



ASIC

Australian Securities & Investments Commission

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REGULATORY GUIDE 188

Disclosure in reconstructions

Related instruments [CO 03/606], [CO 04/671], [CO 05/850], [CO 07/9], [CO 07/10]

Chapter 2J—Transactions affecting share capital, Chapter 5—External administration, Chapter 6D—Fundraising, Chapter 7—Financial services and markets

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From 5 July 2007, this document may be referred to as Regulatory Guide 188 (RG 188) or Policy Statement 188 (PS 188). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 188.1) or their policy statement number (e.g. PS 188.1).

What this guide is about

RG 188.1 This guide explains:

A how the prospectus provisions of the *Corporations Act 2001* (Act) apply to reconstructions or capital reductions involving the issue or transfer of securities

see RG 188.5–RG 188.17

B what prospectus relief we give for reconstructions involving the issue or transfer of securities

see RG 188.18–RG 188.37

C what technical relief we give for a prospectus or Product Disclosure Statement (PDS) accompanying an invitation to vote on an issue or transfer of securities or interests in a managed investment scheme

see RG 188.38–RG 188.49

- D** what disclosure relief we give for Pt 5.1 schemes or foreign schemes involving the issue of interests in a managed investment scheme

see RG 188.50–RG 188.52

RG 188.2 For the purposes of this guide, a reconstruction is a compromise or arrangement between an entity and its members or between a managed investment scheme and the members of the scheme. For example, a trust scheme or foreign scheme of arrangement is a reconstruction.

RG 188.3 While reconstructions are not formal Pt 5.1 schemes, they are similar. Offers of securities under Pt 5.1 schemes are exempt from the prospectus provisions: s708(17).

RG 188.4 This guide replaces Practice Note 40 *Reconstruction meetings* [PN 40].

Contents

What this guide is about	1
A Offers of securities in reconstructions and capital reductions.....	3
Our policy	3
Underlying principles	3
Explanation.....	4
B Prospectus relief for reconstructions	6
Our policy	6
Underlying principles	7
Explanation.....	8
C Technical relief for disclosure in reconstructions and capital reductions.....	10
Our policy	10
Underlying principles	11
Explanation.....	12
D Disclosure relief for Pt 5.1 schemes.....	13
Our policy	13
Underlying principles	13
Key terms.....	14
Related information	15

A Offers of securities in reconstructions and capital reductions

Our policy

Invitation to vote constitutes an ‘offer’

RG 188.5 An invitation to vote at a reconstruction or capital reduction meeting on the issue or transfer of securities constitutes an offer for the purposes of Ch 6D.

Prospectus requirement

RG 188.6 Unless an exemption under s708–8A applies, a prospectus must accompany an offer of securities in a reconstruction or capital reduction where the offer is to:

- (a) issue securities (see s706); or
- (b) transfer securities, either off-market by the body’s controller (s707(2)) or where the on-sale requirement applies (see s707(3) or (5)).

Updating the prospectus

RG 188.7 The person offering securities must give each offeree a supplementary or replacement prospectus (see s728) if, before the meeting, they become aware of any of the following matters that are materially adverse from the point of view of an investor:

- (a) that the prospectus contains a misleading or deceptive statement;
- (b) that information required in the prospectus was omitted; or
- (c) of a new circumstance that would have been required to be included in the prospectus.

Underlying principles

RG 188.8 Our interpretation of ‘offer’ means the disclosure requirements for securities and interests issued as a result of a vote at a reconstruction or capital reduction meeting are consistent.

RG 188.9 If an invitation to vote were not an ‘offer’, a reconstruction involving the issue of interests would require a Product Disclosure Statement (PDS), while one involving the issue of shares would not require a prospectus. This is because the requirement for an offeror of interests to give a person a PDS applies to the ‘issue’ as well as the

‘offer’, but the requirement to give a prospectus only applies to an ‘offer’.

