

Attachment 19 to CP 239: Draft regulatory guide



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 66

Transaction-specific disclosure for PDSs

September 2015

About this guide

This guide is for issuers of Product Disclosure Statements (PDSs) and their advisers.

It sets out our policy on the use of transaction-specific PDSs under s1013FA of the *Corporations Act 2001* (Corporations Act), describes the relief available to a disclosing entity that issues interests in registered managed investment schemes and outlines the circumstances in which we may exercise ASIC's determination powers under s1013FA(3).

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 draft guide was issued in September 2015 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Practice Note 66, issued October 1997, reissued October 2002, July 2004, December 2004, rebadged as regulatory guide 7 July 2007

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.

DRAFT

Contents

A Overview	4
Scope of this guide	4
Transaction-specific disclosure and the continuous disclosure regime	5
When a transaction-specific PDS can be used	6
Disclosure requirements for transaction-specific PDSs	6
B When a transaction-specific PDS can be used	7
Requirements of s1013FA	7
Effect of suspensions from quotation and trading halts on continuous disclosure	8
Relief from enhanced disclosure provisions	9
ASIC's exclusion powers—s1013FA(3)	10
C Disclosure requirements for transaction-specific PDSs	12
Content and presentation requirements	12
Right to obtain documents	12
Key terms	14
Related information	15

DRAFT

A Overview

Key points

Section 1013FA of the *Corporations Act 2001* (Corporations Act) permits a disclosing entity that issues interests in a registered managed investment scheme to use a shorter, or transaction-specific, Product Disclosure Statement (PDS) if the interests are continuously quoted securities

This guide sets out our policy on the use of transaction-specific PDS.

This guide also explains our relief to allow a disclosing entity to use a transaction-specific PDS when they are also a beneficiary of certain technical accounting relief given by us under s341, and the circumstances in which we may exercise ASIC's determination powers under 1013FA(3).

Scope of this guide

RG 66.1 This guide sets out:

- (a) how we administer s1013FA;
- (b) the relief we give to enable transaction-specific disclosure to be used where an issuer of a PDS would otherwise be prevented from using such disclosure;
- (c) ASIC's power to exclude a disclosing entity from using transaction-specific disclosure; and
- (d) the content required in transaction-specific disclosure.

RG 66.2 Section 1013FA permits a disclosing entity that issues continuously quoted securities to omit information (required under s1013D, 1013E and 1013F) from the PDS if the information is already disclosed in:

- (a) the annual financial report most recently lodged with ASIC by the disclosing entity;
- (b) any half-year financial report most recently lodged with ASIC by the disclosing entity after the lodgement of the most recent annual financial report and before the date of the PDS; or
- (c) any continuous disclosure notices given by the issuer after the lodgement of the most recent annual financial report and before the date of the PDS.

Such a PDS is also commonly referred to as a 'transaction-specific PDS'.

Note: Continuously quoted securities are discussed in RG 66.15.

DRAFT

Transaction-specific disclosure and the continuous disclosure regime

- RG 66.3 Transaction-specific disclosure was originally introduced for prospectuses by the *Corporate Law Reform Act 1994* (Corporate Law Reform Act), which also introduced a continuous disclosure regime for certain entities. Since the Corporate Law Reform Act, the transaction-specific prospectus provisions have been amended further and are now contained in s713 of the Corporations Act.
- RG 66.4 The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (CLERP 9 Act) introduced transaction-specific PDSs. Before the commencement of the CLERP 9 Act, the disclosure provisions for financial products made no express distinction between the requirements for continuously quoted securities and those that are not continuously quoted. The CLERP 9 Act introduced s1013FA to permit a disclosing entity that issues continuously quoted securities to issue more concise, or transaction-specific, PDSs.
- RG 66.5 The CLERP 9 Act introduced s1013FA to align the operation of the transaction-specific disclosure regime for PDSs with the framework for prospectuses in Ch 6D of the Corporations Act as it applies to continuously quoted securities. Section 1013FA is modelled largely on s713 but does not replicate that section, given the differing content requirements of PDSs and prospectuses.

Note: See Section C of draft Regulatory Guide 000 *Offering securities under disclosure documents* (draft RG 000) for our detailed policy on transaction-specific prospectuses.

