



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 125

# Share purchase plans

March 2010

### About this guide

This guide is for:

- ASX-listed companies, their advisers and investors involved in offers of shares under share purchase plans; and
- ASX-listed managed investment schemes, their advisers and investors involved in offers of interests under interest purchase plans.

It explains the conditional relief we have given to allow offers of shares (or interests) to existing members without a prospectus (or Product Disclosure Statement).

### 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 15 March 2010 and is based on legislation and regulations as at 15 March 2010.

Previous versions:

- Superseded Regulatory Guide 125, issued 18 June 2009
- Superseded Regulatory Guide 125, issued 3 March 1997 as Policy Statement 125, rebadged as a regulatory guide on 1 July 2007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

We have given relief under Class Order [CO 09/425] to allow:

- ASX-listed companies to offer shares to existing members under a share purchase plan without a prospectus; and
- ASX-listed managed investment schemes to issue interests under an interest purchase plan to existing members without a Product Disclosure Statement (PDS).

Our relief is subject to certain limitations and conditions: see RG 125.8 and Section B.

## Share purchase plans

- RG 125.1 A share purchase plan is a plan for the offer to existing investors of shares by a company listed on the Australian Securities Exchange (ASX).
- RG 125.2 Share purchase plans give existing members a convenient means of obtaining additional shares that are priced at a discount to the market price during a particular period before the offer and without brokerage fees or stamp duty.

## Our approach to relief from Ch 6D

- RG 125.3 Generally, an offer of shares requires a disclosure document under Ch 6D of the *Corporations Act 2001* (Corporations Act). The rationale for this requirement is to ensure that investors have access to all the information required to make an informed investment decision.
- RG 125.4 Where the amount to be raised from each investor under a share purchase plan is relatively small, the cost of preparing, printing and distributing a prospectus for that offer may be quite high compared to the amount being raised.
- RG 125.5 Without relief from the disclosure requirements of Ch 6D, it is unlikely that share purchase plans would be offered. This would disadvantage retail investors, who are the most likely to participate in share purchase plans and who may be excluded from other fundraising opportunities such as institutional placements.

## Class order relief for share purchase plans

- RG 125.6 We have used our modification powers under s741(1) to give conditional class order relief from Ch 6D for shares offered by ASX-listed companies to existing members under a share purchase plan: see Class Order [CO 09/425] *Share and interest purchase plans*.
- RG 125.7 [CO 09/425] supersedes Class Order [CO 02/831] *Share purchase plans*. The most significant changes are increasing the monetary limit for share purchase plans to \$15,000 and introducing the requirement for a cleansing notice to be lodged with ASX.

### Conditions of relief

- RG 125.8 Under our relief, a share purchase plan, under which shares in a listed company are issued, will not require a disclosure document if certain conditions (including the following) are met:
- (a) the company has complied with its continuous disclosure and financial reporting obligations;
  - (b) subject to special conditions for some custodians, any registered holder is not issued more than \$15,000 worth of shares in any consecutive 12-month period;
 

Note: Under [CO 09/425], we have increased the monetary limit from \$5000 to \$15,000 to reflect the increased size of the average retail trade since 2002 and to align the limit with the 'small investment' exemption threshold under s946AA.
  - (c) the issuer lodges with ASX a cleansing notice;
 

Note: This condition has been introduced in [CO 09/425] so that shareholders still have access to additional information not available through continuous disclosure.
  - (d) offers are made only to registered holders of shares in the same class;
  - (e) each offer is made on similar terms and conditions and on a non-renounceable basis;
  - (f) the issue price is less than the market price during a specified period (determined by the issuer) in the 30 days before either the date of the offer or the date of the issue;
  - (g) the written offer document discloses the method used to calculate the issue price, the relationship between the issue and market price, and the risk that the market price may change between the date of the offer and the date when the securities are issued; and
  - (h) if an issuer chooses to issue shares under a share purchase plan to a registered holder who is a custodian (as defined in [CO 09/425]) for the beneficiaries of that custodian:
    - (i) the custodian must certify in writing to the issuer that certain conditions have been met; and

- (ii) the issuer must be reasonably satisfied that in any consecutive 12-month period, the total application price of the shares to be issued to, or in relation to, any beneficiary is not more than \$15,000 (excluding shares applied for by the custodian on behalf of a beneficiary but not issued).

