



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 108

No-action letters

July 2008

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. It explains how to make an application for a no-action letter and sets out the factors ASIC considers when dealing with a request for a no-action letter.

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 9 July 2008 and is based on legislation and regulations as at 9 July 2008.

This document can also be referred to as Policy Statement 108 No-action letters (PS 108).

Previous versions:

- Superseded Policy Statement 108, issued 17 June 1996, updated 4 July 2001 and rebadged as Regulatory Guide 108 on 5 July 2007.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 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

A person may ask ASIC to give a no-action letter. A no-action letter states to a particular person that we do not intend to take regulatory action over a particular state of affairs or particular conduct.

This guide details how we will deal with requests for no-action letters.

An applicant should follow the process described in Section C and provide all information needed to address the issues referred to there.

In some circumstances we may give a class no-action position when more than one person is affected.

What is a no-action letter?

RG 108.1 A no-action letter is a letter in which we state to a particular person that we do not intend to take regulatory action over a particular state of affairs or particular conduct. It is an expression of our regulatory intent at the time the letter is given that we do not anticipate taking other regulatory action in relation to conduct regulated by the *Corporations Act 2001* (Corporations Act), the *Australian Securities and Investments Commission Act 2001* (ASIC Act) or any other legislation that ASIC administers.

Note: As at the date this guide was issued, in addition to the Corporations Act and the ASIC Act, ASIC administers parts of the *Insurance Contracts Act 1984*, the *Superannuation (Resolution of Complaints) Act 1993*, the *Superannuation Industry (Supervision) Act 1993*, the *Retirement Savings Accounts Act 1997*, the *Life Insurance Act 1995* and the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (legislation ASIC administers).

RG 108.2 A no-action letter is used to provide comfort and some level of certainty to an applicant on the basis that we do not currently foresee that we will take other regulatory action in relation to the conduct. It is not, however, a guarantee that ASIC will not take action in the future, nor is it intended to affect the rights of third parties to take action in relation to any contravention. It is not legal advice and may be withdrawn at any time.

RG 108.3 We will only give a no-action letter where we think 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.

No-action letters are not a substitute for applicants carefully considering their actions and the consequences of those actions. We will not give no-action letters 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 will be used to address concerns that the applicant may have that a course of action may have unintended consequences such as a contravention.

Note 1: See s1(2) of the ASIC Act for a statement of our regulatory purpose.

Note 2: We will consider whether a no-action letter is consistent with the regulatory goals listed in RG 108.9.

Applying for a no-action letter

RG 108.4 You must apply for a no-action letter: see Section C. The factors that we will take into consideration when deciding whether or not to give a no-action letter are summarised in Table 1.

Note: There is no prescribed form for an application and no fee: see Section D of this guide.

RG 108.5 In addition to this guide, you should read Regulatory Guide 51 *Applications for relief* (RG 51), and (where relevant) Regulatory Guide 52 *Enforcement action submissions* (RG 52).

RG 108.6 Please send your application to applications@asic.gov.au. You can also contact ASIC Infoline on 1300 300 630 for information and assistance.

Why ASIC gives no-action letters

RG 108.7 In some areas we have no specific power to modify or grant an exemption from the legislation we administer. 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 legislation, we have some discretion as to how we exercise our enforcement powers. This discretion will be exercised in accordance with the policy objectives of the legislation we administer.

RG 108.8 We consider that communicating our regulatory intention in the form of a no-action letter is a part of our charter to facilitate business under s1(2) of the ASIC Act. Under that charter, the exercise of our discretionary powers should have the effect of promoting commercial certainty, reducing business costs and enhancing the efficiency and development of the economy.

RG 108.9 When considering an application for a no-action letter we will keep in mind our regulatory goals of:

- (a) promoting consumer confidence in using financial services (including informed decision making);
- (b) promoting the provision of efficient, honest and fair financial services by all licensees and their representatives; and
- (c) supporting confident use of financial markets by consumers and market participants.

Class no-action position

- RG 108.10 In some circumstances, we may wish to give a no-action position that relates to a class of people or a class of conduct. We will do so in the form of a regulatory guide. We will generally consult affected people as part of our policy development process for a regulatory guide..
- RG 108.11 We may take a 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).

B What is a no-action letter?

Key points

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

A no-action letter 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 action.

While generally we will not publish no-action letters, we reserve our right to do so.

