



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 173

Disclosure for on-sale of securities and other financial products

March 2016

About this guide

This guide is for listed companies and listed managed investment schemes.

It outlines the circumstances in which we will provide relief from the disclosure requirements under the *Corporations Act 2001* (Corporations Act) for the on-sale of securities and other financial products.

Note: From 27 July 2020, applications for relief should be submitted through the [ASIC Regulatory Portal](#). For more information, see [how you apply for relief](#).

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 guide was issued in March 2016 and is based on legislation and regulations as at the date of issue. The note on the front page was inserted on 27 July 2020.

Previous versions:

- Superseded Regulatory Guide 173, issued 18 June 2009, reissued 11 May 2010 and June 2012
- Superseded Policy Statement 173, issued 3 December 2002, reissued 1 July 2004 and 21 December 2004, rebadged as a regulatory guide 5 July 2007

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

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A Overview

Key points

The on-sale provisions are anti-avoidance provisions that are designed to ensure that retail investors receive adequate disclosure regardless of whether securities are issued to them directly or through an intermediary.

In some situations the on-sale provisions can present certain practical difficulties. We consider that relief should be provided if this will facilitate fundraising without compromising the protection that the on-sale provisions provide to retail investors.

What is the purpose of the on-sale provisions?

- RG 173.1 Sections 707(3)–(4) and 1012C(6)–(7) of the *Corporations Act 2001* (Corporations Act) (the on-sale provisions) are an anti-avoidance mechanism that is designed to minimise the opportunity for issuers of securities or other financial products to avoid giving disclosure to retail investors by:
- (a) first issuing the financial products to an intermediary for whom disclosure is not required; and
 - (b) the intermediary then on-selling the financial products to retail investors.
- RG 173.2 The on-sale provisions seek to ensure that, regardless of whether financial products are issued directly to retail clients or indirectly:
- (a) retail clients receive adequate disclosure for what is, in substance, an issue of financial products; and
 - (b) the issuer is liable to retail clients for the efficacy of that disclosure.

Balancing commercial considerations and investor protection

- RG 173.3 The issue of financial products to wholesale investors is an important feature of the Australian capital market. Generally, such issues can be completed more quickly and at a lower cost than issues made to retail clients due to a combination of factors, including economies of scale and fewer regulatory requirements.
- RG 173.4 Many of the products issued in the wholesale market are of the same kind as those issued or traded in the wider markets. In such cases, financial products issued to wholesale investors could be on-sold to retail clients. Such transactions, being secondary in nature, usually do not attract an obligation

to issue a disclosure document or Product Disclosure Statement (PDS). This is because disclosure requirements in the Corporations Act (e.g. prospectus disclosure under Pt 6D.2 and PDS disclosure under Pt 7.9) and in the Corporations Regulations 2001 (Corporations Regulations) (e.g. shorter PDS disclosure under Sch 10A, Pt.5C) generally apply to the issue of financial products and not to their on-sale, unless the sale occurs within 12 months of the issue and the on-sale provisions apply.

Note: Simple managed investments schemes are subject to a shorter PDS regime: see Corporations Regulations, Pt 7.9, Subdiv 4.2C. For more information on the shorter PDS regime that applies to these products, see [Information Sheet 133](#) *Shorter PDS regime: Superannuation, managed investment schemes and margin lending* (INFO 133) and [Information Sheet 155](#) *Shorter PDSs: Complying with requirements for superannuation products and simple managed investment schemes* (INFO 155).

- RG 173.5 Financial products issued in the wholesale market are likely to be on-sold into the retail market in the ordinary course of wholesale investors carrying on their investment activities. In such transactions, avoiding disclosure to retail clients will usually not be a relevant motive.
- RG 173.6 However, the differences in the regulatory requirements between wholesale and retail markets necessarily raises the potential for:
- (a) financial products issued in the wholesale market to be on-sold to retail investors within 12 months of their issue (this may undermine the requirements for disclosure for retail offers of financial products); and
 - (b) opportunities for abuse of those differences by persons who are inclined to exploit them.
- RG 173.7 Consequently, anti-avoidance provisions have long been a feature of Australian law. By enacting the on-sale provisions, Parliament intended to tighten the operation of their anti-avoidance effect.
- RG 173.8 Nonetheless, we realise that without relief the on-sale provisions can present some practical difficulties. For example:
- (a) in certain circumstances, ordinary placements of equities or other financial products might be unduly impeded; and
 - (b) retail clients who are issued financial products without disclosure under a specific exemption from the disclosure provisions (e.g. for dividend reinvestment plans or as consideration for a takeover offer) might not be able to on-sell those products within 12 months of their issue.
- RG 173.9 In considering relief, it would generally not be appropriate for us to exercise ASIC's discretionary powers to make fundamental changes to the settings determined by Parliament. However, we can exercise ASIC's powers to enable the legislation to operate more appropriately in particular circumstances that may not have been envisaged, or to mitigate apparently unintended outcomes.

When do we provide relief?

- RG 173.10 This guide discusses relief we have provided from the on-sale provisions. There are two types of relief:
- (a) *Disclosure-based relief*: The Corporations Act provides exemptions from the on-sale provisions: s708A and 1012DA. The on-sale exemptions apply where retail investors have the benefit of information that is comparable to that otherwise available in a prospectus or PDS. If the on-sale exemptions do not apply, but retail investors have the benefit of this type of information and investor protection is not compromised, we may provide additional on-sale relief: see Section B.
 - (b) *Exemption-based relief*: This relief ensures that products issued to persons including retail clients under separate disclosure exemptions may be readily on-sold: see Section C.
- RG 173.11 In considering whether to provide relief and the nature of this relief, we have sought to balance the commercial considerations relevant to wholesale capital markets against the retail client protection provided by disclosure under the on-sale provisions.
- RG 173.12 We believe that any significant relief from the on-sale provisions can only be justified if a comparable level of protection is otherwise available to retail clients who acquire financial products by way of transfer within 12 months of their issue.
- RG 173.13 We have provided relief where we consider it will facilitate fundraising and on-sales without compromising the investor protection that the on-sale provisions provide to retail clients.

