



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 46

# Unlisted property schemes— improving disclosure for retail investors

September 2008

### **About this guide**

This is a guide for responsible entities, compliance committees, compliance plan auditors and others involved with the issue of interests in unlisted property schemes.

It sets out principles for improved disclosure to retail investors to help them compare risks and returns across investments in the unlisted property sector.

## 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 2 September 2008 and is based on legislation and regulations as at 2 September 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.

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## A Overview

### Key points

This guide applies to unlisted property schemes in which retail investors have a direct or indirect investment: see RG 46.1–RG 46.4.

ASIC has developed 8 disclosure principles for unlisted property schemes that can help retail investors understand the risks and decide whether these investments are suitable for them: see RG 46.8–RG 46.10.

Responsible entities of unlisted property schemes should apply the disclosure principles in their Product Disclosure Statements for retail investors. They should also apply the disclosure principles to their ongoing disclosures and communicate the information in the most effective way possible (e.g. by website or regular updates). See RG 46.11–RG 46.23.

## Who does this guide apply to?

### Unlisted property schemes

RG 46.1 For the purposes of this regulatory guide, an ‘unlisted property scheme’ is an unlisted managed investment scheme that has or is likely to have at least 50% of its non-cash assets invested in real property and/or in unlisted property schemes.

Note: Infrastructure assets are not ‘real property’ for the purposes of the above definition. Examples of infrastructure assets are roads, railways, ports, airports and other transport facilities; and facilities for telecommunications, electricity generation, transmission and distribution, gas transmission and distribution, water supply and sewerage.

RG 46.2 This guide applies to registered unlisted property schemes in which retail investors invest directly or indirectly (e.g. through an investor directed portfolio service).

RG 46.3 This guide does *not* apply to:

- (a) listed property schemes;
- (b) property securities funds whose only exposure to property is through investments in listed property schemes;
- (c) property schemes that do not have any direct or indirect investment by retail investors; or
- (d) serviced strata schemes or timeshare schemes.

## Hybrid schemes

- RG 46.4 This guide may apply to hybrid property schemes (schemes that invest in both property and other non-cash assets), depending on the scheme's proportion of assets in direct real property or unlisted property schemes.

## Why is improved disclosure required for unlisted property schemes?

- RG 46.5 Unlisted property schemes often appeal to retail investors, who may believe that the investment offers capital stability and consistent ongoing returns that are not likely to vary significantly. This is not always the case and retail investors need better information on the risks associated with investment in unlisted property schemes: see RG 46.35–RG 46.36.
- RG 46.6 Disclosure by unlisted property schemes on key issues affecting the assessment of risk and returns has at times been unclear, making it difficult for retail investors to compare investments. Responsible entities of unlisted property schemes need to improve their disclosure so that retail investors can assess the effect of changing economic conditions on their investment: see RG 46.37–RG 46.42.
- RG 46.7 We have analysed the disclosure practices of property schemes in the context of the debt market turbulence that Australia has experienced since mid-2007: see RG 46.41. This analysis led us to develop principles designed to extract key risk and return information for retail investments in unlisted property schemes: see RG 46.8–RG 46.10.

## Disclosure principles for unlisted property schemes

- RG 46.8 ASIC has developed 8 disclosure principles covering information that is key to analysing the risks associated with unlisted property schemes (the disclosure principle information). Clear and prominent disclosure of this information will allow retail investors to compare the relative risk and return of investments in unlisted property schemes.
- RG 46.9 Responsible entities should generally find the information easy to disclose. In many cases, the disclosure principles simply increase the clarity and effectiveness of existing information for retail investors.
- RG 46.10 The disclosure principles are summarised in Table 1 and explained further in Section C of this guide.

**Table 1: Disclosure principles for unlisted property schemes**

<b>1. Gearing ratio</b>	A scheme's gearing ratio indicates the extent to which a scheme's assets are funded by external liabilities.
<b>2. Interest cover</b>	Information on a scheme's interest cover indicates the scheme's ability to meet interest payments from earnings.
<b>3. Scheme borrowing</b>	This principle requires information on the scheme's borrowing maturity and credit facility expiry and any associated risks. It is also important that investors are kept informed and updated with information they would reasonably require on breaches of loan covenants.
<b>4. Portfolio diversification</b>	This information addresses the scheme's investment practices and portfolio risk.
<b>5. Valuation policy</b>	Key aspects of the scheme's valuation policy for real property assets should be disclosed so that investors can assess the reliability of the valuations.
<b>6. Related party transactions</b>	Investors need to be able to assess the responsible entity's approach to related party transactions.
<b>7. Distribution practices</b>	Information on the scheme's distribution practices helps investors assess the sources of the distributions and be informed about the sustainability of distributions from sources other than realised income.
<b>8. Withdrawal rights</b>	If a scheme gives investors withdrawal rights, these rights should be clearly explained.

## Applying the disclosure principles

- RG 46.11 Responsible entities should apply the disclosure principles to Product Disclosure Statements and ongoing disclosures to enable retail investors to assess investments in unlisted property schemes.

### Product Disclosure Statements (PDSs)

- RG 46.12 The disclosure principles reflect key information for analysing an investment in an unlisted property scheme given debt market turbulence that commenced in mid-2007. This means that the disclosure principle information must be included in PDSs for such schemes under s1013D–1013E of the *Corporations Act 2001* (Corporations Act). For an explanation of how this key information should be prominently presented in a PDS, see RG 46.98–RG 46.100.

Note: The disclosure principles do not attempt to cover all of the information that will be required by s1013D–1013E. Other information will also be required depending on the nature of the unlisted property scheme and the offer being made in the PDS.

- RG 46.13 The PDS should explain how the responsible entity intends to update investors for ongoing disclosure. If there are material changes to disclosure principle information while a PDS is in use, the responsible entity is likely to need to provide a supplementary or new PDS (if the changes are materially adverse) or otherwise update the PDS: see RG 46.101–RG 46.106.

RG 46.14 Subject to the transitional arrangements in this guide (see RG 46.24–RG 46.29), when reviewing an unlisted property scheme’s PDS, ASIC will consider whether the disclosure principles have been applied. We will consider exercising our stop order powers under s1020E if there is material non-disclosure of this information. Failure to apply the principles may also result in liability to investors under the Corporations Act.

### Ongoing disclosure

RG 46.15 Ongoing disclosure plays an important role in helping investors to monitor their investment. Responsible entities have obligations to provide ongoing disclosure to investors under the Corporations Act. We consider that this includes the disclosure principle information: see RG 46.114–RG 46.121.

RG 46.16 Apart from these legal obligations, many responsible entities have a practice of updating investors with a quarterly or half-yearly report. We recommend that responsible entities update investors on the status of the disclosure principle information at least every 6 months.

RG 46.17 Although it is not necessary to repeat information that has not changed in these updates, we consider it is good practice to provide investors with:

- (a) an overview of any material changes to the disclosure principle information since the last update (so far as the responsible entity is aware);
- (b) if there have been no material changes, confirmation that this is the case;
- (c) details of how to access the scheme’s disclosure principle information on the website (if available there); and
- (d) confirmation that they are entitled to a hard copy of the disclosure principle information on request.

Note: An alternative would be for responsible entities to provide investors with details of material changes to the disclosure principle information using a procedure similar to that applying for the provision of the financial report under s314.

RG 46.18 For more information on good practice for ongoing disclosure, see RG 46.110–RG 46.113.

