



**ASIC**

Australian Securities & Investments Commission

**REPORT 473**

# **Response to submissions on CP 239 Disclosure documents: Update to ASIC instruments and guidance**

March 2016

## **About this report**

This report highlights the key issues that arose out of the submissions received on Consultation Paper 239 *Disclosure documents: Update to ASIC instruments and guidance* (CP 239) 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 254](#) *Offering securities under a disclosure document* (RG 254);
- [Regulatory Guide 55](#) *Statements in disclosure documents and PDSs: Consent to quote* (RG 55);
- [Regulatory Guide 66](#) *Transaction-specific disclosure for PDSs* (RG 66);
- [Regulatory Guide 173](#) *Disclosure for on-sale of securities and other financial products* (RG 173);
- [Regulatory Guide 189](#) *Disclosure relief for rights issues* (RG 189); and
- [Regulatory Guide 228](#) *Prospectuses: Effective disclosure for retail investors* (RG 228).

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## A Overview/Consultation process

- 1 In [Consultation Paper 239](#) *Disclosure documents: Update to ASIC instruments and guidance* (CP 239), we consulted on proposals to update and reorganise a range of our guidance on Ch 6D of the *Corporations Act 2001* (Corporations Act) by:
  - (a) consolidating into a new regulatory guide our policy on the different types of disclosure documents and the procedure for offering securities for issue or sale under a disclosure document;
  - (b) updating Regulatory Guide 173 *Disclosure for on-sale of securities and other financial products* (RG 173) and consolidating into that guide other guidance regarding the on-sale of quoted securities that are issued on conversion of convertible notes; and
  - (c) issuing minor updates to certain other regulatory guides.
- 2 We also consulted on proposals to remake, in conjunction with the release of the new and updated regulatory guides, a number of legislative instruments to which those guides relate.
- 3 This report highlights the key issues that arose out of the submissions received on CP 239 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 239. We have limited this report to the key issues.
- 5 For a list of the non-confidential respondents to CP 239, see the appendix. Copies of these submissions are currently on the ASIC website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 239.

### Responses to consultation

- 6 We received four responses to CP 239 from the legal community and other interested parties. We are grateful to respondents for taking the time to send us their comments. We are also grateful to individuals who provided feedback and discussed specific issues with us prior to, and during, the consultation process.
- 7 Most respondents were generally supportive of our proposal to update and consolidate our guidance.

- 8           The matters on which issues were raised, or more detailed comments provided, differed among respondents. Some of the issues respondents focused on were:
- (a) our proposal to issue a new legislative instrument that modifies s723 and 724 to deal with the time periods applying to the minimum subscription and quotation conditions;
  - (b) our proposed guidance on the quotation condition as it applies to the offer of primary securities and attaching securities;
  - (c) our proposal to limit our relief enabling the use of transaction-specific disclosure for offers of certain convertible notes and convertible preference shares; and
  - (d) the adoption of exchange-neutral language in our guidance.

## B Making new legislative instruments

### Key points

Respondents were generally supportive of our proposals to issue two new legislative instruments to:

- clarify the application of the minimum subscription and quotation conditions, and streamline the process for an issuer to extend the relevant time periods; and
- provide disclosure and on-sale relief for offers of bank hybrids, together with the ordinary shares issued on conversion of such instruments.

### Minimum subscription and quotation conditions

- 9 In CP 239 we proposed to issue a new legislative instrument that modifies s723 and 724 to deal with the time periods applying to the minimum subscription and quotation conditions.
- 10 Attachment 16 to CP 239, draft Regulatory Guide 254 *Offering securities under a disclosure document*, also included guidance on the application of the minimum subscription and quotation conditions to offers of securities at Section I.
- 11 The feedback we received largely supported the proposed relief.

### Flexibility for issuers when lodging a refresh document

- 12 One respondent suggested that there should be greater flexibility regarding the requirements for issuers to:
- (a) offer applicants one month to withdraw if a refresh document is lodged; and
  - (b) repay the money received from applicants if the quotation period expires before that condition is met.

#### ASIC's response

As discussed in Regulatory Guide 254 *Offers of securities under a disclosure document* (RG 254), the purpose of the quotation condition is to ensure that investors get a marketable investment if and when the issue of securities goes ahead.

However, we acknowledge that in some cases the failure to meet the quotation condition may not be a delay of such a magnitude that applicants will seek to have their application money returned.

