



ASIC
Australian Securities &
Investments Commission

REGULATORY GUIDE 161

Share and interest sale facilities

March 2018

About this guide

This guide is for companies and responsible entities, operators of their registries, and intermediaries involved in the operation of share and interest sale facilities and related purchase facilities.

This guide explains:

- the relief available for share and interest sale facilities and related purchase facilities in [ASIC Corporations \(Share and Interest Sale Facilities\) Instrument 2018/99](#); and
- our approach to relief for facilities that are not covered by our relief instrument.

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 2018 and is based on legislation and regulations as at the date of issue. On 27 July 2020, we updated the process for submitting an application for relief in RG 161.28–RG 161.30. We also updated the reference to the relief instrument in RG 161.15.

Previous version:

- Superseded Regulatory Guide 161, issued March 2008

Disclaimer

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

Contents

A Overview	4
Share and interest sale facilities and related purchase facilities	4
Our relief	5
No-action letters: Australian market licence provisions	6
B Relying on the relief	7
When the relief applies	7
Conditions of our relief	8
‘Excluded person’ share and interest sale facilities	9
Applying for individual relief	10
Key terms	12
Related information	14

A Overview

Key points

We have given relief in [ASIC Corporations \(Share and Interest Sale Facilities\) Instrument 2018/99](#) for certain share and interest sale facilities and related purchase facilities (e.g. facilities where the shares and interests are sold or purchased on a licensed market or on an approved foreign market).

We consider that the managed investment, Australian financial services (AFS) licensing and product disclosure provisions of the *Corporations Act 2001* (Corporations Act) were not intended to apply to the types of facilities covered by the relief.

If a person operates a share or interest sale facility of the kind covered by the relief, the operator generally does not operate a financial market for the purposes of the Australian market licence provisions in Pt 7.2 of the Corporations Act. We do not think it is necessary for operators of these facilities to apply for a no-action letter in relation to these provisions.

Share and interest sale facilities and related purchase facilities

- RG 161.1 Share and interest sale facilities can be a convenient and cost-effective way for holders of shares and interests in managed investment schemes, especially those with small holdings, to sell their shares or interests at or near their current market value.
- RG 161.2 Share and interest sale facilities are offered in a variety of situations—some are stand-alone facilities, while others form part of a corporate restructure or some other larger transaction. While the context may differ, many share and interest sale facilities have the same basic features, including:
- (a) the financial products that may be sold through the facility are issued by the operator of the facility or a related body corporate of the operator;
 - (b) the operator invites holders to sell their shares or interests through the facility;
 - (c) the shares or interests of holders who elect to participate in the facility are sold on a licensed market by an AFS licensee in batches over a specified period of time; and
 - (d) the proceeds of the sale are pooled and participating holders are paid a volume weighted average price (VWAP) on all shares or interests sold through the facility, less the reasonable expenses of operating the facility (unless those expenses are borne by the product issuer or the operator).

RG 161.3 Sometimes, in conjunction with a share and interest sale facility, operators also offer a related purchase facility under which holders can, as an alternative to selling their shares or interests, purchase more shares or interests of the same class that are issued by the operator of the facility or a related body corporate of the operator.

Our relief

RG 161.4 [ASIC Corporations \(Share and Interest Sale Facilities\) Instrument 2018/99](#) provides conditional relief to facilitate the operation of certain share and interest sale facilities and related purchase facilities. We have provided relief from:

- (a) the managed investment provisions (Ch 5C), the AFS licensing provisions (Pt 7.6) and the product disclosure provisions (Pt 7.9) of the Corporations Act, but only to the extent that the operation of the facility itself constitutes a managed investment scheme (for both share and interest sale facilities and related purchase facilities); and
- (b) to avoid doubt, Div 5A of Pt 7.9 of the Corporations Act, which includes the prohibition on unsolicited offers in s1019F (for share and interest sale facilities only).

RG 161.5 The relief is given to the operator, being the person who operates a managed investment scheme by reason of operating a share and interest sale facility or related purchase facility. This applies when the financial products that may be sold or purchased through the facility are issued by the operator or a related body corporate of the operator.