Explanation

Meaning of ‘offer’

RG 188.10 *Attorney-General for New South Wales v Australian Fixed Trusts Ltd* (1974) 1 NSWLR 110 established that ‘offer’ in this context is broader than its strict contractual meaning. Street CJ found that the words ‘offer to the public for subscription or purchase or invite the public to subscribe for or purchase any interest’ encompassed ‘any solicitation of the public to enter into a course of negotiations calculated to result in the issue of an interest’.

RG 188.11 The exemption from the prospectus requirement for Pt 5.1 schemes (see s708(17)) shows that Parliament considers the term ‘offer’ in Ch 6D is broad enough to include an invitation to vote on the issue or transfer of securities at a meeting.

RG 188.12 Interpreting ‘offer’ broadly for the purposes of Ch 6D is consistent with the legislative intent of the prospectus provisions. Parliament intended that ‘all issues, offers and invitations with respect to securities other than those which are specifically excluded, are to be made pursuant to a prospectus’ (Corporations Bill 1988 (Cth)).

RG 188.13 In *Re Crusader Ltd* [1996] Qd R 117, Thomas J of the Supreme Court of Queensland found that the Pt 5.1 scheme in that case did not constitute an offer of shares in the company for subscription or an invitation to subscribe for them. The scheme involved a change to the terms of convertible notes that would result in their early conversion into shares after the scheme was approved.

RG 188.14 One view of *Re Crusader* is it stands for the proposition that a scheme involving the issue of securities does not constitute an ‘offer’ for the purposes of Ch 6D. However, *Re Crusader* did not concern a scheme involving the issue of securities but rather a scheme to change the terms of convertible notes. It would not have involved an ‘offer’ of securities on any view. It is worth noting the scheme in *Re Crusader* was exempt from the prospectus requirement as a Pt 5.1 scheme (under former reg 7.12.02).

RG 188.15 The better interpretation of ‘offer’ is one that promotes the purposes of the prospectus provisions, that persons disclose relevant information in relation to the issue or, in some cases, transfer of securities. Parliament intended that investors have sufficient information to make an investment decision whenever a person offers securities.

Which invitations to vote are affected?

RG 188.16 Each invitation to vote on the issue or transfer of securities at a meeting of a company or managed investment scheme constitutes an 'offer' for the purposes of Ch 6D.

RG 188.17 This includes any invitation to vote on any of the following involving the issue or transfer of securities to members:

- (a) a reconstruction; and
- (b) a capital reduction.

B Prospectus relief for reconstructions

Our policy

RG 188.18 We have given class order relief and may give case-by-case relief from the prospectus requirement for a reconstruction or capital reduction in certain circumstances. This relief is from:

- (a) Parts 6D.2 and 6D.3 for offers contained in the notice of meeting; and
- (b) s707(3) and 707(5) for the on-sale of securities issued as a result of that meeting.

Foreign schemes

RG 188.19 We have granted class order relief for an offer of securities under a scheme of arrangement in certain foreign countries where the relevant regulation has the same essential characteristics as Pt 5.1: see Class Order [CO 07/9] *Prospectus relief for foreign schemes of arrangement and PDS relief for Part 5.1 schemes and foreign schemes of arrangement*.

RG 188.20 [CO 07/9] gives prospectus relief for foreign schemes in the following countries because their regulation of schemes is substantially similar to Pt 5.1:

- (a) Hong Kong;
- (b) Malaysia;
- (c) New Zealand;
- (d) Singapore;
- (e) South Africa; and
- (f) the United Kingdom.

Note: We have also given disclosure relief for the on-sale of securities received under these foreign schemes (see RG 188.36 to RG 188.37), PDS relief for these foreign schemes (see Section D of this guide) and licensing relief for general advice contained in an explanatory statement for these foreign schemes (see Class Order [CO 03/606] *Financial product advice—exempt documents*).

RG 188.21 We may give case-by-case relief in similar form to [CO 07/9] for schemes of arrangement in other countries if the regulation of schemes in that country:

- (a) has the same essential characteristics as Pt 5.1 (in terms of shareholder or creditor approval, court oversight and mandatory disclosure); or
- (b) otherwise provides adequate disclosure and investor protection so that a prospectus is not required.