Rationale for transaction-specific disclosure for PDS

- RG 66.6 Transaction-specific PDSs were introduced so that a disclosing entity could issue a PDS with specified limited content for continuously quoted securities.
- RG 66.7 Transaction-specific disclosure for PDS is possible only within a regime of continuous disclosure because the market generally should have all information necessary to reach an informed view about the relevant continuously quoted securities.
- RG 66.8 That view will be based on previous disclosure the entity has made to the market about its activities, financial standing and prospects. The market's view will already be reflected in the price of those continuously quoted securities: see para 254 of the Explanatory Memorandum to the Corporate Law Reform Bill 1992.
- RG 66.9 The policy underpinning the transaction-specific PDS regime is that, when issuing continuously quoted securities, disclosing entities need not disclose

DRAFT

information to investors if that information is already available in the marketplace. The disclosing entity is subject to various disclosure obligations. For instance, if it is listed on ASX it is required to immediately disclose information that would have a material effect on the price or value of the securities. In the absence of the transaction-specific PDS regime, a PDS would unnecessarily duplicate information that is available in the market.

When a transaction-specific PDS can be used

- RG 66.10 A disclosing entity can only use transaction-specific disclosure if it has not received relief from specified disclosure provisions at any time during the 12 months before the issue of the transaction-specific PDS.
- RG 66.11 We have given relief in draft ASIC Corporations (Disregarding Technical Relief) Instrument 2015/XX to allow a disclosing entity to use a transaction-specific PDS when they are also the beneficiary of certain technical accounting relief given by us under s341.

Disclosure requirements for transaction-specific PDSs

- RG 66.12 Section 1013FA allows a transaction-specific PDS to not repeat information contained in a disclosing entity's recent financial reports and continuous disclosure notices; however, the disclosure still needs to satisfy the requirements in s1013D and 1013E for any other information.
- RG 66.13 A transaction-specific PDS must either inform people of their right to obtain a copy of the entity's financial reports and continuous disclosure notices, or be accompanied by or include a copy of those documents.

B When a transaction-specific PDS can be used

Key points

A disclosing entity can only use transaction-specific disclosure if it has not received relief from specified disclosure provisions at any time during the 12 months before the issue of the transaction-specific PDS.

We have given relief in draft ASIC Corporations (Disregarding Technical Relief) Instrument 2015/XX to allow a disclosing entity to use a transaction-specific PDS when they are also the beneficiary of certain technical accounting relief given by us under s341.

Requirements of s1013FA

RG 66.14 Transaction-specific disclosure applies to a PDS that relates to continuously quoted securities: s1013FA(1).

Continuously quoted securities

RG 66.15 Continuously quoted securities are securities that are, at all times in the three months before the date of the PDS:

- (a) in a class of securities that were quoted enhanced disclosure (ED) securities (see s111AE(1A)); and
- (b) securities of an entity for which the following are satisfied:
 - (i) no exemption under s111AS or 111AT or modification under s111AV covered the entity or any person as director or auditor of the entity;
 - (ii) no exemption under s741(1)(a) or declaration under s741(1)(b) relating to a provision that is a disclosing entity provision for the purposes of Div 4 of Pt 1.2A covered the entity or any person as director or auditor of the entity; and
 - (iii) no order under s340 or 341 covered the entity or any person as director or auditor of the entity.

Note: In 2007, an amendment was made to the definition of ‘continuously quoted securities’ to reduce the listing period required from 12 months to three months (*Corporations Legislation Amendment (Simpler Regulatory System) Act 2007*). The Explanatory Memorandum to the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 (at paras 5.16–5.17) indicated that the 12-month period was unnecessarily long and could be reduced without undermining investor protection.

RG 66.16 For these purposes, continuously quoted securities are not in different classes merely because of a temporary difference in the distribution rights attaching

to the continuously quoted securities or because different amounts have been paid up on the continuously quoted securities.

Convertible securities

- RG 66.17 A transaction-specific PDS cannot be issued for options over continuously quoted securities under s1013FA, unless the options are themselves continuously quoted securities. However, a disclosing entity may apply for individual relief to do so.
- RG 66.18 We may also grant relief, on application, to allow a PDS to contain only the information required by s1013FA(2) for convertible securities that are not continuously quoted securities. Applicants must demonstrate that investors have been able to obtain sufficient information under the continuous disclosure regime or by other means to make an informed decision about both the nature and risks of the convertible securities that are the subject of the offer.

Effect of suspensions from quotation and trading halts on continuous disclosure

Suspensions from quotation

- RG 66.19 One part of the definition of ‘continuously quoted securities’ in s9 requires that the relevant continuously quoted securities are in a class of securities (as defined in s92(1)) that were quoted ED securities at all times in the three months before the date of the PDS.
- RG 66.20 Interests in a registered managed investment scheme are in a class of quoted ED securities if:
- (a) an undertaking to which interests in a registered scheme relates is— with the agreement, consent or acquiescence of the responsible entity— included in the official list of a prescribed financial market; and
 - (b) the market’s listing rules (according to their terms) apply to the undertaking for a class (which may be some or all) of managed investment products for the scheme.
- RG 66.21 The Explanatory Memorandum to the Financial Services Reform Bill 2001 notes that it is possible (depending on an individual market’s listing rules) that continuous disclosure may apply when managed investment products are suspended, or after a body is listed but before managed investment products are actually quoted: para 18.6.

