

Attachment 2 to CS 11: Draft updated RG 108



ASIC
Australian Securities &
Investments Commission

REGULATORY GUIDE 108

No-action letters

October 2024

About this guide

This guide is for persons (and their professional advisers) who want to ask the Australian Securities and Investments Commission (ASIC) for a no-action letter (including a class no-action position).

It explains how to make an application for a no-action letter (including a class no-action position) and sets out the factors ASIC considers when dealing with such applications.

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
- 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 draft guide was issued in October 2024 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 108, issued 9 July 2008, reissued December 2009, updated August 2017, September 2018, June 2019 and July 2020
- Superseded Policy Statement 108, issued 17 June 1996, updated 4 July 2001, rebadged as a regulatory guide on 5 July 2007.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, the National Credit Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

This guide details how we will deal with requests for no-action letters, including class no-action positions.

An applicant should follow the process and provide the information outlined in Section C.

The purpose of no-action letters

- RG 108.1 An ASIC no-action letter communicates to a particular person that we intend to take no regulatory action over a particular state of affairs or conduct. A no-action letter:
- (a) is an expression of our regulatory intent at the time the letter is given and is not a form of legal advice or relief;
 - (b) is specific to a particular set of circumstances and does not have precedent value;
 - (c) does not restrict our right to take action in the future, i.e. our intention of taking no action may be withdrawn at any time; and
 - (d) is not intended to affect the rights of third parties to take legal action against the recipient of the letter.

Why ASIC might give a no-action letter

- RG 108.2 We can give a no-action letter in relation to actual or possible conduct that does not comply with the legislation ASIC administers, including:
- (a) past conduct;
 - (b) ongoing or transitional conduct; or
 - (c) future conduct.
- RG 108.3 When deciding whether we will give a no-action letter, we will consider:
- (a) the policy and intent of the legislation;
 - (b) the facts at the time of the application; and
 - (c) the other factors and requirements outlined in RG 108.33.
- RG 108.4 We will only give a no-action letter when we are of the view that it would serve a clear regulatory purpose and it would not advance the policy of the legislation to take other regulatory action in relation to the conduct in question.

Class no-action positions

- RG 108.5 In some circumstances, we may give a no-action position to a class of people or for a class of conduct. This is known as a class no-action position.
- RG 108.6 A class no-action position:
- (a) is not legal advice and is specific to the facts and circumstances;
 - (b) will not restrict ASIC's right to take action and may be withdrawn or revised; and
 - (c) does not preclude third parties taking legal action.
- RG 108.7 We may take a class no-action position on our own initiation or in response to a request. The principles that apply to ASIC giving no-action letters also apply to class no-action positions.

How to apply for a no-action letter or class no-action position

- RG 108.8 An applicant must apply for a no-action letter or class no-action position through the [ASIC Regulatory Portal](#).
- RG 108.9 The process and requirements for applications for no-action letters and class no-action positions are outlined in Section C.

Application fees

- RG 108.10 Fees are payable to apply for no-action letters and class no-action positions. The cost is set under legislation and available in Information Sheet 30 *Fees for commonly lodged documents* ([INFO 30](#)).

Note: Although ASIC considers all requests for no-action letters, in certain circumstances we may not give a no-action letter or class no-action position or provide a final determination.

B What is a no-action letter?

Key points

A no-action letter is an expression of ASIC's regulatory intent and is not a form of legal advice or relief. It is specific to a particular set of circumstances and does not have precedent value.

In some circumstances, we may give a no-action position that relates to a class of people or a class of conduct i.e. a class no-action position.

A no-action letter (including a class no-action position) does not restrict our right to take action in the future and may be withdrawn at any time. It is not intended to affect the rights of third parties to take legal action.

In general, we will not publish no-action letters (however, we reserve our right to do so). From time to time, we may publish class no-action positions.

Role of no-action letters

- RG 108.11 ASIC has some discretion to give a letter to a person, that is, a no-action letter, in which we state that we do not intend to take regulatory action against that person over a particular state of affairs or conduct at a specific point in time.
- RG 108.12 A no-action letter is an expression of our regulatory intent at the time the letter is given in relation to conduct regulated by:
- (a) the *Corporations Act 2001* (Corporations Act);
 - (b) the *National Consumer Credit Protection Act 2009* (National Credit Act);
 - (c) the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act);
 - (d) the *Superannuation Industry (Supervision) Act 1993* (SIS Act);
 - (e) the *Australian Securities and Investments Commission Act 2001* (ASIC Act);
 - (f) the *Insurance Act 1973* (Insurance Act); or
 - (g) any other legislation ASIC administers: see s12A of the ASIC Act.
- RG 108.13 A no-action letter is intended to provide comfort and some level of certainty to an applicant that we do not currently foresee that we will take regulatory action in relation to the specified conduct. No-action letters are not legal advice, relief, nor a guarantee that ASIC will not take action in the future. No-action letters may be withdrawn at any time and are not intended to affect the rights of third parties to take legal action in relation to any contravention.