Exclusion power

- RG 173.14 This guide also discusses ASIC's power to make a determination to exclude an entity from relying on the statutory on-sale exemptions where the entity has contravened certain provisions of the Corporations Act (exclusion power): see RG 173.62–RG 173.67.

B Disclosure-based relief

Key points

We have provided relief:

- on terms similar to the statutory on-sale exemptions for issuers of stapled securities and issuers who rely on certain technical accounting relief (see [ASIC Corporations \(Sale Offers That Do Not Need Disclosure\) Instrument 2016/80](#) and [ASIC Corporations \(Disregarding Technical Relief\) Instrument 2016/73](#));
- so that institutional offers of convertible notes can be made by a cleansing notice containing prospectus-like disclosure. A condition of relief is that certain ongoing disclosures are included in the annual report of the issuer during the term of the convertible notes (see [ASIC Corporations \(Sale Offers: Securities Issued on Conversion of Convertible Notes\) Instrument 2016/82](#)); and
- so that a transaction-specific prospectus can be used for offers of hybrid securities by banks and other prudentially regulated bodies (bank hybrids), and on-sale relief for the ordinary shares issued on conversion of those securities (see [ASIC Corporations \(Regulatory Capital Securities\) Instrument 2016/71](#)).

Our individual relief includes increasing the five-day maximum suspension period for listed entities relying on the on-sale exemptions in s708A(5) and 1012DA(5) where the policy underlying the five-day requirement is upheld despite the suspension.

We may provide other relief in circumstances falling outside the on-sale exemptions.

We may exercise ASIC's exclusion powers to prevent an entity from relying on the on-sale exemptions where an issuer has contravened certain provisions of the Corporations Act. Before exercising these exclusion powers we will generally offer the entity an opportunity to make submissions about whether the determination should be made.

On-sale exemptions

- RG 173.15 Sections 708A and 1012DA operate as exemptions from the on-sale provisions and set out requirements for the content and method of disclosure needed to qualify for these exemptions.
- RG 173.16 Generally speaking, under these exemptions there are two methods by which information can be made available to investors:
- (a) a notice to the market that the issuing entity has provided a full release of information to the market under s708A(5) or 1012DA(5); or

- (b) a prospectus or PDS for a retail issue that is more or less contemporaneous with an institutional placement under s708(11) or 1012DA(11).
- RG 173.17 A notice to the market under s708A(5) or 1012DA(5) verifies that the issuer has complied with its continuous disclosure and reporting obligations, and provides the market with information that is excluded from continuous disclosure to ensure investors receive disclosure equivalent to that ordinarily available under a prospectus or PDS.
- RG 173.18 Sections 708A(11) and 1012DA(11) recognise that investors may also receive relevant information through a prospectus or PDS that, while not issued for a placement, contains current information on the same class of financial products as the placement.
- RG 173.19 The on-sale of certain securities or other financial products placed with underwriters (or their nominees) is also exempt from the on-sale provisions under s708A(12) and 1012DA(12).
- RG 173.20 RG 173.21–RG 173.61 sets out examples of where we have provided class relief or will consider granting individual relief.

Relief for stapled securities

- RG 173.21 The disclosure exemptions provided by s708A apply to ‘quoted securities’, which are defined by s9 as ‘a security that is quoted on a prescribed financial market’. This definition does not include stapled securities and, therefore, s708A does not apply to stapled securities.
- RG 173.22 To facilitate the secondary sale of stapled securities, we have provided disclosure-based relief for the sale of stapled securities on terms similar to s708A: see ASIC Corporations (Sale Offers That Do Not Need Disclosure) Instrument 2016/80. We can see no reason why the exemptions in s708A should not apply to stapled securities merely because the quoted security offered is stapled to another financial product.

Relief to disregard technical accounting relief

- RG 173.23 Sections 708A(5)(d) and 1012DA(5)(d) prevent an entity from relying on the on-sale exemptions where relief has been granted under certain provisions of the Corporations Act, including those relating to accounts. We have given relief to enable an entity to rely on the on-sale exemptions even where it also relies on certain technical accounting relief: see ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73. We consider that the technical accounting relief does not detract from the level of information available to the market, and so relief from the on-sale provision should be extended.

Relief to facilitate offers of convertible notes made without prospectus disclosure

- RG 173.24 While offers of convertible notes made only to institutional investors do not require a prospectus or PDS, this disclosure would generally be required for an on-sale of the underlying securities to retail investors within 12 months of the conversion unless the issuer:
- (a) provides a cleansing notice on each conversion so that the on-sales fall within the exemption in s708A(5) or 1012DA(5); or
 - (b) has prepared a prospectus or PDS for the initial offer of the convertible notes so that the on-sale of the underlying securities falls within our exemption-based relief (see RG 173.76).

Note: A transaction-specific prospectus may be used if the issuer satisfies the requirements of [ASIC Corporations \(Offers of Convertibles\) Instrument 2016/83](#).

- RG 173.25 ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82 provides relief for offers of convertible or converting notes to institutional investors (or that are otherwise permissible without prospectus disclosure) so that the underlying securities can be on-sold to retail investors without a prospectus or PDS. Our relief requires the issuer to instead provide a cleansing notice containing prospectus-like disclosure at the time the convertible notes are issued. A further condition of the relief is that certain ongoing disclosures must be included in the annual report of the issuer during the term of the convertible notes.