Trading halts

- RG 66.22 As in the case of a suspension, a halt in the trading of continuously quoted securities does not prevent a disclosing entity using transaction-specific disclosure. If the listing rules continue to apply to continuously quoted securities, then the securities may still qualify for the use of transaction-specific disclosure.

Relief from enhanced disclosure provisions

- RG 66.23 A disclosing entity can only use transaction-specific disclosure if it has not received relief from specified disclosure provisions at any time during the 12 months before the issue of the transaction-specific PDS: see para (b) of the definition of ‘continuously quoted securities’ in s9. This means that, without relief, the entity may not use transaction-specific disclosure if it received relief under:
- (a) s111AS, 111AT or 111AV;
 - (b) any of the disclosing entity provisions under s741(1); or
 - (c) s340 or 341.
- RG 66.24 In some cases, however, the granting of relief under these sections will not have had a materially adverse effect on the level of information available to the market. In these cases, we may grant individual relief to allow the use of a transaction-specific PDS.
- RG 66.25 We have given relief in draft ASIC Corporations (Disregarding Technical Relief) Instrument 2015/XX to allow a disclosing entity to use a transaction-specific PDS when they are also the beneficiary of certain technical accounting relief given by us under s341. We consider the technical accounting relief does not detract from the level of information available to the market.

Individual relief

- RG 66.26 On receiving an application for individual relief, we may discuss it with the operator of any prescribed financial market on which the entity is listed (e.g. ASX). This is because the legislature envisaged that, in the case of listed entities:
- (a) we and the relevant financial market operators would cooperate in making sure that the market is fully informed; and
 - (b) issuers of continuously quoted securities would comply with the enhanced disclosure provisions of the Corporations Act.

RG 66.27 Accordingly, we may consult with the operator of any Australian prescribed financial market on which the entity is listed about the effect of the relief on the level of information available to the market.

ASIC's exclusion powers—s1013FA(3)

RG 66.28 Under s1013FA(3), ASIC has the power to exclude a disclosing entity from the benefit of s1013FA. When such a determination is in force, the relevant disclosing entity cannot use transaction-specific disclosure during the period specified.

RG 66.29 Under s1013FA(3), we may exercise ASIC's power to exclude a disclosing entity from s1013FA if we are satisfied that, in the previous 12 months, the entity issuing the continuously quoted managed investments has not complied with any or all of its disclosure obligations to:

- (a) prepare audited financial reports (Ch 2M);
- (b) provide continuous disclosure (s674 and 675);
- (c) correct a defective issuer's notice (s1012DAA(10) and 1012DA(9)); and
- (d) ensure there are no false or misleading statements in an issuer's notice required by s1012DAA(2) or 1012DA(5) (s1308).

RG 66.30 In addition, we may exclude the operation of the transaction-specific PDS regime if we are satisfied that, in the previous 12 months, the responsible person for the PDS has contravened its obligations to:

- (a) meet the PDS disclosure conditions (s1016E); or
- (b) ensure it does not prepare defective disclosure documents (s1021D, 1021E and 1021J).

RG 66.31 For instance, we might use ASIC's exclusion powers to prevent a disclosing entity from using the transaction-specific PDS regime if the entity's continuously quoted securities are suspended from quotation or are the subject of a trading halt and we have concerns that the entity has not complied with its continuous disclosure obligations.

RG 66.32 Before exercising ASIC's exclusion powers, we will generally offer the disclosing entity an opportunity to make submissions about whether the determination should be made. We will not usually regard it as a sufficient argument against making a determination that the breach of the relevant obligation has since been rectified in some way.

RG 66.33 Each determination must be published in the *ASIC Gazette*: s1013FA(4). We will also send the determination to the operator of the market on which the

entity is listed to ensure the operator is aware of the determination for its supervision of listed entities and for market transparency.

Note: A disclosing entity should consider, at the time it becomes aware of its failure to comply with the provisions and after a determination is made, whether it has an obligation to disclose any information to comply with its continuous disclosure obligations.

Period of exclusion

RG 66.34 A determination made by us under s1013FA(3) will generally exclude a disclosing entity from using a transaction-specific PDS for a period of 12 months from the date of the determination.

DRAFT

C Disclosure requirements for transaction-specific PDSs

Key points

Section 1013FA allows a transaction-specific PDS to not repeat information contained in a disclosing entity's recent financial reports and continuous disclosure notices.