### Omitting disclosure principle information where misleading

RG 46.19 If the application of a disclosure principle to an unlisted property scheme’s particular business model or circumstances would be likely to mislead investors or would be clearly inappropriate, then the responsible entity should inform investors that the information has been omitted for this reason: see RG 46.122–RG 46.125.

### Advertising

RG 46.20 Advertisements for unlisted property schemes should be consistent with all corresponding disclosures in the PDS: see Section E for further guidance on advertising, including the use of investment ratings.

## Compliance plans, compliance committees and compliance plan auditors

- RG 46.21 Compliance plans for unlisted property schemes should set out measures to ensure the responsible entity complies with their obligations under the Corporations Act, including those relating to disclosure and advertising: see RG 46.131–RG 46.135.
- RG 46.22 Responsible entities, compliance committees and compliance plan auditors should examine whether their compliance plans are adequate to ensure compliance with the obligations in this guide.
- RG 46.23 Compliance committees and compliance plan auditors should monitor the responsible entity's compliance with the obligations set out in this guide and report any failures to comply as required: see Section F.

## What is the timing?

### New investors

- RG 46.24 Responsible entities of unlisted property schemes should apply the disclosure principles to any PDS dated on or after 30 November 2008.
- Note: We encourage responsible entities apply the disclosure principles to new PDSs before 30 November 2008 if possible.
- RG 46.25 By no later than 30 November 2008, if an existing PDS is still in use, responsible entities should:
- (a) include the disclosure principle information on a website referred to in the PDS (if the omission of disclosure principle information from the PDS is not materially adverse); or
  - (b) update the PDS by a new or a supplementary PDS so that it includes the disclosure principle information.

Note: If the omission of disclosure principle information from a PDS dated before 30 November 2008 is not materially adverse, responsible entities may be able to rely on Class Order (CO 03/237) *Updated information in product disclosure statements* to update the PDS by providing this information on a website referred to in the PDS: see RG 46.103–RG 46.106.

### Existing investors

- RG 46.26 By no later than 30 November 2008, responsible entities of open schemes should provide existing investors with updated disclosure that applies the disclosure principles: see RG 46.88–RG 46.91 for requirements applying to the initial update. For the purposes of this guide, an open scheme is an unlisted property scheme that at any time from 30 November 2008 to 31 March 2009 gives investors withdrawal rights.

- RG 46.27 By 31 March 2009, responsible entities of closed schemes should provide investors with updated disclosure that applies the disclosure principles: see RG 46.88–RG 46.91 for requirements applying to the initial update. A closed scheme is one where investors do not have any withdrawal rights at any time from 30 November 2008 until 31 March 2009. If withdrawal rights commence on or shortly after 31 March 2009, the disclosure should be provided in sufficient time so that investors can make an informed decision.

**Table 2: Timetable for implementing improved disclosure**

Date	Action(s)
<b>By 30 November 2008—open schemes</b>	Responsible entities of open schemes should provide existing investors with updated disclosure that applies the disclosure principles (e.g. in a regular investor update or by including the information on a website that is used to communicate with investors).
<b>By 30 November 2008—PDS that are dated before 30 November 2008 but remain in use</b>	If an existing PDS is still in use, responsible entities should either: <ul style="list-style-type: none"> <li>• include the disclosure principle information on a website referred to in the PDS (if the omission of disclosure principle information from the PDS is not materially adverse); or</li> <li>• update the PDS by a new or a supplementary PDS so that it includes the disclosure principle information.</li> </ul>
<b>New PDSs from 30 November 2008</b>	PDS dated on or after 30 November should clearly and prominently disclose information covered by the disclosure principles.
<b>By 31 March 2009—closed schemes</b>	Responsible entities of closed schemes should provide existing investors with updated disclosure that applies the disclosure principles, unless the investors need earlier disclosure to make a decision on withdrawal rights that commence on or shortly after 31 March 2009.

### ASIC implementation

- RG 46.28 Subject to the transitional arrangements above, we will review PDSs in use and ongoing disclosures for unlisted property schemes to check that the disclosure principle information is adequately disclosed.
- RG 46.29 We will also:
- (a) work with responsible entities to ensure that the disclosure principles and our disclosure expectations are understood;
  - (b) discuss any concerns we have with a responsible entity's disclosure with them and, where necessary, require additional disclosure;
  - (c) discuss any concerns we have about the financial position and performance of a scheme with the responsible entity; and
  - (d) conduct surveillance visits as needed to test and reinforce our disclosure expectations.

## B The unlisted property scheme sector and improved disclosure

### Key points

The business models of unlisted property schemes tend to have some common features: see RG 46.30–RG 46.34.

Some of these features can create risks for investors: see RG 46.35–RG 46.36.

Clear disclosure principles can help investors make better-informed decisions about these products. Improved disclosure is particularly important when economic volatility increases the risks associated with investments: see RG 46.37–RG 46.42.

### Business models of unlisted property schemes

- RG 46.30 Understanding an unlisted property scheme’s business model can help investors to assess the potential risks and returns associated with the investment. We expect responsible entities to give investors adequate information on the scheme’s business model in a PDS: see RG 46.93.
- RG 46.31 The following sets out some common features of unlisted property schemes’ business models:
- (a) The responsible entity raises funds by issuing interests in the scheme to investors in exchange for money. This money is pooled and used by the responsible entity on behalf of the scheme to invest a substantial proportion of its assets directly in real property or to invest in other unlisted property schemes.
  - (b) Investors have beneficial but not legal ownership in the property assets the responsible entity chooses to invest in.
  - (c) The return to investors is generally expected to be derived from rental income from property owned by the scheme and from the net proceeds the scheme receives if it sells the real property it has invested in. Property schemes may also make distributions from capital and/or unrealised revaluation gains on the investment properties provided that cash is available within the fund or from borrowings.
  - (d) While unlisted property schemes should be considered as long-term investments, some schemes offer periodic withdrawal facilities whereby investors may withdraw some or all their investments. Withdrawal facilities are usually subject to restrictions, such as pre-set limits or arrangements if withdrawal demands exceed the cash available.

- (e) The value of an investor’s investment is subject to change depending on the value of the property assets held by the scheme, which may fluctuate from time to time.
- RG 46.32 Most unlisted property schemes are geared. In these cases, the ability of the scheme to repay debt principal and interest on time and meet all loan covenants is material to the performance and viability of the scheme.
- RG 46.33 The underlying assets in unlisted property schemes are real property. A significant feature of real property is that it is a largely illiquid asset. It is not homogenous, it is not traded on an active market, and it has high transaction costs. This highlights the importance of disclosing and understanding the ability of the unlisted property scheme to service debt and interest from cash flows.
- RG 46.34 A relatively small proportion of unlisted property schemes have significant property development assets. Investors in unlisted property schemes with property development are exposed to additional construction and development risks. Importantly, while cash outflows are required to fund the construction and development, the cash inflow on those assets do not occur until completion when the asset is available for rental or for sale.

## Risks to investors

- RG 46.35 Unlisted property schemes are often attractive to retail investors, who may believe that they offer capital stability and consistent ongoing returns. This is not always the case and there are a number of common risks associated with investments in the unlisted property sector. These key risks, many of them relating to the scheme’s borrowings, are identified in Table 3.
- RG 46.36 These risks do not affect all unlisted property schemes and are not unique to unlisted property schemes. However, disclosure relating to these risks is relevant for investors in unlisted property schemes. The disclosure principles in Section C address the risks so that investors can make more informed decisions about whether to invest in an unlisted property scheme, including comparing risks and returns across investments in the sector.