RG 108.14 We may give a no-action letter to a person in relation to some areas where we have no specific power to modify or grant an exemption (i.e. grant relief) from the legislation we administer. We may also give a no-action letter where there is an unintended contravention of the legislation as a result of conduct that is not inconsistent with the spirit and policy of the relevant legislation.

RG 108.15 Communicating our regulatory intention in the form of a no-action letter is a part of our function under s1(2) of the ASIC Act to:

- (a) maintain, facilitate and improve the performance of the financial system and entities within it in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy;
- (b) promote confident and informed participation of investors and consumers in the financial system; and
- (c) administer the laws effectively and with minimum procedural requirements.

Note: See s1(2) of the ASIC Act for a complete statement of our regulatory purpose.

RG 108.16 It is important to note that applying for a no-action letter does not substitute for carefully considering your actions and their consequences. We will not give a no-action letter simply for the convenience of applicants who have not taken all reasonable measures to avoid the need for a no-action letter.

No-action letters are not legal advice

RG 108.17 It is not part of ASIC's function to provide legal advice on the interpretation and application of the law. Therefore, no-action letters are not an expression of our legal views.

No-action letters are not relief

RG 108.18 No-action letters are not the same as relief from the operation of the law. ASIC's powers to grant relief are outlined in Regulatory Guide 51 *Applications for relief* ([RG 51](#)). No-action letters are not intended to be a substitute for relief where ASIC otherwise has the power to grant relief. We are unlikely to give a no-action letter where providing relief would be more appropriate (see Table 1).

Specific to a case

RG 108.19 Any no-action letter is specific to the facts and circumstances of a particular case. Therefore, they should not be considered as a de facto 'rulings system' indicating our view of whether particular types of conduct are legal, nor should such letters be relied on as precedents.

ASIC's right to take future action is not restricted

RG 108.20 A no-action letter is only a statement of our intentions on the basis of information available to us at a particular time. Even after a no-action letter has been given, we reserve our right to take action in the future. This is especially so if there has been incomplete disclosure at the time the application for the no-action letter was made.

No-action letters may be withdrawn or revised

RG 108.21 We may at any time reconsider our view of the relevant legislation, its legislative policy or our administrative policy and withdraw or revise a no-action letter. We issue all no-action letters on this basis, regardless of whether they include such a statement of our right to withdraw or revise our views.

RG 108.22 In revising or withdrawing a no-action letter, we will consider the consequences for persons who have already acted in reasonable reliance on a no-action letter provided to them.

Third parties are not precluded from taking legal action

RG 108.23 A no-action letter does not preclude third parties (including the Director of Public Prosecutions) from taking legal action in relation to the same conduct or conduct of that kind. Nor does it prevent a court from holding that a particular conduct infringes the relevant legislation. We do not represent that the conduct covered by our no-action letter will not be held to contravene the relevant legislation by a court. Nor do we undertake to intervene in an action brought by third parties in respect of such conduct.

Distinguishing no-action letters from other ASIC correspondence

RG 108.24 We also communicate our regulatory intent in correspondence other than no-action letters. For example, we may give a 'no further inquiry' response to a breach notification by an Australian financial services (AFS) licensee, or a 'no further action' response to a complaint. However, a person should not regard such correspondence as being a no-action letter. Correspondence from us will only be a no-action letter if it contains a clear statement that it is a no-action letter given under this guide (i.e. RG 108).

Note: See Regulatory Guide 78 *Breach reporting by AFS licensees and credit licensees* ([RG 78](#)).

Class no-action positions

RG 108.25 In some circumstances, we may give a no-action position to a class of people or for a class of conduct. This is known as a class no-action position.

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- RG 108.26 A class no-action position:
- (a) is not legal advice (see RG 108.17) and is specific to the facts and circumstances (see RG 108.19);
 - (b) will not restrict ASIC's right to take action (see RG 108.20) and may be withdrawn or revised (see RG 108.21–RG 108.22); and
 - (c) does not preclude third parties taking legal action (see RG 108.23).