The PDS disclosure still needs to satisfy the requirements in s1013C, 1013D and 1013E for any other information

A transaction-specific PDS must either inform people of their right to obtain a copy of the entity's financial reports and continuous disclosure notices, or be accompanied by or include a copy of those documents.

Content and presentation requirements

- RG 66.35 Part 7.9 contains, under s1013D, a list of specific statements and information that must be included in a PDS and a general obligation, under s1013E, that a PDS contain any other information that might reasonably be expected to influence a retail client's decision to acquire the financial product. While s1013FA allows a transaction-specific PDS to not repeat information contained in a disclosing entity's recent financial reports and continuous disclosure notices, the disclosure still needs to satisfy the requirements in s1013D and 1013E for any other information.
- RG 66.36 In addition, s1013C requires all of the information included in a PDS to be worded and presented in a clear, concise and effective manner.

Right to obtain documents

- RG 66.37 A transaction-specific PDS must either inform people of their right to obtain a copy of any of the following documents, or be accompanied by or include a copy of the following documents:
- (a) the disclosing entity's most recently lodged annual financial report;
 - (b) any half-year financial report lodged after the most recent annual financial report; and
 - (c) any continuous disclosure notices given by the disclosing entity after the most recent annual financial report and before the lodgement of the PDS (see s1013FA(2)).

- RG 66.38 If the transaction-specific PDS informs people of their right to obtain a copy of the above documents, it must include a statement that the disclosing entity will give a copy of the document free of charge to anyone who asks for it during the application period for the PDS: see s1013FA(2).

Note: See Regulatory Guide 221 *Facilitating digital financial services disclosures* (RG 221) for our detailed policy on the use of technology, including email and the internet, to provide PDSs and meet disclosure requirements.

- RG 66.39 Section 1013I requires a transaction-specific PDS to include a statement that the entity, as a disclosing entity, is subject to regular reporting and disclosure obligations, and that copies of documents lodged by the entity may be obtained from, or inspected at, an ASIC office.

Statement identifying documents

- RG 66.40 We consider it is not enough that the disclosing entity simply state that it will supply on request the general types of documents listed in s1013FA(2). At a minimum, the statement must identify each document that is available. It is enough if the entity gives the descriptive title of the document or a description of its content, without summarising the document.

Responding to a request for documents

- RG 66.41 An issuer of a transaction-specific PDS must supply a copy of a document referred to in a s1013FA(2) statement free of charge to a person who asks for it. This obligation lasts throughout the application period of the transaction-specific PDS. The issuer should supply the documents requested within a reasonable time of receiving the relevant request. This is so the investor has enough time to consider the material before making a decision to invest.

Key terms

Term	Meaning in this document
CLERP 9 Act	<i>Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004</i>
continuously quoted securities	Has the meaning given in s9
convertible securities	Has the meaning given in s9
Corporate Law Reform Act	Corporate Law Reform Act 1994
Corporations Act	<i>Corporations Act 2001</i> , including any regulations made for the purposes of that Act
disclosing entity	A body described in s111AC
ED securities	Has the meaning given by s111AD of the Corporations Act
PDS	Product Disclosure Statement
Product Disclosure Statement	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
responsible person	For a PDS, a person described in s1013A(3)
RG 221 (for example)	An ASIC regulatory guide (in this example numbered 221)
s1013FA (for example)	A section of the Corporations Act (in this example numbered 1013FA)
securities	Has the meaning given in s92A
transaction-specific PDS	A PDS prepared under s1013FA

Related information

Headnotes

convertible securities, disclosing entity, enhanced disclosure provisions, exclusion, Product Disclosure Statements, quoted ED securities, right to obtain documents, securities, suspensions from quotation, trading halts, transaction-specific PDSs

Legislative instruments

Draft ASIC Corporations (Disregarding Technical Relief) Instrument 2015/XX

Regulatory guides

RG 221 *Facilitating digital financial services disclosures*

Draft RG 000 *Offering securities under a disclosure document*

Legislation

CLERP 9 Act

Corporate Law Reform Act

Corporations Act, Chs 2M and 6D, Pts 1.2A and 7.9, s9, 92(1), 111AE(1A), 111AS, 111AT, 111AV, 340, 341, 674, 675, 713, 741(1), 1012DA(5), 1012DA(9), 1012DAA(2), 1012DAA(10), 1013C, 1013D, 1013E, 1013F, 1013FA, 1016E, 1021D, 1021E, 1021J, 1308

Corporations Legislation Amendment (Simpler Regulatory System) Act 2007

Explanatory Memorandum to the Corporate Law Reform Bill 1992, para 254

Explanatory Memorandum to the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007, paras 5.16–5.17

Explanatory Memorandum to the Financial Services Reform Bill 2001, para 18.6

DRAFT