**Table 3: Key risk features of unlisted property schemes**

Risk feature	What this means
<b>Gearing</b>	A higher gearing ratio means a higher reliance on external liabilities (primarily borrowings) to fund assets. This exposes the scheme to increased funding costs if interest rates rise. A highly geared scheme has a lower asset buffer to rely upon in times of financial stress.
<b>Interest cover</b>	A property scheme’s interest cover is a key indicator of its financial health. The lower the interest cover, the higher the risk that the scheme will not be able to meet its interest payments. A scheme with a low interest cover only needs a small reduction in earnings (or a small increase in interest rates or other expenses) to be unable to meet its interest payments.

Risk feature	What this means
<b>Scheme borrowing</b>	<p>Relatively short-term borrowings and credit facilities with short expiry dates are a risk factor if they are used to fund assets intended to be held long term.</p> <p>If the scheme has a significant proportion of its borrowings that mature within a short timeframe, it will need to refinance. There is a risk that the refinancing will be on less favourable terms or not available at all. If the scheme cannot refinance, it may need to sell assets on a forced sale basis with the risk that it may realise a capital loss.</p> <p>Breach of a loan covenant may result in penalties being applied, or the loan becoming repayable immediately. This means that the scheme may need to refinance on less favourable terms or sell assets. Termination of critical financing could also mean the scheme is no longer viable.</p>
<b>Portfolio diversification</b>	Generally, the more diversified a portfolio is, the lower the risk that an adverse event affecting one property or one lease will put the overall portfolio at risk.
<b>Valuation of real property</b>	Investing in a property scheme exposes investors to movements in the value of the scheme's assets. Investors therefore need information to assess the reliability of valuations. The more reliable a valuation, the more likely the asset will return that amount when it is sold. However, any forced sale may still result in a shortfall compared to the valuation.
<b>Related party transactions</b>	A conflict of interest may arise when property schemes invest in, make loans or provide guarantees to related parties.
<b>Distributions</b>	Some property schemes make distributions partly or wholly from unrealised revaluation gains and/or capital rather than solely from realised income. This may not be commercially sustainable over the longer term, particularly where property values are not increasing.
<b>Withdrawal rights</b>	Unlisted property schemes often have limited or no withdrawal rights. This means they are usually difficult to exit.

## Improving disclosure for investors in unlisted property schemes

- RG 46.37 Unlisted property schemes are difficult to exit easily due to the illiquidity of the underlying assets and the limited withdrawal rights, where they are available. It is therefore important that investors have a good understanding of the true nature of unlisted property schemes and their associated risks before they decide to invest.
- RG 46.38 Investment risks generally increase in more adverse economic conditions. Good disclosure on the risks associated with unlisted property schemes is particularly important due to recent volatility in the financial and property sectors.
- RG 46.39 In the 2008 financial year, listed property schemes experienced a significant decrease in market capitalisation due to debt market turbulence flowing from the US sub-prime difficulties, interest rate rises and a cyclical softening in property markets.
- RG 46.40 These factors are also likely to affect unlisted property schemes. Property schemes may need to renegotiate debt rollovers and extend existing debt

facilities. Such refinancing is likely to be difficult to achieve without paying higher interest rates or lowering the amount of debt. Failure to refinance may result in an increased number of properties for sale.

RG 46.41 In light of the significant changes in economic conditions referred to in RG 46.39, we compared the disclosure practices of a number of Australian listed and unlisted property schemes. Generally, we observed that listed property schemes were more likely than unlisted property schemes to disclose information that is important to retail investors when comparing the risks and rewards of different schemes. Listed property schemes were also more likely to update investors on how global financial turbulence was affecting the scheme's financial circumstances.

RG 46.42 In this context, ASIC has developed the 8 disclosure principles that responsible entities of unlisted property schemes should apply to their upfront and ongoing disclosures for retail investors: see Section C. The following table sets out our approach to improved disclosure for retail investors in these schemes.

**Table 4: Improved disclosure for unlisted property schemes**

Guideline	Related information
1. The information covered by the disclosure principles will enable retail investors to assess the risk and rewards of unlisted property schemes.	See Section C
2. Responsible entities of unlisted property schemes should apply the disclosure principles to the scheme's PDS and ongoing disclosures for retail investors.	See Section D
3. Ongoing disclosures should be communicated to investors in the most effective way possible. Responsible entities should be particularly conscious of the need to update investors with information on significant events that may affect their investment.	See Section D
4. Compliance plans for unlisted property schemes should set out adequate measures to ensure compliance with the law relating to disclosure and advertising obligations. Compliance committees and compliance plan auditors should be aware of the disclosure principles and advertising obligations in this guide and monitor the responsible entity's application of them.	See Sections E and F
5. Additional education will help retail investors use the disclosure principle information when making investment decisions.	Investor guide to be released

## C Disclosure principles for unlisted property schemes

### Key points

Responsible entities of unlisted property schemes should give retail investors information on the following aspects of the scheme:

- gearing ratio (see RG 46.43–RG 46.49);
- interest cover (see RG 46.50–RG 46.53);
- scheme borrowing (see RG 46.54–RG 46.62);
- portfolio diversification (see RG 46.63–RG 46.67);
- valuation policy (see RG 46.68–RG 46.74);
- related party transactions (see RG 46.75–RG 46.76);
- distribution practices (see RG 46.77–RG 46.78); and
- withdrawal rights (see RG 46.79–RG 46.82).

This information should be disclosed clearly and prominently in the responsible entity's PDS and ongoing disclosures: see Section D.

### Disclosure principle 1: Gearing ratio

RG 46.43 Responsible entities should disclose a gearing ratio for the scheme calculated using the following formula:

$$\text{Gearing ratio} = \frac{\text{Total interest bearing liabilities}}{\text{Total assets}}$$

Note: If the scheme or a stapled group prepares consolidated financial statements, the gearing ratio should be based on the consolidated figures.

RG 46.44 The liabilities and assets used to calculate the gearing ratio should be based on the scheme's latest financial statements. The latest financial statements would usually be the latest audited or reviewed financial statements, except where the responsible entity is aware of material changes since those statements.

RG 46.45 If members' contributions (other than borrowings from members) are classified as liabilities in the financial statements, they should be excluded from liabilities in calculating the gearing ratio. If the scheme has material off balance sheet financing, the responsible entity should disclose the following gearing ratios:

- (a) a 'look through' gearing ratio that takes into account such financing; and

- (b) a gearing ratio based on liabilities disclosed in the scheme’s financial statements.

Note: Examples of off balance sheet financing include borrowings of equity accounted investments and loans taken out by investors to invest in the scheme where those loans are secured over the scheme’s assets on a limited recourse basis.

- RG 46.46 Responsible entities should also explain to investors what the ratio means in practical terms and how investors can use the ratio to determine the scheme’s level of risk.

### Explanation

- RG 46.47 The gearing ratio in RG 46.43 indicates the extent to which a scheme’s assets are funded by interest bearing liabilities. It gives an indication of the potential risks the scheme faces in terms of its level of borrowings due to, for example, an increase in interest rates or a reduction in property values.
- RG 46.48 Retail investors may not have the skills or information to calculate a scheme’s gearing ratio (especially the ‘look through’ gearing ratio) from the scheme’s financial statements. In contrast, responsible entities should be able to calculate the scheme’s gearing ratio and explain its relevance to investors.
- RG 46.49 We consider that a scheme’s gearing ratio is a risk factor that retail investors should weigh up against the scheme’s rate of return. Consistent disclosure of gearing ratios across this sector will enable investors to compare relative risks and returns for unlisted property schemes.

