



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 161

Share and interest sale facilities

March 2008

About this guide

This is a guide 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 sale facilities and related purchase facilities. It covers:

- the class order relief we have given; and
- our approach for facilities not covered by the class order relief.

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 on 18 March 2008 and is based on legislation and regulations as at 18 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.

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

Contents

A Overview	4
Sale facilities and related purchase facilities	4
Class order relief	4
Relief for other facilities	6
B Relying on the class order relief	7
Where the relief applies	7
Conditions of the relief	8
Key terms	10
Related information.....	11

A Overview

Key points

We have provided class order relief for certain share and interest sale facilities and related purchase facilities: see RG 161.4–RG 161.10.

Facilities not covered by the class order relief can continue to apply for individual relief, if required: see RG 161.11–RG 161.13.

Sale facilities and related purchase facilities

- RG 161.1 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 Sale facilities are offered in a variety of situations—some are stand-alone facilities and others form part of a corporate restructure or some other larger transaction. While the context may differ, many sale facilities share the same basic features. These include the following:
- (a) the issuer invites holders to sell their shares or interests through the sale facility;
 - (b) the shares or interests of holders who elect to participate in the facility are sold on a licensed market by a financial services licensee in batches over a specified period of time; and
 - (c) 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 reasonable expenses of operating the facility (unless those expenses are borne by the issuer).
- RG 161.3 Sometimes, in conjunction with a sale facility, issuers 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.

Class order relief

- RG 161.4 We have provided class order relief to facilitate the operation of certain share and interest sale facilities and related purchase facilities: see Class Order (CO 08/10) *Share and interest sale facilities*.

Scope of the relief

- RG 161.5 CO 08/10 provides conditional relief from:
- (a) the managed investment provisions in Chapter 5C, the financial services licensing provisions in Part 7.6 and the Product Disclosure Statement (PDS) provisions in Part 7.9 of the *Corporations Act 2001* (the Act), but only to the extent that the operation of the facility itself constitutes a managed investment scheme (for both sale facilities and related purchase facilities); and
 - (b) to avoid doubt, Division 5A of Part 7.9 of the Act, which includes the prohibition on unsolicited invitations in s1019F (for sale facilities only).
- RG 161.6 The relief is given to the product issuer that offers the facility. However, it also covers other persons who act as agent of the product issuer in operating the facility and giving invitations to sell financial products through the facility. This will usually include:
- (a) the intermediary engaged by the product issuer to sell or purchase products on a financial market; and
 - (b) the operator of the issuer's member registry.
- RG 161.7 The class order relief only applies to certain sale facilities and related purchase facilities, e.g. facilities where the shares and interests are sold or purchased on a licensed market or approved foreign market. Section B explains which facilities the relief covers, and the conditions of the relief.

Rationale for the relief

- RG 161.8 We have granted this class order relief because we think that:
- (a) Division 5A of Part 7.9 (including the prohibition in s1019F), the managed investment provisions and related provisions were not intended to apply to the types of facilities covered by the class order;
 - (b) strict compliance with these provisions would be impractical or disproportionately burdensome for the operators of these facilities; and
 - (c) there would be no significant regulatory benefit in requiring compliance with the managed investment and related provisions.
- RG 161.9 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. 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, overnight crossings); and

- (b) sale or purchase transactions must be completed within a reasonable time from the holder's election to participate in the facility.

Australian market licence provisions

- RG 161.10 We occasionally receive requests for 'no-action letters' under Regulatory Guide 108 *No-action letters* (RG 108) in relation to whether the operators of sale facilities need to hold an Australian market licence under Part 7.2 of the Act. In the past, we have sometimes issued these types of no-action letters for the avoidance of doubt. We have reviewed this practice and decided that, where a person operates a sale facility of the kind covered by the class order, the operator generally does not operate a financial market for the purposes of Part 7.2 of the Act. We therefore do not think it is necessary for operators of these facilities to apply for a no-action letter for the Australian market licence provisions.

