REPORT 139

Report on submissions for CP 100 Unlisted property schemes—improving disclosure for retail investors

September 2008

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 100 *Unlisted property schemes—improving disclosure for retail investors* (CP 100) and our responses 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 the 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 46 *Unlisted property schemes—improving disclosure for retail investors* (RG 46).

Contents

A Overview

Key points

In July 2008, we consulted on improving disclosure for retail investors in unlisted property schemes.

While there was broad support for improvements in disclosure for retail investors, we have made some changes to the final guide in response to the submissions received.

About our consultation

1 On 8 July 2008, we released Consultation Paper 100 *Unlisted property schemes—improving disclosure for retail investors* (CP 100): see www.asic.gov.au/cp. CP 100 set out our proposals to improve disclosure for retail investors in unlisted property schemes.

2 CP 100 included a draft regulatory guide with 8 disclosure principles designed to extract information that is key to analysing the risks associated with unlisted property schemes. We proposed that responsible entities apply the disclosure principles to Product Disclosure Statements (PDSs) and ongoing disclosures to retail investors.

Note: The final guide, Regulatory Guide 46 *Unlisted property schemes—improving disclosure for retail investors* (RG 46), was published on 2 September 2008. A copy of the final guide is available at www.asic.gov.au/rg.

3 As part of our consultation, we wrote to 98 responsible entities of unlisted property schemes seeking their feedback on CP 100. This report highlights the key issues that arose out of the submissions received to CP 100, both from the responsible entities and generally, and our response 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 for feedback in CP 100.

5 For a list of non-confidential respondents to CP 100, see the Appendix. Copies of these submissions are available at www.asic.gov.au/cp under CP 100.

Responses to consultation

6 We received 23 written responses to CP 100 from a wide variety of sources including responsible entities of unlisted property schemes, relevant industry bodies, compliance plan auditors, law firms and ratings providers. We also met with a number of interested parties during the consultation period, including responsible entities and industry bodies. Table 1 summarises our consultation. We are grateful to respondents for taking the time to provide us with their comments.

Table 1: Unlisted property scheme coverage from consultation

Number of responsible entities visited	24
Percentage of total responsible entity population	25%
Number of unlisted property schemes those responsible entities represent	160
Percentage of total number of schemes	56%
Assets managed by responsible entities visited	$16.58 billion
Percentage of total assets under management of all responsible entities of unlisted property schemes	60%
Written submissions from various sources	23

7 Most respondents supported the need to improve disclosure for retail investors and suggested few material changes to our proposals in CP 100. We have therefore kept the overall approach of CP 100, including all of the disclosure principles in the draft guide.

8 In response to submissions, we have clarified our expectations and simplified some of the disclosure principles: see Section C of this report. We have also allowed a longer time frame for implementation: see Section D of this report.

9 We have confirmed that we will not take an 'if not, why not' approach for the unlisted property sector, in contrast to our approach for debentures and mortgage schemes: see Regulatory Guide 69 *Debentures—improving disclosure for retail investors* (RG 69) and Regulatory Guide 45 *Mortgage schemes—improving disclosure for retail investors* (RG 45). However, we may review this approach, depending on how economic conditions affect the unlisted property sector: see paragraphs 64–66 of this report.

10 In this report, we have grouped comments from the submissions and our response to them based on the main issues raised by respondents:

(a) who the disclosure principles should apply to, including their application to closed funds (see Section B);

(b) the proposed disclosure principles, including the formulae for calculating gearing and interest rates (see Section C);

(c) how the disclosure principles should be applied, in particular to ongoing disclosures and the proposed timing for implementation (see Section D);

(d) how the disclosure principles could be supported by compliance plans, compliance committees and compliance plan auditors (see Section E); and

(e) the use of investment ratings in advertisements for unlisted property schemes (see Section F).

B Who should the disclosure principles apply to?

Key points

Most submissions supported our proposed definition of 'unlisted property scheme'.

We have clarified that the final guide does not apply to serviced strata schemes or timeshare schemes.

However, we consider that investors in closed funds should still be given the disclosure principle information.

