



**ASIC**

Australian Securities & Investments Commission

## REPORT 385

# Response to submissions on CP 211 Facilitating electronic offers of securities: Update to RG 107

March 2014

### **About this report**

This report highlights the key issues that arose out of the submissions received on Consultation Paper 211 *Facilitating electronic offers of securities: Update to RG 107* (CP 211) and details our responses in relation to those issues.

### 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.

### Disclaimer

This report 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.

This report does not contain ASIC policy. Please see Regulatory Guide 107 *Fundraising: Facilitating electronic offers of securities* (RG 107).

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## A Overview/Consultation process

1 In Consultation Paper 211 *Facilitating electronic offers of securities: Update to RG 107* (CP 211), we consulted on proposals to update our guidance in Regulatory Guide 107 *Electronic prospectuses* (RG 107)—to be renamed RG 107 *Fundraising: Facilitating electronic offers of securities*—to facilitate the use of the internet and other electronic means to make offers of securities under Ch 6D of the *Corporations Act 2001* (Corporations Act).

Note: In this document, references to sections (s), and chapters (Chs) are to the Corporations Act, unless otherwise specified.

2 Specifically, we consulted on our proposals to:

- (a) update RG 107 by explaining our interpretation of the fundraising provisions in Ch 6D and the application of these provisions to using and distributing electronic disclosure documents and application forms;
- (b) revoke Class Order [CO 00/44] *Electronic disclosure documents, electronic application forms and dealer personalised applications* and issue a new class order for personalised or Australian financial services (AFS) licensee created application forms;
- (c) provide good practice guidance to assist persons offering securities (offerors), distributors and publishers in using the internet when making offers of securities; and
- (d) incorporate our previous guidance contained in Regulatory Guide 150 *Electronic applications and dealer personalised applications* (RG 150) (now superseded SRG 150) into RG 107.

3 This report highlights the key issues that arose out of the submissions received on CP 211 and our responses to those issues.

4 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 211. We have limited this report to the key issues.

5 For a list of the non-confidential respondents to CP 211, see the appendix. Copies of these submissions are on the ASIC website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 211.

## Responses to consultation

6 We received four responses to CP 211. We are grateful to respondents for taking the time to send us their comments. We are also grateful to the individuals who provided feedback and discussed specific issues with us before, and during, the consultation process.

- 7 All respondents were generally very supportive of our proposal to update our guidance in RG 107, to revoke [CO 00/44] and to issue a new class order for personalised or AFS licensee created application forms.
- 8 On some issues, there were mixed responses and different views expressed. The main issues raised by respondents related to:
- (a) clarification of the legislative and policy settings in relation to the good practice guidance on:
    - (i) the obligation to distribute supplementary and replacement disclosure documents;
    - (ii) electronic application forms and electronic payment processes, including the current market practice of using BPAY; and
    - (iii) the electronic advertising of offers of securities; and
  - (b) the potential restrictiveness, practical difficulties and costs associated with certain parts of the good practice guidance, including:
    - (i) electronic distribution methods—in particular, the need to ensure that guidance is broad enough to encourage the innovative use of technology for electronic offers of securities;
    - (ii) the obligation for offerors to monitor social media;
    - (iii) the steps that offerors can take to minimise security risks;
    - (iv) the use of hypertext links; and
    - (v) the need to ensure receipt of electronic disclosure documents for entitlement offers.

## B The legislative and policy settings in relation to the good practice guidance

### Key points

All respondents were generally supportive of our views on the legislative and policy settings in our draft updated regulatory guide.

One respondent was concerned that our draft guidance in relation to when offerors should distribute supplementary or replacement disclosure documents went beyond the legal requirements of the Corporations Act.

One respondent sought clarification about whether the current market practice of using BPAY to apply for securities, without requiring the investor to submit a completed application form to the issuer, was consistent with the legal requirements and underlying policy objectives of the Corporations Act.

Some respondents were concerned that our draft guidance on the electronic advertising of offers of securities was too restrictive and went beyond the legal requirements of the Corporations Act.

We have amended our regulatory guide, as appropriate, to address this feedback.