RG 161.6 However, it also covers other persons who act as an agent of the product issuer or the operator when:

- (a) operating the share and interest sale facility; and
- (b) giving invitations to sell financial products through the facility.

RG 161.7 This will usually include:

- (a) the intermediary engaged by the product issuer or the operator to sell or purchase products on a financial market; and
- (b) the registry provider who maintains the members' register.

RG 161.8 The relief only applies to certain share and interest sale facilities and related purchase facilities (e.g. facilities where the shares and interests are sold or purchased on a licensed market or on an approved foreign market).

RG 161.9 Section B of this guide explains which facilities the relief covers, and the conditions of the relief.

Rationale for the relief

- RG 161.10 We have granted the relief because we think that:
- (a) the managed investment, AFS licensing and product disclosure provisions were not intended to apply to the types of facilities covered by the relief;
 - (b) without relief, product issuers and operators would be unable to offer these facilities to their members without incurring excessive costs or regulatory obstacles, which would disadvantage them and members; and
 - (c) there would be no significant regulatory benefit in requiring compliance with the managed investment, AFS licensing and product disclosure provisions because the relief maintains sufficient disclosure to members.
- RG 161.11 We also consider that participating holders' interests will be adequately protected because:
- (a) the price of the shares or interests that are sold or purchased through the facility will be determined by an independent pricing mechanism; and
- Note: The relief does not cover facilities that allow the price to be set outside the operation of a licensed market or approved foreign market (e.g. off-market transactions and overnight crossings).
- (b) sale or purchase transactions must be completed within a reasonable time after the holder elects to participate in the facility.

No-action letters: Australian market licence provisions

- RG 161.12 We occasionally receive requests for 'no-action letters' under [Regulatory Guide 108](#) *No-action letters* (RG 108) in relation to whether the operators of share and interest sale facilities need to hold an Australian market licence in Pt 7.2 of the Corporations Act. In the past, we have sometimes issued no-action letters for the avoidance of doubt.
- RG 161.13 We consider that, if a person operates a share or interest sale facility of the kind covered by the relief, the operator generally does not operate a financial market for the purposes of Pt 7.2 of the Corporations Act. In light of this, we do not think it is necessary for operators of these facilities to apply for a no-action letter in relation to the Australian market licence provisions.

B Relying on the relief

Key points

The relief in [ASIC Corporations \(Share and Interest Sale Facilities\) Instrument 2018/99](#) only applies to share and interest sale facilities and related purchase facilities with certain features: see RG 161.14–RG 161.15 and Table 1.

The relief is also subject to conditions, which must be complied with by operators who rely on the relief: see RG 161.16–RG 161.21.

Operators of share and interest sale facilities that are not covered by the relief may apply for individual relief: see RG 161.25–RG 161.30.

When the relief applies

- RG 161.14 [ASIC Corporations \(Share and Interest Sale Facilities\) Instrument 2018/99](#) applies to facilities with the features set out in the relief. These features are summarised in Table 1.
- RG 161.15 The relief also applies to related purchase facilities offered in conjunction with a share and interest sale facility (i.e. the relief does not apply to stand-alone purchase facilities) provided that:
- (a) The related purchase facility has the features set out in the relief (as summarised in Table 1).
 - (b) Each participating holder may only purchase financial products for consideration totalling no more than \$5,000 in any consecutive 12-month period. The total consideration paid by a holder in any 12-month period includes consideration paid for financial products of the same class that were purchased by that holder through any previous facility. The aggregate limit of \$5,000 is intended to take into account any purchase through similar related purchase facilities operated by the issuer during the consecutive 12-month period. It is not intended to also include acquisitions by issue made during that period under [ASIC Corporations \(Share and Interest Purchase Plans\) Instrument 2019/547](#).