Relief for other facilities

- RG 161.11 We recognise that the class order relief will not cover all types of sale facilities. For example, some facilities offered in connection with some corporate restructures might not fit within the class order relief.

Case-by-case relief

- RG 161.12 If an issuer proposes to operate a sale facility that is not covered by the class order relief, it can apply for individual relief. Applications should address the criteria set out in Regulatory Guide 51 *Applications for relief* (RG 51).

'Excluded person' sale facilities

- RG 161.13 We sometimes receive relief applications for sale facilities operated for the purposes of s619(3) or 619(4) of the Act (as notionally inserted by ASIC Class Order (CO 00/343) *Unmarketable parcels*). In the past, we have occasionally provided 'comfort' relief from the managed investment and related provisions in relation to these facilities for the avoidance of doubt. However, we have reviewed this practice and do not propose to continue providing this type of relief because, in our view, it is unnecessary.

B Relying on the class order relief

Key points

CO 08/10 only applies to sale facilities and related purchase facilities with certain features: see RG 161.14–RG 161.15 and Table 1.

The class order is also subject to conditions, which must be complied with by issuers who rely on the relief: see RG 161.16–RG 161.17.

Where the relief applies

- RG 161.14 CO 08/10 applies to sale facilities with the features set out in the class order. These features are summarised in Table 1.
- RG 161.15 The relief also applies to related purchase facilities offered in conjunction with a 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 class order (as summarised in Table 1); and
 - (b) each participating holder may only purchase financial products for consideration totalling no more than \$5000 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 \$5000 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 Class Order (CO 02/831) *Share purchase plans* or Class Order (CO 02/832) *Interest purchase plans*.

Table 1: Summary of facilities covered by CO 08/10

	Feature	Where the class order applies
A	Types of financial products that can be sold or purchased	The class order only applies where 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 approved foreign market; and • issued by the entity that operates the facility.
B	Method of sale or purchase of financial products	The class order only applies where the products are sold or purchased on a licensed market or approved foreign market in the ordinary course of trading on that market. This means that the price at which the products are sold or purchased must be determined in the ordinary course of trading on the market.
C	Time for payment of proceeds of sale or transfer of products to participating holders	The class order only applies where each participating holder is paid the proceeds of sale or 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 the relief

Disclosure to holders

- RG 161.16 The relief is subject to a condition that requires the issuer to send holders a document containing certain information about the market value of 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. This condition is designed to ensure that holders have sufficient information about the facility so they can make an informed decision about whether to participate.

Control transactions

- RG 161.17 The relief is also subject to a condition that the issuer takes reasonable steps to ensure the facility must not be operated during any period where a control transaction has been publicly proposed and has not ended. This condition is intended to ensure that the sale and purchase of products through a facility is not used to affect the control transaction.

Participation in both a sale facility and a related purchase facility

RG 161.18 The relief is also subject to a condition that the issuer takes reasonable steps to ensure that, where a related purchase facility is made available in conjunction with a sale facility, a participating holder can only participate in either, but not both, of the facilities.

Key terms

Term	Meaning in this document
Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of this Act
approved foreign market	A market that is included in the list set out in CO 08/10
ASIC	Australian Securities and Investments Commission
CO 08/10 (for example)	An ASIC class order (in this example numbered 08/10)
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 sale facility or related purchase facility
licensed market	A financial market the operation of which is authorised by an Australian market licence
related purchase facility	A facility offered in conjunction with a sale facility that enables holders to purchase more shares or interests of the same class
sale facility	A facility under which holders can sell shares or interests

Related information

Headnotes

share sale facilities, interest sale facilities, related purchase facilities, unsolicited offers

Class orders

CO 08/10 *Share and interest sale facilities*

Regulatory guides

RG 51 *Applications for relief*

Legislation

Corporations Act 2001 Ch 5C, Ch 7, Pt 7.2, Pt 7.6, Pt 7.9, s601ED, 619, 911A, 1019F

Consultation papers

CP 85 *Share and unit sale facilities*

Information releases

IR 07-35 *ASIC consults on class order relief for share and unit sale facilities*