Our proposal

11 We proposed that the disclosure principles would apply to registered unlisted property schemes in which retail investors invest directly or indirectly (e.g. through an investor directed portfolio service). We defined an '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 unlisted property schemes.

12 We proposed that the disclosure principles would 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.

Definition of 'unlisted property scheme'

13 Most submissions supported our proposed definition of 'unlisted property scheme'. However, a few respondents queried the benefit in providing disclosure principle information to investors in closed funds (i.e. funds that do not offer investors any withdrawal rights).

14 Some respondents suggested serviced strata schemes and timeshare schemes should not be subject to the regime. Respondents said the disclosure principles are not relevant to these products because they are 'lifestyle' rather than investment products.

ASIC's response

The definition of 'unlisted property scheme' remains largely unchanged in the final guide. We have clarified that the guide does not apply to serviced strata schemes or timeshare schemes.

We consider that investors in closed funds should be given the disclosure principle information. The disclosure principles reflect information that we consider is required under s675 and 1017B of the Corporations Act for ongoing disclosure. These provisions do not distinguish between existing investors in closed and open funds. Therefore, we consider that investors in closed funds are legally entitled to the information under s675 or 1017B (as applicable).

Also, although investors in a closed fund cannot use the information to exit the scheme they can use it to monitor the performance of the responsible entity and compare this performance with representations made in the original PDS.

The final guide allows responsible entities of closed funds a longer transition period in which to update existing investors compared with open funds: see Section D.

C Disclosure principles

Key points

This section outlines the key issues from submissions and our response for each of the proposed disclosure principles in CP 100:

- Gearing ratio (see paragraphs 18–23);
- Interest cover (see paragraphs 24–29);
- Scheme borrowing (see paragraphs 30–35);
- Portfolio diversification (see paragraphs 36–38);
- Valuation policy (see paragraphs 39–43);
- Related party transactions (see paragraphs 44–45);
- Distribution practices (see paragraphs 46–48); and
- Withdrawal arrangements (see paragraphs 49–51).

Usefulness of disclosure principle information

15 Respondents agreed that the information covered by the disclosure principles in our draft regulatory guide was important for analysing an investment in an unlisted property scheme, especially given current economic conditions. It was confirmed that sophisticated investors routinely require this type of information (both before investing and during the term of the investment).

16 Some respondents, although acknowledging the importance of the information, queried its usefulness to retail investors. Although we have simplified some of the disclosure principles, we do not consider that retail investors should be denied important information on the basis that they may not understand it (particularly as there is no clear empirical evidence of this and varying levels of financial literacy amongst retail investors). We are also publishing an investor guide to help investors understand the disclosure principle information.

17 A few respondents also suggested that the disclosure principle information was inconsistent with clear and concise disclosure.

ASIC's response

We do not agree that our guidance is inconsistent with clear and concise disclosure because we expect the disclosure principle information to be concise. The final guide provides more guidance on how the disclosure principle information can be clearly and effectively presented.

Disclosure principle 1: Gearing ratio

18 A gearing ratio 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. In CP 100, we proposed that responsible entities should disclose a gearing ratio for unlisted property schemes calculated using the following formula:

Gearing ratio = total liabilities/total assets

19 We consulted on whether there is an alternative formula that would be preferable. Some respondents said the formula should be changed by:

(a) replacing 'total liabilities' with 'total debts'. Respondents were concerned that 'total liabilities' includes the total value of financial claims on a scheme's assets which may include liabilities of the scheme which are not relevant to the scheme's borrowings and debt levels;

(b) excluding expenses, accrued and undistributed income and other amounts from the formula which are likely to change frequently; and

(c) excluding intangible assets such as goodwill from 'total assets'.

20 A number of respondents submitted alternative formulae which they suggested would be more consistent with current industry practice including:

(a) *Gearing ratio = debt/total assets*;

(b) *Gearing ratio = interest bearing liabilities/total assets;*

(c) *Gearing ratio = debt/property assets*; or

(d) *Gearing ratio = (total liabilities – cash)/(total assets – cash).*

21 We also received feedback that a gearing ratio would be inappropriate for schemes with no liabilities (e.g. start ups). There were also some concerns about application of a gearing ratio to schemes with significant development assets.