### Supplementary and replacement disclosure documents

- 9 The draft updated version of RG 107 attached to CP 211 (draft updated RG 107) provided that offerors should not accept applications for securities if they have reason to believe that the investor did not receive the application form together with a supplementary or replacement disclosure document that had been lodged with ASIC—that is, if they have reason to believe a person is making an investment decision based on the outdated original disclosure document without the benefit of the supplementary or replacement document.
- 10 The draft guidance also recommended that offerors should take reasonable steps to determine which version of the disclosure document a particular application form accompanied to ensure that the application was based on the most up-to-date disclosure concerning the offer.
- 11 We received feedback that the draft guidance went beyond the legal requirements of the Corporations Act. One respondent submitted that the Corporations Act does not require offerors to ensure that investors who have already received a disclosure document receive an updated disclosure document, in the form of a supplementary or replacement disclosure document, or a new application form, unless the correcting information is

materially adverse to investors. As such, the respondent submitted that offerors should only be required to take steps to ensure that applications for securities received by the offeror are based on the most up-to-date disclosure document in cases where a supplementary or replacement disclosure document contains information that is ‘materially adverse’ from the point of view of the investor.

#### *ASIC’s response*

As a result of the feedback received, we have amended our good practice guidance in RG 107 to clarify that:

- as a matter of good practice, offerors should not accept applications if they have reason to believe a person is making an investment decision based on an outdated disclosure document without the benefit of any supplementary or replacement document; and
- to do so in circumstances where the offer is made after the supplementary or replacement document has been lodged with ASIC, or where the updated disclosure document contains information that is ‘materially adverse’ from the point of view of the investor, may contravene the Corporations Act.

We have included examples of steps that offerors can take to help avoid investors continuing to consider an outdated document in making their investment decision, where a disclosure document is generally accessible from a website.

We have clarified that offerors should take steps (and have included examples of such steps) to help determine which version of the disclosure document an application is based on. We have highlighted that this is particularly the case if new offers may be made after a supplementary or replacement document has been lodged with ASIC without any active steps being taken by the offeror (for instance, if the original disclosure document has continued to be accessible from a website).

We have provided additional guidance encouraging offerors, or persons involved in the distribution of an offer, to consider providing any supplementary or replacement document to investors who have already received the original disclosure document (even if not required to do so under the Corporations Act), if this will assist investors in making an investment decision.

## Electronic application forms and BPAY

- 12            The draft updated RG 107 recommended that offerors, distributors and publishers should take reasonable measures to ensure that an investor who is issued with an electronic application form is given access, at the same time and by the same means, to the electronic disclosure document.

- 13 The draft guidance contained examples of ways in which offerors accepting an application for securities can satisfy themselves that they have reasonable grounds to believe that the electronic application form distributed to the investor was accompanied by the electronic disclosure document.
- 14 The draft guidance also referred to securities only being issued or transferred *on receipt* of an electronic application form issued together with the electronic disclosure document, and offerors being able to accept electronic application forms and electronic payments (e.g. using BPAY) for offers of securities.
- 15 One respondent sought clarification about whether the current industry practice of using BPAY to apply and pay for securities (without requiring the investor to submit a completed application form) was consistent with the legal requirements and underlying policy objectives of the relevant provisions in the Corporations Act. This respondent submitted that the current market practice of using BPAY—where investors are only able to make electronic payments to apply for securities using information that is derived solely from a personalised application form that the investor receives with a disclosure document—satisfied the legal requirements of s723.
- 16 Some respondents also sought clarification about what we mean by accessing the application form ‘at the same time and by the same means’ as the disclosure document, given that application forms are commonly provided in a separate electronic document to the disclosure document so that they are able to be completed and submitted electronically (e.g. through an interactive html website).

#### *ASIC’s response*

As a result of the feedback received, we have amended RG 107 to clarify what we mean by ‘ensure that an investor who is issued with an electronic application form is given access, *at the same time and by the same means*, to the disclosure document’.