Publishing no-action letters and class no-action positions

RG 108.27 We generally do not publish no-action letters (however, we reserve the right to do so). No-action letters are case-specific and are not precedents that may be quoted as the basis for further applications. Further, publishing particular no-action letters may discourage persons with bona fide cases from requesting ASIC no-action.

RG 108.28 From time to time, we may publish our class no-action positions.

Confidentiality

RG 108.29 Under s127 of the ASIC Act, we must take reasonable measures to prevent unauthorised use and disclosure of information received in confidence in connection with our statutory functions. Certain uses and disclosure are taken to be authorised.

Note 1: ASIC also has express powers under s25 and s37 to disclose certain information for certain purposes.

Note 2: For information about our approach to confidentiality, see Regulatory Guide 103 *Confidentiality and release of information* ([RG 103](#)).

C How do I get a no-action letter or a class no-action position?

Key points

ASIC will only give a no-action letter or a class no-action position under certain circumstances and when we are of the view that it would serve a clear regulatory purpose, having regard to the:

- policy and intent of the legislation;
- facts at the time of the application; and
- factors set out in Table 1.

An application for a no-action letter or class no-action position cannot be made on a 'without prejudice' basis, and some applications will not receive a final determination.

Why ASIC may give a no-action letter

RG 108.30 Upon formal application, we can give a no-action letter in relation to actual or possible conduct that does not comply with the legislation ASIC administers, including:

- (a) past conduct;
- (b) ongoing or transitional conduct; or
- (c) future conduct.

RG 108.31 ASIC's decision to give a no-action letter will be based on considerations of legislative policy, our interpretation of the relevant legislation, our understanding of the intention of Parliament in enacting the legislation, and the facts at the time of the application.

RG 108.32 We will only give a no-action letter where we are of the view that:

- (a) it would serve a clear regulatory purpose to provide a no-action letter to an applicant—business facilitation is an example of a regulatory purpose; and
- (b) it would not advance the policy of the legislation to take other regulatory action in relation to the conduct in question.

Factors that ASIC will consider

RG 108.33 The factors that we will consider in forming our view are set out in Table 1. We will be more likely to give a no-action letter if your situation is similar to, and your application addresses, these non-exhaustive factors.

Table 1: Factors making it more likely ASIC will give a no-action letter

Our policy	<p>ASIC has not published any regulatory guidance on a subject or settled its views on a subject, or the circumstances leading to the application arise infrequently.</p> <p>The facts and circumstances giving rise to the application for the no-action letter were not the subject of an investigation or other ASIC regulatory action prior to the receipt of the application (if they were, see INFO 151).</p>
No other relief	<p>There is no appropriate relief available.</p> <p>Note 1: We are unlikely to give a no-action letter where providing relief would be more appropriate (see RG 51), unless there is no specific relief available in the circumstances.</p> <p>Note 2: In particular, applicants should look at our guidance on comfort relief in RG 51.</p>
Nature of the conduct	<p>There is room for doubt as to whether the relevant conduct would be lawful.</p> <p>Any contravention is transitional in nature and will be rectified as soon as practicable (particularly where the contravention will soon cease to be a contravention because of expected law reform).</p> <p>Any contravention does not suggest a serious flaw in your internal compliance controls.</p> <p>Any offence is merely regulatory in nature (i.e. a summary offence that ASIC would prosecute without reference to the Commonwealth Director of Public Prosecutions).</p>
Your actions	<p>Any contravention was due to inadvertence or lack of factual knowledge, with failure to ascertain the facts not being due to carelessness.</p> <p>You have taken available steps to alleviate any mischief resulting from the conduct. Where appropriate, you have taken prompt action to investigate and rectify the breach once identified.</p>
Your actions in applying for a no-action letter	<p>You have brought the matter to our attention without delay.</p> <p>You acknowledge that we may publicly announce the no-action letter, along with matters relating to its circumstances, including material contained in your submission to ASIC requesting the letter.</p>
Your past actions	<p>Your compliance history is satisfactory.</p> <p>Note: We are less likely to give a no-action letter in relation to past conduct if that conduct is not an isolated incident (e.g. where past contraventions may demonstrate that your compliance systems are inadequate, where there are repeated contraventions over multiple years, or where there is an ongoing failure to monitor compliance with the conditions in a legislative instrument to ensure the relief continues to apply).</p>
Third parties	<p>The adverse effects on third parties are minimal.</p> <p>The contravention does not appear to reduce investor protection or the credibility or efficiency of the financial system.</p>

When ASIC may give a class no-action position

RG 108.34 We may take a class no-action position on our own initiation or in response to a request (including where an application made for an individual no-action

letter relates to circumstances or conduct that affects people in addition to the applicant). An example would be a request from an industry or professional association seeking a no-action position for its members.