- RG 173.26 The key conditions of our relief are:
- (a) the convertible notes must be convertible into continuously quoted securities of the same body that issues the notes;
 - (b) trading in the underlying quoted securities must not have been suspended for more than five days during the previous 12 months;
 - (c) the issuer must provide a cleansing notice to the relevant market operator that:
 - (i) contains the information required by s713(2) for the convertible notes;
 - (ii) contains the information required by s713(2)–(5) for the underlying securities (or the information required to be included in a PDS for continuously quoted securities);
 - (iii) is worded in a clear, concise and effective manner;
 - (iv) satisfies the consent requirements for statements by third parties;and

- (v) is given to the relevant market operator on the same day as, or within two business days before, the day on which the convertible notes are first issued;
- (d) the conversion of the convertible notes must not involve any further offer; and
- (e) the annual reports of the issuer during the term of the convertible notes must contain information about:
 - (i) how many notes can still be converted, the number of underlying securities they will convert into, the price (if any) to be paid on conversion and the circumstances in which conversion may occur;
 - (ii) the issuer's remaining liability to make payments under the notes;
 - (iii) the average conversion price (if any) paid for any notes converted during the previous 12 months and the number of underlying securities issued on conversion; and
 - (iv) any other matters relating to the notes that holders of the issuer's enhanced disclosure securities would reasonably require to make an informed assessment of the issuer's financial position and its prospects for future financial years.

Note 1: Some of the information referred to in RG 173.26(e) may also be required by relevant accounting standards.

Note 2: The annual report may omit material that would otherwise need to be included in relation to the issuer's prospects for future financial years if it is likely to result in unreasonable prejudice to the issuer.

Our rationale for providing this relief

- RG 173.27 We recognise that the requirement to prepare a transaction-specific prospectus or issue cleansing notices for each conversion of convertible notes may act as an impediment to offers of convertible notes to institutional investors.
- RG 173.28 The option of providing a cleansing notice for each conversion is often unattractive to issuers because:
- (a) there may be multiple conversions that would each require a cleansing notice;
 - (b) the timing of the conversions may not be within the control of the issuer; and
 - (c) a cleansing notice may require disclosure of confidential information that would otherwise fall within an exception to the listing rules of the relevant market operator as they relate to continuous disclosure.
- RG 173.29 The option of preparing a prospectus for the issue of the convertible notes may involve greater cost to the issuer relative to an information memorandum prepared for institutional investors.

- RG 173.30 Although our relief does not require a formal prospectus to be prepared for the offer of convertible notes to institutional investors, it preserves standards of investor protection for retail investors who acquire the underlying quoted securities. This is because:
- (a) our relief only applies to the on-sale of the underlying quoted securities. We have not provided any relief for the issue or on-sale of the convertible notes, meaning that a prospectus or PDS will generally be required for issues or on-sales of the convertible notes to retail investors;
 - (b) the issuer will be subject to continuous disclosure obligations and there will be prospectus-like disclosure (including information that might otherwise not be disclosed due to an exception to the listing rules of the relevant market operator as they relate to continuous disclosure) at the time the convertible notes are issued, meaning that the market should receive sufficient information about the issue of convertible notes;
 - (c) it is unlikely that an issuer that relied on our relief would have the purpose of seeking to avoid disclosure to retail investors, contrary to the policy behind the on-sale provisions; and
 - (d) the ongoing disclosures contained in the issuer's annual report will help investors decide whether or not to purchase quoted securities sold after conversion of the convertible notes.

Relief for offers of bank hybrids

- RG 173.31 Authorised deposit-taking institutions (ADIs), general insurers and life insurers (i.e. banks and other prudentially regulated bodies) are regular issuers of hybrid securities (bank hybrids), which are used to meet the issuer's regulatory capital requirements under the relevant prudential standards: see [Report 365 Hybrid securities](#) (REP 365).
- RG 173.32 Those prudential standards prescribe that, in order to qualify as regulatory capital, bank hybrids must include a number of features; for example, the standards require that on the occurrence of certain trigger events, the bank hybrids must be written-off or converted into ordinary shares.
- RG 173.33 ASIC Corporations (Regulatory Capital Securities) Instrument 2016/71 provides relief:
- (a) to permit the use of transaction-specific disclosure for offers of bank hybrids to retail investors, and the subsequent on-sale of the underlying securities issued on conversion; and
 - (b) to facilitate the use of an 'enhanced cleansing notice' for offers made without prospectus disclosure (e.g. to institutional investors or foreign retail investors) to permit the subsequent on-sale of the underlying securities issued on conversion.

- RG 173.34 While referred to simply as ‘bank hybrids’, the securities covered by this relief:
- (a) may be issued by ADIs, general insurers, life companies, or their subsidiaries or non-operating holding companies;
 - (b) may or must, according to their terms of issue, be converted into or exchanged for ordinary shares in the issuer or its ultimate holding company in the circumstances permitted or required by the relevant prudential standards; and
 - (c) would be converted into or exchanged for ordinary shares that are in a class of continuously quoted securities if that conversion or exchange occurred at the time the securities are issued.

Transaction-specific disclosure and on-sale relief for retail offers of bank hybrids

- RG 173.35 As discussed in Section C of [Regulatory Guide 254](#) *Offering securities under a disclosure document* (RG 254), a transaction-specific prospectus may be used by an issuer when offering:

- (a) continuously quoted securities (s713(1)(a));
- (b) options to acquire continuously quoted securities (s713(1)(b)); and
- (c) certain convertible or converting notes or convertible or converting preference shares that are convertible into continuously quoted securities (ASIC Corporations (Offers of Convertibles) Instrument 2016/83).

Note: Our relief in ASIC Corporations (Offers of Convertibles) Instrument 2016/83 (discussed at RG 173.35(c)) is available for offers of both convertible securities (where conversion is at the election of the holder or the issuer of the securities, including where this election may only be made if certain events occur) and converting securities (where conversion can or may occur automatically in accordance with the terms of the security, on particular dates or if certain events occur).

- RG 173.36 Our relief in ASIC Corporations (Offers of Convertibles) Instrument 2016/83 is in many cases not available for offers of bank hybrids as:
- (a) the potential interposition of a non-operating holding company means the securities to be issued on conversion may be those of a non-operating holding company (which would become the listed parent company of the issuer), rather than the issuer; or
 - (b) in other cases, typically where such a holding company has already been established, it may be optimal from a capital management perspective for particular operating companies to issue bank hybrids directly, where those instruments are required to convert into securities in the listed parent company.

