



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 101

Managed investment scheme buy-backs

October 2016

About this guide

This guide is for responsible entities of registered managed investment schemes, including schemes that form part of a stapled group, and their advisers involved in buy-backs of interests in such schemes.

It explains:

- the relief we have given in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX from certain provisions of the *Corporations Act 2001* and what a responsible entity of an ASX-listed scheme should do in conducting an on-market buy-back; and
- our policy on applications for individual relief for scheme buy-backs.

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 (for example, 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 October 2016 and is based on legislation and regulations as at the date of issue.

Previous version:

- Superseded Regulatory Guide 101 *On-market buy-backs by ASX-listed schemes*, issued December 2007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.

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A Overview

Key points

To enable a responsible entity of an ASX-listed registered managed investment scheme to buy back interests in the scheme on-market, we provide conditional relief in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX from certain requirements in the *Corporations Act 2001* (Corporations Act) to facilitate the scheme buy-back.

We consider applications for individual relief, subject to conditions, for a range of other types of scheme buy-backs, such as off-market scheme buy-backs, selective scheme buy-backs or scheme buy-backs involving stapled securities.

Purpose of this guide and our relief

- RG 101.1 This guide will assist a responsible entity of a registered managed investment scheme (scheme), including one that forms part of a stapled group, and its advisers, to understand ASIC relief to facilitate a buy-back of interests in the scheme. This guide explains:
- (a) the relief in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX, which is available to a responsible entity of an ASX-listed scheme to carry out an on-market buy-back of interests in the scheme; and
 - (b) our policy on applications for individual relief to facilitate other types of buy-backs of interests in a scheme.
- RG 101.2 The Corporations Act defines a ‘buy-back’ as an acquisition by a company of shares in itself. We use the term ‘scheme buy-back’ in this guide to refer to the acquisition by a responsible entity of interests in the scheme that are paid for using scheme property.
- RG 101.3 Our policy on scheme buy-backs is broadly consistent with our policy on share buy-backs: see [Regulatory Guide 110 Share buy-backs](#) (RG 110) at RG 110.1 and s256B.
- RG 101.4 In granting the relief covered by this guide, our intention is to:
- (a) enable a responsible entity to utilise a cost-effective, transparent and fair means of returning capital to members;
 - (b) avoid placing a scheme at a regulatory disadvantage to a company in relation to capital management techniques where there is no regulatory reason for different treatment; and

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- (c) ensure that the special regulatory protections that Parliament intended for schemes are not undermined but operate in a commercially sensible manner.

What this guide does not cover

- RG 101.5 This guide does not cover share buy-backs. Where a proposed scheme buy-back also involves a buy-back of shares (e.g. a buy-back of stapled securities), this guide should be read in conjunction with RG 110.
- RG 101.6 A scheme buy-back will at times be a part of a broader transaction involving other activities. For example, a transaction might also involve a change in responsible entity of the scheme or some other capital raising activity. These other activities may separately require additional ASIC relief. Although a responsible entity might apply for other relief relevant to a broader transaction proposal, this guide is limited to the scheme buy-back portion of the overall transaction.
- RG 101.7 Employee share scheme buy-backs and minimum holding buy-backs are also not specifically covered by this guide.

Types of scheme buy-backs

On-market scheme buy-backs

- RG 101.8 We consider that a buy-back by the responsible entity of a scheme listed on a prescribed financial market in the ordinary course of trading on that market is an on-market buy-back. An on-market scheme buy-back is generally a continuous buy-back, where the responsible entity regularly buys back interests over a period of time.

Equal access scheme buy-backs

- RG 101.9 Generally, an equal access scheme buy-back is an offer to every member to buy back a fixed percentage of the interests held by each member of the scheme. It is not a continuous buy-back given the buy-back agreements are not entered into until a specified time for acceptance of offers has closed. Every member must have a reasonable opportunity to accept the offer.

Selective scheme buy-backs

- RG 101.10 In a selective scheme buy-back, the number of interests purchased from one member need not relate to the number (if any) purchased from other members. This means members will be treated selectively, and the potential for (and risk of) abuse increases.

- RG 101.11 For a company, a selective buy-back is a buy-back that does not come within one of the other types of buy-back provided for in the Corporations Act—that is, it is not an equal access buy-back, a minimum holding buy-back, an on-market buy-back or an employee share scheme buy-back. We apply similar concepts for a scheme buy-back.
- RG 101.12 Typically, selective scheme buy-backs are subject to greater regulation because they offer certain members the right to withdraw their capital without making the same offer to all members. Table 1 sets out some examples of selective scheme buy-backs.

Table 1: Examples of selective scheme buy-backs

Type of buy-back	Description
Tender offer	In a tender offer scheme buy-back, the responsible entity invites each member to tender their interests for sale, rather than offering to buy back interests. We consider that a tender offer scheme buy-back cannot be an equal access scheme buy-back because the responsible entity does not 'offer' to buy interests, but rather invites members to offer to sell interests. This means it is a selective scheme buy-back.
'Dutch auction' tender offer	In a Dutch auction tender offer scheme buy-back, the responsible entity invites each member to tender their interests at a price nominated by the member. Usually, members choose from a range of prices set by the responsible entity, where each price is a certain discount to the market price at the time of the buy-back. The responsible entity then calculates the lowest price (i.e. the biggest discount to the market price) at which it can buy back the desired number of interests, and buys interests at that price (the final price) from each member who nominated a price at or below the final price.
Irrevocable acceptances are allowed	In an equal access scheme buy-back, agreements are not entered into until the offer period has closed. If a responsible entity allows members to give irrevocable acceptances during the offer period, the buy-back agreement is entered into when the responsible entity receives the acceptance. Accordingly, we consider the buy-back is technically a selective scheme buy-back.

Overview of our relief

- RG 101.13 We grant relief to facilitate scheme buy-backs because although the Corporations Act does not specifically prohibit a scheme buy-back, certain requirements in the Act have the effect of preventing or making it commercially difficult for a responsible entity to carry out a scheme buy-back.
- RG 101.14 We have provided conditional relief for on-market buy-backs of ASX-listed schemes in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX. We will consider granting conditional individual relief in appropriate circumstances for a range of other types of scheme buy-backs, including off-market scheme buy-backs, selective scheme buy-backs and a scheme buy-back involving stapled securities.

Note: Where a scheme has more than one class of interests, the responsible entity has a duty under s601FC(1)(d) to treat members of each class fairly.

Relief for on-market buy-backs of ASX-listed schemes

RG 101.15 ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX gives relief from the following requirements in the Corporations Act to enable responsible entities of ASX-listed schemes to carry out on-market buy-backs of interests in those schemes:

- (a) the requirement that a scheme's constitution must specify any right to withdraw and set out adequate procedures for making and dealing with withdrawal requests under s601GA(4) (see RG 101.22–RG 101.23);
- (b) the withdrawal procedures for non-liquid schemes in Pt 5C.6 (see RG 101.24–RG 101.27); and
- (c) the takeovers prohibited acquisition provisions in s606 (see RG 101.28–RG 101.29).