RG 108.35 The same principles and factors outlined in RG 108.31–RG 108.32 and Table 1 will apply to an application for a class no-action position.

We may not provide a final determination

RG 108.36 Although we will consider all requests for no-action letters or class no-action positions, there may be instances where it is not appropriate for us to give a final answer. We may also decide that we should not, as a matter of policy, give no-action letters, or class no-action positions, in certain matters.

RG 108.37 In all cases, we will notify you of the outcome of our assessment of the application. ASIC’s decision about whether or not to provide a no-action letter is not reviewable by the Administrative Review Tribunal.

Applying for a no-action letter or class no-action position

RG 108.38 You must submit a request for a no-action letter or a class no-action position through the [ASIC Regulatory Portal](#).

RG 108.39 In addition to this guide, you should read [RG 51](#), and (where relevant) Information Sheet 151 *ASIC’s approach to enforcement* ([INFO 151](#)).

What you should include in your application

RG 108.40 Applications for no-action letters and class no-action positions should include:

- (a) all the information needed to address the issues referred to in RG 108.31–RG 108.32;
- (b) the matters of policy and law that would lead us to decide that it is not in the public interest for ASIC to take action, having regard to Table 1;
- (c) any information required by [RG 51](#) which deals with applications for the exercise of our discretionary powers. The considerations which may be relevant to an application for a no-action letter or class no-action position include, but are not limited to, whether there are any third parties whose interests may be affected by the contravention or by us giving a no-action letter or class no-action position; and
- (d) specific information addressing why court-based relief (e.g. under s1318(2) of the Corporations Act or s183 of the National Credit Act) is not available or is inappropriate.

Full and frank disclosure

RG 108.41 An application must contain full and frank disclosure of all relevant information.

Prejudice

RG 108.42 An application cannot be made on a ‘without prejudice’ basis and we may use the material contained in it for any of our statutory functions.

Confidentiality

RG 108.43 Information supplied in support of an application for a no-action letter or class no-action position will not usually be regarded as confidential. Where there is a compelling reason for that information to be regarded as confidential, and we agree that it should be treated as such, we will nevertheless retain our rights to disclose that information under s127 of the ASIC Act.

Note: For information about our approach to confidentiality, see [RG 103](#).

Priority

RG 108.44 We will not usually give applications for no-action letters or class no-action positions priority over our other regulatory tasks.

Urgent applications

RG 108.45 In exceptional circumstances, we may consider applications on an urgent basis, or within a specific time period. If your application is urgent, or a decision is required by a specific date, you must set this out in your application.

Submitting your application

RG 108.46 You must submit your application for a no-action letter or class no-action position through the [ASIC Regulatory Portal](#). For more information on the process, see the related guidance on [How to apply for relief](#) and [FAQs: Apply for relief on our website](#).

Application fee

RG 108.47 You will need to pay a fee for your application. Fees are set under legislation. For more information, see [INFO 30](#). Details about the payment options are available through the [ASIC Regulatory Portal](#).

Note: Also see Sch 1 to the Corporations (Fees) Regulations 2001 and Sch 1 to the National Consumer Credit Protection (Fees) Regulations 2010 (Credit Fees Regulations) for current fee amounts.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
legislation ASIC administers	This refers to: <ul style="list-style-type: none"> • the ASIC Act; • the Corporations Act; • the Insurance Act; • the National Credit Act; • the SIS Act; • the Transitional Act; or • any other legislation ASIC administers: see s12A of the ASIC Act.
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
RG 51 (for example)	An ASIC regulatory guide (in this example, numbered 51)
Transitional Act	<i>National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009</i>

Related information

Headnotes

application, business facilitation, class no-action position, discretion, enforcement powers, individual no-action letter, no-action, regulatory intent, regulatory purpose

Regulatory guides

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

[RG 78](#) *Breach reporting by AFS licensees and credit licensees*

[RG 103](#) *Confidentiality and release of information*

Information sheets

[INFO 151](#) *ASIC's approach to enforcement*

Legislation

ASIC Act, s1(2), 12A, 127

Corporations Act, s1318(2)

Life Insurance Act 1995

National Credit Act, s183

Superannuation Industry (Supervision) Act 1993

Transitional Act

Corporations (Fees) Regulations 2001, Sch 1

National Consumer Credit Protection (Fees) Regulations 2010, Sch 1