- RG 173.37 We consider providing separate relief to permit the use of a transaction-specific prospectus for offers of bank hybrids is appropriate because:
- (a) given the features and risks of bank hybrids, and the way in which these determine the expected return to investors, prospectus disclosure needs to be focused to a great degree on the terms of the bank hybrids (see Section C of REP 365); and
 - (b) issuers of bank hybrids (or their listed parent company) are subject to the continuous disclosure regime, compliance with which is informed by ongoing entity or group-level disclosure requirements regarding capital adequacy, capital instruments and risk exposure (required by the relevant prudential standards). Accordingly, investors in bank hybrids are able to access sufficient information to make an informed investment decision about ordinary shares in the issuer (or its listed parent company where current or proposed holding structures are involved).
- RG 173.38 ASIC Corporations (Regulatory Capital Securities) Instrument 2016/71 permits the use of a transaction-specific prospectus for offers of bank hybrids where that prospectus:
- (a) meets the requirements in s713 for the ordinary shares that will be issued on conversion. If the issuer of these ordinary shares is not the same as the issuer of the bank hybrid (e.g. where the bank hybrid is being issued by an operating subsidiary of a listed parent company), the issuer of the ordinary shares must consent to all statements in the prospectus about that body and the ordinary shares; and
 - (b) discloses the information required by s713(2) for the bank hybrids.
- RG 173.39 If the terms of the bank hybrid contemplate the potential interposition of a non-operating holding company as the issuer of ordinary shares on conversion, but at the time of issue no such holding company has been established, the body that would issue ordinary shares if the bank hybrid converted on the day it is issued is the body that must meet the disclosure requirements discussed at RG 173.38(a).
- RG 173.40 ASIC Corporations (Regulatory Capital Securities) Instrument 2016/71 also provides relief to permit the on-sale of the ordinary shares issued on conversion of bank hybrids if the bank hybrids were issued under a prospectus (whether or not relief permitting the use of a transaction-specific prospectus was relied on) and the conversion did not involve any further offer.

Note: Our disclosure and on-sale relief for retail offers of bank hybrids is available where the ordinary shares to be issued on conversion are those of the issuer, a listed parent company of the issuer, or a potential non-operating holding company where one is not already in place. Our relief for retail offers is not available where the terms of the bank hybrids permit, following a change of control involving a third-party acquirer, that third-party acquirer being substituted as the issuer of ordinary shares on conversion of the bank hybrid.

On-sale relief for offers of bank hybrids made without prospectus disclosure

- RG 173.41 For similar reasons to those discussed at RG 173.36, our relief in ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82 may not be available for offers of bank hybrids made without prospectus disclosure: see RG 173.24–RG 173.30. In the absence of an exception or other relief, the on-sale of securities issued on conversion of those bank hybrids would require disclosure.
- RG 173.42 ASIC Corporations (Regulatory Capital Securities) Instrument 2016/71 provides relief comparable to ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82 to facilitate the use of an enhanced cleansing notice to permit the subsequent on-sale of the underlying securities issued on conversion.
- RG 173.43 The notice must contain:
- (a) the information required by s713(2)–(5) for the ordinary shares that will be issued on conversion; and
 - (b) the information required by s713(2) for the bank hybrids.
- RG 173.44 Where the issuer of the ordinary shares to be issued on conversion is:
- (a) the same as the issuer of the bank hybrid, the notice must be given to the relevant market operator for the issuer of the bank hybrid; and
 - (b) not the same as the issuer of the bank hybrid (e.g. where the bank hybrid is being issued by an operating subsidiary of a listed parent company), the notice must be given jointly by the issuer of the ordinary shares and the issuer of the bank hybrid to the relevant market operator for the issuer of the ordinary shares.
- RG 173.45 If the terms of the bank hybrid contemplate the potential interposition of a non-operating holding company as the issuer of ordinary shares on conversion, but at the time of issue no such holding company has been established, the body that would issue ordinary shares if the bank hybrid converted on the day it is issued is the body that must give the notice discussed at RG 173.44(a) (or jointly give the notice discussed at RG 173.44(b)).
- RG 173.46 For similar reasons to those discussed at RG 173.37, we consider it is appropriate to provide relief for offers of bank hybrids that are not able to rely on ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82. For those reasons, and in contrast to that relief, our relief under ASIC Corporations (Regulatory Capital Securities) Instrument 2016/71 does not impose ongoing disclosure obligations once the notice is given for a particular offer of bank hybrids.

- RG 173.47 Our relief applies to both wholesale programme issuance (whether domestic or offshore) and other offers that are permissible without prospectus disclosure (e.g. an offer of bank hybrids by a New Zealand subsidiary of an Australian bank, where those offers are made to investors in New Zealand with disclosure under New Zealand law, and where the securities issued on conversion of the bank hybrids are those of the Australian listed parent company).

Individual relief from the on-sale provisions

Relief to increase the maximum five-day suspension period

- RG 173.48 A listed issuer can rely on the on-sale exemptions in s708A(5) and 1012DA(5) only where trading of the relevant securities or financial products has not been suspended for more than five days during the shorter of:
- (a) the period during which the class of securities or financial products are quoted; and
 - (b) the period of 12 months before the date on which the relevant securities or financial products under the offer were issued.
- RG 173.49 In calculating whether securities or financial products have been suspended for more than five days, we take the view that:
- (a) ‘five days’ should be read as ‘five trading days’; and
 - (b) securities or financial products are not suspended during a trading halt.

ASIC relief is not required for these purposes.

