. This policy should cover, at a minimum:
- (a) how often they obtain valuations for direct investments in real property, including how often they obtain independent valuations;
 - (b) if independent valuations are not regularly obtained, the reason for this;

- (c) who performs the valuation (e.g. directors or an independent valuer) and details of the professional qualifications required;
- (d) the methodology used (e.g., comparable sales, discounted cash flow and capitalisation of earnings) (see also RG 000.60);
- (e) the dates when the properties were last valued;
- (f) whether the valuation is in accordance with relevant industry standards; and
- (g) how investors will be updated on any material changes to previous valuations.

RG 000.60 Where a property under development is valued on an ‘as if complete’ basis, the ‘as is’ basis of the valuation should also be disclosed. The responsible entity should also disclose the risks associated with ‘as if complete’ valuations, including the risk that assumptions about future market conditions on which such valuations are based may prove to be inaccurate.

RG 000.61 Responsible entities should also inform investors if they fail to follow their previously disclosed policy on valuations or if there are any changes to the policy (unless clearly immaterial).

RG 000.62 We expect valuers who accept an appointment to provide valuations for an unlisted property scheme to:

- (a) where applicable, be registered under one of the state or territory valuer registration regimes; and
- (b) include a statement in their valuation reports on whether the valuation complies with all relevant industry standards.

Explanation

RG 000.63 The value of real property assets can be volatile, particularly when access to credit is constrained and more properties are on the market. A significant fall in valuation will mean an increase in gearing ratio and may trigger a default of loan covenants.

RG 000.64 Investors should be able to understand and compare how responsible entities value their schemes’ real property assets. This will help investors assess the reliability of the valuations.

RG 000.65 It is in the interests of responsible entities that the valuations they obtain and use are robust and accurate. Responsible entities are responsible for the financial statements and other documents that rely on the accuracy of these valuations. Therefore, we expect that where possible responsible entities will only use professional valuers who are registered or licensed in the relevant state or territory, and who subscribe to a relevant industry code of conduct. We also expect that responsible entities will be careful to ensure that their

instructions to valuers are comprehensive and contain reasonable terms of reference.

Note: We realise that not all states and territories have a registration or licensing regime for valuers at this time.

Disclosure principle 6: Related party transactions

- RG 000.66 Responsible entities who enter into transactions with related parties should disclose their approach to related party transactions, including:
- (a) details of investments in and loans, guarantees and fees to any related party;
 - (b) their policy on related party transactions, including the assessment and approval process and arrangements to manage conflicts of interest; and
 - (c) how the processes and arrangements are monitored to ensure their policy is followed.

Note: The term ‘related party’ should be interpreted broadly, taking into consideration the definitions of ‘related party’ in s228 (as applied to the scheme by Part 5C.7) and accounting standard AASB 124 ‘Related Party Transactions’ and includes the responsible entity.

Explanation

- RG 000.67 Related party transactions carry a risk that they could be assessed and monitored less rigorously than arm’s length third party transactions. Investors should therefore be able to assess whether responsible entities take an appropriate approach to related party transactions. A significant number and value of such transactions may mean that investors should consider the financial position of the related group as a whole and the risk of potential conflicts of interest.

Note: Responsible entities are financial services licensees and have duties to adequately manage conflicts of interest: s912A(1)(aa). If applicable, responsible entities may need to obtain investor approval for related party transactions under Part 5C.7.

Disclosure principle 7: Distribution practices

- RG 000.68 Where a scheme has made or forecasts to make distributions to members, the responsible entity should disclose:
- (a) the sources for such distributions (e.g. from realised income, capital, unrealised revaluation gains);
 - (b) whether the source of any forecast distributions is expected to differ from the sources of previous distributions;

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- (c) if distributions are not solely sourced from realised income, the reasons for making distributions from other sources; and
- (d) whether distributions sourced other than from realised income are sustainable.

Note: Any forward-looking statements should comply with s769C and Regulatory Guide 170 *Prospective financial information* (RG 170).