Individual relief for other types of scheme buy-backs

RG 101.16 We consider applications for individual relief from a range of requirements that may be granted to a responsible entity as appropriate in the circumstances of the particular scheme buy-back proposal.

RG 101.17 For a scheme buy-back that is not an on-market buy-back of an ASX-listed scheme, we may grant relief similar to that provided for on-market buy-backs of ASX-listed schemes in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX. We may also extend relief provided to on-market buy-backs of ASX-listed schemes to schemes listed on other financial markets: see RG 101.46.

RG 101.18 We may also grant relief:

- (a) from the requirement to treat members equally under s601FC(1)(d) (see RG 101.31–RG 101.37);
- (b) from the prohibition on a responsible entity from acquiring interests in the scheme for less consideration than another person under s601FG(1)(a) (see RG 101.38–RG 101.40);
- (c) from the prohibition on unsolicited offers to purchase products off-market under Div 5A of Pt 7.9 (see RG 101.41–RG 101.43);
- (d) from the requirement to give the offer to all members of the scheme or to all members of a particular class (see RG 101.44);
- (e) to facilitate a shorter offer period (RG 101.45); and
- (f) for scheme buy-backs involving stapled and unstapled securities (see RG 101.47–RG 101.48).

RG 101.19 Section D provides details of the factors we will consider when deciding applications for individual relief for a scheme buy-back.

Overview of conditions of relief

RG 101.20 Our relief in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX and individual relief is subject to conditions. Table 2 provides a summary of these conditions, which are described in more detail in Section C.

Table 2: Summary of key conditions of relief

Condition	Conditions in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX	General conditions for individual relief	Reference
The scheme buy-back must be in accordance with the constitution	The constitution must contain a power to allow the responsible entity to buy back the interests and the scheme buy-back must be carried out in accordance with the constitution.	The constitution must contain a power to allow the responsible entity to buy back the interests and the scheme buy-back must be carried out in accordance with the constitution.	RG 101.49– RG 101.50
The scheme buy-back must not materially prejudice creditors	The scheme buy-back must not materially prejudice the responsible entity's ability to pay the scheme's creditors.	The scheme buy-back must not materially prejudice the responsible entity's ability to pay the scheme's creditors.	RG 101.51
Listed scheme buy-backs must be in the 'ordinary course of trading'	The scheme buy-back must be carried out in the ordinary course of trading on ASX.	<i>On-market:</i> The scheme buy-back must be carried out in the ordinary course of trading on the prescribed financial market. <i>Off-market:</i> The condition is not imposed.	RG 101.53– RG 101.55
The price must be paid from scheme property	The purchase price must be paid from the scheme property.	The purchase price must be paid from the scheme property.	RG 101.56

Condition	Conditions in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX	General conditions for individual relief	Reference
Listed scheme buy-backs must comply with listing rules	The responsible entity must comply with the ASX Listing Rules for an on-market scheme buy-back as if the scheme were a company listed on ASX, including Rules 3.8A (disclosure), 7.29 (recorded transactions) and 7.33 (buy-back price). The responsible entity should also satisfy itself as to whether it would need to seek a waiver from any ASX Listing Rules.	<p><i>On-market and off-market:</i> The condition applies generally to scheme buy-backs (including off-market buy-backs) of a scheme listed on a prescribed financial market as if the buy-back were being carried out on the prescribed financial market. The responsible entity should also satisfy itself as to whether it would need to seek a waiver from any rule of the relevant prescribed financial market from the Australian market licensee.</p> <p><i>Unlisted schemes:</i> The condition is not imposed.</p>	RG 101.57– RG 101.62
Interests must not be disposed of and must be cancelled	<p>The responsible entity must:</p> <ul style="list-style-type: none"> • not dispose of the interests it buys back; and • ensure that, immediately after registration of the transfer to the responsible entity of the interests bought back, the interests are cancelled. 	<p>The responsible entity must:</p> <ul style="list-style-type: none"> • not dispose of the interests it buys back; and • ensure that, immediately after registration of the transfer to the responsible entity of the interests bought back, the interests are cancelled. 	RG 101.63
Member approval must be sought for the scheme buy-back in certain circumstances	<p><i>If the '10/12 limit' is exceeded:</i></p> <ul style="list-style-type: none"> • a valid resolution of members is required; • members must be given all information known to the responsible entity that is material to the decision on how to vote on the resolution; and • member approval can only be relied on for 12 months after it is given. <p>Note: The 10/12 limit is 10% of the smallest number of interests that are on issue at any time during the previous 12 months.</p>	<p><i>If a selective scheme buy-back:</i></p> <ul style="list-style-type: none"> • a valid special resolution of members is generally required; • members must be given all information known to the responsible entity that is material to the decision on how to vote on the resolution; and • member approval can only be relied on for 12 months after it is given. <p><i>If the 10/12 limit is exceeded:</i></p> <ul style="list-style-type: none"> • a valid resolution of members is generally required; • members must be given all information known to the responsible entity that is material to the decision on how to vote on the resolution; and • member approval can only be relied on for 12 months after it is given. 	RG 101.67– RG 101.84

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Condition	Conditions in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX	General conditions for individual relief	Reference
Notification requirements	<p><i>If the 10/12 limit is not exceeded:</i></p> <ul style="list-style-type: none"> • the responsible entity must notify the market at least 14 days before the scheme buy-back; and • the buy-back must commence within two months of the date the buy-back was notified to the market. 	<p><i>If a listed scheme buy-back and the 10/12 limit is not exceeded:</i></p> <ul style="list-style-type: none"> • the responsible entity must notify the prescribed financial market at least 14 days before the scheme buy-back; and • the buy-back must commence within two months of the date the buy-back was notified to the market. 	RG 101.85– RG 101.89

B ASIC relief for scheme buy-backs

Key points

For on-market buy-backs of ASX-listed schemes, we have provided relief in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX from certain provisions of the Corporations Act: see RG 101.21–RG 101.29.

For other types of scheme buy-backs, we will consider applications for individual relief: see RG 101.30–RG 101.48 and Section D.

All relief is subject to a range of conditions, which are described in detail in Section C.

Relief for on-market buy-backs of ASX-listed schemes

- RG 101.21 ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX grants relief to responsible entities of ASX-listed schemes to carry out on-market scheme buy-backs.

Relief from the requirements for withdrawal rights in s601GA(4)

- RG 101.22 Section 601GA(4) requires that if members have a right to withdraw, the scheme's constitution must specify the right and set out adequate procedures for withdrawal in a way that is fair to all members. However, the right to withdraw in an on-market scheme buy-back arises from the market contract rather than being specified in the constitution.

Note: See [Regulatory Guide 134](#) *Managed investments: Constitutions* (RG 134) at RG 134.146–RG 134.152.