In particular, we have:

- clarified that electronic application forms and electronic disclosure documents do not need to be contained in the same document (e.g. a locked portable document format (PDF)) and that the industry practice of using an interactive html website to enable investors to apply for securities electronically is acceptable; and
- retained our guidance that an investor should not be able to gain access to an electronic application form without having first received and accessed the electronic disclosure document, or without confirming they have received and accessed the electronic disclosure document.



In relation to the industry practice of using BPAY or another electronic payment process to apply for securities, without the investor being required to submit a completed application form to the issuer, we have provided additional guidance. We consider that the policy objective underlying s723(1) is to ensure that an investor's decision to apply for securities is based on a current disclosure document.

We have explained in RG 107 that an electronic payment process (e.g. the current BPAY process) that contains a means of verifying or linking an identifiable investor's electronic payment to an application form distributed with a specific version of the disclosure document (including any supplementary or replacement disclosure document) is likely to satisfy the legal requirements and policy objectives of s723(1).

We have also explained that this verification can be achieved if:

- an investor makes an electronic payment using information that is contained only in an application form that was received together with a disclosure document (where that information is unique to the investor, to the offer and to a specific version of the disclosure document); and
- the issuer or the issuer's share registry can only issue or transfer the securities on receipt of that information.

In addition, we have provided an illustrative example of an electronic payment process that we believe satisfies the above settings (which we understand is similar to the current BPAY payment process).

We have also explained that we will consider applications for individual relief to permit the use of electronic payment processes that may have different features but may satisfy the underlying policy objectives of s723(1).

## Electronic advertising of offers of securities

- 17 The draft updated RG 107 recommended reasonable steps that offerors, distributors and publishers should take to ensure that promotional material is not provided in a way that investors would be likely to confuse it with the electronic disclosure document, and to encourage investors to make decisions on the basis of the information contained in the disclosure document.
- 18 Some respondents were concerned that our draft guidance went beyond the advertising restrictions contained in the Corporations Act. In particular, one respondent suggested that, if promotional material complied with the legislative requirements in s734 (and was otherwise not misleading), there would be no basis for limiting advertising in the electronic environment that would otherwise be permitted under the Corporations Act.

19 We received further feedback that our draft guidance in relation to statements that should be included in promotional material, and the separation of promotional material from a notification or email containing an electronic disclosure document, or link to an electronic disclosure document, was inappropriate and unnecessary.

*ASIC's response*

As a result of the feedback received, we have amended RG 107 to clarify our views on good practice in relation to the electronic advertising of offers of securities.

In particular, we have removed our recommendation that pre-offer promotional and advertising material should not be distributed in a way that individually targets investors and should, where possible, be limited to an offeror's generic website.

However, we have included additional guidance that offerors, distributors and publishers should include a clear and prominent statement in any promotional material, explaining that a disclosure document for the offer is available and how this can be obtained. This is because we consider that the risk that investors may confuse promotional material with the electronic disclosure document is heightened in the electronic environment.

We have also clarified in our guidance that:

- a basic summary of the offer (e.g. the identity of the issuer, the nature of the securities being offered, the price of the securities and the closing date of the offer) may be contained within the email or notification containing the electronic disclosure document or a link to the electronic disclosure document; and
- offerors, distributors and publishers should include a clear and prominent statement, in any promotional and advertising material, indicating that the information does not constitute part of the disclosure document and encouraging investors to access and read the disclosure document before making an investment decision.

## C Potential restrictiveness, practical difficulties and costs associated with the good practice guidance

### Key points

We received feedback that parts of the draft updated RG 107 were too technology specific, which may unintentionally reduce innovation and restrict the development of new ways for making electronic disclosure documents available to investors.

Concerns were expressed that our draft guidance on monitoring social media was too onerous for offerors, and some respondents submitted that offerors should not be required to monitor websites and social media (other than their own) or to correct any misleading information.

Some respondents expressed concerns about:

- the practical difficulties of complying with the guidance in relation to managing security risks; and
- the practical difficulties and costs associated with monitoring and ensuring receipt of disclosure documents.