Explanation

RG 000.69 Some unlisted property schemes make distributions to members from capital and/or unrealised revaluation gains where cash is available from either within the fund or from borrowings. If this is the case, the responsible entity should clearly and prominently disclose whether these distributions are sustainable, and if not, the reasons why not and the implication of this for investors.

Disclosure principle 8: Withdrawal arrangements

- RG 000.70 If investors are given the right to withdraw from a scheme, the responsible entity should clearly disclose:
- (a) the maximum withdrawal period allowed under the constitution for the scheme (this disclosure should be at least as prominent as any shorter withdrawal period promoted to investors);
 - (b) any significant risk factors or limitations that may impact on the ability of investors to withdraw from the scheme (including risk factors that may impact on the ability of the responsible entity to meet a promoted withdrawal period); and
 - (c) a clear explanation of how investors can exercise their withdrawal rights, including any conditions on exercise (e.g. specified withdrawal periods and scheme liquidity requirements).
- RG 000.71 The responsible entity should ensure that investors are updated on any material changes to withdrawal rights through ongoing disclosure. For example, investors should be informed if the responsible entity knows that withdrawal requests will be suspended during an upcoming withdrawal period for whatever reason.
- RG 000.72 Responsible entities should also clearly disclose if investors have no withdrawal rights.

Explanation

RG 000.73 It is important for responsible entities to make investors aware of withdrawal arrangements so that investors form realistic expectations about their ability to withdraw from the scheme.

Note 1: Members will only have a limited ability to withdraw if a scheme is not 'liquid' for the purposes of Part 5C.6.

Note 2: Where a responsible entity makes representations about likely future withdrawal periods, it must have reasonable grounds for those representations: s769C.

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D Applying the disclosure principles

Key points

Responsible entities of unlisted property schemes should apply the disclosure principles to their PDSs because the principles reflect information required for upfront disclosure under the Corporations Act: see RG 000.84–RG 000.85.

The disclosure principles also reflect information required for ongoing disclosure to investors: see RG 000.93–RG 000.103. We encourage responsible entities to communicate this information to investors in the most effective way possible (e.g. by the scheme's website and regular reports): see RG 000.90–RG 000.91.

We expect responsible entities of both new and existing unlisted property schemes to apply the disclosure principles from 31 October 2008: see RG 000.78–RG 000.79. We expect responsible entities of existing schemes to provide updated disclosure to existing investors against the principles by 31 October 2008: see RG 000.80.

The disclosure framework

- RG 000.74 The Corporations Act requires responsible entities of unlisted property schemes to:
- (a) disclose upfront in a PDS to retail investors all the information they reasonably need to know to make a decision to acquire an interest in the scheme; and
 - (b) provide ongoing disclosure about material matters to help retail investors monitor whether their expectations are being met.
- RG 000.75 The disclosure principles in Section C reflect information that retail investors reasonably need to make an investment decision and monitor whether their expectations are being met. This information is required under the Corporations Act for both upfront and ongoing disclosures.
- RG 000.76 When reviewing an unlisted property scheme's PDS or ongoing disclosures ASIC will consider whether the disclosure principles have been applied.
- RG 000.77 We will consider exercising our stop order powers under s1020E if we consider there is material non-disclosure or misleading disclosure of information required by the disclosure principles. Failure to apply the principles may also result in liability to investors because the disclosure principles reflect information that is required under the Corporations Act.

How to apply the disclosure principles

- RG 000.78 The disclosure principles apply to both existing and new offers of interests in unlisted property schemes. Table 5 explains how we expect responsible entities for existing and new unlisted property schemes to apply the disclosure principles.
- RG 000.79 We will review updated investor disclosures for unlisted property schemes to check that information relating to the disclosure principles is being adequately disclosed to investors.