- RG 101.23 We have given relief from s601GA(4) because in our view compliance with this provision would be impracticable for an on-market scheme buy-back.

Note: See RG 134.134–RG 134.159 for our policy on withdrawal rights in s601GA(4).

Relief from withdrawal procedures in Pt 5C.6

- RG 101.24 A payment by a responsible entity out of scheme property to a member, where there is an act of volition by the member, in return for the member's rights in the scheme will generally be a withdrawal for the purposes of Pt 5C.6. If the right to withdraw may be exercised while the scheme is non-liquid, the constitution must provide for the right to be exercised in accordance with the withdrawal procedures in Pt 5C.6.

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Note: See *MacarthurCook Fund Management Ltd v TFML Ltd* (2014) 32 ACLC 14-023; [2014] HCA 17.

- RG 101.25 Many schemes listed on ASX may be classified as non-liquid schemes for the purposes of Pt 5C.6 because of the nature of the assets held by the scheme.
- RG 101.26 In the absence of relief, s601KD may have the effect of preventing a non-liquid listed scheme from engaging in an on-market buy-back. On-market buy-backs by nature are continuous buy-backs rather than proportional. Trading system rules require trades to be settled within a certain number of days of the transaction. However, under s601KD, the responsible entity must not satisfy withdrawal requests until the close of the withdrawal offer period (which must be a minimum of 21 days) and the proportional satisfaction requirement could only be calculated at the end of the withdrawal offer period.
- RG 101.27 We consider the policy objectives of Pt 5C.6 of fair and equal access to liquidity to be less relevant for non-liquid listed schemes because all members are likely to have the ability to liquidate their investment by selling on-market at any time.

Takeovers relief from s606

- RG 101.28 Section 606 prohibits certain acquisitions of relevant interests in voting interests. We consider this prohibition could make it difficult for schemes to engage in a scheme buy-back because it might mean that the proportionate share of those members who do not participate increases. The holding of those members could exceed the permitted threshold when there is not a takeover offer.

Note: Such a problem would also exist for share buy-backs were it not for the exception in s611, item 19, which facilitates acquisitions that result from share buy-backs.

- RG 101.29 For consistency with our policy on share buy-backs, we have given relief from the prohibition in s606 on certain acquisitions of relevant interests in listed schemes. Consequently, an acquisition of relevant interests in a listed scheme that results from a scheme buy-back complying with the terms of our relief is exempt from the prohibition in s606.

Relief for other types of scheme buy-backs (individual relief)

- RG 101.30 In addition to the relief provided in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX, we may also provide individual relief in appropriate circumstances where an application is made.

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Relief from the equal treatment requirements

RG 101.31 Section 601FC(1)(d) requires that members who hold interests of the same class be treated equally. This requirement may be difficult for a responsible entity to comply with in certain types of scheme buy-back situations, such as in a tender scale-back, where there are small parcels of interests or where there are foreign members.

Tender scale-backs

RG 101.32 A responsible entity may set a maximum number, value or percentage of interests it will buy back and make it a term of the offer that if (at the close of offers) the responsible entity has received acceptances for more interests than the specified limit, the number of each acceptor's interests will be reduced by the same proportion needed to ensure the responsible entity buys back no more than the specified limit (i.e. a 'scale-back'). A proportional scale-back ensures that members are treated equally. However, we understand that sometimes a proportional scale-back may result in members ending up with small and unmarketable parcels after the scale-back.

RG 101.33 We consider that preferential treatment under the proposed scheme buy-back may be beneficial to small balance members but not unfair to other members. We would generally limit the preferential treatment to small balance members to a monetary cap appropriate in the circumstances of the scheme buy-back.

RG 101.34 Relief may also be appropriate for rounding any fractions of interests arising from calculating the number of interests to be bought back.

Small parcels

RG 101.35 We may grant relief to enable a responsible entity to give priority to small parcels of interests or to selectively scale back a scheme buy-back to avoid members being left with small parcels following the scheme buy-back.

Note: The scheme's market capitalisation and the size of the parcel of interests to be bought back should be determined using the volume weighted average price (VWAP), where the average is calculated over the last five days reasonably practicable before any notice of meeting being issued to members proposing a resolution to carry out the scheme buy-back or any announcement being made of the scheme buy-back.

RG 101.36 We would generally limit the relief so that the maximum value of a small parcel is:

- (a) for schemes with a market capitalisation of less than \$1 billion:
 - (i) \$2,000 for interests to be bought back from each participating member, including the entire holding of participating members whose holding is less than \$2,000 (threshold parcel); and

- (ii) \$500 where a participating member's remaining interests are worth less than \$500 after the threshold parcel is bought back (residual parcel); and
- (b) for schemes with a market capitalisation of more than \$1 billion:
 - (i) \$5,000 for threshold parcels; and
 - (ii) \$2,000 for residual parcels.

Excluding foreign members

RG 101.37 Relief may be required to enable a responsible entity to buy back interests in situations where:

- (a) the responsible entity would be prohibited from making a payment under relevant legislation, regulations or regulatory requirements in Australia or the relevant foreign jurisdiction;
- (b) the member resides in a jurisdiction where it would be prohibited from making a payment under relevant legislation, regulations or regulatory requirements to make an offer to the member to buy their interests; or
- (c) the member does not reside in Australia and it would be unreasonable to make the offer to the member having regard to each of the following:
 - (i) the number of members in the jurisdiction in which the member resides;
 - (ii) the value of the interests held by members in that jurisdiction; and
 - (iii) the cost of complying with relevant legislation, regulations or regulatory requirements applicable to making the offer in that jurisdiction.

Note: Additional relief may be required from Pt 5C.6 if the offer will not be made to all members.

Relief from the self-acquisition provisions

RG 101.38 Section 601FG(1)(a) requires that a responsible entity of a managed investment scheme may acquire and hold an interest in the scheme, but must only do so for not less than the consideration that would be payable if the interest were acquired by another person and subject to terms and conditions that would not disadvantage other members.

RG 101.39 In some scheme buy-backs the buy-back price may be set based by reference to the VWAP for a certain number of days leading up to the scheme buy-back. For example, the buy-back price might be set at a 5% premium to the VWAP in the five days leading up to the scheme buy-back: see RG 101.61.

RG 101.40 We consider there is a risk that changes in the market price in the days leading up to the scheme buy-back (e.g. if there is a substantial surge in the

market price) at the time the units are transferred to the responsible entity may lead to a breach of s601FG(1)(a).

Relief from the prohibitions on unsolicited offers

- RG 101.41 Division 5A of Pt 7.9 prohibits unsolicited offers to purchase financial products off-market. Division 5A establishes a disclosure regime to prevent persons profiting from an investor's lack of knowledge of the market value of their financial products by offering to purchase their financial products at a grossly undervalued price. The offeror must disclose the current market price, or a fair estimate if not quoted on a market, in an offer document.
- RG 101.42 The division was not intended to capture offers made under an off-market buy-back on the basis that such offers are subject to an adequate disclosure regime. Section 1019D(1)(d)(ii) provides a carve out to the anti-hawking provisions for equal access or selective access buy-backs for companies occurring under s257A.
- RG 101.43 We consider that technically, by inviting members under a scheme buy-back to tender their interests, there is an unsolicited invitation of offers to sell financial products prohibited by the section. We consider that the rationale behind the carve out for company buy-backs may also be applicable to some scheme buy-backs.