Note: Issuers have a discretion as to whether to make share purchase plan offers to some or all beneficiaries of custodians.

### Rationale for relief

- RG 125.9 We consider that the benefits of this conditional disclosure relief for investors (such as savings on brokerage) and issuers (such as savings on the costs of preparing, printing and distributing disclosure documents) outweigh the disadvantages and risks of not having prospectus disclosure.
- RG 125.10 We also consider that the risks of not having prospectus disclosure are limited because:
- (a) the amount that may be invested by each investor in a 12-month period under the scheme is restricted;
  - (b) the offer price must be at a discount to the market price during a specified period; and
  - (c) the issuer must comply with its continuous disclosure requirements and other conditions that apply to our relief.
- RG 125.11 Similar to the rights issues disclosure regime in s708AA, our relief for share purchase plans is conditional on an issuer complying with its continuous disclosure obligations and notifying the market of certain excluded information by lodging a cleansing notice with ASX.
- RG 125.12 Our relief also provides issuers with an additional means of effecting more efficient capital raising.

### Class order relief for interest purchase plans

- RG 125.13 Our relief under [CO 09/425] also applies to the issue of interests in a managed investment scheme listed on ASX, superseding Class Order [CO 02/832] *Interest purchase plans*. The conditions of relief and rationale for relief are substantially the same as for share purchase plans.

## B Conditions of relief

### Key points

Our relief under [CO 09/425] is subject to limitations and conditions including:

- the maximum amount that can be raised under the relief (see RG 125.15–RG 125.18);
- the identity of the offerees (see RG 125.19–RG 125.25);
- quotation of the issuer and continuity of quotation (see RG 125.27–RG 125.29);
- market disclosure of information by the issuer (see RG 125.34–RG 125.41);
- contraventions of, or exemptions or determinations under, the Corporations Act (see RG 125.42–RG 125.46);
- the pricing of the offer (see RG 125.47); and
- the content of the offer document (see RG 125.48–RG 125.49).

- RG 125.14 The conditions of our class order relief are designed to ensure that while offerees under a share purchase plan will not receive a prospectus:
- (a) they will have access to information through continuous disclosure and market pricing due to quotation of the issuer;
  - (b) the offer will be at a discount to market price during a given period before the offer or issue; and
  - (c) there is a limit to the amount that can be offered to investors without a prospectus.

## Offers only to registered holders, up to a value of \$15,000

### Monetary limit

- RG 125.15 [CO 09/425] restricts the value of shares that can be issued to shareholders under our class order relief. Generally, no registered shareholder may be issued shares under the class order relief with an application price totalling more than \$15,000 in any consecutive 12-month period (excluding shares applied for but not issued).

Note: In 2009, the limit was increased to \$15,000. This amount reflects the increased size of the average retail trade since 2002 and aligns with the ‘small investment’ exemption threshold under s946AA. Section 946AA exempts an Australian financial services (AFS) licensee from the requirement to provide an investor with a Statement of Advice for ‘small investment advice’. A ‘small investment’ is defined as an amount not exceeding \$15,000: see reg 7.7.09A of the Corporations Regulations 2001.

- RG 125.16 Subject to particular conditions for some custodians (see RG 125.22–RG 125.25), and for applicants applying via an electronic payment facility (see RG 125.17), registered holders must certify to the issuer at the time of application that the total price does not exceed \$15,000 for:
- (a) shares that are the subject of their application; and
  - (b) any other shares in the class received by the shareholder under the share purchase plan or any similar arrangement in the 12 months before the application (excluding shares applied for but not issued).
- RG 125.17 Where a person applies for shares via an electronic payment facility, the part of the offer document containing instructions on how to apply must include:
- (a) a unique identifier that must be provided by the holder when making a payment using the facility; and
  - (b) a prominent statement that the holder, by making an application, represents to the issuer that they have complied with the matters set out in the certification in RG 125.16.
- RG 125.18 When completing the certification in RG 125.16, or making the representation in RG 125.17, the registered holder must aggregate all securities issued to them, whether directly as the registered holder or in a joint capacity: see RG 125.19–RG 125.26.