Table 5: Applying the disclosure principles

Existing schemes—addressing disclosure principles by 31 October 2008	By 31 October 2008, responsible entities of existing schemes should address the disclosure principles in updated disclosure that is brought directly to the attention of existing investors: see RG 000.80.
PDSs from 31 October 2008	All new PDSs issued on or after 31 October 2008 should apply the disclosure principles: see RG 000.85–RG 000.87. If there are material changes to information required under the disclosure principles while the PDS is current, the responsible entity will generally need to issue a new or supplementary PDS. The responsible entity should also communicate the information to existing investors who will not receive the PDS.
Ongoing disclosures from 31 October 2008	Where there are any material changes to information required under the disclosure principles, the responsible entity should deal with this in ongoing disclosures. We encourage responsible entities to communicate this information to investors as soon as practical by the most effective means possible (e.g. by updates on the scheme's website). From 31 October 2008, periodic statements under s1017D should update information required under the disclosure principles (if this has not previously been notified to investors) or confirm there has been no change to the information. Responsible entities should also consider whether it would help investors to give them more frequent updates of the information required under the disclosure principles. We recommend that responsible entities update investors at least every 6 months. See RG 000.88–RG 000.103.

Updating existing investors

- RG 000.80 The first information that responsible entities will provide to existing investors in response to the disclosure principles will be after they have invested. By 31 October 2008, we expect responsible entities to provide existing investors with updated disclosure addressing the disclosure principles.

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- RG 000.81 For example, this could be in a periodic statement under s1017D, by the website (if used to regularly update investors) or another regular report to investors (e.g. a quarterly report). Another alternative would be to issue a supplementary PDS and send a copy to existing investors or publish it on the website and notify investors that it is available and how to access it.

Upfront disclosure in a PDS

Content of a PDS

- RG 000.82 The Corporations Act requires disclosure in the form of a PDS for an offer of interests in an unlisted property scheme. The PDS must:
- (a) make specific disclosures, including significant risks associated with holding the product (s1013D); and
 - (b) include all other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to invest in the scheme (s1013E).
- RG 000.83 The PDS for an unlisted property scheme should clearly explain:
- (a) the business model of the scheme and what it will do with the money sought to be raised by the PDS (e.g. what type of property the scheme will invest in);
 - (b) the track record and experience of senior management; and
 - (c) key features and risks of the scheme.
- RG 000.84 The disclosure principles reflect information about the key features and risks of an unlisted property scheme. It is information that might reasonably be expected to have a material influence on the decision of a reasonable person whether to invest (s1013D(1), 1013E), but which they would not be expected to know without explicit disclosure in a PDS (s1013F(2)). The disclosure principles therefore reflect the information required under s1013D–1013E.
- RG 000.85 From 31 October 2008, a new PDS for an offer of interests in an unlisted property scheme should include the information required by the disclosure principles.

Clear, concise and effective disclosure

- RG 000.86 PDSs must be worded and presented in a clear, concise and effective manner: s1013C(3). A PDS should therefore contain clear and prominent disclosure of the key features and risks of the investment (e.g. in the first few pages of the PDS either by a separate section or a clear and well-referenced

table). For unlisted property schemes, this includes the information required by the disclosure principles.

- RG 000.87 We encourage responsible entities to use consumer-friendly tools as much as possible in disclosing key features and risks, including by using tables, diagrams and other comparative features. Effective disclosure of the key features and risks will help retail investors compare investments across the unlisted property scheme sector.

Ongoing disclosures

Effective ongoing disclosure

- RG 000.88 A responsible entity makes a number of statements in the PDS about how the funds being raised by the PDS will be used, and how the responsible entity will operate the unlisted property scheme. These ‘promises’ are part of the basis on which the investor invests their money, and the investor should be given the opportunity to monitor the responsible entity’s performance against these promises.
- RG 000.89 Good ongoing disclosure therefore plays an important role in helping investors monitor their investment, evaluate its performance and decide if and when to exit their investment (provided exit mechanisms exist) or increase their investment.
- RG 000.90 Responsible entities have a number of obligations to make ongoing disclosures to investors under the Corporations Act: see RG 000.92–RG 000.103. Apart from these legal requirements, we encourage responsible entities to use the most efficient and effective methods to communicate ongoing disclosure to investors. We consider that best practice is for responsible entities to give information directly to members or make it easily accessible (e.g. by updates on the scheme’s website), even where the information is also lodged with ASIC.
- RG 000.91 Investors should be informed how the responsible entity intends to make ongoing disclosures available to investors. For example, a responsible entity may choose to make ongoing disclosure generally available to retail investors in quarterly fund updates or via the scheme’s website.