Relief from the requirement to make offer to all members

- RG 101.44 Section 601KB(2) requires that the offer must be made to all scheme members. In our view, relief may be required where Pt 5C.6 applies if the offer will not be made to all members (e.g. if foreign members are excluded).

Relief relating to the offer period

- RG 101.45 Section 601KB(3)(a) requires that the offer period must remain open for 21 days. In our view, relief may be required to facilitate differing timetable requirements for the particular scheme buy-back.

Relief for schemes listed on financial markets other than ASX

- RG 101.46 We will consider granting relief to facilitate a scheme buy-back for a scheme that is listed on a prescribed financial market other than ASX or an approved foreign market. This relief may be granted where the applicant demonstrates that the prescribed financial market is governed by investor protections comparable to ASX. We will consider applications for relief on a similar

basis to the relief granted in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX.

Note: See [Regulatory Guide 72](#) *Foreign securities disclosure relief* (RG 72) at RG 72.54 for a list of foreign markets we consider to be comparable to ASX in terms of being fair, efficient, well-informed and internationally competitive.

Relief for scheme buy-backs involving stapled and unstapled securities

- RG 101.47 Where a proposed scheme buy-back is for a stapled security that involves an interest in a scheme and a share in a company, relief would be subject to the requirements set out in RG 110 as well as in this guide.
- RG 101.48 In a small number of cases, we have provided limited relief to facilitate scheme buy-backs involving unstapled securities. These have generally been:
- (a) to reduce complexity and corresponding complexity in the accounts and in distributing payments to members; or
 - (b) where the commercial purpose of the unstapled securities no longer existed.

C Conditions of relief for scheme buy-backs

Key points

This section provides details of the conditions applicable under ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX.

For individual relief, we will adapt conditions relevant for each head of relief we grant as appropriate for the circumstances of the particular scheme buy-back. We may also impose additional conditions not described in this section where we consider it appropriate for the scheme buy-back.

Table 2 in Section A provides an overview of:

- the conditions of relief in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX for responsible entities of ASX-listed schemes conducting an on-market scheme buy-back; and
- our approach to the conditions of individual relief for scheme buy-backs.

Scheme buy-back must be in accordance with the constitution

RG 101.49 A scheme buy-back may only be carried out if the constitution gives the responsible entity power to buy back interests in the scheme. We have imposed this requirement to ensure that members have agreed that the responsible entity may buy back interests in the scheme when permitted by law.

RG 101.50 The responsible entity must not buy back an interest in the scheme in reliance on our relief except in accordance with the procedure outlined in the constitution and in our conditions of relief.

Scheme buy-back must not materially prejudice creditors

RG 101.51 The responsible entity may only carry out a scheme buy-back if it does not materially prejudice the responsible entity's ability to pay scheme creditors in relation to liabilities incurred or acquired by it as responsible entity of the scheme. The responsible entity will be liable for debts it incurred as responsible entity, but is usually entitled under the constitution to be indemnified from scheme property where it acts in the proper performance of its duties.

RG 101.52 We consider a scheme buy-back could adversely affect creditors of the responsible entity, and this might affect the ability of the responsible entity to operate the scheme and affect continuing members.

Listed scheme buy-backs must be in the ‘ordinary course of trading’

- RG 101.53 For an on-market scheme buy-back, the buy-back must be carried out in the ‘ordinary course of trading’ on the prescribed financial market.
- RG 101.54 In Australia, this phrase means that the trading is in strict order of price and time priority, with indifference as to the identity of counterparties, and no pre-agreements or selection of counterparties: see *Attorney-General (Vic) v Walsh’s Holdings Ltd* [1973] VR 137.
- RG 101.55 We consider that a scheme buy-back in the ‘ordinary course of trading’ does not extend to a situation where:
- (a) the parties have negotiated or prearranged ‘crossings’ (where the broker acts for both the buyer and the seller)—see *Aberfoyle Ltd v Western Metals Ltd* (1998) 16 ACLC 1,335; or
 - (b) a transaction relying on the trade with ‘price improvement exception’ is effected other than on an order book.

Note: See, for example, Rule 4.2.3 (‘Exception—Trades with price improvement’) of ASIC Market Integrity Rules (Competition in Exchange Markets) 2011 and [Regulatory Guide 223](#) *Guidance on ASIC market integrity rules for competition in exchange markets* (RG 223) at RG 223.195.

Purchase price must be paid from scheme property

- RG 101.56 To be within the scope of what is considered to be a scheme buy-back the purchase price must be paid from scheme property. For example, if the responsible entity bought units of the scheme using its own property (or property other than scheme property), then the transaction would not be equivalent to a company buying back shares in itself.

Listed scheme buy-backs must comply with listing rules

- RG 101.57 The responsible entity of a listed scheme must comply with the listing rules for a scheme buy-back as if the scheme were a company listed on a prescribed financial market. This avoids placing a listed scheme at a regulatory advantage or disadvantage to a listed company in relation to capital management techniques.

Note: A responsible entity should also satisfy itself as to whether it would need to seek a waiver of any rule of the relevant prescribed financial market from the Australian market licensee.

- RG 101.58 For ASX-listed schemes, this includes Rules 3.8A, 7.29 and 7.33.

Note: There may be other listing rules that apply.

- RG 101.59 Under Rule 3.8A, the responsible entity of a listed scheme must make appropriate ongoing disclosure to ASX to:
- (a) comply with the continuous disclosure requirements of the Corporations Act and the ASX Listing Rules; and
 - (b) assure the market it is not buying back interests while possessing inside information in breach of the insider trading provisions (s1043A).
- RG 101.60 Under Rule 7.29, the responsible entity of a listed scheme may only buy interests under a scheme buy-back if transactions in the interests in the listed scheme were recorded on a prescribed financial market on at least five days in the three months before it buys back the interests.
- RG 101.61 Under Rule 7.33, the scheme buy-back price must not exceed 5% of the VWAP for interests (or stapled securities, if applicable), where the average is calculated over the last five days on which sales in the interests were recorded before the day on which the purchase is made.
- RG 101.62 We consider that buying back interests for an amount that significantly exceeds their value might dilute the value of holdings of those members who do not participate in the scheme buy-back. This requirement prevents entities from using the scheme buy-back as a means of artificially increasing or manipulating the market price.

Note: Section 601FC(1A) notionally applying under [Class Order \[CO 13/657\]](#) *Discretions affecting the amount of consideration to acquire interests and withdrawal amounts* requires the responsible entity to ensure that the manner in which a discretion affecting determination of the amount of consideration to acquire interests or the terms of any payment or removal of liability arising from withdrawal from the scheme is exercised as far as practicable consistently with ordinary commercial practice and is reasonably current at the time of issue or withdrawal.