22 CP 100 consulted on whether we should include a separate ratio, such as loan to cost ratio, that accommodates development assets. The few responses that we received on this proposal said that the disclosure of a ratio for development assets in addition to a gearing ratio would be likely to confuse investors.

23 The draft regulatory guide proposed that responsible entities should explain to investors the relevance of any loan covenants that specify a level of gearing. A number of respondents said that this would be too onerous, especially for schemes with multiple lenders. Respondents were also concerned that gearing ratios in loan covenants are generally calculated on detailed formulae which vary from loan to loan and between different

tranches of debt. Given the different bases for their calculations, this information could not be used by investors to compare schemes.

> *ASIC's response*
>
> Given respondents' concerns, we have changed the gearing ratio formula to:
>
> *Gearing ratio = total interest bearing liabilities/total assets*
>
> We changed 'total liabilities' to 'total interest bearing liabilities' because it better reflects industry practice.
>
> In the final regulatory guide, we have not maintained our proposal that responsible entities explain the relevance of any loan covenants that specify a different formula for gearing because disclosure of a number of different gearing ratios may be confusing for retail investors.
>
> In the final guide, we have not specifically excluded unlisted property schemes that have no liabilities. However, we have clarified that if the application of a disclosure principle to an unlisted property scheme's particular business model would be clearly inappropriate, then the responsible entity should explain why this information has been omitted.
>
> We were not persuaded that disclosure of a gearing ratio is inappropriate for schemes that have significant development assets. Those schemes can explain that their gearing ratio is calculated using the cost value of assets.

Disclosure principle 2: Interest cover

24 Interest cover gives an indication of an unlisted property scheme's ability to meet the interest payments from earnings. In CP 100, we proposed that responsible entities disclose the scheme's interest cover calculated using the following formula:

Interest cover = EBIT/interest expense

25 A number of responses indicate that EBIT is too narrow a definition and does not reflect the interest cover ratio commonly used in loan covenants. In particular, it was submitted that non-cash flow items such as unrealised gains and losses, depreciation and amortisation should be excluded from EBIT as they cannot be used to meet interest expenses.

26 Some respondents were concerned that we had not recognised the common practice of interest rate hedging in the calculation of interest expense.

27 A number of respondents suggested that it was inappropriate to extend this disclosure principle to:

(a) new schemes where the responsible entity has not yet entered into debt financing arrangements in relation to the scheme; and

(b) some unlisted property schemes who engage in property development where the interest is capitalised.

28 We also proposed that where an unlisted property 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.

29 No respondent supported disclosure of 'look through' interest cover because it is not regarded by industry as a meaningful figure and is difficult to calculate if the scheme invests in a number of unlisted property schemes. Respondents did not support disclosure of a debt service cover ratio.

ASIC's response

In the final guide, we have changed the interest cover formula to:

Interest cover = EBITDA minus unrealised gains plus unrealised losses/interest expense

Based on the submissions we received, we are satisfied that interest rate hedging is sufficiently common to warrant inclusion in the calculation of interest expense. In the final guide, we have specified that interest expense calculations should take into account any related hedging arrangements.

In the final guide, the disclosure principle does not include:

- look-through interest cover;
- debt service cover ratio; or
- the relevance of interest cover loan covenants (for the same reasons this was removed from the gearing ratio disclosure principle: see our response under Disclosure principle 1: Gearing ratio.

New schemes with no interest expense and schemes that capitalise interest should explain why they have omitted information on interest cover ratio.

Disclosure principle 3: Scheme borrowing

30 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.

31 Where a scheme expects to borrow funds or has borrowed funds, we proposed in CP 100 that responsible entities should clearly and prominently disclose information on when debt and credit facilities will mature and the risks associated with those facilities.