Capital reductions

RG 188.22 We may give case-by-case 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 (e.g. an in specie distribution).

No change to the underlying business or assets

RG 188.23 We may give case-by-case relief for reconstructions involving no change to the underlying assets or business.

RG 188.24 Any relief would be restricted to changes in the form of the entity rather than the substance of its business. Factors we will take into account in assessing an application for relief include:

- (a) the impact of the reconstruction on the underlying business or assets; and
- (b) whether investors hold the same proportionate rights and liabilities in relation to the business or assets before and after the reconstruction.

Underlying principles

RG 188.25 Part 5.1 schemes are exempt from the prospectus requirement because there is adequate disclosure with court oversight so a prospectus is not necessary. Foreign schemes subject to regulation with the same essential characteristics as Pt 5.1 also provide an adequate disclosure mechanism.

RG 188.26 Where a capital reduction results in no significant change to a member's overall investment, the member may not be making a new investment decision when voting on the capital reduction. The cost of preparing a prospectus is not justified.

RG 188.27 Where a reconstruction involving the issue or transfer of securities does not involve a change to the underlying business or assets of the entity, there is no new investment decision for members. Therefore, members do not need prospectus disclosure.

Explanation

Foreign schemes

RG 188.28 Our relief for foreign schemes of arrangement is based on an analogy with the exemption from the prospectus requirement for offers of securities made under a Pt 5.1 scheme: s708(17).

RG 188.29 The essential characteristics of Pt 5.1 are:

- (a) the company must distribute an explanatory statement to members;
- (b) there is court oversight of the content of the explanatory statement and the member approval process; and
- (c) the members of the company must approve the scheme.

Capital reductions

RG 188.30 A company can give securities as consideration in a capital reduction by:

- (a) transferring to members securities the company holds in another entity (an in specie distribution); or
- (b) procuring the issue or transfer to members of securities by another entity.

RG 188.31 When a member receives securities previously held by the company, the only change to their overall investment may be that an indirect interest becomes a direct interest. In this case, a prospectus is not necessary because the member is not making a new investment decision when voting on the capital reduction. However, some capital reductions involving an in specie distribution of securities may be more complex, so relief will depend on the circumstances in each case.

RG 188.32 The second type of capital reduction involves a change to the member's overall investment because the member receives a security to which they previously had no exposure. They are making a new investment decision when voting on the capital reduction, so a prospectus is appropriate.

Note: A company making a capital reduction not otherwise authorised by law must comply with Div 1 of Pt 2J.1 of the Act.

No change to the underlying business or assets

RG 188.33 Because reconstructions vary in nature and complexity, relief will depend on the circumstances in each case.

RG 188.34 Examples of reconstructions where we may give relief include:

- (a) a managed investment scheme converting into a company where the underlying assets or business do not change;
- (b) a stapling transaction where the underlying assets or business do not change; and
- (c) a simple ‘top hatting’ scheme to replace the parent company of a group.

RG 188.35 Examples of reconstructions that will normally involve a change to the underlying business or assets include:

- (a) an existing scheme or company being stapled to a new business; or
- (b) a stapling transaction that internalises the management of a managed investment scheme.

On-sale of securities

RG 188.36 We have included on-sale relief because a member would be unable to sell the securities without an on-sale prospectus within 12 months of receiving them if a reconstruction involved:

- (a) the issue of securities without a prospectus; or
- (b) the transfer of a body’s securities without a prospectus where the entity transferring the securities controls the body.

RG 188.37 The on-sale relief is in Class Order [CO 04/671]
Disclosure for on-sale of securities and other financial products.

C Technical relief for disclosure in reconstructions and capital reductions

Our policy

RG 188.38 We have granted class order relief from certain procedural requirements under Ch 6D and Pt 7.9 for reconstructions and capital reductions where a prospectus or PDS is required: see Class Order [CO 07/10] *Technical disclosure relief for reconstructions and capital reductions*.