Note: On occasion, more formal communication (such as a supplementary PDS or s1017B notice) may be required in addition to these other methods of communication: see RG 000.92–RG 000.103.

The legal framework for ongoing disclosure

- RG 000.92 Responsible entities of unlisted property schemes have obligations to provide ongoing disclosure to investors under the Corporations Act, including:
- (a) issuing a supplementary PDS if there are certain material changes to information in a current PDS;
 - (b) periodic statements to members under s1017D; and
 - (c) disclosure of material changes and significant events (s675 or 1017B).
- RG 000.93 The responsible entity should include information required by the disclosure principles in ongoing disclosures and explain any material changes to information required by the disclosure principles.

Supplementary PDSs

- RG 000.94 The disclosure principles relate to information required in a PDS under the Corporations Act. A PDS must be given to prospective investors in various circumstances: s1012A–1012C. The information in a PDS must be up-to-date as at the time it is given. Where there are material changes to information required by the disclosure principles, a responsible entity with a current offer open will generally need to issue a new or supplementary PDS.

Note: Class Order CO 03/237 provides an exemption for updated information that is not materially adverse and which is made available.

- RG 000.95 We consider that it is best practice to also make the information in new or supplementary PDSs available to any existing investors (e.g. in a regular investor update or on the website).

Continuous disclosure

- RG 000.96 If the responsible entity of a scheme that is a disclosing entity becomes aware of information that is not generally available and that a reasonable person would expect, if it were available, to have a material effect on the price or value of the interests in the scheme, s675 requires the responsible entity to lodge a document with ASIC containing the information.
- RG 000.97 The disclosure principles reflect information that would reasonably be expected to have a material effect on the price or value of interests in the scheme. Therefore material changes to information required by the disclosure principles may trigger s675, unless the information is already generally available.

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Notifications of material changes and significant events

- RG 000.98 If an unlisted property scheme is not subject to continuous disclosure obligations under Ch 6CA, the responsible entity is required to give investors notice under s1017B of any material change to a matter, or a significant event that affects a matter, that would have been required to be specified in a PDS.
- RG 000.99 In our view, material changes in information disclosed under the disclosure principles are matters that should be covered in notifications to investors under s1017B. Where such changes or events are adverse to investors, notifications generally need to be provided as soon as practicable and in any event within 3 months.

Periodic statements

- RG 000.100 Issuers of interests in a property scheme must give members a periodic statement under s1017D at least annually. Periodic statements must include details of:
- (a) the information that the responsible entity reasonably believes the investor needs to understand their investment in the unlisted property scheme; and
 - (b) details of any change in circumstances affecting the investment that has not been notified since the previous periodic statement.
- RG 000.101 Periodic statements are designed to give investors regular updates about their investment. The disclosure principles reflect key features and risks for property schemes. In our view, periodic statements should provide an update of a scheme's performance against the disclosure principles if this has not previously been notified to investors.
- RG 000.102 Disclosure in a periodic statement is not a substitute for compliance with other ongoing disclosure obligations (such as continuous disclosure notices or notifications under s1017B). Where there is a requirement to provide a continuous disclosure notice or notifications under s1017B, responsible entities must comply with the timeframes applying to those obligations and not delay compliance until the time they provide a periodic statement.
- RG 000.103 Responsible entities should consider whether it would assist investors to provide them with more regular updates on the matters dealt with in the disclosure principles (e.g. in quarterly reports). We recommend that responsible entities provide such updates to investors at least every 6 months.

E Advertising

Key points

Advertising for unlisted property schemes should be consistent with all corresponding disclosures in the PDS: see RG 000.104–RG 000.107.

If investment ratings are used in advertising for unlisted property schemes, they should be properly explained and not create a misleading impression about the scheme: see RG 000.108–RG 000.110.