No-action letters are not legal opinions

- RG 108.12 It is not part of our function to provide legal advice on the interpretation and application of the law. Therefore no-action letters are an expression of our regulatory intention and only incidentally an expression of legal views. The decision to give a no-action letter will be based on considerations of legislative policy, as well as our interpretation of the relevant legislation and facts at the time of the application.

Expressions of regulatory intent

- RG 108.13 A no-action letter is an expression of our regulatory intention about how we will exercise our powers. The purpose of a no-action letter is to provide an indication as to the future regulatory action that we will, or will not take.
- RG 108.14 A no-action letter will state that we do not intend to take regulatory action in relation to particular conduct on the basis of our understanding of the facts of the particular case at the particular time that an application for a no-action letter is made.

Specific to the case

- RG 108.15 Any no-action letter is specific to the facts and circumstances of the particular case. They should not be considered as a de facto ‘rulings system’ to indicate our view of whether particular types of conduct are legal, nor should such letters be relied on as precedents.

Note: This does not apply to regulatory guides setting out a class no-action position.

ASIC's right to take action is not restricted

RG 108.16 A no-action letter is only a statement of our intentions on the basis of information available to us at a particular time. Even where a no-action letter has been given, we reserve our right to take action. 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 108.17 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. In revising or withdrawing such a statement, we will consider the consequences for persons who have already acted in reasonable reliance on a no-action letter provided to them.

RG 108.18 Normally a no-action letter will include an express statement of our right to withdraw or revise our views. We issue all no-action letters on this basis, regardless of whether or not they include such a statement.

Third party actions are not precluded

RG 108.19 An ASIC 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 particular conduct infringes the relevant legislation. We do not represent that the conduct covered by the no-action letter will not be held to contravene the relevant legislation. Nor do we undertake to intervene in an action brought by third parties in respect of such conduct.

Publishing no-action letters

RG 108.20 We will generally not publish no-action letters or details of particular no-action letters. No-action letters are case specific and are not precedents which may be quoted as the basis for further applications. Further, publicising particular no-action letters may inhibit persons with bona fide cases from applying to us for them. However, we reserve the right to publish any no-action letter.

Note: This does not apply to regulatory guides setting out a class no-action position as all regulatory guides are published.

Correspondence from ASIC that is not a no-action letter

RG 108.21 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 licensee or a ‘no further action’ response to a complaint. However, a person should not regard such correspondence as 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 1: See Regulatory Guide 78 *Breach reporting by AFS licensees* (RG 78).

Note 2. We publish our reasons for approving or refusing significant no-action applications in our quarterly Omnibus Relief Reports.

C How do I get a no-action letter?

Key points

We will only give a no-action letter where the following circumstances are present:

- we have received a formal application for the no-action letter;
- we believe that it would serve a clear regulatory purpose to give a no-action letter to an applicant; and
- we are of the view that it would not advance the policy of the legislation to take other regulatory action in relation to the conduct in question.

The factors that will influence our decision are set out in Table 1 below.

An application for a no-action letter cannot be made on a without prejudice basis, and some applications will not be given a final response.

Applying for a no-action letter

- RG 108.22 An application for a no-action letter should be made to applications@asic.gov.au. There is no fee for a request for a no-action letter.
- RG 108.23 Applications for no-action letters should include:
- (a) all information needed to address the issues referred to in RG 108.29;
 - (b) the matters of policy and law which would lead ASIC to make a decision that it is not in the public interest that it take action, having regard to Table 1; and
 - (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 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.
- RG 108.24 The application must contain a full and frank disclosure of all relevant information. This includes addressing specifically why court-based relief (e.g. under s1318(2)) is not available to the applicant or is inappropriate.
- RG 108.25 You can contact ASIC Infoline on 1300 300 630 for further information and assistance.

Prejudice and confidentiality

- RG 108.26 An application for a no-action letter cannot be made on a ‘without prejudice’ basis and we may use the material contained in it for any of our statutory functions. Information supplied in support of an application for a no-action letter will not usually be regarded as confidential. Where there is a cogent 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 2001.

Priority

- RG 108.27 We will not usually give applications for no-action letters priority over our other regulatory tasks. However, we may consider applications on an urgent basis, within a specific timeframe, in exceptional circumstances, which must be set out in the application.

When might we give a no-action letter?

- RG 108.28 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 108.29 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; and
- (b) it would not advance the policy of the legislation to take other regulatory action in relation to the conduct in question.