Interests must not be disposed of and must be cancelled

- RG 101.63 Interests bought back must not be disposed of and must be cancelled immediately upon registration of the transfer to the responsible entity. We impose this requirement to ensure that when scheme property is used to buy back interests in the scheme, the scheme receives the benefit of having fewer interests on issue that have rights in relation to the scheme.

Member approval must be sought in certain circumstances

- RG 101.64 Member approval for a scheme buy-back must be sought in the following circumstances:

- (a) if the buy-back is a selective scheme buy-back (see RG 101.67–RG 101.69); or
- (b) if the ‘10/12 limit’ is exceeded (see RG 101.70–RG 101.73).

RG 101.65 The responsible entity must ensure that:

- (a) the approval is valid (see RG 101.74); and
- (b) members are given all information known to it that is material to the decision on how to vote on the resolution (see RG 101.75–RG 101.79).

RG 101.66 Member approval can only be relied on for 12 months after it is given: see RG 101.82.

Circumstances that require member approval

Special resolution required for selective scheme buy-backs

RG 101.67 For a selective buy-back of a company, a special resolution passed at a general meeting of the company of the terms of the buy-back agreement is generally required: see s257B.

RG 101.68 We consider that there may be cases where a proposed scheme buy-back is, but for technical exceptions, selective, but it is more appropriate to treat it as an equal access scheme buy-back (e.g. a tender offer that is in all material respects an equal access scheme buy-back: see Table 1). In appropriate circumstances, we will consider requiring a resolution of members of the terms of the buy-back arrangement, rather than a special resolution.

Irrevocable acceptances

RG 101.69 As discussed in Table 1, because irrevocable acceptances would technically make the scheme buy-back selective, a special resolution would generally be required. Because some agreements will be entered into while offers are still open, we will generally require member approval.

Members' resolution required for scheme buy-backs that exceed the ‘10/12 limit’

RG 101.70 If a responsible entity proposes to buy back an interest in the scheme that would exceed the 10/12 limit, it must have obtained the approval of members passed at a meeting of members of the terms of the buy-back arrangement. This is consistent with our policy on share buy-backs: see s257B.

RG 101.71 We consider that a scheme buy-back that exceeds the 10/12 limit is more likely to give rise to significant control and dilution issues. In our view, members should have a right to vote on buy-backs that raise these control and dilution issues. For example:

- (a) where a responsible entity and its associates do not participate in the scheme buy-back, there may be control or entrenchment issues; and
- (b) when the buy-back price is higher than needed to effect the scheme buy-back, members who do not participate in the scheme buy-back may have the value of their interests diluted.

Calculating the 10/12 limit

RG 101.72 The 10/12 limit for a responsible entity proposing a scheme buy-back is 10% of the smallest number of interests that are on issue at any time during the previous 12 months.

RG 101.73 A proposed scheme buy-back would exceed the 10/12 limit if the number of votes attaching to all the voting interests in the scheme that have been bought back in the last 12 months, and the voting interests that will be bought back if the proposed buy-back is made, would exceed the 10/12 limit.

Example

On 1 January, a listed scheme has 1,000 interests, each carrying one vote. The 10/12 limit would be exceeded if more than 100 interests were bought back (i.e. more than 10% of 1,000 interests).

On 1 July, the responsible entity buys back 50 interests, which does not exceed the 10/12 limit because it has not exceeded 5% of the total 1,000 interests and has not bought any other interests in the scheme in the previous 12 months. The scheme now has a total of 950 interests carrying one vote each.

On 1 December, the scheme has 950 voting interests and the 10/12 limit is 10% of 950. As the responsible entity has already bought back 50 interests during the previous 12 months, it would exceed the 10/12 limit if it bought back more than 45 interests.

Ensuring the approval is valid

RG 101.74 For member approval to be effective, the resolution must approve a transaction the consequences of which were known at least to those who voted for it. This requires that the scheme buy-back proposal must be mature enough to be put before members. For example, where the substance of a key term of the proposed scheme buy-back has not yet been established, it would not be possible to make fair disclosures or to obtain the consent of members on an informed basis: see *ANZ Nominees Pty Ltd v Wormald International Ltd* (1988) 13 ACLR 698 at 704–5 and *NSCS v Consolidated Gold Mining Areas NL (No. 2)* [1985] 1 NSWLR 622 at 625.

Note 1: Section 253E imposes voting restrictions on the responsible entity and its associates if they have an interest in the resolution other than as a member.

Note 2: See Ch 2G.4 for requirements for meetings of scheme members.

Disclosing all material information

RG 101.75 The notice of meeting or the explanatory material accompanying it must include all information known to the responsible entity that is material to the decision on how to vote on the scheme buy-back resolution. However, the responsible entity need not disclose information if it would be unreasonable to do so because the responsible entity had previously disclosed the information to members of the scheme.

Note: The disclosure requirement is equivalent to the disclosure required for a selective share buy-back: see s257D(2).

RG 101.76 Information material to the decision on how to vote on the scheme buy-back requires an assessment of whether the information ‘would reasonably have affected the mind’ of a hypothetical member in determining whether they would support or oppose the scheme buy-back. This involves a wider inquiry than the likelihood the information would have led a member to oppose a resolution.

Note: See *Lantern Hotel Group and Australian Securities and Investments Commission* [2015] AATA 428 (17 June 2015) at para 70.

RG 101.77 We consider that the information summarised in Table 3 is likely to be material to a member’s decision on how to vote on the scheme buy-back.

Table 3: Information to be provided to scheme members

Information required	Description
How a scheme buy-back works	<p>There should be an explanation of the type of scheme buy-back and how it works, including:</p> <ul style="list-style-type: none"> • an explanation of the scope of the scheme buy-back and of the key points in the terms and conditions; • if the scheme buy-back is on-market, details of how the responsible entity proposes to purchase interests in the ordinary course of trading on the prescribed financial market; • prominent disclosure of the reasons for any members proposed to be excluded from the scheme buy-back, and reasons for any other unequal treatment of members, such as a scale-back; and • details of how the procedures for scheme buy-back offers are fair to all members.
The number of interests on issue and the number and percentage to be bought back	<p>The number of interests on issue and the number and percentage of interests to be bought back should be specified.</p> <p>If it is not possible to specify the exact number and percentage of interests to be bought back, the maximum proportion of the interests to be bought back within the scope of the approval should be explained.</p> <p>For a selective scheme buy-back, if the buy-back is to be scaled back details should be provided of the method used to determine the number of interests to be bought back by each member offering to sell.</p>