32 Respondents were generally supportive of disclosure of this information and agreed that 12-month increments were appropriate. Some minor technical amendments were suggested, in particular the use of the term 'borrowings' rather than 'debt'. One respondent believed that similar information on interest rate hedging should be disclosed, including if no hedging arrangements were in place.

33 Where debt and credit facilities are to mature within 12 months, we proposed that the responsible entity should make appropriate disclosure about the prospects of refinancing or possible alternative actions (e.g. sales of assets). A number of respondents were concerned that because many external factors can impact on a responsible entity's ability to refinance debt, a responsible entity may not have a reasonable basis to disclose the prospects of refinancing.

34 We also proposed that responsible entities disclose information about breaches of any loan covenants that is reasonably required by investors. A number of respondents suggested that such disclosure should be limited to breaches of any material covenants that are likely to result in the lender requesting early repayment of the facility. One respondent was concerned that disclosing this information would be problematic in that it would involve considerable additional disclosures in the PDS that would quickly become out-of-date and would not be useful to investors.

35 In CP 100, we asked whether information on prospective breaches would be helpful for retail investors. We received mixed responses on this issue, including some suggestions that information on prospective breaches would never be required.

ASIC's response

Responsible entities should explain any risks associated with their borrowing and credit facility maturity profile, including whether borrowings have been hedged and if so, to what extent.

If the responsible entity has no reasonable grounds for commenting on the prospect of refinancing or possible alternative actions, then they should state this and explain why to investors.

We consider that it is up to each responsible entity to determine when a breach of a loan covenant will amount to a 'material' breach - as this will vary from scheme to scheme. We have added a note clarifying that retail investors may reasonably require disclosure on prospective breaches.

We did not agree that disclosure of this information would involve significant additional disclosures on the basis that scheme borrowing information quickly goes out-of-date. The regulatory guide makes it clear that only material information will require a new or supplementary PDS.

Disclosure principle 4: Portfolio diversification

36 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 of the scheme.

37 In CP 100, we proposed that 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.

38 Overall, there was broad acceptance of this proposal. However, a number of respondents commented that retail investors would not understand some of the technical information covered by this disclosure principle. In addition, some respondents asked that we clarify what 'significant tenant' meant.

ASIC's response

While this disclosure principal remains materially unchanged, we have removed disclosure of the discount rate and terminal capitalisation rate (or terminal yield) of an unlisted property scheme's portfolio.

In terms of 'significant tenant', responsible entities should now disclose the name and percentage of lettable area or income for the top 5 tenants that each constitute 5% or more by income across the investment portfolio.

Disclosure principle 5: Valuation policy

39 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.

40 In CP 100, we proposed that 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 and details of the professional qualifications required;

(d) the methodology used;

(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.

41 Some respondents queried whether all of this information would aid investor decision-making. A number of respondents submitted that it was inappropriate for them to disclose a policy on valuation method as the valuation method should be determined by the valuer, rather than the responsible entity.

42 We also proposed that 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.

43 Two respondents commented that they only conduct 'as if complete' valuations in relation to their development properties and that there would be significant additional cost in obtaining a valuation on an 'as is' basis as well.

ASIC's response

We have reduced the amount of information responsible entities should disclose in relation to their valuation policy, but specified more detail to be provided for actual valuations of significant properties in disclosure principle 4 (Portfolio diversification).

We have not altered our proposal in relation to 'as is' and 'as if complete' valuations. We believe that the risks associated with 'as if complete' valuations should be disclosed and that investors should also be provided with 'as is' valuations.

Disclosure principle 6: Related party transactions

44 In CP 100, we proposed that 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.

45 The submissions received were mostly supportive of this disclosure principle and it was evident that sophisticated investors already require this type of information. However, a few respondents had concerns about how ongoing disclosure applied to existing related party transactions.

> *ASIC's response*
>
> We believe that information on related party transactions is important. We have clarified our expectations on ongoing disclosure which should address concerns about updating information on related party transactions.

Disclosure principle 7: Distribution practices

46 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. Where a scheme has made or forecasts to make distributions to members, we proposed that 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;

(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.