## Disclosure principle 2: Interest cover

- RG 46.50 Interest cover gives an indication of an unlisted property scheme’s ability to meet the interest payments from earnings. Responsible entities should disclose the scheme’s interest cover calculated using the following formula based on the latest financial statements:

$$\text{Interest cover} = \frac{\text{EBITDA} - \text{unrealised gains} + \text{unrealised losses}}{\text{Interest expense}}$$

Note: If the scheme or stapled group prepares consolidated financial statements, the interest cover should be calculated based on the consolidated figures. Interest expense calculations should take into account any related hedging arrangements. Unrealised losses and gains include losses and gains relating to revaluations of properties, hedging arrangements and straight lining of rental income.

- RG 46.51 EBITDA (earnings before interest, tax, depreciation and amortisation) and interest expense used to calculate interest cover should be consistent with those disclosed in the scheme’s latest financial statements. The latest financial statements would usually be the latest audited or reviewed financial

statements, except where the responsible entity is aware of material changes since those statements.

- RG 46.52 Many retail investors may not understand what interest cover means. Responsible entities should explain how investors can use the interest cover to assess the scheme's ability to meet its interest payments.

### Explanation

- RG 46.53 Interest cover measures the ability of the scheme to service interest on debt from earnings. It is therefore a critical indication of a scheme's financial health and key to analysing the sustainability and risks associated with the scheme's level of borrowing. It is information that many retail investors would be unable to calculate. As with the gearing ratio, interest cover is information that responsible entities should be able to provide. Consistent disclosure by this sector will allow investors to compare relative risks and returns across investments in unlisted property schemes.

## Disclosure principle 3: Scheme borrowing

- RG 46.54 If a scheme has borrowed funds (whether on or off balance sheet), responsible entities should clearly and prominently disclose:
- (a) for each borrowing that will mature in 5 years or less—the aggregate amount owing and the maturity profile in increments of not more than 12 months;
 

Note: For borrowings that will mature within 12 months, the responsible entity should exercise judgment to determine whether it would be appropriate to disclose aggregate amounts for time bands within 12 months.
  - (b) for borrowings that mature in more than 5 years—the aggregate amount owing;
  - (c) for each credit facility—the aggregate undrawn amount and the maturity profile in increments of no more than 12 months; and
  - (d) the fact that amounts owing to lenders and other creditors of the scheme rank before an investor's interests in the scheme.

- RG 46.55 If borrowings and credit facilities are to mature within 12 months, the responsible entity should make appropriate disclosure about the prospects of refinancing or possible alternative actions (e.g. sales of assets or further fundraising). If the responsible entity has no reasonable grounds for commenting on the prospect of refinancing or possible alternative actions, then they should state this and explain why to investors: see Regulatory Guide 170 *Prospective financial information* (RG 170) at RG 170.91.

Note: Any forward-looking statements should comply with s769C and RG 170.

RG 46.56 Responsible entities should explain any risks associated with their borrowing maturity profile, including whether borrowings have been hedged and if so, to what extent.

RG 46.57 Responsible entities will also need to disclose any information about breaches of loan covenants that is reasonably required by investors. Responsible entities should update investors about the status of any breaches through ongoing disclosure.

Note: Responsible entities should be aware that in certain cases, investors would reasonably require information on likely breaches of loan covenants (e.g. if the responsible entity has approached the lender about a likely breach and has been informed that the loan is likely to be terminated if the breach occurs).

## Explanation

### Borrowing maturity and credit facility expiry profile

RG 46.58 Borrowing maturity and credit facility expiry profiles are important information where an unlisted property scheme borrows to invest. Credit facilities that are due to expire within a relatively short timeframe can be a significant risk factor, especially in periods where credit is more difficult and expensive to obtain. A failure to renew borrowing or credit facilities can adversely affect a scheme's viability.

RG 46.59 It is important that disclosure on the expiry of credit facilities is clear and prominent enough for retail investors to easily locate and understand the information.

### Breach of loan covenants

RG 46.60 Information about breaches of loan covenants reasonably required by investors is key risk information in upfront and ongoing disclosures. Breach of a loan covenant may result in the lender being able to require immediate repayment of the loan or impose a freeze on further draw-downs on the credit facility.

RG 46.61 If the lender exercises such rights, the scheme may be forced to arrange alternative financing or asset sales within a short timeframe. This can be problematic, particularly in periods when access to credit is more constrained and where the scheme has a poor history of meeting loan covenants or when there is a softening of the property market.

### Ranking of investors

RG 46.62 Retail investors should be made aware that they will rank behind the creditors of a scheme.

## Disclosure principle 4: Portfolio diversification

- RG 46.63 A responsible entity should disclose the current composition of the property scheme's direct property investment portfolio, including:
- (a) properties by geographic location by number and value;
  - (b) non-development properties by sector (e.g. industrial, commercial, retail, residential) and development projects by number and value;
  - (c) for each significant property, the most recent valuation, the date of the valuation, whether the valuation was performed by an independent valuer and, where applicable, the capitalisation rate adopted in the valuation;
  - (d) the portfolio lease expiry profile in yearly periods calculated on the basis of lettable area or income and where applicable, the weighted average lease expiry;
  - (e) the occupancy rate(s) of the property portfolio; and
  - (f) for the top 5 tenants that each constitutes 5% or more by income across the investment portfolio, the name of the tenant and percentage of lettable area or income.
- RG 46.64 Disclosure should cover the responsible entity's investment strategy on these matters, including its strategy on investing in other unlisted property schemes. A responsible entity should also provide a clear description of any significant non-direct property assets of the scheme, including the value of such assets.
- RG 46.65 Responsible entities of unlisted property schemes involved in property development should also disclose:
- (a) the project timetable with key milestones;
  - (b) funding arrangements;
  - (c) the total amounts of pre-sale and lease pre-commitments where applicable; and
  - (d) development status (e.g. percentage of completion).

### Explanation

- RG 46.66 The quality of the properties held by an unlisted property scheme, including the quality of leases entered into over those properties, is a key element in the financial position and performance of the scheme. Generally, the more diversified a portfolio, the lower the risk that an adverse event affecting one property or one lease will put the overall portfolio at risk.
- RG 46.67 It is important that responsible entities disclose in their PDSs and ongoing disclosures their approach to portfolio diversification. Most responsible entities will have a firm policy on the types of properties in which the scheme will invest. This should be disclosed as clearly and prominently as possible to help investors monitor the financial position and performance of the scheme over time.

## Disclosure principle 5: Valuation policy

- RG 46.68 Responsible entities should disclose, at a minimum, the following information on valuation of direct property investments:
- (a) how often they obtain valuations for direct investments in real property, including how often they obtain independent valuations;
  - (b) if independent valuations are not regularly obtained, the reason for this; and
  - (c) whether valuations are in accordance with relevant industry standards.
- RG 46.69 If a property under development is valued on an ‘as if complete’ basis, the ‘as is’ basis of the valuation should be disclosed. The responsible entity should also disclose the risks associated with ‘as if complete’ valuations, including the risk that assumptions on which such valuations are based may prove to be inaccurate.
- RG 46.70 Responsible entities should inform investors if they fail to follow their previously disclosed policy on valuations or if there are any changes to the policy (unless clearly immaterial).
- RG 46.71 We expect responsible entities to only use valuers who:
- (a) where possible, are registered under one of the state or territory valuer registration regimes or a relevant overseas registration regime; and
  - (b) include a statement in their valuation reports on whether the valuation complies with all relevant industry standards and codes.