After consideration, we have decided to maintain the policy setting for our relief set out in RG 254 and [ASIC Corporations \(Minimum Subscription and Quotation Condition\) Instrument 2016/70](#), because:

- our relief is consistent with the consequences set out in the Corporations Act, under which an issuer must give applicants one month to withdraw (where applicants are entitled to withdrawal rights) or repay application money (if the quotation condition has expired);
- under the terms of our relief, the issuer is able to extend the minimum subscription and quotation conditions before their expiry by lodging a refresh document. This mechanism is specifically designed to address those cases where the issuer considers that it is unlikely to satisfy one or more conditions and intends to proceed with the offer; and
- without the requirement to return application money within a reasonable time if the quotation condition expires, the ability of the quotation condition to ensure investors either get the offered securities or their application money returned within a reasonable time may be eroded.

### Seven-day application period

- 13 A respondent requested that we consider providing relief from the first part of the quotation condition, which requires that an application for quotation be made within seven days after the date of the disclosure document. The respondent suggested that the issuer should be able to extend the time period in which the application for quotation of securities must be made.

#### *ASIC's response*

We have amended our relief in ASIC Corporations (Minimum Subscription and Quotation Condition) Instrument 2016/70 to modify s723 and 724 so that a refresh document can also extend the time for applying for quotation of securities, even after the initial seven days has passed.

Our relief seeks to address the disruptive consequences that follow a breach of the seven-day application requirement, by providing a mechanism—the lodgement of a refresh document—to extend this period. However, it does not relieve the issuer from complying with the substantive obligations currently required by s724 (and which are imposed in a modified form by our instrument).

We have also updated our guidance at Table 9 of RG 254 and RG 254.246–RG 254.259 to reflect this relief.

## Disclosure and on-sale relief for offers of regulatory capital instruments

- 14 We received support for our proposed new legislative instrument to provide disclosure relief for regulatory capital instruments issued by banks and other prudentially regulated bodies (bank hybrids), and on-sale relief for the ordinary shares issued on conversion of such instruments.

### Substitution of a third-party acquirer as the issuer of ordinary shares on conversion

- 15 We received feedback that, in very limited and specific circumstances, our proposed relief may also be available for the ordinary shares of a third-party acquirer who comes to control the issuer of the bank hybrid.

#### *ASIC's response*

Draft ASIC Corporations (Regulatory Capital Securities) Instrument 2015/XX (Attachment 2 to CP 239), and particularly the definition of 'regulatory capital securities', was necessarily drafted in broad terms to cover the range of bank holding structures that have to date necessitated individual relief. In particular, relief under [Superseded Class Order \[SCO 00/195\] Offer of convertible securities under s713](#) and [Superseded Class Order \[SCO 10/322\] On-sale for convertible notes issued to wholesale investors](#) was typically not available for offers of bank hybrids, as the issuer of the hybrids may not be the body that issues securities on conversion.

We have become aware that the relief proposed in CP 239 would also cover a third-party acquirer, if the terms of the hybrid:

- do not require conversion when a change of control is to occur (a term requiring conversion in these circumstances is typically included as a protection for hybrid securityholders, who may then participate in the control transaction as ordinary shareholders of the target); and
- provide that where such a change of control does occur, the third-party acquirer may become the issuer of ordinary shares under the instrument.

Such an outcome departs from the policy basis for providing disclosure relief for retail offers—broadly, that investors have access to sufficient information about the ordinary shares to be issued on conversion as a result of:

- the continuous disclosure of the listed parent; and
- the disclosure contained in the transaction-specific prospectus for the offer of bank hybrids.

Non-operating holding company structures do not change this analysis, as any such structure so interposed would 'be' the issuer in a substantive sense.



We have therefore issued [ASIC Corporations \(Regulatory Capital Securities\) Instrument 2016/71](#) with conditions for retail offers that preclude such reliance by a third-party acquirer, but continue to accommodate the potential interposition of a non-operating holding company.

### Consent requirements for enhanced cleansing notices

- 16 We received feedback that our relief could be used in connection with a larger range of wholesale offers of bank hybrids if we provided an exception from the consent requirement for statements made by credit rating agencies.

