



ASIC
Australian Securities &
Investments Commission

REGULATORY GUIDE 192

Licensing: Wholesale equity schemes

September 2018

About this guide

This is a guide for trustees and managers of wholesale equity schemes and their advisers. It is particularly relevant to venture capital and private equity schemes.

This guide explains the licensing relief we have given in [ASIC Corporations \(Wholesale Equity Scheme Trustees\) Instrument 2017/849](#). The relief is for trustees of wholesale equity schemes that are operated by a manager holding an Australian financial services (AFS) licence under Ch 7 of the *Corporations Act 2001* (Corporations Act). This guide also explains amendments to financial requirements that may apply to these managers, made by [ASIC Corporations \(Amendment and Repeal\) Instrument 2017/848](#).

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This regulatory guide was issued in September 2018 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 192, issued August 2008

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.

Licensing: Wholesale equity schemes

Key points

To remove impediments in the venture capital and private equity industry, we have given trustees of wholesale equity schemes relief from the requirement under Ch 7 to hold an AFS licence to provide custodial or depository services and dealing services in connection with the investment products held under the scheme.

The relief provided under [ASIC Corporations \(Wholesale Equity Scheme Trustees\) Instrument 2017/849](#) applies when a fund manager that has an AFS licence and is a related body corporate of the trustee accepts responsibility for the conduct of the trustee.

The relief is subject to a number of requirements and conditions.

What is a wholesale equity scheme?

- RG 192.1 A 'wholesale equity scheme' for the purposes of our relief is a managed investment scheme to which all of the following apply:
- (a) the scheme is not registered;
 - (b) all of the trust property (other than incidental property) consists of investment products;
 - (c) at all times, the value of the investment products that are quoted on a financial market does not exceed 20% of the trustee's reasonable estimate of the market value of the trust property; and
 - (d) no interests in the scheme have been issued to a person as a retail client.
- RG 192.2 Many venture capital and private equity schemes are wholesale equity schemes. These schemes primarily hold equities in small, unlisted, closely held private companies and are generally operated using a multiple-unit trust structure with separate corporate trustees to ensure that each trust is not treated as a public trading trust for tax purposes.

Why is relief required?

- RG 192.3 [ASIC Corporations \(Wholesale Equity Scheme Trustees\) Instrument 2017/849](#) gives trustees of wholesale equity schemes relief from the requirement under Ch 7 to hold an AFS licence to:
- (a) deal in investment products that form part of the trust property of the wholesale equity scheme (other than by issuing to a person as a retail client); and
 - (b) provide a custodial or depository service in relation to the investment products.

Note: In this guide we refer to these two financial services as 'wholesale equity financial services'.

- RG 192.4 In the absence of relief, the trustee of each wholesale equity scheme may require an AFS licence because it will be carrying on a financial services business by:
- (a) dealing (under s766C(1)(a) and (e)), when acquiring and disposing of financial products (e.g. shares in unlisted companies) on behalf of members of the wholesale equity scheme;
 - (b) dealing (under s766C(1)(b)), when issuing interests in the wholesale equity scheme. The trustee is likely to be the issuer in relation to the wholesale equity scheme if it is responsible for obligations owed to members under the terms of the facility that is the product (s761E(4)); and
 - (c) providing a custodial or depository service (under s766E), by holding financial products (e.g. shares in unlisted companies) on trust for, or on behalf of, the members of the wholesale equity scheme.
- RG 192.5 Certain exemptions from the requirement to hold an AFS licence may apply, depending on the circumstances. However, in relation to the financial services provided by trustees in relation to wholesale equity schemes, we consider it unlikely that trustees will be able to rely on the exemptions for:
- (a) authorised representatives in s911A(2)(a), because the trustee would undertake and be personally responsible for obligations to clients under the terms of the trusts and not as the manager's representative; and
 - (b) intermediaries in s911A(2)(b), other than where a licensed manager offers to arrange for the issue of interests in the scheme.
- RG 192.6 We have provided our relief because we consider that it would impose a disproportionate cost burden on a wholesale equity scheme and create impediments in the venture capital and private equity industry to require the trustee of the scheme to also hold an AFS licence:
- (a) when the scheme is structured with separate corporate trustees, so that the trustee does not control any of the entities in which it invests; and
 - (b) when a manager who holds an AFS licence with appropriate authorisations takes responsibility for the operation of the scheme.

Requirements and conditions for relief

- RG 192.7 The relief in [ASIC Corporations \(Wholesale Equity Scheme Trustees\) Instrument 2017/849](#) is subject to:
- (a) the requirements in sections 5 and 6 of the instrument, summarised in Table 1; and
 - (b) the conditions in section 7 of the instrument, summarised in Table 2.