Note: We realise that not all states and territories have a registration or licensing regime for valuers at this time.

### Explanation

- RG 46.72 The value of real property assets can be volatile, particularly when access to credit is constrained and more properties are on the market. A significant fall in valuation will mean an increase in gearing ratio and may trigger a breach of loan covenants.
- RG 46.73 Investors should be able to understand and compare how responsible entities value their schemes’ real property assets. This will help investors assess the reliability of the valuations.
- RG 46.74 It is in the interests of responsible entities that the valuations they obtain and use are robust and accurate. Responsible entities are responsible for the financial statements and other documents that rely on the accuracy of these valuations. We expect that, where possible, responsible entities will only use professional valuers who are registered or licensed in the relevant state or territory or overseas jurisdiction, and who subscribe to a relevant industry code of conduct. We also expect that responsible entities will be careful to ensure that their instructions to valuers are comprehensive and contain reasonable terms of reference.

## Disclosure principle 6: Related party transactions

- RG 46.75 Responsible entities who enter into transactions with related parties should disclose their approach to these transactions, including:
- (a) details of investments in and loans, guarantees and fees to any related party;
  - (b) their policy on related party transactions, including the assessment and approval process and arrangements to manage conflicts of interest; and
  - (c) how the processes and arrangements are monitored to ensure their policy is followed.

Note: The term 'related party' should be interpreted broadly, taking into consideration the definitions of 'related party' in s228 (as applied to the scheme by Part 5C.7) and accounting standard AASB 124 *Related Party Transactions* and includes the responsible entity.

### Explanation

- RG 46.76 Related party transactions carry a risk that they could be assessed and monitored less rigorously than arm's length third party transactions. Investors should therefore be able to assess whether responsible entities take an appropriate approach to related party transactions. A significant number and value of such transactions may mean that investors should consider the financial position of the related group as a whole and the risk of potential conflicts of interest.

Note: Responsible entities are financial services licensees and have duties to adequately manage conflicts of interest: s912A(1)(aa). If applicable, responsible entities may need to obtain investor approval for related party transactions under Part 5C.7.

## Disclosure principle 7: Distribution practices

- RG 46.77 If a scheme is making or forecasts making distributions to members, the responsible entity should disclose:
- (a) the source of the current distribution (e.g. from realised income, capital, unrealised revaluation gains);
  - (b) the source of any forecast distribution;
  - (c) if the current or forecast distribution is not solely sourced from realised income, the reasons for making the distribution from other sources; and
  - (d) if the current distribution or forecast distribution is sourced other than from realised income, whether this is sustainable over the next 12 months.

Note: Any forward-looking statements should comply with s769C and RG 170. If a responsible entity does not have reasonable grounds for disclosing whether current or forecast distributions sourced other than from realised income are sustainable, it should explain this to investors: see RG 170.91.

## Explanation

RG 46.78 Some unlisted property schemes make distributions to members from capital and/or unrealised gains where cash is available from either within the fund or from borrowings. If this is the case, the responsible entity should clearly and prominently disclose whether these distributions are sustainable.

## Disclosure principle 8: Withdrawal arrangements

RG 46.79 If investors are given the right to withdraw from a scheme, the responsible entity should clearly disclose:

- (a) the maximum withdrawal period allowed under the constitution for the scheme (this disclosure should be at least as prominent as any shorter withdrawal period promoted to investors);
- (b) any significant risk factors or limitations that may affect the ability of investors to withdraw from the scheme (including risk factors that may affect the ability of the responsible entity to meet a promoted withdrawal period);
- (c) a clear explanation of how investors can exercise their withdrawal rights, including any conditions on exercise (e.g. specified withdrawal periods and scheme liquidity requirements); and
- (d) if withdrawals from the scheme are to be funded from an external liquidity facility, the material terms of this facility including any rights the provider has to suspend or cancel the facility.

RG 46.80 The responsible entity should ensure that investors are updated on any material changes to withdrawal rights through ongoing disclosure. For example, investors should be informed if the responsible entity knows that withdrawal requests will be suspended during an upcoming withdrawal period for whatever reason.

RG 46.81 Responsible entities should also clearly disclose if investors have no withdrawal rights.

## Explanation

RG 46.82 It is important for responsible entities to make investors aware of withdrawal arrangements so that investors form realistic expectations about their ability to withdraw from the scheme.

Note 1: Members will only have a limited ability to withdraw if a scheme is not 'liquid' for the purposes of Part 5C.6.

Note 2: If a responsible entity makes representations about likely future withdrawal periods, it must have reasonable grounds for those representations: s769C.

## D Applying the disclosure principles

### Key points

Responsible entities of unlisted property schemes should apply the disclosure principles to their PDSs because the principles reflect information required for this disclosure under the Corporations Act: see RG 46.83–RG 46.85.

The disclosure principles also reflect information required for ongoing disclosure to investors: see RG 46.114–RG 46.121.

If applying disclosure principles would result in misleading or clearly inappropriate information, this should be explained to investors: see RG 46.122–RG 46.125.

For an overview of how to apply the disclosure principles, see Table 5.

### The disclosure framework

- RG 46.83 The Corporations Act requires responsible entities of unlisted property schemes to:
- (a) disclose in a PDS to retail investors all the information they reasonably need to know to make a decision to acquire an interest in the scheme; and
  - (b) provide ongoing disclosure about material matters to help retail investors monitor whether their expectations are being met.
- RG 46.84 The disclosure principles in Section C reflect information that retail investors reasonably need to make an investment decision and monitor whether their expectations are being met, especially given the debt market turbulence and flow-on effects experienced since mid-2007. This information is therefore required under the Corporations Act for both PDSs and ongoing disclosures.
- RG 46.85 Apart from disclosures required by the Corporations Act, it is good practice for responsible entities to update investors on the status of the disclosure principle information at least every 6 months: see RG 46.110–RG 46.112.

### How to apply the disclosure principles

- RG 46.86 The disclosure principles apply to both existing and new offers of interests in unlisted property schemes. Table 5 explains how we expect responsible entities for existing and new unlisted property schemes to apply the disclosure principles and our views on good practice for updating investors.

RG 46.87 From 30 November 2008 (subject to the transitional arrangements set out in Table 5 below), we will review updated investor disclosures for unlisted property schemes to check that this information is being adequately disclosed to investors.

