ASIC
Australian Securities & Investments Commission

REGULATORY GUIDE 128

Collective action by institutional investors

Chapter 6 — Acquisition of shares (Pt 6.7)

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From 5 July 2007, this document may be referred to as Regulatory Guide 128 (RG 128) or Policy Statement 128 (PS 128). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 128.1) or their policy statement number (e.g. PS 128.1).

Headnotes

Section 41, 609, 615, 1002A, 1002G, Pt 6.7, collective action by institutional investors, class order relief [CO 98/649] to allow institutions to vote collectively at a meeting, relevant agreements, public announcement, relief from substantial shareholding provisions, share trading, holding discussions which do not result in a breach of Ch 6.

[*Historical note:* Headnote to RG 128 amended 8/7/1998 by inserting the class order number, [CO 98/649].]

Contents

Purpose

RG 128.1 This guide sets out:

(a) the ASC's view on when institutional investors (institutions) which hold shares in a company can collectively discuss their intentions about voting at a meeting of that company without becoming associates or entering into a relevant agreement which would result in an acquisition of shares under Ch 6 of the Corporations Law (Law): see RG 128.4–RG 128.7; and

(b) how the ASC will give relief so that two or more institutions which hold shares in a company can enter into an agreement about voting at a meeting of that company. Institutions which comply with Class Order [CO 98/649] will obtain relief from restrictions on acquiring shares and lodging substantial shareholder notices. This relief is only available to institutions which meet specific criteria: see RG 128.15.

[*Historical note:* RG 128.1 para (b) amended 8/7/1998 by replacing the words in the second sentence, "the ASC's class order" with "Class Order [CO 98/649]".]

Part I: Voting agreements

RG 128.2 Institutions which agree together about voting at a company meeting are likely to become associates under s 12 or 15 of the Law. As a result, each of them becomes entitled to shares in that company held by the other institutions, as well as to the shares it already holds. If an institution becomes entitled to 5% of the company's shares, or if it is already a substantial shareholder and increases its entitlement by 1%, it must lodge a substantial shareholder notice under Pt 6.7. If the institution acquires shares so that it or another person becomes entitled to more than 20% of the shares in the company, it will breach s615 and would be unable to acquire any more shares.

RG 128.3 This can deter institutions from supporting or opposing matters which can or will be the subject of a vote at a company's meeting, eg proposals from management or third parties, or changes to board membership. The ASC wishes to ensure that the Law does not have the unintended consequence of preventing institutions from actively participating in corporate governance issues.

Part II: Discussions that do not lead to a breach of Ch 6

RG 128.4 Institutions can discuss issues which will, or may, be the subject of a vote at a meeting without entering into a relevant agreement that might breach Ch 6. "Relevant agreement" is broadly defined in s9 as an agreement, arrangement or understanding which may be formal or informal, written or oral and may or may not have legal or equitable force. It is difficult to establish the point when discussion ends and a relevant agreement is entered into. However, there is case law which indicates what parties can do without reaching this point. Generally, to persuade a person to follow a course of action in relation to voting shares does not involve an acquisition; but to persuade that person to *undertake* to follow such a course of action may well be to acquire the shares.

RG 128.5 Specifically, the ASC considers that institutions will not have entered into a relevant agreement about voting if they confine their actions as follows, and do not go any further:

(a) holding discussions or meetings about voting at a specific or proposed meeting of a company;

(b) discussing issues about the company, including problems and potential solutions;

(c) discussing and exchanging views on a resolution to be voted on at a meeting;

(d) disclosing individual voting intentions on a resolution; or

(e) recommending that another institution votes in a particular way.

RG 128.6 However, parties will be considered to have entered into a relevant agreement if any of the following occur:

(a) any institution accepts an inducement to vote or act in a specific way regarding the disposal of shares;

(b) there is an arrangement under which one institution expects another institution to act in a certain way regarding voting or disposal of shares;

(c) agreement on a plan concerning voting or disposal of shares; or

(d) an institution limits its freedom to vote or dispose of shares.

RG 128.7 Institutions may be unsure about whether their discussions fall within the definition of a relevant agreement. If they want to be sure that they do not breach Ch 6, they should comply with

the terms of Class Order [CO 98/649]. The ASC will consider enforcement action against institutions which act collectively in breach of the Law or outside the terms of the class order: see RG 128.31–RG 128.33.

[*Historical note:* RGS 128.7 amended 8/7/1998 by substituting the words "Class Order [CO 98/649]" for "the class order" throughout.]

Part III: Legal issues

RG 128.8 The Law can prevent shareholders from agreeing to act together when voting at a company meeting, or acquiring shares after they have entered into the agreement (s12, 15, 609, 615).