Table 1: Summary of the features of facilities covered by our relief

Feature of facility	Where the relief applies
Types of financial products that can be sold or purchased	The relief only applies if the facility is for the sale or purchase of shares or interests that are: <ul style="list-style-type: none"> • admitted to quotation on a licensed market or on an approved foreign market; and • issued by the operator of the facility or a related body corporate of the operator.
Method of sale or purchase of financial products	The relief only applies if the financial products are sold or purchased on a licensed market or on an approved foreign market in the ordinary course of trading on that market. This means that the price at which the financial products are sold or purchased must be determined in the ordinary course of trading on that market.
Time for payment of proceeds of sale or transfer of products to participating holders	The relief only applies if each participating holder is paid the proceeds of sale or is transferred the number of products allocated to them within eight weeks after the date on which their election to participate in the facility was received.

Conditions of our relief

- RG 161.16 The relief in [ASIC Corporations \(Share and Interest Sale Facilities\) Instrument 2018/99](#) is subject to a number of conditions, which must be complied with by an operator who relies on the relief.

Disclosure to holders

- RG 161.17 The operator must send holders a document containing certain information about:
- the market value of the financial products;
 - how the facility works;
 - how the proceeds of sale or financial products purchased will be allocated between participating holders; and
 - what the holder can do instead of participating in the facility.

- RG 161.18 This condition is designed to ensure that holders have sufficient information about the facility so they can make an informed decision about whether or not to participate.

Control transactions

- RG 161.19 The operator must take reasonable steps to ensure the share and interest sale facility is not operated during any period when a control transaction has been publicly proposed and has not ended.

RG 161.20 This condition is intended to ensure that the sale and purchase of financial products through a facility is not used to affect the control transaction.

Participation in both a share and interest sale facility and a related purchase facility

RG 161.21 The relief is also subject to a condition that the operator takes reasonable steps to ensure that, if a related purchase facility is made available in conjunction with a share and interest sale facility, a participating holder can only participate in one, not both, of the facilities.

‘Excluded person’ share and interest sale facilities

RG 161.22 We sometimes receive relief applications for share and interest sale facilities operated for the purposes of s619(3) or 619(4) of the Corporations Act (as notionally inserted by [Class Order \[CO 13/521\] Takeover bids](#)). In the past, we have occasionally provided ‘comfort’ relief from the managed investment, AFS licensing and product disclosure provisions, and the unsolicited offer provisions in Div 5A of Pt 7.9 of the Corporations Act, in relation to these facilities for the avoidance of doubt. However, we will no longer be providing this type of relief because, in our view, it is unnecessary.

RG 161.23 Similarly, we have provided ‘comfort’ relief from the managed investment, AFS licensing and product disclosure provisions, and the unsolicited offer provisions in Div 5A of Pt 7.9 of the Corporations Act, for the avoidance of doubt, for share and interest sale facilities that operate in the same way as that contemplated by s619(3) or 619(4) (as notionally inserted by [\[CO 13/521\]](#)) as part of the terms of a scheme of arrangement under Pt 5.1 or a trust scheme. However, we will no longer be providing this type of relief because, in our view, the managed investment, AFS licensing and product disclosure provisions and the unsolicited offer provisions in Div 5A of Pt 7.9 were also not intended to apply to these types of facilities. This is because excluded persons are obliged, rather than choose, to participate in these facilities.

RG 161.24 However, we consider that share and interest sale facilities not akin to those in s619(3) or 619(4) or ASIC Corporations (Share and Interest Sale Facilities) Instrument 2018/99, that are part of the terms of a scheme of arrangement under Pt 5.1 or a trust scheme, may require individual relief. See RG 161.25–RG 161.30 for further information on how to apply for individual relief.

