

CHAPTER 7: DISCLOSURE RULES

495. Schedule 7 of the Bill contains amendments to the Corporations Act provisions dealing with disclosure rules. Within the Schedule the amendments are grouped as follows:

- Part 1 Presentation of disclosure documents
- Part 2 Product Disclosure Statements for continuously quoted securities
- Part 3 Exemptions from disclosure requirements

PART 1: PRESENTATION OF DISCLOSURE DOCUMENTS

Presenting disclosure documents in a clear, concise and effective manner

496. Disclosure documents (defined in section 9 as prospectuses, profile statements and offer information statements) contained in Chapter 6D are integral elements of the fundraising provisions, as they provide investors and their advisers with appropriate information to make an informed investment decision. While the content of a disclosure document (such as a prospectus) is important, the effectiveness of this document as an information source can be impaired if that information is presented in a manner that ambiguous, vague or unclear.

497. Section 715A provides that the content of a disclosure document must be presented in a clear, concise and effective way. This amendment is intended to improve the effectiveness of documents such as prospectuses as a useful information source for investors and is consistent with requirements for a Product Disclosure Statement (PDS) under subsection 1013C(3).

498. That said, this requirement sits alongside and does not detract from the content requirements for the relevant disclosure document, such as for a prospectus under sections 710 and 711. The intention is not to alter compliance with the content requirements, by:

- limiting the amount of information provided; or
- reducing the quality of information contained in a prospectus; or
- forcing material, such as technical terms, to be oversimplified.

499. There may be concerns that the parameters of clear, concise and effective could be subjective. Given that each disclosure document is different, determining if a document is clear, concise and effective will necessarily be decided on a case by case basis. This amendment is intended to improve how the content of a disclosure document is presented and its meaning is conveyed. It is also expected that industry understanding of this concept will develop as this phrase is increasingly applied in practice under both Chapter 7 and now in Chapter 6D of the Corporations Act.

Breach of the presentational requirement

500. A breach of this requirement is not an offence. Therefore, this requirement is not subject to the materially adverse criteria that is part of offence provisions such as section 728.

501. Instead of an offence, if ASIC is satisfied the requirement for clear, concise and effective presentation is not met, the remedy will be the ability for ASIC to impose a stop order on the issue. It is noted that under *ASIC Policy Statement 152: Lodgment of disclosure documents*, ASIC will attempt to resolve prima facie disclosure concerns it is aware of with the issuer after lodgment.

502. Section 719(1A) provides the opportunity for a person to lodge a replacement document if they become aware the information in the document may not be presented in a clear, concise and effective manner.

Commencement of the provisions

503. Under section 1462, this amendment only applies to disclosure documents for an offer of securities lodged with ASIC after the commencement of the legislation.

PART 2: PRODUCT DISCLOSURE STATEMENTS FOR CONTINUOUSLY QUOTED SECURITIES

Overview

504. The amendments to the Corporations Act contained in this Part of the Bill will:

- permit issuers of managed investment products that are continuously quoted securities to issue shorter, or transaction specific, Product Disclosure Statements (PDS); and
- allow ASIC to deny access to these arrangements in relation to issuers that have contravened relevant provisions of the Corporations Act in the past 12 months.

505. As a consequence of the commencement of the *Financial Services Reform Act 2001*, the disclosure framework governing securities and debentures is found in Chapter 6D of the Corporations Act, and the analogous regime regulating managed investment products is found in Part 7.9. Chapter 6D refers to prospectuses and Part 7.9 refers to PDS.

506. Chapter 6D provides concessionary arrangements in relation to further issues of continuously quoted securities by listed disclosing entities. Section 713 of the Corporations Act provides that these securities can be issued to retail investors through a transaction specific prospectus (rather than a full prospectus of the type that would ordinarily be required under section 710 of the Act). It allows this prospectus to refer to, and does not require the disclosure of, other information that has been disclosed by the entity under the continuous disclosure provisions. Subsection 713(6) allows ASIC to deny a disclosing entity access to these arrangements if the entity has contravened the continuous disclosure provisions (or other relevant disclosure provisions) in the previous 12 months.

507. Part 7.9 (section 1013F) simply provides that in determining what information needs to be contained in a PDS, an issuers status as a disclosing entity is one of the factors that a responsible person may take into account. No distinction is made between a PDS for continuously quoted (CQ) securities or non-continuously quoted (NCQ) securities and no further guidance is provided. Furthermore, there is no provision similar to subsection 713(6).

508. The purpose of these amendments, therefore, is to align in terms of practical operation the framework of disclosure in Part 7.9 of the Corporations Act with the framework in Chapter 6D.