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Information required	Description
The objective for the scheme buy-back and alternatives considered	<p>There should be a description of the objective of the scheme buy-back and reasons why the proposal will achieve this objective, including advantages and disadvantages of the scheme buy-back.</p> <p>This section should also include an evaluation of alternative options considered to achieve the objective and a description of why other options have not been chosen.</p>
Associated interests	<p>There should be a description of the interests of the responsible entity and any associate of the responsible entity who may participate in the scheme buy-back. Among other things, the directors must make full and frank disclosure of their interests in the reduction and in any scheme of which the reduction forms part.</p>
Financial and other effects	<p>There should be an explanation of:</p> <ul style="list-style-type: none"> the financial effect that the scheme buy-back will have on members, including on any distributions; and the effect the reduction will have on the scheme and on the control of the scheme.
Source of funds for the scheme buy-back	<p>Details should be provided of the source of funds proposed to be used to pay for the scheme buy-back.</p> <p>If an asset is proposed to be used to satisfy the liability to pay for interests bought back, the amount of money expected to be available when the asset is converted into cash should be specified.</p>
Key dates	<p>The date the scheme buy-back offer will commence and close should be specified. If the scheme buy-back will be open for an indefinite period of time until a certain number and percentage of interests, or maximum proportion of the scheme's funds, are bought back, a statement of that fact should be made.</p>
Scheme buy-back price and current market price	<p>Details should be provided of how the scheme buy-back price was determined. For on-market buy-backs, details of any applicable pricing rules such as caps (e.g. the requirement that the buy-back price does not exceed 5% of the VWAP for interests: see RG 101.61) should be provided.</p> <p>For a tender offer, details of the factors taken into account in determining the tender range should be provided.</p> <p>Information regarding the current market price of the interests, and for a listed scheme buy-back any additional information that the listing rules of the prescribed financial market require to be disclosed, should be included.</p>

Note: This information is similar to the information we expect a company to provide to shareholders when seeking shareholder approval and making offers under a share buy-back: see RG 110.18.

Additional disclosures when buying back a significant percentage of interests

- RG 101.78 If a responsible entity proposes to buy back a significant percentage of interests, it should consider including:
- a report by any of its directors who are independent about whether members should vote in favour of the scheme buy-back, particularly having regard to how much the responsible entity is paying for the interests; and

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(b) an independent expert report with a valuation of the interests.

RG 101.79 For scheme buy-backs of a significant percentage of the interests in a scheme or involving parties holding a significant interest, we consider it is usually helpful for members to have the benefit of independent advice on whether to vote for a scheme buy-back that sets out the expert's opinion on whether the proposed terms give a 'fair value' for the interests and the reasons the expert holds this opinion.

Note: See [Regulatory Guide 111](#) *Content of expert reports* (RG 111) and [Regulatory Guide 112](#) *Independence of experts* (RG 112).

When previously disclosed information is overtaken by events

RG 101.80 We consider that if the information disclosed to members approving the scheme buy-back no longer adequately describes the circumstances surrounding the scheme buy-back, the responsible entity can no longer rely on that resolution in order to carry out a valid scheme buy-back. Any information disclosed to members must not be misleading or deceptive.

Confidential information

RG 101.81 All information known to the responsible entity that is material to the decision to how to vote must be disclosed. There is no exclusion that would enable the responsible entity or expert to omit confidential information. If a responsible entity is concerned about disclosing detailed confidential information about the scheme, we consider the responsible entity or expert should summarise this information.

Member approval can only be relied on for up to 12 months

RG 101.82 We impose a 12-month limit on any resolution approving the scheme buy-back given by members. After 12 months, we consider that an approval of a scheme buy-back may be 'stale' (i.e. the approval will likely no longer provide the intended protection for members and creditors). A 12-month period is also consistent with the operation of the 10/12 limit in s257B for companies.

RG 101.83 Where member approval is required, members are approving the terms of the scheme buy-back arrangement. This means the terms of the arrangement must be sufficiently certain for member approval to be effective. We consider that a responsible entity can only rely on approval for up to 12 months.

RG 101.84 For continuous scheme buy-backs, after 12 months, further approval will be required if the responsible entity intends to continue buying back interests.

Note: For listed schemes, a further notice must be made to the prescribed financial market after 12 months of the previous notice: see RG 101.87.

Notification requirements

Prescribed financial market must be notified for listed scheme buy-backs that do not exceed the 10/12 limit

RG 101.85 For a listed scheme buy-back that does not require member approval (i.e. the 10/12 limit is not exceeded), the responsible entity must disclose in a notice to the prescribed financial market:

- (a) the intention of the responsible entity to buy back interests;
- (b) the number of interests in the scheme held by the responsible entity and any associate; and
- (c) the source of funds to pay for any interests to be bought back.

Note: See Appendix 3C of ASX Listing Rules ('Announcement of buy-back').

RG 101.86 The responsible entity must notify the prescribed financial market at least 14 days before the scheme buy-back. This process will help to ensure that members are given sufficient time to be made aware of the intended scheme buy-back. Notification is intended to promote a reasonable opportunity for members to participate in the scheme buy-back having regard to the fact that the responsible entity is not required to send a withdrawal notice to scheme members under Pt 5C.6.

Note: A 14-day waiting period is consistent with the equivalent requirements for on-market share buy-backs: s257F(1).

Continuous scheme buy-backs

RG 101.87 For a continuous scheme buy-back, a new notice setting out the information in RG 101.85 must be made to the prescribed financial market if the scheme buy-back is to continue after 12 months from the date of the previous notice.

Note: See the corresponding 12-month limit on member approval at RG 101.82–RG 101.84.

When the responsible entity must start buying back interests

RG 101.88 The responsible entity must start buying back interests:

- (a) at any date specified in the notice to the prescribed financial market; or
- (b) otherwise, within two months of the date of the notice to the prescribed financial market.

Note: We have imposed a two-month time limit because we consider that after two months members may reasonably expect that a scheme buy-back is not proceeding if it has not already commenced. A two-month timeframe is also consistent with s631(1) for announcements about proposed takeovers. We do not believe it will be difficult to have to lodge a further notice with the prescribed financial market if required.

RG 101.89 We will calculate the two-month period from:

- (a) the date specified, if the disclosure to the prescribed financial market specifies a date for the proposed scheme buy-back; or
- (b) if no such date is specified, the date the scheme buy-back is announced.

No notifications to ASIC are required

RG 101.90 A responsible entity carrying out an on-market scheme buy-back is not required to directly lodge any notices with ASIC. All relevant notices relating to the commencement, ongoing status and completion of the on-market scheme buy-back must be made through the prescribed financial market in accordance with the listing rules.

Note: See, for example, Rule 3.8A, Appendix 3C ('Announcement of buy-back'), Appendix 3D ('Change relating to buy-back'), Appendix 3E ('Daily notification') and Appendix 3F ('Final notice') of the ASX Listing Rules.

Notification requirements for other types of scheme buy-backs

RG 101.91 For scheme buy-backs where there will not be notifications to a prescribed financial market of the scheme buy-back (e.g. an unlisted scheme), we may impose alternative notification requirements to promote members having a reasonable opportunity to participate in the scheme buy-back.