RG 128.9 Under the Law, shareholders who agree to act collectively:

(a) will become associates;

(b) may acquire one another's voting shares in a company and may thereby breach s615;

(c) may be prevented by s615 from acquiring more shares in the company after entering into the agreement (s618 will not be available to them for six months after the agreement);

(d) may be in possession of inside information about the agreement itself. If so, they could contravene s1002G if they buy or sell shares in the company after entering into the agreement without informing the market that an agreement exists. (See s1002G and para (b) of the definition of "information" in s1002A(1)): see RG 128.13–RG 128.14; and

(e) must lodge substantial shareholding notices disclosing the effect of the voting agreement on their entitlements.

Part IV: Policy underlying relief

Takeover provisions not appropriate

RG 128.10 The ASC will allow institutions to act collectively when voting at a specific meeting because it is not appropriate to strictly apply all the takeover requirements of Ch 6 in these circumstances. The objective of Ch 6 is to regulate the acquisition of shares in a target company for valuable consideration when the acquirer wants to get, or increase, control of the company.

Agreements entered into without passing of consideration

RG 128.11 The ASC considers that the relief is consistent with the policy already recognised in s41 of the Law. This is because s41 disregards the relevant interest that shareholders acquire when they are given, for no consideration, a proxy to vote at a meeting. The ASC's policy is designed to allow institutions to enter into voting agreements when those agreements are specific and short term, and no consideration passes. The ASC considers that agreements of this type are not steps towards the purchase or sale of control of a company.

Disclosing information

RG 128.12 Under Class Order [CO 98/649], institutions entering into voting agreements must make full and timely disclosure about the agreement (see RG 128.26–RG 128.28) at least seven days before the meeting. Other shareholders and market participants, therefore, will know about the institutions' action and objectives. The market can then:

(a) scrutinise the agreement before the meeting;

(b) consider this information when making their investment decisions;

(c) seek additional information from the institutions; and

(d) consider the company's response (if any) to the institutions' action.

[*Historical note:* RG 128.12 amended 8/7/1998 by substituting in the first sentence the words “Class Order [CO 98/649]” for the words “the class order” and in the same sentence substituting the words “seven days” for the words “one week”.]

Insider trading

RG 128.13 The mere existence of the voting agreement is likely to be price sensitive information. Therefore, it is likely to attract the prohibitions against insider trading until announced (see para (d) of RG 128.9) and publicly available. Other aspects of the agreement may also constitute inside information, including the nature and content of discussions between institutions, or between institutions and the company.

RG 128.14 Persons possessing information which is price sensitive and not generally available to the market must cease trading for as long as those circumstances apply.

Part V: What institutions are covered by Class Order [CO 98/649]?

RG 128.15 Class Order [CO 98/649] applies to a body corporate (an institution) whose primary functions are to:

(a) pool the funds of persons to whom the institution owes a fiduciary duty; and

(b) invest the funds of any of the following:

(i) a prescribed interest scheme for which there is an approved deed under Div 5 of Pt 7.12 of the Law and, after the commencement of the *Managed Investments Act 1998*, a registered managed investment scheme;

(ii) a regulated superannuation fund, an approved deposit fund or a pooled superannuation trust within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth); or

(iii) a statutory fund of a registered life insurance company within the meaning of the *Life Insurance Act 1995* (Cth).

[*Historical note:* The heading "Part V: What institutions are eligible for relief?" was amended 8/7/1998 to read "Part V: What institutions are covered by Class Order [CO 98/649]?".

RG 128.15 was amended 8/7/1998 as follows:

In the first sentence, the words "The ASC will only give relief" were replaced by the words "Class Order [CO 98/649]".

In para (b)(i) the words "and, after the commencement of the *Managed Investments Act 1998*, a registered managed investment scheme" were inserted before the semi-colon.

In para (b)(iii) the words "defined benefit" were deleted before "statutory fund".]

RG 128.16 Class Order [CO 98/649] is restricted to this type of investor because generally the objective of these types of institutions is to manage funds on behalf of persons to whom they owe a fiduciary duty. In doing so, they normally do not seek control of companies in which they invest. The ASC considers, therefore, that there is less risk of these institutions using a voting agreement as a covert way of obtaining control of a company in a way that is contrary to the principles expressed in s731 and 732.

[*Historical note:* RG 128.16 was amended 8/7/1998 by deleting the first word, "relief", and inserting the words "Class Order [CO 98/649]".]

Institutions collectively entitled to 20% or more of shares as principal are not covered by Class Order [CO 98/649]

RG 128.17 Parties to the voting agreement are *not* covered by Class Order [CO 98/649] if, collectively, they and their associates are entitled, as principal, to 20% or more of the shares in the company in question. Class Order [CO 98/649] does not apply to such institutions because there is the possibility that they will use it as a means of increasing their control of the company.