### Electronic distribution methods and innovations in technology

- 20 The draft updated RG 107 set out our understanding of the main ways in which offerors and distributors currently distribute electronic disclosure documents and electronic application forms, and acknowledged that there may be other methods of distribution that offerors use in the future.
- 21 The draft guidance also contained numerous references to commonly used electronic file formats (e.g. PDF, tagged image file format (TIFF) or html) and currently used electronic tools (e.g. password encryption and read-only formats).
- 22 We received feedback that some parts of the draft updated RG 107 were too technology specific or terminology specific, which may unintentionally restrict the development of new and innovative ways for making electronic disclosure documents available to investors (i.e. through mobile platforms or other emerging technology platforms).
- 23 The feedback suggested that our guidance should further encourage the additional functionality that electronic communications provide, including multimedia components (e.g. video) and accessibility features (e.g. text or screen readers), which can make disclosure documents easier to read.

*ASIC's response*

As a result of the feedback received, we have amended our guidance in RG 107—in particular, Principle 1—to ensure that it is technology neutral, and to anticipate the development of new technology for delivering electronic disclosure documents in the future.

We remain of the view that our guidance sufficiently allows offerors to utilise the increased functionality of different electronic media.

We consider that information contained in non-text forms (e.g. video) within an electronic disclosure document is not currently permitted under Ch 6D. Accordingly, relief is required to permit the inclusion of such information. We consider that the most appropriate way to deal with non-text-based disclosure is for offerors to apply to ASIC for individual relief.

## Monitoring social media

- 24 The draft updated RG 107 included guidance that offerors should actively monitor their own website and social media pages, as well as other external social media networks (including investor blogs, chat sites, Twitter and Facebook), which they know regularly include postings about the offeror.
- 25 The draft guidance also recommended that offerors publish statements on their website clarifying any false or misleading information about the offer of securities which has been made available through social media networks and which has originated from a source other than the offeror or conventional market channels.
- 26 Some respondents were concerned that our guidance on monitoring social media was too onerous and disproportionately burdensome for offerors. They expressed the view that offerors should not be required to monitor websites and social media (other than their own) or to correct any false or misleading information.

*ASIC's response*

In response to the feedback received, we have amended our guidance in RG 107 in relation to monitoring social media so that it does not suggest that offerors should generally actively monitor websites or social media pages (other than their own).

We have also removed our guidance on whether offerors should make corrective disclosure if they become aware of false or misleading information about the offer or the offeror contained on any website or social media network. In our view, it is up to an offeror to determine how it should comply with its legal obligations under the Corporations Act (including the continuous disclosure requirements, and any prohibitions against false or misleading statements and misleading or deceptive conduct).

We have retained our guidance that the advertising provisions in Ch 6D should be considered by offerors, distributors and publishers during an offer period in relation to information contained on their own websites, social media networks and blogs, and that care should be taken to ensure that these provisions have not been contravened in relation to information contained on these platforms.

## Managing security risks

- 27 The draft updated RG 107 provided guidance that offerors, distributors and publishers should implement reasonable measures to protect investors (and themselves) from the risk of fraud, infringements of investor privacy and unauthorised tampering with disclosure documents.
- 28 The draft guidance also included examples of reasonable measures that could be taken, and contemplated that offerors and distributors should certify whether the electronic disclosure document, or website hosting the electronic disclosure document and application form, were secure.
- 29 Some respondents expressed concerns about the practical difficulties of complying with the guidance on managing security risks. In particular, one respondent expressed the view that an offeror or distributor would be unlikely to be able to make assurances about the security of a website hosting the disclosure document and application form, because this is the publisher's responsibility.

### *ASIC's response*

In response to the feedback received, we have amended RG 107—specifically, Principle 2 of the good practice guidance—to clarify the reasonable steps that we think offerors should take to ensure that a website containing the electronic disclosure document or electronic application form is secure.

For example, such reasonable steps would include the offeror ensuring that the publisher has a legal or contractual obligation (e.g. under the terms of any agreement between the offeror and publisher) to ensure that:

- the website containing the electronic disclosure document or electronic application form is, and will remain, secure; and/or
- the publisher has adequate software and safeguards to mitigate security risks.