47 Overall, respondents supported disclosure of distributions practices. Respondents commented that the proposed disclosure principle was not clear on the period to which the opinion on sustainability relates or on whether the references to distributions includes all past distributions.

48 We also asked whether it was feasible to disclose whether distributions sourced other than from realised income are sustainable. A number of respondents submitted that it could be difficult to comment on sustainability because this would constitute a forecast.

> *ASIC's response*
>
> We have changed this disclosure principle so that it includes only information on current and forecast distributions. If the current distribution or forecast distribution is sourced other than from realised income, responsible entities should disclose whether this is sustainable over the next 12 months.
>
> The responsible entity should explain if they are unable to disclose whether distributions are sustainable because there are no reasonable grounds for such disclosure. We consider it is inadequate for a responsible entity to simply state that the payment of distributions historically is no guarantee they will continue to pay.

Disclosure principle 8: Withdrawal arrangements

49 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.

50 In CP 100, we proposed that where 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;

(b) any significant risk factors or limitations that may impact on the ability of investors to withdraw from the scheme; and

(c) a clear explanation of how investors can exercise their withdrawal rights, including any conditions on exercise.

51 There was broad support for this proposal. It was suggested that where withdrawals from the scheme are to be funded from an external liquidity facility, the material terms of this facility should be disclosed including any rights the provider has to suspend or cancel the facility

> *ASIC's response*
>
> We have adopted the suggestion on disclosure about external liquidity facilities but otherwise did not change this disclosure principle.

D Applying the disclosure principles

Key points

Submissions were generally supportive of our approach to applying the disclosure principles in upfront and ongoing disclosures. However, respondents did raise some implementation issues for ongoing disclosures.

Due to the number of submissions on the difficulties with applying the disclosure principles by 31 October 2008, we have allowed a longer transition period to facilitate better disclosure to investors.

Almost unanimously, respondents opposed applying an 'if not, why not' approach to unlisted property schemes.

Upfront disclosure in a PDS

52 In CP 100, we proposed that responsible entities of unlisted property schemes should apply the disclosure principles when preparing a PDS.

53 Respondents were generally supportive of our approach to applying the disclosure principles. A number of respondents were concerned about the format of such disclosure in a PDS and where the disclosure principle information should appear (e.g. should the disclosure principles be addressed in a separate section of the PDS?).

54 Some submissions were concerned with the suitability of expecting this sort of disclosure in a PDS on the basis that the PDS is an infrequent document and that disclosure would be better served by online updates through incorporation by reference. One respondent submitted that having to issue a supplementary PDS if the disclosure principle information in a PDS is out-of-date would require frequent publication of a supplementary PDS which may not be appropriate.

55 A number of respondents asked us to clarify when a supplementary PDS would be required.

ASIC's response

In response to submissions, we have provided greater guidance on how information dealing with the disclosure principles should be set out in a PDS. We consider that key information will be prominently disclosed if it is set out in the first few pages of the PDS. However, if the information is better included later in the document, the first few pages of the PDS should provide a summary of the information with a clear reference to more detailed disclosure.

ASIC's response (cont.)

We have also explained that for existing PDSs that continue in use after 30 November 2008 responsible entities should either:

- include the disclosure principle information on a website referred to in the PDS (if the omission of disclosure principle information from the PDS is not materially adverse); or
- update the PDS by a new or a supplementary PDS so that it includes the disclosure principle information.

Note: PDSs commonly allow information to be updated through a website if the updated information is not materially adverse: see Class Order (CO 03/237) *Updated information in product disclosure statements*. We consider that if the omission of the disclosure principle information from an existing PDS is not materially adverse, the responsible entity will generally be able to rely on CO 03/237 to update the PDS for this information without the need for a supplementary or new PDS.

Ongoing disclosure

56 In CP 100, we proposed that if there are any material changes to disclosure principle information, the responsible entity should explain this in ongoing disclosures. We considered that best practice would be for responsible entities to give information directly to members or make it easily accessible (e.g. by updates on the scheme's website).

57 We proposed that periodic statements under s1017D should update disclosure principle information (if this has not previously been notified to investors).