Specific amendments

509. Items 4, 5 and 6 amend sections 111AQA, 1013D and 1013E, respectively, to clarify that a disclosing entity's continuous disclosure obligations are relevant in deciding what information should be included in a PDS for either CQ or NCQ securities. These items reflect the amendments made by Items 7 and 8.

510. Items 7 and 8 create a distinction between a PDS for a CQ security and a NCQ security, and provide for differential treatment of CQ and NCQ securities for the purpose of limiting the extent to which information is required to be included in a PDS.

511. Section 1013F (General limitations on extent to which information is required to be included) provides that an issuer's status as a disclosing entity is one of the factors that a reasonable person may take into account in determining what information needs to be contained in a PDS. This provision currently makes no distinction between a PDS for a CQ or a NCQ security. Item 7 will amend section 1013F to provide that this factor now only applies to a PDS for a CQ security.

512. Item 8 will insert section 1013FA, which provides that information contained in an issuer's recent financial reports and continuous disclosure notices is not required to be included in a PDS for a CQ security (proposed subsections 1013FA(1) and (2)).

513. Proposed subsections 1013FA(3) and (4), modelled on subsection 713(6) in Chapter 6D, allow ASIC to deny access to the arrangements in subsection 1013FA(2) if the issuer of the CQ securities or a person responsible for the PDS contravened relevant provisions of the Corporations Act.

Transitional arrangements

514. Proposed section 1463 of the Corporations Act (see item 1 of Schedule 12) provides that the amendments in Part 2 of Schedule 7 apply to a Product Disclosure Statement that is required to be given on or after the commencement day.

PART 3: EXEMPTIONS FROM DISCLOSURE REQUIREMENTS

Secondary sales where no disclosure document has been prepared

515. Section 708A is an exemption from the on-sale provision in subsection 707(3) that concerns placements of securities to investors when no further disclosure document is required to be prepared.

516. These amendments are intended to improve the practical operation of the secondary sale provisions in the Corporations Act.

517. The basis of the proposed amendments is that no further disclosure is required where investors have the benefit of information that is comparable to that otherwise available in a prospectus. Information can be made available to investors through:

- a notice to the market that the issuing entity has provided a full release of information to the market; or
- a prospectus for a retail issue that is more or less contemporaneous with an institutional placement.

518. As highlighted in the CLERP 9 consultation paper, this amendment will not inhibit additional ASIC relief being provided in appropriate circumstances.

Notice to the market

519. Subsection 708A(5) is available if the placement is:

- part of a class of securities that is listed; and
- subject to the continuous disclosure requirements of sections 674 and 675 without exemption for at least 12 months prior to the on-sale.

This provides the market with a body of information about those securities that are being on-sold.

520. No on-sale can occur until a notice under subsection 708A(6) is provided to the relevant market operator. This notice is a one-off and contains current information as at the date when it is lodged with the market provider.

521. The issuer, rather than the on-seller, is tasked with providing the notice given it did not provide disclosure through a prospectus when making the placement and is best placed to provide prospectus-like disclosure to the market. The issuer of the securities has up to ten days after the placement to provide the notice to the relevant market operator. This allows the issuer flexibility on when to disclose information to the market.

522. The notice:

- verifies to the market that the issuer has complied with its continuous disclosure and reporting obligations; and
- provides the market with information that is excluded from continuous disclosure to ensure investors receive prospectus-like disclosure.

523. The additional information in the notice is beyond that required under continuous disclosure. The information required under continuous disclosure is not a complete substitute for the information provided in a prospectus. Principally, continuous disclosure does not include certain confidential information that must be included in a prospectus, which may be critical in making an investment decision. This ensures that investors are provided with material information to make an informed investment decision.

524. This requirement is not intended to force companies to respond to rumours but rather to inform investors and the market through providing information of a kind that would otherwise be found in a prospectus. The proposed content of the subsection 708A(6) notice is consistent with special prospectus content rules in section 713.

Withdrawal of the notice

525. It is proposed under subsection 708A(9) that the issuer may withdraw the notice at any time. Under paragraph 708A(5)(f) this will prevent any on-sale without disclosure from the time the notice is withdrawn.

526. The intent behind the ability to withdraw the notice is to provide relief to the issuer. The notice must be correct at the time it is lodged with the market operator. However, if that notice is materially false, misleading or omits required information, the issuer commits an offence if an on-sale is made that relies on that defective notice. Therefore, the issuer has the opportunity to withdraw a notice if they believe it may be in breach of section 738A.

527. The ability to withdraw a notice is comparable to providing defence provisions that are available in relation to Chapter 6D disclosure documents, such as the due diligence defence.