Advertising and the disclosure principles

- RG 000.104 Statements in advertisements for unlisted property schemes should be consistent with all corresponding disclosures on that subject matter in the PDS. In particular, responsible entities should take into account the disclosures in the PDS that deal with the disclosure principles in Section C.

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

- RG 000.105 When considering consistency with the PDS, responsible entities should be aware that an advertisement may be misleading if it quotes a statement from the PDS out of context.
- RG 000.106 Responsible entities of unlisted property schemes who fail to ensure that advertisements are consistent with PDS disclosures risk making false or misleading statements or engaging in misleading or deceptive conduct in contravention of the Corporations Act or the *ASIC Act 2001* (ASIC Act).
- RG 000.107 The law provides ASIC with various options for dealing with misleading or deceptive advertisements for unlisted property schemes or unlisted property scheme advertising that constitutes misleading or deceptive conduct. These include:
- (a) issuing a stop order on any misleading or deceptive statements in an advertisement for property schemes;
 - (b) seeking an injunction against a responsible entity for property scheme advertising that constitutes misleading or deceptive conduct;
 - (c) investigating potential criminal action for contraventions of s1041E of the Corporations Act or s12DF of the ASIC Act; and

- (d) taking other regulatory action against a responsible entity where property scheme advertising contravenes its obligations as a financial services licensee.

Note: For further guidance about when advertising may be misleading or deceptive, see Regulatory Guide 156 *Debenture advertising* (RG 156) at RG 156.31–RG 156.132.

Use of investment ratings

- RG 000.108 If an investment rating is used in an unlisted property scheme advertisement, it should be properly explained. This may include:
- (a) information about the rating scale;
 - (b) the meaning of the rating and where an investor can obtain further information about the rating; and
 - (c) the experience of the research house giving the rating (if it is not a prominent research house).
- RG 000.109 Responsible entities should ensure that the impression the investment rating creates about the unlisted property scheme being advertised is not misleading.
- RG 000.110 Responsible entities should ensure that investment ratings used in advertisements for unlisted property schemes are only quoted from research houses that hold an Australian financial services licence.

F Compliance plans

Key points

Compliance plans must set out measures for the responsible entity to comply with the Corporations Act and scheme constitution.

We expect compliance plans for unlisted property schemes to set out adequate measures to ensure compliance with the law relating to disclosure and advertising.

We expect compliance committees and compliance plan auditors to be aware of the disclosure principles and advertising obligations set out in this guide and to have regard to them in carrying out their duties.

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

The compliance plan

- RG 000.111 Compliance plans play a key role in protecting investors and promoting their interests. The law requires a property scheme to have a compliance plan: s601EA. The compliance plan must set out adequate measures for the responsible entity to ensure compliance with the Corporations Act and the scheme's constitution: s601HA. The responsible entity has a duty to comply with the compliance plan: s601FC(1)(h).
- RG 000.112 Compliance plans should contain adequate procedures to ensure that a responsible entity applies the disclosure principles in its upfront and ongoing disclosure to retail investors. Compliance plans should also contain adequate procedures to ensure that responsible entities comply with their advertising obligations.
- RG 000.113 We do not expect that responsible entities will necessarily need to change their compliance plans to deal expressly with the disclosure principles and advertising obligations referred to in this guide. Good compliance plans should already contain procedures that ensure that responsible entities comply with all of their disclosure and advertising obligations under the Corporations Act.
- RG 000.114 However, we expect responsible entities to critically examine existing compliance plans and consider whether they are adequate to ensure compliance with the obligations discussed in this guide.

RG 000.115 Regardless of whether a scheme has a compliance committee, responsible entities have a duty to ensure that compliance plans establish adequate measures to ensure compliance (including with disclosure and advertising obligations): s601FC(1)(g).

Compliance committees

RG 000.116 Many unlisted property schemes have a compliance committee. A scheme is required to have a compliance committee unless at least half of the responsible entity's directors are external directors: s601JA. If the scheme does not have a compliance committee, the responsible entity's directors should be particularly vigilant about ensuring the responsible entity complies with the compliance plan and that the compliance plan is adequate.