In reaching a view on these issues we will take into account our understanding of the intention of the Parliament in enacting the legislation. The factors that we will take into account in forming our view are set out in Table 1. This is not intended to be an exhaustive list of factors.

Factors making it more likely we will give a no-action letter

- RG 108.30 The following factors will be relevant to our decision whether or not to give a no-action letter. We will be more likely to give a no-action letter if your situation is similar to and your application addresses the factors described in Table 1.

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

Our policy	<p>We have not yet settled our 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 prior to the receipt of the application (if they were, see RG 52).</p>
No other relief	<p>There is no appropriate relief available. 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: In particular, applicants should look at our guidance on comfort relief in RG 51 (see RG 51.58–RG 51.62).</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 which ASIC would prosecute without reference to the Commonwealth Director of Public Prosecutions).</p>
Your actions	<p>Any contravention was due to inadvertence or not knowing the facts of the matter and you were not careless in failing to fully ascertain the facts.</p> <p>You have taken available steps to alleviate any mischief resulting from the conduct.</p>
Your actions in applying for a no-action letter	<p>You have not delayed bringing the matter to our attention.</p> <p>You acknowledge that we are free to make a public announcement in relation to the fact that the letter has been given and any other matter arising out of the facts or circumstances which gave rise to the letter, including any material contained in a submission in relation to the letter.</p>
Your actions in the past	<p>Your compliance history is satisfactory. 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).</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>

We may not give a final answer

RG 108.31 Although we will consider all requests for no-action letters 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 advice or no-action letters in certain kinds of matters.

D Class no-action position

Key points

We may take a no-action position in relation to circumstances or conduct that applies to more than one person.

We will issue a regulatory guide setting out our no-action position.

You may make an application for a class no-action position. We will apply the principles set out in Section C of this guide when deciding whether or not to take a class no-action position.

What is a class no-action position?

RG 108.32 In some circumstances, we may wish to give a no-action position that relates to a class of people or a class of conduct. We will do so in the form of a regulatory guide. We will consult affected people as part of the policy development process for such a regulatory guide.

Effects of a class no-action position

RG 108.33 The following features set out in Section B of this guide apply to a class no-action position (adapted where necessary). A class no-action position:

- (a) is not a legal opinion (see RG 108.12), is an expression of regulatory intent (see RG 108.13–RG 108.14) and is specific to the facts and circumstances;
- (b) will not restrict our right to take action (see RG 108.16) and may be withdrawn or revised (see RG 108.17); and
- (c) does not preclude third party actions (see RG 108.19).

Applying for a class no-action position

RG 108.34 We may determine a class no-action position on our own initiation or in response to a request for a no-action position (including where an application made for an individual no-action letter relates to circumstances or conduct that affects other 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 You should follow the steps set out in Section C (adapted where necessary) when making an application for a class no-action position.

When we might take a class no-action position

RG 108.36 The same principles outlined in Section C will apply to a request for a class no-action position (adapted where necessary). We:

- (a) will not consider a request for a class no-action position on a without prejudice basis (see RG 108.26);
- (b) will not ordinarily regard information provided in support of a request for a class no-action position as confidential (see RG 108.26);
- (c) will not usually give priority to a request for a class no-action position over our other regulatory tasks (see RG 108.27); and
- (d) may not always give a final answer to a request for a class no-action position (see RG 108.31).

RG 108.37 We will consider the factors set out in Table 1, when considering whether or not to take a class no-action position as well as the threshold test in RG 108.29.

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>
RG 51 (for example)	An ASIC regulatory guide (in this example numbered 51)

Related information

Headnotes

Application; no-action; regulatory purpose; regulatory intent; enforcement powers; discretion; individual no-action letter; class no-action position; business facilitation

Regulatory guides

RG 51 *Applications for Relief*

RG 52 *Enforcement Action Submission*

RG 78 *Breach reporting by AFS licensees*

Legislation

Corporations Act 2001 (Cth), s1318(2)

Australian Securities and Investment Commission Act 2001 (Cth), s1(2), 127

Insurance Contracts Act 1984 (Cth)

Superannuation (Resolution of Complaints) Act 1993 (Cth)

Superannuation Industry (Supervision) Act 1993 (Cth)

Retirement Savings Accounts Act 1997 (Cth)

Life Insurance Act 1995 (Cth)

Medical Indemnity (Prudential Supervision and Product Standards) Act 2003 (Cth)