- RG 173.50 The underlying policy of the five-day requirement is to ensure that securities and other financial products are adequately priced by the market and that the market is fully informed.
- RG 173.51 We will consider granting individual relief to permit an issuer to rely on s708A(5) or 1012DA(5)—even where the relevant securities or other financial products have been suspended for more than five days—where it appears that the securities are adequately priced and the market is fully informed.
- RG 173.52 When determining if the securities or other financial products appear to be adequately priced and if the market is fully informed despite the suspension, we will need to take into account all the circumstances of the case. We will consider circumstances such as:
- (a) the length of the suspension—generally, the longer the period, the greater the level of scrutiny we will apply in granting relief;

- (b) the reason for the suspension—we will consider whether the suspension is voluntary or whether it was being imposed as a result of failing to comply with the listing rules of the relevant market operator or suspected market misconduct;
- (c) the period of time that has elapsed since the suspension—generally, the less time that has elapsed since the suspension, the greater the level of scrutiny we will apply in granting relief. We will be unlikely to grant relief if the on-sale could occur while the issuer is suspended;
- (d) the announcements made to the market since the suspension—we will be more likely to grant relief where disclosure to the market since the time of the suspension, either in the form of continuous disclosure announcements or unqualified financial reporting disclosure, has been timely and otherwise in accordance with the entity’s legal obligations. We expect that disclosure after the suspension would address the reasons for the suspension and, where appropriate, detail steps taken to avoid similar suspensions in the future;
- (e) recent history of disclosure—an entity that has contravened disclosure requirements in the previous 12 months will need to explain why the securities are adequately priced and the market fully informed, despite this non-compliance; and
- (f) any other relevant circumstances that support the underlying policy.

RG 173.53 An application for individual relief should address generally whether the securities or other financial products are adequately priced by the market and the market is fully informed, and address specifically each of the factors listed in RG 173.52. As the five-day suspension period is effectively refreshed every 12 months, the application should concentrate on events that have taken place during that period.

Note: Similar individual relief will be considered for issuers whose securities are suspended for more than five days but who wish to rely on the disclosure exception under s708AA and s1012DAA in a rights issue: see [Regulatory Guide 189](#) *Disclosure relief for rights issues* (RG 189).

Rationale for relief to increase the maximum five-day suspension period

RG 173.54 If relief were not granted, a listed entity that has been suspended for more than five days would need to prepare and lodge a prospectus in order to raise equity capital. We consider that individual relief to increase the maximum five-day suspension period is appropriate as it will enable listed entities to raise capital in a quicker and less costly way without undermining investor protection.

RG 173.55 Parliament has considered that an entity must not have been suspended for more than a five-day period in order for an investor to make a secondary sale

without a prospectus. We will not take an approach that simply adopts a longer period than five days without critical consideration of why the period set out in the legislation should be changed and whether the relevant securities are adequately priced by the market and the market is fully informed.

Market expectations

RG 173.56 When conducting placements and other capital raisings, we think that issuers of securities must take steps to ensure that:

- (a) robust due diligence is conducted regarding compliance with the continuous disclosure rules and identification of all excluded information to be contained in the cleansing notice;
- (b) there has been a timely issue of the cleansing notice;
- (c) the cleansing notice clearly sets out the excluded information;
- (d) there has otherwise been timely disclosure of information by the issuer under its continuous disclosure obligations (e.g. material information is disclosed as soon as an entity becomes aware of it, unless there is a relevant exclusion);
- (e) prospective investors are fully informed before they take up any offer; and
- (f) the pricing and availability of any capital raising offer is fair for all shareholders and in the best interests of the company.

RG 173.57 Generally, communicating information about equity capital raisings to potential investors before it is provided to the market can raise concerns about breaches of continuous disclosure or insider trading laws. Because of this, it is important that the listed entity maintains confidentiality when sounding out equity capital raising proposals. Potential investors must give confidentiality and 'no-trade' undertakings (e.g. establish information barriers within their organisation): see [Report 393](#) *Handling of confidential information: Briefings and unannounced corporate transactions* (REP 393).

RG 173.58 We may monitor the effectiveness of these information barriers around price-sensitive information, both in relation to listed entities that are conducting equity capital raisings and their advisers and prospective investors. There should be a complete list of all parties (within and outside the entity) provided with confidential information about the listed entity and records setting out what they were told.

RG 173.59 Announcements on a particular topic can create a market expectation that they will be updated. If an announcement is made updating an earlier market announcement, the fact that it is an update should be highlighted. Material information in the announcement should be given appropriate prominence and be clear as to its possible implications.

RG 173.60 If market practices indicate ongoing risks in this area, we will need to consider whether further regulatory guidance or changes regarding non-prospectus and non-PDS equity capital raising are needed.

Other relief

RG 173.61 In considering other relief, we will not exercise ASIC's discretionary powers to make fundamental changes to the settings determined by Parliament. However, we may grant relief where the policy rationale for the on-sale exemptions is satisfied and where granting relief would mitigate apparently unintended outcomes.

Exclusion power

RG 173.62 ASIC has the power to make a determination removing the benefit of s708A and 1012DA if an issuer has contravened relevant provisions of the Corporations Act in the previous 12 months: s708A(2) and 1012DA(2).

RG 173.63 The on-sale exemptions are not available to those entities that, at the time when the relevant securities are issued, are the subject of a determination made by ASIC: s708A(1)(c) and 1012DA(1)(d).

RG 173.64 We may make a determination if we are satisfied that in the previous 12 months the entity has not complied with any of the provisions set out in:

- (a) s708A(2) if the product offered is a security; or
- (b) s1012DA(2) if the product offered is a financial product other than a security.

RG 173.65 Before exercising ASIC's exclusion powers, we will generally offer the entity an opportunity to make submissions about whether the determination should be made. We will not usually regard it as a sufficient argument against making a determination that the breach of the relevant obligation has since been rectified in some way. We will use ASIC's exclusion powers in a way that provides an incentive to ensure that full, accurate and timely disclosure is provided to the market and to investors.

RG 173.66 A determination must be in writing, and is required to be published in the *ASIC Gazette*: s708A(3) and 1012DA(3). We will also send the determination to the operator of the market on which the entity is listed to ensure that the operator is aware of the determination for its supervision of listed entities and for market transparency.

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

Period of exclusion

RG 173.67 A determination made by us under either s708A(2) or 1012DA(2) will generally exclude an entity from accessing disclosure relief for a period of 12 months from the date of the instrument of exclusion.