[*Historical note:* RG 128.17 was amended 8/7/1998 by deleting the words "eligible for class order relief" after the word "not" in the first sentence and replacing them with the words "covered by Class Order [CO 98/649]". At the beginning of the second sentence, the words "The ASC considers that relief should" were replaced by the words "Class Order [CO 98/649] does".]

Shares held "as principal"

RG 128.18 In this guide, shares held "as principal" means shares held by an institution:

(a) on its own or its associates' account; and

(b) *not* held on trust for, as agent of, on behalf of or for the benefit of persons to whom the institution owes a fiduciary duty.

RG 128.19 The term does not include shares held for a statutory fund of a registered life insurance company in respect of investment-linked policies. A company holds shares as principal, notwithstanding that it holds them for the benefit of its shareholders.

Part VI: Class order relief — general

RG 128.20 Class Order [CO 98/649] enables two or more institutions which hold shares in a company to enter into an agreement about voting at a meeting of that company. Under the class order, institutions will not, merely because they have entered into a voting agreement, have relevant interests in, or be entitled to, each others' voting shares in the company or become associates in relation to the company.

[*Historical note:* The heading "Part VI: Class order relief" was amended 8/7/1998 to read "Class order relief — general".

RG 128.20 was amended 8/7/1998 by replacing the words at the beginning of the paragraph, "The class order" with the words "Class Order [CO 98/649]".]

RG 128.21 Relief will apply from the time that institutions enter into an agreement until the close of the meeting. It will not apply to an institution which has withdrawn from the agreement.

Relief from lodging substantial shareholder notices (Pt 6.7)

RG 128.22 Institutions which comply with the terms of Class Order [CO 98/649] will not have to lodge substantial shareholder notices about changes in entitlement which arise solely because of the agreement. The ASC considers the market will be adequately informed because of the information required to be disclosed in the public announcement: see RG 128.26–RG 128.28. However, to ensure that the market remains informed, the class order requires the institutions to announce changes to their individual and collective relevant interests during the time the relief applies: see RG 128.30.

[*Historical note:* RG 128.22 was amended 8/7/1998 by replacing the words in the first sentence "the class order" with the words "Class Order [CO 98/649]".]

No restrictions on share trading

RG 128.23 The effect of Class Order [CO 98/649] is that s615 will not restrict trading in the shares of the company by parties to the agreement because of relevant interests and entitlements arising from the agreement. The market will know about the agreement because of the public announcement and will factor the information into their investment decision making. Trading will be monitored by Australian Stock Exchange Ltd (ASX) and the ASC in the usual way. However, each party will have to comply with s615 as regards relevant interests

and entitlements arising outside the agreement, and the insider trading provisions will apply: see para (d) of RG 128.9.

[*Historical note:* RG 128.23 was amended 8/7/1998 by replacing the words "the class order" in the first sentence with the words "Class Order [CO 98/649]".]

Extension of class order on application

RG 128.24 A body corporate which does not fall within the terms of Class Order [CO 98/649] may consider that it falls within the policy of the relief. It can request an extension of the class order, either generally or for a specific situation. The applicant must demonstrate to the ASC that it:

(a) invests funds on behalf of persons to whom it owes a fiduciary duty; and

(b) does not hold shares in the company for the purpose of obtaining or increasing control of that company.

[*Historical note:* RG 128.24 was amended 8/7/1998 by replacing the words "An institution" in the first sentence with the words "A body corporate". In the same sentence the words "the class order or within RG 128.15" were replaced by the words "Class Order [CO 98/649]". In the last sentence of the paragraph, the word "applicant" was substituted for the word "institution".]

Part VII: Requirements of Class Order [CO 98/649]

RG 128.25 The relief in Class Order [CO 98/649] is only available when:

(a) the agreement is publicly announced: see RG 128.26–RG 128.28;

(b) no consideration (other than a promise to exercise a vote in a particular way) passes between any of the relevant institutions or other parties in connection with, or as a result of, the agreement;

(c) the agreement relates to voting in a particular way, on a particular issue, or abstaining from voting, at a specified or a proposed meeting;

(d) any party to the agreement is able to terminate its participation in the agreement at will;

(e) the agreement specifies that it will terminate at the close of the relevant meeting; and

(f) the parties to the agreement are not collectively entitled to 20% or more of the voting shares in the relevant company, as principal.

[*Historical note:* The heading "Part VII: Conditions of class order" was replaced by the words "Requirements of Class Order [CO 98/649]".

RG 128.25 was amended 8/7/1998 by replacing the words in the first sentence "the class order" with the words "Class Order [CO 98/649]".]

Content of announcement

RG 128.26 A public announcement about the agreement must be made. One party may make the announcement on behalf of all parties to the agreement.