D Applying for individual relief

Key points

We will consider applications for individual relief for scheme buy-backs in appropriate circumstances subject to the responsible entity being able to meet certain conditions: see Section C.

We will exercise our discretionary power to grant individual relief after taking into account relevant considerations and the proper use of our discretionary power.

This section provides details of the factors we will generally consider relevant to our consideration of applications for individual relief for scheme buy-backs. We may require additional information or consider further factors not set out in this section as required in the context of a particular relief application.

Types of individual relief applications we will consider

- RG 101.92 When considering applications for individual relief, we will consider the types of relief that would be required to facilitate the proposed scheme buy-back. The types of relief we will generally consider granting are described in Section B. Our considerations will include a general assessment of whether the proposed scheme buy-back would be consistent with our policy settings for scheme buy-backs: see RG 101.4.
- RG 101.93 If we decide that relief would be appropriate for a particular scheme buy-back, we will consider how the conditions generally described in Section C should be applied to the circumstances of the particular proposal.

Considerations linked to our conditions of relief

- RG 101.94 When we assess an application for individual relief, we will consider the following factors linked to the conditions set out in Section C:
- (a) whether the constitution includes a power for the responsible entity to buy back interests (see RG 101.49–RG 101.50);
 - (b) whether the scheme buy-back materially prejudices scheme creditors (see RG 101.51–RG 101.52);
 - (c) for listed schemes, whether the scheme buy-back will be in the ordinary course of trading (see RG 101.53–RG 101.55);
 - (d) whether the purchase price will be paid from scheme property (see RG 101.56);

- (e) for listed schemes, whether the scheme buy-back will comply with the listing rules of the prescribed financial market (see RG 101.57–RG 101.62);
- (f) whether the interests will be disposed of and will be cancelled (see RG 101.63);
- (g) whether member approval will be required—we may review the draft disclosure that the responsible entity proposes to give to members eligible to participate in the scheme buy-back and consider whether the draft disclosure contains all material information to assist a member to make a decision to participate in the scheme buy-back (see RG 101.67–RG 101.84); and
- (h) for listed scheme buy-backs that do not require member approval, the notifications proposed to be made to the prescribed financial market and the timing of when the scheme buy-back is proposed to be carried out (see RG 101.85–RG 101.89).

Other relevant considerations

RG 101.95 The considerations in this section are linked to a corresponding disclosure requirement (where the proposed scheme buy-back requires member approval). For the factors in this section, in addition to the considerations set out in Table 3 and in RG 101.78–RG 101.79, we will also consider the following factors as relevant to the circumstances of the proposed scheme buy-back:

- (a) the type of scheme buy-back and the type of relief required to facilitate the scheme buy-back, and whether it will be carried out on-market or off-market (see RG 101.96–RG 101.97);
- (b) whether the scheme buy-back is fair to all members (see RG 101.98–RG 101.104);
- (c) documentation supporting the proposed scheme buy-back (see RG 101.106);
- (d) whether there is any report by independent directors about whether they recommend members voting in favour of the scheme buy-back or an independent expert has given an opinion that the scheme buy-back is fair and reasonable (see RG 101.107–RG 101.108);
- (e) the proposed scheme buy-back price and trading volumes (see RG 101.109–RG 101.110);
- (f) alternative options considered and reasons why each alternative option was not considered to be appropriate (see RG 101.111); and
- (g) appropriate conditions and limitations applicable to the relief sought (see RG 101.112–RG 101.114).

Type of and mode of scheme buy-back

- RG 101.96 We will consider the type of scheme buy-back and whether it will involve stapled or unstapled securities. We will also form a view on the type of relief that will be required to facilitate the scheme buy-back.
- RG 101.97 We will also consider whether the scheme buy-back is proposed to be carried out on-market or off-market or whether it is proposed to be conducted concurrently on-market and off-market. If the scheme buy-back is to be carried out on a prescribed financial market that is not ASX, we will consider whether the prescribed financial market has equivalent investor protections to ASX.

Fairness to members

- RG 101.98 We will consider whether the scheme buy-back is, and the scheme buy-back procedures are, fair and reasonable to members as a whole (to align with the general policy for share capital reductions in s256B(1)(a)) and whether the scheme buy-back proposes to treat any members differently: see s601FC(1)(d).

Members have a reasonable opportunity to offer for sale their interests

- RG 101.99 In our view, notification to members is generally required to promote a reasonable opportunity for members to participate in the scheme buy-back.
- RG 101.100 Where approval is required to carry out the scheme buy-back, 21 days notice of the meeting to approve the scheme buy-back will generally be required to be given to members. Where member approval is not required, 14 days notice is generally required to be made. This notification process may be similar to the notification that would be required for a listed scheme buy-back: see RG 101.86.

Equal treatment of members

- RG 101.101 We will consider whether the proposed scheme buy-back is intended to treat all members equally, whether some members are proposed to be prioritised over others, and whether any members would be ineligible to participate in the scheme buy-back. We will assess whether any proposed unequal treatment of members is within our policy and whether equal treatment relief is appropriate: see RG 101.31–RG 101.37.
- RG 101.102 We will carefully consider any unequal treatment of members, including the following factors:
- (a) the overall number of interests and the total value of the scheme interests;

- (b) the relative number, and the value, of the holdings of groups of members that will be treated in different ways; and
- (c) reasons for the differences in how members will be treated under the proposed scheme buy-back and how information about different treatment of members is proposed to be disclosed.

RG 101.103 Typically, we will seek to apply reasonable limits on any relief we grant from the requirement to treat members equally as appropriate to the circumstances of the scheme buy-back.

How the scheme buy-back is to be funded

RG 101.104 We will consider in detail how the proposed scheme buy-back is to be funded having regard to:

- (a) whether the scheme buy-back is to be funded out of existing cash holdings of scheme property;
- (b) whether the scheme buy-back might prompt any realisation of assets that could be disadvantageous to members; and
- (c) the liquidity of the assets of the fund.

Impact of the scheme buy-back

RG 101.105 We will consider the impact of the scheme buy-back on net asset value, including the risk that the asset backing of non-participating members may be diluted, change in control and how impacts are proposed to be disclosed to members.

Documentation supporting the proposed scheme buy-back

RG 101.106 We may request copies of draft documentation relating to the proposed scheme buy-back, including:

- (a) any notice of meeting of members, including any supporting statements relating to a resolution to carry out the scheme buy-back or approve the scheme buy-back terms or any other related approval (such as an approval for a related party transaction—see [Regulatory Guide 76](#) *Related party transactions* (RG 76));
- (b) any draft changes proposed to be made to a scheme constitution; and
- (c) any draft disclosure document related to the proposed scheme buy-back, including any draft Product Disclosure Statement (PDS).