C Exemption-based relief

Key points

ASIC Corporations (Sale Offers That Do Not Need Disclosure) Instrument 2016/80 provides exemption-based relief from the on-sale provisions for the following categories:

- Category 1: Share or interest purchase plans;
- Category 2: Options or convertible or converting securities;
- Category 3: Dividend reinvestment, distribution reinvestment or bonus plans;
- Category 4: Compromises and arrangements;
- Category 5: Deeds of company arrangement;
- Category 6: Takeovers; and
- Category 7: Securities of exempt public authorities.

We will also give relief for the on-sale of securities if we have provided disclosure relief for the issue or transfer of securities under a capital reduction or reconstruction in accordance with our policy in [Regulatory Guide 188](#) *Disclosure in reconstructions* (RG 188).

[ASIC Corporations \(Non-Traditional Rights Issues\) Instrument 2016/84](#) provides on-sale relief for the sale of securities or interests that have been issued under the rights issue exemption in s708AA or s1012DAA.

Why is relief needed?

RG 173.68 We have provided relief for the circumstances listed in Categories 1–7 of ASIC Corporations (Sale Offers That Do Not Need Disclosure) Instrument 2016/80 because:

- (a) the basis for exemption from disclosure for the issue of these financial products extends to the on-sale of the products; and
- (b) any relief would not erode the anti-avoidance effect of the on-sale provisions.

RG 173.69 The on-sale provisions are an anti-avoidance mechanism to prevent indirect issues of financial products to retail clients. However, they may apply to all financial products that are issued directly to retail clients without disclosure. Examples are financial products that are issued under:

- (a) ASIC relief for share or interest purchase plans; and
- (b) the statutory exemptions available for dividend reinvestment, distribution reinvestment or bonus plans.

- RG 173.70 Retail clients who acquire financial products under these exemptions may have a purpose of on-selling. In this case, the on-sale provisions may apply to any on-sale by these clients within 12 months after the issue. Unless they sell under a disclosure exemption, these clients will not be able to on-sell their investments within 12 months of the issue without disclosure.
- RG 173.71 For example, some of the statutory disclosure exemptions available for offers of financial products for issue in schemes of arrangement and takeover bids can attract the on-sale provisions. These offers are subject to specific alternative disclosure requirements and accordingly do not seem to give rise to the avoidance issues contemplated by the on-sale provisions.
- RG 173.72 In our relief we have not included all categories of exemptions. For example, we have excluded the exemption available for small-scale offers under s708(1) because that exemption is expressly excluded from application to on-sales.

Category 1: Share or interest purchase plans

- RG 173.73 We have provided relief from the on-sale provisions for the on-sale of securities and other financial products issued under:
- (a) relief for share purchase plans and interest purchase plans (i.e. [Class Order \[CO 09/425\] Share and interest purchase plans](#)); or
 - (b) any individual relief similar to [CO 09/425] provided for share purchase plans and interest purchase plans.
- RG 173.74 We have provided class relief to enable listed issuers to make offers of shares and interests in managed investment schemes to existing members without prospectus disclosure under a share purchase plan. This relief is provided on the basis that the relatively small scale of the offers involved does not justify the cost of prospectus disclosure.
- RG 173.75 In the same way, we consider that relief from the on-sale provisions for the on-sale of such securities issued without disclosure under a share purchase plan is warranted. If the on-sale provisions apply, then the cost savings for issuers and retail clients (which is the underlying reason for the relief from the disclosure provisions for a share purchase plan) will be lost. Further, the purpose of such offers is to allow existing shareholders to make further investments in the issuer, rather than to avoid disclosure through indirect offers to retail clients. Therefore, we believe that relief for the on-sale of securities issued under a share purchase plan will not undermine the anti-avoidance purpose of the on-sale provisions.

Category 2: Options or convertible or converting securities

- RG 173.76 We have provided relief from the on-sale provisions for the on-sale of underlying securities or other financial products issued on the exercise of options or the conversion of convertible or converting securities where:
- (a) the option or convertible or converting security was issued with disclosure; and
 - (b) the exercise of the option, or the conversion, did not involve any further offer.
- RG 173.77 An offer of an option for the issue of a financial product requires disclosure under Pts 6D.2 or 7.9, unless it is subject to a specific exclusion. If no further offer is involved in exercising the option, then further disclosure is not required at the time of exercise. A new financial product is issued as a result of the exercise of the option.
- RG 173.78 Even where a prospectus or PDS is provided for the offer of an option, the issue of the underlying product on the exercise of the option arguably involves an issue without disclosure for the purposes of s707(3) or 1012C(6) (as the case may be). This is because the prospectus or PDS relates to the offer of the option rather than to the underlying product, even though it is difficult to envisage that the document would not include information that is relevant to the underlying security: see s702 and 1011C. In these circumstances, a product issued on the exercise of an option may be affected by s707(3) if the issuer or acquirer had the requisite on-sale purpose.
- RG 173.79 We consider that the legislative policy requires disclosure at the point where the option is issued, rather than at the time of exercise. It is consistent with that policy to provide relief from the on-sale provisions for the on-sale of products issued on the exercise of the options, where there had been disclosure under Pt 6D.2 or 7.9 at the time of the issue of the options. Such an outcome appears to be broadly consistent with note 1 to s702, which states:
- If a disclosure document is needed for the option and there is no further offer involved in exercising the option, the issue or sale of the underlying securities on the exercise of the option does not need a disclosure document.
- RG 173.80 Similarly, a person who wishes to rely on our relief for the on-sale of products issued on the conversion of convertible or converting securities should provide a disclosure document or PDS at the time of issue of the convertible or converting securities. We will generally not provide on-sale relief for the conversion of convertible or converting securities if the issuer has not made such disclosure.

