



ASIC

Australian Securities & Investments Commission

## INFORMATION SHEET 99

### Disclosure of credit ratings in Australia

This information sheet is for credit rating agencies and issuers of financial products to retail and wholesale clients.

#### CRAs hold either a retail or wholesale licence authorisation

Since 1 January 2010, all credit rating agencies (CRAs) operating in Australia are required to hold an Australian financial services (AFS) licence. A CRA may choose to apply for an AFS licence that either authorises it to issue credit ratings to:

- retail and wholesale clients (retail authorisation); or
- wholesale clients only (wholesale authorisation).

Note: These terms are defined in s761G. In some cases professional investors (previously known as "sophisticated investors" under the old Corporations Act) now fall under the definition of wholesale clients: see s761G(7)(d).

#### Type of CRA authorisation determines when ratings may be disclosed

	CRA with retail authorisation	CRA with wholesale authorisation
Disclosure by an issuer of a credit rating in a retail prospectus or PDS	✓	✗
Disclosure by a company of a credit rating in a continuous disclosure announcement	✓	✓
Other disclosure of a credit rating in a manner that could reasonably be regarded as being intended to influence a retail client	✓	✗

A CRA that holds an AFS licence with a wholesale authorisation must ensure that its credit ratings are not disclosed (and restrict a third party from disclosing its ratings) in a manner that could reasonably be regarded as being intended to influence a retail client in making a decision in relation to a particular financial product or class of financial products.

See s766B and ASIC Information Release 04-78 *If you provide a financial service to a retail client via an intermediary (a secondary service) is the service caught by the retail client requirements?*

Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Standard & Poor's (Australia) Pty Limited, Moody's Investors Service Pty Limited and Fitch Australia Pty Limited each hold an AFS licence with a wholesale authorisation.

## Disclosure of credit ratings in a retail prospectus or PDS

An issuer must only cite a credit rating in a retail prospectus or Product Disclosure Statement (PDS) if the CRA has consented to the credit rating being included in the form and context in which it appears: s716(2) and 1013K.

On 12 November 2009 we announced that we would revoke class order relief (known as 'consent to quote relief') that permitted an issuer to cite a rating in a retail prospectus or PDS for debt securities, hybrid products and bank equities without the consent of the CRA.

See ASIC Class Order 09/1084, Consultation Paper 117 *Consent to quote credit ratings in disclosure documents and PDS* and 09-225AD *ASIC gives credit rating agencies improved control over ratings use*.

If an issuer omits a credit rating in a retail prospectus or PDS because the CRA has not given consent, an issuer will not breach:

- its disclosure obligations (including s710(1) and 1013E);
- the prohibition against misleading or deceptive conduct; or
- its general licensee obligations (including its obligation to ensure financial services are provided efficiently, honestly and fairly).

See *Mildura Co-operative Fruit Company Limited [2004] ATP 5*; *Perpetual Executors and Trustees Assoc of Australia Ltd v FCT (1948) 77 CLR 1 at 29*; and *Refrigerated Express Lines (A/Asia) Pty Ltd v Australia Meat and Live-stock Corp (1980) 29 ALR 333 at 347*.

## Transition arrangements for a retail prospectus or PDS dated before 1 January 2010

Issuers may still be using retail prospectuses and PDSs dated before 1 January 2010 that contain a credit rating for which consent was not received from the CRA. We expect that issuers with such documents will review and (where necessary) reissue them:

- as required by law; and
- in any event, by 30 April 2010.

We may take action against issuers that continue to use these pre 2010 documents after 30 April 2010.

## Continuous disclosure obligations and credit ratings

A disclosing entity must comply with its continuous disclosure obligations by disclosing to the market a credit rating when it considers the rating to be material and price sensitive information: s674.

It is common practice for a disclosing entity to also publish its continuous disclosure announcements on its website alongside shareholder information. An issuer may continue to do this. To the extent that contractual arrangements purport to prevent a disclosing entity from complying with its continuous disclosure obligations, they would be unenforceable by a CRA against the disclosing entity.

## Disclosure of credit ratings (other than in a retail prospectus or PDS)

A credit rating must not be disclosed in a manner that is intended to (or could reasonably be regarded as being intending to) influence a retail client in making a decision in relation to a particular financial product or class of financial products, unless:

- required by the Corporations Act (e.g. to meet continuous disclosure obligations); or

- the credit rating was issued by a CRA that holds an AFS licence with a retail authorisation.

Whether such an intention exists is a question of fact to be determined by the person considering the disclosure of a credit rating and by the CRA in considering restrictions on disclosure of its ratings by third parties.

## Examples of disclosures of credit ratings

To assist issuers, companies and CRAs, we have developed the following 12 examples of disclosures of credit ratings issued by a CRA with a wholesale authorisation.