Table 1: Summary of requirements of relief

Requirement	Explanation
<p>1 The scheme must be a 'wholesale equity scheme' meeting all of the following criteria:</p> <ul style="list-style-type: none"> • the scheme is not registered; • all of the trust property (other than incidental property) consists of investment products; • at all times, the value of the investment products that are quoted on a financial market does not exceed 20% of the trustee's reasonable estimate of the market value of the trust property; and • no interests in the scheme have been issued to a person as a retail client. 	<p>The relief is available only for unregistered managed investment schemes whose members are all wholesale clients.</p> <p>The trust property requirements reflect the fact that the relief is aimed at helping the venture capital and private equity industry. We have imposed the 20% limit because we envisage that it will only be necessary to hold small holdings in listed entities on a transitional basis after floats.</p>
<p>2 The scheme must be operated by a related body corporate of the trustee (the manager).</p>	<p>The relief is intended to apply where the manager is effectively controlling the operations of the scheme so that, as far as possible, the same regulatory and liability consequences apply as if the manager were providing the wholesale equity financial service itself.</p>
<p>3 The manager must have an AFS licence that:</p> <ul style="list-style-type: none"> • authorises it to provide all of the wholesale equity financial services that are provided by the trustee when relying on the relief; and • contains conditions to the effect that the manager must: <ul style="list-style-type: none"> – as far as possible, comply with the Corporations Act as if the trustee were providing the wholesale equity financial services as the manager's representative; – have in place a deed poll that contains enforceable, unlimited and irrevocable covenants, for the benefit of each person (beneficiary) to whom the trustee provides a wholesale equity financial service, to the effect that the manager will indemnify the beneficiary in relation to any liability (other than an exempt liability) that arises from the trustee's provision of the wholesale equity financial services to the beneficiary; and – for the purposes of the 'relevant financial conditions' of the manager's AFS licence— treat the assets, liabilities, cash inflows and cash outflows of the trustee as though they were the assets, liabilities, cash inflows and cash outflows of the manager. 	<p>These conditions are intended to protect scheme members by ensuring, as far as practicable, that the same regulatory and liability consequences apply as would apply if the manager had provided the wholesale equity financial services itself.</p> <p>For more information about how the financial conditions on the manager's AFS licence will apply, see RG 192.9.</p>

Requirement	Explanation
<p>4 The trustee or manager must report to ASIC if the trustee has failed to comply with the conditions of section 7 of ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/849 (summarised in Table 2). The trustee or manager must make its report:</p> <ul style="list-style-type: none"> • in writing, setting out full particulars of the failure (to the extent that the trustee or manager knows those particulars or would have known them if it had undertaken reasonable inquiries); and • within 10 business days of becoming aware, or when it should reasonably have become aware, of matters that give it reason to believe that the trustee has failed to comply, other than in an immaterial respect, with the conditions. 	<p>Our relief is structured so that a failure by the trustee to meet the conditions of relief summarised in Table 2 will not necessarily cause the relief to cease. However, a failure to meet the requirement to report such a failure will cause the relief to cease. ASIC will consider reports of failure to meet conditions and determine whether or not to exclude the relevant trustee from relief.</p>

Table 2: Summary of conditions of relief

Condition	Explanation
<p>1 The trustee must:</p> <ul style="list-style-type: none"> • be solvent at all times and have positive net assets (see conditions 13(a) and (b) of Pro Forma 209 Australian financial services licence conditions (PF 209)); • comply with the tailored cash needs requirement in Class Order [CO 13/761] Financial requirements for custodial or depository service providers, except for the net tangible assets (NTA) requirements; and • lodge the audit opinion on the trustee's compliance with the financial requirements in [CO 13/761] (except for the NTA requirements) within the specified timeframe. 	<p>We consider these are important requirements, as the trustee is a separate legal entity with obligations to scheme members and it is important that it has the financial capacity to meet these obligations.</p>
<p>2 The trustee must comply with the minimum custody requirements for providers of custodial and depository services in Class Order [CO 13/1410] Holding assets: Standards for providers of custodial and depository services.</p>	<p>As the trustee will be providing the financial service under the exemption, it should ensure that the custody requirements are met.</p>

Condition	Explanation
3 The trustee must take all reasonable steps to ensure that no interests in the scheme are acquired by a person as a retail client.	This requirement is intended to ensure that our relief will not affect the protections Parliament intended for retail clients, such as the requirement for a Financial Services Guide to be given to them. If interests in the scheme are acquired by retail clients, then the financial services provided will no longer be 'wholesale equity financial services' and the scheme will no longer be a 'wholesale equity scheme' within the terms of relief, and our relief will no longer apply.