#### *ASIC's response*

We acknowledge that the consent requirement in our relief may prevent issuers of bank hybrids from preparing an enhanced cleansing notice by simply attaching a copy of the offer document to a very short cleansing notice (of the type typically used for placements). This is because the offer document may contain a credit rating, and the credit rating agency will not provide consent for that statement.

We note the consent requirement for enhanced cleansing notices is consistent with the requirements for a transaction-specific prospectus, on which the content of an enhanced cleansing notice is based. It is also consistent with equivalent consent requirements in many other regulated documents. Further, attaching a document that contains a credit rating (whether or not consent has been obtained) may not be consistent with our guidance in Information Sheet 99 *Disclosure of credit ratings in Australia* (INFO 99).

We have therefore not amended the consent requirement in ASIC Corporations (Regulatory Capital Securities) Instrument 2016/71, and note that issuers may be able to satisfy the majority of the content requirements of an enhanced cleansing notice by extracting the relevant information from the wholesale or foreign retail offer document, rather than reproducing it verbatim.

## C Remaking Ch 6D class orders

### Key points

Respondents were generally supportive of our consolidation of, and updates to, our instruments relating to fundraising.

We received feedback suggesting changes to our instruments to extend:

- our consent relief for references to historical geological reports;
- our relief for advertising, market research and roadshow presentations;
- our relief enabling offers of certain convertible securities to be made using a transaction-specific prospectus;
- our disclosure relief for non-traditional rights issues as it may apply to dual-listed entities;
- certain relief available for offers of securities to offers of financial products; and
- other existing relief, which was not the subject of consultation in CP 239, to prescribed financial markets other than ASX.

We also received feedback suggesting new relief and changes to our existing policy on when ASIC will approve nominees for the purposes of s615.

### Consent relief for statements taken from certain geological reports

- 17 One respondent suggested that we should significantly amend our consent relief, for including statements taken from certain geological reports, by extending that relief to reports:
- (a) available on a prescribed financial market (rather than being limited to reports available on ASX);
  - (b) prepared by any person permitted to do so under the JORC Code—for example, a member of a recognised professional organisation (rather than being limited to reports prepared by Members or Fellows of either the Australasian Institute of Mining and Metallurgy (AusIMM) or the Australian Institute of Geoscientists (AIG)); and
  - (c) prepared under the Society for Petroleum Engineers' Petroleum Resources Management System, Canadian National Instrument 43-101 and the South African Code for Reporting of Exploration Results, Mineral Resources and Mineral Reserves (rather than being limited to reports prepared in accordance with the JORC Code).

*ASIC's response*

We have extended our relief in ASIC Corporations (Consents to Statements) 2016/72 to geological reports available from a prescribed financial market.

Extending our relief in this way has the practical effect that our relief will also apply to geological reports prepared under reporting standards other than the JORC Code, where those standards are permitted under the listing rules of the prescribed financial market on which the geological report is available.

We remain comfortable with the membership condition, which ensures the person preparing the report is subject to the relevant professional standards of organisations within our jurisdiction and, by virtue of membership of AusIMM or AIG, is bound by the Valmin Code for independent experts' reports concerning mineral and petroleum assets and securities.

We have not received any individual applications for relief in connection with reports prepared by members of recognised professional organisations, and therefore have not identified a need for the relief to be so expanded.

## Consent relief for books, journals or comparable publications

- 18 One respondent sought a clarification of the categories of publicly available information that may be used without consent under our relief for 'books, journals or comparable publications', and suggested that the relief also allow information from these documents to be graphically represented (rather than the current requirement that it be a correct and fair copy of, or extract from, a statement that has already been published in a book, journal or comparable publication).

*ASIC's response*

Our consent relief for books, journals or comparable publications is provided on the basis that:

- it is generally impractical for an issuer to obtain the consent of the author of a statement in a book, journal or other comparable publication where the statement is not specific to the issuer or its business; and
- by limiting the categories of publication for which relief is available in this way (which our current guidance notes already extends to other publicly available information of a similar standard available electronically), ensures a level of accountability for the content, which is subject to some form of editorial control.

We consider any modification to the text of the relief to broaden these categories or to permit graphical representation of publicly available information risks undermining the protective function of

the consent requirement for attributed statements in regulated documents.

We have instead provided additional guidance in Regulatory Guide 55 *Statements in disclosure documents and PDSs: Consent to quote* (RG 55) at RG 55.62–RG 55.63, which reflects the way we currently administer this relief in practice and encourages issuers who do rely on this relief to appropriately reference the source document and include a statement that the author has not provided their consent for the inclusion of the statement.