RG 188.39 This relief covers reconstructions and capital reductions where securities or interests in managed investment schemes are offered as consideration.

Type of relief	Description	Explanation
<i>No application form with a prospectus or PDS</i>	Relief from s723(1): an offeror of securities can omit an application form from a <i>prospectus</i> in a reconstruction or capital reduction. Relief from s1016A(2): an offeror of interests can omit an application form from a <i>PDS</i> in a reconstruction or capital reduction.	RG 188.44
<i>Advertising and publicity</i>	Relief from s734(5)(a)(ii), 734(5)(b)(iii) and 734(6)(b): advertisements or publications about an offer need not state that persons wishing to acquire the securities must complete an application form.	RG 188.45
<i>PDS labelling</i>	Relief from s1013B(1): a PDS issued in a reconstruction or capital reduction need not be entitled 'Product Disclosure Statement'.	RG 188.46
<i>PDS distribution</i>	Relief from s1015C(1)(a): a PDS in a reconstruction or capital reduction can be sent to the address of the recipient of interests as it appears in a register of members. Note: This relief is only available where the PDS is in a document that includes other information about the reconstruction or capital reduction, such as a notice of meeting or prospectus.	RG 188.47– RG 188.48

Unsolicited offers

RG 188.40 We have also granted class order relief from the unsolicited offers provisions in Div 5A of Pt 7.9 for foreign schemes regulated under the laws of certain foreign countries: see Class Order [CO 05/850] *Unsolicited offers under a regulated foreign takeover bid or scheme of arrangement.*

RG 188.41 The relief extends to schemes regulated in the following countries:

- (a) Canada;
- (b) France;
- (c) Germany;
- (d) Hong Kong;
- (e) Italy;
- (f) Japan;
- (g) Malaysia;
- (h) the Netherlands;
- (i) New Zealand;
- (j) Singapore;
- (k) South Africa;
- (l) Switzerland;
- (m) the United Kingdom; and
- (n) the United States of America.

Underlying principles

RG 188.42 The procedural relief is necessary to avoid confusion and technical breaches of the Act when an entity issues a prospectus or PDS in a reconstruction or capital reduction.

RG 188.43 We have given class order relief from the unsolicited offers provisions because the laws of the foreign countries involved require adequate disclosure about the scheme as a substitute for disclosure under the unsolicited offers provisions.

Explanation

Procedural relief

No application form with a prospectus or PDS

RG 188.44 If an offer of securities needs a prospectus, those securities may only be issued or transferred in response to an application form: see s723(1) and 1016A(2) for the equivalent PDS requirement. Application forms are inappropriate where securities or interests are issued or transferred as a result of a vote on a reconstruction or capital reduction.

Advertising and publicity

RG 188.45 Similarly, if an offer of securities needs a prospectus, any advertising and publicity must state that anyone wishing to acquire the securities will need to complete the application form in (or accompanying) the prospectus: s734(5)(a)(ii), (5)(b)(iii) and (6)(b). We have granted relief from these provisions for the same reason.

PDS labelling

RG 188.46 A PDS must have the title 'Product Disclosure Statement' on the cover or near the front: s1013B(1). Entities conducting a reconstruction or capital reduction will often seek to issue one document, which includes the PDS as well as other information (e.g. a notice of meeting or a prospectus). Calling this composite document a 'Product Disclosure Statement' could be confusing to investors.

PDS distribution

RG 188.47 A PDS must either be given to a person or their agent personally, or sent to the person or their agent at an address or fax number nominated by the person or the agent: s1015C(1)(a).

RG 188.48 A PDS in a reconstruction or capital reduction will generally only be sent to a person who already owns interests in the managed investment scheme or securities in the company. Sending the PDS to the member's address as listed in the register is a suitable alternative to contacting each member for their nominated address.

Unsolicited offers

RG 188.49 In line with our policy on offers of securities for issue or sale, foreign schemes are likely to involve an offer to purchase a financial product and so, without our relief, would be subject to the provisions in Div 5A of Pt 7.9. Disclosure under a scheme in an approved foreign country is likely to be comparable to that required under Div 5A.

