



ASIC

Australian Securities &
Investments Commission

REPORT 629

Response to submissions on CP 304 Remaking ASIC class order on share and interest purchase plans: [CO 09/425]

August 2019

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 304 *Remaking ASIC class order on share and interest purchase plans: [CO 09/425]* (CP 304) and details our responses to those issues.

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Disclaimer

This report does not constitute legal advice. We encourage you to 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 125](#) *Share and interest purchase plans*.

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A Overview/Consultation process

- 1 In [Consultation Paper 304](#) *Remaking ASIC class order on share and interest purchase plans: [CO 09/425]* (CP 304), we consulted on proposals to remake, without significant amendment, our class order on share and interest purchase plans, which was due to expire on 1 October 2019 under the *Legislation Act 2003*.
- 2 In CP 304 we proposed to continue the relief under [Class Order \[CO 09/425\]](#) *Share and interest purchase plans*, without significant change. We invited specific comment on:
- (a) whether [CO 09/425] was operating effectively and efficiently; and
 - (b) whether the conditions of relief (including the \$15,000 limit per individual member in any consecutive 12-month period) should remain unchanged.
- 3 This report highlights the key issues that arose out of the submissions received on CP 304 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 304. We have limited this report to the key issues.
- 5 We received three non-confidential responses to CP 304 during the consultation period. Respondents included relevant industry bodies and a custodian association. We are grateful to respondents for taking the time to send us their comments.
- 6 For a list of the non-confidential respondents to CP 304, see the appendix. Copies of these submissions are currently on the [CP 304](#) page on the ASIC website.

Responses to consultation

- 7 The main issues raised by respondents related to:
- (a) whether the current monetary limit of \$15,000 should be increased;
 - (b) whether relief by legislative instrument should extend to entities listed on a licensed financial market other than ASX;
 - (c) whether we should impose a minimum offer period as an additional condition of our relief; and
 - (d) whether the existing certification regime for custodians should be replaced with an alternative compliance regime.

B Remaking [CO 09/425]

Key points

This section outlines the submissions on our proposals to remake [\[CO 09/425\]](#) and our response to those submissions. In particular, it discusses:

- the appropriate monetary limit that applies to individual investors under a purchase plan, and our decision to increase the monetary limit to \$30,000 (see paragraphs 8–10);
- extending relief by way of legislative instrument to entities listed on a licensed market other than ASX, and our decision not to extend the relief (see paragraph 11);
- imposing a minimum offer period as a condition of our relief, and our decision not to impose a minimum offer period (see paragraphs 12–13); and
- changing the certification requirements applicable to custodians that accept purchase plan offers on behalf of others, and our decision to not amend the custodian requirements (see paragraphs 14–16).

Monetary limit

- 8 In [CP 304](#) we invited comment on whether the monetary limit in [\[CO 09/425\]](#) should remain unchanged. The monetary limit sets a cap on the amount a holder can invest under a purchase plan in any consecutive 12-month period.
- 9 Our preliminary view (as discussed in CP 304) was that the monetary limit did not require adjustment in the new legislative instrument.
- 10 One respondent recommended that the monetary limit should be increased to \$30,000 because:
- (a) the \$15,000 limit set in 2009 does not account for the subsequent growth in market capitalisation in ASX-listed companies;
 - (b) an increased monetary limit would ensure that a greater number of non-institutional security holders would be able to subscribe at equal to, or greater than, their pro-rata holding; and
 - (c) the requirement for an issuer to prepare and lodge a ‘cleansing notice’ that complies with s708A(6) or 1012DA(6) of the Corporations Act mitigates the risk of investors not receiving a prospectus or a Product Disclosure Statement (PDS).

ASIC's response

As discussed in [Regulatory Guide 125 Share and interest purchase plans](#) (RG 125), the purpose of providing purchase plans is to facilitate the offer of additional discounted shares and interests to retail holders who may be excluded from other secondary fundraising activities such as institutional placements.

After consideration, we have determined that the monetary limit should be increased to \$30,000 because:

- increasing the monetary limit is consistent with our aim of facilitating retail participation in discounted secondary offers;
- increasing the monetary limit recognises the effects of both inflation and the increasing capitalisation of entities quoted on ASX;
- in the absence of a lodged disclosure document, the requirement for an issuer to lodge a cleansing notice mitigates some of the risk associated with an increase to the monetary limit; and
- the increased monetary limit appears to strike the right balance between the benefits to issuers in terms of cost savings and flexibility and the potential detriments associated with investors not having a prospectus or a PDS.