## Relief relating to advertising, market research and roadshow presentations

- 19 In CP 239 we consulted on the consolidation of class orders dealing with relief relating to advertising, market research and roadshow presentations to preserve their effect beyond their respective sunset dates. We also consulted on the expansion of the relief to cover any prescribed financial market (instead of just ASX) and statements made or published via electronic services.
- 20 The feedback we received largely supported our proposed consolidation and expansion of the relief. One respondent, however, suggested that we should consider further expanding our relief in [Superseded Class Order \[SCO 00/175\]](#) *Pre-prospectus roadshow presentations* to provide standard relief to permit pre-registration arrangements for initial public offerings (IPOs) and communications to employees and other stakeholders about the IPO in advance of prospectus lodgement, instead of leaving these matters for individual relief. The respondent noted that the individual relief granted by ASIC in these circumstances is largely standardised.

### *ASIC's response*

We have preserved the effect of the class orders dealing with relief relating to advertising, market research and roadshow presentations by issuing [ASIC Corporations \(Market Research and Roadshows\) Instrument 2016/79](#). We have incorporated expanded relief to cover any prescribed financial market and statements made or published via electronic services.

We acknowledge the feedback suggesting that further expansion of our relief to include broader communications to employees and other stakeholders before lodgement of a prospectus and pre-registration arrangements for IPOs may be of assistance.

However, we have maintained the scope of the relief proposed in CP 239, which does not permit such communications to be made (in the absence of individual relief). This approach was reached after careful consideration of the applications that we have

received for individual relief to undertake such communications and the policy underlying [SCO 00/175]. In particular, the terms on which we are prepared to grant individual relief are often tailored to the proposed content of the communication or the class of persons to whom that communication could be made. Our ability to assess the terms of the relief being sought in the context of each individual applicant's proposed communication provides an essential filter on the making of such communications.

This approach is consistent with the policy underlying [SCO 00/175], which provided relief in relation to a specific policy setting regarding the undertaking of roadshow presentations to Australian financial services (AFS) licensees or their representatives. The provision of relief to facilitate the pre-prospectus communications would necessarily encompass an extremely broad range of circumstances, which may blur the boundaries of the relief and result in communications being made with an improper purpose.

Considering the individual relief that we have historically provided to permit such communications, we are of the view that we can continue to appropriately facilitate these communications through the provision of individual relief. On balance, we consider this is a preferable approach to ensure that the underlying principles of the advertising provisions, and our relief, are met.

## Relief to enable offers of certain convertibles under s713

- 21 In CP 239 we proposed to remake our relief contained in [SCO 00/195]. We invited submissions on whether there should be any limitations on the availability of the disclosure relief we proposed to provide in our remade instrument, to ensure a sufficient relationship between the convertible and underlying security.
- 22 One respondent to this question favoured ASIC continuing the current arrangements under [SCO 00/195], noting that there is no compelling evidence of abuse of the class order. The respondent suggested that it would be unduly restrictive to narrow the scope of relief so that it applies only to convertible notes or convertible preference shares that are convertible at the election of the holder. They also suggested that our clarification that relief applies only where the issuer of the convertible note or convertible preference share is also the issuer of the underlying security may inadvertently create tax and accounting issues.
- 23 A respondent also suggested that we extend our relief to converting securities.

*ASIC's response*

In response to feedback regarding the consequences of narrowing of the scope of relief, we have retained the existing scope from [SCO 00/195] to facilitate transaction-specific disclosure for convertible notes and convertible preference shares, so that relief applies regardless of the conversion mechanism: see [ASIC Corporations \(Offers of Convertibles\) Instrument 2016/83](#).

Based on feedback received, we have also granted relief to permit transaction-specific disclosure for the offer of converting securities. We consider that a converting feature creates a sufficient connection between the convertible and underlying security such that transaction-specific disclosure is appropriate.

We consider that this position addresses the concerns raised by the respondent that relief may be unduly restrictive it is available only to offers of securities convertible at the option of the holder. This position also addresses the concerns that the difference in terms may not warrant the requirement of a full prospectus.