Applying for individual relief

- RG 161.25 We recognise that the relief in [ASIC Corporations \(Share and Interest Sale Facilities\) Instrument 2018/99](#) will not cover all types of share and interest sale facilities and related purchase facilities. For example, some facilities offered in connection with some corporate restructures or other transactions might not fit within the relief.
- RG 161.26 If an operator proposes to operate a share and interest sale facility and related purchase facility that is not covered by the relief, it can apply for individual relief. Applications should address the criteria set out in [Regulatory Guide 51 Applications for relief](#) (RG 51).
- RG 161.27 In making our decision whether to grant relief, the factors we may consider include:
- (a) the facility is offered in connection with a restructure or other transaction where commercial and investor benefits may flow from granting relief;
 - (b) the types of financial products that will be sold or purchased through the facility are admitted to quotation on a licensed market or on an approved foreign market to enable the price to be independently determined;
 - (c) if the method or price mechanism is outside the operation of a licensed market or an approved foreign market (e.g. certain ‘book builds’), whether the method or price mechanism of the financial products that are sold or purchased through the facility is fair and sufficiently capable of being objectively determined;
 - (d) if an entity acts as an agent of the product issuer in operating the facility and giving invitations to sell financial products through the facility, whether in the circumstances it would be disproportionately burdensome for the product issuer (or related body corporate of the product issuer) to operate the facility;
 - (e) whether the timeframe during which the sale or purchase transactions will be completed from the holder’s election to participate in the facility is reasonable in the circumstances and minimises the delay to holders;
 - (f) whether holders are provided with sufficient information about the facility to make an informed decision about whether to participate. We would expect disclosure to holders to include information about:
 - (i) the valuation of the financial products;
 - (ii) how the facility works;
 - (iii) how the proceeds of sale or financial products purchased will be allocated between participating holders; and
 - (iv) what the holder can do instead of participating in the facility.

We may request a copy of the proposed disclosure to be sent to holders to ensure that the disclosure given to holders about the facility is adequate; and

- (g) whether the interests of investors will be adequately protected.

How to apply for relief

RG 161.28 Applications for individual relief should address all relevant considerations and include all relevant information.

RG 161.29 You should submit your application for relief through the [ASIC Regulatory Portal](#). You will need to pay fees for your application. We have provided details about payment options in the portal. For more information, see [how you apply for relief](#).

RG 161.30 Make sure your application:

- (a) addresses all the considerations in RG 161.27 and generally in this guide; and
- (b) complies with [RG 51](#).

Note: You can also contact ASIC on 1300 300 630 for information and assistance.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
AFS licensing provisions	The provisions in Pt 7.6 of the Corporations Act
approved foreign market	A market that is included in the list set out in ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669
ASIC	Australian Securities and Investments Commission
Australian market licence	An Australian market licence under s795B of the Corporations Act that authorises a person to operate a financial market
[CO 13/521] (for example)	An ASIC class order (in this example numbered 13/521) 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
financial market	Has the meaning given in s767A of the Corporations Act, and includes a facility through which offers to acquire or dispose of financial products are regularly made or accepted
financial product	A facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.
interest	An interest in a managed investment scheme
issuer	A company or responsible entity that is the issuer of the financial products that may be sold or purchased through the share and interest sale facility or related purchase facility, that is either the operator of the facility or a related body corporate of the operator

Term	Meaning in this document
licensed market	A financial market the operation of which is authorised by an Australian market licence
managed investment provisions	The provisions set out in Ch 5C of the Corporations Act and in the Corporations Regulations
operator	The person who operates a managed investment scheme by reason of operating a share and interest sale facility or related purchase facility
product disclosure provisions	The provisions set out in Pt 7.9 of the Corporations Act and in the Corporations Regulations
related purchase facility	A facility offered in conjunction with a share and interest sale facility that enables holders to purchase more shares or interests of the same class
scheme of arrangement	A scheme of arrangement conducted under Pt 5.1 of the Corporations Act
share and interest sale facility	A facility under which holders can sell shares or interests
trust scheme	A type of item 7 of s611 of the Corporations Act transaction used to acquire control of a managed investment scheme

Related information

Headnotes

managed investment scheme, related purchase facility, share and interest sale facility, unsolicited offer

Legislative instruments

[ASIC Corporations \(Share and Interest Sale Facilities\) Instrument 2018/99](#)

[ASIC Corporations \(Share and Interest Purchase Plans\) Instrument 2019/547](#)

[\[CO 13/521\]](#) *Takeover bids*

Regulatory guides

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

[RG 108](#) *No-action letters*

Legislation

Corporations Act, Ch 5C, Pts 5.1, 7.2, Pt 7.6 and 7.9, s619, 1019F

Consultation papers

[CP 252](#) *Remaking ASIC class order on share and interest sale facilities:*
[CO 08/10]