Independent reports

RG 101.107 Depending on the circumstances of the proposed scheme buy-back, and whether an independent expert report is required, we may request a copy of

any draft independent report proposed to be provided to members relating to the scheme buy-back: see RG 101.78–RG 101.79. We will consider any recommendation from the expert and reasons for the recommendation in relation to the scheme buy-back and whether the expert has given an opinion as to whether the scheme buy-back is fair and reasonable.

RG 101.108 We will similarly consider any report or recommendation by an independent director on how members should vote in a resolution relating to the proposed scheme buy-back.

Scheme buy-back price

RG 101.109 In considering the scheme buy-back price, we will consider the following factors:

- (a) potential impacts on the trading volume of the class of interests to be bought back;
- (b) how the scheme buy-back price is proposed to be determined;
- (c) the extent of any proposed premium or discount to the average market price;
- (d) whether the scheme buy-back price complies with Rule 7.33 of the ASX Listing Rules (see RG 101.61)—that is, the price does not exceed 5% of the VWAP for interests, where the average is calculated over the last five days on which sales in the interests were recorded before the day on which the purchase is made; and
- (e) whether the scheme buy-back price is more than the net asset value of the interest.

RG 101.110 Generally, the scheme buy-back price will not be at a discount to the average market price; however, if a discounted buy-back price is proposed we will consider the reasons for the discount. For example, a discounted price may be justified for a scheme with a history of being illiquid. Relief from the self-acquisition provisions in s601FG(1)(a) may be required where there is a proposed discount to the average market price: see RG 101.38–RG 101.40.

Alternative options

RG 101.111 We will consider what other options are open to the responsible entity, the responsible entity's assessment of these options and why the proposed scheme buy-back is considered the preferred option. Where an independent expert report is proposed to be provided to members, we may also consider the expert's findings on any alternative options considered.

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Scheme buy-back conditions

- RG 101.112 We will consider whether any special conditions or variations on the general conditions applicable to scheme buy-back relief set out in Section C would be appropriate in the circumstances.
- RG 101.113 Standard conditions are typically adapted to the circumstances of the particular scheme buy-back in the following ways:
- (a) determining the type of resolution if member approval is required and whether the resolution should be a special resolution (see RG 101.67–RG 101.71);
 - (b) establishing appropriate limits on any relief from the requirement to treat members of the same class equally (see s601FC(1)(d))—for example, setting appropriate limits on any tender scale-backs (see RG 101.32–RG 101.33), or limits on the maximum value of a small parcel where priority is proposed to be given for small parcels (see RG 101.35–RG 101.36); and
 - (c) ensuring there are appropriate parameters around the scheme buy-back price and the timing of the scheme buy-back, including any record date.
- RG 101.114 We may as appropriate for a particular scheme buy-back apply different conditions that are not included in this guide.

How to apply for individual relief

- RG 101.115 To submit a relief application, you should:
- (a) lodge an electronic copy to applications@asic.gov.au or a hard copy of the document to an ASIC office in your state or territory;
 - (b) include the prescribed fee(s); and
 - (c) ensure that your application addresses the criteria in [Regulatory Guide 51 Applications for relief](#) (RG 51) and this guide.
- RG 101.116 If you are considering applying for relief, you should lodge your relief application well in advance of when you are considering commencing the scheme buy-back. We may also require additional time to consider any disclosure to be given to members.

Key terms

Term	Meaning in this document
10/12 limit	10% of the smallest number of interests that are on issue at any time during the previous 12 months
ASX	ASX Limited or the exchange market operated by ASX Limited
buy-back price	The amount to be paid to a member whose interest in the scheme is being purchased by the responsible entity of the scheme
[CO 13/657] (for example)	An ASIC class order (in this example numbered 13/657) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
constitution	A constitution of a scheme
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
employee share scheme buy-back	Has the meaning given in s9
equal access scheme	Has the meaning given in s9 and as described in RG 101.9
listed	Has the meaning given in s9
minimum holding buy-back	Has the meaning given in s9
non-liquid scheme	Has the meaning given in s601KA(3)
on-market	Has the meaning given in s9
prescribed financial market	Has the meaning given in s9
Product Disclosure Statement (PDS)	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 entity	Has the meaning given in s9
RG 110 (for example)	An ASIC regulatory guide (in this example numbered 110)
Rule 3.8A (for example)	A rule of the ASX Listing Rules (in this example numbered 3.8A), unless otherwise specified
s601GA(4) (for example)	A section of the Corporations Act (in this example numbered 601GA(4)), unless otherwise specified

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Term	Meaning in this document
scheme	A registered managed investment scheme as defined in s9
scheme buy-back	A scheme buy-back as described in RG 101.2
scheme property	Has the meaning given in s9
scheme's creditor	A creditor of a responsible entity in relation to which the responsible entity has a right of indemnity for the liability out of scheme property
selective buy-back	A selective buy-back as defined in s9 and described in RG 101.10–RG 101.12
VWAP	Volume weighted average price

Related information

Headnotes

10/12 limit, buy-back price, disclosure, discretion, managed investment scheme, market price, member approval, members, off-market scheme buy-back, on-market scheme buy-back, responsible entity, scheme buy-back, scheme constitution, withdrawal procedures, withdrawal requests

Legislative instruments

[\[CO 13/657\]](#) *Discretions affecting the amount of consideration to acquire interests and withdrawal amounts*

ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX

Regulatory guides

[RG 51](#) *Applications for relief*

[RG 72](#) *Foreign securities disclosure relief*

[RG 76](#) *Related party transactions*

[RG 110](#) *Share buy-backs*

[RG 111](#) *Content of expert reports*

[RG 112](#) *Independence of experts*

[RG 134](#) *Managed investments: Constitutions*

[RG 223](#) *Guidance on ASIC market integrity rules for competition in exchange markets*

Legislation

Corporations Act, Ch 2G.4, Pt 5C.6, Div 5A of Pt 7.9, s253E, 256B, 256B(1)(a), 257A, 257B, 257D(2), 257F(1), 601FC(1)(d), 601FC(1A), 601FG(1)(a), 601GA(4), 601KB(2), 601KB(3)(a), 601KD, 606, item 19 of 611, 631(1), 1019D(1)(d)(ii), 1043A

Market integrity rules

ASIC Market Integrity Rules (Competition in Exchange Markets) 2011

Cases

Aberfoyle Ltd v Western Metals Ltd (1998) 16 ACLC 1,335

ANZ Nominees Pty Ltd v Wormald International Ltd (1988) 13 ACLR 698

Attorney-General (Vic) v Walsh's Holdings Ltd [1973] VR 137

Lantern Hotel Group and Australian Securities and Investments Commission
[2015] AATA 428 (17 June 2015)

MacarthurCook Fund Management Ltd v TFML Ltd (2014) 32 ACLC
14-023; [2014] HCA 17

NSCS v Consolidated Gold Mining Areas NL (No. 2) [1985] 1 NSWLR 622

Consultation paper

CP 269 Remaking ASIC class order on managed investment scheme buy-backs and updating related guidance

DRAFT