For clarity, we have proceeded with the same issuer requirement as proposed. We are of the view that this requirement was always implied by our existing relief. We will continue considering, on a case-by-case basis, whether to give disclosure relief where the issuer of the convertible note or convertible preference share is not the same as the issuer of the underlying security. We consider this a preferable approach to help ensure the underlying principles of transaction-specific disclosure, and our relief, are met.

We have updated our guidance in RG 254 on the scope of relief: see RG 254.53–RG 254.58.

## Disclosure relief for rights issues

- 24 In CP 239 we highlighted that, in remaking our instruments and updating our guidance relating to disclosure relief for rights issues, we proposed to make only minor changes to extend our relief to rights issues conducted using a Pro-rata Accelerated Institutional Traditional (or Tradeable) Retail Entitlement Offer (PAITREO) structure.
- 25 We received support for this proposal, but also received feedback from one respondent suggesting we:
- (a) vary our current relief to facilitate certain additional aspects of accelerated rights issues for dual-listed entities;
  - (b) make more fundamental amendments to our policy on when we will approve nominees for the purposes of s615;
  - (c) grant new relief applying to non-renounceable rights issues to relieve issuers of the obligation to issue to the nominee, and for the nominee to

- then sell, securities or rights that would otherwise be issued to foreign holders to whom the rights issue has not been extended; and
- (d) grant new relief to permit securities or rights that have not been offered to foreign holders to be included as part of the available allocation for retail oversubscriptions, rather than requiring those securities or rights be issued to and sold by the nominee (and the proceeds of such sale then being remitted to foreign holders).

#### *ASIC's response*

The relief we provided under [Superseded Class Order \[SCO 08/35\] Disclosure relief for rights issues](#), and continue to provide under [ASIC Corporations \(Non-Traditional Rights Issues\) Instrument 2016/84](#), reflects our policy that the most important features of the rights issue disclosure exemption are those relating to the equal opportunity principle—that is, the requirements that ensure members have a pro-rata entitlement to invest at the same offer price. The relief also recognises that technical issues with rights issue structures should not frustrate the intention of the disclosure exemption—which is to facilitate retail investors' access to a discounted form of fundraising, while ensuring they have adequate information about the securities or interests being offered.

In this context, we have and will continue to consider granting individual relief to facilitate rights issues (including those using non-traditional structures) for dual-listed entities where we are satisfied that doing so is both consistent with the equal opportunity principle (including as it relates to the same offer price requirement in a multi-currency context) and involves investors being provided with adequate information. Given the small number of dual-listed entities that seek to undertake rights issues each year, and the range of foreign regulatory regimes to which such offers will also be subject, we consider providing individual relief best allows us to ensure these policy objectives are maintained while also facilitating efficient capital raising by dual-listed entities.

We acknowledge the feedback on our approach to considering applications to approve nominees under s615, and note that this has previously been discussed in [Consultation Paper 193 Takeovers, compulsory acquisitions and substantial holdings](#) (CP 193), and submissions made in response to that consultation on this same issue addressed in [Report 350 Response to submissions on CP 193: Takeovers, compulsory acquisitions and substantial holdings](#) (REP 350). We are not making any changes to our current policy, which is set out in [Regulatory Guide 6 Takeovers: Exceptions to the general prohibition](#) (RG 6).

Similarly, we note that the application of s615 to non-renounceable rights issues can be problematic where the rights issue price is close to or exceeds the market price—in these cases, the nominee may suffer a loss in relation to the securities



and no proceeds will flow to the foreign holders. However, we do not propose to change our policy or grant class relief, but we will continue to consider individual relief in the limited circumstances set out in RG 6.

We recognise that new relief to permit securities or rights that have not been offered to foreign holders to be included as part of the available allocation for retail oversubscriptions could form part of a broader dispersion strategy, which has the overall goal of minimising the control impact of a rights issue that may result in a substantial shortfall.

However, as retail oversubscriptions are satisfied at the offer price, this would have the effect of depriving foreign holders of any proceeds they would otherwise receive if the nominee is able to sell the securities or rights not offered to foreign holders above the offer price. Such a departure from the nominee procedure in s615 would be contrary to the underlying policy that all holders should have the opportunity to participate equally in the benefits flowing from a rights issue (in the case of foreign holders, not by receiving an offer of securities or rights, but cash realised from the sale of the securities or rights). This is consistent with our guidance set out in RG 6.