RG 128.27 The public announcement must contain:

(a) the names of all the institutions which have entered into the voting agreement;

(b) the name of the company the subject of the voting agreement;

(c) the date and time of the meeting (if known — otherwise a specific description of the meeting, eg the next annual general meeting of xyz company);

(d) a summary of the matter to be voted on;

(e) a summary of the objective of the action and how the institutions propose to vote; and

(f) the relevant interests in the company held by:

(i) each institution; and

(ii) the institutions collectively.

Timing and method of announcement

RG 128.28 The parties must:

(a) make the announcement at least seven days before the day of the meeting;

(b) make the announcement to ASX if the company is listed, before 9.30 am on the next business day after the day the voting agreement was entered into (the required time), or otherwise place an advertisement in a national newspaper as soon as possible; and

(c) send a copy of the announcement to the company, the subject of the agreement, by the required time.

[*Historical note:* Para (a) of RG 128.28 was amended 8/7/1998 by replacing the words "one week" with the words "seven days".

Para (b) was amended by deleting the words "any of the institutions" between the words "ASX if" and the words "the company" in the first line.]

Less than seven days notice

RG 128.29 Institutions wishing to enter into an agreement less than seven days before the meeting should apply to have Class Order [CO 98/649] extended to them. The ASC may grant relief if it considers that the market and the board of the company would have adequate time to react to the public announcement.

[*Historical note:* The heading before RG 128.29 was amended 8/7/1998 by replacing the words "one week's" with "seven days".

RG 128.29 was amended 8/7/1998 by replacing in the first sentence the words "one week" with the words "seven days", and the words "the class order" with the words "Class Order [CO 98/649]".]

Ongoing disclosure

RG 128.30 While the class order relief applies to it, each institution must also disclose:

(a) changes greater than 1% in the relevant interests it holds in the company; and

(b) changes greater than 5% in the relevant interests in the company held collectively by the parties to the agreement.

These changes must be announced in the manner set out in RG 128.29 before 9.30 am on the next business day after the institution becomes aware of the changes, or advertised in a national newspaper as soon as possible. One institution may make these announcements on behalf of all parties to the agreement.

Part VIII: Enforcement

RG 128.31 If persons act collectively without being eligible under Class Order [CO 98/649], they may breach s615 and Pt 6.7 of the Law. The ASC will consider taking injunctive or other action against them.

[*Historical note:* RG 128.31 was amended 8/7/1998 by substituting the word "persons" in the first sentence for the word "institutions", and in the same sentence, substituting the words "under Class Order [CO 98/649]" for the words "for class order relief".]

RG 128.32 If the provisions of Class Order [CO 98/649] are contravened, the ASC will consider taking action. For example it may take action under:

(a) s995: if the behaviour is misleading or deceptive conduct;

(b) s999: if there have been false or misleading statements about securities;

(c) s1002G: if a person trades in securities while in possession of inside information or otherwise contravenes that section; and

(d) s737 or 741.

[*Historical note:* RG 128.32 was amended 8/7/1998 by replacing the words in the first sentence "an institution breaches conditions of the class order" with the words "the provisions of Class Order [CO 98/649] are contravened".

Sub-paragraph (d) was amended by deleting the section number "729".]

RG 128.33 If an institution does anything which is not within the spirit of the relief, the ASC is likely to consider that unacceptable circumstances have occurred (s733(1)) and may refer the matter to the Corporations and Securities Panel.

Part IX: How to get relief

Class Order [CO 98/649]

RG 128.34 Class Order [CO 98/649] applies automatically when the terms of the class order are met.

[*Historical note:* The heading "Class order" was amended by adding at the end the word "[CO 98/649]".

RG 128.34 was amended 8/7/1998 by replacing the word "relief" with the word "[CO 98/649]".]

Extension of class order on application

RG 128.35 Persons wanting the class order extended to include them can make a request to any ASC Regional Office. The request must deal with the matters mentioned in RG 128.21 and must be accompanied by the standard fee for a s730 application. It will be dealt with as a new policy matter: see RG 51. Applications must include documentation supporting the institution's view that it should be given relief.

[*Historical note:* RG 128.35 was amended 8/7/1998 by replacing the first word "Institutions" with the word "Persons". At the end of the second sentence, after "RG 128.21", the words "and must be accompanied by the standard fee for a s730 application" were added. A third sentence, immediately after this, saying "There is no fee for such a request" was deleted.]

RG 128.36 Applications must be lodged in enough time for:

(a) the ASC to consider the matter; and

(b) the agreement to be publicly announced at least one week before the company's meeting (or a shorter period if the ASC agrees).

RG 128.37 In general, the ASC will not consult with third parties prior to making a decision in such cases. As a general rule, the ASC considers that there will be no-one whose interests may be materially adversely affected under the relief. The company and other shareholders will have adequate time to provide additional information to the market if they so wish.