### **Offers only to registered holders**

- RG 125.19 Our relief under [CO 09/425] only applies to offers to registered holders of shares in the class, whose address is in a place where it is lawful and practical (in the reasonable opinion of the issuer) for the issuer to offer shares to those people.
- RG 125.20 To be able to rely on the class order, the issuer can only make offers to people who are recorded in the register of members as at a date determined by the issuer.
- RG 125.21 Where two or more persons are recorded in the register of members as jointly holding shares in the company, they are taken to be a single registered holder for the purpose of relief and any offer should be made to them jointly.
- RG 125.22 Where a registered holder is a custodian that holds shares in a class on behalf of a beneficiary (whether directly or indirectly through one or more interposed custodians), an issuer can only issue shares totalling more than \$15,000 in any consecutive 12-month period to that custodian if, on application for the shares, the custodian certifies in writing:
- (a) that the custodian holds shares in the class (directly or indirectly) on behalf of one or more beneficiaries;

Note: Beneficiary in this context means a client of a custodian or a member of an investor directed portfolio service (IDPS)-like scheme, self-managed superannuation fund or superannuation master trust. The phrase 'holds shares' means holds legal title. Shares acquired through an IDPS-like scheme, self-managed superannuation fund or superannuation master trust are taken to be held on behalf of the member who gave the instruction to acquire the shares.

- (b) the number of beneficiaries;
- (c) the name and address of each beneficiary for whom the custodian applies for shares;
- (d) for each beneficiary, the number of shares that the custodian holds (directly or indirectly) on behalf of that beneficiary;
- (e) for each beneficiary, the number, or dollar amount, of shares the beneficiary or another custodian has instructed the custodian to accept on behalf of the beneficiary;
- (f) for each beneficiary, that the application price for the shares applied for on their behalf, and any other shares in the class applied for on their behalf under a similar arrangement in the previous 12 months (excluding shares applied for but not issued), does not exceed \$15,000;
- (g) that a copy of the written offer document was given to each beneficiary; and
- (h) where the custodian holds shares on behalf of a beneficiary indirectly, through one or more interposed custodians, the name and address of each interposed custodian.

Note 1: The relief applies to:

- custodians that hold an AFS licence that allows them to perform custodial/depository services or operate IDPS accounts;
- custodians that are exempt from holding an AFS licence by virtue of Class Order [CO 03/184] *Employee share schemes*, or by relying on the AFS licence of their 'master custodian' under para 7.1.06(k) of the Corporations Regulations 2001;
- trustees of self-managed superannuation funds and superannuation master trusts;
- responsible entities of IDPS-like schemes; and
- registered holders of shares noted on the company's register of members as holding the shares on account of another person.

Note 2: In certifying the above matters, the custodian may rely on information provided to it by the beneficiary or any interposed custodian.

RG 125.23 The issuer must also be reasonably satisfied that, in any 12-month period, the total application price of the shares issued to any beneficial owner is not more than \$15,000 (excluding shares applied for by the custodian on behalf of a beneficiary but not issued), whether those shares are issued to the beneficiary in their own rights as a registered holder, or to the custodian.

RG 125.24 If the issuer is not satisfied with the certification by the custodian (for whatever reason), the issuer cannot issue shares to the custodian on behalf of the beneficiary.

- RG 125.25 The offer is made to the custodian as the registered holder (not to the beneficiary directly). The terms of the relief do not require custodians to participate on behalf of their beneficiaries. This means it is at the discretion of the custodian whether to extend the offer to its beneficiaries.

### Stapled securities

- RG 125.26 Specific conditions apply to shares or interests which must, under the terms on which they are traded, only be transferred together with one or more other shares or interests or other financial products (stapled securities). The \$15,000 limit applies to the stapled security as if its component shares, interests or products constituted a single share or interest rather than to any of those components separately.

## Offers only for quoted shares

- RG 125.27 Relief under [CO 09/425] is limited to companies that are admitted to the official list of ASX for a class of shares that is quoted. This is because investors in these shares have access to:
- (a) information released under the continuous disclosure regime (requiring the release of price-sensitive information); and
  - (b) the current market price of the shares.
- RG 125.28 Our relief does not apply if trading in the class of shares is suspended. This is because, when trading is suspended, investors do not have the benefit of a current market price of the shares.
- RG 125.29 Our relief also does not apply if shares in the relevant class have been suspended from trading for more than five days in the shorter of the previous 12 months or the period of quotation of the securities. This is consistent with s708A and 708AA.
- Note: In calculating whether securities or financial products have been suspended for more than five days, we take the view that:
- (a) 'five days' should be read as 'five trading days'; and
  - (b) shares are not suspended during a trading halt.
- RG 125.30 However, we will consider granting case-by-case relief to permit an issuer to offer a share purchase plan even where the shares have been suspended for more than five days, if it appears that the securities are adequately priced and the market is fully informed.
- RG 125.31 To determine whether the securities or other financial products appear to be adequately priced, and the market is fully informed despite the suspension, we will need to consider all the circumstances of the case. In undertaking this assessment, we will have regard to circumstances such as:

- (a) the length of the suspension—generally, the longer the period, the greater the level of scrutiny we will apply in granting relief;
- (b) the reason for the suspension—we will consider whether the suspension was voluntary or whether it was imposed as a result of failing to comply with the ASX Listing Rules or suspected market misconduct;
- (c) the period of time that has elapsed since the suspension—generally, the less time that has elapsed since the suspension, the greater the level of scrutiny we will apply in granting relief;
- (d) the announcements made to the market since the suspension—we will be more likely to grant relief where disclosure to the market since the time of the suspension, either in the form of continuous disclosure announcements or unqualified financial reporting disclosure, has been timely and otherwise in accordance with the entity’s legal obligations. We expect that disclosure after the suspension would address the reasons for the suspension and, where appropriate, detail steps taken to avoid similar suspensions in the future;
- (e) the recent history of disclosure—an entity that has contravened disclosure requirements in the previous 12 months will need to explain why the securities are adequately priced and the market fully informed notwithstanding this non-compliance; and
- (f) any other relevant circumstances that support the underlying policy.

RG 125.32 An application for case-by-case relief should address generally whether the shares are adequately priced by the market and the market is fully informed, and address specifically each of the factors listed in RG 125.31. As the five-day suspension period is effectively refreshed every 12 months, the application should concentrate on events that have taken place during that period.

RG 125.33 We will also consider extending this relief to cover other markets on a case-by case-basis, based on an assessment of the liquidity of the market, and its supervision and disclosure regime.

## Cleansing notice

RG 125.34 Under [CO 09/425], members being offered shares must have access to information:

- (a) that can be excluded from the continuous disclosure notices under the ASX Listing Rules; and
- (b) that investors and their advisers would reasonably require and expect to find in a disclosure document.

RG 125.35 This information (contained in a cleansing notice) must be lodged with ASX by the issuer. The timing of lodgement depends on the particular circumstances of the share purchase plan.

Note: These notices are also required for share placements and rights issues conducted without a disclosure document: see s708A and 708AA.

### Stand-alone share purchase plans

RG 125.36 Where an offer under a share purchase plan is made as a stand-alone offer (i.e. it is not offered in conjunction with a placement), a cleansing notice must be lodged with ASX within a 24-hour period before the offer is made.

RG 125.37 The cleansing notice must:

- (a) state that the issuer will be issuing shares without disclosure to investors under Pt 6D.2;
- (b) state that the notice is being given in accordance with this exemption;
- (c) state that, as at the date of the notice, the issuer has complied with:
  - (i) the provisions of Ch 2M as they apply to the issuer; and
  - (ii) s674; and
- (d) set out any information that is excluded information as at the date of the notice (or that there is no such information) in accordance with the requirements of s708A(7) and (8), as if the notice were a notice under s708A(5)(e).

RG 125.38 Excluded information is information:

- (a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom the notice is required to be given; and
- (b) that investors and their professional advisers would reasonably require for the purpose of making an informed assessment of:
  - (i) the assets and liabilities, financial position and performance, profits and losses, and prospects of the body; or
  - (ii) the rights and liabilities attaching to the relevant securities.

RG 125.39 Excluded information only needs to be included in a cleansing notice to the extent that it is reasonable for investors and their professional advisers to expect to find the information in a disclosure document.

### Share purchase plans conducted with a placement

RG 125.40 An issuer need not issue a further cleansing notice for a share purchase plan where:

- (a) a share purchase plan offer follows a share placement; and

- (b) the issuer has lodged a cleansing notice under s708A(6) not more than 30 days before the share purchase plan offer.

### **Defective cleansing notice**

- RG 125.41 If a cleansing notice is defective, and the issuer becomes aware of the defect within 12 months after the shares or interests are issued under the offer, the issuer must give ASX a notice that corrects the defect. This notice must be given within a reasonable time after the issuer becomes aware of the defect.