RG 000.117 The functions of a compliance committee are to:

- (a) monitor the extent to which a responsible entity complies with the compliance plan and report its findings to the responsible entity;
- (b) report any breach of the law or the scheme's constitution to the responsible entity;
- (c) report to ASIC if the compliance committee considers that the responsible entity is not taking adequate action to deal with a matter reported under paragraph (b); and
- (d) assess at regular intervals whether the compliance plan is adequate, to report to the responsible entity on the assessment and to make recommendations to the responsible entity about any changes that it considers should be made to the plan: s601JC(1).

RG 000.118 We expect compliance committees for unlisted property schemes to be aware of the disclosure principles and advertising requirements set out in this guide. Compliance committees need to regularly assess whether the compliance plan contains adequate measures to ensure compliance by responsible entities with their:

- (a) upfront and ongoing disclosure obligations to retail investors, including in relation to the disclosure principles in this guide; and
- (b) obligation to ensure that any advertising for the scheme is not misleading or deceptive, as set out in Section E.

RG 000.119 If a compliance committee forms the view that a compliance plan is not adequate, it needs to report this to the responsible entity, together with recommendations about changes that should be made to the plan.

RG 000.120 A compliance committee should also monitor compliance by the responsible entity with the compliance plan. Where a compliance committee identifies non-compliance or a possible breach of the Corporations Act (including a

breach relating to the responsible entity's disclosure or advertising obligations), the compliance committee will need to make a report to the responsible entity and, if necessary, report the matter to us.

Compliance plan auditors

RG 000.121 Compliance plans are subject to an annual audit. The auditor of a compliance plan must give the responsible entity a report that states the auditor's opinion on whether:

- (a) the responsible entity has complied with the compliance plan; and
- (b) the plan continues to meet the requirements of the Corporations Act.

RG 000.122 We expect compliance plan auditors of unlisted property schemes to be aware of the disclosure principles and advertising obligations in this guide. In determining whether a plan continues to meet the requirements of the Corporations Act, compliance plan auditors should carefully consider whether the compliance plan is adequate to ensure that the responsible entity applies the disclosure principles in its upfront and ongoing disclosure to retail investors and meets its obligations to avoid any misleading advertising. If a compliance plan auditor becomes aware of a breach by the responsible entity of these obligations, the auditor may be required to report the breach to us under s601HG(4).

Key terms

Term	Meaning in this document
ASIC	The Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> (Cth) including regulations made for the purposes of that Act
'as if complete' valuation	An estimate of the market value of a property, assuming certain specified improvements are made
'as is' valuation	An estimate of the market value of a property in its current state (i.e. without any further improvements)
Corporations Act	<i>Corporations Act 2001</i> (Cth) including regulations made for the purposes of that Act
CP 100	An ASIC consultation paper (in this example, numbered 100)
PDS	Product Disclosure Statement
related party	The term 'related party' should be interpreted broadly, taking into consideration the definitions of 'related party' in s228 (as applied to the scheme by Part 5C.7) and accounting standard AASB 124 'Related Party Transactions' and includes the responsible entity
RG 69	An ASIC regulatory guide (in this example, numbered 69)
s710	A section of the Corporations Act (in this example, numbered 710)
unlisted property scheme	An unlisted managed investment scheme that has or is likely to have at least 50% of its non-cash assets invested in real property and/or in unlisted property schemes Note 1: For the purposes of this definition, 'real property' does not include infrastructure assets. Note 2: this guide does not apply to listed property schemes.

Related information

Headnotes

Property schemes, retail investors, disclosure, listed, unlisted, disclosure principles, advertising, misleading, deceptive, responsible entities, valuers, compliance plans, compliance committees, compliance plan auditors

Regulatory guides

RG 69 *Debentures—improving disclosure for retail investors*

RG 120 *Commentary on compliance plans: Property schemes*

RG 132 *Managed investments: Compliance plans*

RG 156 *Debenture advertising*

RG 170 *Prospective financial information*

Legislation

Ch 2M, 6CA, Part 7.9, 7.10 Corporations Act, ASIC Act

Consultation papers and reports

CP 100 *Property schemes—improving disclosure for retail clients*

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