58 CP 100 also recommended that responsible entities should consider whether it would help investors if they were given more frequent updates of the disclosure principle information. We recommended that responsible entities update investors at least every 6 months.

Implementation issues

59 A number of respondents asked us to clarify how we expected responsible entities to meet the proposals for 'ongoing disclosure' of the disclosure principle information. Respondents were concerned about the amount of information they would have to gather and the frequency of this information-gathering for ongoing disclosure.

60 In particular, respondents submitted that ongoing disclosure should be limited to materially adverse changes in the operations of the scheme that would affect the disclosure principle information.

61 Some respondents queried the use of periodic statements as way of communicating updated information because periodic statements are typically only used to communicate financial information such as unit price.

ASIC's response

We have clarified our expectations for ongoing disclosure based on the recommended 6-monthly updates. In particular, we have provided that although it is not necessary to repeat information that has not changed in these updates, we consider it is good practice to advise investors in writing:

- of any material changes to the disclosure principle information since the last update (so far as the responsible entity is aware);
- how to access the scheme's disclosure principle information on the website (if available there); and
- that they are entitled to a hard copy of the disclosure principle information on request.

If a responsible entity does not otherwise report to investors, they should update them on the status of the disclosure principle information in the periodic statement. The periodic statement is merely one option for updating investors (e.g. where the responsible entity does not provide quarterly or half-yearly reports).

When you need to apply the disclosure principles

62 A number of respondents stated that it would be difficult for responsible entities to provide good disclosure on the disclosure principles by 31 October 2008, as proposed in the draft guide. This was particularly the case for responsible entities with a large number of schemes. Responsible entities of schemes with a large number of investors said that the logistics of printing and postage would make it practically difficult to comply by 31 October, especially when combined with other regular reporting to investors.

63 For closed funds, it was submitted that the information was not needed as urgently as 31 October 2008 because investors cannot use the information to exit the scheme.

ASIC's response

Due to the number of submissions on the difficulties with applying the disclosure principles by 31 October 2008, we have allowed a longer transition period in the final guide to facilitate better disclosure to investors: see Table 2 below.

We accept that responsible entities of closed funds should have longer to comply. The date of 31 March 2009 will allow responsible entities of closed funds to use their December accounts as the basis for their initial update to investors.

We have facilitated the use of online disclosure in the first instance by confirming that the initial update to existing investors can be done by way of an online disclosure on a website that is currently used to update investors.

ASIC's response (cont.)

We have also confirmed that responsible entities may be able to update disclosure principle information in existing PDSs through online disclosure, provided that omitting the information in the PDS itself would not be materially adverse to investors: see CO 03/237.

Table 2: Timetable for applying the disclosure principles

Date	Action(s)
By 30 November 2008	Responsible entities of open schemes (i.e. schemes with withdrawal facilities) should provide existing investors with updated disclosure that applies the disclosure principles.
From 30 November 2008	By 30 November 2008, where an existing PDS is still in use, responsible entities should either: • include the disclosure principle information on a website referred to in the PDS (if the omission of disclosure principle information from the PDS is not materially adverse); or • update the PDS by a new or a supplementary PDS so that it includes the disclosure principle information. Any PDS dated on or after 30 November 2008 must include the information covered by the disclosure principles.
By 31 March 2009	Responsible entities of closed schemes should provide existing investors with updated disclosure that applies the disclosure principles, unless the investors need earlier disclosure to make a decision on withdrawal rights that commence on or shortly after 31 March 2009.

Not an 'if not, why not' approach

64 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.

65 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 proposed adopting a similar approach for unlisted mortgage schemes (see Consultation Paper 99 *Mortgage schemes-improving disclosure for retail investors*), in CP 100 we did not propose to extend the 'if not, why not' approach to unlisted property schemes.

66 Almost unanimously, respondents opposed applying an ‘if not, why not’ approach to unlisted property schemes. Respondents submitted that it would be difficult to apply the disclosure principles on an ‘if not, why not’ basis because unlisted property schemes tend to vary in size and investment strategies. For example, a few respondents said that it would be difficult for ASIC to specify a gearing or interest cover benchmark.