## **Conditions relating to the issuer**

### **No exemptions or orders**

- RG 125.42 During the 12-month period before the day on which the relevant securities were issued, the issuer, or directors or auditors of the issuer, must not have been covered at any time by:

- (a) an exemption under s111AS or 111AT; or  
 (b) an order under s340 or 341 (other than an excluded order).

- RG 125.43 This is so that investors can be more confident that the market is fully informed about the relevant securities and that there is a reliable market price for them.

### **No contravention of certain provisions of Corporations Act**

- RG 125.44 A determination under s708AA(3) or 708A(2) must not be in force in relation to the issuer.

Note: For interest purchase plans, the corresponding provisions under which a determination must not have been made are s1012DAA(3) and 1012DA(2).

- RG 125.45 Similarly, the issuer must have complied with s674 and Ch 2M, and must state this in the relevant cleansing notice.

- RG 125.46 This is to ensure that full and timely disclosure has been made by the issuer over the previous year.

## **Issue price**

- RG 125.47 The issue price must be less than the market price during the 30 days before either the date of the offer or the date of the issue.

## Information that must be disclosed in the offer document

- RG 125.48 The written offer document must contain the following information:
- (a) the method used to calculate the issue price and the time when this price will be determined;
  - (b) a statement describing the relationship between the issue price and the market price; and
  - (c) disclosure of:
    - (i) the risk that the market price may change between the date of the offer and the date when the shares or interests are issued to an applicant under the arrangement; and
    - (ii) the effect this would have on the price or value of the shares or interests that the applicant would receive.
- RG 125.49 We expect the issuer to make clear disclosure in the offer document if it reserves the right to scale back entitlements. This is to ensure offerees understand that they may not receive the full amount of shares or interests for which they have subscribed.

## Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange Limited
beneficiary	See definition in [CO 09/425]
Ch 6D (for example)	A chapter of the Corporations Act (in this example, numbered 6D)
cleansing notice	A notice confirming to the market that all excluded information has been disclosed to the market. Excluded information is defined in s708AA(8) and 708A(7) of the Corporations Act
Corporations Act	<i>Corporations Act 2001</i> including regulations made for the purposes of the Act
custodian	See definition in [CO 09/425]
[CO 09/425] (for example)	An ASIC class order (in this example, numbered 09/425)
IDPS	An investor directed portfolio service (i.e. a service for acquiring and holding investments that generally involves custody arrangements and consolidated reporting to investors, typically marketed as a master fund or wrap account)
interest purchase plan	An offer to existing investors of interests in a managed investment scheme listed on ASX
PDS	Product Disclosure Statement
Pt 6D.2 (for example)	A part of the Corporations Act (in this example, numbered 6D.2)
RG 125 (for example)	An ASIC regulatory guide (in this example, numbered 125)
s946AA (for example)	A section of the Corporations Act (in this example, numbered 946AA)
share purchase plan	An offer to existing investors of shares by a company listed on ASX

## Related information

### Headnotes

capital raising, cleansing notice, disclosure relief, interest purchase plans, placement, Product Disclosure Statement, prospectus, security purchase plans, share purchase plans

### Class orders

[CO 02/831] *Share purchase plans* (superseded by [CO 09/425])

[CO 02/832] *Interest purchase plans* (superseded by [CO 09/425])

[CO 03/184] *Employee share schemes*

[CO 04/671] *Disclosure for on-sale of securities and other financial products*

[CO 05/26] *Constitutional provisions about the consideration to acquire interests*

Note: [CO 05/26] modifies s601GA(1)(a) to allow for purchase plan offers even though the consideration to acquire an interest in the managed investment scheme cannot be independently determined.

[CO 09/425] *Share and interest purchase plans*

[CO 09/751] *Covered short sales*

### Regulatory guides

RG 51 *Applications for relief*

RG 173 *Disclosure for on-sale of securities and other financial products*

### Legislation

Corporations Act Chs 2M, 6D, s111AS, 111AT, 340, 341, 601GA(1)(a), 674, 675, 708AA, 708A, 724, 728, 741(1), 946AA, 1012DA, 1016D, 1016E, 1020F(1)(a)

Corporations Regulations 2001

### Consultation papers and reports

CP 103 *Review of share purchase plan threshold*

REP 159 *Report on submissions to CP 103 Share purchase plan threshold*

### Media and information releases

IR 02/17 *ASIC amends policy on share purchase plans*