Category 3: Dividend reinvestment, distribution reinvestment or bonus plans

- RG 173.81 We have provided relief from the on-sale provisions for the on-sale of:
- (a) securities issued without disclosure to existing members under a dividend reinvestment plan or a bonus plan (i.e. under the statutory exemption in s708(13)); and
 - (b) financial products issued to clients holding a financial product of the same kind under a distribution reinvestment plan (i.e. under the statutory exemption in s1012D(3)).
- RG 173.82 Issuers can issue shares to existing shareholders under dividend reinvestment or bonus plans without prospectus disclosure under the exemption in s708(13). The underlying reasons for this statutory exemption appear to be that the need for and the cost of prospectus disclosure is not warranted because of:
- (a) the information available to existing members; and
 - (b) the limited or small-scale nature of the capital raising involved.
- RG 173.83 Although on-sales are not limited to existing members, we consider that the cost considerations that underpin the statutory exemption should extend to any on-sale by shareholders within 12 months of the issue. Therefore, we consider that relief from the on-sale provisions is warranted.
- RG 173.84 Similar considerations apply to other financial products issued under distribution reinvestment plans under s1012D(3).

Category 4: Compromises and arrangements

- RG 173.85 We have provided relief from the on-sale provisions for the on-sale of:
- (a) securities or interests issued as part of a compromise or arrangement under Pt 5.1; and
 - (b) securities or interests issued as part of certain foreign compromises or arrangements whose regulation is substantially similar to a Pt 5.1 compromise or arrangement.
- RG 173.86 Securities issued as part of a compromise or arrangement under Pt 5.1 do not require prospectus disclosure if the compromise or arrangement was approved at a meeting held as a result of an order under s411(1) or (1A): see s708(17). A court-approved explanatory statement is required for such meetings. That statement must include, among other things, information that is material to the making of a decision by a creditor or member about whether or not to agree to the compromise or arrangement. We therefore consider it appropriate to provide on-sale relief for those securities.

- RG 173.87 We provide disclosure relief for offers of interests under a Pt 5.1 compromise or arrangement, since there is no reason to distinguish between an offer of securities under a Pt 5.1 compromise or arrangement (which is exempt under s708(17)) and an offer of interests under a Pt 5.1 compromise or arrangement: see RG 188.52.
- RG 173.88 We also provide disclosure relief for offers of securities or interests under certain foreign compromises or arrangements whose regulation is substantially similar to a Pt 5.1 compromise or arrangement: see RG 188.50. For these offers, both the disclosure and on-sale relief is provided by [ASIC Corporations \(Compromises or Arrangements\) Instrument 2015/358](#): see [Regulatory Guide 72 Foreign securities: Disclosure relief](#) (RG 72) at RG 72.22–RG 72.25.

Note: Where the offers described in RG 173.87 occurred on or prior to 1 September 2015, the relevant disclosure relief was provided by [Superseded Class Order \[SCO 07/9\] Prospectus relief for foreign schemes of arrangement and PDS relief for Pt 5.1 schemes and foreign schemes of arrangement](#), and ASIC Corporations (Sale Offers That Do Not Need Disclosure) Instrument 2016/80 provides on-sale relief for those securities or interests.

Category 5: Deeds of company arrangement

- RG 173.89 We have provided relief from the on-sale provisions for the on-sale of securities that were issued as part of an offer made to any or all of a company's creditors without disclosure under a deed of company arrangement.
- RG 173.90 For the exemption in s708(17A) to apply, an administrator making an equity for debt offer (that does not require accepting creditors to contribute any further consideration) must provide a statement that sets out all relevant information about the offer that is within the knowledge of the administrator, and discloses that the statement is not a prospectus and may contain less information than a prospectus.
- RG 173.91 Where the exemption in s708(17A) applies, we consider it is also appropriate to provide on-sale relief.

Category 6: Takeovers

- RG 173.92 We have provided relief from the on-sale provisions for the on-sale of securities issued as consideration for a takeover bid under Ch 6 that is accompanied by a bidder's statement (i.e. under the statutory exemptions in s708(18) or 1012D(7)).

Note: We have provided other technical relief from the on-sale provisions for offers by a nominee appointed by the bidder to sell scrip consideration on behalf of foreign holders under s619(3): see [Class Order \[CO 13/525\] On-sale disclosure relief for scrip bids and schemes of arrangement](#).

- RG 173.93 Where securities are issued as consideration for a takeover bid under a bidder's statement, the issue does not require disclosure because of s708(18) (if securities) or s1012D(7) (if managed investment products). In those circumstances, the bidder's statement itself must include the information that would be required to be included in a prospectus or a PDS for the offer of the securities or products: see s636(1)(g)–(ga).
- RG 173.94 Given that equivalent disclosure is required, as with compromises and arrangements, we consider that avoidance of the disclosure obligations is not an issue. However, the on-sale provisions are technically capable of applying to securities or products issued as consideration for a takeover, and again we consider that relief from the on-sale provisions is warranted.
- RG 173.95 We have provided conditional prospectus and PDS relief for securities and interests offered as consideration under a foreign regulated takeover where Australian residents hold no more than 10% of the bid class securities: see RG 72.16–RG 72.21. We consider that avoidance of Australian disclosure obligations is not an issue for these foreign takeovers and that it is therefore appropriate to provide on-sale relief. Both the disclosure and on-sale relief is provided by [ASIC Corporations \(Foreign Scrip Bids\) Instrument 2015/357](#).

Note: Where the offers described in RG 173.95 occurred on or prior to 1 September 2015, the relevant disclosure relief was provided by [Superseded Class Order \[SCO 09/68\] Prospectus and PDS relief for foreign scrip takeovers](#), and ASIC Corporations (Sale Offers That Do Not Need Disclosure) Instrument 2016/80 provides on-sale relief for those securities or interests.

