



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 201

Unsolicited credit cards and debit cards

August 2009

About this guide

This is a guide for people (card providers) who send out credit or debit cards to consumers.

It sets out ASIC's position on the prohibition of the unsolicited sending of credit cards and debit cards in s12DL of the *Australian Securities and Investment Commission Act 2001* (ASIC Act), and in particular the scope of the exceptions to that prohibition.

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 version was issued on 6 August 2009 and is based on legislation and regulations as at 6 August 2009.

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.

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

When is the sending of credit cards and debit cards allowed by s12DL of the ASIC Act?

Key points

The sending out of credit cards and debit cards is prohibited by s12DL of the ASIC Act except in circumstances set out in s12DL(2).

We consider that credit cards and debit cards can be sent to a consumer where they have been solicited either:

- directly through a written request by the consumer, or
- indirectly because the card replaces another card that has previously been requested or used by the consumer and has substantially the same features.

- RG 201.1 Section 12DL(1) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) provides that a person must not send another person (called the ‘targeted person’ in the section) a credit card or debit card except in accordance with subsection (2).
- RG 201.2 Section 12DL(2) of the ASIC Act sets out three circumstances in which a card may be sent out, i.e.:
- (a) in response to a request in writing by the person who will be liable to the issuer of the card in respect of the use of the card (see s12DL(2)(a));
 - (b) in renewal or replacement of, or in substitution for, a card of the same kind previously sent to the targeted person after a request in writing to the issuer of the previous card (see s12DL(2)(b)(i)); and
 - (c) in renewal or replacement of, or in substitution for, a card of the same kind previously sent to the targeted person and used for a purpose for which it was intended to be used (see s12DL(2)(b)(ii)).
- RG 201.3 Card providers may be uncertain about what conduct is permitted by s12DL(2). This guide sets out how ASIC will administer this provision.

Purpose of s12DL

- RG 201.4 This provision mirrors s63A of the *Trade Practices Act 1974* (TPA). Section 63A of the TPA was introduced following a large number of unsolicited credit cards being sent to consumers who did not have an existing credit arrangement with the relevant credit provider. The concerns that arose as a result of this conduct were identified as:
- (a) credit cards, if sent out unsolicited, could fall into the wrong hands;

- (b) the risk that a mail out of unsolicited credit cards might breach the privacy of consumers;
- (c) the risk that consumers would be confused and anxious about receiving unsolicited credit cards; and
- (d) the potential for increased consumer debt as a result of the availability of unsolicited credit.

RG 201.5 We consider that s12DL of the ASIC Act addresses these concerns by ensuring that credit cards and debit cards are only sent out to consumers in circumstances where they have been solicited (directly or indirectly) by the consumer.

RG 201.6 We think that the three circumstances set out in s12DL(2) of the ASIC Act cover:

- (a) A card (the initial card) is sent in response to a written request by a consumer: see s12DL(2)(a). The initial card is directly solicited by the consumer, and the consumer is in a position to know what the features of the card are before asking for it to be sent.
- (b) A card (the first replacement card) is sent to renew or replace, or as a substitute for, the initial card: see s12DL(2)(b)(i). Even though there is not a direct request for the first replacement card to be sent out, if it has effectively the same features as the previous (requested) card the consumer is in a position to know what the features of the card are before it is sent. The card has been indirectly solicited by reason of the consumer's initial request.
- (c) A card (a subsequent replacement card) is sent to renew or replace, or as a substitute for, the first replacement card or a subsequent replacement card that has been used by the consumer: see s12DL(2)(b)(ii). The consumer's use of the first replacement card or a previous subsequent replacement card implies that they have accepted the features of that card. Even though there is not a direct request for the subsequent replacement card to be sent out, if it has effectively the same features as the previous cards the consumer is in a position to know what the features of the card are before it is sent. The card has been indirectly solicited by reason of the consumer's initial request and use of the previous cards.

RG 201.7 As each card that is sent is either directly requested by the consumer or effectively the same as the card that was directly requested, the consumer will not receive a card that has features that they have not asked for or agreed to.

What is the meaning of ‘in renewal or replacement of, or in substitution for’?

RG 201.8 As these terms are not defined in the ASIC Act, we will apply them on the basis that they have their ordinary meaning.

Renewal

RG 201.9 The ordinary meaning of ‘renew’ is ‘to make effective for an additional period; to restore or replenish’.

RG 201.10 We consider that a card will be sent out to renew a previous card where the card is in all respects the same as the previous card but with a different expiry date.