Application of relief to entities listed on licensed markets

- 11 One respondent recommended that the terms of the legislative instrument should be revised to apply to entities listed on the market of *any* licensed market operator.

ASIC's response

As discussed in [RG 125](#), relief under the legislative instrument is limited to entities that are admitted to the official list of ASX.

After consideration, we have decided to maintain the existing scope of our relief because:

- disclosure relief is generally available only when there is a relatively high degree of certainty about the reliability of the quoted market prices of securities, which requires sufficient market liquidity;
- entities listed on a market operated by a licensed market operator other than ASX may continue to seek individual relief analogous to that provided by [ASIC Corporations \(Share and Interest Purchase Plans\) Instrument 2019/547](#); and
- since 2009, we have received only one application from an entity listed on a licensed market other than ASX seeking relief analogous to that provided by [\[CO 09/425\]](#) and the application was refused because of price uncertainty.

We will consider granting purchase plan relief to entities listed on other licensed markets on a case-by-case basis, taking into account an applicant's trading history, the liquidity of securities, and its compliance with the continuous disclosure regime.

Minimum offer period

- 12 One respondent recommended that issuers utilising our relief should be prevented from closing a purchase plan offer early. In effect, this would create a minimum offer period.
- 13 The respondent considered that such a condition was appropriate because it may lead to a reduction in the compliance costs related to custodian arrangements. This is because the potential for an issuer to close a purchase plan offer early means that a custodian may decide to lodge applications on behalf of beneficiaries on an 'as received' basis to reduce the risk that an application is not received by the issuer before the close of the offer. When multiple applications are lodged separately by the custodian rather than in bulk, this may result in additional costs being incurred.

ASIC's response

As previously noted, the purpose of our relief is to facilitate offers of discounted shares in ASX-listed entities to retail holders who may otherwise be excluded from secondary fundraising activities.

We do not consider that it is appropriate to impose a minimum offer period as a further condition to relief because:

- imposing a minimum offer period reduces the flexibility of the issuer to raise capital quickly and efficiently, which is one of the objectives of the relief;
- in our experience, purchase plan offers close early infrequently; and
- as discussed in [RG 125](#), it is at the discretion of the custodian as to whether to extend a purchase plan offer to its beneficiaries.

Custodian certification requirements

- 14 Under [\[CO 09/425\]](#), before shares or interests are issued to a registered holder acting as a custodian on behalf of a beneficiary:
- (a) the custodian must certify in writing to the issuer that certain conditions have been met;

- (b) the custodian must provide the issuer with particulars of the relevant beneficiary wishing to participate in the purchase plan offer and the existing interests of the beneficiary in the relevant securities; and
- (c) the issuer must be reasonably satisfied that, in any consecutive 12-month period, the total application price of the shares or interests to be issued to, or for the benefit of, any beneficiary is not more than the monetary limit.

15 One respondent recommended that instead of providing written certification of the prescribed information required under [CO 09/425], custodians should instead be permitted to attest to the issuer that all underlying beneficial owners who wish to participate in the purchase plan offer meet the requirements of the remade legislative instrument.

16 The respondent considered that such an attestation process would be more appropriate than the certification regime in [CO 09/425] because:

- (a) the regime creates a significant resource overhead, and is cumbersome—particularly for custodians with intermediate custodian clients;
- (b) over the period of operation of [CO 09/425] there have been few, if any, applications that would, if processed, have led to the beneficial holder exceeding the monetary limit; and
- (c) the alternative attestation process proposed by the respondent could provide the same outcome as the written certification requirements, in a streamlined and more efficient manner.

ASIC's response

We recognise that custodians acting on behalf of beneficiaries must comply with additional informational requirements (as compared to other registered holders).

However, we do not consider that it is appropriate to liberalise the custodian requirements in [ASIC Corporations \(Share and Interest Purchase Plans\) Instrument 2019/547](#) because:

- the additional compliance costs incurred by custodians (as compared to other registered holders) are a consequence of the structuring of the custodian arrangement and are a normal cost of doing business;
- the purpose and function of the additional requirements are to ensure that the issuer has reliable information necessary to ensure that it continues to comply with the terms of ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547, and we consider that these objectives are best met through the existing verification controls; and
- there is no positive obligation for a custodian to extend a purchase plan offer to its underlying beneficiaries.

Appendix: List of non-confidential respondents

- Australian Custodial Services Association
 - Law Council of Australia
 - National Stock Exchange of Australia
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