**Table 5: Timetable for responsible entities implementing the disclosure principles**

<b>Open schemes— update existing investors by 30 November 2008</b>	By 30 November 2008, the responsible entity should provide investors in an open scheme with an initial update of information covered by the disclosure principles: see RG 46.88–RG 46.91. This could be by using the responsible entity’s normal investor communication channels (e.g. in a regular investor update or by including the information on a website that is used to communicate with investors).
<b>By 30 November 2008—PDS that are dated before 30 November 2008 but remain in use</b>	<p>By 30 November 2008, if an existing PDS is still in use, responsible entities should either:</p> <ul style="list-style-type: none"> <li>• include the disclosure principle information on a website referred to in the PDS (if the omission of disclosure principle information from the PDS is not materially adverse); or</li> <li>• update the PDS by a new or a supplementary PDS so that it includes the disclosure principle information.</li> </ul> <p>Note: PDSs commonly allow information to be updated through a website if the updated information is not materially adverse: see CO 03/237. We consider that if the omission of the disclosure principle information from an existing PDS is not materially adverse, the responsible entity will generally be able to rely on CO 03/237 to update the PDS for this information without the need for a supplementary or new PDS: see RG 46.103–RG 46.106.</p>
<b>New PDSs from 30 November 2008</b>	<p>PDSs dated on or after 30 November 2008 should clearly and prominently disclose information covered by the disclosure principles.</p> <p>The PDS should also explain how the responsible entity intends to update investors for ongoing disclosures.</p>
<b>Closed schemes— update existing investors by 31 March 2009</b>	<p>By 31 March 2009, the responsible entity should provide investors in a closed scheme with an initial update of information covered by the disclosure principles: see RG 46.88–RG 46.91. This could be by using the responsible entity’s normal investor communication channels (e.g. in a regular investor update or by including the information on a website that is used to communicate with investors).</p> <p>If withdrawal rights commence on or shortly after 31 March 2009, then the disclosure should be provided in sufficient time so that investors can make an informed decision.</p>
<b>Material changes to information</b>	Where there are any material changes to the disclosure principle information, the responsible entity should deal with this in ongoing disclosures. It is good practice to update investors on material changes to key information concerning an unlisted property scheme as soon as practicable (e.g. by updating a website used for this purpose).
<b>Updating on status of information</b>	It is good practice for responsible entities to update investors at least half-yearly on the status of the disclosure principle information, including whether the information has been updated for any material changes since the last investor report: see RG 46.110–RG 46.112.

## Updating existing investors

- RG 46.88 For existing investors, the first information that responsible entities will provide in response to the disclosure principles will be after they have invested.
- RG 46.89 The initial update for existing investors could be in a regular report (e.g. in the quarterly report) or in a periodic statement under s1017D. An alternative would be to put the initial update on the scheme's website (if this is already used to communicate with investors).
- RG 46.90 The initial updated disclosure should also advise investors how the responsible entity intends to update them on the status of the disclosure principle information and material changes. This is particularly important if the responsible entity intends to use a website to communicate material changes to key information.
- RG 46.91 The timeframe for giving existing investors the initial disclosure depends on whether the scheme is an open scheme or a closed scheme:
- (a) Open schemes should update existing investors by 30 November 2008—an open scheme is one that gives investors withdrawal rights at any time from 30 November 2008 to 31 March 2009. A responsible entity should give the initial update by 30 November 2008 if it is likely that they will give investors withdrawal rights in the period to 31 March 2009. If the responsible entity does not comply by 30 November 2008 but subsequently decides to give investors withdrawal rights before 31 March 2009, they should contact us to discuss an appropriate timeframe for the initial update.
  - (b) Closed schemes should update existing investors by 31 March 2009—a closed scheme is one where investors do not have any withdrawal rights at any time from 30 November 2008 to 31 March 2009. If withdrawal rights commence on or shortly after 31 March 2009, the initial disclosure should be provided in sufficient time so that investors can make an informed decision on whether or not to exit the scheme.

## Disclosure in a PDS

### Content of a PDS

- RG 46.92 The Corporations Act requires disclosure in the form of a PDS for an offer of interests in an unlisted property scheme. The PDS must:
- (a) make specific disclosures, including significant risks associated with holding the product (s1013D); and
  - (b) include all other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to invest in the scheme (s1013E).

- RG 46.93 The PDS for an unlisted property scheme should clearly explain:
- (a) the business model of the scheme and what it will do with the money raised by the PDS (e.g. what type of property the scheme will invest in);
  - (b) the track record and experience of senior management; and
  - (c) key features and risks of the scheme.
- RG 46.94 The disclosure principles reflect information about the key features and risks of an unlisted property scheme. It is information that might reasonably be expected to have a material influence on the decision of a reasonable person whether to invest (s1013D(1), 1013E), but which they would not be expected to know without explicit disclosure in a PDS (s1013F(2)). The disclosure principles therefore reflect the information required under s1013D–1013E.
- Note: The disclosure principles do not attempt to specify all of the information that is required to be included in a PDS by the Corporations Act.
- RG 46.95 A PDS for an offer of interests in an unlisted property scheme should include the disclosure principle information. The PDS should also explain how the responsible entity intends to update investors on material changes to key information concerning the scheme.
- RG 46.96 From 30 November 2008, ASIC will consider whether the disclosure principles have been applied when reviewing any PDS for an unlisted property scheme.
- RG 46.97 We will consider exercising our stop order powers under s1020E if we consider there is material non-disclosure or misleading disclosure of information covered by the disclosure principles. Failure to apply the principles may also result in liability to investors because the disclosure principles reflect information that is required under the Corporations Act.

### **Clear, concise and effective disclosure**

- RG 46.98 PDSs must be worded and presented in a clear, concise and effective manner: s1013C(3). A PDS should therefore contain clear and prominent disclosure of the key features and risks of the investment. For unlisted property schemes, this *includes* the disclosure principle information.
- RG 46.99 One way of prominently disclosing key information is to set it out in the first few pages of the PDS. If the key information is too lengthy to be included in full, the first few pages of the PDS should provide a summary of the information with a clear reference to more detailed disclosure. This could include a well-referenced table in the first few pages that gives investors a brief introduction to the key information and a reference to where the information is further explained (e.g. a table that says ‘the scheme’s gearing ratio is X, see page 10 for an explanation of what this gearing ratio means’).
- RG 46.100 We encourage responsible entities to use consumer-friendly tools as much as possible in disclosing key features and risks, including tables, diagrams and other comparative features. Such effective disclosure will help retail investors compare investments across the unlisted property scheme sector.

## Supplementary PDSs

- RG 46.101 The disclosure principles relate to information required in a PDS under the Corporations Act. A PDS must be given to prospective investors in various circumstances: s1012A–1012C. If there are material changes to the disclosure principle information, a responsible entity with a current offer open will need to provide a new or supplementary PDS if the new information would be materially adverse to the reasonable investor.
- RG 46.102 We consider that it is good practice to also make the information in new or supplementary PDSs available to any existing investors (e.g. in a regular investor update or on the website).

## Updating PDSs

- RG 46.103 Responsible entities may be able to rely on CO 03/237 to provide updated disclosure for information covered by the disclosure principles on a website, subject to various conditions including:
- (a) the updated information is not materially adverse;
  - (b) the PDS must have included a statement that non-materially adverse information may be updated by a website and that a paper copy of any updated information will be given to a person without charge on request;
  - (c) the updated information is easily accessible to investors; and
  - (d) the PDS was up-to-date at the time it was prepared.

Note: See CO 03/237 for all of the applicable conditions that must be fulfilled.

- RG 46.104 Subject to fulfilling the conditions in the class order (including that the updated information is not materially adverse), we consider that CO 03/237 should allow responsible entities to update:
- (a) PDSs dated before 30 November 2008 for the disclosure principle information; and
  - (b) PDSs that do include the disclosure principle information for changes to that information.
- RG 46.105 By 30 November 2008, if an existing PDS that does not contain the disclosure principle information remains in use, we expect responsible entities to:
- (a) disclose the disclosure principle information using a website or other means of communication referred to in the PDS (if the omission of disclosure principle information from the PDS is not materially adverse); or
  - (b) update the PDS by a new or a supplementary PDS so that it includes the disclosure principle information.