## Extending existing relief for securities to financial products

- 26 In CP 239 we proposed to remake our relief in:
- (a) [Superseded Class Order \[SCO 00/169\]](#) *Relief from exposure period: Supplementary and replacement prospectuses*—which provided, for the avoidance of doubt, that supplementary and replacement disclosure documents lodged under s719 are not subject to an exposure period under s727(3); and
  - (b) [SCO 00/175]—which provided that issuers may undertake roadshow presentations before the lodgement of a disclosure document.
- 27 One respondent observed that we had not extended comparable relief to offers of financial products (and, in relation to [SCO 00/175], suggested that we should do so).

### *ASIC's response*

When preparing [ASIC Corporations \(Exposure Period\) Instrument 2016/74](#) (which relevantly remakes [SCO 00/169]) and [ASIC Corporations \(Market Research and Roadshows\) Instrument 2016/79](#) (which relevantly remakes [SCO 00/175]) for consultation, we considered whether the terms of this relief should be extended to also cover offers of financial products.

We note that the provisions relating to a supplementary Product Disclosure Statement (s1014D) are expressed differently to the



corresponding provisions relating to a supplementary prospectus (s719(4)), and that the potential ambiguity in the latter is not present in the former.

We also note that different restrictions apply to advertising or publicity for offers of securities than need a disclosure document (s734(2) and relevant exemptions) compared to advertisements for or statements about a financial product that is not available for acquisition by retail clients (s1018A(2)).

Based on these differences, we do not consider it necessary to provide analogous relief for offers of financial products.

## Extending other existing relief to apply to prescribed financial markets other than ASX

- 28 Only one of the instruments we proposed to remake in CP 239 contained a specific reference to ASX—[ASIC Corporations \(Consent to Statements\) Instrument 2016/72](#), which is discussed at paragraphs 17–18.
- 29 One respondent submitted that when our instruments referred to other relief and *that* relief contained a specific reference to ASX (e.g. [ASIC Corporations \(Disregarding Technical Relief\) Instrument 2016/73](#), which refers to [Class Order \[CO 09/425\] Share and interest purchase plans](#)), we should remake that other relief in exchange-neutral terms.

### *ASIC's response*

Our consistent approach to extending existing relief to prescribed financial markets other than ASX has been to consider such matters when the market in question makes an application in relation to a specific instrument of relief.

We will generally also consider extending existing relief when we give substantive consideration to remaking (or revoking) that instrument as part of ASIC's ongoing work in relation to legislative instruments that are due to expire under the *Legislation Act 2003*.

In both cases, this is because the policy rationale for each instrument needs to be freshly considered, taking into account the particular circumstances of the prescribed financial market seeking the benefit of the relief (either on their own behalf or on behalf of entities listed on their market).

## Securities issued on conversion of convertible notes

- 30 In CP 239 we consulted on a proposal to continue the relief currently given by [SCO 10/322] in a draft instrument proposed to be titled 'ASIC Corporations (On-Sales of Convertible Notes) Instrument 2015/XX'. In

making this new instrument, we have changed the title to '[ASIC Corporations \(Sale Offers: Securities Issued on Conversion of Convertible Notes\) Instrument 2016/82](#)' to more accurately reflect the relief it provides.

## D Updating and consolidating our guidance

### Key points

Respondents were generally supportive of our updated and consolidated guidance, and the process of consolidating our guidance more generally.

We received feedback suggesting we change our proposed new policy and guidance on:

- how the quotation condition applies to the offer of both primary securities and attaching securities;
- our approach to exposure periods generally, and the circumstances in which we may consider revoking an extension to the exposure period; and
- how issuers can withdraw an offer under a disclosure document.

We also received feedback suggesting that our updated and consolidated guidance should be expressed in exchange-neutral terms.

### Guidance on attaching securities

- 31 Attachment 16 to CP 239 included new guidance on how the quotation condition applies to the offer of both primary securities and attaching securities (e.g. an offer of shares with attaching options). We invited submissions on whether an issuer should be permitted to issue quoted shares and non-quoted free attaching options under a disclosure document that states or implies that both shares and attaching options will be quoted.
- 32 One respondent suggested that an issuer should be permitted to issue quoted shares and non-quoted free attaching options under a disclosure document that clearly states that the free attaching options will only be quoted if the quotation conditions in ASX Listing Rule 2.5 are met, and that if those conditions are not met, then the options will still be issued but unquoted. The respondent suggested that, in this scenario, an issuer should not need to deal with applications for shares and attaching options offered under a disclosure document as a bundle.
- 33 The respondent also suggested that we clarify the application of our guidance in relation to the comments made by Lindgren J in *Re NuSep Ltd* [2007] FCA 613, and bonus issues of options.