### Example 1: Wholesale offer documents

A credit rating issued by a CRA (with wholesale authorisation) may be disclosed in communications with wholesale investors, including wholesale offer documents.

An issuer is not required by the Corporations Act to obtain the consent of a CRA to cite a credit rating in an offer to wholesale investors.

Care should be taken to avoid presenting disclosure to wholesale investors in a manner intended to influence a retail client's decision about a financial product (e.g. a hyperlink from a webpage containing a retail offer document to a webpage containing a wholesale offer document).

### Example 2: Offers to foreign investors

An issuer may disclose credit ratings in its offer documents for foreign investors. Such disclosure could not reasonably be regarded as being intended to influence an Australian retail investor's decision in relation to a financial product.

### Example 3: Marketing and other communications

In many cases, disclosing a credit rating in marketing or other communications to retail clients could reasonably be regarded as being intended to influence a decision of a retail client in relation to a particular financial product or class of financial products. Disclosure of a credit rating issued by a CRA (with wholesale authorisation) will be restricted, unless required by the Corporations Act.

For example, disclosure of a credit rating issued by a CRA (with wholesale authorisation) will be restricted if it is part of:

- advertising of deposit products, securities or other financial products to retail clients; or
- a page of a publicly available website frequented by depositors or other retail clients (such as the homepage or personal banking webpage).

Disclosure will be restricted because it could reasonably be regarded as being intended to influence a decision of a retail client in relation to a particular financial product or class of financial products.

Consideration should also be given to whether 'brand marketing' could reasonably be regarded as having this intention.

A person will not breach their disclosure obligations or general licensee obligations (including its obligation to ensure financial services are provided efficiently, honestly and fairly) by omitting a credit rating in marketing and communications to retail investors.

We expect that, to ensure compliance with the restrictions on disclosure of credit ratings, issuers will review their marketing or other communications (including websites):

- as required by law; and
- in any event by 30 April 2010.

#### **Example 4: Annual reports and AGMs**

A company may disclose a credit rating in its annual report or AGM as part of meeting its reporting obligations.

#### **Example 5: Communications with shareholders**

A company may disclose a credit rating in standard shareholder communications, such as quarterly reports and updates, in the usual manner. It may do this when the disclosure could not reasonably be regarded as being intended to influence a retail client in making a decision in relation to a particular financial product or class of financial products.

Disclosing a credit rating on webpages designed for institutional investors or continuous disclosure announcements could not reasonably be regarded as being intended to influence a decision of a retail client in relation to a particular financial product or class of financial products (unless arrangements, such as hyperlinks, are used to promote that webpage to retail clients).

#### **Example 6: Retail investor presentations**

A credit rating issued by a CRA (with wholesale authorisation) should not be disclosed in presentations to an audience of retail investors when the disclosure could reasonably be regarded as being intended to influence a retail client in making a decision in relation to a particular financial product or class of financial products.

#### **Example 7: Analyst briefings**

A person may disclose credit ratings to equity analysts.

#### **Example 8: Unsolicited press coverage**

We will not hold an issuer or a CRA responsible for:

- unsolicited media coverage in which a rating is disclosed; or
- an issuer answering an unsolicited question from the media about its rating, unless by giving the answer the issuer intends that the answer is used to influence retail investors.

#### **Example 9: Descriptions of investment mandates**

An investment manager may include in a retail offer document a description of its investment mandate (e.g. 'the manager will invest in investment grade bonds'). Such descriptions would not involve disclosure of a specific credit rating to retail investors.

#### **Example 10: Disclosure required under terms of existing securities**

An issuer of a security issued before 1 January 2010 may, when required under the terms of that security, give notice to a security holder of a change to a relevant credit rating.

### **Example 11: Retail prospectuses and PDSs that are no longer in use**

In most cases, publishing on a website retail prospectuses and PDSs that cite a credit rating but are no longer in use could not reasonably be regarded as being intended to influence a retail client in making a decision in relation to a particular financial product or class of financial products.

Care should be taken to avoid presenting disclosure that is no longer in use in a manner intended to influence a retail client's decision about a financial product (e.g. a hyperlink from a webpage containing a retail offer document to a webpage containing a disclosure that is no longer in use).

### **Example 12: Disclosure in takeovers**

A person must only cite a credit rating in a bidder's statement or target's statement in a takeover if the CRA (with wholesale authorisation) has consented to the credit rating being included in the form and context in which it appears: s636(3) and 638(5).

A CRA (with wholesale authorisation) must not consent to the inclusion of a credit rating in a bidder's statement or target's statement that is to be given to retail investors.

### **Further information**

MR 09-224 ASIC outlines *improvements to regulation of credit rating agencies in Australia*.

This guidance does not constitute legal advice. We encourage issuers and CRAs to seek their 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 information sheet are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.