- RG 46.106 The information in a PDS must be up-to-date at the time it is given. We consider that PDSs that do not contain the disclosure principle information by 30 November 2008 are unlikely to be up-to-date given the key nature of the disclosure principle information, particularly in light of recent economic conditions affecting the property sector and the fact that new PDSs will disclose this information.

## Ongoing disclosure

- RG 46.107 In a PDS, a responsible entity makes a number of statements about how the funds being raised by the PDS will be used, and how the responsible entity will operate the unlisted property scheme. These ‘promises’ are part of the basis on which the investor invests their money, and the investor should be given the opportunity to monitor the responsible entity’s performance against these promises.
- RG 46.108 Good ongoing disclosure therefore plays an important role in helping investors monitor their investment, evaluate its performance and decide if and when to exit their investment (provided exit mechanisms exist) or increase their investment in the scheme.
- RG 46.109 Responsible entities have a number of obligations to make ongoing disclosures to investors under the Corporations Act: see RG 46.114–RG 46.121. Apart from these legal requirements, we encourage responsible entities to use the most efficient and effective methods to regularly communicate key information to investors: see RG 46.113.

### Good practice for ongoing disclosure

- RG 46.110 It is good practice for a responsible entity to maintain a document applying the disclosure principles that is updated for material changes that the responsible entity becomes aware of in the ordinary course of managing the unlisted property scheme. This updating allows the responsible entity to provide consolidated updated disclosure to investors on request. It is also good practice for this consolidated disclosure document to be clearly accessible on the scheme’s website (if used for updating investors). The consolidated disclosure document should indicate the date it was prepared and last updated.
- RG 46.111 Many responsible entities have a practice of updating investors on key information about the scheme with a quarterly report. We consider that it is good practice for responsible entities to update investors in writing on the status of key information, including the disclosure principle information, at least every 6 months.
- RG 46.112 Although it is not necessary to repeat information if it has not changed in these updates to investors, we consider it is good practice to provide investors with:
- (a) an overview of any material changes to the disclosure principle information since the last update (so far as the responsible entity is aware);
  - (b) if there have been no material changes, confirmation that this is the case;

- (c) details of how to access the scheme’s consolidated disclosure document on the website (if available there); and
- (d) confirmation that they are entitled to a hard copy of the disclosure principle information on request.

Note: An alternative would be for responsible entities to provide investors with details of material changes to the disclosure principle information using a procedure similar to that applying for the provision of the financial report under s314.

RG 46.113 In addition to the regular updates discussed in RG 46.111, material changes to key information, including the disclosure principle information, should be notified to investors, or made accessible by them, as soon as practicable using the most efficient and effective method of communication. For example, this could be through a website used for updating investors. The regular investor update would then advise investors directly that the disclosure principle information had been updated for a material change: see RG 46.112.

### **The legal framework for ongoing disclosure**

RG 46.114 Responsible entities of unlisted property schemes have obligations to provide ongoing disclosure to investors under the Corporations Act, including:

- (a) disclosure of material changes and significant events (s675 or 1017B); and
- (b) periodic statements to members under s1017D.

RG 46.115 The responsible entity should include information covered by the disclosure principles in ongoing disclosures and explain any material changes to this information.

Note: The disclosure principles do not attempt to specify all of the information that the Corporations Act requires for ongoing disclosures.

### **Continuous disclosure**

RG 46.116 If the responsible entity of a scheme that is subject to continuous disclosure becomes aware of information that is not generally available and that a reasonable person would expect, if it were available, to have a material effect on the price or value of the interests in the scheme, the responsible entity must lodge a document with ASIC containing the information: s675.

Note: It is good practice for responsible entities to provide investors with access to continuous disclosure documents lodged with ASIC, either by sending investors a hard copy or posting the information on a website used for updating investors.

RG 46.117 The disclosure principles reflect information that would reasonably be expected to have a material effect on the price or value of interests in the scheme. Therefore material changes to disclosure principle information may trigger s675, unless the information is already generally available.

**Notifications of material changes and significant events**

- RG 46.118 If an unlisted property scheme is not subject to continuous disclosure obligations under Ch 6CA, the responsible entity must give investors notice of any material change to a matter, or a significant event that affects a matter, that would have been required to be specified in a PDS: s1017B.
- RG 46.119 In our view, material changes in information disclosed under the disclosure principles are matters that should be covered in notifications to investors under s1017B. If such changes or events are adverse to investors, notifications generally need to be provided as soon as practicable and in any event within 3 months.

**Periodic statements**

- RG 46.120 Issuers of interests in a property scheme must give members a periodic statement at least annually: s1017D. Periodic statements must include details of:
- (a) the information that the responsible entity reasonably believes the investor needs to understand their investment in the unlisted property scheme; and
  - (b) details of any change in circumstances affecting the investment that has not been notified since the previous periodic statement.
- RG 46.121 Periodic statements are designed to give investors regular updates about their investment. If a responsible entity does not otherwise report to investors in regular updates, they should update investors on the status of the disclosure principles in the periodic statement.

**Omitting disclosure principle information where misleading**

- RG 46.122 If the application of a disclosure principle to an unlisted property scheme's particular business model or circumstances would be likely to mislead investors or is clearly inappropriate, then the information should be omitted.
- Note: For example, if a property scheme has no interest bearing liabilities, ratios would not need to be provided for gearing and interest cover (disclosure principles 1 and 2).
- RG 46.123 If key information is omitted, the responsible entity should tell investors the information has been omitted and explain why it would be misleading or inappropriate to include the information.
- RG 46.124 If the responsible entity is unable to apply a disclosure principle, they should consider whether they can disclose other information that would allow investors to assess the relevant risk factor. For example, where a property scheme is a start up and cannot disclose a gearing ratio because it has no liabilities, it should consider whether investors need to know its target gearing ratio and policy on gearing.
- RG 46.125 If a disclosure principle that did not apply to an unlisted property scheme becomes relevant, then the responsible entity should disclose information to investors through ongoing disclosure.

## E Advertising

### Key points

Advertising for unlisted property schemes should be consistent with all corresponding disclosures in the PDS: see RG 46.126–RG 46.128.

If investment ratings are used in advertising for unlisted property schemes, they should be properly explained and not create a misleading impression about the scheme: see RG 46.129–RG 46.130.

### Advertising and the disclosure principles

- RG 46.126 Statements in advertisements for unlisted property schemes should be consistent with all corresponding disclosures on that subject matter in the PDS. In particular, responsible entities should take into account the disclosures in the PDS that deal with the disclosure principles in Section C.

Note: References to ‘advertisements’ in this guide should be read broadly. They include comment and promotion of unlisted property schemes in media programs or publications (generally known as ‘advertorials’) and statements about the schemes published by responsible entities on their websites that are intended to promote the scheme to retail investors. They do not, however, include statements in a PDS.

- RG 46.127 When considering consistency with the PDS, responsible entities should be aware that an advertisement may be misleading if it quotes a statement from the PDS out of context.
- RG 46.128 Responsible entities of unlisted property schemes who fail to ensure that advertisements are consistent with PDS disclosures risk making false or misleading statements or engaging in misleading or deceptive conduct in contravention of the Corporations Act or the *ASIC Act 2001* (ASIC Act).