Replacement or substitution

RG 201.11 The ordinary meaning of ‘replace’ is ‘to fill or take the place of; to substitute for (a person or thing); to provide a substitute or equivalent in the place of; to restore; return; make good’. The ordinary meaning of ‘substitute’ is ‘to put (one person or thing) in the place of another; to take the place of; replace’.

RG 201.12 We think that, in general,

- (a) the reference to ‘replacement’ may deal with the situation where an existing card has been lost, broken or can no longer be used; and
- (b) the reference to ‘substitution’ may deal with the situation where an existing card is otherwise still able to be used.

RG 201.13 We consider that a card will be sent out to replace or substitute a previous card where the card is effectively the same as, or equivalent to, the previous card. Any differences between the card and the previous card would need to be minor, and not place the consumer in a different position with respect to use of the card.

What is the meaning of ‘a card of the same kind’?

RG 201.14 This phrase is not defined in the ASIC Act. We consider that these words should be read in the context of the preceding words ‘in renewal or replacement of, or in substitution for’. Accordingly, they should be read to only cover a credit card or debit card, as the case may be, that is effectively the same as, or equivalent to, the previous card and would not place the consumer in a different position with respect to use of the card.

Examples

RG 201.15 Table 1 describes some situations in which cards are sent to existing cardholders to give guidance on whether ASIC considers that the sending of the cards would be allowed under s12DL.

Table 1: Examples illustrating how s12DL may apply to different conduct

<p>Example 1: A person loses their credit card and asks in writing for a new card to be sent.</p>	<p>The consumer has solicited the sending of the card. This is allowed by s12DL(2)(a).</p>
<p>Example 2: A card provider sends new cards to existing cardholders whose existing cards are close to expiry. The new card has the same features as the previous card, but a new expiry date. The cardholders have each used the existing cards.</p>	<p>If the existing card had been sent out in response to a written request from the consumer, this situation would be covered by s12DL(2)(b)(i). As the consumer previously requested a card with these features, the consumer has indirectly solicited the sending of the replacement card.</p> <p>If the existing card was itself a replacement of a previous card, this situation would be covered by s12DL(2)(b)(ii). The consumer has indirectly solicited the sending of this card through their initial request for a card with these features and use of previous replacement cards. If the cardholder had not used their existing card, the connection to the original written request would be broken, and the cardholder would not be considered to have indirectly solicited the new card.</p>
<p>Example 3: A card provider sends out new cards to existing cardholders that have improved security features. The other features of the new cards are the same as those of the existing cards.</p>	<p>The new card will replace or substitute the previous card. As in example 2, this situation would be covered by either s12DL(2)(b)(i) or s12DL(2)(b)(ii) (depending on whether the previous card had been sent out in response to a written request from the consumer was itself a replacement card).</p>
<p>Example 4: Clients hold an existing credit card that is a 'store card'. This card uses a proprietary payment system, and allows payments to be made only with a specified merchant. The card provider wishes to change the payment system used to a different payment system that is accepted by a wider range of merchants. The card provider sends new cards to existing cardholders to enable use of the different payment system.</p>	<p>This situation would not be allowed by s12DL. The consumer has not directly or indirectly solicited a card that uses the different payment system.</p>
<p>Example 5: Clients hold an existing credit card that uses a payment system that is accepted by a broad range of merchants. The card provider wishes to allow use of an additional payment system. Both payment systems access the client's existing account. The card provider sends new 'companion cards' to each existing cardholder for using the additional payment system. Loyalty points are offered to encourage use of the additional payment system.</p>	<p>This situation would not be allowed by s12DL. The companion card is an additional card, and not a replacement of, or substitute for, an existing card. The consumer has not directly or indirectly solicited a card that uses the additional payment system.</p>

Example 6: Clients hold an existing debit card that uses a single payment system. The card provider wishes to allow use of an additional payment system. The card provider sends new cards to existing cardholders that enable use of both payment systems.

This situation would not be allowed by s12DL. The consumer has not directly or indirectly solicited a card that uses the additional payment system.

Applications for a no-action position where application of s12DL is not clear

- RG 201.16 The examples set out in Table 1 include circumstances in which we have previously refused to give a no-action position because we consider that s12DL is intended to prohibit this conduct for the benefit of consumers, and it would not serve a clear regulatory purpose to provide a no-action letter.
- RG 201.17 However, we recognise that product development and innovations by card providers may result in some circumstances where the application of s12DL is not clear. If you consider that it is not clear whether a particular card distribution would be permitted by s12DL, you may apply to ASIC for a no-action letter. Our policy on considering applications for a no-action position is set out in Regulatory Guide 108 *No-action applications* (RG 108).