#### ASIC's response

We are concerned to ensure that investors who apply for primary securities and free attaching options that are both subject to a

quotation condition are afforded the rights available to them under s724 for both securities.

We acknowledge the feedback on our approach to an offer of primary securities and attaching securities, and that some practitioners do not support this policy.

However, we have retained this approach and the related guidance (see RG 254.243–RG 254.245), which reflects our current practice when reviewing disclosure documents and assessing related applications for relief. This approach was reached after careful consideration of s723(3) and its underlying policy. In particular, we consider that:

- regardless of any disclosure setting out alternative scenarios for quotation, a statement (or implication) that an issuer has or will apply for quotation of securities indicates that it is intended that securities will be quoted, and therefore activates s723(3); and
- a policy that shifts the risk of an issuer obtaining quotation of its securities to investors is inconsistent with the intention of the Corporation Act, which requires money to be repaid and renders any issue void if the quotation condition is not achieved as promised within three months.

## Guidance on exposure periods

34 In CP 239 we consulted on the update of our guidance on exposure periods generally, including our pre-existing guidance on when we may exercise ASIC’s administrative powers to extend the exposure period of a disclosure document offering non-quoted securities.

35 We received feedback from one respondent about our proposed approach, suggesting that where circumstances permit, we should retain flexibility regarding our approach to the exposure period. In particular, where issues with a disclosure document are raised and have been resolved to our satisfaction, the disclosure document will have been subjected to enhanced scrutiny by the market.

### *ASIC’s response*

We have retained our guidance on our general approach to where we will extend the exposure period.

However, we have included further clarification of our approach following an extension of an exposure period at RG 254.163, which states that extensions will in almost all cases be for a period of seven days, and, once extended, we will consider revoking an exposure period only in exceptional circumstances.

## Guidance on withdrawing an offer

- 36 In Attachment 16 to CP 239 we provided guidance on how an issuer can withdraw an offer under a disclosure document. Our approach is that an offer can be withdrawn by changing the terms of the offer under a supplementary or replacement disclosure document.
- 37 We also consulted on our proposed approach to an issuer withdrawing an offer made under a defective disclosure document. We proposed guidance that we may put these matters to an ASIC delegate, who may issue a final stop order to prevent the offer, issue, sale or transfer of securities under the document.
- 38 One respondent suggested that where an issuer has lodged a supplementary or replacement disclosure document to withdraw an offer made under a defective disclosure document, there would be no need for ASIC to proceed to a final stop order on the offer.

### *ASIC's response*

In response to the feedback received we have reconsidered our approach to an offer that is withdrawn or proposed to be withdrawn. In such cases, our approach will be to accept the withdrawal without proceeding to a final stop order: see RG 254.132.

## Exchange-neutral language in our guidance

- 39 One respondent suggested that, in updating our guidance, we should change many current references to ASX (typically used as an example of a prescribed financial market) to either include other prescribed financial markets, or instead to refer to prescribed financial markets generally. The submission considered this was necessary to permit fair competition in, and ensure regulation neutrality for, the provision of listing market services in Australia.

### *ASIC's response*

We acknowledge that it is generally preferable to, where possible, present our guidance using exchange-neutral language. We have therefore made approximately 30 minor changes to the updated guidance proposed by CP 239 where we consider doing so does not impact the accuracy or reduce the utility of our guidance to readers.

In a limited exception to this general position, we have retained two specific references to ASX in Regulatory Guide 189 *Disclosure relief for rights issues* (RG 189). These references are included to illustrate the interaction of our relief under ASIC Corporations (Non-Traditional Rights Issues) Instrument 2016/84

with the requirement to lodge cleansing notices on particular days under the ASX timetable in Appendix 7A of the ASX Listing Rules.

In this specific case, we considered the information value for the reader of including the illustration—concerning particular timing requirements and referring to ASX timetables, with which many readers may be familiar—outweighed the drawbacks to departing from exchange-neutral language.

## Appendix: List of non-confidential respondents

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- Governance Institute of Australia

- Sydney Stock Exchange

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