D Disclosure relief for Pt 5.1 schemes

Our policy

RG 188.50 We have granted class order relief from the requirement to provide a PDS for:

- (a) the offer and issue of interests as consideration under a Pt 5.1 scheme or foreign scheme in certain countries (see RG 188.19–RG 188.20); and
- (b) the on-sale of those interests.

See Class Order [CO 07/9] *Prospectus relief for foreign schemes of arrangement and PDS relief for Part 5.1 schemes and foreign schemes of arrangement* and Class Order [CO 04/671] *Disclosure for on-sale of securities and other financial products*.

RG 188.51 We may give case-by-case PDS relief to foreign schemes in other jurisdictions on the same basis as prospectus relief: see RG 188.21.

Underlying principles

RG 188.52 There is no reason to distinguish between disclosure for the offer of securities and disclosure for the offer or issue of interests under a Pt 5.1 scheme or foreign scheme. Like a prospectus, a PDS is not necessary in a Pt 5.1 scheme or foreign scheme that is exempt from the prospectus requirement.

Key terms

RG 188.53 In this guide, terms have the following meanings:

[CO 04/671] (for example) An ASIC class order (in this example, numbered 04/671)

Act The *Corporations Act 2001* (Cth) including regulations made for the purposes of the Act

capital reduction A share capital reduction under Pt 2J.1 or corresponding legislation in a foreign jurisdiction

foreign scheme A compromise or arrangement between a foreign company and its members

interest An interest in a managed investment scheme

PDS A Product Disclosure Statement

Pt 5.1 A Part of the Act (in this example, numbered 5.1)

Pt 5.1 scheme A scheme of arrangement conducted under Pt 5.1

reconstruction A compromise or arrangement between an entity and its members or between a managed investment scheme and the members of the scheme (including but not limited to a trust scheme or foreign scheme) other than a Pt 5.1 scheme

reconstruction meeting A meeting of members to vote on a reconstruction

s707(3) (for example) A section of the Act (in this example, numbered 707(3))

securities Securities as defined in s92

trust scheme A compromise or arrangement between a managed investment scheme and the members of the scheme

Related information

RG 188.54

Headnotes

Capital reduction, disclosure, distribution in specie, invitation, offer, on-sale, on-sale provisions, Pt 5.1 scheme, PDS, PDS relief, prospectus, prospectus relief, prospectus requirement, reconstruction

Class orders and pro formas

[CO 03/606] *Financial product advice – exempt documents*

[CO 04/671] *Disclosure for on-sale of securities and other financial products*

[CO 05/850] *Unsolicited offers under a regulated foreign takeover bid or scheme of arrangement*

[CO 07/9] *Prospectus relief for foreign schemes of arrangement and PDS relief for Part 5.1 schemes and foreign schemes of arrangement*

[CO 07/10] *Technical disclosure relief for reconstructions and capital reductions*

Regulatory guides

RG 173 *Disclosure for on-sale of securities and other financial products*

Practice notes

Superseded Practice Note 40 *Reconstruction meetings* [SPN 40]

Legislation

Corporations Act Pts 2J.1 Div 1, 5.1, 5.3A, 6D.2, 6D.3 and 7.9 Div 5A, s256B, 256C, 411, 706, 707(3), 707(5), 708(17), 723(1), 734(5)(a)(ii), 734(5)(b)(iii), 734(6)(b), 911A, 1012B, 1013B(1), 1015C(1)(a), 1016A(2) and 1019E(1)

Cases

Attorney-General for New South Wales v Australian Fixed Trusts Ltd (1974) 1 NSWLR 110; *Re Crusader Ltd* [1996] Qd R 117

Consultation papers

CP 67 *Disclosure in reconstructions* (July 2005)

Regulation Impact Statements

RIS *Disclosure in reconstructions* (February 2007)

Information releases

[IR 05-39] *ASIC seeks industry comment on policy for disclosure in reconstructions* (6 July 2005)