## Use of hypertext links

- 30 The draft updated RG 107 provided good practice guidance about the use of hypertext links to electronic disclosure documents, within electronic disclosure documents and from electronic disclosure documents to external electronic documents or websites.
- 31 In particular, the draft guidance stated that hypertext links in emails or notifications sent to investors should take investors straight to the first page of the electronic disclosure document.
- 32 The draft guidance also stated that hypertext links from the electronic disclosure document to the electronic application form should not be used (unless the link can only be accessed after the disclosure document has been viewed in its entirety, or the investor has positively confirmed that they have read the disclosure document).
- 33 Many respondents expressed the view that the draft guidance on the use of hypertext links conflicted with other parts of the regulatory guide relating to jurisdictional disclaimers or confirmation by investors of their identity and/or eligibility to participate in an offer. These respondents suggested that hypertext links to a jurisdictional disclaimer page, or an eligibility confirmation or identity verification page, should be permitted before accessing the disclosure document.
- 34 One respondent was of the view that hypertext links to the application form from the contents page (but not from other pages) of the disclosure document should be permitted, and that the requirement for investors to only access the application form after they have viewed the disclosure document in its entirety (or have confirmed that they have read it) should be removed, as this was too restrictive and was not required for paper disclosure documents.

### *ASIC's response*

We think that the risk that investors may apply for securities without reading a disclosure document is heightened in the electronic environment.

We believe it is good practice for offerors to encourage investors to read the disclosure document before they make a decision to invest in securities.

We also think that offerors should ensure that recipients of electronic disclosure documents are eligible to participate in the offer, and that relevant confirmations should be acquired from recipients before they can access the electronic disclosure document.

As such, we have amended our guidance in RG 107 to clarify that:

- a hypertext link from an email or notification may take investors to a webpage that confirms their eligibility to participate in an offer (including but not limited to a jurisdictional disclaimer or confirmation), but that investors should then be taken directly to the first page of the electronic disclosure document;
- an investor should only be provided with a hypertext link from the electronic disclosure document to the electronic application form after the investor has ‘accessed’ (rather than ‘viewed’ or ‘read’) the electronic disclosure document;
- offerors are not required to confirm that an investor has read the electronic disclosure document ‘in its entirety’ before accessing the electronic application form; and
- we do not expect offerors or distributors to use additional software to monitor whether investors have viewed or read the electronic disclosure document in its entirety before they apply for securities.

## Ensuring receipt of electronic disclosure documents

35 The draft updated RG 107 included good practice guidance that, for offers of securities to existing investors, offerors and distributors should take reasonable steps to ensure that investors receive the electronic disclosure document and electronic application form.

36 The draft guidance also recommended that, if an offeror or distributor becomes aware that the disclosure document has not been received, they should make reasonable attempts to contact the investor by other means to give them the disclosure document (e.g. by sending it to an alternative electronic address or by sending a paper copy by mail to the investor).

37 Some respondents expressed concerns that there were practical difficulties with complying with this good practice guidance.

38 For example, one respondent was concerned that, if a rights issue offer sent by email failed to reach its intended recipient and was ‘bounced back’, offerors and distributors may not be able to send an investor a paper copy of the disclosure document within sufficient time to enable the investor to receive the document and apply for securities before the offer close date, particularly in light of the ASX’s proposed shortening of the timetables for rights issues.

39 Another respondent was concerned that the guidance would result in increased costs for offerors and distributors who would need to establish and implement new measures to comply with the guidance.

*ASIC's response*

In response to the feedback received, we have amended RG 107—specifically, Principle 3—to clarify that we do not expect offerors and distributors to use special software to monitor whether emails containing electronic disclosure documents have been received, read or accessed. In our view, using a standard email 'bounce-back' or undeliverable notification function is sufficient.

We remain of the view that, as a matter of good practice, offerors and distributors should make reasonable attempts to contact the investor by other means to provide them with a copy of the disclosure document (if they have not received the electronic version).

We recommend that offerors (and their share registries, as relevant) should endeavour to ensure that investors' contact details are kept up to date, particularly their email addresses.



## Appendix: List of non-confidential respondents

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- Corporations Committee of the Business Law Section of the Law Council of Australia
  - Australian Financial Markets Association
  - Broadridge Financial Solutions, Inc.
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