Category 7: Securities of exempt public authorities

- RG 173.96 We have provided relief from the on-sale provisions for the on-sale of securities of an exempt public authority (i.e. securities issued under the statutory exemption in s708(21)).
- RG 173.97 An offer for issue of securities of an exempt public authority of a state or territory does not require disclosure under Pt 6D.2: see s708(21). These authorities are generally statutory bodies or other agencies of government. Some of them engage in fundraising from time to time—for example, debt securities may be issued by a government agency to fund government programs. Those persons acquiring the securities may have an on-sale purpose.
- RG 173.98 Because the offer of these securities for issue to any person does not require disclosure, it would not seem appropriate to require disclosure for their on-sale.
- RG 173.99 Similarly, disclosure is not required for offers of debentures by ADIs and registered life insurance companies, and offers of securities of exempt

bodies: see s708(19) and (20). However, it is unnecessary for us to provide relief for the on-sale of these securities, because the statutory exemptions in s708(19) and (20) already provide relief for both issue and on-sale.

Capital reductions and reconstructions

- RG 173.100 We may give individual disclosure relief for capital reductions involving an issue or transfer of securities to members where there is no significant change to their overall investment so the members are not making a new investment decision: see RG 188.22. We may also give individual disclosure relief for reconstructions involving no change to the underlying assets or business: see RG 188.23–RG 188.24. We consider that where there is no new investment decision for investors, the cost of a prospectus is not justified: see RG 188.18–RG 188.35.
- RG 173.101 If we give disclosure relief for the issue or transfer of securities under a capital reduction or a reconstruction, we will also give on-sale relief so that a member can on-sell the securities within 12 months without an on-sale prospectus: see RG 188.36.

Rights issues

- RG 173.102 The rights issue disclosure exemptions in s708AA and 1012DAA allow a person to undertake a rights issue of quoted securities or interests without a disclosure document or PDS provided that certain conditions are satisfied. ASIC Corporations (Non-Traditional Rights Issues) Instrument 2016/84 provides relief to streamline the application of the on-sale provisions in s708A and 1012DA to sales of securities or interests that have been issued under the rights issue exemption: see RG 189.76–RG 189.82.

Key terms

Term	Meaning in this document
ADI	Authorised deposit-taking institution
ASIC	Australian Securities and Investments Commission
bank hybrid	Hybrid securities issued by banks and other prudentially regulated bodies
[CO 13/525] (for example)	A class order issued by ASIC (in this example, numbered 13/525) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
disclosure document	Has the meaning given in s9 of the Corporations Act
exclusion power	The power in s708A(2) and 1012DA(2) to preclude an entity from relying on the on-sale exemptions
listing rules	Has the meaning given by s761A of the Corporations Act
on-sale exemptions	The exemptions in s708A and 1012DA of the Corporations Act
on-sale provisions	Sections 707(3)–(4) and s1012C(6)–(7) of the Corporations Act
PDS	Product Disclosure Statement
Product Disclosure Statement	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
Pt 6D.2 (for example)	A Part of the Corporations Act (in this example numbered 6D.2)
REP 365 (for example)	An ASIC report (in this example numbered 365)
retail client	Has the meaning given in s761G of the Corporations Act
RG 188 (for example)	An ASIC regulatory guide (in this example numbered 188)
shorter PDS	A PDS that is required to comply with the shorter PDS regime

Term	Meaning in this document
shorter PDS regime	The requirements set out in Div 3A of Pt 7.9 of the Corporations Act as modified by Subdivs 4.2 to 4.2C and Schs 10B, 10C, 10D and 10E of the Corporations Regulations, which prescribe the content and length of the PDS for first home saver accounts, margin loans, superannuation products and simple managed investment schemes
s707 (for example)	A section of the Corporations Act (in this example numbered 707)

Related information

Headnotes

anti-avoidance, disclosure, disclosure-based relief, exemption-based relief, on-sale, on-sale provisions, placements, prospectus, share purchase plans

Legislative instruments

[ASIC Corporations \(Compromises or Arrangements\) Instrument 2015/358](#)

[ASIC Corporations \(Foreign Scrip Bids\) Instrument 2015/357](#)

[ASIC Corporations \(Disregarding Technical Relief\) Instrument 2016/73](#)

[ASIC Corporations \(Non-Traditional Rights Issues\) Instrument 2016/84](#)

[ASIC Corporations \(Offers of Convertibles\) Instrument 2016/83](#)

[ASIC Corporations \(Regulatory Capital Securities\) Instrument 2016/71](#)

[ASIC Corporations \(Sale Offers: Securities Issued on Conversion of Convertible Notes\) Instrument 2016/82](#)

[ASIC Corporations \(Sale Offers That Do Not Need Disclosure\) Instrument 2016/80](#)

[\[CO 09/425\]](#) *Share and interest purchase plans*

[\[CO 13/525\]](#) *On-sale disclosure relief for scrip bids and schemes of arrangement*

[\[SCO 07/9\]](#) *Prospectus relief for foreign schemes of arrangement and PDS relief for Pt 5.1 schemes and foreign schemes of arrangement*

[\[SCO 09/68\]](#) *Prospectus and PDS relief for foreign scrip takeovers*

Regulatory guides

[RG 72](#) *Foreign securities: Disclosure relief*

[RG 188](#) *Disclosure in reconstructions*

[RG 189](#) *Disclosure relief for rights issues*

[RG 254](#) *Offering securities under a disclosure document*

Reports

[REP 365](#) *Hybrid securities*

[REP 393](#) *Handling of confidential information: Briefings and unannounced corporate transactions.*

Legislation

Corporations Act, Ch 6, Pts 5.1, 6D.2 and 7.9, s9, 411(1), 411(1A), 619(3), 636(1)(g)–(ga), 702, 707(3), 707(4), 708(1), 708(11), 708(13), 708(17), 708(17A), 708(18), 708(19), 708(20), 708(21), 708A, 708AA, 713, 1011C, 1012C(6), 1012C(7), 1012D(3), 1012D(7), 1012DA, 1012DAA; Corporations Regulations, Pt 7.9, Subdiv 4.2C, Sch 10A, Pt 5C

Information sheets

[INFO 133](#) *Shorter PDS regime: Superannuation, managed investment schemes and margin lending*

[INFO 155](#) *Shorter PDSs: Complying with requirements for superannuation products and simple managed investment schemes.*