### Use of investment ratings

- RG 46.129 If an investment rating is used in an unlisted property scheme advertisement, it should be properly explained. This explanation should include the meaning of the rating and where an investor can obtain further information about the rating. The advertisement should also state that investment ratings are only one factor to be taken into account when deciding whether to invest.
- RG 46.130 Responsible entities should ensure that:
- (a) the impression the investment rating creates about the unlisted property scheme being advertised is not misleading; and
  - (b) investment ratings used in advertisements are only quoted from research houses that hold an Australian financial services licence.

## F Compliance plans

### Key points

Compliance plans must set out measures for the responsible entity to comply with the Corporations Act and scheme constitution.

We expect compliance plans for unlisted property schemes to set out adequate measures to ensure compliance with the law relating to disclosure and advertising.

We expect compliance committees and compliance plan auditors to be aware of the disclosure principles and advertising obligations discussed in this guide and to have regard to them in carrying out their duties.

Responsible entities, compliance committees and compliance plan auditors should consider the disclosure principles and advertising obligations when assessing whether a compliance plan is adequate.

### The compliance plan

- RG 46.131 Compliance plans play a key role in protecting investors and promoting their interests. The law requires an unlisted property scheme to have a compliance plan: s601EA. The compliance plan must set out adequate measures for the responsible entity to ensure compliance with the Corporations Act and the scheme's constitution: s601HA. The responsible entity has a duty to comply with the compliance plan: s601FC(1)(h).
- RG 46.132 Compliance plans should contain adequate procedures to ensure that a responsible entity applies the disclosure principles in its upfront and ongoing disclosure to retail investors. Compliance plans should also contain adequate procedures to ensure that responsible entities comply with their advertising obligations.
- RG 46.133 We do not expect that responsible entities will necessarily need to change their compliance plans to deal expressly with the disclosure principles and advertising obligations discussed in this guide. Good compliance plans should already contain procedures that ensure that responsible entities comply with all of their disclosure and advertising obligations under the Corporations Act.
- RG 46.134 However, we expect responsible entities to critically examine existing compliance plans and consider whether they are adequate to ensure compliance with the obligations discussed in this guide.
- RG 46.135 Regardless of whether a scheme has a compliance committee, responsible entities have a duty to ensure that compliance plans establish adequate measures to ensure compliance (including with disclosure and advertising obligations): s601FC(1)(g).

## Compliance committees

- RG 46.136 Many unlisted property schemes have a compliance committee. A scheme is required to have a compliance committee unless at least half of the responsible entity's directors are external directors: s601JA. If the scheme does not have a compliance committee, the responsible entity's directors should be particularly vigilant about ensuring the responsible entity complies with the compliance plan and that the compliance plan is adequate.
- RG 46.137 The functions of a compliance committee are to:
- (a) monitor the extent to which a responsible entity complies with the compliance plan and report its findings to the responsible entity;
  - (b) report any breach of the law or the scheme's constitution to the responsible entity;
  - (c) report to ASIC if the compliance committee considers that the responsible entity is not taking adequate action to deal with a matter reported under paragraph (b); and
  - (d) assess at regular intervals whether the compliance plan is adequate, to report to the responsible entity on the assessment and to make recommendations to the responsible entity about any changes that it considers should be made to the plan: s601JC(1).
- RG 46.138 We expect compliance committees for unlisted property schemes to be aware of the disclosure principles and advertising obligations discussed in this guide. Compliance committees need to regularly assess whether the compliance plan contains adequate measures to ensure compliance by responsible entities with their:
- (a) upfront and ongoing disclosure obligations to retail investors, including in relation to the disclosure principles as discussed in Sections C and D; and
  - (b) obligation to ensure that any advertising for the scheme is not misleading or deceptive as discussed in Section E.
- RG 46.139 If a compliance committee forms the view that a compliance plan is not adequate, it needs to report this to the responsible entity, together with recommendations about changes that should be made to the plan.
- RG 46.140 A compliance committee should also monitor compliance by the responsible entity with the compliance plan. If a compliance committee identifies non-compliance or a possible breach of the Corporations Act (including a breach relating to the responsible entity's disclosure or advertising obligations), the compliance committee will need to make a report to the responsible entity and, if necessary, report the matter to us.

## Compliance plan auditors

RG 46.141 Compliance plans are subject to an annual audit. The auditor of a compliance plan must give the responsible entity a report that states the auditor's opinion on whether:

- (a) the responsible entity has complied with the compliance plan; and
- (b) the plan continues to meet the requirements of the Corporations Act.

RG 46.142 We expect compliance plan auditors of unlisted property schemes to be aware of the disclosure principles and advertising obligations in this guide. In determining whether a plan continues to meet the requirements of the Corporations Act, compliance plan auditors should consider whether the compliance plan is adequate to ensure that the responsible entity applies the disclosure principles in its PDS and ongoing disclosures to retail investors and meets its obligations to avoid any misleading advertising.

## Key terms

Term	Meaning in this document
advertisements	Includes comment and promotion of unlisted property schemes in media programs or publications (generally known as ‘advertorials’) and statements about the schemes published by responsible entities on their websites that are intended to promote the scheme to retail investors (but does not include statements in a PDS)
ASIC	The Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> (Cth) including regulations made for the purposes of that Act
‘as if complete’ valuation	An estimate of the market value of a property, assuming certain specified improvements are made
‘as is’ valuation	An estimate of the market value of a property in its current state (i.e. without any further improvements)
closed scheme	An unlisted property scheme that does not give investors any withdrawal rights at any time from 30 November 2008 until 31 March 2009
Corporations Act	<i>Corporations Act 2001</i> (Cth) including regulations made for the purposes of that Act
CP 100	An ASIC consultation paper (in this example, numbered 100)
disclosure principle information	Information covered by the disclosure principles in Section C of this guide
open scheme	An unlisted property scheme that provides investors with withdrawal rights at any time between 30 November 2008 and 31 March 2009
PDS	Product Disclosure Statement
related party	The term ‘related party’ should be interpreted broadly, taking into consideration the definitions of ‘related party’ in s228 (as applied to the scheme by Part 5C.7) and accounting standard AASB 124 <i>Related Party Transactions</i> and includes the responsible entity
RG 69	An ASIC regulatory guide (in this example, numbered 69)
s710	A section of the Corporations Act (in this example, numbered 710)

Term	Meaning in this document
unlisted property scheme	<p data-bbox="772 300 1391 389">An unlisted managed investment scheme that has or is likely to have at least 50% of its non-cash assets invested in real property and/or in unlisted property schemes</p> <p data-bbox="831 405 1364 461">Note 1: For the purposes of this definition, 'real property' does not include infrastructure assets.</p> <p data-bbox="831 477 1315 533">Note 2: This guide does not apply to listed property schemes.</p>

## Related information

### Headnotes

Property schemes, retail investors, disclosure, listed, unlisted, disclosure principles, advertising, misleading, deceptive, responsible entities, valuers, compliance plans, compliance committees, compliance plan auditors

### Regulatory guides

RG 69 *Debentures—improving disclosure for retail investors*

RG 120 *Commentary on compliance plans: Property schemes*

RG 132 *Managed investments: Compliance plans*

RG 156 *Debenture advertising*

RG 170 *Prospective financial information*

### Legislation

Ch 2M, 6CA, Part 7.9, 7.10 Corporations Act, ASIC Act

### Consultation papers and reports

CP 100 *Property schemes—improving disclosure for retail clients*