> *ASIC’s response*
>
> At this time, we will not take an ‘if not, why not’ approach to unlisted property schemes.
>
> We will be reviewing the unlisted property schemes sector to see whether our guidance has improved investor disclosures. We will also continue to closely analyse this sector and the impact of global and domestic economic conditions. In particular, we will monitor the restricted availability of credit in the context of the sector’s generally high debt levels.
>
> Our analysis may lead us to establish benchmarks for property schemes to disclose against on an ‘if, not why not’ basis.

E Compliance plans, compliance committees and compliance plan auditors

Key points

Most submissions saw no significant issues with the proposed role for compliance committees and compliance plan auditors in supporting the disclosure principles when carrying out their duties.

67 In CP 100, we stated that we expected compliance committees and compliance plan auditors for unlisted property schemes to be aware of the disclosure and advertising requirements and to have regard to these requirements in carrying out their duties.

68 Submissions received from auditors generally considered that compliance plans would not have to be modified to specifically address the disclosure principles and advertising standards but noted that responsible entities may have to implement new policies and procedures. Other submissions noted that, in most cases, no changes or only minor changes would be needed.

69 Most submissions saw no significant issues with the proposed role for compliance committees and compliance plan auditors in having regard to the disclosure principles when carrying out their duties. Submissions varied on the costs that would be incurred by compliance committees and compliance plan auditors in fulfilling the proposed role. Some stated that it would be a substantial cost, while others stated that the cost would be minimal. Generally, the submissions received from auditors stated that the proposals would have little impact on costs.

ASIC's response

Consistent with submissions, we have made only minor changes to our proposals on compliance plans, compliance committees and compliance plan auditors. We expect that existing compliance plans would generally specify procedures that are adequate to ensure compliance with the disclosure and advertising obligations.

F Investment ratings

Key points

While submissions generally noted that investment ratings were useful to retail investors, several submissions noted the difficulties that retail investors face in interpreting investment ratings.

70 Some retail investors and their financial advisers use investment ratings as a source of information when deciding whether to invest in unlisted property schemes. We have some concerns about the use of investment ratings for unlisted 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.

71 In CP 100, we proposed that references to investment ratings in property scheme advertisements should be properly explained to retail investors so as not to create a misleading impression about the scheme.

72 Submissions said that investment ratings were useful to retail investors. However, several submissions noted the difficulties that retail investors face in interpreting investment ratings. Some submissions considered that retail investors placed too much weight on investment ratings.

73 Some respondents raised concerns about the proposal to provide additional information if the research house was not a prominent research house. Queries were also raised about which firms constitute a prominent research house.

ASIC's response

We have modified our original proposals so that advertisements that include an investment rating should state that investment ratings are only one factor to take into account when deciding whether to invest. We have kept our expectation that investment ratings in advertisements should be properly explained.

Given uncertainty about what research houses would be considered 'prominent', we have decided that advertisements need not provide additional information in this case. All research houses should hold an Australian financial services licence in any event. Based on submissions, the key risks for investors are that they do not understand investment ratings and that they place too much weight on them. Our standards for the use of investment ratings address these key risks.

We are considering how investment ratings are used by investors as part of a separate review (with Treasury) of the regulation of ratings agencies and research houses that was initiated by the Minister for Superannuation and Corporate Law in May 2008.

Appendix: List of non-confidential respondents

- Australasian Compliance Institute
- Australian Direct Property Investment Association
- Australian Pacific Exchange
- Australian Property Institute
- Becton
- Capital Planning Accountants
- Deloitte
- Financial Planning Association
- Grant Thornton
- Investment and Financial Services Association
- Industry Superannuation Property Trust
- KPMG
- Lonsec
- Macquarie Bank Group of Companies
- McCullough Robertson Lawyers
- Property Investment Research Pty Ltd
- Property Council of Australia
- QLD Building Services Authority
- Stockland
- Standard and Poor’s
- Westpac Investment Bank