528. While an on-seller may check to see if a notice exists at the time they plan to on-sell or seek warranties from the issuer that a valid notice will be in place, the ability to withdraw the notice may lead to market uncertainty.

529. An alternative approach is to allow an issuer to correct the information provided in the notice. This could involve the ability to lodge a supplementary or replacement document, as provided for with a prospectus under section 719. Given the notice contains information excluded from continuous disclosure, reliance on continuous disclosure to correct a notice is not sufficient.

Issue 7.1

Should the issuer be allowed to withdraw the notice?

Should the issuer be able to lodge a supplementary notice to replace the original notice?

Should the issuer have access to a range of defences for a notice that is false, misleading or omits relevant information?

Protection for on-sellers relying on the subsection 708A(6) notice

530. Given the responsibility for the notice rests with the issuer, the proposed subsection 727(5) makes it clear that an on-seller relying on a notice that actually does not comply with subsection 708A(6) is not in breach of the law.

Contemporaneous prospectus

531. The proposed subsection 708A(10) recognises that investors may also receive relevant information through a prospectus that concerns the particular class of securities, even though that prospectus was not issued in relation to the particular placement that is the subject of the on-sale. Therefore, there is an exemption from subsection 707(3) for a contemporaneous prospectus for the same class of securities that was lodged with ASIC on or after the placement but before the on-sale.

Issue 7.2

Under section 719, a person may lodge a supplementary or replacement document with ASIC. Should the contemporaneous prospectus under paragraph 708A(10)(b) make it clear that the supplementary or replacement document provisions continue to apply?

532. The proposed subsection 708A(11) grants similar relief to securities placed with underwriters or a person nominated by the underwriter in an underwriting agreement.

Limitations of relief

Anti-avoidance intent of the law remains

533. This provision does not reduce the primary anti-avoidance intent of subsection 707(3) — a prospectus must accompany the issue of securities where the issuer has the purpose of those securities being on-sold. Further, subject to the exemption in section 708A, the anti-avoidance provisions of subsections 707(3) and (4) continue to operate.

No relief if an ASIC determination has been issued

534. As this is an exemption from the disclosure provisions, the relief will not apply if ASIC has issued a determination that the issuer has contravened relevant provisions of the Corporations Act in the previous 12 months. While similar to the determination requirements in subsection 713(6), it also includes breaches of certain Chapter 2L provisions and a breach of the proposed obligations under subsection 738A(1).

Application of Chapter 2L to debentures

535. The amendment to subsection 283AA(1) ensures that even due to the section 708A exemption from disclosure, a body offering debentures must meet the requirements of Chapter 2L of the Act and enter into a trust deed and appoint a trustee.

Similar relief from Chapter 7 secondary sale provisions

536. Section 1012DA is an exception from the on-sale provision in subsection 1012C(6). Section 1012DA and associated provisions mirror the relief proposed in section 708A and its associated provisions, taking into

account the different disclosure regime for PDS under Part 7.9 compared with the prospectus regime under Chapter 6D. For example, the obligation applies to regulated persons.

Remedies

537. Under the proposed sections 738A and 1022D, it will be an offence if the notice under subsection 708A(5) or 1012DA(5) that is lodged with the relevant market operator is:

- misleading, deceptive or omits information required under subsection 708A(6) or 1012DA(6); and
- is materially adverse to the investor.

538. This will ensure the information provided to the market in the notice is accurate and provides meaningful disclosure to investors. The notice must only be correct at the time it is lodged with the market operator.

539. It is also proposed that investors may be able to recover the loss caused by a breach of the notice provision under sections 738B and 1022E. This is in line with existing rights to recovery for contraventions of the law, such as subsection 729(1).

540. ASICs stop order powers under subsections 739(1) and 1020E(1) are also proposed to apply in relation to a notice under subsection 708A(5) or 1012DA(5) that is in breach of subsections 738A(1) or 1022D(1). This will assist in preventing an on-sale where there has been insufficient disclosure to the market.

541. The penalty for a breach of subsections 738A(2) and 1022D(2) is 50 penalty units or imprisonment for one year or both. These penalties are consistent with similar provisions that relate to takeover and compulsory acquisition and buy-out documents under Chapter 6B.

Commencement of the provisions

542. Under section 1464:

- The amendment to subsection 283AA(1) applies to an offer of debentures that is made on or after commencement of the legislation.
- Section 708A applies to an offer of securities for sale that is made on or after the commencement of the legislation.
- Section 1012DA applies to a recommendation and sale situation that occurs on or after commencement of the legislation.