Amendment of financial requirements for managers

- RG 192.8 As an AFS licensee, the manager operating the scheme must also meet the financial requirements relevant to the authorisations on its AFS licence.
- RG 192.9 Schedule 1 to the [ASIC Corporations \(Amendment and Repeal\) Instrument 2017/848](#) amends the financial requirements applying to a manager that holds an AFS licence that authorises it to provide wholesale equity financial services. This instrument amends the financial requirements for managers to align these with the requirements for relevant financial conditions, summarised in Requirement 3 of Table 1. It provides that the requirements set out in [Class Order \[CO 13/760\] Financial requirements for responsible entities and operators of investor directed portfolio services](#) and [CO 13/761] apply:
- as if the assets, liabilities, cash inflows and cash outflows of any eligible trustee were included in the assets, liabilities, cash inflows and cash outflows of the manager.
- RG 192.10 We have made these amendments to ensure that the outcome would be the same if the trustee's operations were undertaken by the manager.

Key terms

Term	Meaning in this document
AFS licence	<p>An Australian financial services licence under s913B that authorises a person who carries out a financial services business to provide financial services</p> <p>Note: This is a definition contained in s761A</p>
Corporations Act	<p><i>Corporations Act 2001</i>, including regulations made for the purposes of that Act</p>
eligible trustee	<p>A trustee of a wholesale equity scheme that is a body corporate and does not control any entity that is an issuer of an investment product held by the body corporate</p> <p>Note: 'Control' has the same meaning as in s50AA of the Corporations Act</p>
exempt liability	<p>A liability arising from any act or omission relating to a wholesale equity financial service for which the trustee of the scheme may be indemnified from the trust property</p>
financial product	<p>A facility through which, or through the acquisition of which, a person does one or more of the following:</p> <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) <p>Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A</p>
incidental property	<p>Cash, deposits or current accounts with an Australian authorised deposit-taking institution or interests in a cash management trust that are held for no more than three months pending the acquisition of investment products, or expenditure or distribution to members</p>
investment product	<p>Each of the following:</p> <ul style="list-style-type: none"> • a security; • a managed investment product; • a financial product covered by s764A(1)(ba) of the Corporations Act; and • an option to acquire, by way of transfer: <ul style="list-style-type: none"> – a security covered by paragraph (a), (b) or (c) of the definition of 'security' in s761A of the Corporations Act; and – a financial product covered by s764A(1)(b)(i) or (ii) or s764A(1)(ba)(i) or (ii) of the Corporations Act

Term	Meaning in this document
manager	<p>A related body corporate of the trustee that holds an AFS licence containing the conditions in Requirement 3 of Table 1.</p> <p>Note: See section 6(a) of ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/849 for the full definition.</p>
PF 209 (for example)	An ASIC pro forma (in this example numbered 209)
related body corporate	Has the meaning given in s9 of the Corporations Act
relevant financial conditions	<p>Conditions that have the effect of the following financial conditions in PF 209:</p> <ul style="list-style-type: none"> • condition 13 (base level financial requirements); • condition 21 (financial requirements for holding client money or property); • condition 22 (financial requirements for licensee transacting with clients); and • condition 28 (audit opinion on financial requirements)
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations 2001
s766E (for example)	A section of the Corporations Act (in this example numbered 766E)
trustee	A person who is an eligible trustee of a wholesale equity scheme
trust property	<p>Means:</p> <ul style="list-style-type: none"> • contributions of money or money's worth to the scheme; • money borrowed or raised by the trustee for the purposes of the scheme; • property acquired, directly or indirectly, with or with the proceeds of contributions of money or money borrowed or raised; and • income and property derived, directly or indirectly, from contributions of money, money borrowed or raised, or property acquired.
wholesale client	A client who is not a retail client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations 2001
wholesale equity financial services	Has the meaning given in RG 192.3
wholesale equity scheme	Has the meaning given in RG 192.1

Related information

Headnotes

AFS licence, control, custodial or depository service, dealing, managed investment scheme, manager, related body corporate, trustee, wholesale clients, wholesale equity schemes

Legislative instruments and pro formas

[ASIC Corporations \(Amendment and Repeal\) Instrument 2017/848](#)

[ASIC Corporations \(Wholesale Equity Scheme Trustees\) Instrument 2017/849](#)

[\[CO 13/760\]](#) *Financial requirements for responsible entities and operators of investor directed portfolio services*

[\[CO 13/761\]](#) *Financial requirements for custodial or depository service providers*

[\[CO 13/1410\]](#) *Holding assets: Standards for providers of custodial and depository services*

[PF 209](#) *Australian financial services licence conditions*

Legislation

Corporations Act, Ch 7, s761E(4), 766C(1)(a), 766C(1)(b), 766C(1)(e), 766E, 911A(2)(a), 911A(2)(b)

Consultation papers and reports

[CP 280](#) *ASIC class order on wholesale equity schemes: Licensing relief for trustees—[CO 07/74]*

[REP 545](#) *Response to submissions on CP 280 ASIC class order on wholesale equity schemes*

Media releases

[17-063MR](#) *ASIC consults on ‘sunsetting’ class order about licensing relief for trustees of wholesale equity schemes (15 March 2017)*

[17-330MR](#) *ASIC remakes ‘sunsetting’ class order providing licensing relief for trustees of wholesale equity schemes (29 September 2017)*