

Important disclosure changes for unlisted retail managed funds

On 25 June 2009, ASIC released new policy which changes the way unlisted retail funds keep their investors updated.

RG 198 provides guidance on how the continuous disclosure rules in the Corporations Act apply to unlisted funds, as well as an alternative disclosure regime based on website disclosure.

Who does this affect?

Unlisted retail managed funds and other unlisted disclosing entities.

What do you need to do?

1. Ensure that procedures are in place to comply with the continuous disclosure rules.
2. Consider the impact of the new website based disclosure regime.

How the continuous disclosure rules apply to unlisted funds

The continuous disclosure rules apply to unlisted disclosing entities. These include registered managed investment schemes which have 100 or more investors.

The continuous disclosure rules generally require an unlisted disclosing entity to lodge with ASIC, as soon as practicable, any information that:

- is not generally available
- a reasonable person would expect to have a material effect on the price or value of the units, and
- has not been included in a PDS, a supplementary PDS, or a replacement PDS.

Traditionally, lodgements with ASIC by unlisted funds under the continuous disclosure rules have been somewhat limited. There has, however, been an increasing focus on the requirements prompted by events, such as redemption suspensions, associated with the recent financial market turmoil. It is perhaps not surprising that ASIC has developed its policy in the area.

RG 198 - alternative website based disclosure

RG 198 recognises that investors rarely search ASIC's database for information about their investments (which requires payment of a fee). They are far more likely to look for information of this kind on the issuer's website.

RG 198 implements an alternative of disclosing information on the issuer's website, based on a set of 'good practice guidance' principles. The key requirements of the new regime are:

- the issuer must be satisfied that most of its investors are likely to look for information of this kind on its website, for example, an issuer that routinely sends information by post to most of its investors may not be able to adopt this new regime
- the issuer must notify existing and new investors that it will make disclosure available in this way, and
- the issuer must disclose the material information on its website in a timely fashion and in accordance with the good practice guidance set out in RG 198.

The good practice guidance deals with how information should be disclosed on the website (regardless of whether the information has also been disclosed in some other public document), for example, it should be:

- located in a single place and not “buried” amongst information that is not material and
- the issuer should consider giving investors the option of receiving an email alert when material information is updated.

Any new material information must be:

- included on the website as soon as practicable
- kept on the website for as long as it is relevant and
- that appropriate records are kept.

RG 198 also provides some examples of the type of material information which ASIC considers would be required to be disclosed, such as:

- redemptions being suspended
- the fund no longer being liquid for the purposes of the Corporations Act or
- a change in control of the responsible entity.

Implications of RG 198 for fund managers

Retail fund managers to reassess how they keep investors updated. In particular:

- It seems ASIC will clearly increase its focus on compliance with the continuous disclosure rules by unlisted funds.
- Fund managers will need to decide whether they will comply with ASIC’s website based disclosure requirements, or alternatively comply with the lodgement requirements in the Corporations Act.
- The website based disclosure regime is not based on Class Order or other formal relief from the law. Rather, it is a statement of how ASIC will administer the law, similar to a ‘no-action’ approach. Fund managers will therefore need to be comfortable that there will be no material risk of civil liability by not technically complying with the ASIC lodgement requirements under the continuous disclosure rules. RG 198 indicates that there may be law reform in the future.
- ASIC expects fund managers to notify existing and new investors whether they intend to follow ASIC’s good practice guidance or whether they intend to lodge continuous disclosure notices with ASIC. This should be done by normal investor communication channels.
- ASIC expects that all PDSs that are dated after 30 September 2009 will notify how the fund manager will satisfy its continuous disclosure obligations. ASIC considers that this notification is required under the PDS content requirements in the Corporations Act.